Date: 20241129
Docket: CI 20-01-26926
CI 20-01-28295
(Winnipeg Centre)
Indexed as: WSIB Investments (Infrastructure) Pooled Fund Trust et al. v. Plenary Group (Canada) Ltd et al.
Cited as: 2024 MBKB 176

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B E T W E E N:

WSIB INVESTMENTS (INFRASTRUCTURE) POOLED FUND TRUST, and 1697125 ONTARIO INC., plaintiffs,	)	Peter H. Griffin, K.C. Dena N. Varah Meghan Bridges Jonathan McDaniel Andrew Locatelli for the plaintiffs
- and -	)	
PLENARY GROUP (CANADA) LTD continued as PLENARY GROUP (CANADA) HOLDING LTD., PLENARY INVESTMENTS (CANADA) LTD, PLENARY INVESTMENT MANAGEMENT CORP., in its capacity as general partner of PLENARY CANADA FUNDING LP and PLENARY CANADA FUNDING II LP, PLENARY INVESTMENT MANAGEMENT II CORP, in its capacity as general partner of PLENARY CANADA FUNDING LP and in its capacity as general partner of PLENARY CANADA FUNDING II LP, PLENARY CCM U.S. FUNDING I LP, PLENARY GREAT LAKES HOLDING LTD., PLENARY GROUP PTY LTD., PLENARY GROUP HOLDINGS PTY LTD., PLENARY GROUP NO. 1 PTY LTD., PLENARY GROUP EXECUTION CORP, in its capacity as Trustee for and on behalf of THE PLENARY GROUP TRUST, PLENARY GROUP TRUST, PAUL DUNSTAN, BRIAN BUDDEN, PAUL MARTIN, PHIL DREAVER, DALE BONNER, STUART MARKS, DUNSTAN HOLDINGS LTD., DREAVER HOLDINGS LTD. continued as DREAVER (VIC.) Pty Ltd., DREAVER INVESTMENTS LTD., RECIPIENT CORPORATIONS OF THE	)	Stein Gudmundseth, K.C. Howard A. Mickelson, K.C. Clayton J. Gallant Katrina P. Labun for the Plenary defendants

PROCEEDS #1-10, BENEFICIARIES OF PROCEEDS J. DOE #1-10, and BENEFICIARIES OF PROCEEDS CORPORATIONS #1-10,

defendants,

- and -

PLENARY GROUP (CANADA) LTD continued as PLENARY GROUP (CANADA) HOLDING LTD., PLENARY INVESTMENTS (CANADA) LTD, PLENARY INVESTMENT MANAGEMENT CORP., in its capacity as general partner of PLENARY CANADA FUNDING LP and PLENARY CANADA FUNDING II LP, PLENARY INVESTMENT MANAGEMENT II CORP, in its capacity as general partner of PLENARY CANADA FUNDING II LP, PLENARY GREAT LAKES HOLDING LTD., PLENARY GROUP PTY LTD., PLENARY GROUP HOLDINGS PTY LTD., PLENARY GROUP NO. 1 PTY LTD., PLENARY GROUP EXECUTION CORP, in its capacity as Trustee for and on behalf of THE PLENARY GROUP TRUST, and THE PLENARY GROUP TRUST,

plaintiffs by counterclaim,

- and -

WSIB INVESTMENTS (INFRASTRUCTURE) POOLED FUND TRUST, and 1697125 ONTARIO INC.,

defendants by counterclaim,

- and -

CBRE CALEDON CAPITAL MANAGEMENT INC., and PLENARY CCM U.S. FUNDING I GP INC.,

third parties.

<u>Judgment Delivered:</u>
November 29, 2024

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KROFT J.

I. INTRODUCTION

[1] In March 2020, the defendant, Plenary Group (Canada) Ltd., continued as Plenary Group (Canada) Holding Ltd. (PG Canada), suddenly and unilaterally terminated its 10-year-old partnership with the Plaintiffs as part of a billion-dollar sale of its entire business to Caisse de dépôt et placement du Québec (CDPQ). The singular focus of the partnership had been investing long term in North American private public infrastructure projects (P3s) generating regular, stable and relatively low risk returns. The termination and news of the sale of PG Canada came as a surprise to the Plaintiffs.

[2] The Plaintiffs allege PG Canada's termination and conduct (and that of the affiliates it controlled) prior thereto, constituted, among other things, breaches of both the contractual terms governing the partnership and fiduciary duties owing as a result of the partnership.[1] They seek significant damages or disgorgement in the event there was a breach of fiduciary duty. The Plaintiffs also seek related declarations.

[3] The Defendants deny breaching any duty, fiduciary, contractual, or otherwise and counterclaim alleging the Plaintiffs made misrepresentations that the Defendants relied on to their detriment. They claim indemnification for costs arising from the misrepresentations and punitive damages.

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[1] Certain Defendants were named so as to be bound by my judgment if certain relief requested by the Plaintiffs is granted.

[4] For the following reasons, I find the Defendants breached both contractual and fiduciary duties owed to the Plaintiffs and grant relief as set out commencing at paragraph 275 hereof.

[5] I dismiss the Defendants' counterclaim.

II. EVIDENCE

i. A Few Observations to Begin

[6] The trial was long, taking almost seven weeks. The facts span well over a decade. The oral and documentary evidence is extensive: more than 30 volumes of transcripts and 1,144 trial exhibits. Written argument was voluminous and oral argument spanned three days in December 2023.

[7] Despite final argument theoretically ending in December 2023, throughout January and February 2024, I received further, fairly robust, written submissions specifically addressing the issue of whether the Plaintiffs should be permitted to amend its pleading to make their disgorgement claim more explicit. My written Endorsement permitting the amendment was issued on April 25, 2024.

[8] The purpose for these observations is not to complain. In fact, I commend counsel for generally making efficient use of court time and resources, despite the intensity and magnitude of the dispute. Rather, my purpose is to underscore the obvious: even though I have read every transcript, exhibit, and brief, in these reasons it is not possible or necessary to mention every fact. I have done my best to mention the evidence I feel is material to the main issues and for the reader to understand my conclusions. I have not summarized the evidence witness by witness, as much

evidence is not disputed. However, where a material fact is disputed, or otherwise requires determination, I have made best efforts to identify it as such and make a clear ruling.

[9] Finally, remember that suits CI 20-01-29626 and CI 20-01-28295 arise from the same events and were heard at the same time. These reasons are intended to address all matters.

ii. <u>What is a P3?</u>

[10] As noted in my introduction, the relationship between the Plaintiffs and the Defendants revolved around investing in P3s. A P3 is an approach to developing public infrastructure (e.g. bridges, roads, hospitals, public services), where public bodies, such as federal, provincial or municipal governments contract with the private sector to provide the infrastructure on the basis ownership thereof remains with the public body.

[11] P3s can be structured in different ways. Most relevant to this case is what is referred to as "availability-based" P3s. An availability-based P3 is one where the public body and the private contracting party agree that the return to the private contracting party will be defined payments over the life of the project, commencing once construction is done. The life of a project easily can exceed 30 years. An alternative to an availability-based P3 is a "revenue risk" P3. Under that model, the financial return for the private contracting party is tied to the usage of the public project (e.g. tolls collected at a toll bridge).

iii. Principal Parties

[12] Despite the multitude of Defendants, the principal parties and the genesis of their connection is easily described.

[13] The Plaintiff, WSIB Investments (Infrastructure) Pooled Fund Trust (WSIB), is owned and controlled by the Workplace Safety and Insurance Board of Ontario. Part of WSIB's mandate is to pay out claims it receives from Ontarians covered by the WSIB regime. The Plaintiff, 1697125 Ontario Inc., is owned and controlled by the Colleges of Applied Arts and Technology Pension Plan (those entities collectively referred to as CAAT). CAAT's mandate is to provide defined pension plans for CAAT members.

[14] To generate funds sufficient to meet ongoing payment obligations to beneficiaries, WSIB and CAAT invest in various income producing vehicles in a manner consistent with applicable legislation, regulations and policies.

[15] At all material times, PG Canada was a leader in the P3 investment industry. It was equipped with the expertise necessary to successfully secure P3 Projects and shepherd them from inception to fruition through an established network of funders, contractors and service providers. While WSIB and CAAT are no strangers to the investment world, at the relevant time they did not possess the in-house expertise or contacts to enable them to do what PG Canada did. More is said about this later.

iv. General Description of Investment

[16] A general description of the structure and form of the Plaintiffs' investments with the Defendants will assist understanding later discussions of specific contractual

terms. I am mindful that, at the end of the day, the specific contractual terms, not my general description, govern.

[17] As for investment structure, typically there were three layers[2]. Layer one was a corporate entity owned and controlled directly by PG Canada that was the contracting party with the public body. It was this corporation that secured construction loans with senior lenders and that contracted with PG Canada's third-party service providers (e.g. construction companies, facility managers) to complete and operate the P3 project. It might be described as an operating company. Layer one commonly was referred to as a Special Purpose Vehicle (SPV). Each project had its own SPV.

[18] Moving up the ladder, Layer two was a holding company, also owned and controlled directly by PG Canada. As with the SPVs, each project had its own holding company. The name of each holding company was the same except that a roman numeral was inserted to distinguish each project. For example, there was Plenary Investments I (Canada) Ltd., Plenary Investments II (Canada) Ltd., Plenary Investments III (Canada) Ltd., etc. These holding companies (and, as I understand matters, the projects to which they related) were often identified simply as PIC I, PIC II and PIC III, etc. The holding companies in the United States were similarly identified as PIA II (i.e. Plenary Investments II (America) Ltd.), PIA III, PIA IV, etc. I will refer to the PICs and PIAs collectively as PICs, except when there is a need to differentiate. At the time PG Canada terminated its relationship with the Plaintiffs in March 2020,

[2] See Appendix "A" to these reasons.

there was an aggregate of 33 PICs spread throughout Canada and the United States of America.

[19] Layer three (the top layer) was a Limited Partnership, interchangeably referred to by me as a "Fund". It was at this level that the Plaintiffs came into the picture. The Fund was, in essence, the repository for a finite sum of money contributed by the Plaintiffs to be used over a fixed commitment period to invest in the P3 Projects. Because each Fund was limited in amount and time, the thirty plus projects to which I referred in the previous paragraph necessarily were spread among three separate Funds created as the Plaintiffs' relationship with PG Canada flourished. The litigants refer to the Funds in order of creation as Fund I, Fund II and Fund III. Fund I and Fund II invested in Canadian projects. Fund III was established to invest in P3s in the United States of America. The Limited Partnerships were created under Manitoba law, which explains why this case is before the Manitoba Courts.

[20] Consistent with the SPVs and PICs, the General Partners for Fund I and Fund II were corporations wholly owned and controlled by PG Canada. For reasons explained later, the General Partner for Fund III was not a PG Canada entity, although the Plaintiffs and PG Canada structured matters so an entity wholly owned and controlled by PG Canada provided the necessary management services to the Fund III General Partner to ensure Fund III mirrored the other Funds as near as possible. The General Partners for Fund I and Fund II are the Defendants, Plenary Investment Management Corp. and Plenary Investment Management II Corp. respectively (I will refer to these corporations mostly as the General Partners). The PG Canada controlled management

services entity for Fund III is the Defendant, Plenary Group Execution Corp. (PG Execution).

[21] In the context of this structure, what form of investment did the Plaintiffs' take?

[22] For any particular P3 project, the Plaintiffs' money was advanced by the Fund/Limited Partnership (Layer three) to the relevant PIC (Layer two) by way of a secured loan[3]. The loan was to be repaid to the Fund by the PIC over the project's life, with interest calculated at an agreed upon fixed rate[4]. Through the PIC, PG Canada would combine the Fund Loan with funds contributed by PG Canada itself, to satisfy the equity component of the project required by the public body and/or those financing the construction of the project (i.e. the proverbial "skin in the game"). PG Canada benefited from the Fund's equity loan in part because money loaned by the Fund to the PIC permitted a corresponding reduction in the amount of money PG Canada had to commit as project equity, thereby freeing up financial resources for PG Canada to use for other business development purposes. One or more trial exhibits described the Plaintiffs' interest as "dequity". To be clear, while the Fund Loans financed PG Canada's equity investments, by design, the loans were not equity investments themselves.

[23] Were a particular P3 project to wind down, the Fund's right to be repaid would rank below that of the SPV's service providers and senior lenders (i.e. the lenders funding construction by the SPV), *but* above that of PG Canada (the PIC) as the equity

[3] A General Security Agreement from the PIC to the Fund.

[4] The payments from the PIC to the Fund were made possible by project net operating revenues passed on from the SPV to the PIC. PG Canada retained no cash in the PICs.

holder. Throughout this trial, the Plaintiffs' position also was described interchangeably as preferred subordinated debt or preferred equity. The loans themselves were referred to as Qualified Loans or, more generically, as Fund Loans. I too will use both terms but always referring to the loans that were advanced by the Limited Partnerships.

[24] I pause to note that at the time the Defendants terminated its relationship with the Plaintiffs, none of the P3 Projects were in distress (financial or otherwise), nor was any party in default of any payment obligations under the applicable loan agreements.

v. <u>Fund I</u>

a) A Little More About PG Canada

[25] The Plenary brand was created by a number of individuals, who had been colleagues at ABN AMRO Bank (a Dutch bank with offices around the world, including Australia and Canada). These individuals included John O'Rourke (O'Rourke), Paul Oppenheim (Oppenheim), Raymond Wilson, and the Defendants Paul Dunstan (Dunstan) and Phil Dreaver (Dreaver). In 2004, O'Rourke, Oppenheim and Mr. Wilson established Plenary Group Australia. A year later, Dunstan and Dreaver, who by that time were working in Canada, established PG Canada.

[26] The principal shareholders of PG Canada included Dunstan, Dreaver, Plenary Group Australia and Deutsche Bank (also a shareholder of Plenary Group Australia). Although there were changes within PG Canada as the years went on, Dunstan and Dreaver were the face of PG Canada when it established its relationship with the Plaintiffs. PG Canada also came to employ the Defendants, Brian Budden (Budden)

and Paul Martin (Martin). Budden joined PG Canada in 2008 as a member of PG Canada's origination group – the group responsible for bidding on, negotiating and closing P3 Projects. In 2016, Budden assumed the position of President and CEO. Budden's background included practicing law and working in commercial finance. Martin joined PG Canada in August 2012. Prior to that, he worked at the Toronto law firm of Davies Ward Phillips & Vineberg LLP (Davies LLP). Davies LLP represented PG Canada from the inception to the end of PG Canada's relationship with the Plaintiffs. Martin was lead counsel until joining PG Canada where his direct engagement with the Plaintiffs continued.

[27] In its first few years, PG Canada enjoyed commercial success. However, the 2008 global financial crisis resulted in problems, including one involving Deutsche Bank. Prior to the 2008 crisis, Deutsche Bank, in addition to being a shareholder and source of infrastructure opportunities for PG Canada, also provided project financing. Deutsche Bank discontinued project financing in the wake of the crisis. For example, Deutsche Bank pulled out of the Niagara Health System Project in Ontario: a new hospital in respect of which PG Canada had already invested time and resources and had been selected as a preferred proponent. Deutsche Bank's withdrawal put this major opportunity in peril. It took approximately 10 months for PG Canada to develop an alternative business plan, this time partnering with Borealis Infrastructure (now OMERS Infrastructure), the infrastructure investment advisory and management arm of the Ontario Municipal Employee's Retirement System (OMERS). Because it will become relevant later in this decision, take note that the interests of PG Canada and

OMERS in Niagara Health System ultimately involved ownership of common and preferred shares. In respect of the common shares, PG Canada enjoyed a right of first refusal. In respect of the preferred shares, PG Canada enjoyed a right of first offer.

[28] OMERS Infrastructure was not PG Canada's exclusive infrastructure partner following 2008. For example, several projects were secured with the support of Innisfree, a United Kingdom-based infrastructure investment group similar to PG Canada.

[29] According to Dunstan, beginning in 2009, PG Canada wanted to change its business model. It resolved to seek out a steady and reliable source of funds from an entity (or entities) that had no interest in owning project equity *per se*. This arrangement would give PG Canada control over each project, do away with the exercise of finding new equity investors on a project-by-project basis, and eliminate the risk associated with sharing commercial plans and know-how with direct competitors like Innisfree and OMERS.

[30] To the extent there was any ambiguity in the trial evidence, in my view, the Plaintiffs were not competitors of PG Canada. To find otherwise runs contrary to Dunstan's resolve to distance PG Canada from such partners. Moreover, it was Budden's evidence that PG Canada was essentially a developer leading a consortium of parties seeking to secure and profit from P3 Projects coming to market. In addition to arranging financing and owning the SPV and the PIC, it, among other things, assembled the design, construction, management and operating teams. This does not describe the expertise of, or business carried on by, the Plaintiffs.

b) Plaintiffs and PG Canada Connect

[31] Simply put, the Plaintiffs were introduced to PG Canada through a company called Caledon Capital Management Inc., now CBRE Caledon Capital Management Inc. (Caledon). That said, some background about Caledon, its connection to the Plaintiffs and the forces at play giving rise to the introduction, is pertinent.

[32] Caledon was in the business of assisting small to mid-sized pension funds invest in infrastructure and private equity. It was founded in or about 2007 by David Rogers (Rogers), an individual experienced in the world of private equity and infrastructure investing. In fact, just prior to starting Caledon, Rogers had worked for OMERS Infrastructure. Rogers' team at Caledon came to include, among others, Jean Potter in 2009 and Asif Hussain in 2010. While Jean Potter and Asif Hussain provided services to the Plaintiffs, overall, it was Rogers who was the Caledon lead in those relationships. In this decision, I use Rogers and Caledon interchangeably.

[33] Caledon's working relationship with both WSIB and CAAT began in the period of 2008 to 2009. Caledon's principal contact at WSIB was John Denham (Denham), WSIB's Vice President of Investment and then Chief Investment Officer. In 2017, Denham's investment management functions (e.g. overseeing each individual investment advisor) were assumed by the Investment Management Corporation of Ontario (IMCO), with Denham shifting focus to developing WSIB's overall investment strategy and overseeing IMCO. The IMCO advisor, primarily in charge of WSIB's infrastructure investments at times relevant to this case, was Tim Formuziewich (Formuziewich).

[34] Caledon's contact at CAAT was CAAT's Chief Investment Officer, Julie Cays (Cays), supported by Kevin Fahey (Fahey). Fahey's involvement with CAAT's infrastructure investments began over the summer of 2010, as Fund I was being negotiated. Although Fahey's involvement increased over time, Cays, not Fahey, was Caledon's principal contact during that time period.

[35] A final piece of background material to the parties connecting is that in 2009, conditions were such that WSIB and CAAT were beginning to look favourably towards investing in infrastructure. Done properly, infrastructure was a means to both diversify portfolios and generate fixed long-term returns at attractive rates. As noted earlier, such investments mesh well with the need to meet long-term pension obligations.

[36] It was in this cocktail of WSIB's and CAAT's expanding interests in infrastructure investment, their coincidental engagement of Caledon to assist in that regard, PG Canada's search for reliable long-term funders and PG Canada learning about Caledon, that PG Canada introduced itself to Caledon who, in turn, introduced PG Canada to the Plaintiffs.

[37] As I move on to discuss the negotiation of Fund I, it is useful to recap the principal commercial players (as distinct from their legal advisors), in the 2009-10 time period:

- PG Canada – Dunstan and Dreaver
- WSIB – Denham
- CAAT – Cays and Fahey
- Caledon – Rogers

c) Presentation of Opportunity to Caledon, WSIB and CAAT

[38] PG Canada's first formal presentation to Caledon of a commercial framework occurred in or around October 2009, with Dunstan and Dreaver taking the lead. With the assistance of Caledon, Denham and Cays, substantially similar versions of the presentation were made to the investment committees at WSIB and CAAT. These presentations culminated in March 2010 in a "Strategic P3 Co-Investment Partnership Summary Term Sheet" (Term Sheet). This Term Sheet, coupled with the necessary instruction from Plaintiffs' Investment Committees, led to the engagement of legal counsel, extensive negotiations and, ultimately, the closing of Fund I (and the advancement of the first two loans, PIC I and PIC II), on September 15, 2010.

[39] Plenary's presentations and the Term Sheet highlight key aspects of the proposed relationship, some of which include:

- PG Canada is one of Canada's leading developers/sponsors of public sector infrastructure projects with a reputation for structuring and delivering high quality comprehensive infrastructure projects.
- The partnership with PG Canada will be a strategic opportunity to co-invest in a range of existing and future public sector infrastructure projects through a fixed 5-year commitment. The funds will be used by PG Canada-sponsored projects. Investments will be on a "club" basis with select "like-minded" institutions.

- Highlights of the opportunity include:
  - Strong established relationships with key public sector clients and quality construction operations and financing institutions.
  - Expertise in both developing deals and in project delivery and management to protect equity investments.
  - PG Canada owns a base of projects that will be offered as immediate investment opportunities to the Plaintiffs (i.e. existing projects).
  - Extensive pipeline of immediate and future projects to provide comfort that committed funds will be invested.
  - PG Canada will absorb all development related risks and project pursuit costs. The Plaintiffs shall not be required to pay PG Canada any management or performance-based fees.
- The Plaintiffs will invest in projects alongside PG Canada in the equity cashflows that flow from the projects. The opportunity is suited for investors like the Plaintiffs, seeking to secure long-term stable cashflows with the intention of holding such investments for a long-term.
- The Plaintiffs will invest in each individual project, provided it meets certain agreed upon defined investment criteria.
- During the investment period, the Plaintiffs shall not compete in the Canadian P3 equity market.
- The typical investment horizon for a project is expected to be 32 years or more, with equity distributions payable during each project's operation.

Any required decision making (most likely to occur if a project does not fall within the defined investment criteria) will be the responsibility of the Plaintiffs, and the Plaintiffs' representative. (Although not specified in the Term Sheet, at all material times, it was understood the Plaintiffs' representative would be Caledon).

- The Plaintiffs' representative's role will be to facilitate the orderly interaction between PG Canada and the Plaintiffs by overseeing the co-investment decision making process (including compliance with the defined investment criteria), and also will represent the Plaintiffs on decisions that fall outside of the defined investment criteria.
- The Plaintiffs will invest in the equity cashflows of a project through a debt-type instrument, documented in a contractual arrangement between the Fund and PIC. The debt instrument will provide for payments to the Plaintiffs made in priority to any returns payable to PG Canada.
- PG Canada shall provide to the Plaintiffs' representative, on a regular basis, a summary of its pipeline of upcoming projects.
- PG Canada will manage the partnership on behalf of the Plaintiffs and provide in-house reporting and accounting services at no cost. PG Canada shall also be responsible for all costs incurred by it pursuing and securing projects.

[40] Overall, the presentations and the Term Sheets reflect an arrangement whereby Plenary is offering to the Plaintiffs exclusive access to long-term, fixed, availability-

based cashflows, backed by the covenant of a government body. Also increasing the relative stability of the investment was PG Canada's experience in negotiating contracts with construction partners in a manner whereby those partners assumed a considerable part of the project's risk. In exchange for the investment opportunity, the Plaintiffs exclusively gave PG Canada the certainty of a readily available pool of funds to draw upon to effectively and efficiently pursue new P3 Projects with someone other than a competitor in the P3 space.

d) Negotiations and Structure of Commercial Documents

[41] By mid-April 2010, matters had progressed to a point where the Plaintiffs retained legal counsel to communicate with PG Canada's legal counsel to discuss the structure and documentation required to advance the Term Sheet. To repeat, at this stage, PG Canada's legal advisor was Davies LLP, and particularly Martin. The Plaintiffs' legal counsel was Gowling Lafleur Henderson LLP (Gowlings LLP), and particularly Myron Dzulynsky (Dzulynsky). Both Martin and Dzulynsky were assisted by others at their respective firms, to whom I will refer in due course.

[42] The lead non-lawyer negotiator for Plenary was Dreaver. The lead non-lawyer negotiator for the Plaintiffs was Rogers. Rogers reported to both WSIB and CAAT. To be clear however, although WSIB's and CAAT's interests were aligned, each entity independently provided instructions to Rogers and independently executed the deal documents.

[43] As for the interaction between Denham at WSIB and Cays at CAAT, the documentary and oral evidence establishes that as clients of Caledon, Denham was

more active in the negotiations than Cays, and Denham insisted on more formalized day-to-day reporting. Cays testified that while she was kept apprised of everything, she appreciated Denham was as particular as he was. Cays knew Denham from the industry and was comforted by the experience he brought to the table.

[44] The structure of the partnership was agreed to as described in paragraphs 16 to 23 hereof (i.e. SPV Layer one, PIC Layer two and Fund Layer three). In the result, the key documents that were the subject of negotiation were: a Master Investment Agreement (MIA), setting out the purpose and structure of the investment arrangement; a Limited Partnership Agreement (LPA), focusing specifically on how the partnership functioned and the rights and obligations of the Limited and General Partners; and a Subscription Booklet, required to be signed by the Plaintiffs to acquire units in the Limited Partnership. It is clear from the evidence, and the specific wording of the documents, that they were intended to work in concert, not in isolation from each other.

[45] As is common in commercial documents, each of the MIAs, LPAs and Subscription Booklets included various exhibits or schedules. For example, the MIA attaches as an exhibit the Defined Investment Criteria. The Subscription Booklet attaches a form of attestation that the Limited Partner is an "accredited investor". Similarly, the LPA attaches, among other things, a list of existing Qualified P3 Projects, a form of Notice of Project Approval (NOPA), a form of quarterly and annual report, and, as Schedule "E", a Template Qualified Loan Agreement (Template QLA),

setting out standard terms applicable to all Fund Loans. I may refer to the signed version of the Template QLA as a Qualified Loan Agreement (QLA).

[46] As will become clear, the Template QLA, and the signed versions thereof, are critical to the Defendants' position that they committed no breach of contract or fiduciary duty in respect of the Plaintiffs.

[47] Certain sections of the various documents received particular attention during trial. I will identify those provisions and any others I feel are pertinent. In most instances, I distill the essence of the provision rather than reproduce it in its entirety. Before I begin, note that the term "Plenary Party" means PG Canada and any entity controlled by it including, the General Partners of the funds, the PICs and the SPVs. The term fund documents refers to the MIA, the LPA, the Subscription Booklet and any documents attached thereto and referred to therein[5].

(1) Master Investment Agreement

- PG Canada has represented to the Plaintiffs it intends to focus its business on availability-based P3 Projects for a period of not less than five years following signing this agreement (Preamble B).
- "Opportunity" means an infrastructure investment in which a Plenary Party is considering an investment, including a P3 Project in respect of which PG Canada is considering participating by responding to a request for qualifications or request for proposals and secondary market investments (s. 1.1).

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[5] See s. 1.1 of the LPA.

- Subject to the terms of the LPA, the Plaintiffs have committed to providing in aggregate up to $175 million (in the case of Fund I) in capital to the Limited Partnership[6] (Preamble D).
- During the Capital Commitment Period, PG Canada will use commercially reasonable efforts and will act reasonably and in good faith to provide to the Plaintiffs qualifying P3 opportunities on an exclusive basis (s. 2.1(a)).
- PG Canada shall advise the Plaintiffs by way of pipeline reports of each opportunity in respect of which PG Canada reasonably believes a Limited Partnership or the Plaintiffs can deliver a commitment before the expiration of the commitment period (s. 2.1(b)).
- The Plaintiffs representative may, at any time, request PG Canada to provide additional information regarding any opportunity identified in the pipeline report, and PG Canada shall, subject to any provisions in the agreements concerning disclosure and confidentiality, provide as much information as it has in its possession and control (s. 2.1(c)).
- Each partnership opportunity shall be offered by the General Partner to the partnership pursuant to a NOPA, a draft of which the General Partner shall prepare and deliver to each of PG Canada's and the Plaintiffs' representative, who shall provide comments and after responding to those comments, the General Partner shall be authorized to deliver the NOPA as provided in the LPA (s. 2.2(a)).

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[6] The level of the aggregate capital commitment was different for Fund II and Fund III.

- If PG Canada intends to establish a new partnership or other investment vehicle, with a purpose substantially the same as the Limited Partnership, each of the Plaintiffs shall have the right to participate and invest prior to any other third-party investors (s. 2.9(a)).
- PG Canada agrees, in respect of itself and its affiliates (as defined in the LPA, which includes any entity controlled by PG Canada) to, among other things, perform and cause to be performed all obligations under the fund documents (s. 4.1).
- PG Canada shall not sell, assign or otherwise transfer its equity interest in the General Partner other than to another Plenary Party (s. 4.3).
- If, prior to the date that is one year after the date on which all of the approved projects in respect of which the Limited Partnership has made Qualified Loans have achieved substantial completion any transfer or restructuring takes place that results in:
  - (a) 50.1% or more of the voting and economic rights in PG Canada being held by persons other than:
    - i. shareholders of PG Canada or their affiliates; and
    - ii. employees or management of PG Canada or its affiliates; or
  - (b) Plenary's voting or economic rights in a Plenary hold being reduced to less than 50.1%:
    - the Plaintiffs may unanimously request PG Canada, in the case described in (a), all of the PICs or, in the case described

in (b), the affected PIC to immediately repay the outstanding amounts owing under the Qualified Loans relating to such PICs, and PG Canada shall cause any such payment to occur.

Where such a transfer or restructure is contemplated by PG Canada, PG Canada may request the Plaintiffs to provide their consent, waiving their right to repayment of the Qualified Loans then outstanding, prior to the negotiation of the documentation or final terms of the transfer or restructuring, which consent shall bind the Plaintiffs (s. 4.4).

- The Plaintiffs shall not at any time during the Capital Commitment Period, directly or indirectly, own any interest in, provide financing or financial assistance to, operate, manage, control, participate in, consult with, advise, provide services to or any other manner carry on, engage in or assist any person with any availability-based P3 project until it has provided PG Canada with written notice of its intention to do so and PG Canada has consented to the Plaintiffs' participation (s. 5.1(a)).
- The terms of s. 12.12 and s. 12.13 of the LPA shall apply to the treatment of confidential information under this agreement (s. 9.1).
- The MIA shall continue in full force and effect until the termination and dissolution of the partnership or, at the option of PG Canada, if at any time the General Partner ceases to be a Plenary Party as permitted under the fund documents (s. 9.3).

(2) Limited Partnership Agreement

- The business of the Limited Partnership is the making of Qualified Loans to PICs in respect of approved projects (s. 1.1, s. 4.1).
- Disabling conduct means, among other things, a willful breach of fiduciary duty by the General Partner, PG Canada or any other Plenary Party (s. 1.1).
- Key person means Dunstan and Dreaver, until otherwise agreed (s. 1.1).
- Material business event means, among other things, a key person ceasing to devote substantial time and attention to qualified P3 Projects and Opportunities in Canada, and PG Canada ceasing to focus significant time, attention and resources on Qualified P3 Projects and Opportunities in Canada (s. 1.1).
- If a material business event occurs, the General Partner shall promptly disclose the details to the Plaintiffs and, within 10 days of the occurrence, if the consequences of the business event are reasonably susceptible to resolution or remedy, deliver to the Plaintiffs' representative a written plan for resolving or remedying the material business event (s. 4.3(a)).
- If, notwithstanding presentation of the plan, the Plaintiffs' representative concludes the material business event is of the nature or severity rendering it commercially imprudent to make further commitments in respect of Limited Partnership opportunities, the Plaintiffs' representative can give notice to the General Partner that the Capital Commitment Period is suspended, and that the General Partner shall not be required to present

further partnership opportunities until the Plaintiffs' representative gives notice that the suspension is lifted. Where the material business event is the cessation of the key persons to pay substantial time and attention to the P3 Projects, the Plaintiffs' representative shall be deemed to have provided notice of the suspension (s. 4.3(b), (c)).

- If under the MIA, an opportunity has been determined to be a partnership opportunity, then no later than 20 days prior to the date on which bids in respect of that partnership opportunity are due, the General Partner shall provide to the Plaintiffs' representative a draft NOPA. The Plaintiffs' representative shall diligently and in good faith assess the draft NOPA and, in five business days, communicate acceptance thereof, with such modifications as shall have been agreed with the General Partner, and thereafter, the NOPA will become an approved project. Alternatively, the Plaintiffs' representative shall deliver written notice to the General Partner that the opportunity does not constitute an approved project, together with an explanation, whereupon the opportunity shall once again be subject to the terms of the MIA (s. 6.1).
- When sending any draft NOPA, the General Partner shall provide to the Plaintiffs' representative, in respect of each approved project, as it becomes available to any member of the Plenary Group, copies of all relevant due diligence undertaken by the senior lenders, including technical and legal due diligence, and all due diligence undertaken by PG Canada on behalf of the

senior lenders, together with any other due diligence material reasonably requested by the Plaintiffs' representative and notice of any material changes to any of the information previously provided to the Plaintiffs' Limited Partners representative (s. 6.2).

- No Qualified Loan in respect of any individual partnership opportunity shall exceed 20% of the aggregate capital commitment of all the Limited Partners (s. 6.3(e)).
- The General Partner shall strictly enforce the terms of any Qualified Loan as against any PIC and shall not terminate, amend or wave any provision without the consent of the Plaintiffs' representative (s. 6.4).
- The Plaintiffs shall not take an active part in the management or control of the activities of the Limited Partnership, transact any business for the partnership or have the power to execute any document or instrument for or on behalf of the Limited Partnership, nor shall they represent or deal with any third party on behalf of the Limited Partnership or otherwise (s. 12.11).
- Except as set out in the LPA, the General Partner shall have, among other things, the power to consummate Qualified Loans, manage, control and develop all activities of the Limited Partnership and to take all measures necessary or appropriate in furtherance of, in connection with, or ancillary to the activities of the Limited Partnership, to execute any and all other documents and do all acts as may be desirable to carry out the intent and purpose of the agreement, and to generally perform all such other acts

necessary or desirable in connection with the activities and affairs of the Limited Partnership, or to carry out the intent and purpose of the agreement (s. 12.1(d), (f), (m), (n)).

- The General Partner shall not, among other things, do any act in contravention of any provision of this agreement or possess partnership property for any purpose other than a partnership purpose (s. 12.2(a)).
- The General Partner shall maintain the standard of care of a prudent manager of investment, having regard for the inherent conflict of interest resulting from the General Partner being an affiliate of the sponsor [SPV] of the approved project and shall discharge its duties diligently, in good faith and in the best interests of the Limited Partnership. For certainty, the exercise by the General Partner of rights or obligations of the General Partner, specifically and expressly provided for hereunder, shall not be treated as a breach of such standard of care, provided that at any discretion of the General Partner, in respect of such rights and obligations, shall be subject to the standard of care set out in the preceding sentence (s. 12.4).
- The General Partner may disclose the names of the Plaintiffs (or affiliates), and any other non-public information, to government entities and financial institutions to the extent the General Partner, acting reasonably and in good faith, considers necessary in pursuit of Limited Partnership opportunities and, in such instances, the General Partner shall use commercially reasonable efforts to cause the recipients of the information to hold it

confidential. The General Partner shall not permit any member of the Plenary Group to disclose the identity of any Limited Partner (or its affiliates), or any information about the Limited Partners (or their affiliates) (s. 12.13).

- The General Partner shall send the Plaintiffs quarterly and annual reports containing, among other things, unaudited financial statements for the preceding quarter (audited statements for the annual report), specific statements pertaining to distributions made, outstanding commitments and unfunded commitments, and that during the preceding quarter, the General Partner has been in compliance with terms of the LPA in all material respects (or, in the event there was material non-compliance, information regarding the nature of breach and any actions taken by the General Partner to remedy it) (s. 13.3(a)-(c), s. 13.4).
- Except as provided in the LPA and MIA, neither the General Partner, nor an affiliate, can engage in activities that are competitive with the Limited Partnership (s. 19.1).
- The LPA, MIA and Subscription Booklet represent the entire agreement among the parties and supersede all prior negotiations, correspondence or agreements (s. 25.4).
- The LPA may be terminated in accordance with its terms or by agreement in writing of all the parties (s. 25.8).

(3) Subscription Booklet

- The Plaintiffs represent and warrant to the Limited Partnership and the General Partner that they, among things:
  - received and reviewed the LPA, the MIA and the Subscription Booklet, and are not relying on any other representation or warranty.
  - were afforded opportunities to ask necessary questions of, and request information from, the General Partner.
  - were afforded full opportunity to review the documents and are each solely responsible for obtaining professional advice in connection with the transaction.
  - are sophisticated investors with the knowledge and experience in business and financial matters as to be capable of evaluating the merits and risk of investment in the partnership.
  - are aware of the characteristics and nature of the investment and of the fact that the investment is not readily marketable and cannot be sold or disposed of except in accordance with, among other things, the provisions of the LPA.
  - obtained independent legal advice (s. 2).

(4) Template Qualified Loan Agreement

- Borrower means the particular PIC receiving the loan (defined party).
- Lender means the Limited Partnership/Fund (defined party).

- The lender shall establish a credit facility in favour of the borrower, pursuant to which it shall, among other things, advance Qualified Loans (s. 1.1, s. 2.1).
- Loans mean loans advanced from time-to-time by the lender to the borrower under the credit facility (s. 1.1).
- Loan documents mean the QLA, the security documents and any other document executed or delivered pursuant to the QLA by the borrower (s. 1.1).

[48] Section 2.5 of the Template QLA received considerable attention at trial so I will set it out separately and in its entirety:

> **Amortization; Maturity; Prepayment**
>
> a) The Credit Facility shall terminate on the Maturity Date and all principal and accrued and unpaid interest outstanding in respect of the Loans, all outstanding Letters of Credit and unpaid fees in respect thereof, and all other Loan Obligations of the Borrower to the Lender shall become due and payable in full on the Maturity Date.
>
> b) The Principal Amount of the Loans shall be repaid by instalments in the amounts and on the dates set out in the Amortization Schedule.
>
> c) The Borrower <u>may prepay, without premium, penalty or bonus, any outstanding Loans in whole or in party (together with all interest accrued on the principal amount prepaid) upon five Business Days' written notice of its intention to do so and of the principal amount to be prepaid</u>. All prepayments shall be applied to pay accrued and unpaid interest on the principal amount prepaid and then to repay instalments of the principal on the Loans in inverse order of maturity.
>
> (emphasis added)

e) Existing Projects

[49] As noted in paragraph 39 hereof, the Plaintiffs' partnership at PG Canada included interests in five projects to which PG Canada was already committed. Those pre-existing commitments are enumerated in Schedule "B" to the LPA, two of

which are PIC I (comprised of North Bay Regional Health Centre, Archives of Ontario, and MGS New Data), and PIC II (comprised of Niagara Health System). The PIC I and PIC II loans closed concurrently with the September 15, 2010, closing of the overall Fund I transaction.

vi. Fund II

[50] On or around January 31, 2011, a Fund Loan, totalling approximately $88 million, was approved in respect of Communications Security Establishment Canada (CSEC). The CSEC commitment significantly depleted Fund I[7] such that discussions turned to establishing a second fund, Fund II. Eventually, on February 1, 2013, that is what occurred.

[51] Some additional background facts to Fund II are warranted. During discussions, PG Canada was desirous of adding additional Limited Partners to Fund II to provide some protection in the event one or both the Plaintiffs wanted to exit. With Caledon's assistance and the concurrence of the Plaintiffs, Shell Canada Pension Plan (Shell) and Air Canada Pension Plan (Air Canada), through corporations owned and controlled by them, became Limited Partners in Fund II.

[52] The admission of new Limited Partners was on the understanding the structure of Fund II would mirror Fund I. There was no desire or need to reinvent the wheel, especially given the time, effort and costs expended to negotiate Fund I. That said, Shell and Air Canada were new to the mix, necessitating some changes to the original

[7] The CSEC project also exceeded the prescribed concentration limits for any one project thereby requiring the Plaintiffs' waiver. The deal documents specifically contemplate the fact that an opportunity might not meet the defined investment criteria and prescribe how to navigate that situation which arose with some regularity. OMERS was another example (see para. 66 hereof).

Fund I documentation, particularly in respect of governance and voting rights. Throughout negotiations of Fund II, Shell and Air Canada were represented by Rogers, with legal assistance provided by Dzulynsky at Gowlings LLP. Rogers and Dzulynsky also represented the Plaintiffs. All other players remained the same for Fund II except that by this time, Fahey had assumed the lead role in respect of the PG Canada file, although continued to report to and take advice from his colleague, Cays.

vii. Fund III

[53] Also, by 2013, P3 Opportunities increasingly were emerging in the United States of America. In fact, by 2013, PG Canada already had been named a preferred partner in respect of creating two toll lanes in Colorado (US 36) and shortlisted for other projects.

[54] Plenary communicated to Caledon an interest in establishing a fund in the United States of America similar to Fund I and Fund II in Canada. This state of affairs is reflected in presentations made by Plenary to the Plaintiffs and Caledon throughout September 2013 to March 2014, once again highlighting the strategic opportunity, PG Canada's proven track record, a "club basis", the preferred nature of the investment, a strong pipeline of mostly availability-based projects, exclusivity and 30 plus years of high quality, low volatility income streams.

[55] The Fund III transaction closed on or about December 23, 2014. Air Canada opted out of Fund III, such that the Fund III Limited Partners were the Plaintiffs and Shell.

[56] The structure of, and documentation for, Fund III substantially mirrors the structure of, and documentation for, Funds I and II. Importantly, both the Plaintiffs and PG Canada vetted the documentation through their respective Canadian and American legal counsel. This included a review of the Template QLA (which for Fund III became a schedule to the MIA rather than the LPA), to ensure that under the laws of the United States, funds advanced using the Template QLA retained the characteristics of a true loan, not an equity investment.

[57] As previously noted in paragraph 20 hereof, one structural difference between the first two Funds and Fund III, material to this dispute, is that the General Partner for Fund III was not a company owned by PG Canada. Instead, the General Partner was the Defendant[8] Plenary CCM U.S. Funding I GP Inc. (CCM), a corporation owned by Caledon. The reason for substituting a Caledon corporation for a PG Canada corporation was that American regulations required a General Partner to be registered with the Securities and Exchange Commission, which PG Canada was not. The work around was to have CCM be the General Partner and to cause Fund III to enter into a Management Services Agreement with PG Execution, securing the same expertise and resources of PG Canada that would have been brought to the table were it able to serve as General Partner. The form of Management Services Agreement was attached as Schedule "C" to the Fund III LPA. Section 3.0 of the Management Services Agreement requires PG Execution to, among other things: make all decisions and take all actions honestly and in good faith (s. 3.3(b)) and, at all times, expeditiously keep

[8] A named Defendant but against whom no breaches are alleged.

the General Partner fully informed of all matters that may properly be considered relevant to the partnership and the business (s. 3.3(c)).

[58] It also was in 2014 that, prior to the closing of Fund III, Dreaver announced he would be moving back to Australia and transitioning out as an active player at PG Canada. As a key person under the MIA, Dreaver's departure was a material business event triggering a potential exit on the part of the Plaintiffs. To secure the trust, confidence and consent of the Plaintiffs to an orderly transition, in September 2014, PG Canada presented to them a detailed Plenary Update and Transition Plan describing, among other things, that Dreaver's origination role would transition to Budden and that Dreaver would continue to devote (on a declining basis) time to PG Canada into 2015, while remaining a director and shareholder of PG Canada.

[59] Another leadership change within PG Canada occurred in or around October 2016, when Dunstan stepped down as President and CEO to focus on strategic initiatives in his capacity as a board member. It was then that Budden transitioned from head of origination to President and CEO, and Martin assumed managerial responsibilities in the Origination and Commercial arm of PG Canada, with a particular focus on projects in eastern North America. This included coordination and communications with Caledon and the Limited Partners. As was the case when Dreaver left, Dunstan's departure was a material business event to which the Limited Partners ultimately consented, as opposed to exercising their exit rights under the MIA.

[60] The latter changes within PG Canada occurred roughly at the same time that IMCO assumed the investment advisor role for WSIB, as described in paragraph 34

hereof, explaining how, by mid-2019, Formuziewich, not Denham, was one of the principal contacts for WSIB in its interactions with Caledon and PG Canada.

[61] One final development deserves mention. In August 2016, CDPQ purchased 20% of Plenary Group Australia. CDPQ is a large international investor in, among other things, infrastructure. A major depositor with CDPQ is the Quebec Pension Plan. Because of the shared branding of PG Canada and Plenary Group Australia, confusion about the impact of CDPQ's acquisition arose among PG Canada's partners. As a result of the confusion, Budden assured the Plaintiffs, through Caledon, that the Australian transaction had no impact on PG Canada's business and that it would not at all change the business relationship between PG Canada and the Limited Partners. If a need to change were to arise, Caledon would be advised. PG Canada did advise that CDPQ would have an indirect interest in PG Canada since one of PG Canada's shareholders was Plenary Group Australia.

[62] Also of note is that the Capital Commitment Period for Fund II was set to expire by February 1, 2018. That Capital Commitment Period was extended by agreement to February 1, 2021, reflecting the fact not all the money in Fund II had been spoken for and there were ongoing P3 Opportunities in Canada.

viii. <u>2019 – 2020: OMERS Opportunity and CDPQ Transaction</u>

[63] Between the summer of 2019 and early spring of 2020, PG Canada engaged in two transactions relevant to this case: one involving the acquisition of OMERS' interest in various health and long-term care facilities and the other, PG Canada's sale of its business to CDQP – a matter about which the Plaintiffs and Caledon had no knowledge,

including that the CDPQ Transaction involved a transfer to CDPQ of the very same OMERS Opportunity offered to the Plaintiffs and the Plaintiffs' (and all the Limited Partners') interests in each loan advanced by Fund I, Fund II and Fund III.

[64] Martin led all matters respecting the OMERS Opportunity. Budden, along with PG Canada's directors and major shareholders, led the CDPQ Transaction.

[65] In this section, I will first describe each of the two transactions. I will then reference additional evidence germane to their overlapping nature and the Plaintiffs' allegations of breach of fiduciary and contractual duties.

a) OMERS Opportunity

[66] On or about September 18, 2019, PG Canada notified Caledon and the Plaintiffs of a new investment opportunity involving the purchase of OMERS' interest in a portfolio comprised of three hospital P3s and 12 long-term care facilities in Ontario. While this investment did not fall within the designated investment criteria, it nonetheless constituted the type of investment opportunity covered by the MIAs. One of the three hospitals (the most valuable asset of the portfolio) was Niagara Health Systems (in which, as noted in paragraph 27 hereof, PG Canada already held shares and associated rights of first refusal and first offer *vis-a-vis* OMERS). Because of this existing relationship with OMERS, OMERS, assisted by CIBC World Markets, offered PG Canada an opportunity to pre-empt the formal sales process by submitting a non-binding offer ahead of the offer deadline for outside third parties. Martin, on behalf of PG Canada, conveyed to the Plaintiffs that it was PG Canada's preferred course to work with them rather than scramble to find alternative funding.

[67] Communications and events, between the fall of 2019 and March 2020, pertaining to securing the OMERS Opportunity included:

- Email exchanges relating to the rate of return acceptable to the Plaintiffs (and PG Canada), culminating in an agreement to make a bid to OMERS that would see a 7% return to the Plaintiffs.
- A NOPA, dated October 25, 2019, permitting PG Canada to pursue the OMERS Opportunity. The NOPA reflects that at the time, the parties were anticipating using cash from Fund II. The commitment period in the NOPA ran to January 15, 2020.
- On November 12, 2019, a conference call took place to discuss the OMERS Opportunity, including the status of negotiations with OMERS, PG Canada fees, closing costs and next steps. For the purposes of the conference call, PG Canada prepared a slide presentation setting out, among other things, the OMERS investment structure, a recap of the negotiations to that point between PG Canada and OMERS, and that a "unit trust" had been formed naming Fund II as the beneficiary.
- On December 19, 2019, PG Canada presented the annual report referencing, among other things, OMERS as a capital commitment for Fund II, the existing pipeline of future P3 Opportunities in Canada and the United States and extending the Fund III Capital Commitment Period to February 1, 2021, to correspond with the Capital Commitment Period for

Fund II. The report also raises the prospect of the Limited Partners participating more with PG Canada in the secondary investment market.

- On December 23, 2019, an agreement was reached to extend the Fund III Capital Commitment Period to February 1, 2021, to match Fund II.
- Emails and telephone calls between the end of January 2020 and March 3, 2020, recognizing the cash in Fund II was insufficient to satisfy the OMERS investment requirements and considering Fund III as an alternate capital source.
- The emails also reflect PG Canada attributing delays in concluding the OMERS transaction to difficulties on the part of OMERS in securing necessary third-party consents.
- A February 3, 2020, email, from PG Canada to Caledon (and others), enclosing a new draft NOPA, this time showing Fund III as the source of capital and a commitment expiration date of April 4, 2020.
- A February 28, 2020, inquiry by Caledon of PG Canada as to whether there were any matters of which Caledon should be aware.
- PG Canada sets up a meeting for March 9, 2020, to further discuss the use of Fund III for the OMERS transaction and other investment opportunities.

[68] A meeting did occur on March 9, 2020, at the Toronto offices of PG Canada. At the meeting, rather than discuss OMERS and the ongoing investment opportunity, as expected by the Plaintiffs, Budden and Martin advised those present that PG Canada was selling its North American business to CDPQ and that PG Canada would be causing

the pre-payment, at par, of all outstanding Qualified Loans across all of the funds. In effect, CDPQ would be stepping into the shoes formally worn by the Plaintiffs.

[69] According to PG Canada, the right to pre-pay the loans all at once at par is grounded in the wording of s. 2.5(c) of the Template QLA.

b) CDPQ Transaction

[70] In mid-2019, PG Canada was looking to raise money to repurchase the block of PG Canada's shares, formerly owned by Deutsche Bank. At trial, this was referred to as the Flag Transaction. CDPQ was one of a number of lenders approached in that regard. Recall that by this time, CDPQ was a 20% shareholder of Plenary Group Australia. PG Canada's principal contact at CDPQ was Olivier Renault (Renault), Managing Director, Infrastructure Investment. In the course of their discussions, Renault discussed CDPQ's interest in perhaps acquiring an ownership interest in PG Canada. A meeting was eventually set for August 20, 2019, in advance of which CDPQ requested from PG Canada certain information about Fund Loan balances and key terms and conditions of the Fund Loans themselves, including any pre-payment penalties. With the consent of the PG Canada board, Budden permitted some due diligence by CDPQ. In that context, Budden recalls reading to Renault the pre-payment rights, as set out in s. 2.5(c) of the Template QLA, reproduced in paragraph 48 herein.

[71] On September 25, 2019, PG Canada received from CDPQ a non-binding indication of interest to acquire between 30 – 100% of PG Canada's business and 100% of the Fund Loans (Indicative Offer). The Indicative Offer was addressed specifically to O'Rourke (Chairman, PG Canada), Dunstan, Dreaver and Oppenheim.

A copy of the Indicative Offer was sent to Budden. The Indicative Offer valued PG Canada at $650 million: $450 million attributed to PG Canada's ownership interest in the projects and $200 million attributed to PG Canada's development operations (employees, contact, goodwill, etc.).

[72] Between September 25, 2019, and November 28, 2019, extensive negotiations occurred between PG Canada and CDPQ, focused largely on asset valuation, with PG Canada proposing a valuation model generating an aggregate value of approximately $1 billion. Since at least November 7, 2019, calculations of asset values included the OMERS Opportunity.

[73] Until late November 2019, knowledge of the CDPQ Transaction was limited to those individuals referenced in paragraph 71 hereof, plus PG Canada's internal tax expert.

[74] By November 28, 2019, matters had progressed to the point where PG Canada and CDPQ entered into an agreement, whereby PG Canada agreed to deal exclusively with CDPQ with respect to the potential acquisition by CDPQ of PG Canada, including 100% of the outstanding principle, and committed future Fund Loans for the aggregate purchase price of $1.071 billion (Exclusivity Agreement). The exclusivity extended to March 2, 2020.

[75] In the Exclusivity Agreement, PG Canada and CDPQ also commit to, among other things:

- Work cooperatively and in good faith, to complete due diligence, secure necessary board approvals, negotiate a definitive agreement to effect the transaction.
- Keep the Exclusivity Agreement and the status of any negotiations confidential, except from those required to assist with negotiations.
- Maintain the aggregate valuation of $1.07 billion subject to certain adjustments, particularized in the Exclusivity Agreement.

[76] It was the evidence of Budden and Martin that confidentiality was important to PG Canada because disclosure could damage business both internally and among co-investors and partners. Despite its role as management service provider to Fund III, at no time prior to March 9, 2020, did PG Canada cause PG Execution to disclose the CDPQ Transaction to CCM (Caledon) in its capacity as General Partner of Fund III.

[77] Following execution of the Exclusivity Agreement, steps were taken to set up a data room at Davies LLP to assist CDPQ in performing confidential due diligence and to begin drafting the commercial agreements. Among the documents in the data room were the QLAs for each project. The evidence establishes, and I find, that in the course of information sharing, the identities of the Plaintiffs were disclosed to CDPQ by PG Canada (or its lawyers).

[78] Also following execution of the Exclusivity Agreement, PG Canada expanded its internal information loop to include a select number of senior executives, including

Martin, once again emphasizing the importance of confidentiality to avoid business disruption.

[79] Negotiations between PG Canada and CDPQ progressed through December 2019 to February 2020. One issue that took until the end of February to resolve was the valuation of the US 36 Project (the largest asset being sold).

[80] Another issue specifically identified and planned for by PG Canada and CDPQ was the anticipated negative reaction of the Plaintiffs to the sudden *en masse* pre-payment of the loans and any defensive actions they might take in response thereto. In fact, in respect of the OMERS Opportunity, PG Canada unilaterally established a second unit trust, naming CDPQ, not the Plaintiffs, as the beneficiary. Additionally, to facilitate the immediate pre-payment by the PICs of the Fund Loans, PG Canada and CDPQ designed the closing to take place in two parts. The purchase of PG Canada's development operations would close April 4, 2020. The purchase of PG Canada's equity interest in the projects would close October 31, 2020, enabling PG Canada to, among other things, secure any consents necessary to affect the transfer of assets to CDPQ.

[81] For clarity, the agreements between PG Canada and CDPQ contemplate that the PICs needed cash to payout the Limited Partnerships. As such, the agreements specifically require PG Canada to cause notices of pre-payment to be sent by each PIC to the appropriate Limited Partnership and to advance (i.e. lend) funds to each PIC to pre-pay the Fund Loans *en masse* at par. But for the April 2020 sale proceeds, the PICs had no funds to affect the pre-payments.

[82] The CDPQ purchase and sale agreement also provided that PG Canada's loans to each PIC would be documented by a form of loan agreement substantially the same as the Template QLA, with the exception there be no right to pre-pay the loan. PG Canada agreed to hold the loans pending closing of the asset purchase on October 31, 2020, at which time the loans would be assigned to an entity owned and controlled by CDPQ. These new loan agreements were entered into and assigned to CDPQ except for the CSEC loan, referred to in paragraph 50 herein. For reasons related to the ongoing litigation, the CSEC loan continues to be held by a company still owned and controlled by Dreaver.

[83] The purchase and sale agreement for the CDPQ Transaction states that the purchase price for the development company, subject to adjustments, is $250 million and that the asset purchase price, subject to adjustments, is $715 million. As a result of the CDPQ Transaction, the PG Canada shareholders named in this lawsuit received the following:

PLENARY GROUP NO. 1 PTY LTD	$	346,526,988.00
Dunstan Holdings Ltd.	$	309,069,297.00
Dreaver Holdings Ltd.	$	256,301,370.00
Brian Budden	$	29,653,799.99
Paul Martin	$	3,929,128.00
Stuart Marks	$	3,929,128.00
Dale Bonner	$	1,037,883.00
Total	**$**	**950,447,593.99**

[84] As noted, it was on March 9, 2020, when PG Canada advised the Plaintiffs of the CDPQ Transaction and that all the Fund Loans would be pre-paid at par upon five days' notice, as per the QLAs. In fact, on March 9, 2020, there were two meetings – the first meeting was a coffee meeting between Budden and Rogers; the second

meeting was later in the day at PG Canada's Toronto offices with representatives of the Plaintiffs present.

[85] Budden recalls taking exception to Rogers describing PG Canada's actions as underhanded. He also recalls referring Rogers to s. 2.5(c) of the Template QLA (the pre-payment clause).

[86] PG Canada advanced the sale proceeds to the PICs and, in the case of Funds I and II, caused them to pre-pay the loans at par. Thereafter, PG Canada caused the General Partners to release the security the PICs had pledged to the Limited Partnerships. In the case of Fund III, where the General Partner was not a PG Canada corporation, PG Canada ultimately negotiated Caledon's consent[9] to have PG Execution (the Management Services Corporation) sign the release of security.

[87] Upon the April 4, 2020, close of the first part of the CDPQ Transaction, PG Canada ceased operations, seamlessly continuing business as Plenary Americas. Budden and Martin (and others) assumed the same roles at Plenary Americas that they held at PG Canada. Plenary Americas' directors included Budden and Renault.

c) CDPQ Payment to PG Canada for the Present Value of the Unexpired Term of Fund Loans

[88] A factual dispute concerning the purchase price that will be relevant to damages, is whether part of the CDPQ purchase price included a premium equal to the present value of the unexpired term of the Fund Loans calculated using a discount interest rate of 5.25%.

[89] The Plaintiffs say it did. PG Canada disagrees.

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[9] The consent was without prejudice to Caledon maintaining its objections to PG Canada's actions.

[90] It is PG Canada's position that its sale price was not arrived at by valuing each individual asset and then totalling those values. Instead, PG Canada says it first determined a global amount for which it was prepared to sell the business and then, after the fact, explored ways to justify the amount to CDPQ by assigning values to its assets. In the context of the many documents pertaining to the negotiation of the CDPQ Transaction, Budden testified that the multiple references to present valuing the unexpired term of the Qualified Loans at a discount rate for 5.25% were simply means to justify to CDPQ that PG Canada's asking price, of approximately one billion dollars, was reasonable. On more than one occasion, Budden referred to the justification as a mere "pitch" to sell the global number. No witnesses were called from CDPQ, including to explain their understanding or interpretation of the segregation of the Qualified Loans and the calculation of the present value of the unexpired term thereof using the discount rate of 5.25%. Without such evidence, I am not satisfied with the "pitch" explanation. I find PG Canada was compensated for the present value of the unexpired term of the Qualified Loans using a discount rate of 5.25%.

[91] My conclusion is supported by, among other things:

- September 25, 2019, email from Dunstan to Budden instructing Budden to separately value the concession assets and the Fund Loans. This request followed PG Canada's receipt of CDPQ's September 25, 2019, Indicative Offer. Budden conceded Dunstan was differentiating between the PG Canada owned equity cashflows and the Fund Loans.[10]

[10] In the email, Dunstan instructs Budden to value the Fund Loans using a 6.25% discount rate.

- October 6, 2019, email from Oppenheim to fellow board members reporting on a meeting with Renault where the Fund Loans were discussed separately, including a present value calculation using a discount rate in the 5% range. The email also references CDPQ being happy to ensure that PG Canada gets all of the benefit (i.e. premium) of pre-paying the Qualified Loans at par.
- October 11, 2019, email from Budden to the board reporting on a call with CDPQ, during which he requested CDPQ separate the concession values from the loan values.
- PG Canada retained Fort Capital to assist with the valuation of assets for the purpose of negotiating with CDPQ. Fort Capital's work included a separate valuation of the Fund Loans.
- On November 10, 2019, Budden and Dreaver agreed to instruct Fort Capital to use a 5.25% discount rate to calculate the Fund Loan premium.
- Fort Capital produced a valuation document for PG Canada for presentation to CDPQ in November 2019. That report explains that a 5.25% discount rate was used for all Fund Loan cashflows reflecting the structural superiority of those cashflows as compared to the equity cashflows. The Fort Capital report shows a Fund Loan premium (excluding the CSEC loan) of $141 million, and Fund Loan premium for the CSEC loan of $65 million.
- Budden conceded at trial that the premium calculated using the discount rate of 5.25% remained part of PG Canada's valuation throughout the

negotiations with CDPQ and is ultimately reflected in s. 3.8(b)(ii) of the CDPQ Purchase and Sale Agreement.

- Email conversation between Budden and Fort Capital, dated November 23, 2019, wherein Budden confirms, among other things, that the Fund Loan cashflow streams will be valued using a discount rate of 5.25%. Budden also confirms that PG Canada's equity cashflows would be valued at a discount rate of 6.75%, and cashflows in respect of OMERS shall be valued at 6.75%.
- The Exclusivity Agreement, dated November 25, 2019, provides at paragraph 6, a formula for the calculation of the CDPQ final purchase price. The formula factors in the Fund Loan premium, defined as "the Net Present value of the future interest and principal payments on the Fund Loans discounted at 5.25% per annum, less the par value of such Fund Loans on the Effective Date".
- In email exchanges, dated February 27, 2020, among Budden, Renault and Fort Capital, Fort Capital observes PG Canada has been operating on the basis that the Fund Loans are a distinct asset and a financial contract that is "separable". The communication also states that the parties proceeded on the basis that 5.25% was an attractive return for the Fund Loans, which was seen to be attractive to a fund such as CDPQ.
- February 27, 2020, email from Fort Capital to Budden, in which Fort Capital explains they are of the view that the Fund Loans were unique assets that

the PG Canada shareholders were selling to CDPQ. He also conveys the Fund Loan premium is a distinct asset.

- The final version of the CDPQ closing financial model, intended to the be relied on by both PG Canada and CDPQ to determine the purchase price, calculates the Fund Loan premium using the 5.25% discount rate.
- Section 3.8(b)(ii) of the CDPQ Purchase and Sale Agreement requires PG Canada to provide CDPQ a written statement containing:
  - "… a calculation of the net present value of the future interest and principal payments of the [PG Canada] Replacement Loans discounted at 5.25% per annum as at the Concessions Closing Date less the net present value of the future drawdowns (following the Concessions Closing Date) on all the [PG Canada] Replacement Loans discounted at 5.25% per annum…".

[92] Based on the foregoing, I repeat I cannot accept the calculation of a Fund Loan premium using a discount rate of 5.25% was merely a pitch to justify the global number of approximately one billion dollars. The Fund Loans and the calculation of the premium were dealt with separately from the other assets being purchased by CDPQ. A portion of the purchase price paid to PG Canada was on account of the premium ascribed to the Fund Loans.

[93] I reach this conclusion without reference to the opinion evidence of Alan Hibben, CPA, CFA ICD.D, of Shakerhill Partners, who the Plaintiffs called to address the question of whether the CDPQ Transaction resulted in PG Canada receiving

compensation for the present value of the unexpired term of the Qualified Loans at a discount rate of 5.25%.

[94] PG Canada objected to me permitting the expert evidence, primarily on the ground it did not meet the second threshold requirement for the admissibility of expert evidence namely, the expert evidence must be necessary to the judge carrying out its fact-finding role. I agree with PG Canada that this is not a case where I am unable to reach my own conclusions in the absence of assistance from an expert with special knowledge (See ***White Burgess Langille Inman v. Abbott and Haliburton Co***., 2015 SCC 23 at paras. 14-32; ***R. v. D.D.,*** 2000 SCC 43 at para. 46). Mr. Hibben was not necessary for the purposes of determining the question posed to him.

d) Additional Evidence Pertaining to OMERS Opportunity and CDPQ Transaction

[95] Some additional relevant evidence arose from the testimony pertaining to the Plaintiffs' interactions with PG Canada in the context of the OMERS Opportunity and CDPQ Transaction. I deferred this evidence in hope it will make more sense now that both transactions have been described. The principal sources of this additional evidence are Martin and Budden.

[96] As for Martin, he testified:

- He kept Budden informed throughout about the OMERS negotiations.
- Despite some occasional friction, the relationship with Formuziewich and IMCO was going well, and PG Canada was interested in building on the existing relationship.

- Martin knew by the end of November 2019 that CDPQ wanted to buy 100% of the Fund Loans, and that PG Canada intended the Qualified Loans to be pre-paid *en masse* at par value. In other words, he knew that information at the same time PG Canada was agreeing with the Plaintiffs to extend the Fund III capital commitment to February 1, 2021, and in December 2019, when he and Budden were presenting the 2019-year end Fund reports (which presentation included discussion of future investment opportunities and a committed funds calculation reflecting the OMERS Opportunity). Martin knew the OMERS Opportunity was part of the assets being offered to CDPQ.
- Despite expiration of the funding commitment set out in the first OMERS NOPA, PG Canada pursued OMERS negotiations with the Plaintiffs, including by preparing and circulating a second NOPA, this time contemplating using the cash in Fund III rather than Fund II.
- Martin conceded it was awkward to be recommending the new NOPA knowing PG Canada intended to terminate its relationship with, and repay the loans owed to, the Limited Partners upon the closing of the CDPQ Transaction.
- Martin agreed the CDPQ Transaction would have been a material consideration to the Limited Partners had PG Canada disclosed the possibility of its occurrence and that upon CDPQ closing, the Limited Partner would be without the reliable, stable income stream previously generated

by the Qualified Loans and exclusive access to Pipeline P3 Opportunities in North America.

- The original purpose of the March 9, 2020, meeting, between the Plaintiffs and PG Canada, was to advance OMERS discussions, including using Fund III instead of Fund II, and to consider the possibility of partnering with PG Canada in projects similar to OMERS (i.e. investing in secondary market interests) in the United States.
- Martin anticipated the Limited Partners would object to pre-payment of the Qualified Loans at par.

[97] Additional evidence arising from the testimony of Budden includes:

- During the course of the CDPQ negotiations and transactions, he and Martin were directors of virtually all the PICs, the General Partners of Funds I and II, and PG Execution (the Management Services provider for Fund III).
- At the time the Exclusivity Agreement with CDPQ was finalized, PG Canada chose not to seek a "carve out" permitting the PG Canada controlled General Partners and PG Execution to provide information to the Limited Partners. It was not until immediately prior to the meeting of March 9, 2020, that PG Canada asked permission from CDPQ to disclose the transaction to the Limited Partners.
- Throughout the negotiation of the CDPQ Transaction, Budden received regular and direct input from the PG Canada board, including Dunstan, Dreaver, Oppenheim and O'Rourke. As noted by Martin, Budden was kept

apprised of the OMERS Opportunity. Budden conceded that, in the period of November to December 2019, he was aware the OMERS Opportunity NOPA had been signed by the Funds, Fund III had been extended to February 1, 2021, and that at no time did CAAT or Caledon suggest they wanted to terminate their relations with PG Canada.

- Budden did testify that he perceived IMCO and WSIB might be signaling a possible withdrawal from the relationship with PG Canada but, in my opinion, this belief is not reasonably supported by the evidence, including that at the relevant time he had only one meeting with Formuziewich, the NOPA for the OMERS Opportunity had just been signed, Fund III was extended to February 1, 2021 and Budden's own admission that neither Formuziewich nor Rogers ever expressed they wanted to sever business relations with PG Canada.
- Budden knew the Limited Partners were not expecting the CDPQ Transaction, especially the *en masse* pre-payment of their loans at par.
- Budden anticipated the Limited Partners would not want to commit to loaning funds for the OMERS Opportunity if, immediately thereafter, the PIC would be pre-paying the loan.
- By February 15, 2020, Budden was devoting considerable time meeting with PG Canada senior staff, including Martin, about the CDPQ Transaction. At or about the same time, Budden reported to his superiors that it would be much easier if the CDPQ deal could close prior to the OMERS transaction.

- Moreover, Budden reported that he was subtly trying to delay the OMERS closing but it was unlikely he could push it off more than a couple weeks. By "subtly" Budden meant he was not pressing OMERS to secure the third-party consents required to make the deal happen.
- Budden instructed Martin to cancel a pending OMERS-related meeting with IMCO and CAAT because it was apparent to Budden that at this stage of the negotiations with CDPQ, every time Martin talked with the Limited Partners, Martin and PG Canada were digging a deeper hole out of which they would have to climb. In Budden's words, "this joke never gets old".
- On Saturday, March 7, 2020, Budden reported to PG Canada's board that the plan was to close the CDPQ Transaction on Monday, March 9, and then notify the Limited Partners that afternoon. Subsequently, a decision was taken to notify the Limited Partners on March 9 and close the CDPQ deal on March 11, 2020.
- After meeting with the Limited Partners in the afternoon of March 9, 2020, PG Canada caused the PICs to issue to the General Partner of each Fund notices that the Qualified Loans would be pre-paid *en masse* at par.
- As at March 9, 2020, no PIC was in distress, financially or otherwise.
- Budden was in regular communication with Renault at CDPQ.

e) Negotiating s. 2.5(c) of the Template Qualified Loan Agreement

[98] To reiterate, a foundational component of the CDPQ Transaction was PG Canada causing its PICs to pre-pay the Qualified Loans *en masse* at par, thereby

bringing PG Canada's arrangement with the Plaintiffs to an immediate end. PG Canada submits the right of the PICs to pre-pay the loans *en masse* on five days' notice is clearly spelled out in s. 2.5(c) of the Template QLA attached to the executed LPAs (Fund I and Fund II), and the MIA (Fund III), reproduced at paragraph 48 hereof.

[99] The Plaintiffs submit the PICs did not have an unfettered right to pre-pay the loans *en masse* (or otherwise) on five days' notice. They say:

- First, the form of Template QLA attached to the signed LPAs and MIA, to the knowledge of PG Canada, is the wrong form. According to the Plaintiffs, the wording that was agreed to and that should appear in s. 2.5(c) of the Template QLA is:

  > (c) The Borrower [i.e. the PIC] may only prepay outstanding Loans in whole or in part (together with all interest accrued on the principal amount prepaid) **with the prior written consent of the Lender [the Fund], such consent not to be unreasonably withheld; provided that such consent shall not be required for so long as any event of default under the documents governing the Senior Debt has occurred, the repayment of the Senior Debt has been accelerated and all reasonable breakage costs (excluding, for certainty, a makewhole or yield protection payment) of the Lender [the Fund] have been paid**. All prepayments shall be applied to pay accrued and unpaid interest on the principal amount prepaid and then to repay instalments of the principal on the Loans in inverse order of maturity.
  >
  > (emphasis added)

  In other words, there could be pre-payment without consent only in the event of default under and acceleration of the senior debt. The wording of s. 2.5(c) should be rectified.

- Second, even if s. 2.5(c) of the final version of the Template QLA is correct, the commercial terms thereof read in the context of the MIAs, the LPAs and the Subscription Agreements do not permit a sudden *en masse* pre-payment of all Fund Loans.

[100] These questions require a specific review of the negotiation of the Template QLA, particularly s. 2.5(c). That review is the focus of this section. Before doing so, it may be helpful to again summarize the principal players involved during the 2010 Fund I negotiations, this time including legal counsel:

- WSIB – Denham
- CAAT – Cays and Fahey
- Caledon – Rogers
- WSIB/CAAT legal counsel – Gowlings LLP
    - Gowlings LLP counsel – Myron Dzulynsky (Dzulynsky), Lilly Wong (Wong), Rob Blackstein (Blackstein) and Frances Macklin (Macklin) (relationship partner)
- PG Canada – Dreaver and Dunstan
- PG Canada counsel – Davies LLP
    - Davies LLP lawyers: Martin and Sonny Bhalla (Bhalla)

These individuals testified at trial, other than Macklin and Bhalla. In each case, it was apparent to me that, due to the sheer volume of communications over the summer of 2010, and with the passage of time until trial (more than a decade), memories have faded. Without exception, the Plaintiffs' and PG Canada's witnesses relied on documents to refresh recollections and I have taken that into my assessment of all the evidence.

[101] The frontline negotiator for the Plaintiffs was Rogers. The frontline negotiator for PG Canada was Dreaver.

[102] As negotiator for the Plaintiffs, Rogers interfaced with Dreaver, but also managed communications between the Plaintiffs and Gowlings LLP. Dreaver's role was similar to Rogers', other than the fact Dreaver was an owner and director of the party on behalf of whom he was negotiating. In that sense, Dreaver was not at arm's length. Rogers and Dreaver received virtually all negotiation-related emails, including exchanges among legal counsel.

[103] In respect of the role of legal counsel, as it related to negotiations of the Template QLA, Dzulynski and Martin were lead counsel for the Plaintiffs and PG Canada respectively. That said, Dzulynski's partner and loan specialist, Wong, was assigned the specific task of negotiating the Template QLA with Martin at Davies LLP.

[104] When it came to final decisions on documents, I accept that the involvement of Denham, Cays and Dunstan was necessary.

[105] Now to the negotiations themselves.

[106] Initially the parties were working towards a July 31, 2010, close. As noted earlier, the transaction did not close until September 15, 2010. Notwithstanding the shift of timetable, I find, based on the evidence of the Plaintiffs' witnesses and my review of the exhibits, the majority of the terms found in the final versions of the deal documents were settled by July 31, 2010, with the August to September period occupied with securing a letter of credit from Royal Bank of Canada (a material

component of the funding model), minor revisions and preparing the documents required to immediately fund PIC I and PIC II on closing.

[107] Neither party disputes that even though the Fund I transaction had not closed, the documents for, and structure of, PIC I and PIC II were to be as contemplated by the Fund I documentation. This included preparation and use of the Template QLA. Dreaver testified that he oversaw the putting together of the PIC I and PIC II documents and, because the parties were proceeding in accordance with the Fund I model, the QLAs for PIC I and PIC II were prepared by PG Canada in its capacity as controlling mind of the Fund I General Partner[11]. Essentially, PIC I and PIC II were test runs for the nascent investment partnership.

[108] Reflective of this test run, is a September 9, 2010 exchange between Dreaver and Rogers evidencing, among other things, that Davies LLP sought confirmation that Gowlings LLP's participation would not be necessary in respect of the PIC I and PIC II loans provided Davies LLP, now acting for the General Partner, was satisfied the QLAs for those projects would not leave the Plaintiffs in a position worse than as provided in the Template QLA. The trial exhibit containing the exchange ends with a later email wherein Dreaver communicates to Rogers, Dreaver's understanding that Davies LLP had sent its blackline updates to the QLA, and that only "conforming" changes had been made to reflect the nature of the PIC I and PIC II structures, "ie. that they are existing projects, no outstanding LCs etc". Ultimately, on September 13, 2010,

[11] Recall that the PIC I and PIC II were pre-existing projects, the structures of which the MIAs and the LPAs would replace.

Davies LLP represented to Rogers that it believed the PIC I and PIC II Qualified Loans and QLAs were reasonable.

[109] I heard and read much evidence about exchanges of the MIA, LPA and Template QLA between Gowlings LLP and Davies LLP. Most relevant to this litigation are the communications after July 27, 2010. There is no dispute that until July 27, 2010, the draft versions of the Template QLA being circulated permitted the PIC borrower to pre-pay a project loan without the consent of the Plaintiffs.

[110] Important to this case are the exchanges between July 28 – 30, 2010.

[111] In the morning of July 28, 2010, Martin sent Wong, among other things, two revised drafts of the Template QLA. Although the content of the drafts was the same, one version tracked revisions to a Davies LLP July 26, 2010, draft and the other tracked revisions to a Gowlings LLP July 27, 2010, draft. As it pertains to pre-payment of a loan by the PIC, s. 2.5(c) of the Template QLA of the new (July 28, 2010) Davies LLP drafts introduce a consent right in favour of the Plaintiffs (not to be unreasonably withheld), except in a situation where there is a continuing event of default under the documents governing the senior debt for the project. The Davies LLP July 28, 2010, version also provides that in the event of pre-payment, the PIC would not be required to pay a premium, penalty or bonus in respect of any outstanding portion of the loan. In his covering email, Martin attributes his revisions to various agreements reached between the parties in the evening of July 27, 2010. The email contains the caveat that the proposed changes remain subject to PG Canada's review and comment. This

type of caveat appears throughout the emails and other documents. From here on, I will refer to the caveat as the "standard caveat".

[112] On July 29, 2010, Wong responded to Martin with a further draft of the Template QLA, retaining the consent right but proposing the consent exception should occur only where the senior lender has actually accelerated the debt and not simply in the event of default. Wong also removed the words "without premium, penalty or bonus", adding in its place a requirement that the PIC pay the Fund's reasonable breakage costs. Later in the morning of July 29, 2010, Martin emailed Wong advising PG Canada prefers the "event of default" language rather than the "acceleration" language, and that PG Canada can accept the PIC paying reasonable breakage costs, provided the Template QLA makes clear there are no other premiums, penalties or bonuses payable.

[113] PG Canada took no issue with the consent right.

[114] In an email response to Martin, Wong advises she will speak to Rogers and Dzulynsky. She also reminds Martin that the impetus for WSIB's and CAAT's requiring a consent right is to protect them from loss of revenue from premature pre-payment of a loan and that restricting the pre-payment to an acceleration scenario is consistent with that concern.

[115] At 3:09 p.m. on July 29, 2010, Wong got back to Martin, providing language she was prepared to recommend to WSIB and CAAT. The language in the email is the same as set out in paragraph 99 hereof (which the Plaintiffs say should have been in

s. 2.5(c) of the Template QLA attached to the executed documents). In the email, Wong's proposed wording is followed by the standard caveat.

[116] Shortly after Wong's email, Martin thanks Wong, requesting she let Davies LLP know how the discussion goes with Rogers and Dzulynsky. Wong replies, "will do".

[117] The exchanges between Wong and Martin, over the period July 28-29, 2010, were copied to, among others, Dzulynsky, Rogers and Dreaver. WSIB and CAAT were not copied.

[118] In the evening of July 29, 2010, Dreaver writes directly to Rogers expressing his view the documentation for the deal is "done", subject only to receiving Denham's comments. Rogers agrees.

[119] As for communications among Rogers, Gowlings LLP and WSIB, on July 29, 2010, Rogers instructed Gowlings LLP to send to Denham, a binder containing the deal documents. Denham did not address the binder until returning from vacation on or about August 13, 2010[12]. The first document in the binder is a memo from Gowlings LLP to Denham, copied to Rogers, in which Dzulynsky describes the enclosures, noting they have been agreed to as between the law firms, but are subject to a final review for nits, cross references and clerical issues, as well as, in the case of the LPA, review by Manitoba counsel. Section 2.5(c) of the Template QLA sent to Denham matched the wording proposed by Wong in her email to Martin on July 29, 2010, at 3:09 p.m.

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[12] Denham was not the only individual to take holidays at that time. Rogers, Wong and Cays also were away during the first week of August.

[120] In terms of communications within PG Canada, I mention three. The first two are emails between Dreaver and Martin exchanged immediately after Wong's July 29, 2010 "will do" email to Dreaver. Both these emails are redacted for privilege. The third email is dated July 30, 2010, whereby Dreaver transmitted the LPA, MIA, Subscription Agreement and Template QLA (and supporting General Security Agreement) to Dunstan and the other PG Canada board members. Budden and certain other PG Canada employees also were on the distribution list. Dreaver's email reads as follows:

> Attached are what I believe to be the final version of the Fund documents. WSIB may have the odd, small comment but I don't think that there will be anything material.
>
> Next steps are to finalize the RBC [letter of credit] facility.

[121] The version of the Template QLA circulated to Dunstan and the board was the same as the one contained in the binder sent by Gowlings LLP to Denham. Once again, that version matched the language proposed by Wong in her email to Dreaver on July 29, 2010, at 3:09 p.m. Significant to me is that in the version circulated by Dreaver, the standard caveat was removed. Martin testified logic dictates it was Davies LLP that made the change to the document and provided it (along with the other documents) to Dreaver for circulation to Dunstan and the board.

[122] Still, on July 30, 2010, Rogers emailed Martin directly thanking Martin for his hard work in moving the documents forward and suggesting he get some rest.

[123] As noted, Denham began his review of his binder of documents upon his return from holidays, on or about August 13. As he did so, he made notations and communicated his changes to Gowlings LLP. He also arranged to meet in person with

Dzulynsky and Rogers on at least one occasion. The meeting is confirmed not only by the oral evidence and emails, but also by insert pages (reflecting changes communicated by Denham to Gowlings LLP) that had been slipped into the binder. Moreover, notations in Denham's binder correspond with notations in a duplicate binder that Dzulynsky created for himself. As reflected in Dzulynsky's binder, the only change to s. 2.5 (c) of the Template QLA was the striking out of the standard caveat.

[124] Although I address CAAT later, it was Dzulynsky's evidence that he would not have removed the standard caveat without having the consent of both WSIB and CAAT to the wording of s. 2.5(c). I accept his evidence in that regard.

[125] From time to time over the summer of 2010, Dzulynsky was assisted by Blackstein, a junior[13] commercial associate. Blackstein played no role in the negotiation of Fund I, including the Template QLA. He provided support in the form of incorporating changes that had been agreed to into the documents, circulating documents and assisting to close the transaction. He played no role in the assembly or sending of the binder, sent to Denham on July 29, 2010. Moreover, he became a father on July 31, 2010, and was away from work until mid-August.

[126] Blackstein had returned to work by August 18, 2010, as evidenced by an email to Rogers and Martin (copied to Dzulynsky), whereby he transmitted copies of the MIA and LPA (not the Template QLA), correcting "a few more drafting nits" and inviting Martin to advise if there was a need to discuss. Martin replied to Blackstein and Rogers (copied to Dzulnysky, Dunstan, Dreaver, Budden, Bhalla and Wong and others) on

[13] Blackstein had been practicing for only four years.

August 19, 2010, among other things, that "These look fine (I understand that Plenary has discussed the deletion of MIA Section 2.6(c) with Caledon and, on the basis that this is the final substantive comment, agreed to its deletion), except for the following minor points: …".

[127] Later, on August 19, 2010, Dzulynsky responds to Martin: "Your comments on the MIA/LPA make sense, and we will incorporate them and send around change pages reflecting those changes, a few other minor nits and Schedule B to the Subscription Booklet with respect to WSIB. As CAAT will be signing the MIA and the Subscription Booklet today (in escrow), please advise as to how many copies of the MIA you would like to have signed …".

[128] In addition to conveying that the MIA and LPA were in an acceptable form (subject of the deletion of s. 2.6 (c) of the MIA), the communications confirmed that Cays at CAAT intended to sign the signature pages that day (August 19, 2010), in advance of Cays leaving on vacation in the latter part of the afternoon.

[129] Blackstein subsequently sent the signature pages to Cays for signing and then, at 3:49 p.m. on August 19, 2010, transmitted to Davies LLP (copied to, among others, Dzulynsky, Rogers, Macklin and Wong), what is described in the email as "final versions of the MIA, LPA and the form of Subscription Agreement…, clean and blacklined against the last drafts reviewed by Davies".

[130] For the first time since negotiations started, the Template QLA physically was incorporated as Schedule "E" to the LPA (as opposed to being shared as a stand-alone document). The track changes function of the Gowlings LLP computer treated the

incorporation as an amendment to the LPA resulting in extensive blacklining. As a courtesy, Blackstein alerted Davies LLP as follows:

> … the blackline for the Limited Partnership Agreement looks more extensive than it is due to the fact that we inserted the final form of loan agreement as Schedule E.

Other than pointing out the excessive blacklining, there is nothing in Blackstein's email suggesting Gowlings LLP wanted to make or had made any changes to the form of Template QLA. Blackstein's email continues with an invitation to discuss closing logistics and a draft closing agenda.

[131] This is the point in time when the Plaintiffs say a mistake occurred.

[132] The form of Template QLA that Blackstein incorporated into the LPA was not the form Dreaver sent to Dunstan and the PG Canada board on July 30, nor the form approved by Denham on or about August 18, 2010. Rather, the form incorporated by Blackstein was a Gowlings LLP July 27, 2010, draft of the document, pre-dating the introduction of, among other things, the requirement that the PIC borrower obtain the Plaintiffs' consent prior to pre-paying a loan.

[133] It is undisputed that until Blackstein's email, no version of the Template QLA had exchanged hands since July 29, 2010. As well, between July 29 and August 19, 2010, there were no negotiations pertaining to the Template QLA and no requests by any party to amend the wording of s. 2.5(c) of the Template QLA.

[134] Bottom line, it is the July 27, 2010, Gowlings LLP version of the Template QLA that ultimately ended up as Schedule "E" of the executed LPA.

[135] Although the focus of this litigation is s. 2.5(c) of the Template QLA, there are other material substantive discrepancies between the July 27, 2010, Gowlings LLP version and the version in Schedule "E" to the executed LPA.

[136] As matters transpired, the wording of s. 2.5(c) of the Template QLA, appended to the Fund I LPA, found its way into the Template QLAs for Fund II and Fund III. In fact, at no time after July 29, 2010, was that particular provision discussed by the parties again. It is the evidence of the Plaintiffs' witnesses that it was not until PG Canada suddenly terminated the business relationship on March 9, 2020, that they noticed the consent right was not in the Template QLA for any of Fund I, Fund II or Fund III.

[137] In contrast, it is Martin's and Dreaver's evidence that at, or shortly after receiving Blackstein's 3:49 p.m. August 19 email, they noticed s. 2.5(c) of the Template QLA differed from what had been negotiated between July 28 and 29 and circulated to Dunstan and the rest of the PG Canada board of directors on July 30, 2010. Both Dreaver and Martin admit a decision was taken to not raise the discrepancy with the Plaintiffs, Rogers or Gowlings LLP.

[138] Dunstan's evidence was different. He testified that, despite receiving Dreaver's July 30, 2010, email and attachments, including the Template QLA, he was not even aware Dreaver and Martin had negotiated a version of the Template QLA with a pre-payment consent right in favour of the Plaintiffs. Similar to the Plaintiffs, Dunstan says it was not until March 9, 2020, that he learned there was an issue.

[139] As for Budden, his focus during the summer of 2010 was securing the letter of credit from the Royal Bank of Canada, not the negotiations overall. He too testified he was unaware of an issue respecting the Template QLA until March 2020.

[140] PG Canada asserts privilege over any discussions that might have occurred with Martin in respect of the decision to not raise the discrepancy in the Template QLA language with the Plaintiffs or their advisors. The Plaintiffs invite me to infer that the discrepancy, and whether or not to raise it, is the precise subject matter of the redacted email exchanges between Martin and Dreaver referenced in paragraph 120 hereof. Although that is a possible inference, without more, that finding would amount to speculation – something I cannot do.

[141] Thus far, this section has focused on interactions with s. 2.5(c) of the Template QLA. However, important to PG Canada's defence is the fact that leading up to September 15, 2010, and thereafter, Caledon, either in its capacity as the Plaintiffs' negotiator or Fund representative, and Gowlings LLP, as ongoing provider of legal services to the Limited Partners of Fund I, Fund II and Fund III, had eyes on the Template QLA for reasons other than examining s. 2.5(c) and should have noticed s. 2.5(c) in the process. For example:

- As described in paragraphs 107 -108 hereof, the QLAs for PIC I and PIC II were prepared leading up to closing the Fund I transaction on September 15, 2010. Because a template had been established, it was agreed that Gowlings LLP would step away, and as contemplated by the soon-to-be finalized deal documents, the customization of those agreements for PIC I and PIC II could be left to the PG Canada controlled General Partner, assisted by Davies LLP and Rogers on behalf of the Plaintiffs. That said, immediately prior to stepping away, there is some evidence of Gowlings LLP reviewing an early version of the PIC I and PIC II QLAs. Section 2.5(c) did not contain the pre-payment consent right in favour of the Plaintiffs.

- On August 20, 2010, a second binder was sent by Gowlings LLP to Denham for review containing execution copies of the transaction documents. Denham, who was a careful and involved participant on behalf of WSIB, testified he did not notice s. 2.5(c) did not contain the pre-payment consent right in favour of the Plaintiffs.
- Although the commercial documents creating Fund II and Fund III mirror those creating Fund I, they each required, to different extents, review by the parties and their representatives. Fund II introduced Shell and Air Canada as partners. Gowlings LLP represented all the Fund II Limited Partners for that purpose. Section 2.5(c) of the Template QLA attached as Schedule "E" did not contain a pre-payment consent right in favour of the Plaintiffs.
- Perhaps most significant, Fund III required the Americanization of the investment partnership, which included obtaining legal opinions as to whether the proposed lending arrangement between Fund III and the PICs (which was the same as existed for Fund I and Fund II) constituted a loan

and not equity under American law. That exercise required consideration of the loan documents and retention by both the Plaintiffs and PG Canada of legal counsel in the United States of America. At the end of the day, s. 2.5(c) of the Template QLA attached to the Fund III MIA, did not contain a pre-payment consent right in favour of the Plaintiffs.

- Including PIC I and PIC II, more than 30 individual loans were agreed to and advanced by the three funds between 2010 and 2020. Each loan was documented by, among other things, a QLA that did not contain a pre-payment consent right in favour of the Plaintiffs.

[142] There can be no question there were opportunities after August 19, 2010, for the Plaintiffs, Caledon and Gowlings LLP to notice the text of s. 2.5(c) of the Template QLA had reverted to an unrestricted right on the part of the PIC to pre-pay. More than one of the Plaintiffs' witnesses candidly admitted, in hindsight, they wish they had. I believe that evidence and find that at no time after July 29, 2010, did the Plaintiffs, Caledon or Gowlings LLP notice or appreciate the wording of s. 2.5(c) of the Template QLA was other than that sent to Denham on July 29, 2010, and circulated by Dreaver to Dunstan and the PG Canada Board on July 30, 2010.

[143] Still in the context of negotiating the Template QLA, PG Canada submits the evidence falls short of establishing CAAT ever knew about or approved of a right on the part of the Plaintiffs to consent to a pre-payment.

[144] I disagree.

[145] PG Canada's position rests on the fact that, although there is documentary evidence of CAAT receiving an early version of the Template QLA, with an unqualified right on the part of the PIC to pre-pay, there is no documentary evidence of Cays or Fahey receiving or reviewing the consent language approved by Gowlings LLP, Davies LLP, Rogers, Dreaver and Denham. PG Canada asks me to conclude CAAT always understood the PIC's right to pre-pay would be absolute. PG Canada relies as well on the fact there is no record of a Gowlings LLP follow-up to Wong's July 29, 2010, email indicating she would get back to Davies LLP once she received her clients' approval of her proposed consent language.

[146] The evidence as a whole does not support PG Canada's position. In particular:

- In, or shortly after, his meeting with Denham on August 18, 2010, Dzulynsky struck the standard caveat from s. 2.5(c) in his draft. Dzulynsky testified he would not have struck the reference without the consent of both WSIB and CAAT. Again, I believe Dzulynsky in this regard.
- The same language was struck from the documents prepared by Martin and circulated by Dreaver to Dunstan and the board of directors, on July 30, 2010.
- It was the evidence of both Cays and Rogers that their relationship operated differently than the relationship between Denham and Rogers. Communications between Cays and Rogers were frequent and took place over the telephone and at face-to-face meetings, including coffee meetings. Cays acknowledged she had no specific recollection of the discussion,

but the practice was for Rogers to engage. Cays described Rogers as careful and someone who, if anything, was prone to over-communicate. Cays also testified that because the amendment was straightforward and in CAAT's favour, it was the type of amendment that could be communicated by telephone. I accept Cays' evidence in this regard. Also, it makes sense in the context of the roles played by the parties and the dynamics of the negotiations.

[147] Overall, I am satisfied CAAT was aware of, and consented to, the version of s. 2.5(c) of the Template QLA that appears in Wong's email of July 29, 2010, in the Template QLA prepared by Martin and circulated by Dreaver to Dunstan and the board on July 30, 2010, and in the Template QLA in the binder sent July 29, 2010, to Denham for review.

[148] To the extent it is not clear already, I find that because of error and/or inadvertence, the Plaintiffs, Caledon, and Gowlings LLP did not know or come to appreciate the version of the Template QLA, attached to the executed LPA (Fund I and II) and the executed MIA (Fund III), did not contain the pre-payment consent right. They believed it did. They were mistaken.

[149] On the other hand, based on their testimony, I am satisfied that Dreaver and Martin (and hence PG Canada) knew the Template QLAs did not contain the consent right and chose to not communicate that fact to the Plaintiffs or Caledon, their representative. In other words, the mistake was unilateral on the part of the Plaintiffs,

not mutual. My findings in respect of whether PG Canada knew the Plaintiffs were mistaken are addressed later at paragraph 172 – 173.

[150] As previously mentioned, the July 27, 2010, draft of the Template QLAs, attached to the executed deal documents, contains other variances from the versions sent by Gowlings LLP to Denham on July 29, 2010, and by Dreaver to Dunstan and the PG Canada board on July 30, 2010. For example, the July 27, 2010, draft notably is missing important descriptions of the security interest to be held by the Funds in support of each PIC loan. As with the consent right, this variance is very different from other items in the Template QLA intended to be adjusted on a project-by-project basis (earlier referred to as conforming changes). Moreover, the security-related provisions were necessary for the loan structure to function at all.

[151] Because Martin and Dreaver admitted to reviewing the form of Template QLAs, ultimately attached to the executed documents, and noticing the pre-payment provision differed from the July 29, 2010, version, I find, on balance, they must also have noticed all material differences. In other words, they must have noticed the form of Template QLA, attached to the executed deal documents, could not function as contemplated without making material, as opposed to conforming, changes thereto.

[152] It is significant that, in preparing the QLAs for PIC I and PIC II, Davies LLP appears to have caught and corrected the omission pertaining to the security interest but made no adjustment addressing the absent consent right. Because of PG Canada's privilege claim in respect of Davies LLP's work product, it is not clear which version of the Template QLA was used by Davies LLP to prepare the PIC I and PIC II QLAs.

The Plaintiffs' ask me to infer that in respect of the PIC I and PIC II QLAs, PG Canada and its counsel, *with knowledge of the Plaintiffs' mistake*, selectively chose to not correct s. 2.5(c) thereof. While that certainly is a possible inference, there are other possible scenarios as well. As such, I am not prepared to make it.

[153] Before concluding this section, I address an aspect of PG Canada's Template QLA evidence that I find incongruous. Despite Dunstan's alleged centrality to finalizing transaction documents, his regular contact with negotiator, co-founder and fellow shareholder Dreaver, and Dunstan's testimony that from the outset he would never have agreed to the Plaintiffs having a pre-payment consent right, Dunstan testified he had no knowledge Dreaver and Davies LLP were recommending that very thing. Dunstan's evidence in this regard strikes me as contrived and I give it no weight.

[154] I find the more accurate picture is as painted by Dreaver. At the relevant time, whether there was or was not a consent right in favour of the Plaintiffs was a "nothing" from PG Canada's perspective. It is clear from the oral and documentary evidence overall, and I find, at the time the Template QLA was being negotiated, the only pre-payment scenario being contemplated by the parties was one where a particular project fell into distress – in Dreaver's eyes, a *de minimis* risk/low probability event. In fact, the oral and documentary evidence reflects a degree of puzzlement and frustration by PG Canada with the Plaintiffs' request for a consent right in the first place: what investor would *not* want to get their money back as soon as possible if a particular project became distressed? I also accept Denham's evidence that given the importance to the Plaintiffs of the long-term nature of each loan, they wanted to secure

a spot at the table if, on the off chance, a PIC was considering pre-payment. The nature of that security was the pre-payment consent right, not to be unreasonably withheld.

[155] I will return to the intentions of the parties later in these reasons when I discuss the interpretation of the unrectified Template QLA.

III. ANALYSIS

i. Contractual Arguments

[156] The Plaintiffs submit that because of the mistake, the LPA should be rectified by replacing the wording of s. 2.5(c) of the Template QLA, attached to the executed LPA/MIA, with what they allege to be the wording *actually* agreed to, namely, the wording circulated by Dreaver to Dunstan and the PG Canada board on July 30, 2010 (and sent by Gowlings LLP to Denham the day before), requiring the Plaintiffs' consent prior to the PIC pre-paying the loan. Alternatively, the Plaintiffs submit that even without rectification, the Template QLA, attached to the LPA/MIA, construed in context, does not contemplate or permit the termination of the investment partnership by way of a sudden, unilateral, *en masse* pre-payment of all outstanding loans for reasons unrelated to the loans themselves or projects. According to Denham, that is the antithesis of the long-term (thirty plus years), exclusive, stable investment opportunity with like-minded partners that the Plaintiffs agreed to or wanted. The Plaintiffs allege other contractual breaches as well.

[157] PG Canada submits the Plaintiffs agreed to, and are bound by, the wording of s. 2.5(c) of the Template QLA, attached to the executed LPA/MIA, which imposes no

conditions on the PIC's right to pre-pay the loan on five days' notice. They say there is no prior agreement to rectify, and the Plaintiffs cannot simply rewrite the deal. PG Canada argues the *en masse* pre-payment of the loans was permitted by the executed QLAs and supported by the balance of the commercial documents.

[158] I will deal with the Plaintiffs' alternative argument first.

a) Is *En Masse* Pre-payment Permitted Regardless of Rectification?

[159] The principles applicable to contractual interpretation may be summarized as follows:

- The goal of contractual interpretation is to give effect to the intention of the parties.
- The Court is to take a common sense approach.
- The contract must be read as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances at the time of contracting.
- Under the rubric of surrounding circumstances, the nature of the evidence that can be relied on will vary from case to case. However, the evidence of surrounding circumstances should consist only of objective evidence of the background facts at the time of contracting – in other words, matters that were, or reasonably ought to have been, within the knowledge of the parties at the time of contracting.
- Where a transaction involves the execution of several documents, which together form a larger composite whole (like a complex commercial

transaction), assistance in the interpretation of one agreement may be drawn from the related documents.

- Related contracts are to be interpreted to make the parts work harmoniously, so as to achieve the overall goal, not to make parts clash.
- Surrounding circumstances cannot be allowed to overwhelm the words of the agreement and defeat the reasonable expectations of the parties evidenced by those words.
- The parol evidence exclusionary rule does not apply to preclude evidence of surrounding circumstances. The target mischief by the parol evidence exclusionary rule is evidence of the subjective of intentions of a party to a contract.

(See ***Elias et al v Western Financial Group Inc***, 2017 MBCA 110 (CanLII) at paras. 67-77; ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53 (CanLII) at paras. 47-61; ***Salah v. Timothy's Coffees of the World Inc.***, 2010 ONCA 673 (CanLII) at para. 16; ***Samson Cree Nation v O'Reilly & Associés***, 2014 ABCA 268 (CanLII) at para. 82)

[160] In my opinion, the plain language of the Template QLA, particularly s. 2.5(c), does not permit the PICs, at the instance of PG Canada or otherwise, to pre-pay the loans *en masse* for reasons unconnected to the loan itself or the project it funds. The meaning is even more plain when the circumstances surrounding the negotiation of the deal documents are considered.

[161] Looking first at the words of s. 2.5(c) of the unrectified Template QLA:

- The right to pre-pay attaches to the PIC. Nothing in s. 2.5(c) permits PG Canada, or some other affiliate of the borrower, to cause the PIC to pre-pay the loan. Neither does the language permit the PIC to allow its parent to force a pre-payment for extraneous reasons.
- In respect of the notice to pre-pay, s. 2.5(c) speaks of the PIC giving written notice of "its" intention to pre-pay. This clearly speaks to the PICs own intention to pre-pay its own loan.
- Loan is defined as advances by the lending Fund to the individual PIC.
- The term credit facility is defined in s. 2.1 of the un-rectified Template QLA as the facility by which the Fund makes loans to the PIC.

[162] The common sense interpretation of the words of s. 2.5(c), within the context of the unrectified Template QLA, is that the right to pre-pay relates to an individual loan to an individual PIC borrower for an individual project. PG Canada's submission that the unqualified pre-payment right in s. 2.5(c) permitted PG Canada to cause a pre-payment for any reasons unrelated to the purpose of the subject loan, is not supported by any reasonable, common sense construction of that section.

[163] I look next to objective evidence of the surrounding circumstances. The circumstances surrounding the negotiation of the deal documents, including provisions in the related documents, fortify my conclusion respecting the unrectified

language of s. 2.5(c) of the Template QLA. These circumstances include:

- The essence of the arrangement between the Plaintiffs and PG Canada was intended to be an exclusive, long-term investment partnership, providing reliable equity funding for PG Canada and long-term stable cashflows for the Plaintiffs. This is clear from both the documentary and oral evidence pertaining not only to the lead up to the Fund I negotiations in 2010, but also to the lead up and negotiations of Fund II and Fund III.
- The documentary and oral evidence pertaining to negotiations of the Template QLA, in the summer of 2010, confirm discussions were about individual loans and the right to pre-pay in the very unlikely event a particular project fell into distress. To Dreaver, the pre-payment consent right issue was a "nothing". The Plaintiffs argue, and I agree, that it would not have been a "nothing" at the time of negotiations had any party contemplated a sudden and early termination of the investment relationship and an *en masse* pre-payment of the loans, in circumstances where no project was in default and the Plaintiffs would be deprived of the long-term, stable cashflows. During his testimony, Dreaver conceded that, at the time of negotiating the deal documents, there was no contemplation of effecting an *en masse* pre-payment of the Qualified Loans for reasons unrelated to a project that was the subject of the loans.
- This is a case where surrounding circumstances must include the other commercial documents, because they are integral to the investment

structure of which the Template QLA is just one piece. At the top is the MIA governing the overall relationship between PG Canada and the Plaintiffs, including such things as exclusivity of opportunity and the right of the Plaintiff to exit the relationship in the event control of PG Canada changed or there was a material business event. Beneath the MIA is the LPA, creating the structure by which funds would move from the Plaintiffs to the PG Canada PICs, and sets out the rights and responsibilities of the Limited and General Partners. At the bottom is, among other documents, the Template QLA, a schedule to the LPA – the mechanism by which funds flowed from the Plaintiffs to the PIC. Its character is transactional, not relational. After considering the nature of the rights addressed in the MIA and LPA on one hand, and the Template QLA on the other, it is my view that if the intention of the parties, at the time of negotiations, had been that the Template QLA could be used to effectively end the entire relationship, consistency dictates that right would have been expressly addressed in the MIA or, perhaps, the LPA. In other words, in the context of the other documents, PG Canada's assertion that the ability to end the partnership as it did, rested in a transactional template scheduled to the LPA, does not square with the overall shape of the deal documents.

- Section 4.4 of the MIA provides that upon a change of control of PG Canada or PIC, the Plaintiffs could either demand that PG Canada cause the repayment of all the outstanding Qualified Loans or waive that right to repay, and thereby continue receiving the cashflows of the loan following the change of control. The option is the Plaintiffs alone. PG Canada's interpretation of s. 2.5(c) of the Template QLA runs contrary to s. 4.4 of the MIA. If accepted, it permits PG Canada to cause the repayment of all outstanding Qualified Loans at any time upon a change of control, depriving the Plaintiffs of the option for which they bargained. That is not a reasonable interpretation.

- Sections 9.3 of the MIA and s. 12.10 and s. 25.8 of the LPA, lay out specific circumstances in which those agreements may be terminated. The circumstances by which PG Canada effectively terminated its relationship with the Plaintiffs are not contemplated by those provisions. Reading s. 2.5(c), so as to be a *de facto* termination provision, is to read it unharmoniously with these provisions. It does not make commercial sense.

[164] In light of the foregoing consideration of the express wording of s. 2.5(c) and the surrounding circumstances, I find the unrectified s. 2.5(c), properly interpreted, does not permit the *en masse* pre-payment of all of the Qualified Loans, especially for reasons having nothing to do with the loan or the individual underlying project. The alternative interpretation is incongruous with the overall commercial arrangement negotiated by the parties.

[165] Thus far, my discussion has surrounded the interpretation of the pre-payment right in the Template QLA. That said, the facts, as found by me thus far, support the Plaintiffs' argument that PG Canada's conduct amounted to other breaches of the

commercial documents. These include: PG Canada's failure to perform, and cause to be performed, all applicable obligations of its affiliates under the fund documents (s. 4.1 MIA); failure to continue introducing new opportunities (s. 2.1-2.5 MIA); disclosing the identities of the Limited Partners for a purpose other than the development of opportunities (s. 9.1 Fund I and Fund II MIA (cross referencing s. 12.3 LPA)); failing to act in the best interests of the Limited Partners (s. 12.4 Fund I and Fund II LPA); failing to strictly enforce the terms of QLAs (s. 6.4 Fund I and Fund II LPA) (given no right to prepay *en masse*); and acting in contravention of the agreement (s. 12.2(a) Fund I and Fund II LPA)[14].

[166] The Plaintiffs would add another item to the breach list: fabricating a material business event (s. 4.3 Fund I and Fund II LPA). In my view, the law distinguishes between *breaches* of contractual provisions from complaints about the use/misuse (i.e. *performance*) of a contractual provision. The Plaintiffs' fabrication argument is best addressed under the heading, "Honest Performance of Contract" at paragraph 178 hereof.

b) Rectification

[167] Because my conclusions in the preceding section about s. 2.5(c) of the Template QLA, technically, it is not necessary for me to rule on rectification. However, given the intense focus placed by PG Canada on defeating the rectification claim (reflected in PG Canada's counsels' trial examinations and written and oral submissions), it merits discussion.

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[14] Similar provisions appear in the Fund III documents.

[168] I already have found the mistake in this case was unilateral on the part of the Plaintiffs. The principles related to rectification, where there has been unilateral mistake, may be summarized as follows:

- Rectification is an equitable, discretionary remedy.
- The objective of the remedy is to restore the original bargain, not to rewrite it after the fact. In other words, it is not a tool for the unhappy contract maker to open the proverbial "flood gates". To order rectification, the plaintiff must establish:
    - The existence and content of a prior inconsistent agreement, and that it was still in effect when the final instrument was executed.
    - At the time of executing the final document, the plaintiff was ignorant of the discrepancy.
    - At the time of executing the final agreement, the defendant knew or ought to have known of the error.
    - The defendant's attempt to rely on the document must amount to "fraud or the equivalent of fraud".
    - The term "fraud or the equivalent of fraud" has a meaning wider than the tort of deceit. It refers to equitable or constructive fraud – situations where it is unconscionable for the defendant to benefit from the advantage obtained as a result of the plaintiff's mistake.

- Rectification cases are to be determined on a balance of probabilities. Because a court is loath to rewrite a contract, the quality of the evidence should be as convincing as possible.
- Lack of due diligence on the part of the plaintiff is not fatal to rectification. In fact, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. That said, given the sanctity of contracts and the need for commercial certainty, rectification is not a substitute for due diligence and courts must hold parties to a reasonable level of due diligence. (See ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, 2002 SCC 19 (CanLII) at paras. 31, 37, 38, 40, 62, 66; ***Canada (Attorney General) v. Fairmont Hotels Inc.,*** 2016 SCC 56 (CanLII) at paras. 12, 14, 32, 36-37; ***Elias***, 2017 MBCA 110 (CanLII) at paras. 67-86, 92-96; ***Fraser v. Houston et al***, 2006 BCCA 66 (CanLII) at paras. 35-39; ***Johnson v. Moody***, 2014 ABQB 80 (CanLII) at paras. 22-23; ***Khajavi v. Eghtesadi***, 2016 BCSC 1127 (CanLII) at paras. 36-39)

[169] I will now apply these principles to the present case.

[170] Was there a prior inconsistent agreement, in respect of the wording of s. 2.5(c) of the Template QLA? I find that by August 18, 2010, the parties had agreed to the pre-payment provision appearing in the drafts of the Template QLA sent to Denham by Gowlings LLP on July 29, 2010, and to the PG Canada board by Dreaver on July 30, 2010. This conclusion is reasonable in all of the circumstances including:

- Legal counsel and negotiators were satisfied with the wording of s. 2.5(c).

- Denham approved of the wording of s. 2.5(c), on or about August 18, 2010.
- Cays approved of the wording prior to August 19, 2010.
- No further discussion about s. 2.5(c) took place after July 29, 2010.
- Dzulynski struck out the standard caveat from s. 2.5(c) in his duplicate copy of the material sent to Denham on July 29, 2010.
- Davies LLP removed the standard caveat from s. 2.5(c) in the version of the Template QLA sent to the PG Canada board on July 30, 2010.

[171] Did the Plaintiffs know of the discrepancies between the agreed upon version of s. 2.5(c) and the version of s. 2.5(c) appearing in the executed deal documents? In paragraph 148 herein, I found they did not.

[172] Did PG Canada know at the time of closing the transaction that the Plaintiffs were mistaken? Martin and Dreaver testified they noticed the wording of s. 2.5(c) had changed, but because all parties had extensive legal and business advisors, and because the Plaintiffs' multiple advisors had eyes on the Template QLA leading up to close, and from time to time thereafter, it did not occur to them the Plaintiffs were mistaken.

[173] The Plaintiffs submit Martin and Dreaver's evidence cannot be believed on this point. They say knowledge of the mistake on the part of PG Canada is the only reasonable inference from Blackstein's August 19, 2010, 3:49 p.m. email, to which he attached a "final version" of the LPA that contained, without explanation, a version of the Template QLA that was missing the consent right which, two weeks earlier, the parties had spent two days negotiating. The Plaintiffs also argue that mistake is the

only explanation for them forfeiting the benefit of the consent right for no consideration, and that it defies logic that Blackstein would extend the courtesy of explaining the reason for the extensive blacklining but not point out that Gowlings LLP had altered s. 2.5(c) to be *more favourable to PG Canada*.

[174] At the end of the day, I must weigh Martin's and Dreaver's testimony (which includes testimony about post-August 19, 2010, exchanges pertaining to the QLA) that they did not know the Plaintiffs (and all their advisors) were mistaken, and what the Plaintiffs' say is an unmistakable inference that PG Canada and its advisors acted in a manner amounting to equitable fraud. After careful consideration, I find the evidence is not sufficiently convincing to establish, on a balance of probabilities, that PG Canada knew, or ought to have known, the Plaintiffs and/or its advisors were mistaken at the time they executed the contracts.

[175] As mentioned earlier, it is not uncommon in rectification cases for there to have been some lack of due diligence on the part of the Plaintiffs and/or its representatives. Lack of due diligence does not necessarily foreclose rectification. However, lack of due diligence and oversight, deliberate or not, is a factor when the court assesses whether it would be unconscionable to permit the Defendants to benefit from the Plaintiffs' conduct.

[176] In the present case, there is no doubt that from August 19, 2010, onward, Caledon and Gowlings LLP had eyes on the Template QLA from time-to-time over the years, as described in paragraph 141 herein. Also, in the Subscription Booklet, the Plaintiffs represent, among other things, they reviewed the documents and obtained

professional advice. When these factors, the sophistication of the parties, the sanctity of contracts, the judicial reminders about the importance of due diligence and my earlier conclusion that knowledge of the mistake on the part of PG Canada was not established, are taken together, I find the Plaintiffs' claim for rectification cannot succeed.

[177] I will make three final comments in this section. First, my findings in respect of rectification do not answer the separate question of whether, in their respective roles, PG Canada and its affiliates were obligated to raise the language discrepancies with the Plaintiffs. Second, the question of whether any player in this story acted negligently is not before me, such that my comments in respect of due diligence, or any other matter, should not be taken as opining on that legal question. Third, in its submission, PG Canada alleges the Plaintiffs waited too long to advance a rectification claim and that the relevant statute of limitations and the doctrine of laches bar them from doing so. They also defend on the basis that, at least in respect of the Fund II and Fund III documents, findings of mistake could not be made absent their co-investors, Shell and Air Canada. Given my dismissal of the rectification claim and finding that there was a breach even of the unrectified agreement, it is not necessary for me to address those matters.

c) Honest Performance of Contract

[178] Canadian courts recognize a general duty of honesty when performing a contract. Parties to a contract must not knowingly mislead each other about matters directly related to the performance of their contract. This duty cannot be erased by

an "entire agreement" clause. To be clear however, on its own, this duty does not impose duties of loyalty or require a party to give up advantages flowing from the commercial bargain they negotiated (***Bhasin v. Hrynew***, 2014 SCC 71 at paras. 73-75, 93; ***C.M. Callow Inc. v. Zollinger***, 2020 SCC 45 at para. 42).

[179] The Plaintiffs submit PG Canada misled them in a number of ways which, in my respectful view, are repetitive of the breaches I have already discussed and properly dealt with as such[15]. However, in their submissions, the Plaintiffs identify two complaints which, in the facts of this case, I find to be breaches by PG Canada of the duty of honest contractual performance.

[180] The first breach is the aforementioned fabrication by PG Canada of a material business event, when PG Canada knew that its business, and all its key persons, were to continue seamlessly in the same P3 business with CDPQ. The relevant facts are referenced commencing at paragraph 70 hereof and need not be repeated. These facts also include the April 6, 2010, letter from Dunstan to Caledon, the Plaintiffs' representative, describing the Material Business Event:

> As a result of the Operating Business Acquisition, Plenary Canada, as an organization, has ceased to focus significant time, attention and resources on the pursuit of Qualified P3 Projects and Opportunities in Canada and the United States, and Brian Budden and all of the other Key Persons under (and as defined in) the relevant LPAs and MIAs are no longer employed by Plenary Canada and will therefore no longer pay substantial time and attention to Qualified P3 Projects…

[181] PG Canada then communicates its determination that:

> …Neither of these Material Business Events is reasonably susceptible to resolution or remedy.

[15] Plaintiffs' Written Closing Submission, Vol. 1, para. 966.

and acknowledges (invokes?) a right that was meant to protect the Plaintiffs:

> Plenary Canada acknowledges that, pursuant to Section 4.3(c) of the Funding II LPA and Section 5.6(c) of the US Funding MIA, the Capital Commitment Period (under and as defined in each of those agreements) is automatically suspended as of the date of Operating Business Acquisition.

[182] The second breach is more general: PG Canada misled the Plaintiffs from at least November 2019 (and arguably before) to March 9, 2020, in respect of the continued contractual relationship, despite secretly and actively working towards ending it. The relevant facts also are referenced commencing at paragraph 70 hereof[16] and need not be repeated. I agree with the Plaintiffs' submission that, relevant (though not determinative) to my assessment of the degree to which PG Canada misled, is the long-term, functional and successful nature of their relationship. Its demise came as a complete surprise to the Plaintiffs.

ii. <u>**Breach of Fiduciary Duty, Knowing Assistance and Knowing Receipt**</u>

[183] The Plaintiffs allege certain Defendants acted directly in breach of a fiduciary duty and/or knowingly assisted in the breach of fiduciary duty or knowingly received proceeds therefrom. These Defendants comprise: the General Partners of Fund I and Fund II, the officers and directors of those General Partners, PG Canada, the PICs, PG Execution (the PG Canada owned and controlled service provider to Fund III) and Plenary Great Lakes Holdings Ltd. (Plenary Great Lakes) (the CDPQ corporation of which Budden is a director, that wholly owns the entity holding the OMERS portfolio).

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[16] See also para. 185 hereof.

[184] Before addressing whether the various parties owed fiduciary or related duties as alleged, I will summarize the legal principles and review the alleged breaches:

- As with rectification, the law concerning breach of fiduciary duties and the consequences thereof, is rooted in equity.
- The caselaw pertaining to fiduciary duties distinguishes between *de facto* fiduciary relationships and *ad hoc* fiduciary relationships. *De facto* refers to a category of relationships specifically recognized at law as fiduciary in nature (e.g. a Trustee of a trust fund). *Ad hoc* refers to an otherwise non-categorized relationship which, in the circumstances, possesses the hallmarks required at law to treat it as fiduciary in nature.
- The hallmarks of an *ad hoc* fiduciary relationship are:
    - The fiduciary has scope for the exercise of some discretion or power.
    - The fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests.
    - The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.
    - An undertaking by the fiduciary to act in the best interests of the beneficiary.

    (See ***Frame v. Smith***, 1987 CanLII 74 (SCC) at para. 60; ***Alberta v. Elder Advocates of Alberta Society,*** 2011 SCC 24 at paras. 27-30)
- Equity imposes on a fiduciary, whether *de facto* or *ad hoc*, strict standards of conduct encompassing a duty of loyalty, utmost good faith, avoidance of

conflict of interest and putting the beneficiary's interest ahead of one's own interest (***Rochwerg v. Truster***, 2002 CanLII 41715 (ON CA) at paras. 36, 62). This includes, without limitation, the duty to disclose facts material to the partnership and its business, to not use partnership assets for personal gain, to not compete, and to account. Many of these duties are legislated (***Rochwerg***, at para. 37, 98; ***The Partnership Act*** (of Manitoba) C.C.S.M c. P30, at s. 23, 31-33, 64).

- A General Partner of a Limited Partnership is a *de facto* fiduciary (***Extreme Venture Partners Fund I LP v. Varma***, 2021 ONCA 853 at para. 98; ***Rochwerg***, at paras. 36, 62; Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Thomson Reuters Canada, 2020), Online Westlaw Canada at §1:4).
- The fiduciary duty owed by a General Partner should be considered in the context of the terms of the partnership agreement, the commercial nature of the Limited Partnership, and the relationship between the General Partner and the Limited Partner(s) (***Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.***, 2004 CanLII 54553 (ONCA)).
- A fiduciary duty may be subject to exceptions if the person to whom the duty is owed has agreed to the exception (***Molchan v. Omega oil and Gas Ltd***., 1988 CanLII 103 (SCC) at para. 36; ***337965 B.C. Ltd. v. Tackama Forest Products Ltd***., 1992 CanLII 5964 (BC CA) at paras. 156-57).

- The duties of a fiduciary may extend to a person other than the specific fiduciary (a stranger), in cases where:
    - The stranger themselves takes on the role of fiduciary, or
    - A stranger knowingly participates in a breach of the fiduciary relationship. Traditionally, these have been situations of "knowing assistance", where the stranger knowingly assisted in a dishonest and fraudulent act by the fiduciary and "knowing receipt", where the stranger received and benefitted from property or proceeds that were the subject of the fiduciary relationship (***Air Canada v. M & L Travel Ltd.,*** 1993 CanLII 33 (SCC) at 808-811, 826; ***Extreme Venture***, at para. 74).
- The elements of the tort of *knowing assistance* in the breach of the fiduciary duty are that:
    - There must be a fiduciary duty.
    - The fiduciary must have breached that duty fraudulently and dishonestly. In this context, "fraud" means the taking of a risk to the prejudice of another's rights. The focus here is the fiduciary's breach, not the activities or intent of the stranger (***Glenko Enterprises Ltd. v. Keller***, 2008 MBCA 24 at paras. 59-60; ***Air Canada***, at 825-26).
    - The stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct. Recklessness or willful blindness

also will suffice. The knowledge hurdle generally will not be difficult to overcome in cases involving directors of closely held corporations, as they usually have knowledge of the actions of the corporate fiduciary. Liability may be based on the substance of the stranger's relationship with the fiduciary. If the fiduciary duty is created by statute, the stranger will be deemed to know it. If created by contract, then whether the stranger knew of the relationship will depend on their familiarity with the contract (***Air Canada***, at 812, 827; ***American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.***, 2010 ONSC 3368 at paras. 35-39; ***Naramalta Development Corporation v. Therapy General Partner Ltd.***, 2012 BCSC 191 at paras. 71-73).

  - The stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct (***Extreme Venture***, at para. 74).

- Liability for the tort of *knowing receipt* requires that strangers to the fiduciary relationship receive or apply trust property for their own use and benefit. The tort is concerned with giving back to someone something that has been taken from them or its equivalent value. The level of knowledge required in knowing receipt cases is lower than that in knowing assistance cases. Constructive knowledge will suffice. Relief will be granted where the stranger, having received trust property for their own benefit, and having knowledge of facts which would put a reasonable person on inquiry, fails to inquire as to the possible misapplication of the property (***Citadel General Assurance Co. v. Lloyds Bank Canada***, 1997 CanLII 334 (SCC) at paras. 25, 30, 48-49).

a) Conduct Plaintiffs Submit Amounts to Breach of Fiduciary Duty

[185] Having reviewed the legal principles, I will summarize the conduct the Plaintiffs argue supports their allegations of breach of fiduciary duty, knowing assistance and knowing receipt. Irrespective of whether or not the conduct constitutes a breach of duty, I previously have found that it occurred. Because of the common ownership and control of the Plenary players, and because each entity was working together towards a common end, to avoid repetition I choose to set out the allegations generally, not entity by entity.

[186] The offending conduct, as alleged by the Plaintiffs includes, among other things:

(1) As Related to 2019-2020

- Orchestrating the *en masse* pre-payment of the Qualified Loans for reasons unrelated to the status of the loan or project, in breach of the Fund I, Fund II and Fund III deal documents.
- Utilizing the sale proceeds from the CDPQ Transaction to loan money to the PICs, for the exclusive purpose of pre-paying the loans *en masse*.
- Declaring the CDPQ Transaction to be a Material Business Event under s. 4.3 of the LPA (protecting the *Plaintiffs* by permitting them to suspend funding commitments in the event, for example, PG Canada ceased to focus significant time, attention, and resources on P3 Projects in Canada) without

presentation of a Cure Plan, or any other opportunity for the Plaintiffs to address the impacts of the sudden termination of its long-term investment partnership with PG Canada.

- Orchestrating the release of security held by each fund in support of the Qualified Loans.
- While negotiating with CDPQ, and up to the commencement of the March 9, 2020, meeting, representing to the Plaintiffs that it was "business as usual", including by, among other things: reporting as such at 2019 year end; extending the Capital Commitment Period for Fund II to match Fund III; and revising the NOPA for the OMERS Opportunity to reflect on going discussions about using Fund III rather than Fund II for that investment.
- Putting off meetings with the Plaintiffs pertaining to the OMERS Opportunity to accommodate fruition of the CDPQ Transaction and diverting the OMERS investment opportunity away from the Plaintiffs to CDPQ[17].
- Receiving and profiting from proceeds of the CDPQ Transaction, representing a premium paid by CDPQ on account of the market value of the Qualified Loans.
- Failing to account to the Limited Partnership.

[17] I am aware that on Friday, March 27, 2020, well after legal counsel became involved and legal positioning began, PG Canada purported to once again offer the Plaintiffs participation in the OMERS Opportunity. The offer was scant on terms, contemplated using Fund II, which had insufficient capital, and required the Plaintiffs to reply by Monday, March 30, 2020. The Plaintiffs advised PG Canada they were not able to respond before the short deadline imposed upon them. I find the Plaintiffs reaction was reasonable and reject any suggestion the Plaintiffs chose to pass on the OMERS opportunity.

- Terminating the relationship with the Plaintiffs and carrying on a virtually identical exclusive investment arrangement with CDPQ, under the newly created Plenary Americas Ltd. (owned by CDPQ).
- Agreeing with CDPQ, in the November 28, 2009, Exclusivity Agreement, to keep all information about the CDPQ Transaction confidential from, among others, the Plaintiffs, knowing the transaction would impact the Plaintiffs in a material and negative way.
- Disclosing to CDPQ, in the Davies LLP data room, at least one document identifying the Plaintiffs, despite a non-disclosure provision in the LPA prohibiting such disclosure.

(2) As Related to the Qualified Loan Agreement

- Deliberately choosing to not draw to the Plaintiffs' attention that the form of Template QLA, scheduled to the executed Fund I LPA and the QLAs prepared for PIC I and PIC II, did not contain the pre-payment consent right and other substantive (non-conforming) sections.
- Deliberately choosing to not draw these matters to the Plaintiffs' attention in subsequent dealings, including during negotiation of Fund II and Fund II.

b) Breaches of Fiduciary Duty

[187] In my opinion, a fiduciary duty was owed to the Plaintiffs by PG Canada, the General Partners (Plenary Investment Management Corp. and Plenary Investment Management II Corp.) and PG Execution (service provider in the United States of America).

(1) General Partners of Fund I and Fund II

[188] The General Partners are *de facto* fiduciaries. The law is clear. However, I must still ask whether the scope of that duty was somehow materially narrowed as a result of the relevant commercial agreements, the nature of the Limited Partnership or the relationship between the General Partner and the Limited Partners. In the present case, I start with the commercial agreements as they dictate many of the other factors.

[189] In my opinion, there are no provisions in the governing agreements reasonably supporting the argument the General Partners' fiduciary duties have been materially circumscribed, at least not in a way relevant to the alleged offending conduct.

[190] For example, the term disabling conduct is defined in the definition section of the LPA:

> "**Disabling Conduct**" means, with respect to the General Partner, Plenary Canada or any other Plenary Party, as applicable:
>
> a) fraud or gross negligence in the conduct of such Person's office;
>
> b) a willful breach of law by such Person;
>
> c) a <u>willful breach of fiduciary duty</u> by such Person; …
>
> [emphasis added]

Later in the same definition, certain conduct is excluded as disabling, but I find those exclusions have no bearing in this case[18]. The Plaintiffs argue, and I accept, that the reference to breach of fiduciary duty in the definition, presupposes the existence of such duty.

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[18] For example …"For greater certainty, "Disabling Conduct" shall not include, without limitation, (i) an Insolvency Event in respect a Project SPV or Plenary Holdco unless accompanied by an instance of the kinds of Disabling Conduct described in clauses (a), (b), (c), (e) or (f) of this definition, or (ii) any circumstances in which a Plenary Party is conducting its business and protecting its business interests through *bona fide* business negotiations with, or enforcement of its contractual rights against, Public Bodies, Project Consortium Counterparties or Third Parties.

[191] Section 12.4 of the LPA is entitled "Standards" and provides:

> **Standards**
>
> Notwithstanding any other provision of this Agreement, the General Partner shall maintain the standard of care of a prudent manager of investments having the same risk profile as a subordinated loan or preferred equity P3 Project, having regard for the inherent conflict of interest resulting from the General Partner being an Affiliate of the Approved Project sponsor, and shall discharge its duties hereunder diligently, in good faith and in the best interests of the Partnership.

[192] This provision does not restrict the fiduciary duty in any manner relevant to this lawsuit. Based on a plain and ordinary reading, s. 12.4 declares the General Partner is acting as a manager of investments and, in so doing, is bound to maintain the standard of care of a prudent manager of investments, having the same risk profile as a subordinated loan or preferred equity in a P3 project. The section also recognizes the obvious potential conflict of interest resulting from the General Partner and SPV being owned and controlled by the same entity. Apart from identifying that inherent conflict and that it is not a breach, s. 12.4 otherwise affirms the duty to act in good faith and in the best interest of the partnership[19].

[193] PG Canada relied on other contractually based arguments to suggest a circumscribed fiduciary duty. Three examples are the negotiation and adoption of defined investment criteria, the imposition of Caledon as a Limited Partner representative and the establishment of communication protocols. In essence, PG Canada argues that by creating these protocols to streamline the investment

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[19] The good faith reference repeats itself throughout the LPA. I am mindful that a duty of good faith alone is not the same as a fiduciary duty.

process, the discretion reposed in, and reliance imposed on, the General Partners were reduced and thereby, eased the General Partners' fiduciary duties.

[194] In response, the Plaintiffs first point out that Dreaver conceded during cross examination that these customized provisions had nothing to do with preventing a willful breach of fiduciary duty. They also argue that even if the protocol decreased the discretion to some degree, it did not diminish the overall obligation of loyalty, utmost good faith and avoidance of conflict of duty and self-interest.

[195] I agree with the Plaintiffs. A plain and ordinary reading of the contractual provisions (objectively and in the circumstances in which the agreements were negotiated), does not establish the parties (especially the Plaintiffs), agreed to alter the General Partners *de facto* fiduciary obligations to the Plaintiffs in a manner relevant to this litigation. More explicit wording is required.

[196] Were those fiduciary obligations breached by the General Partners? I find they were. I adopt the alleged breaches enumerated under the heading of "As Related to 2019-2020" in paragraph 186 hereof. That conduct, as a whole, amounts to the General Partners placing their own interests ahead of the interests of the Limited Partners, as well as the duty to avoid conflicts of interest and self-dealing. Particularly in respect of conflict of interest, it is clear the General Partners, their officers and directors were conscious of being in that position. They felt it. There can be no other explanation for Martin's admitted unease about not telling the Limited Partners about the pending CDPQ Transaction and his (and Budden's) admitted anticipation the Plaintiffs would be very upset when they learned about an early *en masse* pre-payment

of the long-term Qualified Loans. PG Canada and CDPQ planned for it. Paraphrasing their emails, Budden and Martin knew they were digging their proverbial hole ever deeper. Their unease was justified and ought to have triggered some form of communication with the Plaintiffs prior to March 9, 2020. Moreover, both Martin and Budden were trained in law.

[197] From time-to-time PG Canada argued they had every right to sell their company. They did. What they could not do is sell their company without regard to the legal obligations owed to, and the interests of, the Plaintiffs. A partnership is different from a strictly commercial relationship.

[198] In so far as the conduct enumerated under the heading "As Related to the Qualified Loan Agreement" (at paragraph 186 hereof), I find that as a *de facto* fiduciary, there was a duty upon the General Partner, especially in the context of preparing the QLAs for PIC I and PIC II to, at a minimum, raise with the Plaintiffs the fact there were material differences between the PIC I and PIC II QLAs and the Template QLA attached to the executed LPA (rendering it non-functional), which Dreaver and Martin knew about. This duty existed whether or not they believed the Plaintiffs, or their representative, were mistaken.

[199] Once acting as General Partner, with a duty to act with utmost good faith and in the best interests of the partnership, the General Partners ought to have inquired about or pointed out the absent consent right, especially where there had been two days of negotiation about the consent right, an agreement was reached by July 29, 2010, the right benefitted the Limited Partnership, no further discussions or revisions

occurred after July 29, 2010, and, to their knowledge, a deficient form of Template QLA was circulated by Gowlings LLP on August 19, 2010.

[200] Because so much of the PG Canada's submissions focused on the QLA, I want to make clear that my findings in respect of the General Partners' (and others') breach of fiduciary would be the same even without the Plaintiffs' allegations pertaining to their silence in respect of the pre-payment consent language.

(2) PG Canada

[201] I find PG Canada owed fiduciary duties to the Plaintiffs.

[202] PG Canada undertook fiduciary duties expressly. Under s. 4.1(a)(i) of the MIA for Fund I and Fund II, PG Canada agreed, in respect of itself and each of its "Affiliates", to "perform and cause to be performed all applicable obligations under the Fund Documents", which include the LPAs. Section 4.1(a) reflects the reality that PG Canada, at the behest of its officers and directors, was the puppeteer controlling a marionette, whose limbs were made up of the General Partners, the PICs, and the SPVs. Guided by PG Canada's hand, these limbs moved in a coordinated fashion to perform the P3. I do not use this analogy to be harsh. In fact, I suspect the parties would agree with it. As acknowledged by Budden, the decisions for each PIC, the General Partners and PG Execution were made by the executives of PG Canada. There were no separate board meetings or resolutions.

[203] The relationship between PG Canada and the Plaintiffs also possessed the hallmarks of an *ad hoc* fiduciary relationship:

- *Scope to exercise some discretion or power in a manner that affects the beneficiaries legal or practical interest*: At the relevant times, the Plaintiffs were passive investors, not developers like PG Canada. Under the MIAs, PG Canada took on the obligation to act as the sole source of opportunities for the Limited Partners in good faith, within a framework of mutual exclusivity. PG Canada's decision to continue bringing opportunities or not was a unilateral power, and it possessed discretion regarding what opportunities to pursue and bring to the Limited Partners. PG Canada also controlled the General Partners, PG Execution and the PICs. It possessed unilateral powers at all levels of the structure and could impact the benefits flowing to the Limited Partners.
- *Vulnerability:* Under the MIAs, the Plaintiffs relied on PG Canada to pursue and present opportunities to the Limited Partners in good faith. The Plaintiffs were also vulnerable to PG Canada exercising its control over the General Partners, PG Execution and the PICs. The conduct giving rise to this litigation (i.e. PG Canada causing the *en masse* pre-payment and conveyance of the Fund Loans that deprived the Funds of a long-term, reliable and stable income stream), is an example of this vulnerability.
- *Undertaking to act in the best interests of beneficiary:* Once again, PG Canada expressly undertook to supervise and enforce the Fund I and

Fund II General Partners fiduciary duty under the LPA, by virtue of s. 4.1(a)(i) of the Fund I and Fund II MIAs.

[204] Having found a fiduciary relationship existed between PG Canada and the Plaintiffs, I also find PG Canada acted in breach thereof. The specifics of the offending conduct are the same as discussed in the context of the General Partners and need not be repeated.

(3) PG Execution

[205] Recall that in respect of Fund III, the General Partner was CCM, a Caledon corporation. This was a work-around to avoid PG Canada having to become a registered investment advisor with the American Securities and Exchange Commission, a prerequisite to serving as General Partner. As described earlier in these reasons, to ensure Fund III functioned, in all respects, as closely as possible to Fund I and Fund II, PG Canada's participation and expertise was secured through a Management Services Agreement between the General Partner of Fund III and PG Execution, an entity wholly controlled by PG Canada. On a purely functional level (mindful PG Execution was not the General Partner *per se*), there was very little distinguishing the role played by PG Execution in the United States from the role played by the General Partners of Fund I and Fund II in Canada. I agree with the Plaintiffs that the hallmarks of an *ad hoc* fiduciary were present:

- *Scope to exercise some discretion or power in a manner that affects the beneficiaries legal or practical interest*: PG Execution undertook many (even most) of the functions of the General Partner, including administration of the Qualified Loans and managing Fund III's bank accounts and funds (See s. 3.2 and s. 3.1 of the Management Services Agreement). Very significantly, in s. 3.3 of the same agreement, PG Execution also undertook to, at all times, expeditiously keep the General Partner fully informed about all matters relevant to Fund III and its business.

- *Unilateral exercise of discretion or power*: The CDPQ Transaction is illustrative. In concert with the General Partners for Fund I and Fund II, and despite protest from WSIB and CAAT, PG Execution accepted the pre-payment of the Qualified Loans into the Fund III accounts and disbursed the funds to the Limited Partners so the loans could be conveyed to CDPQ. Also, as evidenced by s. 3.3 of the Management Services Agreement, the Fund III General Partner was wholly reliant on PG Execution in terms of knowing all information which was provided to the General Partners of Fund I and Fund II. The deliberate withholding of information, about the impeding CDPQ Transaction, was a unilateral exercise of discretion in respect of a matter clearly relevant to Fund III and its business.
- *Vulnerability:* Again, the CDPQ Transaction is illustrative. The Fund III Qualified Loans administered by PG Execution, were conveyed to CDPQ despite objection from WSIB and CAAT, leaving Fund III assetless and the Limited Partners without cashflows. By refusing to inform the Fund III General Partner until two days before the CDPQ Transaction closed, PG Execution rendered Fund III even more vulnerable.

- *Undertaking to act in the best interests of beneficiary:* Under s. 3.3 of the Management Services Agreement, PG Execution undertook to act honestly and in good faith. At the risk of repeating, in that same section, PG Execution promised to, at all times, expeditiously keep the Fund III General Partner fully informed about all matters relevant to Fund III and its business. In making that promise, I find, in the facts of this case, PG Execution must have known it was the primary source of any such information. Martin testified PG Execution's obligations included supporting Fund III's General Partner to perform its fiduciary duties to the Limited Partnership.

[206] Having found PG Execution owed a fiduciary duty to Fund III, I also find the conduct articulated in this section, and the section dealing with the General Partners for Fund I and Fund II, amounted to a breach of that duty.

c) Knowing Assistance

[207] In the event I am wrong in finding either PG Canada or PG Execution owed a fiduciary duty to the Plaintiffs, I alternatively find PG Canada and PG Execution, and their respective officers and directors named as parties in this lawsuit[20], knowingly assisted breaches of fiduciary duty committed by the Fund I and Fund II General Partners and PG Canada. I have reached the same conclusion in respect of the named directors and officers of the General Partners[21], the PICs, and Plenary Great Lakes.

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[20] PG Execution: Dunstan, Dreaver, Budden and Martin (at their respective times); PG Canada: Dunstan, Dreaver, O'Rourke and Oppenheim.

[21] Dreaver, Dunstan, Budden and Martin (at their respective times).

For ease of reference, and to be consistent with the case law, in this section I will refer to these entities as "strangers"[22].

[208] Referring back to page 92 hereof, and the four elements of knowing assistance, I already have found element one, fiduciary duties to the Plaintiffs, existed on the part of the General Partners of Fund I and Fund II, PG Canada and PG Execution. In respect of element two, I also have found each entity breached its respective duties. However, I must also decide whether the duties were breached fraudulently and dishonestly. Recall the reference to fraud in the present context is to that word's equitable meaning – the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take. In my opinion, the cumulative breaches of fiduciary duty summarized in paragraph 185 hereof, fall comfortably within this description.

[209] Turning to element three, I find the Plaintiffs have established the strangers had actual knowledge of both the fiduciary relationships and the fiduciaries' fraudulent and dishonest conduct, as those concepts have been defined by the case law.

[210] Each of the strangers is deemed to know the fiduciary duties prescribed by ***The Partnership Act***. As for the individual strangers, I am satisfied all were familiar with the LPAs and the MIAs and, collectively, were the controlling minds of PG Canada, the Fund I and Fund II General Partners, PG Execution and the PICs. They were involved in the CDPQ Transaction and in orchestrating the *en masse* pre-payment of

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[22] A comprehensive list of all Plenary companies and their respective directors and officers was submitted as Tab B to Volume 2 of the Plaintiffs' Written Closing Submissions (Exhibit B2). PG Canada took no issue with the list's accuracy. It is too lengthy to reproduce in these reasons. It illustrates the director and executive positions held by Dunstan, Dreaver, Budden, Martin, Stuart Marks and Dale Bonner. I am satisfied that each of those parties was an officer and/or director at times material hereto. I adopt this list by reference.

the Qualified Loans. Each of them personally profited significantly from the CDPQ Transaction.

[211] In specific reference to Plenary Great Lakes, it wholly owns the entity that now holds the OMERS portfolio. Budden is a director of Plenary Great Lakes. In the circumstances, I find Plenary Great Lakes knew of the fiduciary duties owing to the Limited Partners of the funds, and the breach of fiduciary duties committed by PG Canada in conveying the OMERS portfolio to the company holding the OMERS portfolio.

d) Knowing Receipt

[212] As noted earlier in paragraph 83 hereof, the Defendants, Plenary Group No. 1 PTY Ltd., Dunstan Holdings Ltd., Dreaver Holdings Ltd., Budden, Martin, Stuart Marks[23] and Dale Bonner[24] received significant proceeds (ranging from $346,526,988 to $1,037,883) from the CDPQ Transaction. It is also undisputed that Plenary Great Lakes, of which Budden is a director, controls the entity now holding the OMERS Transaction.

[213] I am satisfied that, at the relevant time, each of these parties received the payments and property for their own benefit, and, for reasons similar to those described in the preceding paragraphs, had knowledge of facts which would put a reasonable person on inquiry and failed to address the possible misapplication of the payments and property. They are liable to the Plaintiffs on the grounds of knowing receipt.

[214] I now turn to the relief sought by the Plaintiffs.

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[23] Director of the MIAs
[24] Officer of Plenary Group Concessions Ltd.

IV. RELIEF

[215] Given my findings of breach of fiduciary duty, knowing assistance, and knowing receipt, the Plaintiffs submit the appropriate remedy is an order requiring those Defendants to disgorge the amounts they were paid for the Fund Loans and the OMERS Opportunity, plus the value of the forgone Pipeline Projects. The Plaintiffs calculate that amount to be $269,990,567, calculated as follows:

i. Fund Loans $232,466,345;

ii. OMERS Opportunity $ 6,019,514; and

iii. Pipeline Opportunity $31,504,708.

Alternatively, the Plaintiffs claim damages for breach of contract totalling $225,332,265.

[216] I agree disgorgement (accompanied by ancillary relief) is the appropriate remedy in this case. If I am wrong about disgorgement, the Plaintiffs are entitled to damages for breach of contract, subject to certain adjustments discussed later in these reasons.

i. Disgorgement

[217] Disgorgement principles relevant to the facts in this case:

- Disgorgement describes awards that are calculated exclusively by reference to the Defendants' wrongful gain, irrespective of whether it corresponds to damage suffered by the Plaintiffs or whether the Plaintiffs suffered damage at all.

- Disgorgement is available without proof of damage for breach of fiduciary duty[25] .
- Disgorgement is an equitable remedy and is in the discretion of the Court. Equity seeks what is fair. What is fair should be determined with flexibility, not by means of hard and fast rules. In fact, full disgorgement of all profits need not be ordered in all cases.
- Disgorgement may be directed to either or both for two purposes:
  - A prophylactic purpose, where a fiduciary appropriated any benefit or gain received where there existed a conflict of personal interest in fiduciary duty, or significant possibility of such conflict: the object is to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationships.
  - A restitutionary purpose: to restore the beneficiary profit which properly belongs to the beneficiary, but which was wrongfully appropriated by the fiduciary in breach of the fiduciary's duty.
- In the context of breach of fiduciary duty, the breach is in some ways akin to strict liability, unaffected by the fact the party seeking the remedy could not take advantage of the benefit improperly gained.
- Once it is determined there has been a breach of fiduciary duty, speculation as to what would have transpired if, for example, disclosure had been made, is not relevant.

[25] This is not the case for all torts.

(See: ***Atlantic Lottery Corp. Inc. v. Babstock***, 2020 SCC 19 at paras. 23-32; ***Extreme Venture***, at paras. 107-117; ***Raso v. Dionigi***, 1993 CanLII 8664 (ON CA); M Ellis, at § 26:3)

[218] PG Canada's arguments against disgorgement focused on: denying fiduciary duties and allegations of self-dealing; characterizing its conduct simply as a sale of its own assets (the cashflow stream or equity position in the projects) to CDPQ and using the proceeds therefrom to pay out the Plaintiffs in accordance with the commercial documents; asserting the Plaintiffs are jockeying to obtain a higher award and pocket benefits which should be shared with Shell and Air Canada; and attempting to characterize a straightforward breach of contract claim as a breach of fiduciary duty claim.

[219] The fact is, I have already found that PG Canada and others owed duties of loyalty, to avoid conflicts of interest, to account and to act in the best interests of the Funds. I also have found that in the context of breaching its fiduciary duties, PG Canada breached contractual obligations to the Plaintiffs[26]. In my opinion, disgorgement properly flows from these findings. I specifically reject PG Canada's characterization of the CDPQ Transaction as no more than PG Canada selling its assets and using the proceeds to pay out the Plaintiffs' loans. That description runs contrary to the facts as I have found them to be and, to some degree, trivializes its relationship with the Plaintiffs.

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[26] To be clear, the breach of contract is part of the breach of fiduciary duty. I am not addressing or awarding disgorgement as a contractual remedy.

[220] As for the calculation of the $238,485,859 and $6,019,514, claimed in respect of the Fund Loans and OMERS Opportunity, I am satisfied they are based on the premiums charged and recorded in the CDPQ related documents, including Exhibit 1012 (page 4), a letter from CDPQ to PG Canada enclosing "Devco closing calculation". The $31,504,708, in respect of the lost Pipeline Opportunities, diverted to CDPQ through the sale of PG Canada's entire development business, represents the Plaintiffs' expert's calculation of the lost value thereof as of May 1, 2020. I am satisfied that equity requires some disgorgement reflective of the lost Pipeline Opportunities. Consistent with my treatment of the value of the lost Pipeline Opportunities in paragraph 271 hereof, I find the $31,504,708 should be reduced to $21,504,708. The total amount to be disgorged is therefore $259,990,567.

[221] Despite addressing disgorgement in their written and oral submissions, PG Canada submitted a disgorgement claim should not be permitted because it was not pleaded in as many words in the Plaintiffs' Statement of Claim, as amended from time-to-time. As noted in paragraph 7 hereof, following oral and written submissions, I granted a motion by the Plaintiffs to amend their pleadings to clarify matters.

[222] In the circumstances, I order those Defendants, found by me to have breached fiduciary duties, directly or through knowing assistance or knowing receipt, to disgorge any and all premiums received on account of Fund Loans to Plaintiffs.

[223] The Plaintiffs also submit it is just and equitable for me to make certain orders ancillary to disgorgement, including imposing a constructive trust.

ii. Relief Ancillary to Disgorgement

[224] The criteria for imposing a constructive trust are:

- The Defendants must have been under an equitable obligation in relation to the activities giving rise to the assets in the Defendants' hands.
- The assets in the hands of the Defendants must be shown to have resulted from deemed or actual agency activities of the Defendants in breach of their equitable obligations to the Plaintiffs.
- The Plaintiffs must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the Defendants remain faithful to their duties.
- There must be no factors which would render imposition of a constructive trust unjust in the circumstances of the case (e.g. the interest of intervening creditors must be protected) (***Mellco Developments Ltd. v. Portage La Prairie (City),*** 2002 MBCA 125 at para. 49; ***Soulos v. Korkontzilas***, [1997] 2 SCR 217 at paras. 34, 43)

[225] The constructive trust imposed for breach of fiduciary relationship serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively (***Soulos***, at para. 33).

[226] In my opinion, the four requirements for imposing a constructive trust have been met.

[227] Firstly, I have found that PG Canada, its affiliates and officers and directors were in a fiduciary relationship with the Plaintiffs and therefore, owed them equitable obligations. Secondly, PG Canada received gains as aforesaid, as a result of the sale of Fund Loans to CDPQ, in breach of its fiduciary obligations to the Plaintiffs. Thirdly, in the facts of this case, I am satisfied good conscience requires a constructive trust, as does the need to ensure that others like PG Canada remain faithful to their duties. In concluding legitimate reasons for a constructive trust have been demonstrated, I took into account evidence that Dreaver and Dunstan have transferred their proceeds from the CDPQ Transaction to their personal holding corporations. Fourthly, there is no evidence of which I am aware to suggest the imposition of a constructive trust would be unjust to any other party.

[228] An order imposing a constructive trust is appropriate in the circumstances.

[229] The Plaintiffs also have requested the following:

- A tracing order;
- An accounting;
- The appointment of an equitable receiver; and
- The reinstitution of the security, once held by the Limited Partnership against the PICs, and which PG Canada caused to be released, to facilitate the CDPQ Transaction.

[230] According to the Plaintiffs, some of these remedies should be granted effective immediately, and others after the passage of 30 days.

[231] Although the additional relief sought by the Plaintiff is not unreasonable, I have a slightly different view as to the "when" and "how". In my opinion, matters should unfold as follows:

- PG Canada and the other offending Defendants shall comply with the disgorgement order within 30 days of judgment, or such other time mutually agreed to in writing between the parties.
- In the event disgorgement does not occur within 30 days of judgment, PG Canada shall provide, forthwith, an accounting of the CDPQ proceeds and the Plaintiffs shall be entitled to trace the whereabouts of the proceeds (See M Ellis, at §26.11).
- The Plaintiffs have requested certain declarations in respect of the tracing order that would apply, depending on the location and/or ultimate destination of the proceeds. In my view, such relief is premature and is properly the subject of a post-judgment motion, supported by evidence about the status of affairs.
- In respect of the appointment of an equitable receiver and reinstitution of the security, my view is the same as in the previous bullet.

[232] I will conclude this topic by addressing PG Canada's suggestion the absence of Shell and Air Canada from these proceedings precludes an order for equitable disgorgement because the Plaintiffs will receive more than their fair share. In a case such as this, where breaches of fiduciary duty have been found, it would be inequitable to avoid disgorgement simply because other affected parties have not taken action to

date. Such a result would reward the wrongdoer. In my opinion, the proper and most equitable approach is to order the Plaintiffs to account to Shell and Air Canada, with a view to determining their interest, if any, in the funds.

iii. Contractual Damages

[233] The Plaintiffs alternatively submit they are entitled to contractual damages. I will address that topic in the event it is later found I erred by ordering disgorgement.

[234] I begin by summarizing some general principles relied upon by all parties:

- The ordinary measure of damages for breach of contract is the expectation measure. That measure compensates the innocent party for what it was promised under the contract, not merely an amount to compensate it for the harm suffered in relying on the promise. Damages will include any consequential losses directly flowing from the breach that were, or ought reasonably to have been, within the contemplation of the Defendants at the time of contracting (See ***C.M. Callow***, 2020 SCC 45 at para. 108; ***Semelhago v. Paramadevan***, 1996 CanLII 209 at para. 12; ***Bank of America Canada v. Mutual Trust Co.***, 2002 SCC 43 at para. 25; Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, 2nd ed (Toronto: Thomson Reuters Canada, 2020) (Rel 2023-1) at §1:1, 4:1).
- If the Plaintiffs can prove on a balance of probabilities that a chance was lost, they may be entitled to damages. Loss of chance involves three steps:
    - Establishing the Defendants' breach deprived the Plaintiffs of a chance to secure a non-trivial benefit.

  - Establishing the Plaintiffs' loss of chance is not too remote from the parties' bargain.
  - Valuing the probability that the Plaintiffs' efforts would have been successful and awarding damages proportionately.

  The assessment of lost opportunity is a somewhat uncertain process, but the Court must do its best with the available evidence (*Harvin* at § 4:1).

- The time for calculating damages for breach of contract is presumptively the date when the breach of contract occurred. The presumption should not be easily displaced (***Rummery v. Matthews***, 2001 MBCA 32 at para. 31[27]; ***Rougemount Capital Inc. v. Computer Associates International Inc***., 2016 ONCA 847 at para. 50).
- Disgorgement generally is not available for breach of contract (***Atlantic Lottery***, 2020 SCC 19 at paras. 52-53, 61).

[235] Before delving further, I must address two evidentiary matters advanced by the Plaintiffs.

[236] The first involves the weight to be given to Exhibit 953, a series of charts PG Canada purports to rely on to refute the Plaintiffs' expert's valuation of the lost OMERS Opportunity and, in particular, establishing the OMERS Opportunity was, overall, less risky than the Fund Loans (the OMERS charts). The second involves the admission and/or weight to be given to what the Plaintiffs categorize as new oral evidence given at trial pertaining to specific Pipeline Projects which, they say, differed

[27] The Rummery decision describes some of the possible exceptions.

from evidence previously provided in responses to undertakings upon which the Plaintiffs' expert relied.

[237] As for the OMERS charts, Budden sought to rely on them during his testimony to illustrate his assessment of the risk of the OMERS Opportunity relative to the Fund Loans. Budden acknowledged the charts were prepared by PG Canada's expert at Budden's request and with Budden's input (PG Canada's expert confirmed Budden's evidence and that he needed information from Budden to prepare the OMERS charts).

[238] The Plaintiffs submit the OMERS charts simply are oath helping in the sense they are really Budden's evidence which PG Canada attempts to enhance by connecting it to an expert. The Plaintiffs also submit the OMERS charts are inaccurate.

[239] PG Canada denies the inaccuracy allegation and argues the charts are merely demonstrative of what their expert already concluded in his report.

[240] I admitted the OMERS charts on the understanding the expert would be called and the Plaintiffs would have an opportunity to cross examine the expert. Because I admitted the OMERS charts, the only outstanding question concerns the evidentiary weight they should be given.

[241] I give them no weight. The principal reason for my conclusion is Budden's ultimate admission, after extensive cross examination, that certain information in the OMERS charts is not accurate. For example, there are inconsistencies between information in the OMERS charts and the information in OMERS' own marketing material prepared by CIBC World Markets. Additionally, Budden testified that once a layer of subordinated debt was introduced to the OMERS charts, it became difficult to

compare the OMERS Opportunity with the Fund Loans. Martin also expressed concern about the accuracy of the OMERS charts.

[242] As for the Pipeline Opportunity, at the core of the Plaintiffs' objection is what they describe as "late breaking" evidence from Budden and Martin about the status of some of the Pipeline Opportunities, which evidence differed from information provided during discovery. PG Canada argues the evidence attested to at trial was not new and had been provided to the Plaintiffs prior to trial during the discovery process. In response, the Plaintiffs say, to the extent the information was provided, it was buried among volumes of material and not identified with sufficient clarity to be a meaningful response to the undertakings.

[243] Again, I have some sympathy for the Plaintiffs. That said, it is a fact that trial preparation for all parties involved tight timelines and extensive documentary disclosure. I take the Plaintiffs' objection to the evidence to be more along fairness lines rather than allegations of intentional non-disclosure. If I am wrong in that assessment, I see no evidence of the latter in any event.

[244] In all the circumstances, I find fairness leans in favour of admitting the evidence. I am satisfied the information was provided. Even more important to me is, if I am being asked to award damages for lost Pipeline Opportunities, all material information should be before me. To rule knowing the information upon which I am relying is not accurate or complete, does not sit well with me or, in my view, principles of equity. This is especially so given that excluding the evidence potentially affects damages for which PG Canada et al might be liable.

[245] Against those evidentiary rulings, I will turn to the contractual damages claim itself.

[246] The Plaintiffs submit they have suffered contractual damages in the aggregate amount of $225,332,265 (before mitigation, if any), broken down as follows:

- Fund Loans: $187,912,676
- Fair market value of OMERS Opportunity: $5,914,881
- Fair market value of lost Pipeline Opportunity: $31,504,708

[247] PG Canada submits, in the event I find breaches of contract, which I have, the Plaintiffs' damages are $91,482,659 (before mitigation). This number exclusively relates to the Fund Loans as, according to PG Canada, no compensable losses were sustained by the Plaintiffs in respect of either the OMERS or the Pipeline Opportunity.

[248] Both the Plaintiffs and PG Canada rely on experts to advance their respective damages positions. The Plaintiffs' engaged Thomas Lee (Lee), CPA, CA, FRM, FCBV, ASA, of the firm KPMG LLP. Lee prepared two reports: one dated February 3, 2023, and a reply report dated March 27, 2023. PG Canada retained Chris Milburn (Milburn), CPA, CMA, CBV. Milburn's report is dated March 10, 2023.

[249] Each expert report is lengthy, detailed and at times technical. I have thoroughly read them and reviewed the authors' trial testimony. Although it is impossible even to summarize the reports in these reasons, I will mention the similarities and differences most relevant to making my decision.

[250] The largest portion of the Plaintiffs' damages claim relates to the Fund Loans. Both Lee and Milburn agree the Fund Loans should be valued using what is called the

income approach. The income approach begins with a forecast of the future cashflows associated with each loan. The cashflows are then converted to a present value as of a particular valuation date, using a discount rate which appropriately accounts for the nature of, and the riskiness of, realizing the projected cashflows. The discount rate is central to the valuation exercise.

[251] Both experts also agreed that a buildup approach was an appropriate way to arrive at a discount rate. In other words, each expert started by determining an average yield for public senior project debt and then made subsequent adjustments thereto to arrive at what, in each expert's opinion, was a discount rate that suited the subordinated debt (aka, preferred equity or dequity) position held by the Fund Loans.

[252] Where the experts diverged was in their choices of which public senior project debts to use as a starting point, and in the subsequent adjustments made thereto. In the result, Lee and Milburn arrived at different discount rates which, in turn, resulted in markedly different fair market valuations.

[253] One such adjustment was referred to as a "structural adjustment". In his report, Lee made a 1.49% structural adjustment to the discount rate based on the discount rate implied by the OMERS transaction. In contrast, Milburn opined that the underlying risk associated with OMERS assets was similar to the risk associated with the Fund Loans and, for that reason, the discount rate applied in the OMERS transaction was a direct proxy for the Fund Loans and no structural adjustment was warranted (note that the OMERS charts discussed in paragraphs 236 to 241 hereof were tendered in the context of evidence on this topic).

[254] The experts also disagreed about the valuation date. Once again this materially affected their conclusions. Lee's calculation of the fair market value of the Plaintiffs' interest in the Fund Loans, the OMERS Opportunity and the Pipeline Projects, was as of May 1, 2020, when the alleged breach occurred (i.e. when the bulk of the Qualified Loans were prepaid). In contrast, Milburn valued the Plaintiffs' losses as of January 31, 2023 (i.e. a current date/as close to trial as possible). In his report, Milburn explains his choice of valuation was to ensure damages were calculated fully informed about the projects, the Plaintiffs' investments, and financial market conditions from the date the alleged breaches commenced in May 2020, to a current date.[28] In his March 27, 2023 report, Lee maintains the view the appropriate calculation date is May 1, 2020, because, among other things, the date coincides with the date on which the majority of the Fund Loans were repaid and, from a financial perspective, the losses on May 1, 2020 arose solely due to the alleged wrong. Losses calculated subsequent thereto would relate not just to the alleged wrong, but also to economic circumstances over time, including such things as changes in interest rates, inflation, and foreign exchange rates.

[255] Another point of disagreement between Lee and Milburn was the treatment of the Plaintiffs' loss of the OMERS Opportunity and Pipeline Opportunity. Lee included a value for both in his assessment of damages. Milburn assumed the value for both was nil.

[28] There is no dispute that interest rates increased between May 2020 and January 31, 2023, which, in itself, results in a lower fair market value calculation for January 31, 2023.

[256] In respect of the Fund Loans, the experts also disagreed about the nature of the Plaintiffs' interest which, again, impacts the loss. Milburn expresses the view that the Plaintiffs' owned partnership units, not the loans themselves. Because those units could not be readily transferred on the market themselves, their value was significantly less than the market value of the loan itself. Lee's calculation takes the approach that in the CDPQ Transaction, the Fund Loans were removed from the Limited Partnerships (something to which Milburn agreed). The intended structure of the Limited Partnerships was for the interest payments on the Fund Loans to flow through directly to the Limited Partners. Once the Fund Loans were sold, there were no assets remaining in the Limited Partnerships. The value of the Limited Partnership units was directly tied to the value of the Fund Loans.

[257] One last disagreement to which I will refer relates to mitigation. Lee opines that in respect of the prepayment of the Fund Loans, mitigation does not apply and makes no calculation in respect thereto. Milburn takes the opposite view and offers up two possible calculations. I address mitigation in more detail commencing at paragraph 260 hereof.

[258] At the end of the day, I heard from two experts and must decide whose opinion, if any, I accept in whole or in part. For the following reasons, and subject to the qualifications described below, I prefer the evidence of Lee over Milburn:

- Based on their respective work experience, I find Lee to be more qualified than Milburn. In particular, Lee has more direct day-to-day experience valuing instruments similar to the very instruments at issue in this case.

The focus of Milburn's work is damages calculation for litigation primarily in respect of other industries, primarily mining. I also have noted Lee's role as Chair of the International Valuations Standards Council, Financial Instruments Board – the dependent global standards center for the valuation profession, whose members include the Canadian Institute of Chartered Business Evaluators, CFA Institute, and the American Institute of Certified Public Accountants.

- Milburn did not list in his report all the documents he was provided and reviewed. He listed only those documents he believed were relevant and relied upon, with no explanation for the documents he disregarded.
- I do not agree Milburn's choice of valuation date is appropriate. As noted in paragraph 234 hereof, the law presumes damages are calculated at the date of breach. I have seen no evidence sufficient to rebut that presumption. Quite apart from any legal presumption, I agree with Lee's practical explanation as to why, in this case, valuing the Fund Loan as at the date of breach makes sense.
- From a common sense point of view, I cannot accept Milburn's conclusion that the Plaintiffs' suffered no loss whatsoever from the removal of the Pipeline Opportunity, especially given the exclusivity of its commercial arrangement with PG Canada and the undeniable proven track record over a decade.

[259] The qualifications to the Lee report, to which I referred earlier, are twofold. First, as a matter of law, I do not agree mitigation plays no role in this case. Second, despite me accepting the Plaintiffs suffered damages from losing Pipeline Opportunities, I find the calculation of $31,504,708 to be too high[29].

Dealing first with mitigation, I already have mentioned that the Plaintiffs, supported by Lee, submit mitigation does not apply. That position is based, in part, on the fact the Plaintiffs never received the premium charged in respect of the Fund Loans in the CDPQ Transaction (i.e. the difference between the par value and the fair market value of the future income streams). More simply, Lee opines that the Plaintiffs simply could not mitigate what they did not receive. The Plaintiffs also argue that in and around May 2020, there were no investment arrangements similar to the bespoke arrangement between the Plaintiffs and PG Canada that offered a comparable duration, credit risk and rate of return. The Defendants', supported by Milburn, submit they are entitled to receive credit equal to the amount generated, if any, through the re-investment of the pre-paid funds. The parties' positions must be considered in the context of the applicable legal principles, summarized as follows:

- A Plaintiff claiming breach of contract has a duty to mitigate their damages and give credit for the amounts earned through mitigation.
- The onus is on the Defendants to establish it was possible to mitigate and that the Plaintiffs have not mitigated appropriately.

[29] This amount already reflects a downward adjustment from the original $49,477,065 necessitated by the fact the QE II Halifax Infirmary (Inpatient) project was cancelled.

(See ***Southcott Estates Inc. v. Toronto Catholic District School Board***, 2012 SCC 51 (CanLII) at paras. 23-25; ***Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.,*** [1979] 1 SCR 633 at 661)

[260] The first question is, does mitigation apply to this case? Although I agree the investment relationship between the Plaintiffs and PG Canada was bespoke and, arguably, one of a kind, at the end of the day the Plaintiffs' received payments which could be responsibly invested to minimize further losses. The nature of the asset in this case is different from those cases dealing with a one-of-a-kind physical asset.

[261] Having concluded mitigation is relevant, the questions become: what was done with the pre-paid Fund Loans that were paid to the Plaintiffs, were gains earned thereon, and, if so, to what extent?

[262] There is no dispute the pre-paid Fund Loans were invested. It is the Plaintiffs' oral and documentary evidence (unchallenged on cross examination), that in the case of WSIB:

- Funds were received from PG Canada as follows:

Date	Funds Received	Repayment of
Fund I		
May 1, 2020	CAD$ 63,249,050.49	Principal and interest on PIC I-V and PIC VII-X
July 31, 2020	CAD$ 3,762,752.29	CSEC (PIC VI) - Interest Only
November 13, 2020	CAD$ 65,652,054.80	CSEC (PIC VI) - Principal and Interest Only
Fund II		
May 1, 2020	CAD$ 21,567,152.52	Principal and interest on PIC XII, XIII, XV-XX, XXII,XXIII
Fund III		
May 1, 2020	USD$ 24,038,999.37	Principal and Interest for PIA II, III, IV

- At the time of pre-payment, there were no equivalent available alternative investments with the same duration, return and risk level. There was no way to trace the fund received to a specific investment.
- There exist at IMCO (Investment Advisor to WSIB), specific asset allocation policies designed to make sure monies received are invested in accordance with strategic asset allocations designed for each client (including WSIB). Infrastructure was one such allocation and, until the Fund Loans were pre-paid, they were part of that allocation. Prior to, and at the time of the pre-payment, the amounts targeted for infrastructure exceeded what was actually invested in infrastructure. In other words, the allocation was under-weighted.
- The pre-paid Fund Loans were invested by IMCO, as dictated by those policies specifically governing the situation where a target investment allocation is under-weighted, as was the case for WSIB in May 2020.
- Applying these policies, IMCO calculated WSIB's gains on the pre-paid amounts to be $4,005,353.78.

[263] As for CAAT, it received payments as follows:

Date	Funds Received	Repayment of
Fund I		
May 1, 2020	CAD$18,740,459.41	Principal and interest on PIC I-V and PIC VII-X
July 31, 2020	CAD$1,113,017.57	PIC VI (CSEC) - Interest only
November 13, 2020	CAD$19,452,460.68	PIC VI (CSEC) - Principal and remaining interest
Fund II		
May 1, 2020	CAD$7,168,659.99	Principal and interest on PIC XII, XIII, XV-XX, XXII,XXIII
Fund III		
May 1, 2020	USD$6,009,749.00	Principal and interest for PIA II-IV
Fund III		
May 1, 2020	USD$6,009,749.00	Principal and interest for PIA II-IV

[264] Although CAAT had its own policies, the gist of its evidence was similar to WSIB and need not be elaborated upon. However, in contrast to WSIB, CAAT estimates it incurred negative returns on the reinvested money.

[265] Milburn did not base his mitigation calculations on the Plaintiffs' internal policy, but instead, performed two calculations: one based on returns for each of WSIB's and CAAT's entire investment portfolio and, the other, based on each of WSIB's and CAAT's infrastructure portfolio. Using the entire portfolio rates of return, Milburn calculated returns on the pre-paid Fund Loans to be $11,344,016 for WSIB, and $12,942,681 for CAAT. Using the infrastructure portfolio rates of return, Milburn's calculations for WSIB and CAAT were $41,487,318 and $16,958,478 respectively. Milburn did not state which calculation should be applied.

[266] Although I agree with PG Canada that mitigation is relevant to this case, I do not accept Milburn's calculation thereof. Despite the Plaintiffs' inability to specifically

trace funds, I have no reason to doubt or reject the uncontroverted evidence about how the Fund Loans pre-payment would have been applied in accordance with the Plaintiffs' policies and guidelines. Also, I accept Lee's observation that the actual return – whether based on total portfolios or on infrastructure assets – would have comprised of both equity and bond return weighted more to equity than debt. As such, the actual returns would have involved considerably more risk than the Fund Loans. A duty to mitigate should not require a Plaintiff to commit to investments materially riskier than the Fund Loans. Lastly, and in respect to Milburn, I am not equipped to divine my own mitigation conclusions based on Milburn's two, significantly divergent, calculations.

[267] In all the circumstances, I find that in the case of WSIB, the amount of $4,005,351.78 represents mitigation and must be subtracted from any judgment against the Defendants. No similar judgment is required in the case of CAAT, as it realized no gains.

[268] As for damages pertaining to the lost Pipeline Opportunities, I repeat that the Plaintiffs rely on Lee's calculation of $31,504,708. Milburn rejected that calculation challenging, among other things, Lee's methodology (i.e. income approach), its conformity with legal statements pertaining to assessing opportunity losses and the degree of speculation utilized by Lee.

[269] I accept the methodology used by Lee to value the lost Pipeline Opportunities. Although I appreciate, and the authorities recognize, valuing lost opportunity can be an imprecise and difficult task, in my view, Lee's calculation reflects too much

speculation/optimism in respect of the projects identified as DC Street Lighting, the Ontario Line, and NC.DOT and Broadband. Each of these projects reached financial close but did so *after* February 1, 2021. Recall that February 1, 2021, marked the end of the Fund II and Fund II Capital Commitment Periods. In response to that fact, the Plaintiffs argue that based on the relationship and the conduct of the parties in the decade leading up to March 2020, it is more likely than not an agreement would have been reached to extend one or more of the Capital Commitment Periods.

[270] While a lost opportunity assessment requires some flexibility, I agree with PG Canada the Plaintiffs have over-assessed the certainty of an extension of the Capital Commitment Period. Although the track record of the parties is an important consideration, so is the fact events might have arisen before February 1, 2021, materially impacting the extension decision. As such, a calculation based on the *certainty* of an extension is not reasonable.

[271] The amount of $31,504,708 should be reduced. According to Lee, the aggregate value of the post-February 1, 2021, projects is $20,216,419. To address my concerns, this number requires adjustment, though not eradication. As Milburn offered up no alternative calculations (other than a zero value), it is left to me to come up with a figure. For the reasons expressed, I would reduce the Pipeline claim by $10,000,000, which represents approximately one half of Lee's valuation of the post-February 1, 2021, projects. Damages for the Pipeline loss will be $21,504,708.

[272] Before concluding this section of my reasons, I want to address one final damages-related argument advanced by PG Canada. PG Canada submits I should not

grant the Plaintiffs' damages claim in respect of the Fund Loans because to do so amounts to a "make-whole", which they say was never intended or agreed to by the parties. PG Canada points to the removal of the term "fair market value" when the parties were negotiating s. 4.4 of the MIA (the right of the Plaintiffs to be bought out if the control of PG Canada changes), and its stance against a make-whole when Wong and Martin were negotiating s. 2.5(c) of Template QLA (the pre-payment clause) in the period July 28 to 29, 2010[30].

[273] In response, the Plaintiffs submit:

- They are not relying on, or asking for, a make-whole. PG Canada advances this argument to deliberately blur the distinction between a contractual make-whole and damages properly claimed for breaching that contract.
- Here, the Plaintiffs are claiming for breaches of contract, including those arising from the *en masse* pre-payment and sale of the Fund Loans to CDPQ for reasons unrelated to the loans themselves or the projects.
- At trial, Milburn testified Lee's valuation of the Fund Loans amounted to a make-whole because it valued all future cashflows from the Loans as if the Plaintiffs had sold the assets on May 1, 2020. However, that is exactly what a discounted cashflow method of calculating damages is supposed to do: calculate today's value of future streams of cashflows (in this case, fixed loan repayments over many years).

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[30] PG Canada says its position reflects the fact the Plaintiffs were not equity holders *per se* in respect of the projects and should not share in any growth.

- Milburn’s testimony that Lee’s valuation of the Fund Loans amounts to a make-whole does not accord with the evidence of Lee and Gowlings LLP’s, Wong.
- There is nothing in the commercial documents, including s. 2.5(c) of the Template QLA suggesting the Plaintiffs agreed to limit PG Canada’s liability in the event it chose to breach its contractual obligations thereunder.
- Ironically, the only reference in the commercial documents to the term “make-whole” is in the July 29, 2010, version of the Template QLA (the one I found could not be rectified), not in the version of Template QLA attached to the executed documents upon which PG Canada relies. It would be wrong to permit PG Canada to rely on the July 29, 2010, version of the Template QLA but not the Plaintiffs.

[274] I agree with the Plaintiffs’ submissions in respect of PG Canada’s make-whole arguments. The arguments are supported by the facts as I have found them and the law.

iv. <u>Summary of Relief Ordered</u>

[275] The relief I have ordered can be summarized as follows:

- Those Defendants liable for any of breach of fiduciary duty, knowing assistance or knowing receipt shall, within thirty (30) days of entering the judgment herein (the deadline), disgorge to the Plaintiffs the sum of $259,990,567 (the proceeds).
- The proceeds shall be impressed with a constructive trust.

- In the event disgorgement does not occur by the deadline, the Plaintiffs shall be entitled to an accounting in respect of the proceeds. As well, a tracing order in respect of the proceeds shall come into effect, the specific terms of which can be set by the Court, failing agreement among the parties.
- The Plaintiffs shall account to Shell and Air Canada in respect of all amounts disgorged by one or more of the Defendants, with a view to determining their interest, if any, in the funds.
- The Plaintiffs are not foreclosed from seeking further assistance from this Court following the deadline, should that be required. However, that is not an open invitation, nor a promise relief will be granted[31].

[276] If it is later determined I ought to have awarded contractual damages instead of disgorgement, I would have ordered PG Canada and the General Partners to pay the Plaintiffs the sum of $211,326,913, broken down as follows:

- Fund Loans: $187,912,676
- OMERS Opportunity: $5,914,881
- Pipeline Opportunities: $21,504,708
- Mitigation: ($4,005,351.78)

[31] I am conscious the Plaintiffs also alleged unjust enrichment and breach of confidentiality. Considering my liability and damages findings, I see no purpose in ruling on these matters.

V. CONCLUSION

[277] The Plaintiffs' claim is granted as set out in these reasons.

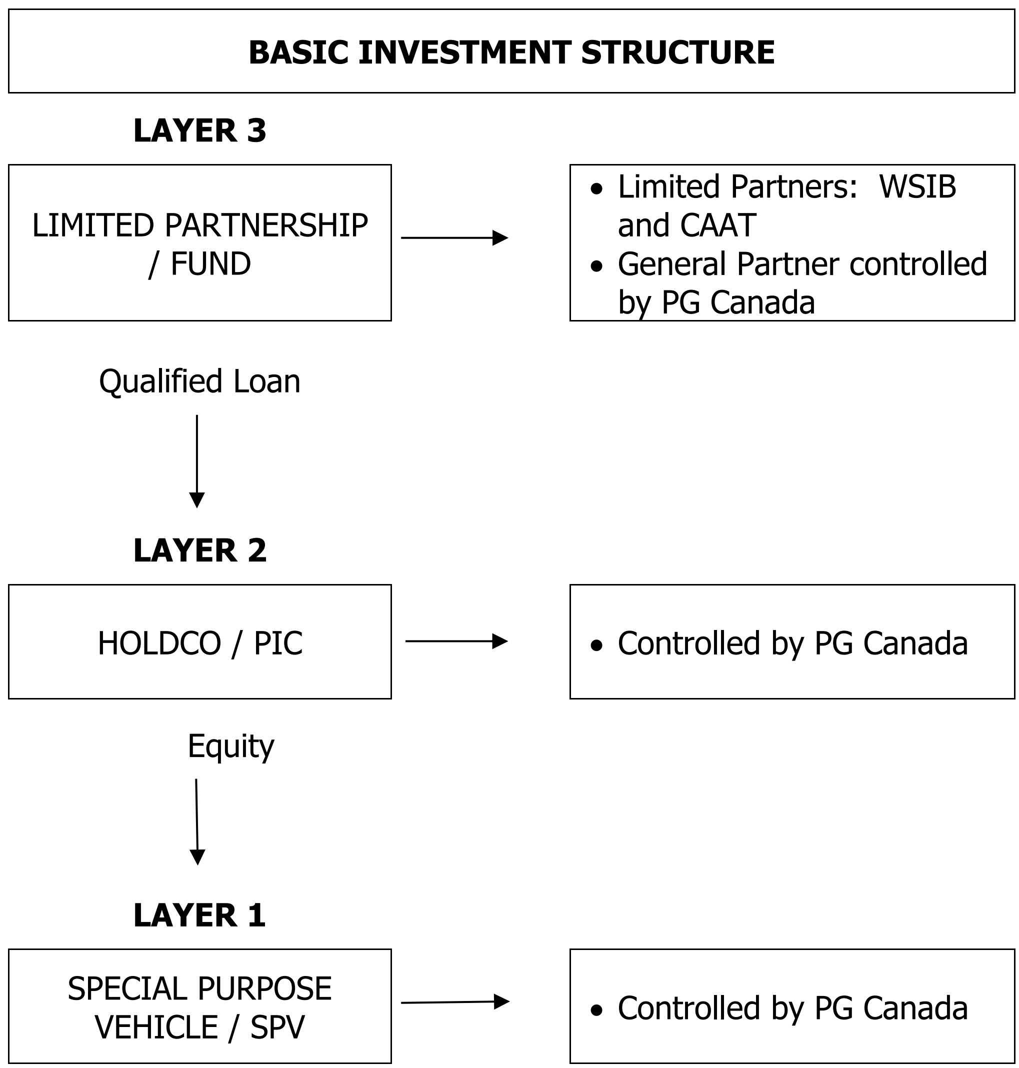
[278] Given my fact and liability findings in the main claim, the counterclaim herein cannot succeed and is dismissed in its entirety.

[279] Costs may be spoken to, failing agreement among the parties.

[280] Finally, I extend sincere thanks to the court staff and other support staff, without whom the trial would not have proceeded as smoothly as it did.

___________________________J.

APPENDIX "A"


BASIC INVESTMENT STRUCTURE
LAYER 3
LIMITED PARTNERSHIP / FUND
Limited Partners: WSIB and CAAT
General Partner controlled by PG Canada
Qualified Loan
LAYER 2
HOLDCO / PIC
Controlled by PG Canada
Equity
LAYER 1
SPECIAL PURPOSE VEHICLE / SPV
Controlled by PG Canada