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From Gold Mining in the Nevada Desert to Seeking Declaratory Relief on the Commercial List

The general principles of contractual interpretation in Ontario are straightforward, but applying them to the unique facts of a given case can be complex. This is often seen in cases involving detailed agreements in specialized industries. *Kinross Gold Corporation v Cyanco Company, LLC*, is one such example. There, the Ontario Superior Court recently addressed an interpretation dispute regarding a supply agreement to two gold mines in Nevada. Justice Cavanagh's decision in *Kinross* is a good reminder of how the well-known contractual interpretation principles play out in cases where specialized knowledge may be required to understand the parties' bargain.

Facts

Kinross Gold Corporation is a company that operates two gold mines in Nevada (the "**Mines**") through its subsidiaries (for convenience, Kinross Gold Corporation and the subsidiary companies are referred to collectively as "**Kinross**"). Cyanco Company, LLC ("**Cyanco**") is a company that produces and supplies sodium cyanide.

Sodium cyanide is a product used in gold mining—at a high level, it extracts gold from ore. It can be sold and transported in either a liquid or solid state. Solid sodium cyanide is typically less expensive because it costs less to transport, but it must eventually be converted to liquid sodium cyanide to be used in the mining process.

In June 2017, the parties entered into an agreement where Cyanco would be the exclusive supplier of liquid sodium cyanide to the Mines (the "**Agreement**"). The term of the Agreement was for the life of the Mines.

Shortly after entering into the Agreement, Kinross expressed concern about the price it would be paying for liquid sodium cyanide, pursuant to the agreed price-setting mechanism. Negotiations between the parties took place, but Cyanco did not agree to reduce the price payable under the Agreement. Subsequently, in May 2020, Kinross issued a Request for Proposals to supply its mines, including the Mines, with solid sodium cyanide. At the time, the Mines did not have the

infrastructure to take supply of and receive solid sodium cyanide.

In response to this Request for Proposals, Cyanco informed Kinross that should it purchase solid sodium cyanide for the Mines from any company other than Cyanco, Kinross would be in breach of its obligations under the Agreement.

Kinross then commenced a proceeding for a declaration that in obtaining a separate supplier for solid sodium cyanide, rather than liquid sodium cyanide, it was not in breach of the Agreement. In essence, it argued that because the Agreement expressly contemplated liquid sodium cyanide, and was silent on solid sodium cyanide, its obligations were only to purchase liquid sodium cyanide from Cyanco, but it was free to purchase and use solid sodium cyanide from whatever party it wished.

The Decision

After determining that this was an appropriate case for declaratory relief, Justice Cavanagh addressed whether the relief sought by Kinross should be granted (i.e., whether the Agreement permitted Kinross to purchase solid sodium cyanide from a supplier other than Cyanco and to then dissolve the solid sodium cyanide into liquid sodium cyanide for use in the Mines' operations).

Justice Cavanagh held that Kinross was contractually precluded from engaging in this conduct.

In arriving at this conclusion, Justice Cavanagh engaged in a detailed review of the relevant background facts, including sodium cyanide, its various forms, its storage and transportation, and its use in mining.

Within this factual context, Justice Cavanagh found that the language of the Agreement contemplated Cyanco supplying all sodium cyanide for the Mines, other than the express "testing" rights afforded to Kinross under the Agreement. This necessarily included solid sodium cyanide because, *inter alia*, solid sodium cyanide was required to be dissolved into liquid form in order to be used at the Mines:

The Agreement requires Kinross to purchase liquid sodium cyanide (in accordance with the specifications in the Agreement to describe the "Product") solely from Cyanco, and not from another supplier. Kinross is required to satisfy this obligation unless the Mines do not require liquid sodium cyanide for their operations. ... There is no need for the Agreement to refer to solid sodium cyanide to understand what these words mean, and the fact that the Agreement does not expressly refer to solid sodium cyanide or contain words precluding Kinross from purchasing solid sodium cyanide from another supplier for use at the Mines is of no consequence...

The Mines are operating. The Mines require liquid sodium cyanide for their operations at the Sites. The Mines require liquid sodium cyanide to be held in storage tanks at a 30% concentration before use in the leaching process. During the leaching process, the Mines require liquid sodium cyanide at lower concentrations to leach gold deposits from ore. Under these conditions, Kinross is contractually precluded from purchasing solid sodium cyanide from other suppliers and then dissolving this product to form liquid sodium cyanide where it would be used by the Mines in their operations. To interpret the Agreement in such a way that would allow Kinross to do so would conflict with “the concept” that Cyanco is to be the sole supplier of liquid sodium cyanide required by the Mines. [see paras 92, 94]

Accordingly, Justice Cavanagh rejected Kinross’ argument that it was permitted to cease purchasing liquid sodium cyanide from Cyanco at its discretion under the Agreement, and instead elect to purchase solid sodium cyanide from another supplier. In analyzing the parties’ obligations under the Agreement, Justice Cavanagh found that such an interpretation would have been commercially unreasonable at the time of contracting, given that Cyanco would be contractually obligated to organize its business to ensure that it was able to resume supply of products to Kinross whenever Kinross elected to place future orders, if ever.

Noting that commercial reasonableness must be assessed at the time of contracting, Justice Cavanagh explained:

I take this caution into account when I conclude that the interpretation advanced by Kinross does not accord with sound commercial principles and good business sense, viewed objectively from the perspectives of Cyanco and Kinross when the Agreement was made. Section 4 of the Agreement and section 15 of the SPCs require Cyanco to allocated production capacity to the Mines that is equal to 120% of the Mines projected consumption requirements for the Products as expressed in their Consumption Forecasts. If Kinross orders Products that are within 120% of its Consumption Forecast for a given Mine, and Cyanco is unable to supply those Products, Cyanco is required to find an alternative supplier and compensate Kinross for any difference in costs between the price payable under the Agreement and the price to be paid to the alternative supplier.

From the perspectives of Cyanco and Kinross when the Agreement was made, these obligations would make it essential for Cyanco to have long-term predictability in Kinross’ demand for Products. Cyanco must enter into supply contracts with its own suppliers, and allocate its production capacity to its customers, over a predictable time horizon. If Cyanco were to be put into the position where Kinross is able to suspend purchases of the Product without prior notice, for an unknown time period

that could extend to the end of the term of the Agreement, and compel Cyanco to resume supply of some or all of Kinross' requirements for liquid sodium cyanide at Kinross' discretion, this would put Cyanco into the untenable position maintaining purchase agreements with suppliers and allocation of production capacity to meet the needs of Kinross without any contractual commitment on the part of Kinross to ever purchase Product from Cyanco. The words of the Agreement do not support such an interpretation that, if accepted, would lead to a commercially absurd result. [citations omitted; see paras 112-114]

Justice Cavanagh also noted throughout the decision that Kinross' interpretation would lead to certain provisions in the contract becoming ineffective, and that it should be rejected on that basis as well.

Notably, and notwithstanding the prior history between the parties and the evidence led on the pre-contractual negotiations of the Agreement, Justice Cavanagh elected not to rely on the evidence of the pre-contractual negotiations. He held that this evidence would not deepen his understanding "of the mutual and objective intentions of the parties as expressed in the words of the Agreement." He explained that he was "unable to understand the meaning and purpose of some of these pre-contractual communications without considering internal communications from each side that do not qualify as surrounding circumstances." However, in so holding, following the Supreme Court's decision in *Corner Brook (City) v Bailey*, he left the door open for such evidence in future cases.

Takeaways

While a contractual interpretation case will always turn on the individual language of the agreement and the unique factual matrix, this decision is a good reminder of several principles that apply beyond the immediate case.

In complex cases, particularly those involving specialized industries, it will be necessary to lead evidence on the nature of the industry and the subject matter of the agreement in order to discern the parties' mutual and objective intentions. Here, it was necessary to understand the nature of the industry, and the processes for using sodium cyanide in its various states, among other things, to inform the written words and the parties' intentions.

And regardless of the complexity of any agreement, Ontario courts remain skeptical of an overly technical approach to contractual interpretation, particularly where the interpretation distorts the parties' bargain or leads to what would have been a commercially unreasonable result at the time of contracting.

Further, even in large and complicated agreements, contracts

will be read as a whole. Where one interpretation renders certain provisions of the contract ineffective, it will not be preferred.