Case Name:

Nature Conservancy of Canada v. Waterton Land Trust Ltd.

Between
The Nature Conservancy of Canada/La Societe Canadienne Pour La Conservation De La Nature, [Plaintiff], and
Waterton Land Trust Ltd., Waterton Land Trust, Wild West Buffalo Ranches Ltd., Waterton Land Trust Limited Partnership, Thomas H. Olson, Bruce Lemons, Kenneth Lukowiak and Moose Mountain Buffalo Ranch, [Defendant], and
Waterton Land Trust Ltd., Waterton Land Trust, Wild West Buffalo Ranches Ltd., Waterton Land Trust Limited Partnership, Thomas H. Olson and Moose Mountain Buffalo Ranch, [Plaintiffs by Counter-claim], and
The Nature Conservancy of Canada/La Societe Canadienne Pour La Conservation De La Nature, Larry Simpson and Alberta Conservation Association, [Defendants by Counter-claim]

[2014] A.J. No. 539

2014 ABQB 303

97 Alta. L.R. (5th) 1

2014 CarswellAlta 822

Docket: 0601 00089

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

P.R. Jeffrey J.

Heard: September 17 and December 21, 2012.
Judgment: May 16, 2014.

(605 paras.)

Contracts -- Mistake -- What constitutes -- Mutual mistake -- Unilateral mistake -- Of fact -- Terms -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Contracts -- Terms -- Implied terms -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Contracts -- Remedies -- Damages -- General principles -- Position had the contract been performed -- Duty to mitigate -- Equitable remedies -- Rectification -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Environmental law -- Environmental legislation -- Conservation easements -- Enforcement and compliance -- Private enforcement -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Natural resources law -- Wildlife -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Real property law -- Interests in land -- Easements -- Creation -- By statute -- Easements in gross -- Conservation easements -- Registration and notice -- Land Titles Acts -- Scope of easements -- Description in grant -- Application by plaintiff to enforce conservation easement dismissed -- Counterclaim by respondents to rectify easement and for damages allowed -- Contested provision related to fencing at property sold to respondent for bison ranching -- Court rectified easement agreement to accord with parties' actual intention -- Rectified conservation easement valid and enforceable -- Respondent not commit land titles fraud by conveying land to limited partnership/trust/trustee arrangement -- Registrations on titles to property ordered rectified -- New fence not breach height restriction -- Respondent awarded $701,813 because applicant breached implied term to issue timely tax receipt -- No mitigation

failure by respondent -- Alberta Land Stewardship Act, ss. 28, 33 and 34.

Application by the plaintiff to enforce a conservation easement. Counterclaim by the respondents to rectify the easement and for damages. The applicant sold the respondent Olson property to be used for bison ranching. The parties' agreement contained a conservation easement with a provision related to fencing. The applicant argued that the respondent's new fencing contravened the easement. The applicant further argued that Olson committed land titles fraud by transferring the property to a limited partnership/trust/trustee arrangement with knowledge that there was an unregistered interest in title. The respondents argued that the written agreement did not conform to the parties' oral negotiations and should be rectified. They further argued that the easement was invalid. The respondent Olson sought damages alleging the applicant breached its obligation to provide a tax receipt on a timely basis. The applicant argued that Olson failed to mitigate any damages by not undertaking a taxpayer relief application.

HELD: The applicant's application was dismissed. The respondents' counterclaim was allowed. Olson's testimony concerning the fence negotiations was clear and credible, while the applicant's witness had little specific recollection. The parties' agreement was not accurately reflected in the conservation easement. Rectification was available on the basis of convincing evidence of either mutual or unilateral mistake. The new fence did not breach the rectified height restriction provision in the easement. The registrations on titles to the property were ordered rectified to be consistent with the rectified easement. The rectified easement was valid and enforceable. The evidence was sufficient to establish the conservation purpose of the easement. It was unnecessary for the applicant to adduce scientific evidence to establish that the easement had a conservation purpose. Olson did not commit land titles fraud by conveying the land to the limited partnership/trust/trustee arrangement. While Olson, who was in de facto control over the arrangement, had knowledge of the unregistered interest, there was no evidence of a required additional fraudulent element. Olson was awarded $701,813 plus interest due to the failure of the applicant to issue the tax receipt in a reasonably timely manner which was an implied contractual term under common law. There was no failure by Olson to mitigate his damages. A taxpayer relief application was a highly uncertain process and Olson did not act unreasonably by not pursuing it.

Statutes, Regulations and Rules Cited:

Alberta Evidence Act, RSA 2000, c A-18, s. 3(2), s. 32

Alberta Land Stewardship Act, SA 2009, c A-26.8, s. 1, s. 1(1), s. 2(1)(d), s. 2(1)(j), s. 22(8), s. 28(a), s. 28(b), s. 28(c), s. 29(1), s. 29(2), s. 30(1), s. 31, s. 31(a), s. 32(3), s. 33(1), s. 33(2), s. 33(4), s. 34(1), s. 34(2), s. 34(4), s. 35, s. 68

Alberta Personal Income Tax Act, RSA 2000, c A-30, s. 11

Business Corporations Act, RSA 2000, c B-9, s. 1(x), s. 32(1), s. 33, s. 34(1), s. 122(1), s. 153

Canada Business Corporations Act, RSC 1985, c C-44, s. 2(1), s. 31

Canada Evidence Act, RSC 1985, c C-5, s. 18

Conservation Easement Registration Regulation (AR 215/96),

Conservation Easements Act, RSNB 2011, c 130,

Conservation Easements Act, SNS 2001, c 28,

Conservation Land Act, RSO 1990, c C.28,

Environment Act, RSY 2002, c 76,

Environmental Protection and Enhancement Act, SA 1992, c E-13.3, s. 22(2)

Income Tax Act, RSC 1985, c 1 (5th Supp), s. 118.1(1), s. 118.1(3) R, s. 152(3.1)(b), s. 152(4), s. 152(4.2), s. 164(1), s. 164(1.5)(a), s. 164(1.5)(b), s. 168(1)(d), s. 188.1(7), s. 188.1(8), s. 188.1(9), s. 188.1(10), s. 188.2, s. 220(3.1), s. 220(3.2), s. 248(30), s. 248(31), s. 248(32), s. 248(33)

Land Titles Act, RSA 2000, c L-4, s. 60, s. 60(1), s. 68, s. 141(1), s. 190(1), s. 203, s. 203(3)

Legal Profession Act, RSA 2000, c L-8,

Municipal Government Act, RSA 2000, c M-26,

Natural Heritage Conservation Act, CQLR c C-61.01,

Stray Animals Act, RSA 2000, c S-20,

The Stray Animals Act, RSS 1978, c S-60,

Stray Animals Regulation, Alta Reg 301/1996,

Stray Animals Regulations, 1999, RRS, c S-60, OC 400/1999, Reg 1, s. 18(b)

Technical Tax Amendments Act, 2012, SC 2013, c 34, s. 358(30), s. 358(54)

The Conservation Agreements Act, CCSM c C173,

The Conservation Easements Act, SS 1996, c C-27.01,

Wildlife Conservation Act, RSPEI 1988, c W-4.1,

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Reasons for Judgment

P.R. JEFFREY J.:--

I. INTRODUCTION

1 The Defendant, Thomas Olson, bought from the Plaintiff, the Nature Conservancy of Canada (the "**NCC**"), a large cattle ranch (the "**Penny Ranch**" or the "**Property**") on which he planned to place wild bison.

2 The Penny Ranch lay on the eastern slopes of the Rocky Mountains, close to Waterton Lakes National Park, and within the migratory corridors of a wide array of species. The NCC believed that the area in which the Property was located was strategically important for the movement of wildlife in Alberta, being within the last half of one percent just east of the mountains. The NCC described the strip of land as the "North American Serengeti".

3 Before selling the Penny Ranch to Olson the NCC arranged for a conservation easement (the "**CE**") to be registered against the titles to the Property to ensure, among other things, that it would not impede future wildlife migrations.

4 Immediately after his purchase Olson began to replace the old fences around the perimeter of the Penny Ranch with new fencing (the "**New Fence**") that he believed would be more effective at restraining his bison, yet still permit wildlife onto, off of and to migrate through the Property.

5 The NCC said that Olson's New Fence breached the terms of the CE. It said Olson was building his New Fence higher than he was allowed and it would impede migrating wildlife.

6 Olson disagreed. Olson said the NCC knew he was going to use the Property for ranching bison not cattle, that the New Fence complied with his obligations under the CE, and that the New Fence did a better job of keeping in his bison and a better job of permitting wildlife to migrate through the Penny Ranch than the old, run-down cattle fences.

7 The NCC brought this law suit (the "**Enforcement Action**") to enforce the CE and to require Olson to modify his fences.

8 Submerged below the surface of such a seemingly straight-forward easement enforcement application, however, lurked a minefield of complicating issues. The parties disagreed on the wording of the CE, with one side saying it was worded incorrectly by a solicitor's drafting error, and wanting it rectified, and the other side saying it was worded correctly but was only partially registered on the Certificates of Title to the Property, by another solicitor's conveyancing error, and wanting that error rectified. That registration error was not addressed at the land registry office before the Property was conveyed by Olson to a third party. Olson sold the Penny Ranch to a limited partnership/corporate trustee arrangement he had created for the purpose of holding the Property through future generations. The parties disagreed on whether any fence height restriction in that CE was binding on the successor in title to Olson and whether the NCC could seek relief against those interests.

9 The NCC argued that the subsequent sale of the Property by Olson to a limited partnership/trustee arrangement over which he had control (by virtue of his *de facto* control over the trust), before any of those fencing issues were resolved, constituted land titles fraud, particularly because Olson was a member of the Law Society of Alberta and thereby required to meet a higher standard of dealings even when acting in his personal capacity.

10 Olson argued that the fencing terms of the NCC's version of the CE did not satisfy any of the statutory purposes for conservation easements, therefore it was *ultra vires* the enabling legislation and was neither valid nor enforceable. Olson also argued that the CE in its entirety was invalid due to the relationship between the NCC and the Alberta Conservation Association ("**ACA**"), a likeminded charity that was a "straw grantee" under the CE prior to and at the time of Olson's purchase of the Property from the NCC.

11 Prior to Olson's installation of the New Fence on the Penny Ranch, Olson acquired the Property from the NCC at a significant premium to fair market value, the excess understood to be his charitable donation to the NCC. No tax receipt (the "**Tax Receipt**") was issued to Olson for a number of years after the gift, allegedly causing financial loss to Olson. The NCC declined to issue the Tax Receipt, it said, because Olson had taken the position that the CE was unenforceable and was not abiding by it. The limitations upon his use of the land under the CE were the basis for his charitable gift - that is, the diminution in land value as a result of the CE restricting Olson's use of the Property was to be the amount receipted as a donation, since Olson paid the fair market value for the Property as if it was not encumbered by the CE. The NCC later issued the receipt, but only after, it said, it was satisfied following Olson's questioning in the pre-trial process that the CE was valid and enforceable. That was more than six years after the parties agreed on the terms of the sale of the Property with the gift to the NCC and more than five years after that transaction closed and the gift was received by the NCC. Olson thus Counter-claimed for damages with respect to the NCC's failure to issue the Tax Receipt in a reasonable time.

12 Olson's business (which was responsible for operating the bison ranches and related business ventures), Moose

Mountain Buffalo Ranch ("**Moose Mountain**"), also claimed the NCC did not deliver on the promises Olson said it made to him at the time of negotiating the sale of the Penny Ranch. Olson said the NCC promised to endorse his business operations and to introduce him to influential food retailers that could open doors to new markets for his bison meat products. For those failures, Moose Mountain Counter-claimed for damages.

13 The trustee (a corporation), which became the registered owner of the Property, also claimed damages for its future cost to relocate the bison ranching operations from the Penny Ranch to new lands if I find in favour of the NCC on this Enforcement Action. Such an outcome, the trustee argued, would wholly defeat its ability to use the Property for the purpose that the NCC knew Olson bought it (bison ranching). If this is my decision then the trustee also claimed it would be damaged by the amount it would have to pay to purchase comparable land that is not subject to such restrictions. The best proxy for that, it argued, was the fair market value of the Penny Ranch itself.

14 Claims were also made against Bruce Lemons, Dr. Kenneth Lukowiak and Larry Simpson in their personal capacities, as well as against the ACA. All but those against Lemons and Dr. Lukowiak were abandoned by the start of trial. The NCC's counsel said that Lemons and Dr. Lukowiak, as directors of the corporate trustee, were only named for notice purposes, and that no remedy was sought against Lemons or Dr. Lukowiak personally.[1]

II. ISSUES

15 The issues requiring determination were:[2]

1. What fencing restriction did the parties agree upon, if any? [Para 327]
2. If the parties' written agreement did not match their actual agreement, will the Court rectify their written agreement accordingly? [Para 331]
3. Did Olson's New Fence breach the fencing restriction? [Para 363]
4. If so, was the CE nevertheless invalid or unenforceable? [Para 378]
5. Will the Court rectify the deficient registrations on the titles to the Property? [Para 405]
6. If so, does indefeasibility of title apply to successors in title or was it vitiated by any Olson land titles fraud? [Para 432]
7. Did the NCC issue the Tax Receipt in a timely manner and, if not, is it liable in damages to Olson? [Para 473]
8. Is the NCC liable in damages for withholding Endorsements? [Para 579]
9. Did the NCC breach an obligation to interpret and enforce the CE in good faith? [Para 591] and
10. Is the NCC liable for punitive damages? [Para 599]

16 In this judgment I provide my reasons on these issues in the above order, after first explaining conservation easements, describing the parties, chronicling the facts and addressing some over-arching evidentiary themes urged upon me by the NCC, particularly regarding Olson's credibility and the allegations of his professional misconduct.

17 In short, and for the reasons that follow, I:

- rectify the CE Amending Agreement to accord with the parties' actual oral agreement, which was as Olson described;
- find the resulting CE valid and enforceable;
- conclude that Olson did not commit land titles fraud but did retain *de facto* control over the Property following his conveyance of it to the limited partnership/trust/trustee arrangement;
- order rectification of the registrations on the titles to the Property and discharge of the NCC's Third Caveat;
- conclude that Olson's New Fence did not breach the fence height restriction;

- award Olson damages in the amount of $701,813.53, plus interest, for the NCC's failure to issue the Tax Receipt to him by August 31, 2005; and
- dismiss all other claims.

III. CONSERVATION EASEMENTS

18 Conservation easements are legally binding statutory instruments under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 ("***ALSA***"). They were created by the Alberta government in 1996 under the *Environmental Protection and Enhancement Act*, SA 1992, c E-13.3 (now RSA 2000, c E-12) ("***EPEA***") to facilitate conservation objectives in the province. Similar provisions for conservation easements were enacted by several other provinces and territories in Canada around the same time.[3]

19 A conservation easement is typically arranged between a private entity, such as a landowner, and a conservation organization or government agency and then embodied in a written agreement. In Alberta these are then registered on the title to the land. These agreements contain perpetual restrictions to the use of the land.

20 By relinquishing such rights of ownership in support of conservation-minded restrictions the landowner is in effect donating them in favour of a conservation purpose. Thus, conservation easements enable private capital from charitable benefactors to be deployed for public interest purposes - such as environmental protection, enhancement and sustainability.

21 The Canada Revenue Agency ("**CRA**") has been prepared to consider such a donation to be one of charitable purpose for which, if made to a registered charity, can be receipted as a charitable donation, offsetting taxes payable. That is, private landowners agree to perpetual restrictions on their land in the public interest which the CRA recognizes as being receiptable by the charity.

22 Prior to the creation of these conservation easements under *EPEA*, perpetual conservation of private land in Alberta was attempted either by way of a common law device such as a covenant, easement or servitude, or by a government agency or conservation organization owning the land and promising to protect it in perpetuity. Notable improvements of the statutory framework for conservation easements over the instruments available at common law include overcoming the requirement for an easement to be negative in nature,[4] the elimination of the requirement of a dominant tenement[5] and the elimination of the interest lapsing through non-enforcement or use of the land for a purpose inconsistent with the purpose of the easement or a change in the use of the surrounding land.[6]

23 In 2009 the statutory provisions in respect of conservation easements were moved from *EPEA* to *ALSA*. The conservation easement in question in this case was originally registered under *EPEA*. The changes to the conservation easement provisions at the time of the move from *EPEA* to *ALSA* are of little consequence to the issues before me.[7] Further, section 68 of *ALSA* provided for the transition of conservation easements registered under *EPEA* to *ALSA*.[8] Therefore, for the purposes of this decision, I will refer to the current conservation easement provisions under *ALSA*.

Characteristics of Conservation Easements under ALSA

24 Conservation easements are defined in paragraph 2(1)(d) of *ALSA* as "a conservation easement granted by agreement under Part 3". Part 3 of *ALSA* - headed "Conservation and Stewardship Tools" - contains the provisions on conservation easements.

25 Under subsection 29(1) of *ALSA*, a registered owner of land may, by agreement, grant to a qualified organization a conservation easement in respect of all or part of the land for one or more of the conservation purposes listed.

26 A conservation easement may be enforced by the grantee, or by a qualified organization other than the grantee designated by the grantor in writing as having the power to enforce the conservation easement, or by both the grantee

and the qualified organization.[9]

27 The conservation easement is considered an interest in land and may be modified or terminated by agreement between the grantor and grantee.[10] A conservation easement may be registered under the *Land Titles Act*, RSA 2000, c L-4 ("***LTA***"), but notice must be given to the Ministers of Infrastructure and Transportation and, if required, to the Minister responsible for the *Municipal Government Act*,[11] the Special Areas Board if the subject land is located in a special area, and the council of the municipality or Metis settlement in which the land is located.[12]

IV. **THE PARTIES**

Plaintiff

28 The NCC is a private non-profit corporation extra-provincially registered in Alberta. It is a national registered charity dedicated to conserving Canada's natural heritage through land conservation in Canada. It partners with individuals, corporations, foundations and governments to achieve the protection of ecologically significant land, including plants and wildlife. It does this by protecting, through donation, purchase or conservation easement, what it considers to be important natural habitats in Canada. Since 1962 (as of the 2004 Annual Report), working with its partners, the NCC helped to conserve more than 1.8 million acres of what it considered to be ecologically significant land across Canada. It works across Canada and has seven regional offices, which are supported by a national office. The NCC reported its 2003 and 2004 fiscal years' annual revenue as $56.2 million and $49.9 million, respectively.

29 Among its many initiatives the NCC invited landowners along wildlife migration corridors to permit conservation easements upon their lands, to ensure permanent continued access to those corridors by the wildlife.

Defendants and Plaintiffs by Counter-claim

30 The Defendant Olson received a Bachelor of Science degree from Brigham Young University, a Juris Doctor degree from Brigham Young University and a Master of Laws in Taxation degree from the University of Denver. He was a tax lawyer with the Calgary-based firm of Olson Lemons LLP. He split his time between Alberta and Utah and, although at the time of the events at issue in this Enforcement Action he maintained his principal residence in Bragg Creek, Alberta, he now resides in Utah. In Calgary Olson practiced primarily in the areas of tax planning and tax litigation, on an international basis, being admitted to both the Alberta and Colorado bars.

31 Olson was also an avid conservationist dedicated to the restoration of wild Plains Bison as a species, as well as natural bison habitat, in Western Canada. To that end he started operating, along with his wife Carolyn and their children, four bison ranches in Western Canada (in Alberta, Saskatchewan and Manitoba) including the Penny Ranch. They were operated by Moose Mountain, an Alberta limited partnership (which I will describe in further detail below). These ranches were dedicated to the restoration and conservation of the wild bison species, but also to the restoration of the natural habitat in which, historically, those bison thrived.

32 Olson described how the restoration of the native grasses in the area - described as the "fescue rangeland" and the "foothills rough fescue" - was integral to his conservation goals and grazing plans for the bison on this fescue rangeland. Olson was therefore not only dedicated to the restoration of wild plains bison as a species at his ranches, but also to the wild native ecosystems at those ranches, which included the fescue rangeland.

33 Olson was very active in his industry, including serving in leadership roles in a number of related organizations, such as the Canadian Bison Association, the Alberta Bison Association, the Bison Producers of Alberta and the Species Survival Commission Bison Specialists Group (North America).

34 Hand-in-hand with the Olsons' conservation objectives and their operation of the four bison ranches was a bison meat distribution business, which operated under the name Olson's High Country Bison ("**OHCB**"). OHCB was the trade name of the bison meat business, selling excess bison from the ranches to a niche market in the form of different

free-range bison meat products. Selling the OHCB meat helped to fund the operating costs of running the conservation ranches.

35 Wild West Buffalo Ranches Ltd. ("**Wild West**") was an Alberta corporation owned indirectly by Olson and was the entity which initially offered to purchase the Property from the NCC. (Olson was ultimately identified as the nominee of Wild West to purchase the Property; the Property was purchased by Olson in his personal capacity from the NCC.) The sole shareholder of Wild West was T.H. Olson Professional Corporation. Wild West owned the bison meat business at the outset of the events leading to this lawsuit. Olson said all its assets and liabilities were later transferred to Moose Mountain.

36 Wild West, Moose Mountain and Olson together are referred to in these reasons as the "**Bison Parties**".

37 Waterton Land Trust Limited Partnership (the "**Limited Partnership**") was an Alberta limited partnership created on March 10, 2005 by way of an Agreement (the "**LP Agreement**") between Olson and Waterton Land Trust Ltd. (the "**Trustee**"), as trustee for Waterton Land Trust (the "**Trust**"). The sole limited partner of the Limited Partnership was Olson. Although the Limited Partnership was named as a Plaintiff by Counter-claim, it has been dissolved.

38 The general partner of the Limited Partnership was a trust whose trustee was a corporation. That corporate trustee was Waterton Land Trust Ltd. which had as its only two directors the defendants Bruce Lemons and Dr. Kenneth Lukowiak.

39 Bruce Lemons was a good friend of Olson and also Olson's name partner in the firm of Olson Lemons LLP. Lemons was an American tax lawyer practicing in Utah. He was not practicing in Alberta and did not have an ownership interest in the firm of Olson Lemons LLP or in the corporate Trustee, of which he was an officer and director.

40 Dr. Kenneth Lukowiak was a professor of neuroscience at the University of Calgary, Hotchkiss Brain Institute, Faculty of Medicine. He also held other professorships at the University of Calgary and other academic health institutions. Dr. Lukowiak was accomplished in his field, having authored or co-authored a number of articles, publications and research projects. Dr. Lukowiak lived near Olson's residence in the Bragg Creek, Alberta, area. He met Olson while they were both involved in the Bragg Creek Environmental Coalition. He was supportive of Olson's objectives with the Penny Ranch.

41 The Limited Partnership purchased the Property from Olson in 2005. Nevertheless, the Certificates of Title to the Property list the Trustee as the owner of the Property; partnerships cannot hold land in Alberta.

42 The Limited Partnership was registered with Alberta Corporate Registry on March 15, 2005. It was dissolved on December 20, 2009. Olson's limited partnership interest in the partnership was redeemed before the Limited Partnership was dissolved.

43 Moose Mountain leased the Property and was the entity through which bison operations were conducted. The general partner of Moose Mountain (at the time of the events leading to this Enforcement Action) was a company called Olson Tax Consultants Inc., an Alberta corporation owned and/or controlled by Olson and/or his immediate family via various corporate entities. Moose Mountain was substantially owned and controlled by Olson and his wife and children.

44 In these reasons I use the name "**Waterton Parties**" to collectively refer to Waterton Land Trust Limited Partnership, Waterton Land Trust Ltd., Waterton Land Trust, Bruce Lemons and Dr. Kenneth Lukowiak, as was done at trial.

Defendants by Counter-claim

45 The ACA is a registered charity dedicated to conservation efforts across Alberta. The NCC enlisted the ACA's

assistance to hold the CE because the NCC believed it could not hold a conservation easement in its own name while it was also the owner of the property subject to that conservation easement. Therefore, when it owned the Penny Ranch the NCC granted the original CE to the ACA. The ACA agreed to accommodate the NCC by holding the CE until the Property had been re-sold, at which time the organizations' mutual understanding was that the CE rights would be transferred to the NCC. That is, the NCC would be the grantor named in the CE initially registered on the titles to the Penny Ranch, and would then be grantee of the CE once it had sold the Property.

46 The ACA was added as a Defendant by Counter-claim on November 10, 2008 by way of an Amended Statement of Defence and Counter-claim. Near the outset of trial, the Bison Parties and the Waterton Parties agreed on the terms of a Consent Order with the ACA to remove the ACA from the litigation. The ACA remained as a party but would not call any evidence and would not otherwise participate in the trial. No relief was sought against it. As a result of the Consent Order, the Bison Parties and the Waterton Parties agreed not to seek costs against the ACA and agreed that the record comprised of documents produced by the ACA and the ACA's responses to written interrogatories were sufficient for issues raised at trial. The ACA also agreed to be bound by this Court's determination of all issues affecting it.

47 Larry Simpson was also named as a Defendant by Counter-claim. Simpson was the Alberta Regional Director of the NCC and, at the material times, the most senior NCC staff member in the Province. Most of Simpson's time was spent negotiating land deals and fund raising for the organization; Simpson was the primary fundraiser and administrator for the NCC in Alberta. The Counter-claim against Simpson was discontinued without costs near the outset of trial.

V. FACTS & EVIDENCE ISSUES

History of the Penny Ranch

48 The Penny Ranch comprised 11 mostly contiguous quarter sections, plus a leased 12th quarter section, within a narrow strip of land lying just northeast of Waterton Lakes National Park, Alberta. The NCC saw the Penny Ranch as strategic, occupying the last fringe between lands on the east, that man had cultivated or otherwise changed, and fairly untainted mountainous lands on the west - a fringe constituting a five to six mile band traversed or occupied by a wide assortment of wildlife. Simpson testified:

> [I]n my view, that part of the province is, from a conservation perspective, the most important private landscape in the province to be conserved. It is -- as I mentioned earlier, this last half of one percent of that little band along the edge of the Rockies, or the Serengeti piece. The fence if -- the Penny Ranch ultimately did get fenced was representative of a loss of a third of that wildlife movement corridor and of course one can debate, you know, whether this fence was functional or not functional, but a fence of that height with the power turned on, and property managed as he was proposing, was going to be a big big problem for wildlife and then our reputation and our ability to work with -- or motivate donors and -- and community landowners to work with us in the future, so this was a really big deal for us.

49 Simpson also testified:

> [A]lthough the map doesn't show it, the mountain ranges -- the mountains at that stage or that location, they -- they actually kind of face out onto the -- out onto the Prairies so for wildlife movement, it's not like they can -- can go up over a range, down into the valley, up over the next range, down into the valley. They aren't going to do that. They are going to use that frontal edge, the lower more logical place that they would be able to move north and south, east and west. So the Penny Ranch is, in terms of east-west it occupied about a third of the last five miles, the last half of one percent of that place that still has that predator-prey kind of relationship thing going on, so that makes it special. It's mostly intact habitat. It's got a wide range of wildlife species from

> grizzly bears to -- to elk and -- and a wide assortment of wildlife. So that's why it's important. That's why it's an important place.

50 The NCC said that such areas were increasingly fragmenting, by the encroaching human uses: largely agricultural and acreage developments. It said that lands of such rugged and stunning beauty are in constant demand for uses adverse to wildlife.

51 Prior to Olson's ownership, the NCC attempted to persuade the original owner of the Penny Ranch, Mr. Penny, to place a conservation easement upon his ranch. Mr. Penny declined the invitation.

52 In time, however, this land became available for purchase on the open market. The NCC acquired it in 2001 for $3.3 million.[13] It bought the land at what it believed to be its fair market value, and an appraisal of the Property dated August 7, 2001 determined that the fair market value of the land excluding farm buildings and improvements as of July 23, 2001 was $3,220,500 and with a conservation easement registered against title would be $1,636,000.

53 The NCC then leased out the lands for continued use in cattle ranching.

Penny Ranch Baseline Report

54 Upon acquisition of a property it was the NCC's practice to prepare a "baseline report", a biophysical survey and report on the property. The NCC explained that it was necessary to have a baseline report completed prior to placing a conservation easement on one of its properties as the conservation values in the conservation easement were tied to the state of the range health and the riparian health, two aspects documented in a baseline report.

55 For the Penny Ranch, the NCC contracted with H. John Russell to prepare a baseline biophysical survey. The final report dated March 2003 (the "**Penny Ranch Baseline Report**") was almost 200 pages in length and detailed the rangeland and riparian health of the Property. The Penny Ranch Baseline Report included information on various biophysical aspects of the Property, such as: physiographic settings and climate; soils; land use; vegetation; threatened, rare and endangered animals; existing land use impacts; range health; and management recommendations for the Penny Ranch.

56 Olson was provided with a copy of the Penny Ranch Baseline Report on April 20, 2004, when an employee of the NCC sent him a copy.

57 Although the Penny Ranch Baseline Report discussed wildlife in terms of the threatened and rare species observed on the Property, such as Grizzly Bears and Trumpeter Swans, it was generally silent on the issue of wildlife migrating through the Property. The NCC disagreed with that description of the Penny Ranch Baseline Report, saying that in mentioning species present on the Property it entailed reference to their movement through the Property. An appendix also listed birds, mammals, and amphibians and reptiles observed or expected on the Property in 2002. However, the Penny Ranch Baseline Report did not address the impact, if any, of the existing fences upon such migrations and the discussion regarding any threatened and rare species was only three paragraphs of the entire report.

58 The Penny Ranch Baseline Report revealed the rangeland to be unhealthy. Most of the range at the lower elevations was assessed as unhealthy due to cattle grazing and the conclusion that "[t]he actions of previous owners have affected the health of several features of the ranch" and there was "abuse by bulldozing and heavy grazing".[14] The range most consistently found to be healthy was that above 1550 metres in elevation.[15]

59 The Penny Ranch Baseline Report did mention the existing fences on the Property, including a few paragraphs dedicated to the location, size and general condition of the fences, notably:

> Almost all fences are well made with treated posts and 4 strands of barbed wire. (The only exception is the west boundary fence SE21 where some posts are untreated and small. Also some

> of the wire strands are old and some are stapled to live aspen trees, a poor practice as the tree grows over and destroys the wire.) They are also well maintained except for the 300 foot (100 m) section along the south side of SE21 where it appears a snowdrift or elk knocked the strands off the posts. Another 300 foot (100 m) section on the very steep east bank of Yarrow Creek between NE34 and SE34 has been destroyed by a soil slump of this bank. One wire and a few posts remain but the wire is not attached to the posts. All quarters of the property are surrounded by fence except NW21 and SW28 that comprise a half section pasture [...] There are 17 miles of fence (27 km) not including those around the home site.[16] [Footnote added]

60 One of the recommendations for improving both the range and riparian health was:

> [T]he most effective management changes would include more effective fencing and increased plant recovery (rest) time between grazing bouts. Damage to the riparian areas can be decreased by the same measures [...] This requires more effort by the lessee so it needs to be done in a way that he can see results over time to encourage his participation.[17] [Footnote added]

61 Despite these findings the NCC did nothing to actively remediate or rehabilitate the rangeland, or through its grazing lease terms prohibit, change or adjust the uses of the Penny Ranch to even passively enable its rehabilitation. The NCC had the opportunity to do so, but failed to, after receipt of the Penny Ranch Baseline Report, when entering into new grazing leases with its tenants.[18]

62 Under the heading "Management Recommendations for the Penny Ranch", the Penny Ranch Baseline Report stated "to allow the land to recover to a healthy state I suggest three possible strategies. [...] All strategies should help range health recover and be more resilient to drought, thus preparing the land for the next drought cycle that is sure to come."[19] The NCC did not implement any of these three strategies, but instead and contrary thereto, entered into the Grazing Lease Agreements.

63 This continued overgrazing of the Property was not consistent with either the NCC's land conservation objectives or with the goal for the Property that it later specified in its proposed Grazing Plan (described in further detail below) to restrict Olson's use of the Property: "to ensure a healthy, functioning landscape that sustains an agricultural (grazing) activity."[20] I accept the conclusion of Dr. Steven Clare Tannas, a professional rangeland agrologist, that the rangeland health of the Penny Ranch was very poor when the NCC owned it and improved after Olson's taking over possession and stewardship of it.

Fencing Provision in the NCC Grazing Lease Agreements

64 During the time of its ownership of the Penny Ranch, the NCC leased out portions of the land for cattle grazing. The fencing provisions in the Grazing Lease Agreements (described in footnote 18) that NCC entered into as landlord, read as follows at sections 16 and 17:

> 16. The tenant agrees to repair and maintain all existing fences, including if necessary, rebuilding new fences should same be necessary. In maintaining the said fences, the tenant agrees to ensure that there are gates, which will allow reasonable access to the premises to the landlord.
> 17. The tenant agrees that prior to building any new fences (where fencing does not currently exist) that it will only do so with the prior approval of the landlord such consent to be entirely within the unfettered discretion of the landlord. In no event, however, shall the tenant build fences, which would restrict the movement of wildlife.

The NCC's Resale of the Penny Ranch

65 In 2003 the NCC decided to sell the Property, but subject to a conservation easement that would ensure its reasons for acquiring the Property would nevertheless be achieved in perpetuity. It had other need for the capital that was tied up

in the Property. Once the land was subject to an acceptable conservation easement, whoever purchased it would have to take it subject to that conservation easement. Therefore, the NCC would not be required to own the Property in order for its motivations in acquiring the Property to be realized; placing a conservation easement on the Property (that it would hold and enforce as grantee) would achieve those objectives.

66 The NCC wished to sell the Penny Ranch for what it paid for the land, even though it would be subject to a conservation easement and therefore of reduced market value. As a registered charity able to issue tax receipts to donors, however, the NCC hoped to rely on proposed amendments to the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("***ITA***") to provide a tax receipt for any amount paid for the lands in excess of their reduced value (the "**Split Receipt Provisions**"). The Split Receipt Provisions provided, *inter alia*, that a registered charity could issue a tax receipt to a taxpayer in such circumstances provided that the taxpayer intended to make a gift. The Department of Finance proposed that the Split Receipt Provisions would apply retroactively to any transactions entered into after December 20, 2002 (a "**Split Receipt Sale**").[21]

67 In a technical opinion procured for the NCC by its tax counsel (the "**Technical Opinion**"), the CRA indicated that its opinion regarding the NCC's issuance of a tax receipt under the Split Receipt Provisions was based on the relevant facts, proposed transactions and purpose of the proposed transactions all constituting a "complete and accurate disclosure". The "proposed transactions" in the Technical Opinion included: list the Property for a price greater than its fair market value; in the listing documentation explain to prospective buyers that, as long as the fair market value of the encumbered Property did not exceed 80 percent of the purchase price, the NCC would issue to the purchaser a tax receipt for the amount the purchase price exceeded the fair market value of the encumbered Property; issue a tax receipt to the purchaser upon acceptance by the NCC of an offer to purchase that qualified for a tax receipt; indicate in the purchase and sale documentation that a gift was intended from the purchaser to the NCC, in the amount that the purchase price exceeded the fair market value of the encumbered Property;[22] and immediately after the sale of the Property closed, the qualified charity currently holding the conservation easement would transfer the conservation easement to the NCC for nominal consideration and that transfer would be registered with the Alberta Land Titles Office.

68 Based on the relevant facts, proposed transactions and purpose of the proposed transactions, the CRA opined, *inter alia*, that the NCC could issue a tax receipt in the amount the purchase price exceeded fair market value of the encumbered Property.

69 In accordance with the Technical Opinion, the NCC hired an appraiser, Laurier Kramps of Reliance Appraisal Consultants, to complete an appraisal of the Property. The NCC received the appraisal in May 2003 (the "**May 2003 Appraisal**"). In the May 2003 Appraisal, the fair market value of the encumbered Property was appraised at $2 million. The NCC listed the Property for a higher price, $3.3 million. The NCC explained in the marketing brochure for the Property that if an offer to purchase was greater than $2.5 million, the tax receipt would be the difference in the appraised value of the encumbered Property ($2 million) and the purchase price.

The NCC Approached Olson to Buy the Penny Ranch

70 The NCC's Margaret Green approached Olson about any interest he might have in buying the Penny Ranch subject to a conservation easement. Green was the Director of Land Conservation for the NCC from 2000 to May or June of 2004. Her responsibilities were to oversee the NCC's land in Alberta, including the land conservation program, the science as it affected the Alberta region, securement of the land and stewardship of the land. Green reported directly to Simpson. Unlike Simpson, Green had a background in the sciences, holding a Bachelor of Science degree in Zoology and a college Diploma in Renewable Resources.

71 Green met Olson through Sue Michalsky, another employee of the NCC. In 2002 Green met Olson at a restaurant in the Westin Hotel, where they dined on OHCB and discussed conservation easements and the native fescue rangeland at the NCC's project of Old Man On His Back Nature Reserve ("**OMB**") in southwestern Saskatchewan.[23] Michalsky

and other NCC employees had visited Olson's ranch in the Milk River Ridge region of southeastern Alberta to learn more about his program of trying to rehabilitate native grasses, particularly the fescue, through bison grazing.

72 The NCC considered Olson to be a good prospect for acquiring the Penny Ranch subject to a conservation easement since it knew that he operated his bison ranches in an environmentally responsible manner, that he tried to raise bison in their traditional habitat to the extent possible and that he was considering increasing his land holdings for his bison operations. An earlier attempt by Olson to acquire land in Saskatchewan adjacent to land already owned by the NCC (the OMB land) fell through after the adjacent land owner decided not to sell.[24] The NCC believed Olson would steward the land appropriately and in accordance with a conservation easement, and that he would allow wildlife migration through the Property without the NCC having to remain as owner of the land. The capital the NCC spent on purchasing the Property, or a significant portion of it, could be freed up to expand elsewhere the land base it controlled for wildlife accessibility and environmental enhancement, or just to improve its balance sheet.

73 Michalsky called Olson in 2003 and advised him that there was an opportunity to purchase the Penny Ranch from the NCC. Michalsky put Olson in touch with Green as someone who might have an interest in acquiring ranch land in Alberta. Green continued to interact with Olson on behalf of the NCC; she was the only one to do so on the sale to Olson for so long as she remained an employee of the NCC, which was some time after his offer was accepted by the NCC. She had the full authority of the NCC to represent it through negotiating and closing the sale of the Penny Ranch.

74 Olson was interested in the Penny Ranch. Along with its suitability for his bison and rangeland restoration objectives, in it he saw ancillary advantages. Because of its proximity to Calgary and its breathtaking scenery, he thought that it held potential as a site for promotional tours and visits to his ecologically-friendly wild bison operation and native grassland restoration (what Olson referred to as the "fescue rangeland"). It also accorded opportunity to enhance his children's home education, maturation and character development through hard work in the outdoors and in a multi-faceted business venture.

75 Olson was prepared to pay fair market value for the Penny Ranch as if it was not restricted in use by any conservation easement, then have the amount by which that purchase price exceeded the fair market value of the land he was actually getting, because it would be subject to a conservation easement, considered to be his donation to the NCC. He agreed with the NCC's objectives. He felt an alignment with its work and an affinity to its representatives that he had met by then. He also thought such a sizeable donation would be publicly recognized by the NCC, which would corroborate his marketing representations to the eco-conscious and health-conscious target markets for his organic bison meat. He thought this donation would be favourably received by his target markets and lead to increased sales.

76 Olson and Green began negotiating the terms of a purchase and sale of the Property. The negotiations took place over approximately three months, between May and August 2003, and were both amicable and constructive. Both parties shared similar environmental stewardship and sustainability objectives.

The ACA's Role

77 As it became apparent to the NCC that it might soon be selling the Property, it proceeded to encumber the various certificates of title with a placeholder conservation easement. The NCC used a template conservation easement for this purpose, which template it periodically updated and revised based on its growing experience, although not based upon any scientific studies in respect of its fencing provisions. Its terms would later be negotiated and revised to suit the purchaser of the Property, so long as any revisions did not compromise the NCC's conservation objectives for the Property.

78 The NCC believed that it could not put a conservation easement in its own name on land that it also owned. Therefore it contacted the ACA to assist it in the interim, through the sale process. Like the NCC, the ACA was a "qualified organization" pursuant to *EPEA* and *ALSA* and therefore able to be a grantee of a conservation easement.

79 The NCC developed a strategy whereby it would place a "standard form" template conservation easement on the

titles to the Property, which it granted to the ACA (the "**Initial ACA CE**"), and then work with Olson to agree on amendments to the Initial ACA CE that would suit his purposes but still protect the NCC's interests. Simpson explained:

> Tom would have comments on certain things he wanted to do that we would discuss and say okay, we can accommodate that, and we can accommodate this, and -- and that's how you get to your amending agreement, and so that's what we were doing, and so that's what this is referring to here, is that we would amend the original easement we placed on our land to accommodate the -- the changes that he wanted.

80 The ACA would hold the Initial ACA CE, that is, it would act as a straw grantee, until the NCC sold the fee simple interest in the Property that was subject to that Initial ACA CE. Then the ACA would be expected to transfer back to the NCC the Initial ACA CE.

81 To that end, the NCC and the ACA entered into a Conservation Easement Agreement dated May 28, 2003 whereby the NCC granted the Initial ACA CE on the Property, with the placeholder terms. The ACA was not obliged by any formal agreement to transfer the conservation easement back to the NCC.

82 The Initial ACA CE was registered on the Certificates of Title to the property on July 11, 2003, in favour of the ACA. The registration was done by the law firm of Beaumont Church LLP by the NCC's lawyer S. Keith Luft. This was also the firm responsible for finalizing Olson's final offer to purchase the Property, acting on behalf of the NCC. One of the lawyers at Beaumont Church LLP, Stanley Church, was on the Alberta Regional Board of Directors of the NCC.

Fencing in the Initial ACA CE

83 Fencing in the Initial ACA CE was dealt with as a "Restriction and Property Management Principle" (in Article 4 thereof) and the particular terms of the Initial ACA CE were set out in its Schedule "B":

> 4.1 The Parties agree that the Restrictions on and Property Management Principles governing the Grantor's use and occupation of the Property as set out in Schedule "B" to this Agreement are terms of the conservation easement.

84 Schedule "B" to the Initial ACA CE contained the following provision on fencing under the heading "Property Management Principles" (the "**Initial Fence Height Restriction**"):

> **Property Management Principles**
>
> 1.0 The following Property Management Principles shall be followed with respect to recreational, scientific research and Property management activities on the Property:
>
> i. The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements (Facilities) located on the Property as of the date of this easement. The Facilities are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of such Facilities are removed or destroyed, the Grantor may replace them with similar structures of the same size in the same location.

85 Schedule "B" of the Initial ACA CE also contained the following applicable terms on fencing under the heading "Restrictions":

> **Restrictions**

1.0 Definitions and Interpretation

[...]

Wherever the term "Property" is used in these restrictions, such term shall be construed to apply to any and all parts of the Property and to any water thereon.

1.1 Restrictions applicable to all parts of the Property:

a. Other than set out herein, it is understood that this Agreement imposes no other obligations or restrictions upon the Grantor and that neither it nor their successors, assigns, leases, nor any other person or party claiming under them shall, in any way, be hereby restricted from utilizing all of the Property in the customary manner for hunting and agricultural activities such as water development and maintenance of existing cultivated fields. Noxious weed control and emergency control of pests necessary to protect the public good are allowed and will be the responsibility of the Grantor, subject to federal and provincial statues and regulations.

b. To maintain and conserve the existing ranching and conservation values of the Property the Grantor acknowledges and agrees with the following RESTRICTIONS and PROPERTY MANAGEMENT PRINCIPLES and shall not conduct pursue or permit the following:

[...]

18. The building of wildlife-proof fences, except in localized area as needed to control or prevent wildlife damage to haystacks, stored forage or domestic gardens.

Green's Negotiation of a Possible Purchase by Olson

86 A copy of the Initial ACA CE was given to Olson. Olson and Green had been discussing a possible purchase by Olson of the Property and the feasibility of and process related to the NCC's issuance of a tax receipt. They added to their discussions the needed amendments to the Initial ACA CE.

87 Olson was prepared to pay $3 million for the Property. Therefore the parties believed that he would be entitled to a tax receipt for the difference between that amount and the actual fair market value, which could only be determined once the parties agreed on the final conservation easement restrictions that would apply. These restrictions would reduce the use that could be made of the land by its owner thereafter and therefore would reduce its fair market value. This diminution in value would be determined after an independent appraisal of the lands was completed, and would be done once the terms of the NCC's final CE on the Property were determined. Olson would then receive a charitable donation receipt for the difference between what he agreed to pay ($3 million) and its appraised fair market value under the restrictions imposed by the CE.

88 Only Green met face-to-face with Olson on the NCC's behalf for the negotiations.[25] As far as Olson was aware, she had full authority to negotiate on its behalf and to bind the NCC, subject only to the formality of the Alberta Regional Board of Directors of the NCC approving whatever terms he and Green agreed. These terms would be included in the offer Olson would make to purchase the Property.

89 Everything Green negotiated had to be authorized by Simpson or the Alberta Regional Board of Directors of the NCC. As of May 8, 2003, Green had authority from the National Board of Directors of the NCC to proceed with the sale of the Property for "no less than $2,562,500".[26] Thus the National Board of Directors of the NCC pre-approved the sale of the Penny Ranch based on an acceptable final sale price only, without reference to any other terms.

90 Like Green, Simpson understood that Olson's interest in the Property and his intent if he were to purchase it, was to ranch bison. Simpson and Green discussed many of the proposals from Olson to revise conservation easement clauses. Simpson took no issue with what Green had negotiated with Olson on fencing.

91 Green's preference was to not testify at all at trial; she was a very reluctant witness. She was very careful to respond accurately to all questions from all parties; she corrected inaccuracies of even the smallest type in questions put to her. She only testified to things of which she was certain. I found her testimony of the few things she could recall to be reliable.

92 Green recalled attending meetings with Olson about the sale of the Property. She could not recall any specifics of those meetings. She recalled that Olson intended to use the Penny Ranch lands for raising bison, but had no recollection of any discussions on fencing. She did not recall any discussions with respect to any potential restoration of the fescue rangeland, or the specifics of the Penny Ranch Baseline Report. She could not recall any specific discussions with Simpson about the CE amendments she was negotiating with Olson, but did recall generally having ongoing discussions with Simpson on the terms of Olson's offer and the CE amendments she was negotiating, although she said there "wasn't a lot of discussion" with Simpson.

93 However, Green did specifically recall discussing with Olson the topic of restrictions in the CE on changes to buildings on the lands. There ensued "a lot of discussion on [...] the building". She did not recall the specific details of the negotiations. She recalled this was important to both parties and therefore was the topic of more of their negotiations, explaining the discussions "had a lot to do with the type of building that -- like the house -- the house that was to be built and the side -- where it could be built and all that type of stuff, because we wanted to keep it in a small area[.]" This point was confirmed by Simpson at trial, who testified that he recalled discussions with Green on allowing for renovations and additions to the family residence on the Property, specifically allowing Olson to build a bunkhouse.

94 The NCC's Alberta Regional Board of Directors did not review any of the amended terms of the CE negotiated between Green and Olson, nor did it play any part in signing off on these terms. Instead, its authority was delegated to Green, a fact which was supported by the timing of the Regional Board's approval of the sale of the Property to Olson and by the actual ballots executed by the Alberta Regional Board members approving Olson's offer. The ballots only mention the final dollar amount of the offer, the dollar amount of the non-refundable deposit and the dollar amount of the one-year lease. They do not mention any of the negotiated terms of the CE and there was no evidence before me to suggest that Board members reviewed, turned their minds to or consented to the CE terms negotiated by Green. This is further supported by the fact that Regional Board members approved the offer in August 2003 (specifically, between August 26-29, 2003) and not later after its wording was available.

95 Green testified that the end result of all her discussions with Olson was whatever wording was in the final version of the agreement that the parties signed, but that she recalled nothing specific about those terms and, in particular, nothing about any fencing provision.

96 As will be discussed further below, the parties now disagree on whether what they signed off on as the deal between them, regarding the height and location of any replacement fencing on the Property, accurately reflected the deal they reached orally on the fencing provision. Olson said the wording of the amendment did not accurately reflect the understanding he reached with Green and sought rectification. He asked that the wording be corrected to reflect the actual arrangement the parties reached on the fencing provision. Green had no recollection of the specific agreement reached on that point (or any point) but said the wording the parties signed off on was the final agreement they reached.

97 Olson said that Green also represented to him in connection with his purchase of the Property that the NCC would: (1) acknowledge Olson's donation to the NCC; (2) acknowledge Olson's bison conservation project as worthy; (3) introduce Olson to Mr. Galen Weston of the Weston Foundation (and the Loblaws chain of supermarkets); and (4) introduce Olson and the conservation bison ranching project to the local community (collectively, the "**Endorsements**"). Olson said these representations induced him to proceed with an offer to purchase the Property, and he relied on those promises by the NCC to help promote OHCB, which induced him to purchase the Property in the manner he did.[27] Green had no recollection of any such promises of promotion or discussions with Olson. Simpson admitted in his testimony that it was the NCC's practice to recognize significant donors publicly by providing recognition in their Annual Report, unless a donor wanted to remain anonymous.[28]

98 Both Green and Simpson confirmed that Olson was to receive a charitable donation receipt for the portion of the amount paid for the Property that exceeded its fair market value once encumbered by the final conservation easement.

The Result of the Negotiations between Olson and Green

99 The formal Offer to Purchase the Property from the NCC, dated August 28, 2003 ("**O2P**"), was made by Wild West "or its nominee". A year later, when the transaction closed, Olson was designated as Wild West's nominee and became the actual purchaser of the Property from the NCC.

100 By the time of that August 28, 2003 O2P, the terms in the O2P had been the subject of considerable discussion between Green for the NCC and Olson. I find the NCC knew that Olson's intention was to raise bison in an ecologically friendly manner, in a manner that would actually facilitate restoration of the habitat on the Property (which included the rangeland and riparian habitats) to its original state.

101 The O2P was accepted by the NCC on August 29, 2003.

102 The O2P contained the following specific terms:

> 4. This offer is made subject to the following conditions precedent which, if not fulfilled or waived in writing by September 30, 2003 (the "Condition Removal Date"), shall render the agreement formed upon acceptance of this offer void, namely:
>
> [...]
>
> d. the Purchaser having reviewed and found satisfactory the tax ruling obtained by the Vendor respecting the charitable donation receipt that the Purchaser is expected to receive in conjunction with the purchase of the Property;
>
> [...]
>
> 12. The revised conservation easement and associated documents, substantially in the form attached hereto as Schedule A, shall, on or before Closing Date, be registered at the Alberta Land Titles Office in addition to the conservation easement and associated documents currently registered at the Alberta Land Titles Office against the title to the Property. Schedule A will be registered at the Alberta Land Titles Office against the title to the Property in priority to any registration that may be placed on the Property by or with the permission of the Purchaser.

103 Attached to and forming part of the O2P was a 5-page Amendment to the Initial ACA CE (the "**CE Amending Agreement**"), which contained certain amendments that the parties (Green for the NCC and Olson for Wild West) had negotiated. It would need to be entered into between the NCC, as owner of the Property and Grantor of the Initial ACA CE, and the ACA as Grantee of the Initial ACA CE, but its content would be determined by the NCC and Olson as part of their agreement of purchase and sale of the Property.

104 The preamble to the CE Amending Agreement read as follows:

> WHEREAS:
>
> A. the Grantor has granted and conveyed to the Grantee, a Qualified Organization, a conservation easement in perpetuity by way of an agreement (the "Agreement") in respect of land described and outlined on Schedule "A" attached hereto (the land hereinafter referred to as the "Property") for the purposes set out in herein; and
> B. the Grantor and the Grantee wish to make certain amendments to the Agreement consistent with the use of the Property for ranching buffalo, as detailed in this amending agreement (the "Amending Agreement").

105 The CE Amending Agreement included at the foot of page 4 thereof (which was part of Schedule "A" to the Agreement):

> Property Management Principles
>
> 8. Section 1.01 of Schedule B of the Agreement is hereby deleted and replaced with the following:

106 And then atop the next page, page 5, it had the following replacement fencing provision (the "**Replacement Fence Height Restriction**"):

> 1.1
>
> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee [Emphasis added].

107 As I mentioned earlier, this wording was one of the primary points of divergence between the parties. Olson said this provision was incorrect and did not capture the actual agreement he and Green reached on fencing. Green, however, said that whatever the parties signed was the deal they reached and that she could not recall its specifics. The NCC's Enforcement Action, first and foremost, was to enforce the above term contained in the signed agreement between them, attached to the accepted O2P.

108 Olson recalled specifically that he and Green agreed on an amendment to the Initial Fence Height Restriction. Green had no recollection of discussing the matter of fences with Olson, nor, therefore, the outcome of any such discussion. Only Olson and Green were privy to the negotiations around amending the CE. Simpson said he was aware of the Initial Fence Height Restriction being one of the matters discussed between Green and Olson. He had no expertise in the area and left it to Green to handle.[29]

109 Olson's recollection and testimony on these negotiations was both clear and credible, and I accept it on these points. Olson specifically recalled negotiating with Green three issues regarding the provisions on Property Management Principles, which did not include fencing.[30] In fact, fencing was not a significant issue in the negotiations with Green, according to Olson:

> Not at all, sir, in fact [...] I didn't even make the offer till I told her that I was going to re-fence the property of a bison fence, at the time I planned to put up a six foot fence. So she was fully aware that was the deal before I even put the offer in. So there was never a discussion about some kind of restriction, other than wildlife-proof on the fencing in the property.

110 I find that Olson and Green discussed briefly the sort of fencing he felt was necessary for adequate bison containment on the Property. I find that the fencing provision the parties agreed to orally resulted from and was consistent with that discussion.

111 The NCC disputed Olson's proposition that he would not be able to ranch bison on the Property without the New Fence that he installed, going so far as to argue that the proposition was entirely disproven by the evidence. I disagree. On all of the evidence presented, and specifically Olson's testimony regarding his previous experience with bison containment and fencing on his other ranches, I find that: (1) absent certainty on the ability to install adequate fencing for bison ranching on the Property, Olson would not have proceeded with the purchase of the Penny Ranch;[31] and (2) if the NCC had any concerns with Olson's wishes on perimeter fencing, Green would have raised them and remembered at trial any ensuing discussions, because of their criticality to Olson's purpose for acquiring the Property. They would have been every bit as, if not more, memorable as their discussions on additional buildings.

112 I find that Green on behalf of the NCC was entirely comfortable with Olson's planned new perimeter fencing on the Property, particularly since he would ensure it was not "wildlife-proof" and was prepared to raise the height of the lowest strand of wire higher off the ground, which lowest strand could be an impediment to the movement of wildlife on the Property.[32]

113 I find that Olson's fencing plans were not a significant issue for the NCC at the time; the NCC was fine with Olson's requested amendments to the Initial Fence Height Restriction. I reach this conclusion because I am satisfied that if the NCC had expressed concern with Olson's fencing intentions, like it had with Olson's wish to be unfettered in adding any new buildings on the Property, the topic would have become contentious and a potential deal breaker for Olson. It would have been foremost in the limited recollections of Green.

114 Green had no recollection of discussing any fencing plans with Olson, yet she did recall a topic that both she and Olson acknowledged was a major issue in their negotiations (the discussion on buildings). I infer from Green's clear recollection of discussing with Olson the one issue of buildings and no recollection of discussing any fencing issue, that fencing was not a major discussion point between them, or between Green and Simpson. I find that the NCC regarded Olson's proposed changes to the Initial ACA CE in respect of fencing acceptable. I find that Green on behalf of the NCC readily agreed with Olson that his desired changes to the Initial Fence Height Restriction would get included in the amendment to the Initial ACA CE and, thereby, become a part of the final NCC conservation easement.[33]

115 Simpson had a few discussions with Green on specific clause revisions during the period of time that Green was negotiating with Olson. Simpson said that his focus was on any changes to the standard template Initial ACA CE.

116 Simpson said that he didn't agree to Olson's fencing requests and that he would not have. I do not accept that as accurate. I find that Simpson was not consulted about Olson's wishes about perimeter fencing. I find his office to have been consulted or engaged only when Green considered that a request to relax a conservation easement restriction needed an executive decision, based upon her expertise in the applicable sciences and her knowledge of what issues were important to the NCC. That threshold was not triggered, in Green's view, for the fencing changes to the Initial Fence Height Restriction that Olson sought. It was triggered for the changes to the building restrictions that Olson

sought. That is, Olson's fencing requests did not necessitate any discussion by Green with Simpson, but his requests for absolute discretion to add more buildings did.

117 Put another way, the only specific issue Green remembers discussing with Olson, of the many they obviously negotiated, was buildings. She did not recall fencing because I find, at the time, Olson's needs for his bison containment made sense to Green and were acceptable to the NCC. If they were not, Olson would not have proceeded with an offer or there would have been significant negotiation of the issue that, like the negotiation on the buildings, Green would have remembered. Green did not remember any fencing discussion because it was a non-issue for the NCC when she was negotiating with Olson.

118 Further, Simpson was away on vacation over the time final wording was crafted to include in the O2P, which wording would amend the Initial ACA CE. He was also away at the time the O2P was presented to and accepted by the NCC. Simpson said that he called in each day of his vacation and discussed such matters with Green. Subject to that the matter was left entirely in Green's hands and, I find, the matter of perimeter fencing never arose in the very limited discussions between Green and Simpson. Green said, again, there was not a lot of discussion with Simpson. Green did not raise any problems or issues with Simpson over the fencing provision or her negotiations with Olson. In cross-examination Simpson said that he did not know what discussions were held between Green and Olson regarding the fence size.[34]

119 I find the matter of fencing on the Property only became an issue for the NCC more than a year later, post-closing (therefore after August 2004) once Olson started upgrading the perimeter fencing with his New Fence. At that time some of his neighbours started calling the NCC with questions about that fencing, which I discuss further below.

120 Unfortunately this agreement that Olson and Green reached did not get correctly reflected in the CE Amending Agreement that they signed, which was supposed to include all their agreed amendments to the Initial ACA CE.

121 On August 28, 2003, Olson was departing with his family on vacation, but delayed his departure to get his offer in on the Property to accommodate the NCC. The NCC wanted it right away to convenience its internal needs. Olson came into his office to sign the O2P, with his large family waiting outside in their vehicle. Although the O2P did not yet accurately reflect the agreement Olson reached with Green on the various remaining amendments they negotiated to the Initial ACA CE, he entrusted the remaining corrections to be made by passing on his comments to his commercial lawyer, Debbie Bryden. Olson signed the O2P in blank and rejoined his family.[35]

122 Numerous other (non-fencing) revisions to the Initial ACA CE, which were agreed to by the NCC, also needed to be captured in the CE Amending Agreement. Bryden was to ensure it was revised to reflect Olson's instructions. He left those revisions with Bryden and signed the O2P before the final CE Amending Agreement was prepared, assuming it would be as he described to Bryden before it was attached to the O2P that she sent to the NCC for acceptance.[36]

123 However the CE Amending Agreement did not get revised as Olson had instructed and as Green and Olson had agreed. The Replacement Fence Height Restriction was included rather than words reflecting their agreement.

124 In their closing brief, the Bison Parties argued that the fencing provision actually agreed on by the parties was as follows:

> The Grantor may maintain, replace and repair the fences, roads, buildings and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired.

125 This fencing provision is somewhat consistent with one of the blacklined versions of the CE Amending Agreement sent by email from Bryden to Luft during their exchanges on August 28, 2003, wherein Bryden removed the phrase "each at its original size and in its same location".[37] However, the phrase "each at its original size and in its same

location" made it back into the final version attached to the O2P sent by Bryden to Green on August 28, 2003. That provision did not accurately reflect the fencing provision agreed to by the parties.

126 Instead, I find the fencing provision that the parties agreed upon only related to the location of the fencing and to it not being wildlife-proof. I find the parties agreed on the following amended fencing provision (the "**Agreed Fence Height Restriction**"):

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property. If doing so with fences or roads, they are to be maintained, replaced or repaired at or near the existing ones. The Grantor may not build fences or roads in areas where none exists without the Grantee's permission. The building of wildlife-proof fences is not permitted, except in localized areas as needed to control or prevent wildlife damage to haystacks, stored forage or domestic gardens. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

127 On August 28, 2003, Olson, as the Wild West nominee, offered to purchase the Property from the NCC, which offer included the Replacement Fence Height Restriction not the Agreed Fence Height Restriction.

128 On August 29, 2003, Green signed the O2P to accept it on behalf of the NCC (the "**Penny Ranch Purchase Agreement**").

129 The NCC Alberta Regional Board had earlier approved the sale of the Property to Olson by mail ballot process; all ballots were received before the formal O2P of August 28, 2003 was received. Therefore the Alberta Regional Board decision to approve the O2P was not based upon the final wording of the O2P, which included the Replacement Fence Height Restriction. The nature of fencing restriction(s), if any, within a final amended conservation easement was delegated and left entirely to the discretion of the NCC staff. Simpson delegated that task entirely to Green. On this transaction Green's decisions and representations were binding upon the NCC.

Penny Ranch Purchase Agreement - Financing

130 The Penny Ranch Purchase Agreement contemplated the transaction closing and the land transferring to Wild West or its nominee one year later, on September 1, 2004.

131 The Penny Ranch Purchase Agreement did not refer to any part of the purchase price representing a gift to the NCC nor did it contain any date by which the Tax Receipt would issue. However, the parties to it agreed that they intended for Olson to receive a tax receipt for that part of the purchase price that exceeded the fair market value of the encumbered Property. I am satisfied that, for purposes of this litigation, Olson had donative intent for the difference between his total payment and the fair market value of the Property subject to the CE, including the Agreed Fence Height Restriction.

132 Over that subsequent year leading up to the closing of the transaction, Olson arranged his financing, leased the land from the NCC through his company Wild West and took steps to populate the land with his bison.

133 Olson arranged part of the financing for the purchase of the Penny Ranch through a mortgage granted by Farm Credit Canada ("**FCC**"). The mortgage with FCC was for $2 million (the "**FCC Mortgage**") at a rate of 18 percent interest per annum. Olson did not recall discussing the value of the Property with FCC; the discussions focused primarily on his business plans for the Penny Ranch. At the time he arranged the financing he still did not have any reliable appraised value for the Property subject to the CE.

134 Olson described to FCC the nature of the Split Receipt Sale. He did not know, and FCC did not tell him, how it

determined the $2 million amount for the loan. Olson had requested from FCC the "maximum amount they thought they could give [him]". Olson had borrowed funds from FCC in the past and said that FCC representatives he spoke with seemed "intrigued" by his business plans for the Penny Ranch. Olson did not personally guarantee the loan. I accept that he was able to borrow the FCC Mortgage based on the mortgage security, his experience as a bison rancher and his prior dealings with FCC. The interest rate of the FCC Mortgage reflects further the degree of risk FCC thought it was taking.

Penny Ranch Purchase Agreement - Grazing Plan

135 The Penny Ranch Purchase Agreement required the development of a mutually acceptable grazing plan for the lands. Kim Good was involved in this process for the NCC, as its Stewardship Coordinator. Good had a Bachelor of Science degree. Both Good and Green were involved in the direct discussions and negotiations with Olson on stewardship of the Property.

136 The result of Good's work with Olson was the "Grazing Plan for Winter 2003-04 for Waterton Conservation Area - Spionkop/Penny Ranch" dated September 30, 2003 (the "**NCC Grazing Plan**"), which was authored by Good. It had been a condition precedent of the O2P that the parties agree on a grazing plan for the Property. Olson was satisfied with the NCC Grazing Plan and waived the condition on September 30, 2003 in a letter from Bryden to Luft.

137 The NCC Grazing Plan did not contain any requirement to maintain the exterior fencing on the Property; interestingly it did not include any discussion on fencing whatsoever.

Wild West Lease

138 Wild West entered into a Lease Agreement with the NCC dated October 1, 2003, for a term of eleven months to August 31, 2004 (the "**Wild West Lease**"). The Wild West Lease was negotiated directly between Olson and Green, and was intended to run until Wild West or its nominee closed the purchase of the Property from the NCC.

139 Sections 14 and 15 of the Wild West Lease provided for fencing on the Property as follows:

> 14. The tenant agrees to repair and maintain all existing and new fences, which includes perimeter and interior fences. The tenant is responsible for the cost of building any new fences which includes perimeter and interior fences, in accordance with clause 17.[38] In maintaining the said fences, the tenant agrees to ensure that there are gates which will allow reasonable access to the premises to the landlord. The tenant agrees that cutting of trees necessary to maintain fence lines will be kept to an absolute minimum.
>
> 15. The tenant agrees that prior to building any new fences (where fencing does not currently exist) that it will only do so with the prior approval of the landlord such consent to be entirely within the unfettered discretion of the landlord. In no event, however, shall the tenant build fences which would restrict the movement of wildlife. [Footnote added]

140 The Wild West Lease was executed by Simpson on behalf of the NCC and by Olson on behalf of Wild West. The rental costs paid by Wild West to the NCC for the term of the Wild West Lease, in the amount of $36,666, were to be treated as payment toward the purchase price for the Property.

Condition of the Penny Ranch

141 After taking possession of the Property Olson discovered that it was distressed. He discovered that, by reason of years of overgrazing and inattention, the lands would not yet be able to sustain his bison. Also, much of both the perimeter and the interior fencing required repair or replacement. Consequently, although it was Olson's plan to place

bison on the Property in 2003, he did not actually do so. Upon inspection of the Property Olson discovered the lower pastures were overgrazed, there was damage to riparian areas, and the perimeter fences were in very bad shape.[39] Instead, Olson rested the Property in order to begin the long-term process of land, vegetation and riparian restoration. This would be aided by the presence of bison but it was not until January 2005 that he put bison on the Property, when he brought 350 head to the Penny Ranch.

142 The condition of the original fencing (both interior and perimeter) on the Penny Ranch varied. Some of the original perimeter fencing was outside the boundary of the Property. Other sections were in extremely poor shape - being dilapidated, tacked to trees in parts, or simply nonexistent where the fencing had fallen down. Olson knew he would have to replace the perimeter fencing in order to bring his bison onto the land and desired to replace sections of the interior fencing as well so as to start rehabilitating the fescue.

November 2003 Appraisal

143 In order to determine the fair market value of the encumbered Property, and to determine the fair market value of the Property to be declared as the value of the land at the time of transfer to Olson, the NCC again retained Laurier Kramps of Reliance Appraisal Consultants to conduct an appraisal.

144 His appraisal was rendered on November 17, 2003 (the "**November 2003 Appraisal**"). In the November 2003 Appraisal, the fair market value of the Property unencumbered by the CE was appraised at $3,508,500, while the fair market value of the Property encumbered by the CE was appraised at $2,125,500.

145 Olson questioned the methodology of the November 2003 Appraisal, suggesting that it would not be defensible if challenged by the CRA. Specifically, Olson was concerned about what he considered a lack of analysis tying the reference points to other properties to the ultimate valuation. Based on appraisals he had seen in the United States, Olson believed the use of the "bundle of rights theory" would be more effective. Olson described this theory as determining the fair market value of property based on the sum of the rights the landowner has with respect to the land. Olson raised these concerns with Green in late November or December 2003.

146 Olson expressed his concerns to Kramps regarding the methodology and discussed the bundle of rights theory. However this did not lead to the changes Olson had hoped. As a result, Olson lost confidence in Kramps' ability to complete a defensible appraisal on his own. Olson wanted the NCC to engage a lawyer to educate and assist Kramps; that did not occur.

147 Kramps indicated in a letter dated April 29, 2004 that he was prepared to increase the percentage of the discount in the November 2003 Appraisal to 50 percent. However, Olson remained unsatisfied with Kramps' methodology.

148 The NCC agreed that the methodology in the November 2003 Appraisal was not acceptable. Green wrote to Olson on May 13, 2004, advising that the NCC would do "everything reasonably necessary to obtain a proper appraisal which would be defensible in court, if necessary". Olson understood that Green told Kramps "not to sign off on any document of the appraisal until all of us are satisfied that the methodology is sound".

149 The NCC took a different position at trial, arguing that Olson created a controversy over the appraisal methodology for ulterior purposes. It theorized that Olson manufactured the appraisal critique to delay quantification of the gift until after closing. This, the NCC suggested, allowed Olson to secure the FCC Mortgage while maximizing the quantum of his gift. In support of this theory it pointed out that: (1) the November 2003 Appraisal's appraised value of the encumbered Property would have resulted in either an $875,000 gift (if deducted from the $3 million purchase price) or a larger gift of $1,182,900 with the encumbered Property valued at less than the amount of the FCC Mortgage (if a percentage discount were applied to value the encumbered Property compared to the unencumbered Property); (2) if the 50 percent discount Kramps suggested in his April 29, 2004 letter were applied then the appraised value of the encumbered Property would be less than the amount of the FCC Mortgage; (3) Olson's desire to be named as solicitor for the NCC occurred in March to May 2004 (and in the NCC's argument is linked to Olson's desire to preserve the $2

million FCC Mortgage); (4) the FCC Mortgage was for the same amount as the appraised fair market value in the May 2003 Appraisal; (5) Olson attested in his Affidavit of Transferee, on August 10, 2004, that the current value of the land in his opinion was $2 million; and (6) lenders rarely if ever lend more than the fair market value of the security, here the encumbered Property alone.

150 These observations are consistent with the NCC's theory, but do not prove it. The NCC did not prove that Olson intentionally refused to accept the early appraisals in order to advantage his position vis à vis FCC or, worse, as the NCC's argument implies, to defraud it by placing it at greater financial risk than was being represented to it.

151 Neither do these circumstances compel an inference bearing out the NCC's theory. Like the NCC, Olson had very good reason to ensure his charitable donation receipt would be accepted by the CRA. Unlike the NCC, Olson also had the professional experience to recognize an appraisal that increased their risk before the CRA, having some understanding of a more principled approach that had been accepted in the United States. Olson also understood there was a likelihood that the Tax Receipt would be the subject of scrutiny by the CRA both because the Split Receipt Provisions had only recently been proposed and because the CRA had earlier provided to the NCC its Technical Opinion. Olson's objection was not designed to get a larger receipt. By insisting on a more principled appraisal, Olson took an equal risk that his charitable receipt would end up lower.[40]

152 I find the NCC took Olson's concerns seriously, it also having a great deal at stake in establishing a successful split receipt process with the CRA. It had little or no previous experience with that process. It hoped to use the process many times in the future. Simpson confirmed generally that "when we issue a receipt, we want to make sure it's for a value that can -- is appropriate and can be defended." The NCC was not pursuing a further appraisal solely to assuage an exacting counter-party in order to "move on" as Simpson purported. Green took Olson's concerns quite seriously and recognized that this also mattered for the NCC, not just Olson.

153 Due in large part to a concern about these appraisals eventually being available to the CRA, Olson suggested the NCC appoint him as its lawyer so that all previous appraisals might remain subject to solicitor-client privilege, thus shielding them from the CRA in the event it questioned the validity of the Tax Receipt. The NCC rejected Olson's proposal. At trial, Olson conceded it had been a "stupid idea".

Meetings at the Westin Hotel Restaurant between the Offer to Purchase and Closing

154 Olson and Simpson had two Westin lunch meetings in June of 2004. Olson preferred to hold his lunch meetings at the Westin's restaurant because it offered OHCB on its menu. Though Simpson did not recall the first meeting,[41] it did in fact occur. This was when Simpson first informed Olson that Green was no longer employed at the NCC.[42] Simpson also informed Olson that Tim Hodgson, the Associate Regional Director of the NCC, who had a background in computer science, had replaced Green.

155 Olson used the opportunity of the June 3rd meeting to repeat his concerns regarding the appraisal, among other things. Simpson admitted that the appraisal issue had not been handled well and that Hodgson would sort it out.

156 On June 28, 2004, Simpson, Hodgson and Olson met for lunch, again at the Westin Hotel restaurant. I find that they met because Simpson wanted to introduce Olson to Hodgson, to find out whether Olson was on track to close on his purchase of the Property and to see if Olson might move ahead the closing of the transaction. The NCC was facing cash flow constraints.

157 However at trial Simpson maintained that he requested the meeting specifically to ensure that the fencing provision in the CE Amending Agreement was going to be sufficient for Olson's bison ranching purposes.[43] That is, Simpson said that the entire purpose of the meeting was to discuss fencing and that is all they discussed. Simpson testified that he twice asked Olson during this lunch meeting whether the fencing provision was sufficient because he knew Olson would be using the lands for running bison:

> I would have said, Tom, as you know, that there's an existing four strand barbed wire fence there. It's certainly not higher than 48 inches. It proved later to be actually 40 inches. Are you sure that this will be adequate for you? And he said that the -- it will be fine. The only thing we'll have to adjust is where there are snow drifts and where there is ravines. And both times I asked the same question and both times he provided the same answer. And Mr. Hodgson and I left and both felt that well, it's very clear, he understands what he's buying and that he can make this work, and the adjustments for ravines or snow drifting seems like a reasonable thing.

158 Simpson said he would have gone to another buyer if the fencing provision was not satisfactory for Olson and that he was prepared to keep Olson whole in terms of deposit and such matters up to that point; at that time it would have been easy to return Olson's deposit and to find another buyer who was "more appropriately aligned" with the NCC's conservation goals at the Property.[44] Simpson's full evidence on this meeting was not consistent with his testimony on the extent of his involvement in the negotiations specific to fencing, nor with his level of participation in negotiating the O2P in 2003. Simpson was anxious for the deal to conclude, sooner if possible.

159 When asked why he happened to raise, of all things, the matter of fencing in June 2004, long before the NCC starting receiving complaints about the New Fence from Olson's neighbours and nearly a year after the finalized O2P had been negotiated and signed, he said he had a feeling that he needed to revisit the issue of fencing with Olson:

> You know what? I don't know why I felt such a compelling need. It could have been [...] his intrusion into the process of the valuation, or I'm not sure what it was, but there was just something in the back of my mind that said we've got to just double-check with this guy. And -- and we did.

160 Although I doubt that Simpson raised the issue of fencing with Olson at that June 28, 2004 meeting because he sagely or fortuitously anticipated the very risk that befell the parties later, I accept that in discussing Olson's use of the Property, fencing did come up in the conversation. That a conversation encompassing fencing occurred between Olson and Simpson at the June 28, 2004 meeting is supported by the transcribed December 2004 phone conversation between Olson and Simpson, which confirmed that both parties recalled a conversation on fencing having taken place earlier that year in June. Hodgson, in his pre-trial questioning, also confirmed that Simpson asked Olson twice about fencing.

161 I find the fencing discussion which took place at that June 28, 2004 meeting was about interior fences, and focused on the issue of distributing the animals for grazing management. They also spoke of the status of the appraisal of the Property: Hodgson stated he had spoken to Bob Thompson, an alternate appraiser, and wanted to arrange a meeting in order to determine if Olson was comfortable with Thompson and assess whether Thompson had the necessary expertise.

162 However the essential elements of this second meeting were for Simpson and Hodgson to confirm with Olson that the sale would proceed (given the full year between signing the O2P and its closing), to ensure that Olson had his financing arranged and to broach whether Olson might close the transaction sooner (to assist with the NCC's cash flow shortage).

163 The NCC wanted to accelerate the sale of the Property to Olson in order to gain some liquidity and to free up the money it had invested into the Property. Olson was amenable to moving ahead the closing date, provided FCC would release funds earlier. Olson would have to finance the purchase earlier; he therefore negotiated a $20,000 purchase price reduction.

Selecting a New Appraiser

164 A few weeks after the June 28th meeting Olson met with Thompson and Hodgson at the NCC office. They discussed the type of appraisal that would pass muster with the CRA. However Thompson said that he had a conflict of interest and could not appraise the Penny Ranch. Thompson suggested Jim Smith as suitable, particularly for the

methodology Olson proposed, as apparently few Canadian appraisers had relevant experience. Olson and Hodgson agreed to ask Smith to appraise the Property.

165 At some point in the ensuing months, Olson had discussions with Smith about the bundle of rights theory, which Smith then followed.

Moose Mountain Lease

166 Olson, as landlord,[45] leased the Property to Moose Mountain, as tenant (the "**Moose Mountain Lease**"). The Moose Mountain Lease had an initial term of five years commencing July 1, 2004, and provided for Moose Mountain to pay rent to Olson for the Property. The Moose Mountain Lease also provided an option for Moose Mountain to renew the Lease for an additional five year term, which it exercised.

167 The tenant's agreement to the Moose Mountain Lease was executed by Moose Mountain's general partner, Olson Tax Consultants Inc. Olson and his wife both signed on behalf of the general partner.

168 Section 5 of the Moose Mountain Lease provided for fencing as follows:

> 5. **Fences**: The Tenant may construct a new bison fence or upgrade the existing fence on the perimeter of the Lands and shall repair and maintain all fences (the "Fences"), both perimeter and interior, including the new bison fence. The Fences shall be constructed so as not to be wildlife proof. In consideration for the Tenant constructing and repairing the Fences during the Term, Tenant may deduct from the Rent otherwise payable the lesser of $100,000 and Rent during the initial term of the lease.

169 Olson testified at trial that section 5 of the Moose Mountain Lease was drafted in this way because it reflected his understanding, as at July 1, 2004, of what the deal was with the NCC, and particularly what the parties had agreed to in the corresponding fencing provision of the CE Amending Agreement. I accept Olson's evidence on this point, as well as his testimony that he was unaware as of July 1, 2004 of the mistake in drafting the fencing provision over his signature.

170 The timing of this term of the lease is significant. It was formed before Olson knew that the fencing provision erroneously included in the O2P was not the Agreed Fence Height Restriction, and yet it was consistent with what Olson said the original agreed fencing provision was, not with what the NCC argued was the agreed fencing provision (maintaining that it was the Replacement Fence Height Restriction and that Olson knew all along that it was the Replacement Fence Height Restriction). This confirms the veracity of Olson's recollection of the Agreed Fence Height Restriction. That the term in the Moose Mountain Lease differed slightly, prohibiting only wildlife-proof fencing rather than being quite as detailed as the Agreed Fence Height Restriction, confirms that fence height really was not a significant issue discussed between Olson and Green. Green recalled no such discussion and Olson, less than a year later, recalled simply that the fences would be redone to be bison suitable and the only restriction was that they not be wildlife-proof. If fence height had been a significant issue between Olson and Green, when he had the Moose Mountain Lease prepared he would have ensured that section 5, on fences, matched word for word what had been arduously negotiated with the NCC.

171 Further, the wording of section 5 of the Moose Mountain Lease, and Olson's testimony, are consistent with the communications between Bryden and Olson when he instructed her on the further changes needed to the NCC's draft CE Amending Agreement, whereas the NCC's position is not. Bryden and Olson met mid-August 2003 to discuss the then-latest draft of the CE Amending Agreement. At that time Bryden and Olson discussed, among other things, whether the draft fencing provisions were acceptable. One was acceptable (that fences would not be wildlife-proof) and on that Olson remarked that Green was told that he planned a six foot fence. Bryden annotated the draft to that effect. The other was not acceptable (replacement fencing be "at its original size and in its same location") and she was to replace that clause with one that would permit him to replace fencing with a similar structure and could add to or raise it from the prior fence.[46]

172 The Moose Mountain Lease was registered on the titles to the Property as a caveat (the "**MM Caveat**") by Olson Tax Consultants Inc., as the general partner of Moose Mountain, on January 31, 2005. The NCC argued that the Moose Mountain Lease was not valid because Olson did not actually own the Property until he completed his purchase and had the titles registered in his name (on August 18, 2004). As such, the MM Caveat is disputed by the NCC, which argued that since the Moose Mountain Lease is a nullity and is of no force and effect, the MM Caveat is therefore also invalid and unenforceable.

173 The MM Caveat was not registered on the titles to the Property until after Olson became the registered owner of the Property, in January 2005. It is the date of registration of the MM Caveat which is significant for these purposes; the MM Caveat was registered on the titles when Olson was the registered owner of the Property and was a valid encumbrance registered against the titles to the Property. At the time of registration Moose Mountain had enforceable leasehold interests that were registrable.

The ACA's Execution of the CE Amending Agreement

174 In anticipation of closing the transaction, the NCC's lawyer Douglas McLean, also at Beaumont Church LLP, and taking over the file from Luft, sent a copy of the CE Amending Agreement to the ACA on July 29, 2004 for its execution. The version sent to the ACA had a variation in the fencing provision from the incorrectly drafted version Olson signed: the Replacement Fence Height Restriction in the second sentence included not only fences and roads, but also the words "and other improvements":

1.1

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property as of the date of this easement. The fences, roads and other improvements are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee. [Emphasis added]

175 The NCC downplayed this additional language, referring to it as the "Gremlin", which implied a mere trifling slip that inexplicably snuck back into the document on its own. The insertion of this additional phrase "and other improvements" (the "**Further Error**") was clearly not something the parties to the sale intended to be included in the fencing provision. There was inadequate version control, to say the least, by the NCC around the various versions of CE terms.

176 The CE Amending Agreement was executed by the ACA and returned back to the NCC by fax on the same day, July 29, 2004. The ACA had no part in the registration of the caveat on the titles.

First Defective NCC Caveat

177 On July 30, 2004, McLean sent a letter to the attention of Olson's lawyer, Wayne Walker at Olson Lemons LLP, enclosing the Transfer of Land, a Statement of Adjustments and copy of a caveat (the "**First Caveat**") with CE Amending Agreement attached. The letter said that the First Caveat was being submitted for registration. It was registered on the titles to the Property on July 29, 2004. Appended to the First Caveat was the CE Amending Agreement respecting the Initial ACA CE.

178 However, McLean's First Caveat was defective because: (1) it omitted reference to the ACA as one of the parties in the first paragraph; (2) the form of CE Amending Agreement attached to the First Caveat omitted page 5 of the CE Amending Agreement (containing the Replacement Fence Height Restriction); (3) the form of CE Amending Agreement attached to the First Caveat was dated "30th day of August, 2003" and not "___ day of August, 2004"; and

(4) the form of CE Amending Agreement attached to the First Caveat failed to correct the reference to the Property Management Principles in section 1 of Schedule "A" to that Agreement from the incorrect reference of "Subsection 1.1 a. 1." to the correct reference of "Subsection 1.1 b. 1".[47]

Second Defective NCC Caveat

179 The First Caveat was discharged and an amended second caveat (the "**Second Caveat**") was registered on the titles to the Property on August 3, 2004. The version of the CE Amending Agreement appended to the Second Caveat included the ACA as a party in the first paragraph, correcting that error. The Second Caveat also corrected the reference to the Property Management Principles from the incorrect reference of "Subsection 1.1 a. 1." to the correct reference of "Subsection 1.1 b. 1" in section 1 of Schedule "A".

180 The CE Amending Agreement attached to the Second Caveat was dated "30th day of August, 2003" not "August ___, 2004". This date does not accord with the date the Second Caveat was actually registered.

181 In both the First Caveat and the Second Caveat (registered on August 3, 2004), the entire page 5 of the five-page CE Amending Agreement attached to the caveat was missing. Consequently, only four pages of the five-page CE Amending Agreement were registered on the titles to the Property; the Replacement Fence Height Restriction was on the missing page 5. Neither party, despite their legal advisors purporting to protect their clients' interests through the transaction, or when reporting on the transaction's effect after, discovered this major omission in the registration of either caveat on the titles.

182 The NCC argued the omission of page 5 was "pretty hard to miss" by Walker. It cross-examined Walker on it extensively. It suggested that Walker had to have noticed the omission and that therefore he intentionally kept silent about it to advantage Olson, either of his own accord or on instructions from Olson, his client and employer. Despite the NCC's speculation, it was not demonstrated that either solicitor - Walker on behalf of Olson or McLean on behalf of the NCC - caught the error when they should have but for whatever reason did nothing to correct it. Both solicitors were experienced. I find that if either solicitor had noticed page 5 was missing, they would have known that their respective client's wishes were not going to be achieved or protected and that both solicitors would have taken steps to address the omission. I also cannot accept the NCC's suggestion that the error was "pretty hard to miss" for Walker but not for McLean. I am not prepared to find something that McLean caused thereafter became Walker's sole responsibility.

183 At trial Walker did not recall the specifics of the transaction and could only answer generally, based on his usual conveyancing practice. Nevertheless I am not prepared to extrapolate from his testimony that the missing page 5 was something he "would have seen" was missing, or that "at some time" he would have discussed the missing page 5 with Olson, in order to impute knowledge to Olson. The omission was certainly not intentional on Walker's part, alone or upon instruction from Olson. Walker was honest, careful and credible; his testimony therefore reliable. I find that Walker did not realize the error in registering the caveat at the time of registration and was only made aware of the mistake later, after his follow-up to Olson asking him about it.

184 Olson left the closing of the transaction to Walker and was not personally involved in reviewing the final documents or in reviewing the registration of the caveat on the titles. I do not accept the NCC's argument that Walker's testimony admits that Olson was aware of the missing page 5 at the time of closing of the transaction; I do not find this to be consistent with the weight of other evidence, such as the conduct and conversations of the parties in the fall of 2004, nor with Walker's testimony. I find that Olson was not aware of the missing page 5 until after November 4, 2004.

The Closing

185 The closing date was moved closer in time. FCC agreed to the new closing date; the FCC Mortgage was dated August 10, 2004 and registered on the titles to the Property on August 18, 2004.

186 The NCC transferred the Property to Olson on August 11, 2004, and the transaction closed on August 24, 2004.

Creation of the Trust

187 The Trust was created on September 28, 2004, by a settlement with Bruce Lemons as settlor and a US $100 bill as the original trust property. A shelf company of Olson's (1030911 Alberta Ltd.) was made trustee of the trust. Lemons signed the trust deed (the "**Trust Settlement**") as both settlor of the Trust and on behalf of the Trustee as its director. 1030911 Alberta Ltd. subsequently changed its name to Waterton Land Trust Ltd., which remained the Trustee of the Trust through to the end of trial. The Trust was established under the laws of the Cook Islands; the Trustee is a corporation registered in Alberta and with a registered office the same as Olson's business office in Calgary.

188 Under the Trust Settlement the Trustee's powers are broad, including the power to make distributions or pay income to beneficiaries, to terminate the Trust and to amend the Trust.

189 The intent at the time of settlement of the Trust was for Olson to retain the Property until the end of 2004 and transfer it to the Trust in early 2005. This timing was planned so that Olson would remain owner of the Property at least through the end of the personal tax year to mitigate any risk of not being entitled in his personal capacity to the charitable donation Tax Receipt.

190 The Trust was created to ensure the preservation of the Property and to protect it from creditors through future generations. Olson had utilized comparable structures for his other ranch land holdings. I do not accept the NCC innuendo that his steps in this regard for the Penny Ranch were designed to optimize his fencing rights with the NCC.

Construction of New Fencing on the Property

191 In September 2004 Moose Mountain commenced construction of the New Fence on the leased quarter-section of the Property, on its north and east boundaries. In October 2004, Olson received a number of telephone calls from Hodgson. Hodgson had called because the NCC received phone calls about the construction of the New Fence from some of Olson's neighbours, which I describe in further detail below.

192 The New Fence being built on the Property was a four-strand smooth wire fence (not barbed wire like the old cattle fence). The middle two strands were electrified, but only when the power was switched on (Olson intended that power would only be switched on when bison were within the fenced area, which would be only a small portion of the time as he would move them between pastures). Olson testified that the New Fence built was of two styles: first, for portions of the New Fence built along a road, the fence had a bottom wire approximately 18 inches off the ground and a top wire at five and a half feet above grade, but that could be lowered to four and a half feet when bison weren't within the fenced area. Olson testified that this design:

> [W]as just to give us an extra bit of safety because if a bison escapes on to that road [...] they can run straight down that road and hit Highway 28 -- or Highway 6 within literally minutes. So we felt we needed to have a more robust fence when the bison were any of those pastures adjacent to the road.

193 The second style of the New Fence, which Olson testified was the majority of the New Fence, was five feet tall, which could be lowered to four feet. The bottom wire was 16 to 20 inches off the ground, on average about 18 inches off the ground, and it was either smooth wire in much of it or in some places it was smooth combined with some barbed wire. Olson testified that this style of New Fence was constructed so as to make it more wildlife-friendly to the juvenile moose, elk, and small deer on the Property in order to allow them to get through the fencing.[48]

194 Much of the old perimeter fencing was not actually situated on the Penny Ranch, or on the exact boundary of the Property. Similarly, some of the New Fence was not built exactly on the boundary, and was instead built inside of the old perimeter fence. For example, on part of sections 27 and 34, Olson testified he wasn't sure if the New Fence was built inside or outside of the exact boundary of the Property, but that it was built inside the old existing fence.[49]

195 Moose Mountain spent over $100,000 on construction of the New Fence and made other improvements as well, so paid no net rent to the Trustee landlord during that first five-year term, as provided for in the Moose Mountain Lease.

Neighbours' Complaints to the NCC

196 The NCC started receiving phone calls from people in the community who wanted to know what was going on as they saw the New Fence being built and began complaining about it. Simpson said people were expecting that a nature conservancy "would not let this happen". The NCC cared about the neighbours' reactions, Simpson said, because its reputation was key for future fundraising and losing the trust or respect of either NCC supporters[50] or the landowners who worked with the NCC would be a big problem.[51]

197 Hodgson called Olson about the complaints. Olson repeatedly took the position that the only restriction on fencing in the CE was that it not be wildlife-proof, consistent with his understanding of the deal he had reached with Green on amendments to the CE.

198 The NCC became increasingly concerned as more calls came in; it had already invested approximately $40 million of donor money conserving landscape in the area.

199 At one point Simpson said they were getting a call every two to three days during hunting season. One of the complaining neighbours did not express concern about conservation or the NCC's reputation, but that he would be asked to pay half of the cost of the new, high-end fence since, it was then explained, the convention in that region was for the landowners on either side of any fence between them to split its cost. But he apparently said that no one had spoken to him about the cost of the New Fence prior and he was not prepared to share in its cost. This landowner repeated his concern at an "open house" held on the Property, convened by Olson and the NCC to hear from and discuss concerns with the neighbours, because he "wanted it on the record" in public that he was not being expected to pay any portion of the cost of the New Fence. Olson confirmed that for him.

200 On November 13, 2004, Simpson and Pearson visited Olson at the Penny Ranch in order to see for themselves the construction of the New Fence.

201 Olson also held the open house at his home on the Property on December 11, 2004, with the NCC invited, to meet with his neighbours and to answer their questions. Simpson said the neighbours were "really coming after me", and the meeting was not that beneficial:

> Well, Mr. Olson [...] shared his views on, you know, basically said this is what I'm doing, this is why I'm doing it. Members of the community had a variety of questions, I don't really see as actually that much got solved, and they went home.

202 Neighbouring landowners' negative reaction to the New Fence began in the fall of 2004 and persisted into 2005. One of the neighbours sent a letter of complaint to Alberta's Minister of Sustainable Resources and Development and others threatened to do so. This government department was politically significant for the NCC because the NCC was trying to partner with the provincial government to conserve and preserve public lands as well.[52] One of the complaining neighbours, it seems, was particularly vocal and put Simpson on the defensive about the effect Olson's New Fence would have on the NCC's reputation.

203 I find the public relations impact of the New Fence on the NCC and the negative implications for the NCC's future fundraising and support stemming from Olson's construction of the New Fence were the motivation for the NCC in pressuring Olson to change his fence, not its purported concern about the additional impediment to wildlife migration presented by the New Fence. The NCC, and particularly Simpson, was worried that the animosity many neighbours felt towards Olson would negatively affect its reputation.[53]

204 Also, despite the pretext and tenor of the complaints, many were motivated by self-interest not wildlife

migration. One neighbour was concerned he might have to pay for part of the new, high-end fence. Two of Olson's neighbours had enjoyed cattle grazing rights on the Property before he purchased it, and many others had previously hunted and fished, and rode their horses across the Property. The construction of the New Fence and the presence of bison affected their ability to continue doing so. Also, the New Fence was simply different, as was the wild bison operation.[54] Neighbouring cattle ranchers were reluctant to have their animals exposed to a wild commercial operation such as ranching bison about which they were not familiar and, not unreasonably, did not know whether the New Fence would be effective at keeping their cattle out of the Penny Ranch.

Efforts to Resolve Disagreement over the New Fence

205 Throughout the fall and early winter of 2004 (until roughly mid to late-December 2004), Olson tried in good faith to work with the NCC to resolve the perceived fencing problem, as he thought that theirs was a valuable partnership and because he was aligned with the conservation goals of the organization. Olson also believed the problem was not with the New Fence, but rather because of the misperceptions of and assumptions about it.

206 Telephone calls between Simpson and Olson ensued in the fall and winter of 2004; Simpson didn't know some of his telephone conversations with Olson were being tape recorded and Olson didn't tell him. Simpson and Olson also had meetings during this time to try to resolve the fencing dispute. During these discussions, Olson offered different solutions to try to address the problem of the New Fence's negative perception in the community, although he maintained that the actual design of the New Fence was not the problem, and that it did not impede the movement of wildlife across the Property. One such suggestion was to put up an educational sign on the Property:

> We could put up a sign just like the Rocky Mountain Elk Foundation did and have a little educational sign. This is a joint project. We are grazing buffalo on a winter range project. We have an innovative fence that moves up and down to contain the bison when they're in the field and so on. And the fence has been judged by wildlife biologists to be fully game friendly when it is up or down. Put up a sign and say that, announce it.[55]

207 The NCC was not amenable to such a sign because it believed it was in a position to require Olson to change the fence and it was not going to compromise on that point. The NCC wanted changes to Olson's New Fence before anything else was done by them jointly, if at all. As Simpson testified:

> You know, during the phase when we were working with Mr. Olson to try and find a productive solution, there was a lot of things that were discussed. But when we did not arrive at a mutually agreed arrangement, then none of these things were going to be in play. [...] That includes the sign. And if we couldn't agree upon a fence design, then we certainly weren't going to agree upon anything else.

208 Olson was equally adamant that his New Fence accorded with his rights under the CE, yet he was prepared to lower the New Fence's top strand of wire to four feet when the bison were not in a particular pasture and make the New Fence adjustable so that it would only be at the highest point when the bison were actually grazing in that particular pasture. The NCC was not satisfied with that proposed accommodation.

209 During this negotiation period in 2004, I find Simpson was more concerned with the neighbouring landowners' perception of the New Fence, and with placating those interests, than in working with Olson towards an effective solution that met both the interests of safe ranching of wild bison and conservation of wildlife migration and habitat. Repeatedly Simpson expressed to Olson and others his concern about getting the community on their side, more so than in gathering actual scientific evidence on the effects the New Fence was having on wildlife movement (if any) to use to make good decisions and to educate the NCC's constituencies.[56] Further, I find Simpson was not aware of the actual state of disrepair of much of the original perimeter fencing on the Property, nor was he aware that the original fences on the Penny Ranch were on road allowances or neighbouring properties in parts. This suggests to me that Simpson did not

undertake either an adequate assessment or an objective assessment of Olson's New Fence and the state of the original perimeter fencing, when he attended to visually inspect the situation following the neighbours' phone calls.

210 Despite Olson's good faith attempts to come to a solution with the NCC, he was not willing to accept a lower top strand height to contain his bison when they were present (no lower than 5 feet 6 inches), and Simpson felt he could not agree to that. Simpson's position on the required fence height was a result of his own "research", not based on any personal experience, and he ultimately came to the conclusion that he could not settle for anything higher than a 40 inch fence height. For research, Simpson essentially reviewed relevant literature and made inquiries of other individuals whom he thought might have a perspective on the issue. Simpson ultimately concluded that he was only prepared to operate on the basis of what he believed had been registered on the titles, based on what he saw the parties had signed.[57]

The NCC's Negative Publicity Concerns

211 At its core the New Fence was a public relations problem for the NCC; the NCC's criticisms of the New Fence had nothing to do with any demonstrable effect on wildlife migration or even on its ability to effectively contain bison, but rather on the surrounding community's perception of the NCC as a result of Olson's New Fence.

212 The NCC was of the view that Olson "inflamed the community and will leave NCC's reputation in tatters if we fail to enforce the easement restrictions".[58] Email correspondence from John Riley, the Director of Conservation and Stewardship for the NCC, and Renny Grilz, the Provincial Stewardship Coordinator for Alberta at the time (who replaced Kim Good in 2004), confirmed this view. Grilz stated: "I think the biggest thing here is small town politics", with which Riley agreed.

213 The "small town politics" at issue here was the local affront of someone from Calgary coming down and putting bison on the land in "cattle country".[59] Another email from an NCC employee named Kim Veness to Pearson stated that: "We almost have more of a cultural issue here with Mr. Olson being "from away" so-to-speak and not fitting in well with the locals", before going on to explain of one of the neighbours that they "have a long standing practice of crossing that land in question twice a year to move their cattle into the forestry lease he manages".

214 Olson's planned fence height, or any changes to fence height, were not a concern to the NCC prior to the community complaints. Fencing did not come up in the pre-O2P conversations between Simpson and Green. Fencing did not get a mention in the NCC Grazing Plan drafted for Olson's use of the Property. The NCC knew Olson would place wild bison on the Property and that the existing fences were intended for cattle and run down.

215 That the NCC did nothing about the overgrazing and poor state of the range health on the Penny Ranch when it was the landlord also supports an inference that the NCC was not as concerned or vigilant about environmental objectives for the Property as it was its reputation. The information about the poor health of the fescue rangeland, which fact was acknowledged by the NCC, did not motivate the NCC to action or precipitate adjustments to land usage for the Property, whereas neighbours' complaints about the NCC's permitting Olson's New Fence prompted immediate action and, indirectly later, this litigation.

Suitable Fencing to Contain Bison

216 Following complaints from neighbours and being concerned about negative publicity that it thought would adversely affect both its local fundraising and regional joint venturing with the Alberta government, the NCC suggested that continuing with Mr. Penny's cattle fencing should be sufficient for Olson (that is, any new fencing being of the same size at the same location).

217 The NCC produced a second monitoring report, the "Penny Property Perimeter Fence Wildlife Movement Study" dated November 29, 2004. This second monitoring report was produced by Pearson, who was sent to the Property to observe the current state of the New Fence without Olson's knowledge or consent. The NCC obtained fence specification protocols to contain bison from its affiliated Montana office. The NCC argued, and introduced related

evidence at trial from Montana, that lower fences were effective to contain bison.

218 The NCC adduced the testimony of Bryce Christensen, Reserve Manager for the American Prairie Reserve in Montana ("**APR**"), a non-profit foundation that was started about ten years ago with the goal of building a 3 to 3.5 million acre private wildlife reserve. Christensen testified that bison were reintroduced to the APR in 2005 and at the time of trial there were around 250 bison on the reserve. The ultimate goal was eventually having five to ten thousand bison there. The total pasture acreage that those 250 bison grazed was 14,000 acres: 9,000 in the summer and 5,000 in the winter. Having overseen the issue of bison fencing at the APR in Montana, Christensen testified for the NCC on the issue of fencing requirements that would contain bison but also be wildlife friendly.

219 Christensen testified that the fence being built for bison containment at the APR (the "**APR Fence**") had four strands of wire, with a total height of between 43 1/2 to 45 inches above grade. The top wire of the APR Fence was barbed, the second wire was smooth and electric at 6000 to 8000 volts, the third wire was barbed, and the fourth bottom wire was smooth and at a height of 18 inches off the ground. However Christensen also testified that bison at the APR are slowly conditioned with electric wires and electricity (during a 30-day quarantine) before being allowed onto the APR lands contained by the APR Fence, "so that they do learn to respect electricity". For this reason, and also the order of magnitude difference in the sizes of accessible grazing ranges between the Penny Ranch and the APR ranges (the occasion for a bison to be lured to cross a fence at the APR by something "on the greener side" being commensurately much, much lower at the APR), I therefore do not find the APR experience comparable or compelling. Some of the fencing sections at the Penny Ranch also are on steep grades, affecting the prudent top strand height.

220 For Olson, ranching bison in pastures surrounded by cattle fencing was simply an untenable option. Olson explained in his testimony, and I accept, that part of the reason the fencing was such an important issue to him was based on his understanding of the legal obligations of bison ranchers, and on his personal experience ranching bison in Alberta and Saskatchewan. In Alberta, the *Stray Animals Act*, RSA 2000, c S-20 and *Stray Animals Regulation*, Alta Reg 301/1996 require an operator to contain his or her livestock (which includes bison) and impose liability for failure to do so.[60]

221 Olson also had personal experience with liability resulting from bison escapes over perimeter fences, having in the past paid damages to neighbours after his bison escaped and caused damage to their crops. Based on Olson's personal experience at his other bison ranches, conventional barbed wire cattle fencing was ineffective to contain bison. Olson would have great difficulty avoiding liability following bison escapes from the Penny Ranch by saying he was being duly diligent, if he used the shorter fences advocated by the NCC, yet on his other ranches he used higher fences. He also already had one fatality occurring on his land from a human encounter with one of his wild bison, so I accept this was a very real and significant issue for him.

Effect of the New Fence on the Movement of Wildlife at the Penny Ranch

222 The NCC requested a mandatory injunction to have the New Fence removed or reduced permanently to a lower height. The NCC failed to demonstrate that the movement of wildlife at the Penny Ranch was actually prevented or even additionally impeded by the New Fence.

223 The NCC chose not to undertake any, nor to participate in any, Property-specific empirical assessments of that point,[61] and therefore had none to adduce to the Court.[62] This was doubly unfortunate, considering Simpson's assertion that:

> If I had evidence to suggest that a five-foot -- an electrified five-foot-six fence would have not been a problem [for wildlife movement], there would have been no issue with Mr. Olson.

224 I was shown lengthy video footage demonstrating that Olson's New Fence was not a problem for wildlife movement through it, over it and under it. I find the New Fence did not impede the movement of wildlife onto, through or off of the Property. The New Fence was not wildlife-proof or wildlife-impermeable. It was not shown to reduce

wildlife diversity at the Property or wildlife migration across the Property.

225 I also reject the NCC's characterization of the New Fence as "deeply offensive" to the NCC; it was not shown to be offensive in the least to the NCC's stated conservation objectives.

Discovery that page 5 of the CE Amendments was missing from the CE Amending Agreement Registered on the Certificates of Title

226 Olson learned of the missing page 5 shortly after November 4, 2004, when reviewing the CE Amending Agreement because of the NCC's concerns with his New Fence. Olson noticed the omission and immediately spoke to Walker about it. Walker could not sufficiently recall the details or offer any explanation for the missing page. So he said he would do some further checking. Next Olson spoke to Bryden and reviewed the missing page 5 with its Replacement Fence Height Restriction. At that point he also discovered the drafting error in the fencing provision. Olson did not inform Simpson or Hodgson.

227 On December 17, 2004, Simpson sent a letter to Olson on behalf of the NCC regarding the New Fence, which restated the Replacement Fence Height Restriction. They exchanged a series of letters setting out their respective positions. No consensus was reached.

228 On December 21, 2004, Simpson and Hodgson met Olson at his office to discuss the issues. Walker was also in attendance, taking notes. Simpson first learned of the missing page 5 at this meeting and he contacted McLean the next day to ask him about it. Olson said that he had already communicated the mistake to the NCC before the December 21 meeting, and just repeated it at this meeting. That was not apparent from any of their recorded or written communications. I find that he did not inform the NCC prior to the December 21 meeting. If it were true, the omission would have been one of the topics discussed at those times.

229 I do note that, despite being aware as far back as early November 2004 of this development that seemed adverse to the NCC, Olson nevertheless attempted in good faith to resolve the issue through compromise, cooperation, education and persuasion.

Transfer of the CE to the NCC from the ACA

230 On January 18, 2005, the NCC took steps to have the CE transferred from the ACA back to the NCC as originally contemplated, as the CE continued to be registered in the name of the ACA, even though the sale of the Property to Olson closed in August 2004.

231 That transfer was made effective September 1, 2005, when the NCC and the ACA entered into an Assignment Agreement transferring the CE back to the NCC. That transfer was registered by Alberta Land Titles on October 28, 2005.

Concurrent Events: The NCC Lawyer's Attempts to Correct the Land Titles Registration Error & Olson Put on Notice of Litigation

232 On January 20, 2005, McLean wrote to Walker to enlist assistance in correcting McLean's omission of page 5 from the caveat. McLean attached to that letter a revised CE Amending Agreement, which included a revised date of "1st day of September, 2004", and replaced the NCC as the party granting the CE with Olson. Therefore this proposed version of the CE Amending Agreement would have been as between Olson as Grantor and the ACA as Grantee. This proposed CE Amending Agreement included the Replacement Fence Height Restriction as the fencing provision, which also included the Further Error.

233 On January 28, 2005, Simpson from the NCC sent Olson a letter stating: "In view of the fact that no agreement has been reached concerning fencing protocols, NCC has no alternative but to enforce [the Replacement Fence Height

Restriction]."

234 Olson was gone on business overseas in Asia from late January 2005 to sometime in late February 2005. While he was gone, in February 2005, bison on the Property got out, and ended up on neighbouring ranchers' lands.

Intervening Registrations on Titles to the Property

235 On January 31, 2005, Olson registered a mortgage on the property in the amount of $508,481.52 in favour of his wife and father, Carolyn R. Olson and Jack H. Olson (the "**Carolyn and Jack Mortgage**"). The Carolyn and Jack Mortgage was dated January 20, 2005. Olson testified that he applied the mortgage proceeds from the Carolyn and Jack Mortgage against the FCC Mortgage, bringing the amount of the FCC Mortgage down to approximately $1.5 million. The Carolyn and Jack Mortgage was a loan borrowed by Olson from his wife and father, as trustees of the Ruth Doxy Trust (Jack was Ruth Doxy's husband), at a rate of 4.25 percent interest per annum, which was a much lower rate than the FCC Mortgage's 18 percent interest rate.

236 The MM Caveat was also registered on titles to the Property on January 31, 2005. Olson testified that the Carolyn and Jack Mortgage and the MM Caveat were registered on the same day in January 2005 because Richard Tingle, a lawyer retained for the Trustee/Trust, insisted that these encumbrances be registered on the titles to the Property. I accept Olson's evidence that he initially contacted and had preliminary discussions with Tingle in early January 2005 regarding his conveyance of the Property to a trust, and that these discussions resulted in the two encumbrances being registered on titles at the same time. The fact that Olson had these preliminary discussions with Tingle in early January 2005 (before he left for Asia) is further confirmation that it was always Olson's intention to transfer the Penny Ranch to a trust arrangement, as he had with his other ranches. That is, he did not do so as a response to the revelation of page 5 being missing (and acting to "lock-in" that omission by conveying the Property to the Limited Partnership/Trustee) or as a response to the threat of litigation.

237 A letter dated February 8, 2005, from another lawyer in Olson's office, Clyde Davis, responded to McLean's letter of January 20, 2005, stating that Olson was out of the country until February 14, 2005 and that he would bring the NCC's January 20 letter to Olson's attention when he returned. Walker said that Davis would only have responded in such a manner acting on instructions from Olson. I accept that and find it to have been so, for the reasons I stated earlier in respect of Walker and the reliability of his testimony.

238 In a letter dated February 22, 2005, Olson responded to Simpson's January 28 letter that threatened enforcement proceedings, by requesting a meeting.

239 By letter of March 4, 2005, McLean attempted again to have the registration error corrected. Olson did not get back to McLean following either his January 20 or his March 4 letters, stating at trial that he left it to counsel to deal with at that point. It appears he failed to extend the professional courtesy to McLean of telling him that.

240 The next interaction between Olson and the NCC was a meeting on March 16, 2005, which took place at the offices of Olson's lawyers Bennett Jones LLP. Olson should not have ignored McLean as he did but he continued discussions with the NCC directly. Also, in response to the NCC's threat of enforcement litigation it was Olson who suggested further discussion.

Conveyance of the Property to the Limited Partnership/Trustee

241 Between the time McLean first requested Olson's assistance in rectifying the missing page 5 from the registration of the CE Amending Agreement and this meeting, Olson sold the Property to the Limited Partnership.

242 The offer to purchase the Property by the Limited Partnership (the "**LP Offer**") to Olson was signed by the Trustee, on behalf of the Trust as general partner of the Limited Partnership, on March 14, 2005, and accepted by Olson on March 16, 2005. A corresponding resolution was passed on March 15, 2005 by the directors of the Trustee, as

general partner of the Limited Partnership on behalf of the Trust, authorizing the purchase transaction of the Property. This was after the NCC's threat of litigation, but it had long been in the works; it was not in reaction thereto.

243 In accordance with the terms of the LP Offer, the Limited Partnership purchased the Property from Olson for consideration of $500,000 cash and a limited partnership interest in the Limited Partnership equivalent in value to the remainder of the fair market value of the Property. The Limited Partnership committed to paying Olson over time for his interest in the Limited Partnership. Once Olson was paid out that remainder of the fair market value of the Property, his limited partnership interest would be transferred back to the Limited Partnership and the Limited Partnership would be dissolved.

244 The $500,000 initial payment to Olson was obtained from the Olson Estate Trust.[63] Subsequent payments to Olson that redeemed his limited partnership interest (ultimately totalling $1,626,542) also came from the Olson Estate Trust.

245 Without a final reliable appraised diminution in value resulting from the CE, Olson did not have a fair market value for the Property to use for the conveyance. Olson said for that he used a rough number provided to him by Smith.

246 The NCC argued these were not arm's length transactions. It pointed to the fact that by the end of 2005, when Olson was substantially redeemed out of his limited partnership interest, the Waterton Parties took on indebtedness between $3 to $3.5 million (including the mortgages on the Property) to acquire land worth approximately only $1.5 million. They argued this reveals the purchase of the Property by the Waterton Parties was simply a manipulation by Olson of family assets as between the various family corporations, limited partnerships and trusts controlled by him. The NCC included the Trust as being one of the entities controlled by Olson; I agree on that point. None of these transactions was at arm's length, and the Trust was but one of the entities controlled by Olson in an entire series of transactions planned and controlled by Olson.

247 The LP Offer was in the same form as the O2P to the NCC, and it was prepared by someone in Olson's office (likely Olson or Bryden), as confirmed by the fact that Tingle, the Trust's solicitor, sent a letter of March 16, 2005 to Olson in which Tingle accepted as solicitor for the Trust the form of offer forwarded to him by Olson.

248 Dr. Lukowiak was the person responsible on behalf of the Waterton Parties for reviewing and executing documents for the purchase of the Property from Olson. Tingle acted as solicitor on behalf of the Trustee/Trust (and Lemons/Lukowiak as directors of the Trustee) and was to advise Dr. Lukowiak as the Trustee's solicitor (as titles to the Property were ultimately registered in the name of the Trustee, despite the Limited Partnership being the named purchaser of the Property in the LP Offer). The NCC alleged that Tingle was not an independent solicitor for the Trustee/Trust and his actions are not those that would reasonably be expected of an independent solicitor.

249 I doubt that Tingle conducted a very thorough due diligence for his clients prior to their purchase of the Property. It would appear that the missing page 5 was never raised by Tingle with Dr. Lukowiak, which suggests that it may not have even been discovered by Tingle, or perhaps the CE Amending Agreement was not even reviewed by Tingle. However I am not prepared to make any findings on the sufficiency of Tingle's legal work or his advice given to Dr. Lukowiak and the Trustee/Trust in this transaction. Other solicitors (McLean, Bryden, Walker) whose alleged errors were scrutinized in this Enforcement Action were able to address the Court in person and to respond. Tingle passed away in 2007 and thus did not have that opportunity. Further, Tingle was highly regarded in the Calgary legal community, was appointed a Queen's Counsel and, it was well known, taught as a sessional instructor at the University of Calgary Law Faculty. In fairness I limit my findings to Lemons' and Dr. Lukowiak's actions as directors on behalf of the Trustee in purchasing the Property from Olson.

250 Although Dr. Lukowiak was responsible for reviewing and executing the conveyancing documents for this transaction on behalf of the Waterton Parties, I find that he did not exercise the requisite independent discretion and review that would be expected of a director in his position. Much of this transaction came down to Dr. Lukowiak

signing the documents based on his faith in both Olson and Tingle, and Dr. Lukowiak acting at Olson's direction. I find Dr. Lukowiak did not understand the structure or nature of the Trust itself, or as it was operating as the general partner of the Limited Partnership, that he did not review or understand the conveyancing transaction whereby the Trust (as general partner of the Limited Partnership) purchased the property from Olson, and that he signed the Property conveyance documents on the advice of Tingle, but ultimately based upon his faith and trust in Olson and without having properly reviewed or understood such documents. Although this was a complicated transaction, Dr. Lukowiak's approach fell short of the duty of care required of directors in discharging their duties on behalf of a corporation.[64]

251 The Waterton Parties maintained that Dr. Lukowiak, acting as director of the Trustee, exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including relying in good faith on the professional advice and opinions of lawyers that practiced significantly in this area of the law (who I take to be Lemons, Olson and Tingle). I disagree. Missing from the discharge of Dr. Lukowiak's duties as a director with respect to this transaction was an honest exercise of his best judgment (or rather, any judgment).

252 Dr. Lukowiak's own testimony supports this conclusion, that in general he did not know what he was doing in relation to the purchase of the Property.[65] Dr. Lukowiak did not fully comprehend the nature of his duties and responsibilities acting as a director on behalf of the Trustee for the Trust, given his failure to exercise his own best judgment in reviewing this transaction. Dr. Lukowiak described in his testimony his role as being "the Alberta face of the Waterton Land Trust" whose expertise was "to look after the land". While I believe Dr. Lukowiak had a real interest in the scientific and conservation goals of the Trust (in respect of the Property), for business transactions such as this conveyance he merely executed the documents he was given, on the advice of Tingle, and with the understanding that Olson would remain ultimately responsible for the transaction. He was, essentially, a "straw man" on this transaction and signed on behalf of the Trustee where he was told to do so without giving any real thought as to the significance of those legal documents.

253 Olson was paid $500,000 cash for the Property (which the Limited Partnership borrowed from the Olson Estate Trust), as well as given an interest in the Limited Partnership, and the Property remained subject to mortgages for close to $2 million: the FCC Mortgage and the Carolyn and Jack Mortgage. It also gave more than a $1 million limited partnership interest to Olson.

254 Section 10 of the LP Offer stated that the mortgages would stay on the Property and Olson (as Vendor) would be responsible for making all payments for them. Despite this provision, no security was taken from Olson to that effect, or granted to the Limited Partnership to that effect.

255 The NCC alleged impropriety by Olson proceeding with these steps when he knew of the fencing dispute remaining unresolved. It alleged he took these steps precisely to advantage his position in the fencing dispute and lock in for the benefit of a subsequent purchaser the current state of registration of the CE on the titles to the Property. The NCC alleged this behaviour constituted land titles fraud.

256 The Trust had been created in September 2004. This was before Olson had knowledge that the content of the missing page 5 of the caveat of the CE Amending Agreement differed from what Olson and Green had agreed on and that it was omitted from the registration of the CE Amending Agreement on titles. For this reason and others (for example the fact Olson already used this structure for other of his bison ranch lands), I accept that it was always part of Olson's tax and estate planning to transfer the Property to a trust holding arrangement.

257 Olson's preliminary discussions with Tingle regarding transferring the Property to a trust, as well as his first reaching out to Dr. Lukowiak about being a director of the Trustee, both occurred in early January 2005. Then, while Olson was overseas, Bryden and Tingle worked on preparing the documents for the conveyance of the Property to the Limited Partnership/Trustee.

258 I am satisfied that it was Olson's intent from the time he decided to acquire the Property that he would transfer it

into a trust, just as he held his other ranch holdings. He chose to acquire the Property in his personal capacity to maximize the use that he could make of the charitable donation; otherwise it may have been acquired by a different entity in the first place.

259 Olson's plan was to hold the Property personally only until after the end of the calendar year. He planned the conveyance to proceed thereafter as soon as possible so that it would defensibly occur at his acquisition cost, rather than at some appreciated price for which there would be a tax consequence.

260 His December 2004 meetings with the NCC made it clear to him that, in his view, the NCC was changing the deal it struck and being unreasonable about it. His efforts towards compromise were ultimately rebuffed. He was about to embark on a business trip overseas and would very soon become pre-occupied with tax season work, so he put the wheels in motion to effect the conveyance. The sale of the Property would have closed four weeks earlier, he said, if he had not been overseas and if corporate lawyers were faster.

261 Olson did not accelerate the timing of his original plan. It took him almost three months after the December 21 2004 meeting to get it done; I find that the conveyance of the Property proceeded later than he originally planned when he purchased the Property in his own name the prior August. There was no obligation upon Olson to disrupt, defer or discontinue his originally planned timing just because of the NCC's public relations or other problems. The NCC's suggestion really is that Olson was obligated to suspend his original plans until the NCC had satisfaction or, at least, until the registrations on the titles were fixed. I disagree.

262 The NCC did nothing by way of filing a caveat on the titles to the Property, or any other such step, to protect its position against all third parties that may transact in respect of the Property.

The Trust

263 As the Trustee was a corporation, the decisions of the Trustee were made by the corporate directors, Lemons and Dr. Lukowiak. Lemons, an American resident, and Dr. Lukowiak, a Canadian resident in Alberta, were both directors and officers of the Trustee. Lemons was involved in creating the Trust.

264 The Trust included the use of a protector role (the "**Protector**"), which position was held by Olson from inception of the Trust through to the time of trial. The Protector was not a trustee and did not bear the corresponding fiduciary obligations of a trustee,[66] but rather operated as a type of oversight mechanism with respect to the Trust. It oversees the management of the Trust by the Trustee.[67] It had the power to appoint, remove and replace trustees.[68] Most notably, the Protector had a "veto" power over decisions made by the Trustee: the Protector had the power to approve many of the functions served by the Trustee because the Trustee is required to give 30 days' advance written notice to the Protector of the Trustee's intended exercise of its authority for many of the Trustee's enumerated authorities under the Trust Settlement.[69] Olson testified that although the concept of a protector is not commonly used in Canadian trusts, it was a US trust concept that had been around for a while.

265 The Trust was referred to several times by both Olson and Lemons as a prototypical "asset protection trust". Both Olson and Lemons testified that they had created this type of "asset protection trust", utilizing the protector mechanism, for numerous clients to protect the assets in the trust from potential creditors. The intent was that an asset protection trust was protecting assets from potential creditors of beneficiaries; potential creditors of beneficiaries of the trust could not recover their claim from out of the property in the trust, by virtue of various mechanisms built into the trust. As Lemons testified:

> Fundamentally a creditor cannot take away from a debtor that which the debtor does not own. An asset protection is all about having assets available so that a debtor, if a claim by a creditor is made, the creditor is not able to attach or reach assets that are in trust solution, of which the debtor would be a beneficiary.

266 One of these "asset protection" mechanisms was the structuring of the Trust such that the Trust was also the 100 percent voting shareholder of the Trustee. In their testimony both Olson and Lemons referred to this arrangement colloquially as a "circular trust". That is, they said it is to prevent a scenario whereby a creditor of a beneficiary can seize the shares of a corporate trustee (if, for example, a beneficiary holds the shares of a corporate trustee), appoint himself as a director by virtue of becoming a shareholder and then cause a distribution of the trust assets. Thus the Trust was made the sole shareholder of the Trustee. Practically speaking, the shares held by the shareholder (in this case, the Trust) would be voted by the directors of the Trustee. This seems to create an intriguing situation whereby the shareholder of the corporate Trustee is the Trustee itself. Here the blurred lines between trustee and beneficiary, and between legal and equitable interests held, raises doubts on the validity of the trust.

267 A trust is a common law concept; it is generally regarded as being:[70]

> the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

268 A trust is not a legal person which holds rights;[71] it cannot vote its shares or take action on its own. The trustee acts in respect of the entrusted property for the benefit of the beneficiaries. By the shares of the corporate trustee being the entrusted property, the corporate trustee is shareholder of itself and, on behalf of the trust, would also seem to have shareholder rights against itself.

269 There is a general prohibition on a corporation holding shares in itself in section 32(1) of the *Business Corporations Act*, RSA 2000, c B-9 ("***ABCA***"). However it is permitted in certain circumstances, under the exception in section 33 of the *ABCA*, notably when "in the capacity of a legal representative".[72]

270 There is no definition of "legal representative" in the *ABCA*. The corresponding exemption in section 31 of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("***CBCA***"), uses the term "personal representative" and defines it to include a trustee.[73] The fact that the definition of "person" under the *ABCA*[74] includes both "trustee" and "legal representative" separately suggests that a legal representative under the *ABCA* would not include a trustee and therefore the permission in section 33 of the *ABCA* may not apply to trustees.

271 In this case perhaps the corporate trustee would be permitted to hold its own shares pursuant to subsection 34(1) of the *ABCA*,[75] which provides for limited exceptions where a corporation may permissibly purchase or otherwise acquire its own shares.

272 The legality of this "circular trust" arrangement was not specifically in issue, so I do not have the benefit of the parties addressing it by evidence and argument. I therefore make no findings in that regard. Given the above provisions of the *ABCA*, however, I do question whether, first, this particular arrangement is permissible under the *ABCA* and, second, how a corporation holding all of the shares in itself (as a trustee) might work in practice.

273 Insofar as the conveyance of the Property to the Trustee (via the Limited Partnership) is asserted to deny the NCC the relief it seeks as against the Property because the new owner took title without the NCC's Replacement Fence Height Restriction being registered on its titles, the NCC would have me look beyond what it described as a self-serving sham transaction which ensures Olson continues to exercise ultimate control over the Property.

274 The NCC alleged that Olson, as Protector of the Trust, had complete control over it by virtue of the fact that if the Trustee were ever to attempt to do anything without Olson's consent as Protector, Olson could effectively disallow it. The NCC noted that Olson as Protector had the power to remove and replace trustees and as such had *de facto* control over the Trust. Olson and Lemons both said that the use of a protector is a commonplace mechanism and that Olson's powers as Protector of the Trust were likewise nothing out of the ordinary.

275 Even if commonplace, I nevertheless agree with the NCC in respect of this particular trust and this particular transaction that Olson continued to have *de facto* control over the Trust and, consequently, over the Property, despite the sale of the Property to the Limited Partnership/Trustee.

Olson's de facto Control over the Trust and the Property

276 First, I find that Olson's role as Protector under the Trust Settlement gave him broad powers over the Trust and granted to him the ability to effectively control it. In effect, the Trustee (or, practically speaking, the directors of the Trustee) could not make any significant decision or take any action related to the Trust without Olson's prior consent. His powers as Protector were nearly absolute. In practical terms, I accept the NCC's submission that the Trustee did not in reality have authority to exercise its discretion under the Trust Settlement. Ultimately authority for the Trust under the Trust Settlement rested exclusively with Olson as Protector, because as Protector Olson would have prior notice of most decisions, which he could veto, and he also had the authority to remove and replace trustees. I accept that this gave Olson *de facto* control over the Trust and by virtue of this particular transaction, over the Property.

277 Second, apart from the powers granted to Olson as Protector under the Trust Settlement, Olson retained control over the Trust also by virtue of the fact that Lemons and Dr. Lukowiak did not exercise independent discretion as directors of the Trustee with respect to the conveyance by Olson of the Property to the Limited Partnership/Trustee.

278 The conveyance of the Property to the Trust was orchestrated and effected by Olson. Dr. Lukowiak merely "formalized" the conveyance of the Property by executing the documents on behalf of the Trustee, not having properly reviewed or understood them. Neither did Lemons review or execute documents on behalf of the Trustee for this transaction - stating in his testimony that he delegated this transaction to Dr. Lukowiak and to their lawyer, Tingle.

279 Third, I accept the NCC's argument that Olson was not acting at arm's length to the Trustee/Trust for the conveyance of the Property. At the time of the conveyance of the Property to the Limited Partnership/Trustee, Olson held all of the shares of the Trustee, which also served on behalf of the Trust as the general partner of the Limited Partnership, of which he was the sole limited partner. Olson suggested that, although he held the shares of the Trustee, the beneficial owner of the shares was instead the Trust, and he only held the shares as bare trustee for the Trust.

280 Olson offered no documentation to support that statement. I am not persuaded of it and find, rather, that this was an additional incident of Olson's control over, and non-arm's length relationship to, the Trust. There were numerous facts which contradicted Olson's claim to be acting at arm's length from the Trust and the Property. For example: the Trustee company had the same registered office as Olson's law office in Calgary, Alberta, and Olson's law office was responsible for preparing and filing the annual returns and other documents required to be filed for the Trustee. As discussed, Olson held all of the shares of the Trustee at the time the conveyance was made to the Limited Partnership/Trustee and for the first few years after the conveyance of the Property. Olson was also the sole limited partner in the Limited Partnership. Indeed, it is difficult to imagine a situation in which Olson could be any less of a non-arm's length party with respect to the Trust and the transaction conveying the Property.

March 16, 2005 Meeting

281 The next interaction between the NCC staff and Olson was at the offices of Bennett Jones LLP in Calgary on March 16, 2005, at a meeting attended by Olson and his counsel Richard Low from Bennett Jones LLP, and Simpson and Stanley Church from Beaumont Church LLP for the NCC.

282 The parties discussed the fencing issue and what would be considered "wildlife friendly". Church at no time disagreed with Low. Low expressed the view that the CE was *ultra vires* the enabling statute and unenforceable and further that Church may want to have that researched.

283 The same day as this meeting with counsel, the "paper closing" of the sale of the Property by Olson to the Limited Partnership/Trustee took place. The NCC was not made aware of the sale until after this meeting.

July 2005 Property Appraisal

284 Before completing the appraisal and sending it to the NCC, Smith sent Olson a draft appraisal via fax dated April 13, 2005. In the draft Smith estimated the fair market value of the Property unencumbered by the CE at $3,585,000 and value of the encumbered Property at $1,438,500. The draft appraisal used an effective date of September 30, 2003. Olson was pleased with the analysis, as it utilized the bundle of rights approach that Olson had promoted. However Olson believed that Smith reached the wrong conclusion, as Smith estimated the fair market value of the unencumbered Property at $3.5 million and subtracted the value of the encumbered Property to determine the value of the CE. The problem, Olson suggested, was that he only paid $3 million for the Property.

285 Smith's appraisal report was issued to the NCC on July 18, 2005 (the "**July 2005 Appraisal**"). The effective date for the appraisal was August 1, 2004. In the July 2005 Appraisal Smith estimated the fair market value of the land to be $1,588,500 while encumbered by the CE, and the value of Olson's charitable donation to be $1,351,000.[76] Olson testified that he did not receive a copy of this appraisal until a few months later. Hodgson explained the NCC did not review the July 2005 Appraisal, as by this time it was "pretty evident that we had some issues, and they needed to be dealt with before we spent a lot of time on this."[77]

Olson's Request for the Tax Receipt

286 In a letter dated October 21, 2005, Olson wrote to John Lounds, President and CEO of the NCC, requesting the NCC issue the Tax Receipt. Olson testified that the intent of this letter was to bring to Lounds' attention that he had not received the Tax Receipt and his ability to use the Tax Receipt for the 2004 taxation year would soon "expire". Olson requested the NCC issue the Tax Receipt within 14 days. Olson also suggested he called Low and asked him to deal with it, but nothing happened after this. Olson did not receive a reply from the NCC to his letter.

The NCC's Third Caveat

287 After McLean did not hear back directly from Olson, or from Olson's lawyer, regarding his attempts to register the missing page 5 on the titles to the Property, the NCC filed a third caveat on December 5, 2005 (the "**Third Caveat**"). Appended to the Third Caveat was an Assignment Agreement between the NCC and the ACA dated September 1, 2005, transferring the CE from the ACA to the NCC. Schedule "B" to the Assignment Agreement (also registered on title) was the Initial ACA CE dated May 28, 2003. Schedule "C" to the Assignment Agreement was the CE Amending Agreement dated August 30, 2003; this version of the CE Amending Agreement included the omitted page 5 with the Replacement Fence Height Restriction and corrected the Further Error:

1.1

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

288 The fencing provision in the Third Caveat was strenuously contested by the Waterton Parties who took title prior to this registration that purported to pre-date their acquisition. They argued it constituted a fundamental alteration to onerous obligations assumed by the grantor under the language contained in the O2P. The Bison Parties submitted that the phrase was neither immaterial, nor inconsequential, and it was to those very words that Olson strongly objected on August 28, 2003, leading him to instruct Bryden to remove them.

289 The Bison Parties submitted that Wild West never agreed the NCC and the ACA could enter into further CE amending agreements after the NCC sold the Property to Olson. The Bison Parties therefore requested in their

cross-claims that this Third Caveat be discharged. The NCC was no longer the owner of the Property and therefore not in a position to be "grantor" of any additional or different rights to the ACA.

The NCC's Monitoring Request

290 In March 2008, Robert Demulder joined the NCC as its Regional Vice-President, Alberta Region. One of the issues the NCC executive asked Demulder to look into was the outstanding Tax Receipt in relation to the Penny Ranch sale. To test whether Olson still maintained his *ultra vires* argument, Demulder sent a letter to Olson, requesting that Olson allow the NCC to enter the Property to conduct a site inspection to monitor compliance with the CE. Demulder believed that Olson's response would reveal whether he viewed the CE as valid.

291 Olson's lawyer responded by letter that the CE was invalid and unenforceable. In addition, they indicated that any attempt by the NCC to attend upon the Property without Olson's permission would "constitute a trespass".

Issuance of the Tax Receipt and Reason for the Delay

292 The NCC advertised the Penny Ranch to potential purchasers, and induced Olson to purchase it for its fair market value unencumbered by the CE, on the basis that it would provide the purchaser with a charitable donation receipt in the amount of the diminution in value of the Property as a result of the CE. By using the Tax Receipt to reduce taxes payable, a taxpayer in effect reduces the after tax cost of the purchase.[78] Olson testified he would not have offered to purchase the Penny Ranch without the Tax Receipt being part of the deal.

293 The Tax Receipt could not be issued on or shortly after the signing of the Penny Ranch Purchase Agreement or its closing a year later because its correct amount was not known, absent a mutually acceptable appraisal. However, by the time the NCC obtained the correct amount from the July 2005 Appraisal, it chose to not issue the receipt.

294 At trial, the NCC said its reason for not issuing the Tax Receipt was that Olson claimed the CE was unenforceable and *ultra vires* the *ALSA*. The NCC claimed it could not issue the Tax Receipt to Olson until it had sufficient particulars to assess the argument that the CE was *ultra vires* and therefore invalid and unenforceable. The reason for this, the NCC explained, was if the CE were invalid and unenforceable, the Penny Ranch would no longer be encumbered by the CE and there would be no gift from Olson to the NCC. The NCC considered itself at serious risk if it issued the Tax Receipt when the CE it was based upon was unenforceable and invalid by reason of being *ultra vires*.

295 Registered charities can face serious penalties, including deregistration, if they issue a tax receipt that is either not in accordance with the *ITA* and regulations or that "contains false information": *ITA* s 168(1)(d).[79] Based on this, Simpson testified, the NCC takes "very seriously" the issuance of tax receipts. The Bison Parties' tax expert,[80] Dr. Vern Krishna, acknowledged the seriousness of the issue, characterizing the revocation of a charity's registration as a "death sentence". Without a gift, a tax receipt could not be issued. Demulder described this situation as "a hell of a conundrum".

296 The NCC eventually issued the Tax Receipt to Olson in December 2009, saying that it did so after concluding the *ultra vires* claim had no legal foundation, on the basis of its questioning of Olson under oath for pre-trial discovery purposes and then consulting the NCC's counsel.

297 The evidence at trial, however, leads me to conclude the NCC's delay was not caused by the *ultra vires* claim, but instead was based on its belief that Olson's New Fence breached the CE.

298 Hodgson's evidence from examinations for discovery, read-in at trial, was that he was the NCC representative who ultimately decided not to issue the Tax Receipt to Olson in 2005 because he thought Olson was in breach of the CE, not because Olson claimed the CE was not enforceable.[81] The NCC withheld the receipt as retaliation for Olson not lowering his fence permanently. The connection to Olson's *ultra vires* claim surfaced much later.

299 While Simpson emphasized on multiple occasions during his testimony the *ultra vires* allegation influenced the NCC to delay in issuing the Tax Receipt, this was not the only reason Simpson gave for the delay. Simpson admitted the alleged breach also played a role in the NCC delaying in issuing the Tax Receipt. For example:

> Q Okay. And was the NCC physically able to [...] was it otherwise able to issue a tax receipt on this transaction prior to receiving this July 18, 2005 appraisal, forgetting for a moment about the ultra vires business --
>
> A And the breach?
>
> Q And the breach, yes. Forgetting about those.
>
> A Yes, I think we could have issued a receipt.

300 Equally telling as the testimony of Hodgson and Simpson, however, were the NCC's actions following its hearing the *ultra vires* allegation on March 16, 2005. Hodgson admitted the NCC issued tax receipts to other donors for conservation easements that were in substantially the same form as the CE. Further, Demulder testified that conservation easements are "relatively templated" and the result if the NCC did not succeed in this case would be that "easements that we've drafted to date, of which we probably have over 140 covering about 160,000 acres in the province, are all called into question at some level. That could be a significant challenge for us." Yet, Demulder also testified, the NCC has "carried on and continued to use [conservation easements]".[82]

301 If the CE was found to be *ultra vires*, the same would likely be so for the other conservation easements for which the NCC issued tax receipts. Because of this, Demulder testified the NCC is "really keen to make sure that [they] have some kind of legal basis and understanding that these contracts are [...] valid when signed."

302 I find it significant, therefore, that the NCC did not proceed with greater urgency to obtain further information with respect to the *ultra vires* claim. While I appreciate that these litigants and their counsel had difficulty with each other proceeding to discoveries, for which all parties share responsibility, nevertheless the NCC never sought particulars regarding the *ultra vires* allegation. The NCC did not ask Olson or his counsel for further details, formally or informally, before commencing this Enforcement Action. Olson testified he had never heard this to be the reason for the delay in issuing his Tax Receipt until December 2009. Demulder suggested that it may have been communicated to Olson orally. I find it was not. Demulder had no personal knowledge of events that took place prior to March 2008; his first communication with Olson was much later and it appears they never spoke directly.

303 Demulder determined that discovery of Olson under oath was the method through which the NCC would obtain information regarding the *ultra vires* allegation. While this may have been Demulder's decision in 2008 or later, after he joined the NCC's staff, the NCC received legal advice suggesting otherwise shortly after the *ultra vires* claim was first made. In a letter from McLean to the NCC, attention Larry Simpson, dated March 31, 2005, McLean summarized the issues Low raised at the March 16th meeting. He described the first issue as follows:

> The original Conservation Easement Agreement may not be a legally binding contract, as it goes beyond the provisions in the *Environmental Protection and Enhancement Act* (Alberta).

304 McLean opined this was the issue of "most concern" arising from the meeting, as it was his understanding "the standard form Conservation Easement Agreement used by NCC in Alberta may be unenforceable." Thus, he

recommended on page 3 of the letter:

> If this statement were correct, then NCC would either have to amend all of the Conservation Easement Agreements currently in place and/or lobby for changes to the *Environmental Protection and Enhancement Act* (Alberta) so as to make its Conservation Easement Agreements legally enforceable. If that is truly the opinion of Bennett Jones LLP, rather than a red herring, it would be worthwhile asking Mr. Low to provide us with a written opinion regarding this issue. [Emphasis added]

305 The NCC never asked Olson's counsel to explain his position. Although the NCC retained new legal counsel shortly after this letter was sent, the NCC did not file its Statement of Claim until January 6, 2006. Therefore, the NCC had over nine months following the initial *ultra vires* allegation and before commencing legal proceedings to informally request details regarding the *ultra vires* allegation.

306 Hodgson also sent an email to the NCC staff dated June 6, 2005. In the email Hodgson directed that a receipt not be issued because of the litigation:

> It appears we are close to finalizing the appraisal for the Penny Ranch which will enable us to issue a tax receipt to Tom Olson. Given the likelihood of us entering into litigation with Mr. Olson it is important that this tax receipt NOT be issued without my explicit approval. [Emphasis added]

307 Simpson stated the reason for this email, which he was copied on, was that the NCC needed greater clarity regarding the *ultra vires* allegation. This does not accord with the rest of the evidence. First, the NCC was motivated by deteriorating public reputation, not enforceability. In his "Olson Property Review", which Simpson prepared for the Alberta Regional Board, he stated Olson had "inflamed the community and will leave NCC's reputation in tatters if we fail to enforce the easement restrictions".

308 Second, given the impact the NCC believed an *ultra vires* finding could have on its business practices to support conservation activities, the absence of any attempt to understand the *ultra vires* allegation outside of examinations for discovery is most peculiar. The NCC produced no record at trial from a board meeting or in a more informal setting in which a concern about the risk of its conservation easements being *ultra vires* was raised. In fact, the minutes to the May 19, 2005 NCC Alberta Regional Board meeting stated the NCC had received advice from its legal counsel (by then its trial counsel) that it had a "high probability of success".[83] Simpson was asked in cross-examination if he agreed based on this that the NCC had legal advice that it had a high probability of success in enforcing the CE, to which he replied "That's what it says here". Simpson was then asked if the NCC had legal advice from its counsel that its claim was enforceable and therefore it continued to act as if the CE was valid. Simpson replied the NCC "certainly wanted to believe that it was valid and took all measure to try and ensure that it would be". But not, it appears, by issuing the Tax Receipt. Nor, it also appears, by simply asking Olson or his counsel the basis for its *ultra vires* position.

309 The fact the NCC continued to use conservation easements and issue tax receipts for conservation easements in substantially the same form as the CE following the *ultra vires* allegation demonstrates the implausibility of that allegation being the reason the NCC delayed issuing the Tax Receipt and demonstrates the NCC's true motivation in refusing to issue the Tax Receipt in the years prior to Demulder's arrival. The NCC was motivated by Olson's alleged fencing breach of the CE and the negotiation and litigation positioning it decided to take with Olson regarding that alleged breach.

310 I accept Demulder's testimony that when he arrived at the NCC in March 2008 his inclination was to issue the Tax Receipt so long as the NCC could determine in examinations for discovery that Olson's *ultra vires* claim would fail. Soon after the discovery under oath of Olson, Demulder ordered the Tax Receipt be issued to Olson.

Post-Tax Receipt Conduct

311 After the Tax Receipt was issued the parties exchanged positional letters regarding mitigation.

312 By this time Olson's options for using the Tax Receipt were limited. Assuming Olson to be correct that the date of the gift was the date on which he waived the conditions for his purchase of Penny Ranch (in 2003), Olson could have used the Tax Receipt by: (1) requesting the CRA reopen any of the 2006, 2007 and 2008 taxation years; and/or (2) applying for taxpayer relief[84] to reopen for reassessment his 2003, 2004 and 2005 taxation years. If the date of the gift was the date the transaction closed, August 24, 2004, Olson had these same options (excluding a taxpayer relief application to reopen his 2003 taxation year) and could also use the Tax Receipt for his 2009 taxation year.[85] However, had Olson received the Tax Receipt soon after the July 2005 Appraisal was completed, before filing his tax returns for the 2005 taxation year, he could have attempted to use the Tax Receipt, without applying for taxpayer relief, in: (1) any of the previous taxation years including and following the year in which the gift was made; and/or (2) future taxation years up to five years following the year in which the gift was made.[86] The availability of these options was subject to Olson meeting the requirements for use of some or all of the Tax Receipt in these years, such as having not already used the maximum allowable amount of charitable donations in each year and having income against which he could apply the tax credits.[87]

313 Olson initially waited before using the Tax Receipt. At the time Olson received the Tax Receipt and into the first part of 2010, the CRA was auditing Olson for the 2006 and 2007 taxation years. Olson did not want to submit the Tax Receipt while being audited, as he feared that he would be under heightened scrutiny.

314 After clearing the audits in early 2010, Olson sent the Tax Receipt to the CRA processing centre, intending to apply as much of it as he could to his 2007 taxation year. The CRA accepted the Tax Receipt, allowing Olson to use $1,175,038 of it. By the time of trial, Olson had not used the remainder of the Tax Receipt. Olson's reasons for this were that he had negative income in 2008, and that he did not apply for taxpayer relief in respect of earlier years.

Allegations of Olson's Professional Misconduct

315 The NCC argued Olson failed to abide by The Law Society of Alberta, *Code of Conduct* (the "***Code***") and that he was required to do so even when pursuing his personal interests. The NCC said Olson breached those standards in failing to disclose his awareness of the missing page 5 from the CE Amending Agreement during his negotiations with the NCC on the fencing provision and in hastily conveying the Property instead to the Limited Partnership/Trustee. It also submitted a lengthy "Compendium of Mr. Olson's Inappropriate Conduct" and argued that because of his numerous breaches of standards of professional conduct all Olson's testimony at trial lacked credibility.

316 First, the NCC is correct that a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public.[88]

317 Section 6.03(1) of the Code also deals with the conduct of a lawyer and outside interests:

> OUTSIDE INTERESTS AND THE PRACTICE OF LAW
>
> Maintaining Professional Integrity and Judgment
>
> 6.03(1) A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.[89] [Footnote added]

318 However, the Bison Parties are correct that this issue does not provide the Plaintiff a cause of action in this forum. Determining whether any particular conduct by a lawyer constituted a breach of professional obligations is the exclusive domain of the Law Society (here, the Law Society of Alberta): *Wilson v. Law Society (British Columbia)*, 9 BCLR (2d) 260, 1986 CarswellBC 409 at para 10 (CA); *Colbeck v. Kaila et al and Dytuco v. Low*, 2007 BCSC 1579 at para 10 (Master).

319 The development and enforcement of the *Code* is a matter for the Law Society of Alberta through its statutory powers governed by the *Legal Profession Act*, RSA 2000, c L-8.

320 Nevertheless the NCC urged that I consider the revelation of Olson's character, from his allegedly less than professional conduct, as tainting the credibility of all his testimony. Not entirely inconsistent with that, albeit without turning my mind to whether Olson's conduct at each step of the way amounted to a breach of the *Code*, I have considered each act in its context in finding the facts that I have. Included in that process I formulated an assessment of each actor based upon all the evidence, which has factored in to each of those findings of fact. I comment on that, with respect to Olson's credibility generally, further below.

321 While I have found Olson always intended to convey the Property to a trust and that he honourably attempted to assist the NCC with its embattled public reputation, once it became clear to him that his efforts were gaining no traction whatsoever at the NCC, he chose to not wait any longer to continue his original plan, despite still not having a reliable final appraisal. He proceeded with dispatch following the December 21, 2004, meeting to formulate his end structure and thereafter to implement it so that he could, and did, then effect the conveyance. Thereafter his intentional ignoring of McLean's entreaty to aid in correcting his omission was regrettable. On that sole point Olson allowed his self-interest to supplant right conduct.

Credibility of Olson

322 More generally the NCC alleged Olson's entire testimony was not believable, lacked credibility and should not be relied upon in any respect. It submitted that wherever his testimony conflicted in any way with that of any other witnesses, Olson's version of events should give way to an understanding of the facts based on the testimony of those others.

323 I found that on some points I preferred the testimony of other witnesses over Olson (*e.g.* that he informed the NCC before the December 21, 2004 meeting that page 5 was missing from the CE Amending Agreement registered on the titles to the Property), but I did not find him to have lacked all credibility entirely as a witness. I did not find him to be the sinister surreptitious underhanded monster the NCC suggested. In fact I preferred his testimony on many issues (*e.g.* the negotiations on fencing between himself and Green, his experience as a bison rancher and his good faith attempts to settle the fencing dispute with Simpson). Overall I found his testimony more consistently accorded with the broader circumstances, the testimony of other witnesses, the proven Exhibits and with plausibility generally.

324 In testifying Olson was passionate, and convincingly so, about his approach to rangeland restoration (that is, by facilitating its return to its pre-human settlement state, complete with wild not domesticated bison) and about the resulting healthier organic bison meat that his OHCB businesses sold. Olson was not qualified as an expert on bison fencing or wildlife-friendly fencing or tax law; his opinion evidence and testimony were not considered, especially not as expert evidence. However his actual experiences in these regards were relevant, including to understanding his conduct and his testimony.

325 Perhaps his passion or "marketing manner" was borne out of pride for the early fiscal sustainability of his environmentally beneficial business model. Regardless, this energetic charm he exuded was not fabricated for purposes of the litigation. At times he came across as the consummate promoter of all things bison, at which the NCC's counsel rolled his eyes, but I have no doubt he is exactly the same when touring around his operation chefs, reporters and potential purchasers of OHCB products (which he did as often as possible, not to make his lawsuit position look real but because it helped grow his business) or when explaining it to guests over a bison meal at the Westin. I suspect he is also just as testy when crossed in a business meeting as he was when his motives or veracity were impugned in cross-examination. He was testy when prodded in cross-examination on, for example, a proposition he considered to be borne out of ignorance of the reality of bison ranching or any suggestion that he was perpetrating a broad deception or fraud.

326 Olson is smart, energetic, takes initiative and has enjoyed considerable success on many fronts. He gravitates towards leadership roles in his various activities. He likes getting his way and can be impatient. The NCC might have thought he was bullying it or he was unreasonably stubborn - never giving in when (the NCC thought) it was clearly right. His manner in court suggested he might come across that way - no doubt emboldened because he thought he was clearly right. But that does not translate into a lack of credibility. His spontaneous manner actually enhanced his credibility; he was not someone ponderously weighing how each word had to be consistent with various earlier fabrications. I am satisfied Olson did not distort his recollections in any way. He was not playing out the string on a detailed multi-year ploy to get away with installing a higher fence than he earlier could get the NCC to agree to. Any such ploy required the participation of many other conspirators (including other reputable professionals), required various deceptions and required Olson's donation of close to $1.5 million. That NCC theory of the events defies credibility on this evidence.

VI. **ANALYSIS**

A. **What Fence Height Restriction did the Parties Agree Upon, if Any?**

327 As stated above,[90] I found Olson and the NCC agreed to the following term to be included in the CE that would limit Olson, and all subsequent owners, in respect of the fencing that could be placed upon the Property:

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property. If doing so with fences or roads, they are to be maintained, replaced or repaired at or near the existing ones. The Grantor may not build fences or roads in areas where none exists without the Grantee's permission. The building of wildlife-proof fences is not permitted, except in localized areas as needed to control or prevent wildlife damage to haystacks, stored forage or domestic gardens. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

328 The NCC says these conclusions (of an oral agreement on a different fencing term and finding that the drafting solicitor erred in preparing the written version of the agreement) were not open to me to find by reason of the parol evidence rule. For the following reasons I disagree.

329 The basic premise of the parol evidence rule is that "when a contract has been reduced to writing, extrinsic evidence is inadmissible to modify the writing": SM Waddams, *The Law of Contracts*, 5th ed (Aurora: Canada Law Book Inc, 2005) at 221.[91] Rectification, however, has been described as "[t]he most venerable breach in the parol evidence rule": Waddams, *The Law of Contracts* at 232, cited by the Supreme Court of Canada in *Performance Industries Ltd v. Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at para 37.[92] If the NCC was correct in its characterization of the parol evidence rule, rectification of a contract would never be available. In this case, applying the parol evidence rule to exclude all evidence leading to the findings I have made would result in the parties being held to an agreement they did not make. That result in this case would be unjust.

330 My finding that the Agreed Fence Height Restriction, not the Replacement Fence Height Restriction, reflected the actual agreement between the parties is also more consistent with (1) the NCC having not included an "at its original size and in its same location" clause in either its "pre-Olson" Grazing Lease Agreements or its grazing lease with Olson (the Wild West Lease), (2) the lengthy NCC Grazing Plan being silent on fencing, and (3) the Penny Ranch Baseline Report not addressing the matter. The opposite is simply too implausible. The approaches to fencing in these contemporaneous documents are also further evidence that fence size was not on the NCC's radar screen until telephone complaints started to be received by the NCC.

B. If the Parties' Written Agreement did not Match their Actual Agreement, will the Court Rectify the Written Agreement Accordingly?

1. Positions of the Parties

331 The Bison Parties sought rectification of the fencing provision so that it would accurately reflect the parties' oral agreement of August 2003.[93] They said the tests for rectification for "mutual mistake" and "unilateral mistake" are both satisfied here.

332 The NCC's position was that the final terms of the Penny Ranch Purchase Agreement already reflected the final terms agreed to by the parties on all counts. However, on the rectification request of the Bison Parties the NCC said the evidence did not meet the stringent requirements for rectification.

333 Rectification is an equitable and discretionary remedy. Rectification is "designed to ensure that one party is not unjustly enriched at the expense of another. A court will rectify an inaccurately drawn written agreement so that it conforms to the agreement the parties intended to make": *Royal Bank of Canada v. El-Bris Limited*, 2008 ONCA 601 at para 13.

2. Rectification for a Mutual Mistake

334 The test for rectification for common or mutual mistake of the parties is set out in *Wasauksing First Nation v. Wasausink Lands Inc*, 184 OAC 84, 2004 CarswellOnt 936 at para 81 (CA). The party seeking rectification must establish on a standard of convincing proof:

> (i) the existence and nature of a common intention by the parties prior to the making of the document or instrument alleged to be deficient; (ii) that this common intention remained unchanged at the date that the document or instrument was made; and (iii) that the challenged document or instrument, by mistake, does not conform to the parties' prior common intention.

335 Justice Poelman of this Court similarly characterized the requirements for rectification in cases of mutual mistake in *Nexxtep Resources Ltd v. Talisman Energy Inc*, 2012 ABQB 62 at paras 66-67, aff'd on other grounds 2013 ABCA 40, as follows:

> Courts are understandably sceptical of claims that the parties' real agreement was something other than recorded by the words of their contract, properly interpreted in the factual matrix. The "high hurdles" established by the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* are instructive filters for rectification claims, but may not be entirely applicable to claims based on mutual mistake. The Court set the hurdles out explicitly as applying to the facts of the unilateral mistake case before it. Nevertheless, it is clear that a high standard of proof is required for rectification to be ordered, and that the Court must be able to put into words the contract that was mistakenly recorded. A useful, concise summary of the test for rectification, which I adopt as a correct statement of the law, is given by Fridman, as follows:
>
> > What must be shown by a party claiming rectification, either in a suit for such remedy, or by way of a defence to an action on a contract, is a mistake in putting down the parties' intentions, and some earlier agreement which shows that there was such a mistake. There must be a written document that does not reflect the true agreement of the parties, and proof of a common intention of the parties at the time of signing, not reflected in the document.

> Evidence of the parties' conduct after execution of the written contract is admissible to show the true intention behind the bargain. [Footnotes omitted]

i. *Existence and Nature of a Common Intention*

336 I have found above that the parties were *ad idem* to include the Agreed Fence Height Restriction in the CE Amending Agreement. I find the existence and nature of a common intention by the parties prior to the making of the Penny Ranch Purchase Agreement and CE Amending Agreement that the Agreed Fence Height Restriction be the fencing provision due to Olson's requirements for containing bison on the Property.

ii. *Common Intention was Unchanged at the Date the Agreement was Made*

337 I also find the parties' common intention (that the Agreed Fence Height Restriction be included in the CE Amending Agreement) was unchanged at the date the agreement was made. Bryden simply made a mistake in attaching the wrong version of the CE Amending Agreement to her email sent to Green at 2:24 pm on August 28, 2003. Green did not review this version for the fencing provision; she was fine with what Olson wished in that regard. These mistakes, however, did not change the common intention of the parties that the Agreed Fence Height Restriction be included in the CE Amending Agreement.

iii. *Challenged Document Does Not Conform to Parties' Intentions*

338 The challenged document here, the Penny Ranch Purchase Agreement and specifically the fencing provision in the CE Amending Agreement, contains a mistake and does not conform to the parties' intentions and prior oral agreement that the applicable fencing provision be the Agreed Fence Height Restriction.

iv. *Proof of the Above Conditions Supported by Conduct of the Parties and Documentary Evidence*

339 The above conclusions are supported by the evidence of the parties' negotiations, of the context of the negotiations and of the parties' subsequent conduct, as more fully described in the facts portion of this judgment.

340 Olson and Wild West would never have agreed to the inclusion of the Replacement Fence Height Restriction in the CE Amending Agreement as it would have precluded their running wild bison on the Property. Bison escapes, along with the associated liability, would have been a certainty. Not only is the Replacement Fence Height Restriction contrary to the evidence, it defies logic for a wild bison ranch.

341 Simpson's testimony that the NCC would have insisted the CE include the Replacement Fence Height Restriction was, first, speculation not recollection (he did not participate in the negotiations with Olson and did not discuss it with Green), and second, completely implausible in the circumstances. It was, if anything, wishful thinking after the fact to advantage the NCC in this litigation or regret for having left matters in Green's hands while on vacation.

342 The subsequent conduct of the parties was consistent with Olson and Green having agreed to the Agreed Fence Height Restriction, not the Replacement Fence Height Restriction. This included the subsequent leases and construction of the New Fence as permitted by the Agreed Fence Height Restriction very soon after becoming owner of the Property, before ever discovering the Replacement Fence Height Restriction was erroneously placed into the CE Amending Agreement.

343 I also agree with the Bison Parties that although the Alberta courts have referred to the criminal standard of "proof beyond a reasonable doubt" in tests for rectification, the Supreme Court has confirmed *Sylvan Lake*, at para 41, the correct standard is "convincing proof". That is, "proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more

probable" than not standard."

344 Recent practice has also moved away from requiring documentary corroboration of the prior oral agreement: *Sylvan Lake* at para 43.

345 The NCC argued the testimony of Green, Simpson and Luft was very clear on this point and that the NCC did not make a mistake; therefore there can be no mutual mistake. I disagree. Green's evidence in particular was quite uncertain, in fact she had no specific recollection of negotiations on the fencing provision other than to say that whatever the final form of the Penny Ranch Purchase Agreement said were the final terms she negotiated. For reasons already given I also accept and prefer Olson's evidence over Simpson's on this point. Therefore, I find there is convincing proof that there was a mutual mistake between the parties on the fencing provision. As stated, this convincing proof is corroborated by the evidence regarding the parties' negotiations, and regarding the surrounding circumstances including the common understanding of Olson's purpose for the acquisition and regarding the parties' subsequent conduct.

346 On this point, I find the Bison Parties have established the necessary elements to a standard of "convincing proof" for rectification of the contract in a case of mutual mistake.

347 In the alternative, I find the Bison Parties have also established rectification of the contract to be warranted for unilateral mistake.

3. **Rectification for a Unilateral Mistake**

348 The leading case on rectification for unilateral mistake is *Sylvan Lake*, where Justice Binnie in his reasons for the unanimous Supreme Court of Canada (on this point) provided a useful step-by-step analysis of the four conditions precedent necessary for a court to support a finding of rectification of a unilateral mistake, at para 31:

> Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud." The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud." The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other [...] In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution." Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

i. ***Existence and Content of Prior Oral Agreement***

349 The first precondition for rectification of the fencing provision is that Olson must show the existence and content of an inconsistent prior oral agreement. That is satisfied by my finding the existence and content of a prior oral agreement between the parties on the Agreed Fence Height Restriction, which is inconsistent with the Replacement Fence Height Restriction actually contained in the written agreement.

350 As the Supreme Court stated in *Sylvan Lake* at para 47: "The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof."

ii. *Fraud or Conduct Equivalent to Fraud*

351 The second precondition is that not only must Olson show the written document does not correspond with the prior oral agreement, but that the NCC either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting the NCC to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. See *Sylvan Lake* at para 38:

> This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630, *Ship M. F. Whalen"*, *supra*, at pp. 126-127.

352 The mistake here was not in the bargain struck between the parties on fencing but in the failure to include correctly in the written agreement that bargain they reached. This is not a case of correcting a mistake by one of the contracting parties in agreeing to a bad deal.

353 The NCC knew or ought to have known of the mistake for several reasons. Olson's purchase of the Property turned on the fencing provision; he would never have agreed to the Replacement Fence Height Restriction or anything akin to a cattle fence height to properly contain his wild bison within the Property. Olson instructed Bryden to ensure his final terms with the NCC, including the fencing provision, reflected the agreement he came to with the NCC via Green.

354 Green was responsible for negotiating with Olson on behalf of the NCC the terms of his purchase of the Property and of the CE Amending Agreement. She knew his intended uses for the Property and that they depended on his ability to contain wild bison within its boundaries. His fencing wishes were not a problem for the NCC, therefore she had no recollection of any contentious negotiation about fencing, but she knew flexibility on fencing was critical to Olson. Therefore had she reviewed the CE Amending Agreement (as both she and Olson should have) she would have recognized the mistake in it: its inclusion of the Replacement Fence Height Restriction and not the Agreed Fence Height Restriction. I conclude the NCC ought to have known of the mistake in reducing the oral terms of the parties' agreement to writing.

355 Here, like McLachlin CJSC (as she then was) in *First City Capital Ltd v. British Columbia Building Corp*, 43 BLR 29, 1989 CarswellBC 309 (SC), I am of the opinion that this transaction falls short of deceit but it would be unconscionable for the NCC to avail itself of the advantage obtained. See *First City Capital* at para 27, quoted by the Supreme Court of Canada in *Sylvan Lake* at para 39:

> [I]n this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained[.]

iii. *Precise Terms of Rectification*

356 The third precondition is that Olson must show "the precise form" in which the written instrument can be made to express the prior intention. This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the

parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that - and only that - which the parties had already orally agreed.

357 In this case "the precise form" in which the written document (the CE Amending Agreement) can be made to conform to the oral agreement would be achieved by substituting the Agreed Fence Height Restriction for the Replacement Fence Height Restriction.

iv. ***Existence of "Convincing Proof"***

358 The fourth precondition is that all of the foregoing must be established by "convincing proof". For the same reasons given in the case of rectification for mutual mistake, I find there is convincing proof that the foregoing preconditions to rectification are established.

4. **Remedy**

359 Allowing the NCC to rely on the incorrect fencing provision in the CE Amending Agreement would unjustly enrich it at the expense of Olson. The NCC would pocket the purchase price of the Property (along with a very substantial gift) plus have enjoyed the alternate deployment of those funds, which it would not otherwise have received. That is, I am convinced that in the face of the Replacement Fence Height Restriction, Olson would not have proceeded with the agreement to purchase and donate. The NCC characterized Olson's testimony on the necessary fencing for bison ranching as a "want" rather than a "need"; the evidence does not support its position in that regard.

360 Further, and apparently no trifle to the NCC, the NCC would be able to trumpet in the area and beyond that it was "right all along", thereby continuing its misinformation that wildlife migration requires short fences, rather than actually informing its constituents by facts about wildlife permeable fencing.

361 Rectification here is not a belated substitute for due diligence; it would not unjustly impose liability on the NCC that ought more properly to be attributed to Olson's negligence.

362 Therefore I order rectification of the CE Amending Agreement, and also the Penny Ranch Purchase Agreement within which it is incorporated, effective as of August 28, 2003 replacing the Replacement Fence Height Restriction contained in it with the Agreed Fence Height Restriction.

C. **Did Olson's New Fence Breach the Fencing Restriction?**

363 The Agreed Fence Height Restriction states, again:

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property. If doing so with fences or roads, they are to be maintained, replaced or repaired at or near the existing ones. The Grantor may not build fences or roads in areas where none exists without the Grantee's permission. The building of wildlife-proof fences is not permitted, except in localized areas as needed to control or prevent wildlife damage to haystacks, stored forage or domestic gardens. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

364 The NCC did not prove the New Fence violated the Agreed Fence Height Restriction. The NCC did not demonstrate that Olson placed the New Fence in any new locations without permission. It was not wildlife-proof. Quite the contrary in fact. The evidence demonstrated the New Fence was wildlife permeable. By increasing the height off the ground of the lowest strand and using less barbed wire than the predecessor fencing it is also highly likely the New Fence has reduced the restrictions to wildlife entering and exiting the Property.

365 In the event I am incorrect in my analysis on the first two issues above, with the result that the Replacement Fence Height Restriction remains binding upon the parties, I also provide my conclusions on whether the New Fence is in breach of that CE term. The Replacement Fence Height Restriction stated, again:

1.1

> The Grantor may maintain, replace and repair the fences, roads, buildings, and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired, each at its original size and in its same location. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee.

366 For an easement term to be enforceable, it must be ascertainable. To be able to comply with an easement term or to be held liable for the failure to do so, that term must be clear, as is the case with restrictive covenants. Restrictive covenants must be sufficiently certain and precise in order to be valid and enforceable; ambiguities are resolved in favour of non-enforcement. As stated in *Re Sekretov and City of Toronto*, [1973] 2 OR 161, (*sub nom Sekretov v. Toronto (City)*) 1973 CarswellOnt 409 at paras 18-19 (CA):

> It is well settled that restrictive covenants must be precise in terms, and if they are vague and indefinite in meaning they will not be enforced: *Taylor v. Gilbertson* (1854), 2 Drewry 391, 61 E.R. 770; *Murray v. Dunn*, [1907] A.C. 283; *Noble v. Alley*, [1951] S.C.R. 64, [1951] 1 D.L.R. 321
>
> [...]
>
> Where such vagueness and uncertainty exists in a restrictive covenant imposed upon a servient tenement the covenant cannot be enforced. I cannot avoid coming to the conclusion that the covenant sought to be imposed in this form is altogether too vague and indefinite to be enforceable against a successor in title to the purchaser of the lands in question.

367 I am unable to ascertain just what the requirement was for fencing under the Replacement Fence Height Restriction. Enforcing this term encounters multiple ambiguities and interpretation problems.

368 First, it is unclear whether "size" of the fence meant its height only or something different, such as its width or its three-dimensional volume. For example a wide-plank wooden fence, but of the same top height, would far more significantly impede wildlife permeability than either the old Penny fence or the New Fence. It may or may not sufficiently restrain bison.

369 Second, it is not clear whether "original" size meant size when first built years ago (for cattle) or size at the time Olson "originally" acquired the Property. The phrase in the prior sentence might be thought to inform that uncertainty, for it says: "as of the date of this easement", but that in fact increases the number of possible reference dates. The "date of this easement" might be May 28, 2003, when the NCC as owner granted the Initial ACA CE to the ACA. It might be July 11, 2003, when the Initial ACA CE was registered on the titles to the Property. It might be the date the CE took effect by Olson becoming owner of the Property, or sometime later when it was registered on the titles to the Property, though the lawyers had difficulty nailing that down. Whichever date was operable for identifying the "benchmark fence size" against which the Olson New Fence is to be compared, to see if it was in violation thereof, no evidence was adduced of the state of the fence as at *any* of those dates and certainly not *all along* its course.

370 *If* the Replacement Fence Height Restriction is simply addressing fence height, then *it might be* inferred that the

top strand of the New Fence (when it is at its highest, not lowered when bison are off that portion of the Property) is higher than whatever cattle fence was ever there (for example by reference to the lower top height of the fence posts used for the old fence). That interpretation, however, seems to import into the interpretive process a results-oriented solution to the NCC's public image and telephone complaints problem, which focused mostly on the height of the New Fence, rather than determining objectively what the words in the Replacement Fence Height Restriction mean on their face.

371 Third, the words "are to be" ("maintained, replaced or repaired") suggest a mandatory obligation, whereas the prior sentence suggests any such activity to be merely permissive: "may maintain, replace and repair the fences". *Perhaps* this just meant "*if* fences are being maintained, replaced or repaired, then they are to be", but it certainly does not say that. The first permissive sentence could just as easily be circumscribed by the second seemingly mandatory sentence than the reverse. How is one to know?

372 Fourth, the intention for the Replacement Fence Height Restriction is to be determined in light of the wording of the entire contract, its purpose and commercial context: *BG Checo International Ltd v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 23-24;[94] *Tercon Contractors Ltd v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 64.[95]

373 The words of the entire Penny Ranch Purchase Agreement (including the CE Amending Agreement, attached to and forming part of the Penny Ranch Purchase Agreement) inform the interpretation of the Replacement Fence Height Restriction. Here the parties made it clear Olson would be using the Property to ranch bison, as expressly set out in the Preamble to the CE Amending Agreement which states: "Whereas [...] the Grantor and the Grantee wish to make certain amendments to the [Initial ACA CE] Agreement consistent with the use of the Property for ranching buffalo, as detailed in this amending agreement." This militates further against the interpretation the NCC seeks to place upon the words.

374 Fifth, the CE applies only to the Property. All fencing, new or old, outside the Property's boundaries, therefore, is not subject to the Replacement Fence Height Restriction. The evidence satisfied me that a significant portion of the old fencing was outside the Property boundaries; does that mean in such areas there are no fences that Olson "may" or "must" maintain, replace or repair?

375 Sixth, the "each at its original size and in its same location" requirement could have the effect of Olson placing new fencing strands wherever the old fencing strands were located, including nailing them into trees. An absurd suggestion perhaps, but it highlights the uncertainty of what basis the affected parties are to ascertain the actual requirement. The NCC pursued this Enforcement Action all in respect of the height of the New Fence based on its desired interpretation of the Replacement Fence Height Restriction. There is no good reason why that subjective interpretation of the fencing provision should trump all others, especially where (1) it is so prejudicial to one of the parties and other interpretations are at least equally plausible, (2) it is counter-productive to the agreed purposes of using the Property to ranch wild bison, and (3) it is less accommodating of wildlife migration than the New Fence, based on the evidence presented. The whole of the agreement was about using the land for wild bison and I am thoroughly convinced that a 40 inch high fence, no matter what its other size dimensions, would not permit that use. It would not restrain the wild bison.

376 The requirements of the Replacement Fence Height Restriction are not sufficiently determinable to fairly find Olson in breach. Enforcement of the Replacement Fence Height Restriction in these circumstances, on this record, would therefore also fail.

377 Further, I do not find the New Fence inconsistent with the fundamental principles of the CE or that it substantially depreciates the "Conservation Value" of the Penny Ranch, as alleged by the NCC. Therefore those arguments that the New Fence violates the CE also fail, regardless of which fencing restriction it contained.

D. **If Olson's New Fence Breached the Fencing Restriction in the CE, was the CE**

Nevertheless Invalid or Otherwise Unenforceable?

378 I concluded the New Fence was not in breach of either version of fencing provision; therefore I need not address the issue of whether the CE was *ultra vires* for purposes of its enforcement by virtue of it containing the Replacement Fence Height Restriction. Nevertheless, in the event I am incorrect on one or some of the preceding issues, I provide my conclusions on the other grounds argued for the invalidity of the CE.

1. Positions of the Parties

379 The Defendants[96] argued the CE was invalid and therefore also unenforceable because: (1) the Replacement Fence Height Restriction did not satisfy any of the conservation purposes set out in *ALSA*; and (2) of the relationship between the ACA and the NCC.

380 The Plaintiff responded the CE satisfied the conservation purposes set out in the statute and that the ACA met the only prerequisite of it to hold the CE for the time it did, namely, it was a "qualified organization".

2. Did the CE satisfy the purposes of *ALSA?*

381 The Defendants said the CE did not satisfy any of the conservation purposes listed in section 29(1) of *ALSA.* Those conservation purposes, they said, were the only purposes for which a conservation easement could validly exist in Alberta. The Defendants further argued the NCC adduced no expert scientific evidence to establish the CE satisfied any of the conservation purposes in *ALSA* and therefore it failed to prove its validity. This argument was specific to the CE Amending Agreement and the NCC's preferred fencing provision, the Replacement Fence Height Restriction, although the Waterton Parties expanded the argument to relate to the entire CE.

382 Section 1 of *ALSA* states:

> **Purposes of Act**
>
> **1(1)** In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.
>
> **(2)** The purposes of this Act are
>
> (a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
> (b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;
> (c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
> (d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

383 The purposes for conservation easements are set out in subsection 29(1) of that statute:

Purpose of conservation easements

29(1) A registered owner of land may, by agreement, grant to a qualified organization a conservation easement in respect of all or part of the land for one or more of the following purposes:

(a) the protection, conservation and enhancement of the environment;
(b) the protection, conservation and enhancement of natural scenic or esthetic values;
(c) the protection, conservation and enhancement of agricultural land or land for agricultural purposes;
(d) providing for any or all of the following uses of the land that are consistent with the purposes set out in clause (a), (b) or (c):

(i) recreational use;
(ii) open space use;
(iii) environmental education use;
(iv) use for research and scientific studies of natural ecosystems.

384 Paragraph 2(1)(j) of the Act defined "environment" as follows:

Definitions

2(1) In this Act,

[...]

(j) "environment" means the components of the earth and includes

(i) air, land and water,
(ii) all layers of the atmosphere,
(iii) all organic and inorganic matter and living organisms, and
(iv) the interacting natural systems that include components referred to in subclauses (i) to (iii).

385 The conservation purposes listed in section 29(1) of *ALSA* must be examined purposively, with a consideration of the legislative intent behind the statute. As the Supreme Court of Canada recently explained in *R. v. ADH*, 2013 SCC 28 at para 25:

> Presumptions of legislative intent are not self-applying rules. They are instead principles of interpretation. They do not, on their own, prescribe the outcome of interpretation, but rather set out broad principles that ought to inform it. As Professor Sullivan has observed, presumptions of legislative intent, such as this one, serve as a way in which the courts recognize and incorporate important values into the legal context in which legislation is drafted and should be interpreted. These values both inform judicial understanding of legislation and play an important role in assessing competing interpretations: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 365.

386 The language found in section 29(1) is directional and encompassing, not prescriptive of instances limited in

number. It speaks of broad principles not narrow lists.

387 The Defendants have not advanced any authority for the general proposition that the NCC was required to introduce expert scientific evidence in order to establish the fencing provision's satisfaction of the conservation purposes set out in *ALSA*.

388 I disagree with what amounts to a presumption of invalidity. I disagree that *a priori* a conservation easement is unenforceable unless the grantee demonstrates with scientific evidence that the conservation easement, or the specific term of it to be enforced, *accomplishes* at least one of the statutory purposes for the legislators creating conservation easements, now set out in *ALSA*. Section 29 permits conservation easements to exist where the grantor had at least one of the stated purposes for the conservation easement. Proof of accomplishing one of those purposes, or proof of the probability of accomplishing one of those purposes, or proof of potentially or even possibly accomplishing one of those purposes is not required. The prerequisite is that the grantor had one of those purposes in mind. There will be many ways to prove such intent, most notably by inference from the wording of the conservation easement. On the face of a conservation easement it will usually be apparent whether the grantor's purposes fell within at least one of the statutory purposes.

389 Put another way, convincing proof that adherence to a particular term of a conservation easement is actually undermining one or all of the statutory purposes would not prove the grantor did not intend the conservation easement to accomplish one of the statutory purposes.

390 In this case, the wording of both the Initial ACA CE and, following its amendments, the CE, satisfied me that its grantor, originally the NCC, intended "(a) the protection, conservation and enhancement of the environment" where "environment" includes "living organisms". The NCC's testimony confirmed this intention.

391 The Waterton Parties asserted the NCC failed to lead evidence demonstrating the validity of the CE's terms. I disagree. The NCC's evidence on this was not in the form of scientific evidence that the Bison Parties maintained was necessary, but Simpson addressed the NCC's intention for the Initial ACA CE and its amendments. Furthermore, similar evidence was adduced from Olson in respect of the amended CE. This evidence satisfied me that the CE fell within *ALSA*'s section 29 purposes. I accept the NCC's argument that, among other things, the CE was intended to prevent any material impediment to wildlife movement on the Property. The Property was purchased by the NCC to preserve its character as a valuable wildlife corridor, because of its proximity to Waterton National Park and the Waterton Front properties in which the NCC had acquired interests and its critical place in the Y to Y corridor.[97]

392 Subsequently, the CE was registered against the titles to the Property in order to preserve its character as a valuable wildlife corridor. I find the New Fence in compliance with the CE to be consistent with and to promote this conservation purpose.

393 Further, taken to its logical extreme, the Bison Parties' position could have the effect of a conservation easement being valid at one time, but then not valid at another. For example, as the understanding of ecosystem dynamics improves over time, measures once thought to enhance their health, and mandated in a conservation easement, could later be discovered to be counter-productive. Under the Bison Parties' reasoning that conservation easement would no longer be valid; the validity of that conservation easement should not be undermined as a consequence. The validity of conservation easements should be static and, in most cases, evident or not on their face. Further, the legislative assembly appears to have contemplated the possible need to update or amend a conservation easement by enacting what is now section 31.[98]

394 More practically, the Bison Parties' approach has the unsavoury effect of making enforcement of conservation easements cost prohibitive, for both parties, to the degree that their original purpose may be undermined by inability to back them up and genuine disputes about their application being abandoned for lack of resources. This also would be contrary to the legislative intent behind them.

395 If a grantor in response to an enforcement action raises sufficient doubt, perhaps based on scientific evidence, that a particular conservation easement or individual clause within one, never was or no longer is valid, then a grantee may have to answer that shifted burden. That was not the case here: the CE was facially valid. Nothing asserted by the Bison Parties, in evidence or argument, seriously challenged that or demonstrated that, absent a response from the NCC, the CE would fail for invalidity.

3. Validity of CE due to Relationship between the ACA and the NCC

396 The Bison Parties also argued the CE was invalid because of the relationship between the NCC and the ACA, that (1) they were not a separate "grantor" and "grantee" as it said were required by *EPEA* and *ALSA*[99] and (2) the ACA was at all times the agent of, or bare trustee for, the NCC, not distinct from it as required by the common law. They said the common law requirement that a valid easement have different persons for the dominant and servient owners applied to conservation easements under *ALSA*.

397 The Bison Parties supported this view by arguing *ALSA* imports into the interpretation of conservation easements the common law restrictions applicable to restrictive covenants. For example: that restrictive covenants are to be interpreted strictly and in a way that minimizes any infringement of private property rights. They say subsection 1(1) of *ALSA* (above) indicates this.

398 The NCC responded the only prerequisite to the ACA holding a conservation easement was that it be a "qualified organization"[100] and that all parties confirmed on the record at the outset of trial both the ACA and the NCC were "qualified organizations" for the purposes of *ALSA*.

399 The wording on minimizing infringement of private property rights in subsection 1(1) is an obligation upon the Government of Alberta when carrying out the purposes of the *ALSA*. That approach is not said to apply more broadly beyond the Government as the Bison Parties advocated. It is not a broader statement applicable to all interpretations of all conservation easements.

400 The short answer to these remaining arguments is provided by section 68 of *LTA*.[101] Alberta abolished the common law requirement that dominant and servient tenements to an easement need be distinct persons or entities. Nothing in *ALSA* overrides this in respect of conservation easements.

401 Therefore I do not find the CE invalid or unenforceable for any of the reasons advanced by the Defendants.

4. Remedies Sought

402 The NCC sought a declaration that the CE, as amended by the CE Amending Agreement, was valid and specifically that its fencing provision was valid. I declare the CE, as amended by the rectified CE Amending Agreement, to be valid. If I am incorrect in concluding the Agreed Fence Height Restriction was the fencing provision within the CE Amending Agreement, and that it was instead the Replacement Fence Height Restriction, I find the resulting CE to be valid and enforceable except that fencing provision and exclude it from the CE that remains in place on the titles to the Penny Ranch.

403 The NCC sought an injunction mandating removal of the New Fence from the Property, or that its height be lowered to no more than 48 inches, within six months. This is denied since the New Fence was not in breach of the rectified CE.

404 The Waterton Parties claimed damages, in the event the CE was interpreted in any manner which would render the Property unfit for bison ranching, for the Trustee having to sell the Penny Ranch and repurchase an equivalent property suitable for use as a bison ranch, in order to fulfil the objectives of the Trust. This is also denied since the CE was interpreted in the manner Olson espoused and which the evidence strongly suggested would not render the Property unfit for bison ranching.

E. Will the Court Rectify the Deficient Registrations on the Titles to the Property?

1. Positions of the Parties

405 The NCC requested rectification of the titles to the Property under subsection 190(1) of *LTA* so the CE is accurately reflected on the certificates of title. The NCC requested this Court either: (1) correct the caveat under which the CE is registered, or alternatively (2) register a copy of the CE Amending Agreement (with the missing page 5) directly on the titles to the Property. The NCC submitted the second option was preferable, as *ALSA* did not seem to expressly contemplate registering the document by caveat.

406 Of course the NCC's request for rectification of the titles to the Property stemmed primarily from its application to enforce the Replacement Fence Height Restriction, and I declined to do so. Therefore the NCC may no longer desire this remedy. Conversely, the current owner of the Property may no longer resist it, for example because page 5 had other amendments that Olson and Green negotiated that better accomplished their respective interests than did the Initial ACA CE.

407 However the parties recognized in their agreements that the Initial ACA CE was registered on the titles and by their CE Amending Agreement they intended for the amended Initial ACA CE to be and remain registered on the titles. Therefore, any rectification in this case will be enforcing the parties' agreement.

408 The Defendants first relied on indefeasibility of title to resist the NCC's rectification application, arguing that the Limited Partnership/Trustee took the Property free and clear of any and all unregistered encumbrances and registrations, including the fencing provision omitted from the CE Amending Agreement. They relied on subsection 60(1)[102] and section 203[103] of *LTA*.

409 The Waterton Parties said rectification of title was not available as the NCC failed both to give notice to the intervening encumbrancers and to raise a claim against them. The NCC first realized this deficiency after counsel for the Waterton Parties announced it during his opening statement in trial (after the NCC closed its case). The NCC later said its request would not apply as against intervening encumbrancers (except Moose Mountain who the NCC alleged was complicit in Olson's alleged land titles fraud and in respect of whom the NCC requested to have the MM Caveat discharged).

410 The Defendants argued, in the alternative, that to the extent that any claim for rectification of title is allowed by this Court, title should only be rectified in a manner that will not prejudice the purpose for which the Trustee purchased the land, namely as a bison ranch.

411 Finally in this regard, the Defendants argued the NCC's attempts to correct the CE in order to include the Replacement Fence Height Restriction on the titles to the Property (by unilaterally registering the Third Caveat) was done without the consent of the grantor of the CE or the consent of the third parties which subsequently registered interests against the titles to the Property (FCC, Carolyn and Jack Olson, and Moose Mountain). The Defendants therefore also requested rectification of title to remove the NCC's registration of the Third Caveat from the titles to the Property.

412 The NCC responded that the CE Amending Agreement attached to the Third Caveat was the form of amending agreement intended by the ACA and the NCC to be reflective of the CE Amending Agreement, although the NCC admitted that its replacement page 5 was different in that it fixed the Further Error. The NCC argued the Third Caveat did not effect any new CE, although it contained the missing page 5 in accordance with the Penny Ranch Purchase Agreement that the parties both signed.

413 The NCC took the position that registration of a revised CE Amending Agreement directly on the titles to the Property by way of rectification would not take priority over the registered FCC Mortgage or the Carolyn and Jack

Mortgage, but should take priority over the MM Caveat. The NCC also requested rectification of title to remove the MM Caveat from title, arguing that the Moose Mountain Lease and MM Caveat were nullities and of no force or effect, and requested a declaration to that effect from this Court.

2. Law on Rectification of Title

i. *Power of the Court to Rectify Title*

414 Under subsection 190(1) of *LTA* this Court has jurisdiction to correct a certificate of title:

> **Power of judge to cancel, correct, etc., duplicate certificate**
>
> **190(1)** In any proceeding respecting land or in respect of any transaction or contract relating to it, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the Registrar to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry on it and otherwise to do every act necessary to give effect to the decree or order.

415 In Alberta the exercise of this power is not always subject to indefeasibility of title.[104] The power is discretionary. Justice Foisy (as he then was) in *Clarkson Company Limited and Midland Bank Canada v. Wiebe Holdings Ltd, Mared Holdings Ltd and Flagstaff Implements Co*, 26 Alta LR (2d) 390, [1983] A.J. No. 1088 (QB) stated at para 35:

> [T]he court's power under s. 180 [now 190] of the Land Titles Act is discretionary and it may well be that in cases where the rights of subsequent encumbrances might arbitrarily be affected the court would refuse to exercise its discretion in favour of the applicant, thus forcing the applicant to pursue other remedies.

416 Duff J (as he then was) of the Supreme Court of Canada in *Hart v. Boutilier*, 56 DLR 620, [1916] S.C.J. No. 84 at para 49 (SCC) said:

> The power of rectification must be used with great caution; and only after the Court has been satisfied by evidence which leaves no "fair and reasonable doubt" (*Fowler v. Fowler* (1859), 4 DeG. & J. 250, at 264, 45 E.R. 97), that the deed impeached does not embody the final intention of the parties. This evidence must make it clear that the alleged intention to which the plaintiff asks that the deed be made to conform, continued concurrently in the minds of all the parties down to the time of its execution; and the plaintiff must succeed in shewing also the precise form in which the instrument will express this intention.

417 Rectification is an available remedy even where the rights of third parties may be affected: *Consortium Capital Projects Inc v. Blind River Veneer Ltd*, 63 OR (2d) 761 at 766, [1988] O.J. No. 103 (H Ct J). In that case, Justice Gray stated at para 15:

> There is yet another principle, namely, that although it has been said that rectification should never be granted when the rights of third parties are affected, the proper test is whether the third party relied on the document as executed and took action based on that document. This proposition or principle flows from the reasoning of Spence J. in the Supreme Court of Canada in *Augdome Corp. Ltd. v. Gray* (1974), 49 D.L.R. (3d) 372, [1975] 2 S.C.R. 354 at pp. 375-6, 3 N.R. 235 and as outlined by Hallett J. in *Federal Business Development Bank v. Elcom Petroleum* (1983), 58 N.S.R. (2d) 246, 28 R.P.R. 1 at pp. 18-19.[105] [Emphasis added, footnote

added]

418 Here the Trustee/Trust did not rely on the CE Amending Agreement as registered on the titles. Neither did Moose Mountain rely on the document as executed or take action based on that document. Therefore I find rectification may be granted despite the fact that third party rights may be affected. Here, as in *Mazurek v. Bakker*, 2001 ABQB 183, the position of the subsequent encumbrancers will not be prejudiced by rectification.

419 I find support for rectification of title in my factual findings on Olson's *de facto* control of the Trust for the transactions conveying the Property.[106] Since I find Olson *de facto* controlled the Trust, rectification of title is an available remedy despite the Property being sold to the Limited Partnership/Trustee (and titles now registered in the name of the Trustee). The directing mind of the Trust (Olson) had notice of the registration omission.

420 In the event I am incorrect in exercising my jurisdiction to rectify title based on Olson's *de facto* control of the Trust, I also find no injustice to the Trustee/Trust in ordering the rectification of the register. Ordering the missing page 5, with the Agreed Fence Height Restriction, registered on titles to the Property will result in no prejudice to the Trustee/Trust. Registering the Agreed Fence Height Restriction on titles to the Property will not prejudice the Trustee/Trust in its bison ranching objectives, as its bison ranch operations would not be impacted nor would they have to be shut down. Indefeasibility of title does not preclude rectification in the present case, under circumstances amounting to an innocent mistake in the documentation of an obvious common intention between parties, where the third party purchaser (the Trustee/Trust) was essentially controlled by the Defendant Olson. I have no doubt that the existing CE registered on the titles to the Property does not embody the parties' intentions. Exercising this Court's statutory power under subsection 190(1) of *LTA* to rectify the titles is appropriate in this case; it gives effect to the parties' original intentions.

421 These circumstances also satisfy the common law requirements applicable to rectification of contracts, discussed above. The Defendants argued there was no common intention to support rectification of title by this Court: that it was not established on the evidence and it can never be established whether the CE Amending Agreement ever contained the page 5 (and consequently the fencing provision).[107]

422 I disagree. The record of exchanges between the parties on and before August 28, 2003 satisfies me that a page 5 existed and that the parties intended all five pages of amendments to the Initial ACA CE. I am satisfied that there was a common intention between the parties for matters on the omitted page 5, including the Agreed Fence Height Restriction. If Olson had not intended there to be a page 5 of amendments to the Initial ACA CE, then he would not have reacted as he did to his discovery of its absence, and would not have followed-up with Walker and then with Bryden about it. At no time did anyone on the Olson side of events ever respond to the NCC side, to McLean in particular, to say "what page 5" or that "there was no page 5 - the four pages registered on title cover all the amendments we made".

423 Finally, and repeating it for completeness here, at para 173 above I concluded that registration of the Moose Mountain Lease was a validly registered interest on the titles to the Property.

3. **Rectification of the CE and CE Amending Agreement**

424 Based on the reasons given for rectification of the Penny Ranch Purchase Agreement, and the jurisdiction of this Court to rectify title pursuant to s 190 of *LTA*, the titles to the Property must be rectified to reflect the terms of the CE agreed on by the parties, which must include the Agreed Fence Height Restriction. In rectifying to include in the CE (and CE Amending Agreement) the Agreed Fence Height Restriction, for reasons given there is no prejudice to the third party encumbrancers, nor to the Waterton Parties or the bison ranching operations generally.

425 The NCC requested rectification by way of ordering the registration of a revised CE Amending Agreement directly on the titles to the Property and argued this was preferable to registering a revised CE Amending Agreement by way of caveat. Its reasoning was that language in subsection 33(4) of *ALSA* did not seem to expressly contemplate

registering the revised CE Amending Agreement by caveat,[108] despite the fact that the CE was registered by the NCC's solicitor on the titles by way of caveat (and so presumably the NCC was amenable to the First Caveat, the Second Caveat, and the Third Caveat all being registered on the titles to the Property). The Defendants opposed registering a revised CE Amending Agreement directly on the titles, stating the NCC's interpretation of s 33(4) of *LTA* was unsound and did not preclude registration by way of a caveat.

426 These positions were espoused before each party knew what would be the outcome of this Enforcement Action regarding fencing and the enforceability of the CE. The parties should address this issue afresh in view of my decisions herein and, if they are still unable to agree, they may return to me on it when they speak to costs.

4. The NCC's Registration of the Third Caveat

427 The Waterton Parties argued the NCC's unilateral registration of the Third Caveat on the titles to the Property was an invalid attempt to amend the CE by incorporating the Replacement Fence Height Restriction, in addition to imposing the Further Error (which they contended was an additional obligation). These restrictions, they argued, were not agreed to by the ACA, Olson, Wild West, or the Trustee and should be struck from the titles pursuant to section 190 and subsection 141(1) of *LTA*:

> **Application to discharge caveat**
>
> **141(1)** In the case of a caveat filed, except a caveat filed by the Registrar as hereinafter provided, the applicant or owner may at any time apply to the court, subject to the *Alberta Rules of Court*, calling on the caveator to show cause why the caveat should not be discharged, and on the hearing of the application the court may make any order in the premises and as to costs that the court considers just.

428 I agree with the Waterton Parties on this point. Only a registered owner of the land may grant or modify a conservation easement[109] and the definition of "grantor" under both *EPEA* and *ALSA* includes "a successor... of the grantor."[110] Therefore once the NCC ceased to be the registered owner of the Property its right to modify the CE with the ACA passed to its successors in title: Olson and then the Trustee. After August 18, 2004, the date the sale of the Penny Ranch closed, the NCC no longer had authority to amend the CE as property owner. The Third Caveat was improperly registered. I order that it be struck from the titles.

429 For the foregoing reasons, I grant the NCC's request for rectification of titles to the Property. This rectification of titles will have the effect of registering the missing page 5 of the CE Amending Agreement on the titles to the Property, which will include the Agreed Fence Height Restriction in place of the Replacement Fence Height Restriction and correct the Further Error.

430 This registration will not take priority over the prior registrations of, if they are still on title, the FCC Mortgage, the Carolyn and Jack Mortgage, or the Moose Mountain Caveat, unless those parties now consent.

431 I also order the discharge of the Third Caveat from the titles to the Property, which was improperly registered by the NCC.

F. <u>If so, Does Indefeasibility of Title Apply to Successors in Title or was it Vitiated by any Olson Land Titles Fraud?</u>

432 This issue was raised by the NCC in order for its desired rectification to not be thwarted by the conveyance of the Property from Olson to the Limited Partnership/Trustee. Although I am not effecting the NCC's desired rectification, nevertheless I provide my decision and reasons on the issue.

1. Positions of the Parties

433 The NCC alleged the Defendants committed land titles fraud when Olson conveyed the Property to the Limited Partnership/Trustee with the knowledge that the CE was not properly registered on the titles (that is, with the knowledge that the registration on titles was missing page 5, which missing page it argued contained the Replacement Fence Height Restriction).

434 The NCC said the evidence from Olson and Dr. Lukowiak was very clear that not only the rights and benefits, but also the obligations and responsibilities of Olson in respect of the Property were assumed by the Limited Partnership/Trustee at the time of the conveyance of the Property. The NCC argued that by conveying the Property to the Limited Partnership/Trustee with page 5 of the caveat missing, the full obligations and responsibilities of Olson were not conveyed to the Limited Partnership/Trustee. The NCC submitted not conveying the Property with the full obligations and responsibilities Olson assumed when purchasing the Property from the NCC constituted land titles fraud and, further, that the Defendants are not entitled to rely on indefeasibility of title as a defence.

435 The NCC alleged fraud on the part of the transferee Limited Partnership/Trustee (including each of the Waterton Parties in its allegation) is satisfied because Olson retained *de facto* control over the Trust and, therefore, Olson and the Trust are essentially one and the same.

436 The NCC submitted a finding of land titles fraud is satisfied by the alleged dishonesty and deceptive and misleading behaviour of Olson in his dealings with the NCC concerning the CE and the fencing provision. Specifically, the NCC argued the January 20, 2005 letter addressed to Olson requesting his assistance to correct the registration error, is an example of this dishonest and deceptive behaviour. The NCC alleged Olson's deliberate lack of response to the January 20th letter and his "haste" to instead convey the Property to the Limited Partnership/Trustee was behaviour that was dishonest, deceptive and misleading.

437 The Defendants responded that the Limited Partnership/Trustee did not assume all of the responsibilities and obligations of Olson to the NCC, as the Penny Ranch Purchase Agreement only included a covenant of Olson to the NCC to allow the CE and associated documents to be registered on titles to the Property. The Waterton Parties further submitted that the only obligations assumed by them were "those appearing on the face of the certificates of title for the Property" and that as purchaser of the Property they did not assume any other obligations, contractual or otherwise, of Olson.

438 The Defendants also disputed the NCC's argument regarding the alleged haste of Olson in conveying the Property to the Limited Partnership/Trustee, describing the argument as an "absurdity" and contradicted by the evidence. Similarly, the Defendants disputed the characterization of Olson as controlling the Trust, and therefore not operating at arm's length from the Trust or Trustee.

439 The Waterton Parties submitted the Trustee is entitled to rely on indefeasibility of title, that there was no fraud or dishonesty on the part of Olson or on the part of the Waterton Parties in purchasing the Property from Olson, and the Waterton Parties were not aware of the missing page 5 in the registration of the caveat on the titles (which missing page contained the fencing provision), nor of Olson's dispute with the NCC about the fencing provision.

440 The Defendants argued that because there was no land titles fraud on the part of the Limited Partnership/Trustee as transferee, therefore there can be no land titles fraud, and the evidence at trial failed to establish any land titles fraud.

441 Further, the Defendants said the NCC's allegation of land titles fraud, added to an amended Statement of Claim very late in the course of this litigation, was only added by the NCC to avert summary dismissal after the Waterton Parties applied for it. Thus, the Defendants argued, the NCC only pleaded land titles fraud as a "last ditch" effort to stave off summary dismissal of its "ill-founded claim".

442 The Bison Parties also argued that upon the NCC becoming aware of the missing page 5, it did nothing in the

nature of filing a caveat or a certificate of *lis pendens* to protect its position. They said the NCC cannot therefore plead land titles fraud based on its own negligence in correctly registering the caveat, nor on filing some form of notice to protect its position.

2. The Law on Land Titles Fraud

443 The Torrens system in use in Alberta generally protects and gives priority to purchasers who register an interest in land, even if such purchasers have notice of a prior unregistered interest in the land.[111] The doctrine of indefeasibility of title arising by registration was seen as the very essence of the Torrens system from its beginning.[112]

444 A purchaser contaminated with fraud, however, does not acquire indefeasible title; thus, a purchaser may only rely on indefeasibility of title where there is no fraud.

445 Sections 60 and 203 of the *LTA* are the relevant statutory provisions in Alberta with respect to land titles fraud. Subsection 203(3) codifies the principle that mere notice of an unregistered interest will not constitute land titles fraud:

> **Obligation affecting land**
>
> **60(1)** The owner of land in whose name a certificate of title has been granted shall, except in case of fraud in which the owner has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.
>
> **(2)** Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which the person claiming priority or any person through whom that person derives title has held possession. [Emphasis added]
>
> [...]
>
> **Protection of person accepting transfer, etc.**
>
> **203(1)** In this section,
>
> (a) "interest" includes any estate or interest in land;
> (b) "owner" means
>
> (i) the owner of an interest in whose name a certificate of title has been granted,
> (ii) the owner of any other registered interest in whose name the interest is registered, or
> (iii) the caveator or transferee of a caveat in whose name the caveat is registered.

> **(2)** A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
>
> (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> **(3)** The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
>
> **(4)** This section is deemed to have been in force since the commencement of *The Land Titles Act*, SA 1906 c24, in place of section 135 of that Act and similar sections in successor Acts. [Emphasis added]

446 Neither the jurisprudence nor the *LTA* provides a specific definition for what constitutes land titles fraud. This Court considered the issue in *Darnley v. Tennant*, 2006 ABQB 575 at para 30, where Slatter J (as he then was) stated:

> *The Land Titles Act* does not define "fraud." The outer boundaries of the concept are established:
>
> (a) Fraud includes deceit and dishonesty and other forms of common law fraud;
> (b) Fraud does not include mere knowledge of an unregistered interest, even when combined with the knowledge that registration will defeat that interest: s. 203(3); *Holt Renfrew & Co. v. Henry Singer Ltd.* (1982), 37 A.R. 90, 20 Alta. L.R. (2d) 97 (C.A.).
>
> Within these broad boundaries, the courts have not attempted to define fraud. It has been said that fraud requires "something more" than mere notice, amounting to injustice, dishonesty, or inequity: *Holt Renfrew*, *supra*; *Boulter-Waugh & Co. v. Phillips*, [1919] 1 W.W.R. 1046, 58 S.C.R. 385, 46 D.L.R. 41.

447 The jurisprudence is perhaps more helpful in pronouncing what is not land titles fraud. The courts have consistently rejected the proposition that notice of an unregistered interest, together with knowledge that registration will defeat such unregistered prior interest, is sufficient to constitute fraud.[113] According to Professor Bruce Ziff:[114]

> The courts have resisted providing closed and specific definitions of fraud, preferring instead to be "free to deal with it in whatever form it may present itself." At its nucleus, fraud involves a dishonest dealing leading to deprivation, and embraces acts or omissions (where there is a legal or equitable duty imposed) that produce an undue or unconscionable injury or disadvantage. [Footnotes omitted]

448 A finding of land titles fraud requires actual fraud - dishonesty of some sort - not what is called constructive or equitable fraud.[115] Di Castri relies on the meaning attributed to fraud in the New Zealand case of *Assets Company, Limited v. Mere Roihi*, [1905] AC 176 at 210 (PC)[116] where Lord Lindley writing for the Judicial Committee of the Privy Council pronounced:

> [B]y fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud -- an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, [...] must be brought home to the person whose registered title is impeached or to his agents.

449 The leading case on land titles fraud in Alberta, *Holt Renfrew & Co v. Henry Singer Ltd*, 37 AR 90, 1982 CarswellAlta 92 (CA), leave to appeal to SCC refused, 39 AR 272n, stands for the proposition that: "To constitute fraud under s. 203, more is required than knowledge of the unregistered interest and the registration of a transfer which defeats the unregistered interest. [...] There must be an additional element." Per Justice McDermid at paras 15, 18 (adopted by the majority on this point).

450 Although the courts have consistently required "something more" (or an "additional element") to satisfy a finding of land titles fraud,[117] they have not been specific in defining what satisfies that requirement. Some guidance is available from the case of *Alberta v. McCulloch*, 116 AR 261, (*sub nom Alberta (Minister of Forestry, Lands & Wildlife) v. McCulloch*) 1991 CarswellAlta 29 (QB), where Justice Sinclair stated at para 36:

> As earlier mentioned, s. 195 provides, and the cases have held, that knowledge of the unregistered interest, by itself, does not constitute fraud. For there to be fraud, the knowledge must be used for an unjust or inequitable purpose.

451 The Defendants submitted *Holt Renfrew* established a three-part test for land titles fraud, and the following three elements must all exist at the time of the transaction for land titles fraud: (1) the defendant had knowledge of the existence of an unregistered interest and knew that the unregistered interest would be defeated by concluding the transaction; (2) the defendant committed some fraudulent act "in addition" to having such knowledge; and (3) the plaintiff relied on the defendant's fraud and was induced by its reliance thereon, to conclude the transaction. The Defendants argued the NCC has failed to prove that any of these three requirements were present when Olson took title to the Property on August 18, 2004, which is fatal to the NCC's claim of land titles fraud.

452 I do not agree with the Defendants' characterization of the law on this point, specifically on it being a requirement that the NCC prove these "three elements" were present on August 18, 2004. While I agree that the first two elements are required for a finding of land titles fraud (knowledge and "something more"), I do not accept that the third is actually a requirement for land titles fraud, nor that this alleged fraud must have occurred when Olson took title to the Property on August 18, 2004.

453 The NCC alleged the fraud occurred by virtue of the transfer of the Property from Olson to the Limited Partnership/Trustee, not on the sale of the Property from the NCC to Olson.[118] I agree with the NCC on this point that the transaction to be scrutinized for land titles fraud is the transfer of the Property from Olson to the Limited Partnership/Trustee, not the transfer from the NCC to Olson.

454 Further, I do not agree with the Defendants' position that *Holt Renfrew* stands for the proposition that for there to be land titles fraud the third of their three elements must be present without exception in all cases: that the plaintiff relied upon and was induced by the defendant's fraud. The jurisprudence on land titles fraud has not interpreted *Holt Renfrew* as requiring this third element for land titles fraud.[119]

455 The jurisprudence is, however, quite consistent with respect to the "additional element" or "something more"

requirement for a finding of land titles fraud;[120] I therefore proceed to consider whether that additional element required for land titles fraud has been demonstrated in this case.

3. **The Additional Element**

456 The issue turns on whether the Limited Partnership/Trustee had notice of the NCC's unregistered interest when purchasing the Property, whether it used such knowledge for an unjust or inequitable purpose, and if the "something more" requirement is satisfied.

457 In *McCulloch* the defendant's knowledge was imputed to the company he controlled, as Justice Sinclair stated at para 35:

> The company must be deemed to have acquired this knowledge because Mr. McCulloch was one of its directors and its president.

Similarly, I have imputed to the Trust the knowledge that the CE was improperly registered on the titles based on Olson's *de facto* control over the Trust.

458 Unlike *McCulloch*,[121] I do not find the "additional element" required for land titles fraud is satisfied on the facts before me. Mere knowledge or notice of the unregistered interest is not enough to ground a finding of land titles fraud. I do not find either Olson or the Waterton Parties possessed more than mere knowledge of the NCC's unregistered interest in the Property (and of the defect in registration of the CE on the titles). Olson did nothing to take advantage of that knowledge, and I specifically reject the NCC's characterization of his conveyance of the Property to the Limited Partnership/Trustee as carried out with a sinister or fraudulent objective. In fact, Olson did nothing to capitalize on his discovery at or immediately after the time he first learned of the missing page 5 (November 2004). He continued to negotiate with the NCC in good faith over the disputed fence height. More than three months passed before Olson effected the conveyance of the Property.

459 Olson used the land titles registry in the normal course, to convey the Property into a trust as he always intended. It is hard to accept the NCC's argument that, because Olson was aware the NCC had erred in a registration, Olson's actions thereafter became fraudulent or constituted land titles fraud. Being a lawyer did not change that. It did not require that he suspend his long term pre-existing plan so that NCC could cloud the titles with a fencing provision that was never agreed to. Had the NCC done so before Olson conveyed the Property, I suspect Olson's intended trust structure would have been long delayed while he applied for rectification.

460 In his negotiations with the NCC, though he had knowledge of the registration omission, Olson in good faith still tried to resolve the dispute with the NCC over fencing. These good faith efforts are not consistent with the NCC's allegation that Olson hastily conveyed the Property to the Limited Partnership/Trustee in circumstances amounting to land titles fraud. Had the NCC's theory been correct, Olson would have commenced the process of transferring the Property to the Limited Partnership/Trustee back in November 2004 after he discovered the registration error and the drafting error, but it did not occur until March 2005. As I have already described, Olson had always intended to transfer the Property to a trust arrangement, and in fact had originally planned the transfer for earlier in 2005 than March. Unlike *McCulloch*, Olson did not create the Trust for the purpose of defeating the NCC's unregistered interest in the Property, and I do not find the transfer of the Property to the Limited Partnership/Trustee was only completed in order to defeat the NCC's unregistered interest.

461 I also do not find it a reasonable expectation that Olson should have held off on the transfer he had always planned to effect of the Property to the Limited Partnership/Trustee, merely due to his knowledge of the dispute with the NCC over fencing. Nor does this constitute land titles fraud. Olson became frustrated at not being able to resolve the dispute and proceeded with his original plans, but his act of transferring the Property to an arrangement he had long before planned is not enough to satisfy the "something more" requirement. I therefore do not accept the NCC's submission on this point that Olson's behaviour in relation to the January 20, 2005 letter and his alleged acceleration of

the transfer was dishonest, deceptive, misleading or in any other way constituted the requisite "something more".

462 I also agree with the Waterton Parties' submissions that *McCulloch* is distinguishable, as the transfer from Mr. McCulloch to his numbered company occurred within days of being advised by the Department that their caveat had been accidentally discharged, in contrast to the facts of this case where the Property was transferred to a Limited Partnership/Trustee/Trust arrangement that had been planned for the very purpose of acquiring the lands some six months prior to the transfer of the lands and, more importantly, prior to any knowledge of the omission from the registration.

463 Although Olson and the Waterton Parties had knowledge of the improperly registered caveat on the titles (which knowledge I have imputed to the Waterton Parties based on Olson's *de facto* control over the Trust), on the facts before me there was no "additional element" that would justify a finding of land titles fraud.

4. **Presumption Against Fraud**

464 The Waterton Parties submitted fraud, even in the land titles context, should never be lightly inferred and cannot be presumed. They noted the presumption of a court is always against fraud and that findings against a person's integrity should not be lightly made. The Waterton Parties further submitted Dr. Lukowiak and Lemons, "two men of the highest standing in their respective fields and of the utmost integrity", were appointed as directors of the Trustee and at all times these two men directed and controlled the Trustee. The Waterton Parties characterized the NCC's argument of land titles fraud as a personal attack against these two directors, who were named Defendants in this Enforcement Action, and argued Lemons and Dr. Lukowiak were not necessary and proper parties to this Enforcement Action.

465 Although I do not agree that at all times Lemons and Dr. Lukowiak directed and controlled the Trustee (for reasons already given), I agree the NCC's allegation of land titles fraud against the two individual directors was without foundation and an unwarranted personal attack. An allegation of fraud should not be lightly made. In this case it was all the more unfortunate that the NCC embarked on this dangerous maneuver to stave off summary dismissal, despite all that it knew at the time.

466 Further, Dr. Lukowiak and Lemons were not necessary or proper parties to this Enforcement Action, as the registered owner of land is a corporation (the Trustee). The NCC responded during its opening statement that no monetary damages were being sought from the directors of the Trustee and they were essentially named for notice purposes. However, I agree with the submission of the Waterton Parties that throughout trial and in its final argument, the NCC directly attacked the credibility and integrity of these two individuals who should not have been named as parties to the Enforcement Action based on the facts.

467 I also accept the Bison Parties' argument that as of December 21, 2004 (when Simpson admitted to being aware of the missing page 5) the NCC could have taken preliminary steps to file a caveat to protect its unregistered interest in the Property. That NCC failed to do so promptly after December 21, 2004 (upon learning of the missing page 5), or after failing to receive a response to the January 20, 2005 letter, does not translate into Olson's transfer of the Property to the Limited Partnership/Trustee three months later being fraudulent or precipitated with haste.

5. **The Badges of Fraud**

468 Although I find the evidence in the facts before me does not support a finding of fraud under *LTA*, I will briefly deal with the NCC's submission regarding the "badges of fraud": factual scenarios that courts have identified as indirect or circumstantial evidence to establish fraudulent intent. These "badges of fraud" are applied in fraudulent preferences claims. See: *1007374 Alberta Ltd v. Ruggieri*, 2013 ABQB 420 at para 33; *FL Receivables Trust 2002-A v. Cobrand Foods Ltd*, 2007 ONCA 425 at para 39; *Builders' Floor Centre Ltd v. Thiessen*, 2012 ABQB 86 at para 13 (Master); *Optimax Developments Ltd v. Northport Industrial Park Inc*, 2012 ABQB 548 at para 17 (Master). In this context, "[t]he more badges of fraud that are proven, the stronger the *prima facie* case of fraudulent intent": *Moody v. Ashton*, 2004 SKQB 488 at para 143.

469 Badges of fraud represent circumstances courts have found to raise a suspicion of fraud, and are generally used in the context of fraud against creditors. The "badges of fraud" have not been used in land titles fraud and are not one of the preconditions for a finding of land titles fraud. However, the NCC argued the "badges of fraud" may be relevant in a case of land titles fraud to point out suspicious circumstances, where several of the badges are present.

470 The NCC argued the facts of the present case are analogous to cases of fraudulent conveyances, where a fraudulent conveyance is made to evade creditors; the NCC submitted Olson conveyed the Property to the Limited Partnership/Trustee in order to evade his legal obligations to the NCC.

471 The NCC said many of the badges of fraud were present here. The NCC said that: (1) the debtor continued in possession and used or benefited from the property; (2) the conveyance was secretly made; (3) a trust was created, "and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud"; (4) there was unusual haste to make the transfer; and (5) a close relationship existed between the parties to the conveyance.

472 However, on the facts as found there was not unusual haste nor use of a trust in order to effect a transfer to defeat the NCC's interest without fully alienating the land. Here the trust was the plan prior to knowledge of the omission and it was planned for unrelated reasons. I do not find Olson and the Limited Partnership/Trustee engaged in deception of the NCC. The transaction by which the Trustee acquired the Property was not suspicious.

G. **Did the NCC Issue the Tax Receipt in a Timely Manner and, if not, is it Liable in Damages to Olson?**

1. **Positions of the Parties**

473 The parties acknowledged the NCC was required by the Penny Ranch Purchase Agreement to issue to Olson a charitable donation receipt for tax purposes if the approximately $3 million Olson paid for the Property sufficiently exceeded its fair market value by virtue of the effect of the CE.[122]

474 The Bison Parties pleaded the NCC's failure to issue the Tax Receipt until December 2009 breached an express or implied term of the Penny Ranch Purchase Agreement requiring it to issue the Tax Receipt in a timely fashion.[123] They argued further that the NCC breached an implied duty of good faith and that it breached the fiduciary duty it owed them.

475 The NCC responded that its only obligation to Olson with respect to the Tax Receipt was to issue it to Olson in a reasonable time in the circumstances. The NCC argued that it did so by issuing the Tax Receipt in December 2009 and in the event I were to find otherwise (or find a breach of any other implied term to issue the Tax Receipt), Olson failed to mitigate by not applying for taxpayer relief.

2. **Implied Terms Generally**

476 There is no express term in the Penny Ranch Purchase Agreement imposing a deadline on the NCC for issuing the Tax Receipt to Olson or requiring the NCC to perform in good faith its obligation to issue the Tax Receipt. The issue is whether the Penny Ranch Purchase Agreement contains an implied term applicable to the timing of issuing the Tax Receipt.

477 There is a presumption at law against implied contractual terms: *Bhasin v. Hrynew*, 2013 ABCA 98 at para 27, leave to appeal to SCC granted, [2013] SCCA No 242; *Benfield Corporate Risk Canada Limited v. Beaufort International Insurance Inc*, 2013 ABCA 200 at para 112.

478 There are three bases on which courts find implied contractual terms: (1) legal incidents of a particular class of contract (*i.e.* by "operation of law"); (2) custom or usage; and (3) the presumed intentions of the parties: *Canadian*

Pacific Hotels Ltd v. Bank of Montreal, [1987] 1 SCR 711 at 773-777; *MJB Enterprises Ltd v. Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 27; *Double N Earthmovers Ltd v. Edmonton (City)*, 2007 SCC 3 at para 30.

479 The majority in *Benfield*, at paras 106-107, explained the two situations in which courts imply terms based on the presumed intentions of the parties:

> The first situation is where the term suggested is so obvious that it is not worth mentioning expressly. The classic example is as follows. Had some officious bystander observed the contract being made and asked the parties whether they intended a certain term to apply which is not expressly mentioned, they would have brushed off the bystander impatiently, saying "Oh, of course!"
>
> [...]
>
> The second situation where the courts will imply a term in a contract is where it is needed "to give business efficacy". In other words, without the term, the contract would fail completely [...] It is needed to make the contract work at all.

480 The officious bystander rule does not generally apply where the response of the bystander regarding the proposed implied term would be "well, probably": Geoff R Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis Canada, 2012) at 154.

481 Moreover "necessity" as described in the context of the business efficacy rule requires that the term be "truly necessary to make the contract work at all, not merely reasonable or fair": *Bhasin* at para 27; see also *Benfield* at para 108.

482 The majority in *Benfield* cautioned more generally at para 110:

> Nothing is more dangerous than courts constructing contracts which the parties did not make, to make the contracts more businesslike or more just [...] Or to make them into what the court supposes would be more businesslike or more just.

483 Cory JA (as he then was) cautioned with respect to implied terms in *G Ford Homes Ltd v. Draft Masonry (York) Co Ltd* (1983), 43 OR (2d) 401 at 403, 1 DLR (4th) 262 (CA):

> When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.

3. **The NCC was Contractually Obligated to Issue the Tax Receipt to Olson in a Timely Fashion**

484 Common law courts have long implied terms requiring contracts without express deadlines be performed within a reasonable time in the circumstances. Justice Fraser (as she then was) summarized the rule, in *Kam's Industrial*

Auctions Ltd v. 331616 Alberta Ltd (cob Ed Wiebe Contracting), 107 AR 363, [1990] A.J. No. 1243 at para 70 (QB):

> [T]he general principle is that where no specific time is stipulated for the performance of a promise or obligation or the exercise of a right, the court will infer that such promise, obligation or right is to be performed or exercised, as the case may be, within a reasonable time [...] Reasonable time, as was stated by J.S. Ewart in Waiver Distributed Among the Departments, Election, Estoppel, Contract, Release (Cambridge: Harvard University Press, 1917) at p. 106, is "a relative term", the length of which is a question of fact. As such, it is dependent upon a number of factors having regard to all the circumstances of a case including the type of contract involved, the subject matter and the parties: see *Karpa v. O'Shea* (1969), 3 D.L.R. (3d) 572.

485 The Bison Parties pleaded that it was a term of the Penny Ranch Purchase Agreement that the NCC would "in a timely fashion" issue the Tax Receipt to Wild West or its nominee. The NCC conceded in its closing submissions to the Court that it was bound by an implied term to issue the Tax Receipt to Olson within a reasonable time in the circumstances.[124]

4. **The NCC did not Issue the Tax Receipt within a Reasonable Time**

486 The NCC argued that issuing the Tax Receipt in December 2009 was reasonable in the circumstances because: (1) the parties did not have an acceptable appraisal until July 18, 2005, by which time Olson had alleged the CE was *ultra vires*; (2) it was not until October 19-20, 2009 that the NCC questioned Olson as part of the pre-trial discovery process and shortly thereafter (the NCC alleged) concluded the *ultra vires* claim was without merit and promptly issued the Tax Receipt; and (3) Olson received the Tax Receipt in December 2009 when he was still able to use it.[125]

487 I have already found the NCC's reason for delaying the Tax Receipt (at least until Demulder joined the NCC staff) was not Olson's claim that the CE was *ultra vires ALSA*, but was actually because Olson refused to permanently lower the maximum height of his fence. This was not a reasonable basis to withhold the Tax Receipt. The Tax Receipt was due to Olson because of his charitable gift, not conditional on or revocable for any post-gift conduct. Therefore the first two of those three NCC arguments (summarized in the previous paragraph) fail.

488 Justice Fraser (as she then was) stated in *Kam's Industrial Auctions*, at para 70, the determination of a reasonable period of time is "a question of fact" dependent on "all the circumstances of a case including the type of contract involved, the subject matter and the parties".[126] In *Karpa v. O'Shea*, 3 DLR (3d) 572, [1969] A.J. No. 4 (SC (AD)), the Appellate Division of the Supreme Court of Alberta determined what constituted a "reasonable time in the circumstances" to complete the purchase of farming land by looking to the standard practice in such agreements, stating at para 13:

> What was a reasonable time must depend on the circumstances of the case. One of the witnesses mentioned the necessity for concluding a sale agreement before the crop season is entered upon. This points up a fact which must be known to every legal practitioner in Western Canada, viz., that most agreements for sale are completed between the end of the harvest and the commencement of preparation for the seeding of the next crop. This was no doubt as well known to the appellant as to the respondents. When the respondent Mrs. O'Shea was advised that the only source of payment of the purchase price had been cut off by the refusal of the loan, she was, I think, entitled to conclude that the appellant was unable to complete within what had been a reasonable time and to treat the contract as at an end.

489 *ITA* and its regulations do not set any timeline that charities are required to follow in issuing a tax receipt. The CRA has "suggested" charities issue tax receipts by "at least the last day of February following the year during which

the gift was made": Interpretation Bulletin IT-110R3, *Gifts and Official Donation Receipts* at para 21.

490 Interpretation Bulletins are not law and therefore are not legally binding: *CLE v. BMR*, 2010 ABCA 187 at paras 33-34. Nevertheless, the parties' tax experts agreed charities generally follow this practice. Jules Lewy, the NCC's tax expert, stated charities "normally" issue tax receipts "by March or by February of the next year, frequently sooner than that" and in "today's world" charities normally issue tax receipts immediately. The Bison Parties' tax expert, Dr. Krishna, likewise confirmed: "Most usually, you make the donation in a particular year, and you get your receipt by February 28 or 29 of the subsequent year". Dr. Krishna replied in cross-examination to a question asking for confirmation that there was no law requiring a tax receipt be issued by February of the calendar year following the donation:

> There is no law, but as I think I say in my opinion, there is an interpretation bulletin by the CRA itself telling you when to issue the receipt, and that says it should be issued by the end of February, and that is in the official publication. So that is the rule that I'm citing to you -- not a rule of law, but a very strong rule of practise -- cited at page 5, and I cite paragraph 21 of Interpretation Bulletin IT110 R3. But it is suggested that it be issued at least by the last day of February.
>
> Otherwise, the entire scheme of charitable donations collapses.

491 Lewy explained the reason the end of February is suggested is "to give both trusts and individuals the opportunity to include it in their tax return". The general practice of charities to issue tax receipts by the end of February following the year in which the donation was made would have been well known to the sophisticated parties to the Penny Ranch Purchase Agreement. Specific to this transaction Simpson testified he understood the NCC would issue the Tax Receipt once the purchase was completed. Olson testified that based on the Technical Opinion he expected to receive the Tax Receipt in time to file it with his 2003 tax return.

492 Taxpayers can only use a charitable donation receipt to obtain tax credits in the taxation year in which the gift was made and any of the subsequent five taxation years. However, the longer a charity takes to issue a charitable donation receipt to the taxpayer, the less flexibility and control the taxpayer has over determining which available taxation year(s) to use the tax receipt. A delay in issuing a tax receipt reduces its monetary value, based on the time value of money. As Dr. Krishna put it: "It's highly inappropriate [...] Not issuing the receipt as promptly as possible. [...] Quite simply, there's a huge time value of money. It makes a great deal of difference to a taxpayer to be able to take the credit as expeditiously as possible. A credit taken five years later rather than today is worth less because of the time value of money." Therefore the sooner a taxpayer receives a charitable donation receipt, the greater its economic value.

493 I find a reasonable time in these circumstances *would have been* the end of February in the year following the gift. The gift was received by the NCC either September 30, 2003 (when Olson waived the conditions precedent in the O2P) or August of 2004 (when the NCC received the money from Olson). I need not determine which of those years the gift was received since the NCC did not yet have all the necessary input information by either of the associated deadlines. Most unusually, the NCC was precluded from issuing the Tax Receipt before either of those "February 28s".

494 The NCC was first able to issue the Tax Receipt when the amount of the gift became known from the acceptable appraisal, therefore on or shortly after July 18, 2005. Some amount of time was needed thereafter to confirm the acceptability of the final version of the appraisal (although the parties knew it was coming - Olson saw a draft well before its release and in June 2005 Hodgson knew its release was imminent - therefore this discussion could have commenced prior to receipt of the July 2005 Appraisal) and to initiate the internal process to prepare the Tax Receipt.

495 I find the NCC was experienced in issuing tax receipts to donors. The issuance of the Tax Receipt was overseen by Hodgson, a senior NCC employee. He directed staff that the Tax Receipt was not to be issued without his "explicit

approval". The NCC was aware of Olson's entitlement to the Tax Receipt and that the deadline for its issuance in accordance with standard practice had long since passed, as had the filing deadline for personal taxes for the immediately prior year, 2004. The size of Olson's gift was quite substantial in real terms plus, in relative terms, almost equal to the fair market value of the Property being acquired. The NCC was not reliant, as some charities are, on the availability of volunteers for such tasks.

496 In these circumstances I find the last day the NCC could render the Tax Receipt in compliance with the implied term of the Penny Ranch Purchase Agreement was August 31, 2005. The NCC did not issue the Tax Receipt to Olson within a reasonable time in the circumstances and therefore breached its implied obligation to Olson.

5. **An Implied Term of Good Faith Performance**

497 "Canadian courts have not yet developed a comprehensive and principled approach to the implication of duties of good faith in commercial contracts": *Transamerica Life Canada Inc v. ING Canada Inc* (2003), 68 OR (3d) 457 at para 52, 234 DLR (4th) 367 (CA). In Alberta, "[t]here is no duty to perform most contracts in good faith": *Bhasin* at para 27.

498 Associate Chief Justice O'Connor of the Ontario Court of Appeal (Sharpe JA concurring) commented in *Transamerica* at paras 51-52:

> Interestingly, when Canadian courts have referred to duties of good faith, they have done so in circumstances where the result of the case has been determined by the application of other, more established legal principles.
>
> [...]
>
> As Professor McCamus points out, many questions about the nature and scope of such duties have yet to be resolved. Indeed, it remains an open question whether implied duties of good faith add anything to the other available common law doctrines that apply to contracts.

499 And, as author Geoff R Hall put it in *Canadian Contractual Interpretation Law* at 331:

> The law of contractual interpretation is for the most part well settled and uncontroversial. The one glaring exception to this happy state of affairs is the duty of good faith. The question of whether contracts should be interpreted as requiring good faith in the performance of contractual obligations is, to put matters mildly, unsettled. [...] The state of the law is entirely unsatisfactory.

500 The Bison Parties placed considerable emphasis upon the trial decision in *Bhasin* in support of their position that the NCC was subject to, and breached, an implied term of the Penny Ranch Purchase Agreement that required it to perform certain contractual obligations in good faith. They said the NCC was required to issue the Tax Receipt in good faith, which they said included in a timely fashion. The Bison Parties argued that it was their reasonable expectation, based on the NCC's words and conduct in August to October 2003, that the NCC would issue the Tax Receipt to Olson in a timely fashion in order to allow him to effectively use it to reduce the amount of income tax he otherwise would have to pay.

501 Since the conclusion of argument in this case the Alberta Court of Appeal overturned the trial decision in *Bhasin*. There, and on at least one other occasion since this trial concluded (*Benfield*), the Alberta Court of Appeal has considered implied obligations on parties to commercial contracts to perform such contracts in good faith.[127]

502 The Bison Parties argued a term requiring the NCC perform its obligation to issue the Tax Receipt to Olson in good faith could be implied either by operation of law or based on the presumed intentions of the parties.

503 The NCC replied the Penny Ranch Purchase Agreement is not akin to any of the categories of contracts in which an implied term of good faith has been found to exist under the common law and there was no inequality of bargaining power between Olson and the NCC that would justify implying a duty of good faith performance.

i. *Was the NCC Required by Operation of Law to Perform its Obligations in Good Faith?*

504 In *Bhasin*, at para 27, and *Benfield*, at paras 105-107, the Court and the majority, respectively, did not include the operation of law as one of the means by which an implied term of good faith (or an implied term generally) could be found.[128] In *Bhasin* the Court overturned the trial judge's finding of a term of good faith implied by operation of law by, in part, referring to the two standards by which terms are implied based on the presumed intentions of the parties: paras 27, 31.

505 Therefore under current Alberta law it is doubtful that finding an implied term by operation of law is available in the circumstances of this case.[129] Even if such a finding is available, the Bison Parties have failed to meet the requirements they say are necessary in order to imply a term of good faith by operation of law.

506 The Bison Parties suggested the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd*, [1997] 3 SCR 701 at paras 91-92, enunciated the following three characteristics as identifying contracts by which duties of good faith performance could be implied by operation of law: (1) an inequality of bargaining power at the time the contract was formed; (2) the weaker person is unable to achieve more favourable contractual terms because of, for example, an inability to access information; and (3) the power imbalance continues to affect the relationship after contract formation. The Bison Parties argue that the Penny Ranch Purchase Agreement is representative of these three characteristics.

507 Without accepting whether the Supreme Court in *Wallace* intended these characteristics to have broad application for implying a term of good faith by operation of law, I find the facts of this case do not satisfy those characteristics. In particular, there was no power imbalance whatsoever at the time of the parties' negotiations. As the Bison Parties themselves argued in closing, Olson had a "strong negotiating position because the NCC badly needed to sell". They further submitted Olson successfully negotiated a number of "deal breakers"[130] with Green. This was anything but a situation in which the NCC dictated the terms of the purchase agreement. Therefore, I decline to find an implied term of good faith performance by operation of law.

ii. *Was the NCC Required Based on the Presumed Intentions of the Parties to Perform its Obligations in Good Faith?*

508 Finding an implied term of good faith performance based upon the presumed intentions of the parties considers whether it was so obvious that it went without saying (the "officious bystander test") or whether it was "truly necessary to make the contract work at all" (the "business efficacy rule"): *Bhasin* at para 27.

509 The jurisprudence on discretionary powers is instructive to any finding of an implied term of good faith based on the presumed intentions of the parties. The Bison Parties discussed this jurisprudence in the context of terms implied by operation of law. Current Alberta law suggests that is not available in these circumstances.[131] That jurisprudence therefore informs the analysis on terms implied based on the presumed intentions of the parties, therefore I consider it here.

510 The Bison Parties argued the NCC had unilateral discretion over "how, when and whether" it would issue the Tax Receipt and that this sole and unfettered discretion had to be exercised in good faith. However the only relevant discretion to the Bison Parties' argument on this issue is with respect to "when" the Tax Receipt was to be issued. The parties agreed it was part of the Penny Ranch Purchase Agreement that Olson would receive a tax receipt for the amount of the purchase price above fair market value of the encumbered property. Therefore, under the contract, the NCC did not have any discretion over whether to issue the Tax Receipt. While the NCC did have discretion over how it issued the Tax Receipt (which I interpret to be the content of the Tax Receipt), the Bison Parties did not argue the NCC

breached any implied term with respect to how it issued the receipt.[132] Instead, the Bison Parties focused on the timing of issuance. Thus, the issue in this case is over unilateral discretion in timing of performance.

511 Under current Alberta law, not all discretionary powers are required to be exercised in good faith. For example, the Court of Appeal in *Bhasin* held there was no duty to act in good faith in exercising a discretionary power under the parties' dealership contract that allowed either party to decline to renew the agreement by notifying the other in writing by at least six months prior to the expiry of the current term (otherwise, the contract automatically renewed for a successive three-year term).

512 The majority in *Benfield*, under the subheading "No Relevant Discretion Here", reasoned that Canadian appellate court decisions finding a duty of good faith in contracts involved a situation "in which one party entrusted the other a discretion to hold property for the other and exercise control over it in the interests of the other party" or a "fiduciary relation, or anything similar" was present: para 123.

513 That is not the sort of discretion that was left to the NCC here, therefore I do not find imported into the NCC's discretion around precisely when to issue the Tax Receipt any implied duty of good faith performance. Olson was not entrusting property to the NCC to control in the sense the Court of Appeal in *Benfield* suggests is required to trigger a duty of good faith. Each party had discretion in how they would perform the promises they exchanged in the Penny Ranch Purchase Agreement, but neither entrusted anything to the other in the more exceptional sense referred to in *Benfield*.

514 Even applying a standard of "significant discretion"[133] does not lead me to find an implied duty of good faith to issue the Tax Receipt in a timely fashion. I have already found the NCC was required under an implied term of the Penny Ranch Purchase Agreement to issue the Tax Receipt to Olson within a reasonable time in the circumstances (which here was no later than August 31, 2005). Its discretion on when to issue the Tax Receipt was therefore limited by the necessity that it be issued to Olson within a reasonable time. Applying the business efficacy rule, a duty of good faith performance on when to issue the Tax Receipt is not necessary to make the contract work at all. The officious bystander test is not satisfied here. Nothing about this agreement distinguishes it from any other contract that one "merely" expects its signatories to honour by their performance. Nothing here compels or even suggests the parties agreed to perform in good faith the contract, and that that went "without saying".

515 Some courts have implied a duty of good faith performance where necessary to ensure a party could not eviscerate the main objectives of the contract. For example, the Ontario Court of Appeal stated in *Barclays Bank PLC v. Devonshire Trust*, 2013 ONCA 494 at para 134, leave to appeal to SCC refused (2014), [2013] SCCA No 374:

> [T]his court has endorsed as an established principle that a duty of good faith arises when necessary to ensure that the parties do not act in a way that defeats the objects of the very contract the parties have entered.

516 In Alberta, Justice Kerans used similar language in writing for a unanimous bench in *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd*, 149 AR 187, [1994] A.J. No. 201 at para 22 (CA), leave to appeal to SCC refused, [1994] SCCA No 202:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties."

517 However the Court of Appeal in *Bhasin* was clear that *Mesa* did not find a general duty to perform contracts in good faith: para 27. I agree with Justice Topolniski's comment that "*Mesa* was not decided on good or bad faith principles as the court found the answer lay in the contract itself and the reasonable expectations it created about its

meaning and performance standards, having regard to the commercial context": *National Courier Services* at para 31.

518 The majority in *Benfield* raised the issue of good faith and eviscerating the main objectives of a contract when they stated at para 120:

> We cannot find any good authority in common-law Canada to import into contracts generally a duty to act in good faith, independent of the express terms, and where there is no question of eviscerating the main objectives of the contract. [Emphasis added]

519 The NCC argued that the question of whether its conduct eviscerated the main objectives of the Penny Ranch Purchase Agreement would only arise if it fell within the limited categories of contacts where the courts recognize a duty of good faith (contracts where there is an imbalance of bargaining power and control, *e.g.* insurance, employment and franchise contracts). Regardless, I find that in this case an implied term requiring the NCC to issue the Tax Receipt within a reasonable time in the circumstances suffices to ensure the NCC could not delay so long as to eviscerate Olson's ability to effectively use the Tax Receipt.

520 As a result I do not find an implied term of good faith based on the presumed intentions of the parties. Therefore, further, I will not consider whether the NCC's delay constituted bad faith.

6. **Fiduciary Duty to issue the Tax Receipt in a Timely Fashion**

521 The Bison Parties argued the NCC breached a fiduciary duty owed to Olson by failing to issue the Tax Receipt in a timely manner. They suggested a fiduciary duty arises on the facts of this case due to Olson's vulnerability to and complete reliance on the NCC with regard to the issuance of the Tax Receipt, which was in the NCC's sole and unfettered discretion and control.

522 The NCC replied it did not owe Olson a fiduciary duty and that, in the event it did, there was no breach. It submitted that no fiduciary relationship was created as no vulnerability could be attributed to Olson with respect to the timing of the issuance of the Tax Receipt and the parties never intended or created any fiduciary relationship. Regardless, the NCC maintained the Tax Receipt was issued within a reasonable time in the circumstances, given the Bison Parties' allegation that the CE was *ultra vires*.

523 Fiduciary obligations presumptively arise in a number of traditional categories of relationships, such as solicitor-client and principal-agent. However, fiduciary obligations can also arise on an *ad hoc* basis in relationships outside of these traditional categories where the facts support the imposition of such obligations: *Lac Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 SCR 574 at 597; *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 408-410; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para 33. The Bison Parties focused their argument on this latter category of *ad hoc* fiduciary relationships.

524 *Ad hoc* fiduciary relationships are rare between arm's length parties to commercial transactions. Justice Fruman explained in this regard in *Ironside v. Smith*, 1998 ABCA 366 at para 79:

> It is not uncommon for each participant in an arm's length commercial relationship to shoulder specific obligations. While they are contractually obligated to fulfil their responsibilities, participants neither relinquish their self interest, nor act solely on behalf of the other parties by agreeing to do so. Parties may depend upon each other to fulfil contractual obligations, without becoming peculiarly vulnerable or at each others' mercies. In a commercial environment, courts should be hesitant about grafting fiduciary duties onto contractual obligations, which are the very consideration for the parties' bargain.

525 In *Hodgkinson*, at 414, Justice La Forest discussed the importance self-interest plays in commercial transactions and the resulting rarity in which fiduciary obligations are found in arm's length commercial relationships:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest; see *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd, [1975] 1 S.C.R. 2; and *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co.*, [1958] S.C.R. 314.
>
> [...]
>
> No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle.

526 Justice Wilson, dissenting in *Frame v. Smith*, [1987] 2 SCR 99 at 136, identified three characteristics of fiduciary relationships, which the Supreme Court of Canada subsequently adopted in *Lac* at 599, 646 and in *Hodgkinson* at 408:

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

527 Recently the Supreme Court of Canada confirmed the requirements for a finding of an *ad hoc* fiduciary relationship. Among other things the Court confirmed that mere vulnerability is insufficient to ground a fiduciary claim: *Elder Advocates* at para 28. Our Court of Appeal summarized these developments in *Indutech Canada Limited v. Gibbs Pipe Distributors Ltd*, 2013 ABCA 111 at paras 37, 39:

> Justice McLachlin summarized the requirements for an *ad hoc* finding of a fiduciary relationship in *Elder Advocates* at para 36 as follows:
>
> > In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship described by Wilson J. in *Frame*; (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of person vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> [...]
>
> Justice Cromwell, in *Perez* at para 69, described that undertaking as follows: "a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party" and then at para 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed upon him or her". Justice Rothstein, in *PIPSC* at para 124, noted that such an undertaking "is now definitely a requirement of an *ad hoc* fiduciary relationship" and went on to say: "It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue."

528 This undertaking may result from "the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way": *Galambos v. Perez*, 2009 SCC 48 at para 77. Relevant factors to finding an implied undertaking include "professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty": *Galambos* at para 79.

529 The Bison Parties focused their argument on Olson's vulnerability and "total reliance" on the NCC with respect to issuing the Tax Receipt. However they did not point to any undertaking by the NCC, express or implied, in which the NCC agreed to forsake the interests of all others (including its own interests) in favour of undivided loyalty to Olson relating to when it would issue the Tax Receipt. Moreover the context involved (of Olson donating a gift to the NCC and of a contractual entitlement to a charitable donation receipt) strongly militates against the finding of a fiduciary relationship.

530 The Bison Parties submitted the facts in *Indutech* as analogous. However in that case the contract imposed express obligations of loyalty and non-competition: *Indutech* at paras 33, 35, 38, 40. The Penny Ranch Purchase Agreement contained no terms of this nature.

531 The Bison Parties have also failed to establish that Olson was sufficiently vulnerable such that a fiduciary relationship was created under the Penny Ranch Purchase Agreement. The implied term that the NCC issue the Tax Receipt to Olson within a reasonable time in the circumstances significantly reduces Olson's vulnerability.

532 The NCC was obligated under an implied term of the Penny Ranch Purchase Agreement to issue the Tax Receipt to Olson in a reasonable time in the circumstances. That the precise date of issuance was in the NCC's control, once it had all the necessary input data, and that Olson's legal interests could be impacted by the exercise of that discretion, do not alone transform the NCC into a fiduciary.

7. **Mitigation**

i. ***Positions of the Parties***

533 The NCC argued in the event it breached the Penny Ranch Purchase Agreement by failing to issue the Tax Receipt until December 2009, Olson is disentitled to damages on the grounds that his refusal to apply for taxpayer relief constituted a failure to mitigate his damages.

534 The Bison Parties submitted Olson fully discharged his duty to mitigate by using part of the Tax Receipt in his 2007 taxation year. Further, they disagreed Olson's duty to mitigate required he apply for taxpayer relief, which they characterized as "unreasonable", "not prudent", "risky or unsavoury" and "expensive and speculative".

535 The NCC replied the determinative factor on this issue is that Olson is a sophisticated tax lawyer and thus it is "sheer sophistry" for him to suggest a taxpayer relief application would be difficult, expensive, unreasonable or time consuming, particularly in light of the "very simple facts" of his case. The NCC alleged the real reason Olson refused to apply for taxpayer relief was he did not want to lose the claim for over $700,000 against the NCC, knowing that he could make the taxpayer relief application any time up to August 2014.

ii. ***The Duty to Mitigate***

536 A party that has suffered a loss from a breach of contract has a duty to take all reasonable steps to mitigate that loss. Failure to take reasonable steps to do so bars that party from recovering damages for the breach: *British Westinghouse Electric & Manufacturing Co, Ltd v. Underground Electric Railways Co of London, Ltd*, [1912] AC 673 at 689 (HL), adopted by the Supreme Court of Canada in *Asamera Oil Corporation Ltd v. Sea Oil & General Corporation and Baud Corporation, NV*, [1979] 1 SCR 633 at 661. This is because avoidable losses in such circumstances are, in effect, caused by the plaintiff's failure to take reasonable steps to mitigate: *British Columbia v.*

Canadian Forest Products Ltd, 2004 SCC 38 at para 176.

537 The burden of proof is on the party alleging another failed to mitigate, to prove that party failed to make reasonable efforts to do so and that mitigation was possible: *Southcott Estates Inc v. Toronto Catholic District School Board*, 2012 SCC 51 at para 24. As a consequence, "any gap in the evidence accrues to the plaintiff's benefit": *Christianson v. North Hill News Inc* (1993), 145 AR 58 at para 11, 13 Alta LR (3d) 78 (CA).

538 The duty to mitigate does not require an injured party to act perfectly. As our Court of Appeal explained in *Christianson*, at para 11:

> The most important and undoubted qualification on [the mitigation] defence is this. The efforts of the plaintiff will not be nicely weighed, particularly with hindsight. All that the plaintiff need do is to make what at the time is an objectively reasonable decision; he or she need not make the best possible decision. In particular, the courts will not usually expect one faced with a breach of contract to take steps which are risky or unsavory. [Emphasis added]

539 The standard for reasonableness in this context is "relatively low"; burdensome measures and speculative ventures are not required: *Davy Estate v. CIBC World Markets Inc*, 2009 ONCA 763 at paras 25-26; *Costello v. Calgary (City)*, 209 AR 1, [1997] A.J. No. 888 at paras 70, 73 (CA), leave to appeal to SCC refused, [1997] SCCA No 566. Put differently, the question is "whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice": *Calmonton Investments Ltd v. Tangye*, 87 AR 22, (*sub nom Tangye v. Calmonton Invt Ltd*) 1988 CarswellAlta 263 at para 30 (CA).

540 Therefore, to establish Olson failed to mitigate, the NCC must show Olson failed to make an "objectively reasonable decision" based on the facts known at the time, excluding any "risky or unsavoury" steps or speculative ventures.

iii. ***Taxpayer Relief***

541 Taxpayer relief is a discretionary authority granted to the Minister of National Revenue. As a practical matter, the CRA acts as the Minister's delegate in taxpayer relief applications. At the time of trial, there were three categories of taxpayer relief: (1) cancellation or waiver of penalties and interest (*ITA* s 220(3.1)); (2) accepting late, amended, or revoked elections (*ITA* s 220(3.2)); and (3) refunds or reduction in amounts payable beyond the normal three-year period (*ITA* ss 152(4.2), 164(1.5)(a)-(b)). This case concerns the third situation.

542 The Minister has authority under subsection 152(4.2) to grant a taxpayer's application for reassessment or redetermination beyond the normal three-year reassessment period for the purpose of determining a refund or reducing tax payable. Under paragraph 164(1.5)(b), the Minister has discretion to refund an overpayment of tax resulting from a reassessment or redetermination related to an adjustment made beyond the normal reassessment period under subsection 152(4.2). Taxpayer relief requests must be filed within 10 years of the end of the calendar year in which the taxpayer relief request relates.

543 The CRA has produced a manual for CRA employees who, as the Minister's delegates, apply the taxpayer relief provisions: *Canada Revenue Agency: Taxpayer Relief Procedures Manual* (April 2011; acquired via Access to Information request, August 2012) (the "**Manual**"). The NCC tendered the Manual as an Exhibit at trial and its tax expert relied on it extensively. The Manual's stated purpose is to "promote consistency and accuracy in decisions [the CRA] make[s] on taxpayer relief requests": Manual at p.7. The CRA's Information Circular IC07-1, "Taxpayer Relief Provisions" ("**IC07-1**") was also tendered as an Exhibit.

544 The CRA describes the purpose of the taxpayer relief provisions as follows:

> The legislation gives the CRA the ability to administer the income tax system fairly and

> reasonably by helping taxpayers to resolve issues that arise through no fault of their own, and to allow for a common-sense approach in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, could not comply with a statutory requirement for income tax purposes.
>
> [IC07-1 at para 8]

545 The situations under subsection 152(4.2) in which the CRA may issue a refund or reduce an amount owed are described as whether "such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct in law and has not been already allowed": IC07-1 at para 71; Manual at 92. This extends to non-refundable tax credits that an individual missed claiming in an available year and IC07-1 gives as an example submitting a tax receipt: IC07-1 at paras 72, 78; Manual at 92-93. According to the Manual, there do not need to be circumstances beyond a taxpayer's control for a request under subsection 152(4.2): Manual at 93.

546 As IC07-1 confirms, however, "These are only guidelines [...] not intended to be exhaustive, and [...] not meant to restrict the spirit or intent of the legislation": para 6. The Federal Court of Appeal has been clear that the Minister is not required to exercise his or her discretion in favour of the applicant taxpayer just because he or she would have been entitled to the benefit requested had it been claimed within the regular reassessment period: *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at para 27, leave to appeal to SCC refused, 2013 CarswellNat 729.

iv. ***Expert Evidence - Admission and Weight***

547 Both the Bison Parties and the NCC adduced expert evidence on Canadian taxation law which warrants a preliminary comment. During the trial I asked counsel to clarify whether I was to receive the tax experts' testimony as evidence as opposed to argument on a matter of law. "Questions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence": Justice Alan W Bryant, Justice Sidney N Lederman & Justice Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada Inc, 2009) at 832. In some cases this has resulted in provincial superior courts declining to rely on expert evidence on *ITA* or other taxation issues under federal jurisdiction: see, for example, *R. v. Century 21 Ramos Realty Inc* (1987), 58 OR (2d) 737, 37 DLR (4th) 649 (CA), leave to appeal to SCC refused, [1987] SCCA No 175; *Eco-Zone Engineering Ltd v. Grand Falls-Windsor (Town)*, 2000 NFCA 21; *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463.[134]

548 The parties never contested admissibility on these grounds.[135] They focused the tax experts' attention primarily onto the practices of the CRA in respect of the taxpayer relief process, rather than legal issues under *ITA* such as its proper interpretation or application. While the experts also gave their views on the content of several *ITA* provisions, I received them as contextual narrative for their opinions on the taxpayer relief process not as evidence, or argument for that matter, on matters of domestic law. I have, of course, taken judicial notice of *ITA*'s provisions and related Parliamentary proclamations, as required by the *Alberta Evidence Act*, RSA 2000, c A-18, s 32; see also s 18 of the *Canada Evidence Act*, RSC 1985, c C-5.

549 The more germane issue on the admissibility of expert evidence in this case concerns the evidence of Lewy's conflict and therefore potential for his bias. His ability to testify as an expert was opposed on the ground that he lacked independence, raising a reasonable apprehension of bias if not actual bias.[136]

550 I qualified Lewy to give expert evidence, as required by subsection 3(2) of the *Alberta Evidence Act*, which provides the evidence of witnesses with an interest in the matter in question "shall" not be excluded simply because of that interest. The Alberta Court of Appeal said in *Webb v. Birkett*, 2011 ABCA 13 at para 46, leave to appeal to Alta CA refused, 2011 ABCA 170:

> Lack of impartiality is no reason to reject a witness' testimony in and of itself, but rather a factor

> to be taken into account when assessing credibility and reliability; see *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 3. Simply because the expert once acted for one of the parties is no reason for an outright, unweighed rejection of his or her entire expert testimony.

551 Expert witnesses have a "duty to give independent and unbiased evidence": *Jacobson v. Sveen*, 2000 ABQB 215 at para 32. As Justice Moore explained in *Frazer v. Haukioja*, 58 CCLT (3d) 259, [2008] O.J. No. 3277 at paras 139-140 (Sup Ct J), aff'd 2010 ONCA 249:

> Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and it will accept nothing less.
>
> The court endeavours to adjudicate each matter coming before it fairly and free from bias. To the extent that the court must receive and rely upon the expert opinions of others and to the extent that those opinions are tainted, the administration of justice is imperiled.

552 In view of these circumstances, therefore, I ascribe less weight to Lewy's testimony, except where his opinion is "supported by other evidence and common sense": *R. v. Klassen*, 2003 MBQB 253 at para 32. For example, where Lewy based his testimony on CRA publications and the Manual, I am prepared to give it greater weight than where he did not. Given the important role the expert witnesses played in the mitigation issue, I have exercised caution in relying on Lewy's testimony.

553 Both Dr. Krishna and Lewy were experienced with taxpayer relief applications, though Lewy appeared to have more practical experience than Dr. Krishna by virtue of having worked on many of the 10 to 15 taxpayer relief applications his law firm's Toronto tax group handled annually, compared to Dr. Krishna's rough lifetime total of 20 to 25. More broadly, both witnesses possessed considerable knowledge and experience in the taxation of charities and Canadian income tax law generally, with Dr. Krishna in particular influencing the development of the law through his scholarly works regularly cited by courts, including the Supreme Court of Canada.

v. *The Taxpayer Relief Process and Findings Related to it*

554 The legislation does not set out a specific method for a taxpayer relief application. Lewy testified that an application generally begins with a letter to the CRA. There is a short form that can but does not have to be used: IC07-1 at para 77.[137]

555 Dr. Krishna explained that after the application is made, there is a long process of supplying information. There is no opportunity for oral representations or a hearing.

556 Lewy placed heavy emphasis on the Manual, and suggested he goes through it every time he makes a taxpayer relief application. Similarly, both experts testified regarding IC07-1.

557 The *ITA* and its regulations do not list specific criteria for the Minister to consider in exercising his or her discretion: *Lalonde v. Canada (Canada Revenue Agency)*, 2008 FC 183 at para 9. Therefore, the situation is as Justice Russell described in *Caine v. Canada Revenue Agency*, 2011 FC 11 at paras 33-34:

> Subsection 152(4.2) of the Act forms part of the taxpayer relief provisions, formerly referred to as the fairness provisions. The Minister's discretion is broad under the relief provisions. The Act and its regulations are silent as to what criteria are to be used by the Minister in exercising his discretion. In these circumstances, the Minister may use any criteria he chooses, as long as he abides by a general duty to act fairly in accordance with the rules of procedural fairness as

> developed in administrative law.
>
> [...]
>
> The Minister has created guidelines to facilitate the exercise of his discretion under subsection 152(4.2) of the Act. These guidelines are entitled IC-07-1 "Taxpayer Relief Provisions". Although the Minister can formulate these general policy guidelines, he cannot fetter his discretion by treating the guidelines as binding and excluding all other relevant reasons for exercising his discretion. Each fairness request is considered on its merits

558 If the taxpayer disagrees with the result, the taxpayer can request reconsideration, *i.e.* a second level administrative review. The taxpayer will then have the opportunity to make additional representations, which would go to a different CRA official. In the event the taxpayer believed that the second review was an improper exercise of discretion, the taxpayer could apply to the Federal Court for judicial review. The standard of review in such appeals is generally reasonableness: *Abraham* at paras 18-36. If the Federal Court were to determine the CRA administrative review erred, the only available relief is to send the decision back to the CRA for reconsideration by another delegated official: IC07-1 at paras 103-108.

559 The tax experts also spoke about the information requirements of taxpayer relief. Olson himself characterized the process as similar to an audit. Dr. Krishna likewise described the informational requirements as "very intense" and emphasized the Minister's delegates are "very careful in their scrutiny of these matters". However Dr. Krishna qualified his opinion by stating "it really will depend upon the complexity of the particular situation." Lewy characterized the process as "relatively straightforward" and "not a very complex application", with the CRA only occasionally asking for clarification on facts (which he said should not happen if the application is done properly the first time). For a situation like Olson's where the taxpayer would be applying to open a statute-barred taxation year, Lewy testified that generally all that is required is an explanation and proof the taxpayer is entitled to the change in their income or taxes.

560 I prefer Dr. Krishna's evidence on this point. He emphasized and I accept that the size of the Tax Receipt alone would lead to closer scrutiny and the "entire charitable donation regime [...] is under a microscope by the CRA." In the context of a $1.4 million charitable receipt following a technical opinion associated with draft amendments to *ITA*, with litigation pending, greater attention and time would be demanded of the Minister's delegate.

561 The tax experts differed markedly on the probable outcome if Olson had applied for taxpayer relief. Dr. Krishna opined it would be a "long and difficult process", with an end result that was "probably uncertain and unfavourable". Lewy differentiated kinds of taxpayer relief applications and opined, given Olson's type, he would have a very good chance of obtaining taxpayer relief. He acknowledged that involvement of the Minister's discretion makes it "impossible to give a black and white answer".

562 On this issue Lewy's potential bias is of particular concern. This is an important question in assessing the reasonableness of Olson's actions, which in turn affects whether he mitigated his damages, as a near certainty of success would likely require he apply despite some of the burdensome steps (*e.g.* documentary compliance). I therefore prefer Dr. Krishna's evidence on this point.

563 Therefore, regarding the taxpayer relief process, and upon review of their respective evidence, I find: (1) the Manual sets out a number of non-binding guidelines that the Minister may or may not follow in a given application; (2) a taxpayer relief application can be very expensive for a taxpayer, but if Olson were to apply it is likely he would do the bulk of the work, and any additional costs would likely be reasonable mitigation costs he could have claimed as damages; (3) the documentary and follow-up requirements in this case would be considerable; (4) the CRA would be very careful before deciding whether to grant relief; (5) Olson would likely be waiting over a year and possibly several

years for a response, with multiple requests for documents to be submitted during this time; (6) Olson would not be treated differently by virtue of his status as a tax lawyer;[138] (7) that the proposed transaction as outlined in the Technical Opinion did not occur precisely as stated would not likely have a material impact on Olson's chances for taxpayer relief; (8) Olson's chances of obtaining taxpayer relief in the circumstances are highly uncertain and at least one highly-respected, independent taxation practitioner, Dr. Krishna, would not have recommended at the time that he even apply; and (9) in not proceeding with such an application, I find Olson was not influenced by the effect any such successful claim might have had on his Counter-claim against the NCC.

vi. ***Conclusion on Mitigation***

564 Olson gave his own reasons for refusing to apply for taxpayer relief and for why he felt his decision was reasonable at the time.

565 He refused to apply based on his professional experience with such applications and his dealings with the CRA. He viewed an application to be "a bit of a fool's errand" and referred to the completely discretionary nature of taxpayer relief applications.

566 Olson said he was well known to the CRA. He believed the CRA did not owe him "anything in the way of a favour" and he was "not on their Christmas card list". His experience with taxpayer relief applications to that point had been "totally unsuccessful". He also suggested there was no access to an independent arbiter. He found "tax bureaucrats, the auditors and the CRA [...] just hard to work with, that's all" and characterized working with bureaucrats as "not pleasant".

567 I again note a taxpayer relief decision based on bias against Olson would be unreasonable, per the Manual and Federal Court jurisprudence. The CRA would not decline Olson's taxpayer relief application on the ground of his profession or his past dealings with the CRA. I disagree with Olson's apprehension having legal merit or being objectively reasonable.

568 With respect to taxpayer relief applications, Olson described the scrutiny as "intense". Sometimes, he said, more information is required than in an audit. He later described the process as an "uber-audit", where the CRA wants to know "everything about it". As I discussed above, I accept that the taxpayer relief process, particularly in the circumstances of this case, may require significant documentary compliance.

569 Olson also maintained that the date of the gift on the Tax Receipt was incorrect and, as a result, he would be unlikely to succeed in a taxpayer relief application. As issued, the Tax Receipt indicated the date of closing as the date of the gift. Olson claimed the date of the gift should have been the date on which he waived the conditions to the O2P, as in his opinion the gift was completed on that date. The NCC argued this position was "untenable", as it had not received the purchase funds from Olson on that date and did not do so until closing.

570 The NCC bears the onus of establishing that Olson's refusal to apply for taxpayer relief was unreasonable and has failed to meet that onus.

571 Taxpayer relief is entirely discretionary. The result of any taxpayer relief application is highly uncertain; even if a claim had indisputable merit and was filed properly earlier, the CRA may decline taxpayer relief. In this case, any such application would have related to the Split Receipt Provisions that were still in draft form, increasing the probable levels of attention the application would receive, the time it would require, and the uncertainty of its outcome.

572 In this case a taxpayer relief application would have proceeded while this litigation remained unresolved. That litigation included questions about the terms of the CE Amending Agreement and the validity of the CE, which formed the basis of the appraiser's quantification of, in effect, the amount of the Tax Receipt. The taxpayer relief application would have required considerable documentary compliance that, with multi-defendant litigation ongoing, would have taken on added complexity. The slow pace of taxpayer relief applications meant further that it very easily could have

continued through trial,[139] exacerbating that complexity.

573 In the face of these circumstances I do not consider Olson's duty to mitigate to have required he apply for taxpayer relief. Olson was not required to make the "best possible decision" and exhaust all potential avenues to reduce his damages. All he was required to do was make an objectively reasonable decision. On the facts of this case, I am satisfied he did so by using as much of the Tax Receipt as possible in his 2007 taxation year.

8. **Remedy**

574 The Bison Parties sought damages payable to Olson in the amount of $702,000 for the late issuance of the Tax Receipt. They calculated this by subtracting the tax savings Olson obtained as a result of his actual use of the Tax Receipt from the tax savings he could have optimally obtained had he received the Tax Receipt in 2006.

575 The NCC did not object to the calculations submitted by the Bison Parties. However it pointed out the Alberta tax credit percentage was raised in 2007 to 21 percent from the previous 12.75 percent. Based on Lewy's estimations, the NCC argued Olson obtained an advantage of $97,000 by using the Tax Receipt in 2007 as opposed to what he would have obtained had the tax credits been claimed for the 2004 and 2005 tax years.

576 Compensatory damages for breach of contract are intended, as far as can be done by a monetary award, to put the innocent party "in the same position as he would have been in if the contract had been performed": *Wertheim v. Chicoutimi Pulp Co*, [1911] AC 301 at 307 (PC); *Bank of America Canada v. Mutual Trust Co*, 2002 SCC 43 at paras 26-27.

577 The Bison Parties quantified damages based on three spreadsheets prepared by Olson and submitted as Exhibits at trial. Those spreadsheets summarized Olson's tax situation by reference to his assessments and reassessments, also submitted as Exhibits. One of the spreadsheets summarized Olson's tax situation prior to the application of any losses or the utilization of the tax credits associated with the Tax Receipt. Another described the actions Olson would have optimally taken to use his tax losses and tax credits associated with the Tax Receipt had it been issued in 2006. The final spreadsheet showed the way in which Olson actually used his tax losses and tax credits associated with the Tax Receipt after receiving it in December 2009.

578 If Olson had received the Tax Receipt within a reasonable time in the circumstances,[140] he would have paid $1,895,407.75 less in taxes.[141] In contrast, after receiving the Tax Receipt in December 2009, Olson's tax savings were limited to $1,193,594.22. The Bison Parties' damages claim is therefore the difference between these two numbers: $701,813.53. I award that amount. I do not reduce it by a further $97,000 since Olson's calculation of the amount he was able to recover was based upon the "benefit" he received by using the higher Alberta tax credit rate. That is, he already factored it in to his calculation. Interest is payable thereon by the NCC from August 31, 2005.

H. **Is the NCC Liable in Damages for Withholding the Endorsements?**

579 Moose Mountain claimed the NCC made a promise to Olson to provide the Endorsements: in order to induce Olson to purchase the Property from the NCC in 2003, Green allegedly advised Olson the NCC would provide the Endorsements for Olson, whose goal was to establish a niche market for OHCB.

580 The Bison Parties alleged the NCC refused to provide the Endorsements and failed to provide any recognition whatsoever of Olson or Moose Mountain as being a significant donor and conservationist. Accordingly, the Bison Parties argued the NCC is liable to Moose Mountain for: (1) breach of a collateral contract; (2) negligent misrepresentation; (3) unlawfully interfering with its economic relations; (4) bad faith; and (5) breach of fiduciary duty. Moose Mountain sought damages of $3,325,000.

581 The NCC urged the claim be summarily dismissed, stating it had not been pleaded. In the alternative, the NCC argued all allegations having to do with the Endorsements were founded upon Olson's testimony alone. The NCC

maintained Olson was not credible in any of his evidence.

582 I deny the claim for two reasons. First, I am not persuaded that any cause of action against the NCC for the alleged Endorsements came to vest in the entity now claiming it: Moose Mountain. If Olson owned the cause of action, as I find was the more likely case, nothing in the Moose Mountain Lease conveyed to it more than a leasehold interest in the Property. No causes of action based upon the alleged Endorsements that Olson may have owned also passed to Moose Mountain as a consequence of the Moose Mountain Lease. If Wild West owned the cause of action, which I find below was not proven, Olson's testimony that Moose Mountain acquired all the assets and liabilities of Wild West was not confirmed by any documentary evidence.

583 The Bison Parties did not explain how the alleged Endorsements became actionable by Moose Mountain other than by citing those two pieces of evidence: the Moose Mountain Lease and Olson's brief testimony on the point. I am surmising they might argue that because Wild West became the offeror on the O2P, therefore all Green's alleged Endorsements-related discussions with Olson either were all along directed to Wild West or became the property of Wild West simply because Olson chose that entity to become the offeror. All the NCC's direct dealings with Olson at the times material to this issue were by Green. She understood the Tax Receipt was integral to any possible agreement they would reach. I find it implausible that she would have thought any Bison Party (if she was aware of the existence of any of the others) other than Olson in his personal capacity would acquire the Property and thereby utilize the Tax Receipt.[142] Olson structured his affairs with considerable acumen and planning, for permissible purposes. Among others, he used separate holding entities, legal personalities and operating structures to protect affected assets from liability risks. But those same lines of distinction that accord that liability protection ought not to be ignored so just any of Olson's entities can make the Endorsements claims.

584 Second, and in any event of the first reason, I am not satisfied that the Endorsements as alleged were ever made. On this record I find they were not. The wording of the Penny Ranch Purchase Agreement was quite specific on the other issues negotiated between Olson and Green,[143] even if erroneously so on the fencing provision in the CE Amending Agreement, yet did not speak to the Endorsements. Simpson denied any knowledge of the Endorsements, which I accept. Although the negotiation with Olson was entirely with Green, if the Endorsements or any one of them were essential to procure an offer from Olson, Green in her careful-to-not-overstate manner would have raised this with Simpson. These were things outside her ability within the organization to deliver. She would have raised it with Simpson to get approval before making anything close to an assurance. I find she did not.

585 I am not persuaded on a balance of probabilities from this evidence that Green ever promised, assured or did anything from which it might reasonably have been inferred that the NCC would make the Endorsements, conditional on his purchase of the Penny Ranch, gratuitously that Olson relied upon, or in any other way. General discussion of what the NCC could also do for Olson may have occurred, but has not been proven on balance.

586 I find that if any such discussions of that sort occurred between Olson and Green, they were precipitated by Olson's possibility thinking and entrepreneurial enthusiasm, not by Green. Green's careful and cautious manner made it extremely implausible that, on behalf of the NCC, she over-promised, promised at all, or said anything that could even have misled Olson about such things. He was anything if not astutely perceptive. At most Green would have remained silent or smiled deferentially if he ever did mention such things. Certainly nothing occurred in regard to the alleged Endorsements beyond discussion, and I am not persuaded that any such discussions even occurred. And if they did their discussions were precatory, not actionable.

587 The documentary record does not support the existence of any obligatory Endorsements - neither arising from the pre-contractual discussions or from the post-closing matters over a year later. After the conclusion of the transaction, and the relationship between the parties soured, none of the documents suggest Olson spoke to the NCC about the NCC delivering on the alleged Endorsements, as representations that he had relied upon or as collateral agreements or as implied terms of their formal agreements. Olson made no follow-up formal demands to extract the alleged Endorsements from the NCC, similar to those he made in respect of the missing Tax Receipt. Olson did later urge the

NCC to introduce him favourably to the community (and educate the community) but in the context of addressing the NCC's nascent public relations issues. Notably, when doing so Olson did not accompany his urgings with anything in the nature of "it was part of our deal" or "you promised".

588 I find the alleged Endorsements did not induce Olson to purchase the Penny Ranch, were not consideration for his purchase/donation, were not agreed to collaterally, were not misrepresentations by the NCC and the NCC did not owe Olson and Moose Mountain a duty of good faith or fiduciary duty. Olson entered into the Penny Ranch Purchase Agreement without any expectation of any Endorsements. He planned to use for marketing purposes the reference he expected to see in the NCC's applicable annual report, but nothing the NCC did promised him it would refer to the gift in that publication, assured him that it would be published, represented that it would happen or expressed confidence that it would happen. The NCC certainly did not assure him of the Endorsements or any one of them provided that he acquire the Property with excess payment as a donation.

589 The NCC's general practice was to acknowledge its major donors such as Olson with a one-line reference in its applicable annual report. The NCC chose not to do that in Olson's case, given what was transpiring between them at the times of publication. It was under no legal obligation to acknowledge Olson in that manner. At the time of agreeing to purchase the Penny Ranch Olson justifiably expected it would occur, but he did not have an enforceable entitlement for it. I do not fault the NCC, in these circumstances, for choosing to omit reference to Olson's gift.

590 I therefore deny this part of the Counter-claim in entirety.

I. **Did the NCC Breach an Obligation to Interpret and Enforce the CE in Good Faith?**

591 The Bison Parties argued the NCC agreed during negotiations of the O2P that it would not interpret and enforce the CE in a manner to prevent Wild West or its nominee from bison ranching on the Penny Ranch, which the Bison Parties submitted was an overarching purpose and objective of their agreement. The Bison Parties submitted the NCC breached a duty of good faith in relation to this promise by: (1) interpreting the CE to prevent Olson from erecting necessary fencing to contain bison on the Penny Ranch; (2) seeking to enforce the CE based on a "political, fundraising and public relations agenda", contrary to the parties' reasonable expectations that the NCC would approach the relationship from a conservation science perspective; and (3) commencing an unjustified enforcement process, culminating in this Enforcement Action, without inquiring into the conservation aspects of the New Fence. As a remedy for this alleged bad faith conduct, the Bison Parties requested the Court sanction the NCC's conduct by ruling against the NCC and rendering a decision that ensures Moose Mountain is able to raise bison on the Penny Ranch, including maintaining the New Fence.

592 The NCC replied that Canadian law does not recognize a stand-alone, general duty of good faith between parties to commercial contracts and the Penny Ranch Purchase Agreement does not fall within the limited categories of cases in which such a duty has been recognized (*i.e.*, contracts where there is an imbalance of bargaining power, such as employment, insurance and franchise contracts). The NCC also submitted it did not act in bad faith, as: (1) it was not an objective of the Penny Ranch Purchase Agreement that Olson be enabled to set up a bison ranching operation; and (2) there is no evidence that Olson required the New Fence or any fence higher than 48 inches to carry on bison ranching on the Penny Ranch.

593 Given my previous findings, particularly the Agreed Fence Height Restriction, the Bison Parties are not prevented from using the Penny Ranch for bison ranching. However, here the Bison Parties' allegation is that the NCC forming the conclusion that the CE was breached and then commencing and prosecuting this Enforcement Action were themselves breaches of another term of their agreement, an implied term. That is, they say implicit in the agreement was a term that it would not be interpreted or enforced in a way that prevented bison ranching.

594 While at trial the contracting parties both acknowledged their mutual understanding at the time of contract formation was that Olson would use the Property to ranch bison,[144] I do not find an implied term requiring the NCC to

interpret and enforce the CE in good faith. I discussed current Alberta law on the limited duty to perform contracts in good faith in the context of the Bison Parties' argument relating to the NCC's delay in issuing the Tax Receipt to Olson. The Bison Parties argued an implied term to interpret and enforce the CE in good faith (to permit bison ranching on the Property) also arises in this case based on the parties' intentions at the time of contracting. I find a term requiring the Bison Parties to interpret and enforce the CE in good faith is not necessary to give the Penny Ranch Purchase Agreement business efficacy and similarly find that it does not meet the officious bystander test. The NCC's interpretation and enforcement of the terms of the Initial ACA CE (as amended by the CE Amending Agreement) does not fall under the type of discretionary power that a majority of the Alberta Court of Appeal in *Benfield* (see para 123) found good authority for implying a term of good faith. The Bison Parties referred to the trial decision in *Bhasin* and submitted the facts of that case are "on all fours with this case" regarding the NCC's alleged agreement not to interpret the CE in a way to prevent bison ranching on the Property. However, the Court of Appeal in *Bhasin* overturned the trial decision and held there was no duty of good faith performance with respect to the discretionary termination provision at issue in that case.

595 The Bison Parties' suggestion is a very large step removed from the sort of "reasonable expectations of the parties" implied limitation in the case law they cited. Those cases address the terms to be performed (such as in *Mesa* the exercise of discretion by one party on behalf of the other) not the meta-issue of the approach to determining or enforcing non-performance of such a term. How an agreement will be interpreted and how it can be enforced are the subjects of established law. Parties can expressly choose different interpretive laws to govern interpretation and different enforcement methods to govern in the event of a perceived breach. Typically, express terms are used to accomplish this. As examples at the extreme end, choice of laws clauses and choice of forum or alternate dispute resolution clauses are used. The infinite range of prefacing steps or pre-conditions to enforcement was available to these parties. The Bison Parties offered no good authority for now implying such matters into their contract.

596 The parties to the agreement spent considerable time and effort negotiating their terms, finding an acceptable balance between their competing interests: bison ranching on the one hand and wildlife migration on the other hand. The balancing of and interplay between those competing purposes was captured in the written terms of their agreement. Neither is paramount to the other, except as expressly captured in the written terms of the agreement. It does not include the term the Bison Parties now suggest. I am not about to imply a term that upsets or varies that balance.

597 Olson and Green negotiated a number of amendments to the Initial ACA CE, however, they did not amend the broad enforcement provision in Article 7.2, which provides:

> 7.2
>
> This Agreement may be enforced by the Grantee upon the default of the Grantor of any provision or element herein, regardless of the degree or significance of the breach or default.
> [...]

598 Therefore the NCC maintained a broad right to enforce. Olson and the NCC turned their minds to all the terms of the Initial ACA CE. They chose not to amend or supplement Article 7.2 as part of their CE Amending Agreement. The express terms of the Initial ACA CE and CE Amending Agreement reflect the balance struck by the parties To interpret the Initial ACA CE in the manner argued for by the Bison Parties would re-write this aspect of their agreement to make paramount the ranching of bison over the conservation interests of the NCC.

J. **Is the NCC Liable for Punitive Damages?**

599 The Bison Parties also Counter-claimed for punitive damages in the amount of $1 million, or such other amount fixed by this Court. The Bison Parties submitted the conduct of the NCC can be characterized as "high-handed, malicious, arbitrary and highly reprehensible" and was a "marked departure" from ordinary standards of decent behaviour, and the Court ought to award punitive damages in an amount assessed by the Court to be reasonably

proportionate to the "egregiousness" of the NCC's conduct and the harm caused to the Bison Parties.

600 The NCC responded there was no evidence of any malicious, oppressive or high-handed conduct on the part of the NCC and therefore no basis for punitive damages.

601 Punitive damages are awarded in "exceptional cases" to punish defendants for misconduct that is "so malicious, oppressive and high-handed that it offends the court's sense of decency" and "represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras 36, 69, 94; *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196. As a general rule, punitive damages are only awarded where the defendant's misconduct would otherwise be unpunished or other penalties are inadequate to achieve the general objectives of retribution, deterrence and denunciation: *Whiten* at para 94. Punitive damages may be awarded for a breach of contract where the defendant's conduct constitutes an independent actionable wrong: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085 at 1106; *Whiten* at para 78. The Supreme Court of Canada confirmed in *Whiten* that the independent actionable wrong requirement can be met not only by establishing an independent tort, but also "in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation" or a contractual duty of good faith: paras 82-83.

602 I agree with the NCC that the facts here do not warrant an award of punitive damages. First, the Bison Parties have not established an independent actionable wrong that caused injury to any Bison Party. Unlike the insurance contract in *Whiten*, the Penny Ranch Purchase Agreement does not contain any duty of good faith on which this Court could ground an independent actionable wrong.

603 Second, the NCC's wrongful conduct was not "so malicious, oppressive and high-handed that it offends the court's sense of decency". Moreover an award of punitive damages is not necessary to further the objectives of retribution, denunciation and deterrence. The compensatory relief granted herein, along with the Court's discretion on costs, avails ample scope to adequately achieve these objectives in this case.

VII. **CONCLUSION**

604 My decisions are summarized at paragraph 17 above.

605 If they cannot agree, the parties may arrange to speak to costs and implementation of this decision.

P.R. JEFFREY J.

1 Statement by the NCC's counsel at trial: "I should also point out to you, Sir, that the two gentlemen who ostensibly are in control of the trustee, Messrs Lemons and Lukowiak, have been named as defendants. You will perhaps note, Sir, in the pleading that we do not seek any remedy against them in the nature of damages et cetera, but since they are presumably the controlling mind of the Trust ultimately, and of the land company, and of the Limited Partnership, it was important, in my view, that they be named to the extent that a mandatory injunction is being sought, and to the extent that a declaration as to the validity of the conservation easement is sought. So they are parties but out of necessity. I think there are some reported cases referring to a defendant being named for notice purposes. And I think these gentlemen fall into all of those categories but certainly without any claim of monetary damages against them." The NCC did not provide any such case authority for that proposition and approach.

2 The number in brackets following each issue is a reference to the first paragraph of the discussion of that issue.

3 See, for example: *The Conservation Easements Act*, SS 1996, c C-27.01; *The Conservation Agreements Act*, CCSM c C173; *Conservation Land Act*, RSO 1990, c C.28; *Natural Heritage Conservation Act*, CQLR c C-61.01; *Conservation Easements Act*, RSNB 2011, c 130; *Conservation Easements Act*, SNS 2001, c 28; *Wildlife Conservation Act*, RSPEI 1988, c W-4.1; *Environment Act*, RSY 2002, c 76.

4 *ALSA* s 34(1).

5 *ALSA* s 34(1).

6 *ALSA* s 32(1).

7 These changes were: (1) a further purpose was added to what is now *ALSA* s 29(1): "the protection, conservation and enhancement of agricultural land or land for agricultural purposes"; (2) a definition of "registered owner of land" was added to *ALSA* s 29(2); (3) a reference to settlement patented land was added to *ALSA* ss 32(3) and 34(4); (4) a requirement to notify the Minister of Infrastructure and the Minister of Transportation prior to the registration of a conservation easement was added to *ALSA* s 33(2); and (5) the power to make regulations was moved to what is now *ALSA* s 35.

8 See *ALSA* s 68: "(1) A conservation easement granted or registered, or granted and registered, under the *Environmental Protection and Enhancement Act* before the coming into force of this section is deemed for all purposes to have been granted or registered or granted and registered, as the case may be, under this Act and continues with the same effect under this Act. (2) The *Conservation Easement Registration Regulation* (AR 215/96) made under the *Environmental Protection and Enhancement Act* remains in force and is deemed to have been made under this Act."

9 *ALSA* s 30(1).

10 *ALSA* s 22(8).

11 *Municipal Government Act*, RSA 2000, c M-26.

12 *ALSA* s 33(1).

13 Simpson testified he could not recall if the NCC purchased the Property in 2000 or 2001, and whether the original purchase price at that time was $3.2 or $3.3 million. I will assume an original purchase price of $3.3 million given that the NCC wanted to sell the Property for what it paid in order to break even, and it was listed in 2003 for $3.3 million.

14 Penny Ranch Baseline Report at 39.

15 Penny Ranch Baseline Report at 39: "This is not surprising, since cattle have to descend to lower levels for water and require higher energy expenditure to climb to higher pasture."

16 Penny Ranch Baseline Report at 35.

17 Penny Ranch Baseline Report at 48.

18 Subsequent to the completion of the Penny Ranch Baseline Report, the NCC as landlord entered into new Grazing Lease Agreements (each a "**Grazing Lease**" and collectively the "**Grazing Lease Agreements**") for certain sections of the Property. On May 26, 2003, the NCC entered into a Grazing Lease with Michael Bonnertz for a period of three months. It entered into a similar Grazing Lease with Grant McNab on June 9, 2003, for three months. Although the Grazing Leases were entered into after the Penny Ranch Baseline Report (and therefore presumably the NCC had full benefit of the information contained in the Penny Ranch Baseline Report), the Grazing Plan for 2003 described in Schedule "C" of the Bonnertz Grazing Lease only contained the following grazing term: "The tenant shall stock the Premises with a maximum of 130 cow calf pairs and 6 bulls. Over a 3-month grazing period this is a maximum of 408 AUM (130 AU for 4 months plus 9 AU for 2 months). Said Animals will be rotated through the premises in order to maintain healthy forage cover. Salt will be used to encourage good distribution." [Emphasis added] Similarly, the McNab Grazing Lease had the following term in Schedule "C": "The tenant shall stock the Premises with 65-70 cow calf pairs and 3-4 bulls. Over a 3-month grazing period this is a maximum of 219.6 AUM (70 AU for 3 months plus 6 AU for 1.6 months). Said animal [sic] will be rotated throughout the premises in order to maintain healthy forage cover. With particular attention being paid to the forage cover in NE 21-30-3 W4. Salt will be used to encourage good distribution." [Emphasis added]

19 Penny Ranch Baseline Report at 51.

20 NCC Grazing Plan at 1.

21 The Split Receipt Provisions were brought into force by the *Technical Tax Amendments Act, 2012*, SC 2013, c 34, ss 358(30), (54), assented to on June 26, 2013. They are found in subsections 248(30)-(33) of *ITA* and apply retroactively to gifts and monetary contributions made after December 20, 2002.

22 This particular requirement (that the "purchase and sale documentation will indicate that the payment of the Excess Amount [*i.e.* amount

of the purchase price above fair market value of the encumbered Property] is intended to be a gift from the Purchaser to [the NCC]") was not followed. Olson was given a copy of the Technical Opinion on August 28, 2003, containing this requirement. This may have been before or after his offer to purchase was submitted by Wild West that same day, on August 28, 2003. It did not contain any indication that a portion of the purchase price was a gift, other than perhaps what might be inferred from the reference in the context of the conditions precedent, that Olson review and find satisfactory the "tax ruling" obtained by the NCC "respecting the charitable donation receipt that the Purchaser is expected to receive in conjunction with the purchase". The NCC did not actually receive a tax ruling; it received a technical opinion from the CRA. That Offer to Purchase was accepted by the NCC August 29, 2003, without any amendment to include that a gift was intended by the amount the purchase price exceeded the fair market value.

23 Green did not recall much about this meeting other than dining on OHCB and that Olson "talked a lot about grass"; she "was quite surprised to have somebody [...] talk about grass so much".

24 Olson and the NCC discussed the possibility of Olson purchasing land adjacent to the OMB land so that the NCC and Olson could ranch bison in cooperation using common facilities and employing Olson's system, in an attempt to restore the fescue rangeland at that location.

25 Simpson testified:

Q And so all of the negotiations between the NCC and Mr. Olson leading up to the sale of the Penny Ranch to him and to Wild West were between Mr. Olson and Ms. Green, correct?

A I would have to qualify that because Margaret Green would have had, you know, face-to-face discussions with Mr. Olson, but negotiations in terms of what clause the Nature Conservancy could and couldn't enter into I would have been a part of, as well, between Margaret Green and myself.

Q Well, we are going to get to that, sir, but the discussions, the direct discussions, were all between Mr. Olson and Ms. Green, correct?

A That's correct.

26 Email from Bob Alexander (Executive Assistant to the President of the NCC) to Simpson and Green (and others) dated May 8, 2003 confirming projects approved by the Executive Committee at the meeting of May 8, 2003 including: "Sale of Spionkop-Penny property (no less than $2,562,500)."

27 Olson testified: "I had an understanding, a very clear understanding, that the NCC supported my goals. It was in the NCC's best interests that I take that land. That is what I was told. They wanted me there, they didn't want some other beef rancher. Margaret Green wanted me there, and she wanted me to be there because I had a record of taking care of the land. So I understood what that -- I understood that I would get a tax receipt for that, but if the NCC was going to promote me and help me to do that other stuff, that is -- wasn't in writing, I acknowledge that, and obviously if I dealt with the NCC in the future it would be, but in this case it was I trusted that those inducements that I was being -- they were trying to persuade me to buy the property and the fact that we had common interests and they could help me out with this, I trusted that would happen. And those references were told to me to support my bison conservation project, just like the NCC had a bison conservation project and I expected the NCC to be good for their word and promote me."

28 Simpson testified: "We certainly always, once a tax receipt is issued we, unless otherwise advised, we provide recognition in our annual reports and sometimes other publications. It just depends on the significance of the property, and so forth. [...] We don't agree to do an infomercial because someone makes a donation, but there is some properties that do stand out and we maybe try to highlight them, sure."

29 Simpson's testimony at trial on the fencing provision was inconsistent. Although he admitted he was not aware what specific fencing discussions occurred between Green and Olson, and that he had no experience with bison fencing (thus leaving the negotiations to Green), he also stated with certainty that he never would have agreed to the version of the fencing provision argued by Olson. Simpson also testified that the "wildlife-proof" restriction was only meant to apply to interior fences and the "original size and same location" clause was meant for perimeter fencing: "Well, I would never -- I didn't agree to anything different than the original size and the same location, it was just have been foolhardy because the words wildlife-proof, that clause in the agreement was designed [...] to fence a haystack so that elk couldn't get in, and you would never use a clause like that so that the entire perimeter of a ranch could be fenced with that kind of a fence. [...] and the word wildlife-proof, you know, we were thinking mainly [...] of herds of elk and [...] deer and things like that that -- because the broader context of wildlife could be a magpie or a squirrel and clearly they would make it through a page-wire fence, or even a 10 foot fence, but

that's really what we are focusing on with this clause." I find Simpson formulated this reasoning in hindsight, after the O2P had already been negotiated and accepted by Green on behalf of NCC and the neighbours' complaints started coming in to the NCC (discussed below). I find these comments of Simpson's inconsistent with the majority of other evidence, including some of his own, and with the context. I do not prefer his recollections in this regard over the recollections of the direct participants in the negotiations: Olson and Green.

30 Olson testified: "The one was the -- they concluded there was five acres that I could move the house to. The second was to ensure that we could cut trees down, protect [electrified] fence lines, and the third was to ensure that I didn't have to go back and negotiate a grazing plan every year, as long as my grazing -- as long as the land improved, that was left to my personal decision and not an arbitrator's."

31 In coming to this conclusion I accept that, by August 2003, Olson: (1) had a great deal of experience in the fencing required to lawfully contain bison in Alberta and Saskatchewan; (2) was of the opinion that a fence at least five feet high was necessary to effectively contain bison; (3) was aware of the potential significant liability that could result from bison escapes; and (4) believed that the existing fencing on the Property would be completely inadequate to contain bison.

32 Olson's approach suited the NCC, since, for example, by raising the bottom strand of wire higher off the ground a fence could become more permeable to more wildlife than would be impeded by also raising the top strand of wire, as Olson told Green he intended. Overall this would reduce the impediment to, among other species, the juvenile ungulates that the NCC was concerned about.

33 Olson testified: "Well, in 2003, the only restriction was if I was going to build a new fence, that is one where one didn't exist, I needed to get their permission and the other provision that I was agreeable to which is at the end of paragraph 15 and says, in no event, however, shall the tenant build fences which would restrict the movement of wildlife. And I was in full concurrence with that."

34 Simpson testified:

Q And so the answer to my question is Margaret Green did not raise with you any problems or issues in terms of her negotiations with Mr. Olson about -- over the fencing provisions, correct?

A Not that I -- not that I recall, no.

35 I find Olson's testimony on this point reliable because it was associated with the memorable experience, the uniqueness and pressure of the moment that he recalled in detail, with his van just outside his office full of his wife and nine children plus all their summer vacation belongings, waiting on him - waiting to depart on vacation while he was yet again having to deal with something at his office, plus the significance of the commitment he was making upon signing the O2P. Although it does not necessarily follow from this that Olson's recollection of the specific terms he earlier negotiated with Green is reliable, I am confident that his recollection of *the process that was followed* that day (his signing the O2P in blank and entrusting its accurate revision to Bryden) was reliable.

36 Bryden's testimony also confirmed the sequence of events that afternoon, that Olson signed the O2P in blank and then entrusted it to her to finalize in accordance with his instructions: "So I would've sent out [...] first version, I guess. 2:24, right, is the first [...] version. So I would've sent the first version of the document, realized I'd made a mistake, sent out the 2:25 version, thinking that was final. Olson would've looked at that, there would've something about the improvements he would've wanted changed. Then he would've left the office, I would've made the change, I would've sent it out."

37 That fencing provision, which was not incorporated into the final O2P, read as follows: "The Grantor may maintain, replace and repair the fences, roads, buildings and other improvements located on the Property as of the date of this easement. The fences, roads and other improvements are to be maintained, replaced or repaired. If any or all of the buildings are removed or destroyed, the Grantor may replace them with structures of a similar purpose at or near the same location within the existing 5 acre home site. Any building construction shall require the prior notice to the Grantee."

38 Wild West Lease clause 17: "The tenant shall not construct any roads or facilities on the premises without the written consent of the landlord."

39 Referring to Olson's own summary entitled "Grazing Management Plan at Mile High Ranch", the entry for 2003-2004 stated the "Plan" was "to graze between 200 to 250 bison during the winter, particularly at higher elevations", whereas the "Actual" that occurred stated "upon further inspection of the ranch, did not bring any bison to the ranch. Rested the ranch". The document was prepared with this litigation in mind but its contents were consistent with other evidence of what occurred and its reliability was not undermined through cross-examination.

40 Olson testified in cross-examination: "Having a big receipt that you can't defend is worthless. [...] what was important to me was I get something that's defensible. [...] I was just looking for methodology that was defensible."

41 Simpson said such a meeting did not take place. On these points I prefer Olson's testimony.

42 Green could not recall when exactly she left the NCC, but it was after sending her letter of May 13, 2004, and prior to June 2004 when Hodgson met with Simpson and Olson at the Westin Hotel.

43 That fencing provision in the CE Amending Agreement that Simpson said he discussed with Olson was actually the Replacement Fence Height Restriction, not the Agreed Fence Height Restriction that Olson had agreed to orally and that he believed was in their sale agreement. Therefore at this meeting if Simpson truly raised the matter of fencing then they each had in their minds a different fencing provision and were speaking at cross purposes.

44 Simpson testified: "I mean, this was -- if he had any concerns about the fence design that was there, or needed to embark on some great grand redesign of it, then would have been the time. If he -- if we had have had any inkling that he needed something completely different, we would have either -- we would have either found a mutually agreeable accommodation or we would have just unwound it and said, you know what, here's your money -- here's your deposit back, we'll find another buyer who is more appropriately aligned for this property. It would have been that easy."

45 At the time (effective July 1, 2004) Olson was not actually the registered owner of the Property, despite the fact that the Moose Mountain Lease stated that he was. His company, Wild West, had entered into the Wild West Lease with the NCC as of October 1, 2003; therefore Wild West was a tenant only, having leased the land from the NCC for a term of less than a year. However, Olson later became the registered owner of the Property, as nominee of Wild West. Olson was not the party whose offer to purchase the Property was accepted, yet was its nominee and ultimately its actual purchaser.

46 For both annotations, see Exhibit 34.

47 Schedule "A", s 1 of the CE Amending Agreement incorrectly read as follows: "Subsection 1.1 a. 1. of Schedule B of the Agreement is hereby clarified by the parties agreeing that each of the quarter-sections of the Property may be separately transferred, sold or otherwise disposed of by the Grantor." [Emphasis added] This reference was to the original Schedule "B" to the Conservation Easement Agreement with the ACA.

48 Olson testified on this point specifically that the NCC advised him on two occasions - in November 2004 and on December 21, 2004 - that this design was acceptable to it: "And then the top wire, that was an innovation for this ranch. We have not done it on any other ranches. It was an innovation and it was an attempt to collaborate with the NCC on a public relations problem they seem to be having with the fence. There were some people complaining about the fence looked too high. So the idea was we could drop the fence down when the bison weren't there. It looks like a normal height of a beef fence at that point. Four-foot-six is a little higher than you would typically see on a beef fence but the rest of it, if a hunter was hunting back there and he saw the four-foot fence, looks no different than the beef fence. So from a public relations perspective we thought that that was something we're prepared to do to help the NCC out."

49 Olson testified:

Q And those two portions of fencing, did you have an understanding of whether [...] the new fence was constructed inside or outside the boundary?

A We [...] really didn't know, we just built it [...] inside, so it wasn't further outside our property because they didn't want us to touch the fence.

50 Of losing the support of the NCC patrons, Simpson testified: "we had one -- one lady that was going to will her estate to us and she backed away because she said, 'Well, how can I trust you guys?'"

51 Simpson testified: "Well, when the Nature Conservancy owns property, people feel like it's going to be protected for -- forever. That we sold property was a bit of a stretch for us, but we thought we had designed an easement to make sure it was well protected. And so people who were calling were -- how could we let -- you know, they had the attitude of how could we, the Nature Conservancy, let this happen. They were very concerned. They could immediately see the size of the fence and could see that there would be problems in terms of wildlife movement through this area. [...] We -- we don't have a printing press that makes money. All we have is our good name and our reputation that's built on trust and integrity. And so we attempt to make sure that we do our work in a quiet non-adversarial fashion achieving lasting meaningful results and if we lose the trust or respect of people who support our work, or landowners who work with us as well, or a community, that's a big problem for us."

52 As Simpson testified, it was significant because: "our ability, as you've heard earlier today, is about 6 million acres of ecologically significant land in the settled area of Alberta, far beyond the range of our ability to conserve much of these lands with just pure private sector philanthropy. We need to be able to partner with Provincial and Federal agencies and all this depends upon community support. So a letter of this nature going to the minister was -- would not be helpful."

53 Transcript of the December 2004 phone call between Olson and Simpson, wherein Simpson stated: "You know what they all said when they left, I'm told. They said the Nature Conservancy is on trial, and many of them are getting ready to send the letter to their MLA, who is now the minister of resource development." This sentiment from Simpson, that "the NCC is on trial", was repeated in other correspondence and I find it was his primary concern.

54 For example, just across the border in Montana, Bryce Christensen, a witness who testified for the NCC on bison fence requirements, admitted in testimony that "bison are still a little contentious with our neighbours".

55 Transcript of telephone conversation in December 2004 between Olson and Simpson, and discussed in Simpson's examination.

56 For example, in the same telephone conversation in late November or early December 2004 between Olson and Simpson, Simpson spoke of one neighbour in particular, Ron Mantle, an adjacent neighbour to Olson on the eastern side of the Property: "[...] maybe even bring Ron Mantle as well into the conference call because he has a good sense of the community [...] Ron will be able to sell this to the community better than anyone and if Ron is satisfied with the protocol, then this thing will fly and there is not much danger for me and if it is a design that he just looks at and says this is ridiculous, my God, the warning bells go off for me like crazy because I realize this is potentially going to be [...] well it's going to cost us our capacity to work with the province is what it will", remarking on the same call that Mantle was "a key link into the community; a key link for me, anyway; his judgment and his feelings on this matter a great deal to me." [Emphasis added]

57 At this point, Simpson was not aware of the missing page 5 in the registration on the titles.

58 From the NCC document entitled "Olson Property Review", likely prepared by Larry Simpson for the NCC Regional Board.

59 For example, Olson's neighbour Ron Mantle described how Olson's winter grazing plan was at odds with cattle grazing in the summer: "when all adjacent ranchers [...] are grazing theirs down during the summer and [...] you're growing grass for winter grazing, the next thing, you have [...] two feet of grass on your side of the fence and -- and very little on the other side, the animals get to pushing the fence and -- and getting [...] off your property onto the neighbour's property."

60 In Saskatchewan, where Olson also has a ranch, it is necessary to install a fence at least five feet high in order to comply with *The Stray Animals Act*, RSS 1978, c S-60. This is significant because, although not this jurisdiction, it supports Olson's proposition that in his experience containing bison requires a fence higher than a standard four-foot cattle fence, or the NCC's 40 inch fence.

See *The Stray Animals Regulations, 1999*, RRS, c S-60, OC 400/1999, Reg 1, s 18(b):

> **Lawful fences**
>
> **18** Subject to section 29 of the Act and sections 19 and 20 of these regulations, a fence must meet the following minimum requirements to be a lawful fence: [...] (b) for bison, five or more barbed or high tensile wire strands secured to substantial posts that are not more than 7.5 metres apart, the strands of wire being 30 to 35 centimetres apart, with the lowest strand being not more than 30 to 35 centimetres from the ground [.]

61 Rather, the NCC relied on Simpson's "research" on fence height, which included his reviewing various reports, in coming to his unqualified opinion that fences higher than 40 inches have an impact on wildlife mortality.

62 Simpson's response to this was: "Well, we looked at the scientific studies that indicated high-tensile electrified fences over 40 inches would be problematic, and they were field-tested by respected entities, and we didn't feel that we could bring a lot more to the table. So no, we did not participate."

63 Olson used different trusts to hold different properties, which included the Ruth Doxy Trust. According to Olson: "Well, the Ruth Doxy Trust was involved in the Bragg Creek Ranch and Moose Mountain Buffalo Ranch. The William Bell Hardy Trust acquired the Cypress Hills Ranch, the Wild Horse Ranch, and it also has the other land, the bulk of the other land on the Milk River Ridge, the -- I believe it's called the -- either the Olson Conservation Trust or the Manitoba Conservation Trust. I think it's Manitoba Conservation Trust is the owner of all the deeded land in Manitoba. A -- a trust can't own or -- or lease government leases, so it's required that that be held by individual hands. So, I and other family members own the two corporations that lease land in Manitoba. The Thorpe property is owned by [...] the George Whitehead Trust. And then the Waterton Land Trust owns all of the other land."

64 *Business Corporations Act*, RSA 2000, c B-9, s 122(1):

Duty of care of directors and officers

122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation, and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

65 Dr. Lukowiak said he did not know where the money came from to make the purchase; he did not know that the Trust was the general partner of the Limited Partnership; he was not sure how the structure actually was or how it evolved; he said the structure was Lemons' area of expertise but Lemons left this transaction to Dr. Lukowiak; Dr. Lukowiak swore the Affidavit of Value on the Transfer but had no idea who arrived at the value that he swore to ($1.4 million); he did not know the amount owing under the mortgages to which the Property would be subject; he did not know the final purchase price for the Property; he had never seen the Trust Deed for the Trust; he confirmed that as a director of the Trustee, he has not had anything to do with the Trust under the Trust Deed; he did not know why Olson and his wife Carolyn were excluded beneficiaries under the Trust; he did not understand the structure of the transaction using the Limited Partnership, Trust and Trustee; and he confirmed that he did not really understand the implications of what he was doing.

66 Trust Settlement s 9.5: "The Protector shall owe no fiduciary duty toward nor be accountable to any person as a result of its position of Protector irrespective of any personal interest or conflict of interest held by the Protector."

67 Trust Settlement s 11.4: "The Trustee may exercise its authority under Clauses 11.1 and 11.3 only if: (a) the Protector is an individual listed in Schedule 6; and (b) the Protector has granted its written consent."

68 Trust Settlement s 8.1(a): "The Trustee shall automatically cease to be a Trustee hereunder in the event: (a) The Protector issues a notice that states that the Trustee is removed[.]"

See also Trust Settlement s 8.3: "The Protector shall have the power at any time by written instrument to appoint a Qualified Person to act as Trustee [...]."

69 Trust Settlement s 2.6: "Notwithstanding the foregoing, the Trustee may not exercise its authority under Clauses 2.1, 2.2, 2.3, 2.4 or 2.5, unless the Trustee has given at least thirty days['] advance written notice to the Protector of the Trustee's intended exercise and the particulars thereof, unless the Protector has waived the requirement for such notice."

70 Donovan WM Waters, QC, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Ltd, 2012) at 3, quoting GW Keeton and LA Sheridan, *The Law of Trusts*, 12th ed (London: Barry Rose Law Publishers, 1993) at 3.

71 Waters, Gillen & Smith, *Waters' Law of Trusts in Canada* at 930: "it is elementary that the trust is not a legal person which holds rights".

72 *ABCA* s 33:

33(1) A corporation may in the capacity of a legal representative hold shares in itself or in its holding body corporate unless it or the holding body corporate or a subsidiary of either of them has a beneficial interest in the shares.

(2) A corporation may hold shares in itself or in its holding body corporate by way of security for the purposes of a transaction entered into by it in the ordinary course of a business that includes the lending of money.

(3) A corporation holding shares in itself or in its holding body corporate shall not vote or permit those shares to be voted unless the corporation

(a) holds the shares in the capacity of a legal representative, and
(b) has complied with section 153

(4) A corporation shall not permit any of its subsidiary bodies corporate holding shares in the corporation to vote those shares or permit those shares to be voted unless the subsidiary body corporate satisfies the requirements of subsection (3). [Emphasis added]

ABCA s 153:

Duties of registrant

153(1) Shares of a corporation that are registered in the name of a registrant or the registrant's nominee and not beneficially owned by the registrant shall not be voted unless the registrant, forthwith after receipt of the notice of the meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents, other than the form of proxy sent to shareholders by or on behalf of any person for use in connection with the meeting, sends a copy of those documents to the beneficial owner and, except where the registrant has received written voting instructions from the beneficial owner, a written request for voting instructions.

(2) A registrant shall not vote or appoint a proxyholder to vote shares registered in the registrant's name or in the name of the registrant's nominee that the registrant does not beneficially own unless the registrant receives voting instructions from the beneficial owner.

(3) A person by or on behalf of whom a solicitation is made shall, at the request of a registrant, forthwith furnish to the registrant at that person's expense the necessary number of copies of the documents referred to in subsection (1) other than copies of the document requesting voting instructions.

(4) A registrant shall vote or appoint a proxyholder to vote any shares referred to in subsection (1) in accordance with any written voting instructions received from the beneficial owner.

(5) If requested by a beneficial owner, a registrant shall appoint the beneficial owner or a nominee of the beneficial owner as proxyholder.

(6) The contravention of this section by a registrant does not render void any meeting of shareholders or any action taken at a meeting of shareholders.

(7) Nothing in this section gives a registrant the right to vote shares that the registrant is otherwise prohibited from voting.

(8) A registrant who knowingly contravenes this section is guilty of an offence and liable to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

(9) If the registrant who contravenes this section is a body corporate, then, whether or not the body corporate has been prosecuted or convicted in respect of the contravention, any director or officer of the body corporate who knowingly authorizes, permits or acquiesces in the contravention is also guilty of an offence and liable to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

73 *CBCA* s 2(1): ""personal representative" means a person who stands in place of and represents another person including, but not limited to, a trustee, an executor, an administrator, a liquidator of a succession, an administrator of the property of others, a guardian or tutor, a curator, a receiver or sequestrator, an agent or mandatary or an attorney". [Emphasis added]

74 *ABCA* s 1(x): ""person" includes an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative."

75 *ABCA* s 34(1)-(2):

34(1) Subject to subsection (2) and to its articles, a corporation may purchase or otherwise acquire shares issued by it.

> **(2)** A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that
>
> (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due, or
> (b) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

76 The July 2005 Appraisal determined values based upon a CE Amending Agreement containing the Replacement Fence Height Restriction, or something close thereto (perhaps containing the Further Error), not the Agreed Fence Height Restriction. I find that any difference in the fair market value of the Property as at July 18, 2005, between the value determined by Smith based upon the incorrect fence height provision and the actual value based upon the correct fencing provision to be *de minimus*. While the different fencing provisions were very important to the parties to this action, they would be of little import to the pool of potential willing arm's length purchasers. The CE restricted ownership of the Property in many other and far more significant ways than fence height, limiting the pool of potential purchasers going forward to farmers or cattle ranchers, neither of which would reduce the price they would be prepared to pay for the Property because of the marginally relaxed difference in fencing restrictions. I find the July 2005 Appraisal to be reliable despite it working from an inapplicable fencing provision.

77 Pre-trial questioning, read-in at trial.

78 In the listing brochure for the Penny Ranch, it was advertised under the heading "Tax Implications" that: "The property is listed at $3,300,000. The appraised value of the property with a conservation easement is $2,000,000, referred to as the 'Base Price'. If a purchase price of $3,300,000 is received, a tax receipt of $1,300,000, which is the difference between $3,300,000 and $2,000,000, may be issued to the purchaser. The tax receipt may in fact reduce the after tax cost of purchase by approximately $521,844 only if the purchaser is an individual, Alberta resident, and uses the full value of the tax receipt during the year of the gift and the ensuing 5 years."

79 See also, *ITA* ss 188.1(7)-(10), 188.2.

80 The Bison Parties and the NCC each adduced expert evidence in Canadian taxation law.

81 When Hodgson was asked why he made the decision not to issue the Tax Receipt, he gave a single justification: "If the conditions of the conservation easement weren't being met, it didn't seem appropriate to provide compensation for a conservation easement." Hodgson did not mention the enforceability or validity of the CE even though Olson's counsel advanced that position some years earlier.

82 The NCC's Reply and Joinder of Issue alleged that the CE was in "substantially the form commonly used by the [NCC] over huge tracts of land throughout Western Canada" (para 5) and the NCC "continues to utilize" this form of CE (para 9). The NCC emphasized this same point in its closing argument, where it stated "any question about the validity or enforceability of its standard form conservation easement such as was used for the Penny Ranch, went to the very heart of the conservation work being conducted by the NCC across Canada." Simpson testified: "We, some time ago, identified the use of conservation easements as an important tool and framed much of the conservation work we were going to be delivering in Alberta within this umbrella of conserving working landscapes places." The NCC continued to use conservation easements following the *ultra vires* allegation, with 10-21 new properties acquired, at least some of which it further described as "conservation lands and easements" encumbered in Alberta each year from 2005 to 2011, despite some partner companies apparently moving away from using conservation easements because of this litigation.

83 These minutes make no mention of the *ultra vires* allegation, but do state "continuing infraction of our easement with fencing".

84 The taxpayer relief process is described below at paragraphs 541-546.

85 Because Olson had net losses for income in his 2008 and 2009 taxation years, there was no benefit to him using the Tax Receipt in either of those taxation years.

86 Olson's net income in those eligible years was such that he could have used all of the Tax Receipt.

87 See generally: *ITA* ss 118.1(1), 118.1(3), 152(3.1)(b), 152(4), 152(4.2), 164(1), 164(1.5)(a)-(b); *Alberta Personal Income Tax Act*, RSA 2000, c A-30, s 11.

88 See *Code* at 7, Preface: "Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise

indicates an unsuitability to practise law. However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public." [Emphasis added]

89 See *Code* at 110, Commentary: "Whether the activity in question is entirely unrelated to the practice of law or overlaps with the practice to some extent, the profession through the Society must maintain an interest in its nature and the manner in which it is conducted. While the Society's primary concern is with conduct that calls into question a lawyer's suitability to practise law or that reflects poorly on the profession, lawyers should aspire to the highest standards of behaviour at all times and not just when acting as lawyers. Membership in a professional body is often considered evidence of good character in itself. Consequently, society's expectations of lawyers will be high, and the behaviour of an individual lawyer may affect generally held opinions of the profession and the legal system."

90 See para 126.

91 See also *Bhasin v. Hrynew*, 2013 ABCA 98 at para 27, leave to appeal to SCC granted, [2013] SCCA No 242: "Parol evidence is not to be used directly to interpret a contract (a) if its words are unambiguous, (b) or to look at the actual subjective intent of one or both parties."

92 Rectification is not the only exception to the parol evidence rule. For example, extrinsic evidence may be admitted to establish a misrepresentation inducing a contract or as evidence of a collateral contract or warranty: *Guarantee Company of North America v. Pashley Farms Limited*, 2013 ABCA 102 at paras 12-13.

93 The Bison Parties in their closing brief submitted that the parties agreed to the following fencing provision: "The Grantor may maintain, replace and repair the fences, roads, buildings and other improvements located on the Property as of the date of this easement. The fences and roads are to be maintained, replaced or repaired."

94 *BG Checo* at 23-24: "It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole".

95 *Tercon* at para 64: "The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."

96 Both the Bison Parties and the Waterton Parties made multiple legal arguments on each of the issues to be considered by this Court. I have summarized and address the primary arguments warranting attention, and generally refer to which party made the argument. In certain cases, both the Bison Parties and Waterton Parties made similar arguments so they will be collectively referred to as the "Defendants".

97 The Y to Y corridor refers to a conservation initiative to preserve a corridor of natural habitat and landscape between Yukon and Yellowstone. As Simpson explained: "Well, [...] it's a band along the edge of the Rockies where wildlife are more likely to move north and south than they are if they go 2 miles west. 2 miles west of here you are into a place where it would be really difficult for it to readily move 2 or 3 miles north, whereas at this location, on the Prairies, on the Penny Ranch, you could readily move 2 or 3 miles north, provided you are not being inhibited with some sort of impediment. [...] I guess probably 15 years ago or so, the whole notion of Yukon, the Yellowstone was -- was a conservation theme that emerged and the idea was that we should try and maintain enough of this remnant habitat so that the genetics of a bear that might be in Yellowstone could ultimately, over generations of time, end up farther north, or a wolf vice versa, or an elk, or you know, any of the wildlife. They wanted to maintain genetic continuity right from Yellowstone all the way to the far north. And there is places where that continuity is -- is pretty limited and this [corridor] happens to be one of them."

98 Section 31 of *ALSA*:

> **Modification or termination of conservation easement**
>
> **31** A conservation easement may be modified or terminated
>
> (a) by agreement between the grantor and the grantee, or
> (b) by order of a Designated Minister, whether or not the Designated Minister is a grantor or grantee, if the Designated Minister considers that it is in the public interest to modify or terminate the conservation easement.

See also subsection 33(4) of *ALSA*:

Registration of conservation easement

[...]

(4) If a conservation easement is modified or is terminated, one of the parties to the agreement, or a Designated Minister in the case of a modification or termination of the conservation easement under section 31(b), must register a copy of the document effecting the modification or termination with the appropriate Registrar, and the Registrar must endorse a memorandum on the certificate of title to the estate or interest in land noting the modification or discharging the registration, as the case may be.

99 See *ALSA* ss 28(a)-(b):

Definitions

28 In this Division,

(a) "grantee" means the recipient of a conservation easement and includes a successor, assignee, executor, administrator, receiver, receiver manager, liquidator and trustee of the grantee;
(b) "grantor" means the person who grants a conservation easement and includes a successor, assignee, executor, administrator, receiver, receiver manager, liquidator and trustee of the grantor;

100 See *ALSA* s 28(c):

(c) "qualified organization" means

(i) the Government,
(ii) a Government agency,
(iii) a local government body, or
(iv) a corporation that

(A) has as one of its objects the acquisition and holding of interests in land for purposes that are substantially the same as any of the purposes for which a conservation easement may be granted,
(B) has in its constating instrument a requirement that, on or in contemplation of the winding-up of the corporation, all conservation easements that the corporation holds are to be transferred to another qualified organization, and
(C) is a registered charity within the meaning of the *Income Tax Act* (Canada).

101 *LTA* s 68:

Grant of easement, etc. by owner to himself or herself

68(1) An owner may grant to himself or herself an easement or restrictive covenant for the benefit of land that the owner owns and against land that the owner owns and the easement or restrictive covenant may be registered under this Act.

(2) When the dominant and servient tenements are registered in the name of the same person, an easement under subsection (1) is not merged by reason of the common ownership.

See also, e.g., *Sturgeon Hotel Ltd v. St Albert (City)*, 2010 ABQB 725 at para 80.

102 *LTA* s 60:

Obligation affecting land

60(1) The owner of land in whose name a certificate of title has been granted shall, except in case of fraud in which the owner has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which the person claiming priority or any person through whom that person derives title has held possession.

103 *LTA* s 203:

Protection of person accepting transfer, etc. 203(1) In this section,

(a) "interest" includes any estate or interest in land;
(b) "owner" means

(i) the owner of an interest in whose name a certificate of title has been granted,
(ii) the owner of any other registered interest in whose name the interest is registered, or
(iii) the caveator or transferee of a caveat in whose name the caveat is registered.

(2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,

(a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

(3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

(4) This section is deemed to have been in force since the commencement of *The Land Titles Act*, SA 1906 c24, in place of section 135 of that Act and similar sections in successor Acts.

104 To illustrate, the rectification provisions (ss 159 and 160) of the Ontario *Land Titles Act*, RSO 1990, c L.5 (the "**Ontario *LTA***") differ from s 190 of *LTA* in that the powers of the court in Ontario to rectify title are explicitly qualified by the proviso: "Subject to any estates or rights acquired by registration under this Act". The absence from Alberta's statutory provision on rectification of any such explicit qualification suggests that s 190 accords the Alberta Court broader jurisdiction to rectify title. Despite this qualification under the Ontario *LTA*, the doctrine of indefeasibility of title is still not absolute in Ontario. The equitable principle of notice has been held to apply to indefeasibility of title in allowing the court to rectify title where a party had notice of an unregistered interest, as discussed in *Durrani v Augier* (2000), 50 OR (3d) 353, [2000] O.J. No. 2960 (Sup Ct J), and by the Supreme Court of Canada in *United Trust v. Dominion Stores* (1976), [1977] 2 SCR 915.

105 See *Augdome Corporation Ltd v. Gray* [1975] 2 SCR 354 at 375 where Justice Spence stated: "Finally, it is argued that rectification should never be granted when the rights of third parties are affected and what counsel for the respondents have termed the right [...] to resist execution is, of course, affected if the agreement of July 5, 1957, as executed should be held to be unambiguous and that agreement should be rectified. I have considered the authorities cited by the respondent upon this topic and other authorities to like effect and I have come to the conclusion that they have no application in the present situation. They are chiefly cases where the third party has relied on the conveyance as executed and has acquired rights or taken action based on that agreement." [Emphasis added]

106 See paras 276-280 above, in respect of Olson's *de facto* control over the Trust.

107 In so arguing, the Bison Parties relied on the Ontario trial court decision of *MacIssac v. Salo*, 2012 ONSC 337, which denied rectification on the basis of indefeasibility of title. After conclusion of final argument in this case, *MacIssac* was reversed by the Ontario Court of Appeal: *MacIssac v. Salo*, 2013 ONCA 98, leave to appeal to SCC refused, [2013] SCCA No. 174.

108 See subsection 33(4) of *ALSA*: "If a conservation easement is modified or is terminated, one of the parties to the agreement [...] must register a copy of the document effecting the modification or termination with the appropriate Registrar [...]".

109 *EPEA* s 22(2) and *ALSA* s 29(1), 31(a).

110 Successors are included in the definitions of both "grantor" and "grantee" under *ALSA* in ss 28(a)-(b):

> **28** In this Division,
>
> (a) "grantee" means the recipient of a conservation easement and includes a successor, assignee, executor, administrator, receiver, receiver manager, liquidator and trustee of the grantee;
>
> (b) "grantor" means the person who grants a conservation easement and includes a successor, assignee, executor, administrator, receiver, receiver manager, liquidator and trustee of the grantor[.]

111 See *McFarland v. Hauser* (1977), 3 AR 449, 2 Alta LR (2d) 289 at 316-317 (SC (AD)).

112 Victor Di Castri, QC, *Registration of Title to Land*, loose-leaf, vol 2 (Toronto: Thomson Reuters Canada Ltd, 1987), ch 17 at 35: "The system is intended to provide security of title and facility of transfer. A person who is named as owner in an uncancelled certificate of title possesses an "indefeasible title against all the world," subject to fraud and certain specified exceptions."

113 See *Holt Renfrew*, *infra* at paras 18 and 24.

114 Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Thomson Reuters Canada Ltd, 2010) at 477.

115 See *Holt Renfrew* at para 22: "This is not to say that it is not a fraud and that equity does not consider it a fraud. It is not a fraud only for the purposes of the section; to purchase an estate which the vendor does not own to the knowledge of the purchaser with the intention of depriving the equitable owner of it still remains a fraud. However, it is a fraud which the legislature allows in order to maintain the integrity of the register under the land titles system."

116 Di Castri *Registration of Title to Land*, vol 2, ch 19 at 32, referring to *Mere Roihi*: "It is submitted [...] [t]he gloss on the word "fraud", if not redundant, should not give it a meaning different from that ascribed to it in the *Assets* case." [Footnotes omitted]

117 See *Holt Renfrew* at para 18. See also *Union Bank of Canada v. Phillips and Boulter Waugh Ltd*, (1919) 58 SCR 385, where the Supreme Court of Canada considered the effect of a similar section in the Saskatchewan Act to Alberta's section 203, and Justice Anglin stated at 395-396: "Here there was knowledge, but nothing more. Knowledge, of course, could not of itself constitute fraud. Fraud must always have consisted in the doing of something which that knowledge made it unjust or inequitable to do. The meaning of the statute must, therefore, be that the doing of that which mere knowledge of "any trust or unregistered interest" would make it inequitable to do shall nevertheless not be imputed as fraud, within the meaning of that term as used in sub-sec. 1 of sec. 194. That which equity deems fraud, therefore, is by this enactment of a competent legislature declared not to be imputable as fraud."

118 The Bison Parties argued with respect to NCC's allegation of land titles fraud that the impugned transaction in the case at bar would be the transfer of the Property to Olson from NCC: that the case law such as *Holt Renfrew* involves situations where there is an actual unregistered interest, and then an impugned transaction that has the effect (absent making out land titles fraud) of defeating the actual unregistered interest. I have already found there was an unregistered interest of NCC on titles to the Property, but I disagree that the impugned transaction was the transfer of the Property from NCC to Olson. Clearly, the impugned transaction in this case was the transfer of the Property from Olson to the Limited Partnership/Trustee.

119 See *McCulloch*; see also *1198952 Alberta Ltd v. 1356472 Alberta Ltd*, 2010 ABCA 42, where the Court of Appeal found land titles fraud based on a covenant made by the appellant purchaser, which covenant was found to be fraud because it was "an additional element" sufficient to overcome s 203: para 15.

120 *1198952* at para 13: "Subsection 203(3) of the *Act* displaces the rule of equity whereby mere knowledge of a prior interest is regarded as equitable fraud. The case law acknowledges the force of this subsection, and confirms that something more than mere notice is required to constitute fraud: "There must be an additional element", engaging an element of dishonesty: *Holt Renfrew and Co. Ltd. v. Henry Singer Ltd.*

(1982), 20 Alta. L.R. (2d) 97, 37 A.R. 90 (C.A.)."

121 I note the Defendants' argument that the Court in *McCulloch* incorrectly made a finding of land titles fraud, because there was no real evidence of any "additional element" in that case.

122 The Bison Parties also argued the *ITA* and Technical Opinion required the NCC to issue the Tax Receipt to Olson. Because the parties agreed that the NCC was contractually obligated to issue the Tax Receipt, I do not need to consider these arguments. I do find, however, that with respect to timing of issuance, the Technical Opinion did not create a binding obligation on the NCC under the Penny Ranch Purchase Agreement to issue to Olson the Tax Receipt within any set time period. While the Bison Parties argued that the Technical Opinion imposed requirements on the NCC, they did not argue that any formed part of the NCC's contractual obligations to Olson.

123 Amended Amended Statement of Defence at paras 31(a), 33; Amended Amended Amended Counter-claim at paras 51, 54-55.

124 Final Argument of the Plaintiff, the Nature Conservancy of Canada at para 508: "Although there is no written agreement on the point, it is submitted that the issuance of the receipt was to have occurred within a reasonable time." Reply Argument of the Nature Conservancy of Canada at para 44: "It is submitted, therefore, that in the case of the tax receipt in the case at bar, the term that the Court would imply would be that the tax receipt would be issued within a reasonable time under the circumstances." Had the NCC not conceded this point, I would have found an implied term of this nature based on the officious bystander test and business efficacy rule. The general practice of Canadian charities, *ITA* time limitations and time value of money (discussed in detail below) all favour implying a term of this nature. Further, while the Bison Parties in their closing submissions focused on an implied term of good faith to issue the Tax Receipt in a timely manner, I agree with the NCC that it is a "well known principle" that courts often imply terms requiring contractual obligations without an express deadline be performed within a reasonable time in the circumstances.

125 Olson could have used it against his previous three years' taxes payable, and if the gift was made in 2004 he also could have used it in the 2009 taxation year (because of losses in 2008 and 2009 he in fact could not have used the Tax Receipt in either of these taxation years) and perhaps also against earlier years' taxes if he succeeded with any application he made for taxpayer relief.

126 See also GHL Fridman, QC, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters Canada Ltd, 2011) at 533: "More often than not [...] the obligation [to perform within a reasonable time] arises expressly or by implication, from the contract itself. In such instances it is a question of fact as to what is a reasonable time." [Footnotes omitted]

127 No party asked this Court for the opportunity to make additional submissions addressing the Court of Appeal's decision in *Bhasin*. Nor did I invite the parties to make submissions on *Bhasin*. I am satisfied that the parties in their initial closing submissions comprehensively informed the Court of their respective positions on the duty of good faith in this case. In any event, my conclusion regarding the Bison Parties' allegation that the NCC owed a duty of good faith was the same had my Reasons in this case been completed prior to the Court of Appeal issuing its Memorandum of Judgment in *Bhasin*.

128 *Bhasin*: "Courts can imply terms in contracts which are not explicit only when the new term is [...] (i) so obvious that it was not even thought necessary to mention, or (ii) truly necessary to make the contract work at all, not merely reasonable of fair." *Benfield*: "Sometimes there is a custom in a certain trade or industry, but that is obviously irrelevant here. And sometimes a statute expressly deems a certain term to be part of every contract, but that is not so here. Apart from that, the courts can insert an implied term in a contract in only two situations. The first situation is where the term suggested is so obvious that it is not worth mentioning expressly [...] The second situation where the courts will imply a term in a contract is where it is needed "to give business efficacy". In other words, without the term, the contract would fail completely".

129 As indicated above, leave to appeal *Bhasin* was granted by the Supreme Court of Canada.

130 Among the "deal breakers" Olson testified he successfully negotiated were the removal of a provision requiring the NCC's approval for any building construction on the Property, removal of express permission prior to Olson giving any tours of the Property (which he referred to as "eco-tourism") and express recognition that bison grazing was a permissible use of the Property.

131 *Bhasin* at paras 27, 31.

132 Though in the context of the submissions on mitigation, the Bison Parties did suggest that the date of the gift the NCC reported on the Tax Receipt that it issued to Olson in December 2009 was incorrect.

133 In *National Courier Services Ltd v. RHK Hydraulic Cylinder Services Inc*, 2005 ABQB 856 at para 28, Justice Topolniski stated: "A duty of good faith also arises where there is significant discretion on the part of one party".

134 By way of pertinent example, the Ontario Superior Court of Justice in *Charette v. Trinity Capital Corporation*, 2012 ONSC 2824 refused to admit expert evidence from Dr. Krishna finding, at para 45, that the date on which liability for tax crystallizes is a question of law and therefore not the proper subject of expert opinion. The plaintiff in that case was attempting to use Dr. Krishna's opinion to support a

submission that the taxpayer has no obligation to pay taxes assessed by the Minister until issues were resolved in appeal to the Tax Court of Canada.

135 Of course, it is irrelevant that neither party objected to any improper questioning or testimony of the experts. As Moldaver J stated for a majority of the SCC in *R. v. Sekhon*, 2014 SCC 15 at paras 46, 48:

> [A]ll trial judges - including those in judge-alone trials - have an ongoing duty to ensure that expert evidence remains within its proper scope [...] It goes without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts.

In *R. v. Abbey*, 2009 ONCA 624 at para 62, Doherty JA explained:

> A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal[.]

136 During the qualification stage of his testimony, Lewy disclosed that his law firm's Tax Group, and at times he himself, had for a number of years done legal work for the NCC. Lewy's compensation as a partner at his law firm was impacted by maintaining relationships with clients (including the NCC, which his law firm had billed over $100,000 annually). Most significantly, Lewy had personally given advice to the NCC on the issue of the Tax Receipt in these very proceedings, separate and apart from his work as an expert witness.

137 An applicant for taxpayer relief under subsection 152(4.2) must send identifying information, the income tax return from the statute-barred year for which the refund or reduction in amount payable is requested, all relevant documentation and an explanation that supports their claim for taxpayer relief: IC07-1 at paras 75-76. Similarly, to support a request for an adjustment, individuals should provide official receipts (for example, charitable donation receipts), tax information slips (for example, T4s), details or calculations of expenses or adjustments being claimed, and proof of payment: IC07-1 at para 78.

138 Contrary to Olson's apprehensions, I see no legal reason why the CRA would be less likely to grant Olson taxpayer relief in this context because he is a tax lawyer or because of some bias against him personally (as Olson alleged). The Minister and his or her delegates must "act fairly in accordance with the rules of procedural fairness as developed in administrative law": *Caine* at para 33. The Federal Court of Appeal has been clear that it will set aside a taxpayer relief decision where "that decision was made in bad faith, if its author clearly ignored some relevant facts or took into consideration irrelevant facts or if the decision is contrary to law": *Barron v. Canada (Minister of National Revenue)*, 97 DTC 5121, [1997] F.C.J. No. 175 at para 5 (CA), leave to appeal to SCC refused, [1997] SCCA No 207. The Manual at pages 57-58 instructs the Minister's delegates that:

> To properly use discretion, it is essential that taxpayer relief employees involved in the review and decision-making process remain impartial. Evidence of non-impartiality could have adverse consequences in court. It could also undermine the CRA's reputation for fairness.
>
> [...]
>
> Impartiality can best be defined as being just and fair or unprejudiced. The best way to remain impartial when performing a review is to avoid prejudging taxpayers or situations and to not be biased. Equal consideration and treatment must be given to all taxpayers.

The Manual then goes on to state that taxpayers deserve equal treatment regardless of, among other things, their level of education, social status, sophistication, access to tax professionals, assertiveness or aggressiveness, or employer or business sizes: at 58.

139 In response to a hypothetical scenario similar to the facts of this case, Dr. Krishna testified that it was "extremely improbable that the taxpayer would have heard in three years". If correct for this case, Olson would not have known the result before the end of the trial.

140 Olson's calculation was prepared on the basis of the Tax Receipt received in 2006. My finding of issuance no later than August 31, 2005, did not reduce the applicability or reliability of those calculations.

141 This is greater than the amount of the donation because of the interplay between the timing of its being claimed and other claims on Olson's tax returns in the relevant years (*e.g.* losses).

142 Green did not mention Wild West or Moose Mountain in her testimony. There was no evidence on the record of Green's degree of knowledge of the various entities Olson controlled, despite the fact that Wild West was the original offeror in the O2P.

143 The promise to issue the Tax Receipt was not an express written term of the Penny Ranch Purchase Agreement, however, there was a condition that "the Purchaser having reviewed and found satisfactory the tax ruling obtained by the Vendor respecting the charitable donation receipt that the Purchaser is expected to receive in conjunction with the purchase of the Property". Moreover there was no disagreement between the witnesses who testified to the issue at trial that Olson was entitled to the Tax Receipt.

144 I disagree with the Bison Parties' statement in their written submissions that: "It does not matter that the parties did not record those particular aspects of the agreement in writing." It does matter. This argument invites the court to re-write the agreement, which it will not do.