NEWFOUNDLAND POWER
A FORTIS COMPANY

Newfoundland Power Inc.

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HAND DELIVERED

May 30, 2011

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

Attention: Ms. Cheryl Blundon
Board Secretary

Ladies & Gentlemen:

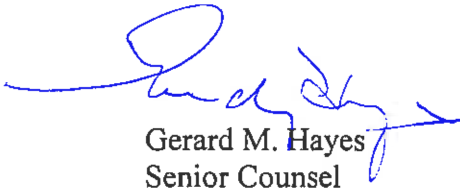
Re: Sale of Joint Use Support Structures Application

Enclosed please find the original and 8 copies of Newfoundland Power's Reply Written Submission.

For convenience, we have provided the Reply Written Submission on 3 hole punched paper.

We trust the enclosed are found to be in order.

Yours very truly,



Gerard M. Hayes
Senior Counsel

Enclosures

c. Geoff Young
Newfoundland and Labrador Hydro

Tom Johnson
O'Dea, Earle

Join us in the fight against cancer.

Telephone: (709) 737-5609 *Email: ghayes@newfoundlandpower.com* *Fax: (709) 737-2974*

IN THE MATTER OF the *Public Utilities Act*, (the "Act"); and

IN THE MATTER OF an application by Newfoundland Power Inc., ("Newfoundland Power") for an Order pursuant to Section 48 of the Act, and all other enabling powers for approval of the sale by Newfoundland Power to Bell Aliant Regional Communications Inc. ("Bell Aliant") of certain utility poles, anchors and related equipment ("Support Structures").

REPLY WRITTEN SUBMISSION OF NEWFOUNDLAND POWER INC.

MAY 30, 2011

NEWFOUNDLAND POWER
A FORTIS COMPANY

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Case Authorities:

McDonald v. Sea Crest Holdings Ltd., 2009 CarswellNfld 161, 2009 NLTD 101, 60 B.L.R. (4th) 208.

1 **1.0 INTRODUCTION**

2 In the Consumer Advocate's Written Submissions (the "CA Submission"), specific submissions
3 are made in respect of the test to be applied by the Board in considering this Application.
4 Specific reference is made to the so-called "no-harm test" (the "no-harm test") which has been
5 adopted by the provincial regulator in Alberta.

6

7 This Reply Written Submission responds to certain of the Consumer Advocate's Written
8 Submissions including those concerning the test to be considered in this Application.

9

10 **2.0 THE TEST TO BE APPLIED**

11 **2.1 The No-Harm Test**

12 At paragraphs 5 through 10 of the CA Submission the no-harm test is only partially described.

13

14 The no-harm test includes regulatory consideration of whether the proposed transaction "will
15 either not harm customers or, on balance, leave them at least no worse off than before in terms of
16 financial impact and reliability of service." However, this consideration is not the only one
17 required in the no-harm test as implemented in Alberta. A second consideration is whether
18 potential adverse impacts could be dealt with in future regulatory proceedings.

19 ***Reference:*** Response to Request for Information CA-NP-1; EUB Decision 2002-037 *Atco Gas*
20 *and Pipelines Ltd., Disposition of Calgary Stores Block and Distribution Net*
21 *Proceeds – Part 2* (March 21, 2002), pages 17-18, CA Submission Authorities,
22 Tab 4.

23

24 As indicated in Newfoundland Power's Written Submissions (the "NP Submission"),
25 Newfoundland Power submits there is no evidence on the record of this Application that customers

1 will be worse off as a result of the proposed sale of the Joint Use Support Structures. Under the
2 no-harm test, the Board would be required to find, on a balance of probabilities, that the proposed
3 sale would harm customers, by way of either detrimental impact on service or rate impact.
4 However, before this would justify denial of the Application, the Board would also be required to
5 conclude that such harm could not be dealt with in a future regulatory proceeding. Matters such as
6 future operating costs are typically capable of being dealt with in future general rate applications.

7 ***Reference:*** NP Submission, pages 16 and 17; AUC Decision 2010-615 *FortisAlberta Inc.,*
8 *Disposition of High River Service Centre* (December 23, 2010), page 3, CA
9 Submission Authorities, Tab 2; EUB Decision 2002-037 *Atco Gas and Pipelines*
10 *Ltd., Disposition of Calgary Stores Block and Distribution Net Proceeds – Part 2*
11 (March 21, 2002), pages 17-18, CA Submission Authorities, Tab 4.

12

13 **2.2 Costs**

14 In the CA Submission, it is indicated "…that there is a reasonable basis to conclude that there is
15 indeed a possibility that customers will be worse off after the sale should the application for
16 approval of the sale be approved".

17 ***Reference:*** CA Submission, para. 22.

18

19 In support of this submission, the Consumer Advocate relies upon (i) the "thinness" of benefits
20 when compared to those forecast under the JUFPA, (ii) an examination of annual revenue
21 requirement impacts, and (iii) the uncertainty of future costs.

22 ***Reference:*** CA Submission, paras. 16, 17, 18, 19, 22.

The "Thinness" of Benefits

In the CA Submission, a number of references are made to the "thin" benefits associated with the new Joint Use regime as compared to the 2001 forecast benefits associated with the JUFPA. The CA Submission highlights diseconomies of scale indicated in the Prefiled Evidence and higher administration costs indicated in the Responses to Requests for Information.

Reference: CA Submission paras. 15, 16, 17, 18, 22.

Such comparison of the benefits of the new Joint Use regime with the 2001 forecast benefits of the JUFPA may be misleading. The benefits associated with the new Joint Use regime reflected in Exhibit 8 are in *addition* to the ongoing benefits established under the JUFPA. These forecast incremental benefits reflect progress in the *overall efficiency* of Newfoundland Power's Joint Use of Support Structures.

Reference: Exhibit 8; Response to Request for Information PUB-NP-45.

Revenue Requirement Impacts

The CA Submission highlights revenue requirement deficiencies in the years 2013 through 2015. These are described in the Prefiled Evidence as representing approximately 0.02% of Newfoundland Power's revenue requirements during that period.

Reference: Prefiled Evidence, page 12, lines 4-6; CA Submission, paras. 15, 16.

Newfoundland Power submits that the Consumer Advocate's focus is unduly narrow. The isolation of very small forecast annual impacts while disregarding positive annual impacts presents a skewed perspective on the cost impacts associated with the Application.

1 The Board has noted that net present value analysis of incremental costs and benefits is generally
2 accepted in finance, and has mandated the net present value methodology for use by
3 Newfoundland Power. On a net present value basis, the benefits are positive on both a five-year
4 and ten-year basis. These positive benefits are in *addition* to the ongoing benefits established
5 under the JUFPA. Put another way, the evidence is clear that the proposal before the Board is
6 superior to a renewal of the JUFPA in accordance with its terms.

7 ***Reference:*** Order No. P.U. 6 (1991), pages 31-32, 83; Exhibit 8; Responses to Requests
8 for Information PUB-NP-45, PUB-NP-81.

9

10 The forecast 0.02% revenue requirement deficiency in the years 2013 through 2015 is also very
11 small. By comparison, the Alberta Utilities Commission considers anticipated rate impacts of
12 0.2% (or 10 times 0.02%) to be "…negligible or *de minimis*…" in application of the no-harm test
13 when considering applications to sell utility assets.

14 ***Reference:*** AUC Decision 2010-615 *FortisAlberta Inc., Disposition of High River Service*
15 *Centre* (December 23, 2010), page 8, CA Submission Authorities, Tab 2.

16

17 ***Future Uncertainty***

18 Newfoundland Power has estimated the increased administration costs associated with the new
19 Joint Use regime as part of its analysis because those costs are reasonably estimable.
20 Newfoundland Power has identified further potential benefits associated with the new Joint Use
21 regime but has not included them as part of its analysis. These may serve to increase the overall
22 benefits to Newfoundland Power and its customers as part of the new Joint Use regime. On
23 balance, this results in a conservative, but still positive, evaluation of the additional benefits
24 associated with the new Joint Use regime.

1 ***Reference:*** Exhibit 8; Responses to Requests for Information PUB-NP-35; PUB-NP-45.

2

3 The CA Submission misinterprets the Response to Request for Information CA-NP-9. This
4 response illustrates the pro forma revenue requirement impact of changes in the Company's
5 allowed return on equity ("ROE") based upon the analysis contained in Exhibit 8. This response
6 does not illustrate, nor does it purport to illustrate, sensitivities related to changes in
7 Newfoundland Power's cost of debt.

8 ***Reference:*** Response to Request for Information CA-NP-9.

9

10 **2.3 Service**

11 The CA Submission does not take issue with the evidence regarding customer service under the
12 new Joint Use regime that customer service (i) will not be impacted in any way, and (ii) will not
13 vary depending on whether a support structure is owned by Bell Aliant or Newfoundland Power.

14 ***Reference:*** CA Submission, pages 12-15; Prefiled Evidence, page 10, lines 14-17; Responses
15 to Requests for Information PUB-NP-38; PUB-NP-68.
16

17 The CA Submission indicates that "The sale of 40% of Newfoundland Power's Joint Use
18 Support Structures will bring us back to the era before the 2001 Joint Use Facilities Partnership
19 Agreement when Newfoundland Power did not have primary or exclusive responsibility for the
20 maintenance of Joint Use Support Structures…", and observes that there has been an overall
21 trend of increased system reliability in the decade after Newfoundland Power acquired the Joint
22 Use Support Structures.

23 ***Reference:*** CA Submission, para. 29.

The implication that the reversion to joint ownership as existed prior to the JUFPA might also reverse the overall trend of increased system reliability is not supported by the evidence. From a service perspective, the JUFPA resulted in the uniform application of Newfoundland Power's construction and maintenance practices to all of the Joint Use Support Structures in Newfoundland Power's service territory. The 2011 JUA preserves that arrangement.

Reference: Prefiled Evidence, page 10, lines 14-17; Response to Request for Information PUB-NP-37.

The CA Submission indicates that, regardless of the adherence to common standards, there will be changes as to who completes the work and observes that while service restoration will be carried out by Newfoundland Power, pole replacements, if required will be performed by either Newfoundland Power or Bell Aliant.

Reference: CA Submission, para. 28.

The evidence is that, for pole replacements, the *only* difference under the 2011 JUA will be which pole contractor is called upon to complete the work on the Support Structure. Further, the evidence is that pole replacements account for less than 1% of service interruptions to Newfoundland Power's customers.

Reference: Response to Request for Information PUB-NP-38.

2.4 Regulatory Considerations

The CA Submission concludes that regulatory considerations weigh decidedly against the sale of 40% of the Joint Use Support Structures to Bell Aliant.

1 In support of this conclusion, the CA Submission raises a number of rhetorical questions.
2 Firstly, why would Newfoundland Power wish to sell assets which it would immediately wish to
3 repurchase if Bell Aliant indicated that it wished to sell them? Secondly, is there any advantage
4 to Newfoundland Power's customers of having 40% of the Joint Use Support Structures beyond
5 the direct regulation of the Board? Thirdly, if joint users of Bell Aliant Support Structures could
6 not agree on terms of access, would it be more advantageous to have that matter determined by
7 the CRTC?

8 ***Reference:*** CA Submission, paras. 36, 37.
9

10 ***The First Question***

11 At page 5 of the Prefiled Evidence, it is indicated that Joint Use of Support Structures can be
12 achieved either through (i) ownership by multiple users or (ii) ownership by a single user with
13 tenants paying for attachments to Support Structures. In either case, sharing of all capital and
14 operating costs ensures there is no economic advantage to owners or tenants of Support
15 Structures. For this reason, Newfoundland Power is broadly economically indifferent to whether
16 it or Bell Aliant owns the Joint Use Support Structures, provided that costs are shared
17 appropriately and there is no substantial detriment to the service provided by Newfoundland
18 Power.

19 ***Reference:*** Prefiled Evidence, page 5, footnote 11.

20

21 Newfoundland Power is selling Joint Use Support Structures to Bell Aliant because (i) in 2001 it
22 agreed to do so as part of the terms of the JUFPA, which established a Joint Use regime that
23 delivered substantial economic benefits to Newfoundland Power and its customers, and (ii) Bell

1 Aliant's repurchase of 40% of the Joint Use Support Structures provides additional economic
2 benefits to Newfoundland Power and its customers.
3
4 Bell Aliant's obligation, or right, to repurchase 40% of the Joint Use Support Structures was part
5 of the *quid pro quo* for Newfoundland Power's acquisition of the opportunity to deliver over $10
6 million of benefits in the period 2001 to 2010. Newfoundland Power has negotiated terms of
7 Bell Aliant's repurchase of Joint Use Support Structures which preserve the broad benefits
8 achieved through the JUFPA and provide additional, if relatively modest, further benefits to
9 Newfoundland Power and its customers.
10 ***Reference:*** Prefiled Evidence, page 2, lines 7-12; Exhibit 4; Exhibit 8.
11
12 In the case that Bell Aliant wishes to discontinue use of specific Support Structures, or in the
13 unlikely event that Bell Aliant were to consider sale to a third party, under the terms of the 2011
14 JUA Newfoundland Power is entitled to purchase the Joint Use Support Structures.
15 Newfoundland Power would do so if it was necessary to preserve its service capabilities. These
16 rights of purchase of Joint Use Support Structures have existed for decades in Joint Use
17 agreements between Newfoundland Power and Bell Aliant (and its predecessors).
18 ***Reference:*** For 2011 JUA, Exhibit 5, Schedule 4, Article V – Dealing with Property; for 1994
19 Joint Use Agreement, Consent # 2 Response to Request for Information NLH 6.0,
20 Facilities Partnership Agreement, Article IV – Dealing with Property.
21
22 Newfoundland Power's 2011 sale of Joint Use Support Structures is part and parcel of its 2001
23 purchase of Bell Aliant's Joint Use Support Structures. The 2011 transaction, like the 2001
24 transaction, is economically justified. Joint Use arrangements between Newfoundland Power

1 and Bell Aliant (and its predecessors) have long provided for first rights of purchase as these are
2 practically required to preserve service capabilities.
3
4 ***The Second and Third Questions***
5 The second rhetorical question posed by the Consumer Advocate concerns 40% of Joint Use
6 Support Structures being "…beyond the direct regulation of the Board." The third question
7 assumes that, in cases of disagreement, Newfoundland Power's Joint Use of Support Structures
8 owned by Bell Aliant would be determined by the CRTC.
9
10 For decades, Joint Use agreements have existed between Newfoundland Power and Bell Aliant
11 (and its predecessors). Interpretative disputes under these Joint Use agreements were governed
12 by arbitration provisions. Since 1994, these arbitrations have been agreed to be conducted under
13 the provincial *Arbitration Act*. This continues under the 2011 JUA.
14 ***Reference:*** For 1994 Joint Use Agreement, Consent # 2, Response to Request for Information
15 NLH 6.0, Facilities Partnership Agreement, Article XVII - Arbitration; for 2011
16 JUA, Exhibit 5, Schedule 4, Article XVIII – Dispute Resolution. Prior to 1994, in
17 a 1991 arbitration on the 1988 Joint Use Agreement the Board served as arbitrator
18 (see: Consent #2 Response to Request for Information PUB-6).
19
20 The direct regulatory jurisdiction of the Board over Joint Use of Support Structures becomes
21 engaged "…in case of failure to agree upon the use, or the conditions or compensation for the
22 use, …" of Support Structures. The regulatory jurisdiction of the CRTC over Joint Use of
23 Support Structures is similarly engaged only in cases of disagreement and where the Support
24 Structures are not situated on private land.
25 ***Reference:*** Section 53 (2) of the Act; Section 43(5) of the *Telecommunications Act*; Response
26 to Request for Information PUB-NP-48.

1 Once Joint Use of a Support Structure is established pursuant to a Joint Use agreement, the terms
2 of Joint Use of that Support Structure continue under the terms of that Joint Use agreement until
3 a new Joint Use agreement is established. As was the case with prior Joint Use agreements, the
4 2011 JUA effectively provides that existing terms of Joint Use will continue indefinitely
5 notwithstanding termination until such time as a new Joint Use agreement is made by the parties.

6 ***Reference:*** For 1994 Joint Use Agreement, Consent # 2 Response to Request for Information
7 NLH 6.0, Facilities Partnership Agreement, Article XIX – Term of Agreement;
8 for 2011 JUA, Exhibit 5, Schedule 4, Article XVIX – Term of Agreement.

9

10 When agreements have existed for Joint Use of Support Structures between Newfoundland
11 Power and Bell Aliant (or its predecessors), there has been *no direct regulation* of that Joint Use
12 by either the Board or the CRTC. Further, once Joint Use is established it continues to be
13 governed by the terms of the Joint Use agreement under which it was established until a new
14 Joint Use agreement is made. Given this, the proposed sale of 40% of Joint Use Support
15 Structures when accompanied by a comprehensive Joint Use agreement such as the 2011 JUA
16 does not result in any loss or gain in a regulatory sense. The terms governing Joint Use are the
17 terms agreed by Newfoundland Power and Bell Aliant. And, in cases of disagreement,
18 Newfoundland Power's Joint Use of Support Structures owned by Bell Aliant will be determined
19 by an arbitrator under the provincial *Arbitration Act,* not by the CRTC.

20

21 ***Concluding***

22 The conclusion in the CA Submission that regulatory considerations weigh decidedly against the
23 sale of 40% of the Joint Use Support Structures to Bell Aliant disregards a number of key aspects
24 of the evidence. One is the terms upon which the substantial economic benefits achieved under

1 the JUFPA were originally based. Another is the longevity of agreed rights of first purchase.
2 This conclusion also ignores the clear effect of negotiated agreements in both the provincial and
3 federal regulatory context regarding Joint Use of Support Structures. It also does not consider
4 the longstanding agreed approach to Joint Use dispute resolution between Newfoundland Power
5 and Bell Aliant (or its predecessors). Accordingly, this conclusion in the CA Submission is
6 without foundation.
7
8 **3.0 OTHER ISSUES**

9 In the CA Submission, it is submitted there is no sound legal basis to suggest that Bell Aliant
10 may hold Newfoundland Power contractually responsible for its losses if the Board denies the
11 Application.

12 ***Reference:*** CA Submission, para. 38.
13

14 The assertion that there is no legal basis for a contractual liability to Bell Aliant is not correct.
15 Newfoundland Power has a contractual obligation to permit Bell Aliant to repurchase the Joint
16 Use Support Structures. This was specifically recognized by the Board in Order No. P.U. 6
17 (2001-2002). Newfoundland Power has an obligation of good faith performance of its
18 contractual obligation to permit Bell Aliant to repurchase the Joint Use Support Structures.

19 ***Reference:*** Order No. P.U. 6 (2001-2002); McDonald v. Sea Crest Holdings Ltd.,
20 2009 CarswellNfld 161, 2009 NLTD 101, 60 B.L.R. (4th) 208, para. 73.
21

22 On any test that has been proposed for the Board's consideration in this Application, the Board
23 would be required to find, on a balance of probabilities, that the evidence discloses harm to
24 customers in order to deny the Application. There is no evidence of harm to customers in this
25 proceeding that would justify the Board making such an order. It would not be appropriate for

1 the Board to exercise its powers in a manner so as to frustrate Newfoundland Power's
2 contractual obligation that it specifically recognized in the past without a reasonable evidentiary
3 basis for doing so.
4
5 **RESPECTFULLY SUBMITTED** at St. John's, Newfoundland and Labrador, this 30th day of
6 May, 2011.
7
8
9
10
11

12 **NEWFOUNDLAND POWER INC.**
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Case Authorities

McDonald v. Sea Crest Holdings Ltd.,
2009 CarswellNfld 161, 2009 NLTD 101, 60 B.L.R. (4th) 208

C

2009 CarswellNfld 161, 2009 NLTD 101, 60 B.L.R. (4th) 208

McDonald v. Sea Crest Holdings Ltd.

J PERCY MCDONALD (First Plaintiff) and STEPHEN NOSEWORTHY (Second Plaintiff) and **CLARENVILLE** ICE & REFRIGERATION LTD. (Third Plaintiff) and SEA CREST HOLDINGS LTD. (First Defendant) and SEA CREST CORPORATION OF CANADA LIMITED (Second Defendant) and CARBONEAR SEAFOODS LTD. (Third Defendant)

Newfoundland and Labrador Supreme Court (Trial Division)

W.G. Dymond J.

Heard: September 8-12, 15-16, 2008
Judgment: July 2, 2009
Docket: 200401T4503

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Counsel: Ian F. **Kelly**, Q.C., Sheilagh Murphy for Plaintiffs

Gregory M. Anthony for Defendants

Subject: Contracts; Civil Practice and Procedure; Corporate and Commercial

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

Plaintiffs M and N and defendant SCH Ltd. owned shares in defendant SC Corp. — M also owned plaintiff C Ltd., business that supplied ice and cold storage to SC Corp. — Parties entered into agreement whereby M and N agreed to sell their interests in SC Corp. to SCH Ltd. — Clause 5.01 of agreement provided that SC Corp. would maintain normal dealings and business with C Ltd. for five years provided prices were competitive — Once agreement was completed, sales to C Ltd. decreased and eventually stopped — M, N and C Ltd. brought action for damages arising from breach of contract — Action allowed — Based on words of agreement, expectations of parties to agreement at time it was entered into, and circumstances relating to agreement, defendants did not comply with obligations under cl. 5.01 — There was binding obligation to buy ice and use cold storage from C Ltd. — SC Ltd.'s need for storage and use of ice had increased — New management in SC Corp. wanted to be more profitable and instituted complete restructuring of operations that eliminated C Ltd. from picture — It was not necessary to show that SC Corp. acted in bad faith or maliciously — To use defendants' interpretation of cl. 5.01 as comfort clause allowing defendants to review their operational requirements and to completely avoid C Ltd. if it did not make any business sense made clause unenforceable and meaningless.

Contracts --- Construction and interpretation — Resolving ambiguities — Conduct of parties

Plaintiffs M and N and defendant SCH Ltd. owned shares in defendant SC Corp. — M also owned plaintiff C Ltd., business that supplied ice and cold storage to SC Corp. — Parties entered into agreement whereby M and N agreed to sell interests in SC Corp. to SCH Ltd. — Clause 5.01 of agreement provided that SC Corp. would maintain normal dealings and business with C Ltd. for five years provided prices were competitive — Once agreement was completed, sales to C Ltd. decreased and eventually stopped — M, N and C Ltd. brought action for damages arising from breach of contract — Action allowed — Based on words of agreement, expectations of parties to agreement at time it was entered into, and circumstances relating to agreement, defendants did not comply with obligations under cl. 5.01 — Because of parties' difference of opinion as to intent of words used, it was necessary to consider context in which cl. 5.01 became part of agreement — If words in clause 5.01 in and of themselves had two possible interpretations, clause had to be read in context of whole agreement — It was clear that parties used language that was binding into future — Clause 5.01 was important to M because income from C Ltd. would become M's income into future — Defendants were aware of how C Ltd. fit into SC Corp.'s operation — It was unnecessary to consider previous drafts of cl. 5.01 — To use defendants' interpretation of cl. 5.01 as comfort clause allowing defendants to review their operational requirements and avoid C Ltd. if it did not make any business sense made clause unenforceable and meaningless.

Contracts --- Parties to contract — Privity — Third party beneficiary — General principles

Plaintiffs M and N and defendant SCH Ltd. owned shares in defendant SC Corp. — M also owned plaintiff C Ltd., business that supplied ice and cold storage to SC Corp. — Parties entered into agreement whereby M and N agreed to sell interests in SC Corp. to SCH Ltd. — Clause 5.01 of agreement provided that SC Corp. would maintain normal dealings and business with C Ltd. for five years provided prices were competitive — Once agreement was completed, sales to C Ltd. decreased and eventually stopped — M, N and C Ltd. brought action for damages arising from breach of contract — Action allowed — Issue arose as to whether or not damages could be claimed for C Ltd., which was not party to agreement — Action allowed — C Ltd. could recover damages — Clause 5.01 was specifically set out to benefit C Ltd. — Activities performed by C Ltd. were very activities contemplated as coming within clause 5.01.

Remedies --- Damages — Damages in contract — Sale of business

Plaintiffs M and N and defendant SCH Ltd. owned shares in defendant SC Corp. — M also owned plaintiff C Ltd., business that supplied ice and cold storage to SC Corp. — Parties entered into agreement whereby M and N agreed to sell interests in SC Corp. to SCH Ltd. — Clause 5.01 of agreement provided that SC Corp. would maintain normal dealings and business with C Ltd. for five years provided prices were competitive — Once agreement was completed, sales to C Ltd. decreased and eventually stopped — M, N and C Ltd. brought action for damages arising from breach of contract — Action allowed — Plaintiffs awarded damages of $191,717 — If SC Corp. had purchased same ice and cold storage over five years of agreement as it had purchased for average of two years previous, C Ltd. would have had capacity to meet this demand — Fact that C Ltd. had greater sales than prior to transfer did not mean that there were no losses to C Ltd. since C Ltd. had storage and ice production capacity available to accommodate needs of SC Corp. for years agreement ran.

Remedies --- Damages — Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Breach of contract

Plaintiffs M and N and defendant SCH Ltd. owned shares in defendant SC Corp. — M also owned plaintiff C Ltd., business that supplied ice and cold storage to SC Corp. — Parties entered into agreement whereby M and N agreed to sell interests in SC Corp. to SCH Ltd. — Clause 5.01 of agreement provided that SC Corp. would maintain normal dealings and business with C Ltd. for five years provided prices were competitive — Once agreement was completed, sales to C Ltd. decreased and eventually stopped — M, N and C Ltd. brought action for damages arising

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from breach of contract — Action allowed — Plaintiffs awarded damages of $191,717 — Case did not warrant aggravated damages — New management in SC Corp. wanted to be more profitable and instituted complete restructuring of operations that eliminated C Ltd. from picture — SC Corp. should not be punished for making business decision — To do so would be signal to managers which could prevent them from acting in best interest of company and obligations of shareholders.

Cases considered by *W.G. Dymond J.*:

Davidson v. Allelix Inc. (1991), 39 C.C.E.L. 184, 86 D.L.R. (4th) 542, 7 O.R. (3d) 581, 54 O.A.C. 241, 1991 CarswellOnt 933 (Ont. C.A.) — referred to

Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town) (2000), 2000 NFCA 21, 2000 CarswellNfld 315, 5 C.L.R. (3d) 55, [2000] G.S.T.C. 106 (Nfld. C.A.) — followed

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 127 B.C.A.C. 287, 207 W.A.C. 287, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 1999 A.M.C. 2840, 50 B.L.R. (2d) 169, [1999] 3 S.C.R. 108, [2000] 1 Lloyd's Rep. 199, 176 D.L.R. (4th) 257, 245 N.R. 88, 1999 CarswellBC 1927, 1999 CarswellBC 1928, [1999] I.L.R. I-3717, [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1 (S.C.C.) — referred to

Gilchrist v. Western Star Trucks Inc. (1998), 1998 CarswellBC 1699 (B.C. S.C. [In Chambers]) — referred to

Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 1998 CarswellOnt 4170, 41 B.L.R. (2d) 42, 114 O.A.C. 357 (Ont. C.A.) — referred to

Kitimat (District) v. Alcan Inc. (2006), 51 B.C.L.R. (4th) 314, 369 W.A.C. 27, 223 B.C.A.C. 27, 2006 BCCA 75, 2006 CarswellBC 411, 19 M.P.L.R. (4th) 1, [2006] 5 W.W.R. 157, 265 D.L.R. (4th) 462 (B.C. C.A.) — considered

Law Society (Saskatchewan) v. McLeod (1993), 115 Sask. R. 144, 1993 CarswellSask 252 (Sask. Q.B.) — considered

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. *London Drugs Ltd. v. Brassart*) 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. *London Drugs Ltd. v. Brassart*) 18 B.C.A.C. 1, (sub nom. *London Drugs Ltd. v. Brassart*) 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 913, 1992 CarswellBC 315 (S.C.C.) — referred to

McKinlay Motors Ltd. v. Honda Canada Inc. (1989), 46 B.L.R. 62, 80 Nfld. & P.E.I.R. 200, 249 A.P.R. 200, 1989 CarswellNfld 9 (Nfld. T.D.) — considered

Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. (1994), 19 Alta. L.R. (3d) 38, 149 A.R. 187, 63 W.A.C. 187, 13 B.L.R. (2d) 310, 1994 CarswellAlta 89 (Alta. C.A.) — considered

ACTION for damages for breach of contract.

***W.G. Dymond J.*:**

Introduction

1 The basis of the present action is for the Court to determine as to whether a clause to an Agreement dated 22

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March 2002 (hereinafter referred to as the "Agreement") between the Second Defendant, Sea Crest Corporation of Canada Limited (hereinafter referred to as "Sea Crest Corporation"), and the Third Plaintiff, Clarenville Ice & Refrigeration Ltd. (hereinafter referred to as "Clarenville Ice"), was an enforceable contractual agreement. Pursuant to the Agreement, Sea Crest Corporation was alleged to have agreed to maintain normal dealings and business with Clarenville Ice for a minimum period of five years while Clarenville Ice maintained competitive prices. Further, Sea Crest Corporation was obligated to provide details of competitive pricing to Clarenville Ice.

What Services Were to Be Provided to Sea Crest Corporation of Canada Ltd. by Clarenville Ice?

2 The subject matter of the Agreement was that Clarenville Ice would provide cold storage services, ice and other related services to Sea Crest Corporation of Canada Ltd. In the Agreement J. Percy McDonald and Stephen Noseworthy, the First and Second Plaintiffs as vendors to the action, agreed to sell their interests in Sea Crest Corporation to Sea Crest Holdings Ltd. (hereinafter referred to as "Sea Crest Holdings") as the purchaser.

3 The Agreement allowed Sea Crest Holdings to acquire all of the shares in Sea Crest Corporation, thereby gaining control of both Sea Crest Corporation and Carbonear Seafoods Ltd. (hereinafter referred to as "CSL"). Sea Crest Holdings, Sea Crest Corporation and CSL are herein referred to collectively as "Sea Crest".

4 The purchase price of the shares was to be paid over a period of five years. At the time of the Agreement, Sea Crest Corporation operated a fish processing plant in Hermitage, Newfoundland and Labrador, and CSL operated a fish processing plant in Carbonear, Newfoundland and Labrador.

5 Clarenville Ice was a company providing cold storage services, suppling ice and providing other related services to Sea Crest. It was estimated that the value of ice supply and cold storage averaged just over $75,000 per annum to Clarenville Ice.

6 It is this part of the Agreement that is the subject of the breach of contract alleged by the Plaintiffs, J. Percy McDonald (hereinafter referred to as "McDonald"), Stephen Noseworthy and Clarenville Ice. Clarenville Ice claims that as part of the Agreement, whereby Sea Crest Holdings obtained all of the shares of Sea Crest Corporation of Canada Ltd. it was agreed that Sea Crest would continue to use the services of Clarenville Ice for the five years after March 31, 2002. The Plaintiffs claim this was part of the consideration in addition to the purchase price of the shares paid to acquire Sea Crest Corporation. A further clause in the Agreement prohibited the First Plaintiff, J. Percy McDonald, from participating in any capacity in the fishery, including participation with any competitor, or potential competitor, of Sea Crest for three years following the execution of the Agreement.

7 There were other terms to the Agreement involving delayed payments of part of the purchase price, which reflected a Promissory Note for a portion of the purchase price payable over a five-year term. The Promissory Note was given by Sea Crest Holdings to the Plaintiffs, McDonald and Stephen Noseworthy.

8 The clause in the Agreement which is the subject to this action is set out in subparagraph 5.01 of the Agreement headed under "Extraordinary Obligations of the Purchaser". The clause states:

> 5.01 The Purchaser, the Company and CSL promises, undertakes and covenants that they will maintain normal dealings and business with Clarenville Ice and Refrigeration Ltd. (CIRL) for a minimum of five (5) years following the closing date PROVIDED prices are competitive with other suppliers. Details of competitive pricing will be provided to the Vendor by the Company and CSL.

9 As noted above, Clarenville Ice was in the business of supplying ice and cold storage of product at their Clarenville warehouse facility located in Clarenville, Newfoundland and Labrador. That was the only business carried on by Clarenville Ice.

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How Clause 5.01 Has to Be Interpreted

10 There are a number of principles of contract law which the common law cases have used in the interpretation of contracts. It is to be noted that this is private law in the context of commercial transaction so the contract has to be interpreted on the basis of the intent of the parties at the time the contract was signed and not at the time of any alleged breach (ref. *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (Ont. C.A.), at 587).

11 The Court has to look at the words used by the parties to arrive at an interpretation as to what the parties objectively manifested by the words they used and not by what they subjectively intended (ref. *Gilchrist v. Western Star Trucks Inc.*, [1998] B.C.J. No. 1863 (B.C. S.C. [In Chambers])).

12 Clauses of a contract should not be read in isolation but read in the context of the whole contract in order to give proper meaning to any given term in the wider context of the whole agreement, often referred to as the "context of the document itself".

13 In interpreting a commercial contract the Court must understand what the parties were seeking to achieve in business terms and strive for an interpretation that promotes those interests. This may mean looking at contextual evidence to allow the Court to effectively place itself in the position of the contracting parties. An interpretation that is commercially obscure is to be avoided (ref. *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 (Ont. C.A.) at para. 27).

14 Even where an agreement which has been reduced to writing is inarticulate or ambiguous, the Court has an obligation to make every effort to find a meaning. If there is ambiguity, the Court has a right to consider extrinsic evidence in the interpretation of the meaning of the words used (ref. *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21 (Nfld. C.A.) at para. 18).

15 It is clear from the decision of Cameron, J.A. in *Eco-Zone* that the first step is to determine whether there is ambiguity in the words used by the parties. In making that determination, the Court is entitled to examine the contextual matrix, the circumstances surrounding the contract or the clause in issue to determine the objective intent of the parties as to the meaning of the clause or the words used.

16 The Plaintiffs argue there is no ambiguity in the words used in the contract itself. The Plaintiffs further argue that the plain language shows clearly the intent of the parties and that the words in their plain meaning contemplate this. Clause 5.01 of the Agreement states:

> The Purchaser (**Sea Crest Holdings Limited)**, the Company (**Sea Crest Corporation of Canada)** and CSL (**Carbonear Seafoods Limited)** promises, undertakes and covenants that they will maintain normal dealings and business with Clarenville Ice and Refrigeration Ltd. (CIRL) for a minimum of five (5) years following the closing date ...
>
> (emphasis mine)

17 The Plaintiffs argue that this was a contractual obligation which was part of the agreement signed by Sea Crest whereby the Plaintiffs were selling the shares to the Purchaser (Sea Crest Holdings) for a price, part of which would include an agreement whereby McDonald would not compete with the new purchasers for a fixed period of time. The Plaintiffs claim that as part of this sale Sea Crest agreed they would maintain normal dealings and business with Clarenville Ice.

18 On the plain meaning of the words used the Plaintiffs argue, that according to *Webster's Universal Dictionary and Thesaurus*, 2003, *s.v.* "maintain" is defined as "to preserve, to support, to sustain", and *Black's Law*

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Dictionary, 6th ed., *s.v.* "maintain" is defined as "keep from falling, declining or ceasing ...to preserve from lapse, decline, failure, or cessation". They further argue that the plain meaning of the word "normal" meant not deviating from an established norm, rule or principle, regular or average. This the Plaintiffs argue is the literal meaning of the words used in plain language.

19 The maintaining of normal dealings and business meant that the Purchaser (Sea Crest Holdings) would continue its business dealings in the same manner that it had done in the previous years before the sale. The only proviso would be that it provided these normal dealings and business with Clarenville Ice as long as their prices were competitive with other suppliers. There was an obligation on Sea Crest Corporation and CSL to provide Clarenville Ice with a list of competitive prices. There is no question that the language was mandatory in that it said it "will maintain" and that there was a minimum fixed term of five years with the proviso of Clarenville Ice being competitive with other suppliers.

20 The Plaintiffs allege in their Statement of Claim that the Defendants broke this Agreement by not maintaining normal dealings and business with Clarenville Ice and that, as a result of changes made by Sea Crest, it purchased ice or used cold storage with competitors resulting in a breach of its contractual conditions.

Position of the Defendants

21 The Defendants claim as well that the language is clear and that it continued dealing with Clarenville Ice the same way it had in the past. The Defendants argue that in the reality of the business of Sea Crest Corporation in executing the fishery in Newfoundland and Labrador, within the commercial context of operating a fish operation, there is an understanding that the fishery dictates that Sea Crest had to be able to continually restructure its operation and that the company, because of the dictates of the market, will often require more or less product (i.e., ice or storage capacity) depending on the dictates of the market place. The Defendants argue that maintaining normal dealings and business has to be interpreted in the context of running a fish processing operation in a continually changing environment. This context is important in relation to how the words in the contract have to be interpreted.

22 The Defendants argue that to interpret the words using the ordinary and contextual meaning in the dictionary and not considering the context of operating a fishery gives the wrong interpretation to the meaning of the words as the parties intended.

23 The Defendants further argue that the same decisions made by McDonald and Stephen Noseworthy around ice and cold storage, prior to March of 2002, when they operated Sea Crest Corporation, were the same considerations taken by the new purchasers, Martin Sullivan, Blaine Sullivan, and their partner, Ches Penney, Sr. who were responsible for the operation of Sea Crest after the purchase of the shares in 2002. They argued that maintaining normal dealings and business relations refers to the fishery environment, the decision making process and considerations that were being taken into account around cold storage and ice as the operation continued.

24 The Defendants claim that the Plaintiffs interpretation of clause 5.01 of the Agreement is a guarantee of average sales for the two-year period, prior to the sales of the shares in 2002, to Sea Crest Holdings. If this is the Plaintiffs' position according to the Defendants, there would appear to be a difference of opinion as to what the intent of the words used meant in the context of the whole Agreement, and in the context of why clause 5.01 was part of the Agreement.

25 The Plaintiffs claim that the clause is not a guarantee of a set amount of money, as no figure was made part of 5.01. There was a guarantee, however, that Sea Crest Holdings and Sea Crest Corporation would continue to do business with Clarenville Ice for goods and services as long as Clarenville Ice remained competitive. This, Clarenville Ice claims, was the obligation made by Sea Crest Corporation on closing the deal. The evidence at trial showed that the prices of Clarenville Ice did remain competitive for the five years the Agreement ran. The evidence

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also showed that Sea Crest did not approach Clarenville Ice at any time and make a claim that its prices were not competitive.

26 Because of this difference of opinion as to the intent of the words used, it is necessary to consider the context in which paragraph 5.01 became part of the Agreement of the purchase and sale of the Sea Crest shares to Sea Crest Holdings.

27 It is also important to note that although Ocean Choice International Inc. was a signatory to the Agreement, it was not bound by the obligations set out in clause 5.01.

The Commercial Context and Players to the Contract

28 In order to fully understand the contract, one has to understand the historical background as to how the contract evolved and how the various assets being bought and sold came into being.

29 More importantly, the players involved also have to be set out how the Agreement came into being. From the various witnesses called by the Plaintiffs and the Defendants, the historical context of the players and the Agreement can be set out as follows:

1) McDonald, at the time of trial, was 63 years of age. He spent his adult life operating and managing fishery companies in Newfoundland and Labrador. By trade he is a registered industrial accountant. In the 1970's he worked at National Sea in St. John's. He was a division manager with National Sea on the south side for two and a half years. In the 1980's he became the general manager of National Sea Products but had many positions at National Sea Products during the 1980's. In the 1990's he was vice-president and president of ComPak Seafoods Inc. (hereinafter referred to as "Compak"). It was while he was working at ComPak that he met Stephen Noseworthy, the accountant, also working at ComPak. In 1996 McDonald suffered some health problems and decided, after spending over 28 years in the fishery, to leave ComPak. Percy McDonald decided to try and find something he himself owned or controlled. He entered into a Lease and Purchase Agreement with Earle's Fisheries in Carbonear. This was a groundfish operation and was referred to as Carbonear Seafoods Ltd. (CSL) in the Agreement between the parties set out in exhibit JPM #7. McDonald assessed the operation and felt it had potential. At that time, McDonald set up his own company, Sea Crest Corporation of Canada Limited. McDonald had no capital but felt he could do something with the CSL operation. McDonald was approached by Ches Penney, Sr., who he had known and who was also involved in some fishery enterprises as an investor. McDonald had discussions with Ches Penney, Sr. and took him out to view the operation, whereby they struck an agreement and Ches Penney, Sr. agreed to inject $200,000 into Sea Crest Corporation of Canada Ltd. for a 45% share of the company. Stephen Noseworthy was also involved and worked in the operation of the company and held 10% of the shares. McDonald himself was the other 45% shareholder as well as the C.E.O. and the president; Ches Penney, Sr. was a silent partner.

2) According to the evidence of McDonald, he understood that any future dealings with the fishery by Ches Penney, Sr. would be with Sea Crest Corporation. McDonald was aware that Ches Penney, Sr. had an interest in Grand Atlantic Seafoods Inc. (hereinafter referred to as "Grand Atlantic"). The evidence of Blaine Sullivan and Martin Sullivan ("the Sullivans") was also heard and it was their understanding that Ches Penney, Sr. would be involved in the fisheries in the future and would be involved with the Sullivans.

3) Ches Penney, Sr. did not testify at trial, so any conflict between McDonald's understanding and the Sullivan's understanding of Ches Penney, Sr.'s future involvement was not before the Court through the direct testimony of Ches Penney, Sr. McDonald, however, grew the company into a profitable operation. At the end of the year 2001 the operation was worth a considerable amount of money in assets. The estimated value was set out in trial exhibit JPM #1 at tab 1. This was an evaluation by Ches Penney, Sr. to McDonald. The document showed a

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share evaluation as of December 14, 2001, of 7.734 million dollars.

4) To arrive at this value, Sea Crest Corporation acquired all of the assets of CSL owned by Mr. Fred Earle. A new crab plant was in Carbonear under the name Carbonear Seafoods Ltd., a subsidiary of Sea Crest Corporation. McDonald and Ches Penney, Sr. acquired shares in Newfoundland Resources Ltd., which in 2001 was worth approximately $592,000.

5) McDonald wanted to sell the shares but Ches Penney, Sr. objected. This became a sticking point between the two. Because Sea Crest Corporation had a plant in Carbonear and another in Hermitage, an arrangement had been worked out to use Clarenville Ice for the storage of product. The Carbonear plant had some cold storage capacity but not enough. Stephen Noseworthy in his testimony outlined the transportation link that the company had developed for delivery of ice to Hermitage and sending product to Clarenville for storage. Over the period between 1998 to 2001, the company went from being worth very little and close to bankruptcy, to being worth 7.734 million in assets.

6) During this period, Grand Atlantic, which was owned by Ches Penney, Sr. had an interest and was also looking for product. The Sullivans had entered into an agreement with Ches Penney, Sr. whereby they operated Grand Atlantic. Sea Crest Corporation had in fact purchased product from Grand Atlantic for processing. Blaine Sullivan in his testimony made it clear that Grand Atlantic and Sea Crest Corporation attempted to cooperate with each other because they were somewhat under the same leadership of Ches Penney, Sr., McDonald and the Sullivans.

7) At this time, the Sullivans were operating Grand Atlantic. They discussed the Hermitage operation with McDonald. The evidence in this area is not clear but, according to McDonald's evidence, although there was discussion with the Sullivans this was limited, as they were competitors to some degree.

8) As a result of a couple of instances, the relationship between McDonald and Ches Penney, Sr. became a bit more strained because of the two operations. It appeared from the evidence presented that the fact that Ches Penney, Sr. was a major player in both Sea Crest Corporation and Grand Atlantic resulted in an impasse between conflicting interests. It came to a head when McDonald offered to sell shares in Newfoundland Resources, which were held by Sea Crest Corporation for $592,000. Ches Penney, Sr. was not in agreement to the sale, according to McDonald's evidence. The issue was not resolved. Newfoundland Resources refused to purchase the shares being held by Sea Crest Corporation and Sea Crest Corporation lost the opportunity to get cash, which McDonald believed would have been a major asset for operation.

9) In the latter part of 2001 relations were strained, according to McDonald. The evidence presented showed that on or about December 17, 2001, Ches Penney, Sr. called McDonald and the two met, whereby Ches Penney, Sr. declared that he was going to get out of Sea Crest Corporation and had a written agreement whereby he agreed that Stephen Noseworthy and McDonald could buy out his interests for $2,250,000 and 45% of the shares in Newfoundland Resources.

10) There were several meetings; one in December 29, 2001, between Ches Penney, Sr. and Stephen Noseworthy wherein McDonald discussed whether Ches Penney, Sr. was willing to buy out Stephen Noseworthy and McDonald for the same valuation of shares.

11) There were a number of meetings in January 2002, one being January 18th between Ches Penney, Sr., Stephen Noseworthy and McDonald and another being on January 20th when Ches Penney, Sr. wanted McDonald to put an offer to Ches Penney, Sr.

12) On February 1, 2002, McDonald and Stephen Noseworthy agreed to sell shares to Ches Penney, Sr. at

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$2,950,000 on certain conditions. There was no mention of Clarenville Ice at that time as one of the conditions of the sale.

13) Ches Penney, Sr. wanted McDonald's son, Percy McDonald, Jr., and Stephen Noseworthy to manage the company for a three-year period. Details of the payment schedule had to be worked out.

14) On February 8, 2002, a new company, Ocean Choice International Inc. (hereinafter referred to as "OCI") made the offer to purchase the shares held by Stephen Noseworthy and McDonald for a price of $2,950,000 with 1.3 million on closing and the balance to be paid over five years in the amount of $300,000 per year plus interest. There was a payment for the interest in CSL over five years at $38,500 commencing on the anniversary date of the closing, plus 4%.

15) One of the conditions of the offer was that clause 7 of the offer was subject to McDonald agreeing to a five-year non-competition agreement but with an understanding of McDonald's potential for future employment with Sea Crest.

16) OCI consisted of Iris Petten, Blaine Sullivan, Martin Sullivan and Ches Penney, Sr. After the meeting of February 8th Stephen Noseworthy, McDonald, Blaine Sullivan and Marin Sullivan gave evidence that they needed to check some points and would get back to Ches Penney, Sr. about the offer. It was because of the offer on February 1st that the issue of clause 5.01 came into play as it related to the intent of the parties at the time the final agreement was signed, as set out in exhibit JPM #7.

30 This is the contextual background outlining how the agreement came into being and how the contract evolved, as well as the parties that were involved in this matter.

31 The actual clause 5.01 was put into the contract for a reason, according to the evidence of the First Plaintiff, McDonald. The Plaintiffs argue it was put in to maintain a flow of business income to McDonald, the owner of Clarenville Ice. The Defendants, Sea Crest, argue it was more of a comfort clause which McDonald put in to solidify the overall agreement.

What Is the Plain Meaning of Clause 5.01?

32 It is important to note that it was the purchaser, Sea Crest Holdings Ltd., the company, Sea Crest Corporation of Canada Ltd., and Carbonear Seafoods Ltd. who promised, undertook and covenanted that they will maintain. *The Shorter Oxford English Dictionary*, 3rd ed., *s.v.* "maintain" is defined as "to carry on, to keep up; to sustain; to keep in being; to preserve; to keep (stock) from declining; to support or uphold" and *s.v.* "normal" is defined as "not deviating or differing from a type or standard; regular, usual". In relation to clause 5.01 wording, this is taken in the context of business dealings with Clarenville Ice. The base meaning of these words constitutes that the purchaser would carry on the business of buying ice and using the facilities for cold storage of their product, as part of their normal operation of the production of fish and fish products. It is set for a limited time period and the only condition was a competitive pricing of Clarenville Ice. Did this mean that if they needed cold storage or ice they had to use Clarenville Ice first? In the past, evidence at trial showed that Sea Crest took ice from Clarenville to Hermitage and trucked product to Clarenville for storage and that over the two-year period prior to the sale, just over $70,000 was paid for this service.

33 At trial the evidence showed that once the agreement was completed, the sales to Clarenville Ice started to decrease both in ice sales and in product storage. The evidence shows in a report prepared for the Plaintiffs through McDonald's evidence and analyzed by Mr. Gabriel Gregory in exhibit GG #3 (hereinafter referred to as "the Gregory Report") that Sea Crest, in the first full year of operation after the sale of shares in March 31, 2002, to April 1, 2003, sold close to the same volume of frozen cold storage. In that particular year, ice sales were a little less than

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the previous two years. The evidence also shows that in the years following 2002 and 2003, being the fishing years 2002 - 2004 and onwards, there was only 102,000 pounds, which equates less than two tractor trailer loads, of product stored at Clarenville Ice from Sea Crest Corporation and CSL. The evidence also shows that after May 2003 there was no product stored at Clarenville Ice and only 29,000 pounds stored to the end of July 2004.

34 In 2004/2005 there was no product stored at Clarenville Ice by Sea Crest. In the year 2005/2006 there was only one load in the amount of 6,800 pounds, which was referred to in the evidence as a "hot load". In the year 2006/2007 there was again no cold storage. These figures are reflected in exhibit JPM #9 entered through McDonald.

35 As for the sale of the ice to Sea Crest Corporation and CSL for the two years after the sale, Sea Crest continued with some ice purchases but not the same volume as the two years prior to the sale. In year three, year four and year five, there were no ice purchase sales whatsoever. These numbers are also reflected in exhibit JPM #10.

36 The Plaintiffs are claiming that in the interpretation of clause 5.01 the Court has to determine whether the clause allowed the Defendants to reduce dependence on ice sales and storage and not be in breach of its obligations as set out in section 5.01.

37 S. M. Waddams, in his text *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005), deals with the objective theory of contract formation. Waddams is quoted in the case of *Law Society (Saskatchewan) v. McLeod*, [1993] S.J. No. 589 (Sask. Q.B.), at paragraph 19 as saying:

> The principal purpose of the law of contracts is to protect reasonable expectations engendered by promises. It follows from this purpose that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee. This is not, however, to say that the will of the promisor is irrelevant. Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee.

Analysis of Clause 5.01 and the Law

38 If the words in clause 5.01 in and of themselves have two possible interpretations, which the Defendants argue they do, the clause should be read in the context of the whole Agreement.

39 The Agreement does talk about future obligations. In exhibit JPM #7, article 7 on page 12 states:

> Notwithstanding the closing of the Purchase and Sale of the purchased shares herein provided, and any investigation made for, by or on behalf of the Purchaser, the undertakings, covenants, representations and warranties contained in this Agreement shall survive the closing and continue in full force and effect for the benefit of the receiving party.

40 It is clear that the parties used language that was binding into the future. The vendors were selling shares and the purchasers were paying money over a period of time. The Agreement allowed for McDonald, Jr. and Stephen Noseworthy to run the operation of Sea Crest and obligated McDonald, Sr. and Stephen Noseworthy to make full efforts ensuring the transaction and transitions went smoothly.

41 In clause 4.94 of the Agreement there is an obligation stating that the vendor "undertakes, covenants and agrees to assist the Purchaser in realizing the benefits of the lease ...". McDonald had to make best efforts to see that

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the lease to M & M Fisheries Limited got resolved in favour of Sea Crest.

42 In the context of the legally binding obligations, McDonald was prohibited from taking part in any fish business. Clause 4.92 states:

> The Vendor, J. Percy McDonald, hereby acknowledges and agrees that one of the objectives of the Purchaser, in the transaction contemplated by this Agreement, is to take away from J. Percy McDonald, for the period of time hereinafter mentioned, any opportunity, plan or objective, he may have or pursue which may compete with the Purchaser in the business of harvesting, processing or marketing seafood products. Therefore, by execution hereof, J. Percy McDonald undertakes, covenants and agrees that for three (3) years from the closing date, he will not, without the consent of the Purchaser, consult for, provide advice to or directly, indirectly or otherwise become involved or interested in any proprietorship, partnership, corporation or other enterprise the business of which is to harvest, process or market seafood products.

43 I would also refer to clause 4.93, whereby McDonald has to make an undertaking for a smooth transition of the business and clause 4.94, whereby he gives his best efforts at realizing on the lease for the benefit of the purchasers.

44 It is interesting to note that clause 5.01 is put in the Agreement just after these obligations of the vendor, McDonald, under the heading "Extraordinary Obligations of the Purchaser". Clause 5.01, states:

> The Purchaser, the Company and CSL promises, undertakes and covenants that they will maintain normal dealings and business with Clarenville Ice and Refrigeration Ltd. (CIRL) for a minimum of five (5) years following the closing date PROVIDED prices are competitive with other suppliers. Details of competitive pricing will be provided to the Vendor by the Company and CSL.

45 Clause 5.03 of the Agreement quotes:

> The Purchaser shall, before the Closing Date, enter into employment contracts with Stephen Noseworthy and Percy McDonald Jr. for five (5) years obliging the Purchaser to employ each of them for a minimum of five (5) years.

46 It is clear that these were binding obligations on the part of the parties to the Agreement. McDonald gave evidence on clause 5.01. He and his wife own Clarenville Ice and it was his intention to go out of business because he was getting out of the fishery, something he had been involved in his whole life. As a result, income from Clarenville Ice would be his income into the future. According to McDonald's evidence, clause 5.01 was important to him for those reasons.

47 The evidence is clear from the witnesses that Ches Penney, Sr., the other major player, along with the Sullivans were aware of how Clarenville Ice did fit into Sea Crest's operation. Stephen Noseworthy gave evidence that he explained to Ches Penney, Sr. how the various truck routes and the use of trucking in Clarenville was used to truck fish to Clarenville from Hermitage and ice to Hermitage and Harbour Grace. The evidence of Stephen Noseworthy confirmed that Ches Penney, Sr. was aware that Clarenville Ice was a major component in Sea Crest's operation. This was not contradicted by any of the witnesses heard at trial.

48 It would seem clear from the context of the Agreement itself that clause 5.01 was connected to other obligations between the parties and was meant to be binding. The parties knew what they wanted. Ches Penney, Sr. wanted the shares for a set price. He wanted Percy McDonald, Jr. and Stephen Noseworthy to run the operation and he wanted McDonald, Sr. out. McDonald, Sr. wanted his money for the shares, based on Ches Penney, Sr.'s own evaluation and McDonald Sr. wanted continued business from Sea Crest to Clarenville Ice in consideration for not

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taking part in the fishery for the three years.

49 Because the covenants are intended to be acted on in the future, the covenants entered into were intended to be effective. This means that they had to have meaning to the parties relying upon them.

50 In the case of clause 5.01, it had to be meaningful to the promissee, McDonald. Looking at the clause objectively, what would be the intention of the language used for it to have meaning?

51 Counsel for the Defendants argue that you do not look at the plain meaning of the words because to do so would not give a fair representation of the reality of the fishery. The fishery is volatile, there are continuous changes, there are gluts, and there are times when you have to make business decisions that are in the best interest of the company. Sea Crest may want to increase its own ice capacity, if that makes good business sense. The defense argues we will continue to carry on maintaining normal dealings and business relations, but that this has to be done in the commercial reality of running a fish business in Newfoundland and Labrador, considering the continually changing nature of the business.

52 If, then, the obligation to have normal dealings and business relations with Clarenville Ice was dictated by the changing circumstances of Sea Crest alone, and Sea Crest found ice located closer to their business for the same price, then the clause becomes meaningless because a company always has the choice to get ice or cold storage at the closest and cheapest place it becomes available.

53 It would then only revert to Clarenville Ice, if it could not get ice somewhere else. There would be no obligation on Sea Crest because it could justify changing suppliers, even if the price was the same because it made good business sense.

54 The Defendants' interpretation of clause 5.01 in such a situation does not mean anything; it is an unenforceable clause. Is this what was intended between the parties? The fact that clause 5.01 is placed just after the vendor's obligations in clause 4.92 of the Agreement, whereby McDonald agrees to stay out of the fishery for three years, is not viewed by this Court as a coincidence. It would appear to make sense that the promisee, McDonald, is relying on the continued business of Sea Crest during this five-year period.

55 The *Concise Oxford Dictionary*, 11th ed., revised 2006, *s.v.* "maintain" is defined as "cause or enable; condition or situation to continue; keep at the same level or rate". *Black's Law Dictionary*, 5th ed., *s.v.* "maintain" is defined as "to hold or to keep in an existing state or condition; keep from change".

56 The *Concise Oxford Dictionary* defines "normal" as "conforming to a standard, usual, typical or expected; the normal state or condition". *Black's Law Dictionary*, 5th ed., *s.v.* "normal" is defined as "according to; not deviating from an established norm, rule or principle; regular, average, natural".

57 Based on the contextual language of the Agreement itself and the various clauses, it is clear that clause 5.01 was meant to be acted upon. The language is couched in terms such as "promises, undertakes and covenants". It is mandatory in that the clause states "The Purchaser, the Company and CSL ... will maintain".

58 There is a proviso so the promissor did have the protection of competitive prices so it would appear there was a binding obligation to buy ice and use cold storage from Clarenville Ice.

Did Sea Crest Breach the Agreement?

59 J. Percy McDonald gave evidence of the reduced sales in ice after the first year of the Agreement and a virtual non-use of storage after July in the second year of the Agreement. Why did this take place? Was it because

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Sea Crest did not need storage, as they had no product to store or did they not use ice during the five-year period?

60 If Sea Crest had ceased the fish business, that would be an issue. However, evidence at trial is quite the opposite. Sea Crest and its affiliates continued in the business. In fact, Sea Crest actually expanded. It is interesting to note that, during the first year after the Agreement was signed, Percy McDonald, Jr. and Stephen Noseworthy ran the fish plant in Carbonear for Sea Crest and sales of ice and cold storage remained not quite as high but close to the two years before the Agreement was signed.

61 However, based on the evidence of Blaine Sullivan, management at Sea Crest did a review of Sea Crest's business after the first year of operation in 2003 and was not happy with the operation. Martin Sullivan, who gave evidence for the Defendants, made it clear that after the review many changes took place with Sea Crest. This is confirmed by the evidence of Blaine Sullivan who was operations manager and many changes took place within Sea Crest after the first year's review. After 2002 Sea Crest eliminated trucking arrangements, the transportation loop that Stephen Noseworthy explained to Ches Penney, Sr. as part of Sea Crest's operation was discontinued, additional freezers were put in at Carbonear, an upgrade of the ice making machines in Carbonear was performed, an ice making machine was put in at Hermitage, ice was no longer trucked to Hermitage from Clarenville, Hermitage product was shipped directly out to the market, Newfoundland Bait storage facility in Hermitage was purchased, and another plant in St. Brides was purchased. This was all done to save money and enhance profitability. This was the evidence given by Blaine Sullivan and Martin Sullivan at trial.

62 Stephen Noseworthy gave evidence that he brought up the Agreement to use Clarenville Ice and complained to Blaine Sullivan, knowing about the obligations to Clarenville Ice but he was told that they were going to do it anyway. The ice machines in Hermitage went from a ten-ton to a fifteen-ton capacity. Sea Crest resurfaced the drums to get more capacity at the Carbonear fish plant. All of these changes may well have been economically feasible, but what the company Sea Crest actually did was reconfigure the whole process so that it eliminated Clarenville Ice from the picture. There was no longer a business relationship with Clarenville Ice. However, documentation provided under an agreement of nondisclosure to competitors and put under seal by Court order showed increased sales of product by Sea Crest during the last four years of the Agreement with Sea Crest. In other words, Sea Crest actually increased sales dramatically as well as the need for storage and the use of ice.

63 J. Percy McDonald argues that good faith performances of the obligations under the Agreement were breached as a result of the deliberate actions of the Defendants.

64 The Defendants at trial did not deny that these changes were made for business purposes, for efficiencies and for profitability. There was a choice that Ches Penney, Sr. and the Sullivans made as to how the operation was going to change. In so doing, the Defendants breached their contractual obligations to continue to maintain normal business and relations with Clarenville Ice.

65 Both Blaine Sullivan and Martin Sullivan gave evidence that they continued to buy ice from persons other than Clarenville Ice. They continued to need cold storage.

66 Based on the words used in the Agreement, specifically clause 5.01 and the provisions at clause 4.92, the expectations of the parties to the Agreement at the time it was entered into, and the circumstances or the matrix of facts relating to the Agreement itself, I am satisfied on the totality of the evidence that the Defendants did not comply with their obligations under clause 5.01.

67 During the course of the trial much was said about prior drafts of JPM #7, which ended up in the final draft and specifically the final clause 5.01. I allowed evidence in on this issue, however, for the purposes of deciding whether there was a breach of the contract, I have restricted myself to the actual wording of the clause, the circumstances surrounding the Agreement and the various players involved. In other words, I reached my

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conclusions on the basis of the words used and the factual matrix of how the contract evolved between the players themselves.

68 I found it unnecessary to be involved with the previous drafts of clause 5.01 for the purpose of deciding the interpretation of what 5.01 meant, at the time the parties executed the Agreement.

69 The language used was plain language. It is the intent of the parties from that language that has to be examined in light of the factual circumstances surrounding the case. This then is the objective view of the intent of the parties. The interpretation given by the Defendants does not meet several of the principles of interpretation, as set out earlier in this decision.

70 To interpret the Agreement as the Defendants argue it should be interpreted, as a comfort clause allowing the Defendants to review their operational requirements and to purchase as required, but to completely avoid Clarenville Ice if it does not make any business sense, makes the clause unenforceable and meaningless to the promissee, Percy McDonald. It also does not fit with the obligations of McDonald who has to remain out of the fishery. Would an objective third party reviewing the Agreement as a whole accept the meaning as interpreted by the Defendants to be the intent of the parties at the time the Agreement was entered into? I believe it would not. The evidence at trial shows that clause 5.01 was a deal breaker. The parties were aware of the reliance on clause 5.01. The words expressed to Stephen Noseworthy by Ches Penney, Sr. was "this is doable", referring to truck routes through Clarenville and the use of Clarenville Ice. Ches Penney, Sr. was aware that this was an integral part of the operation at the time of sale.

71 It is also noteworthy that the structural change in Sea Crest was not gradual. After 2002/2003, it was catastrophic to Clarenville Ice because, to use the vernacular, they were taken "out of the loop". Sea Crest was a profitable company when they used Clarenville Ice in the years before the Purchase and Sale Agreement.

72 New management in Sea Crest obviously wanted to be more profitable and, as a result, the Sullivans instituted a complete restructuring of operations. That was Sea Crest's choice. They made that choice but in so doing they did not continue to maintain normal relations and business with Clarenville Ice. It is not necessary to show that Sea Crest or its management acted in bad faith or maliciously. I do not find in this case, based on all of the evidence, Sea Crest acted in bad faith. These were business decisions made for profit reasons but in so doing they ignored their obligations.

73 In the case of *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201 (Alta. C.A.), at paragraph 14 the Alberta Court of Appeal sums up the law in this area:

> In Canada, the test ... does not include the need for the plaintiff to show that the defendant intentionally acted in bad faith.
>
> ... the common law duty to perform in good faith is breached when a party acts in bad faith, that is, when a party acts in a manner that substantially nullifies the contractual objectives or causes significant harm to the other, contrary to the original purposes or expectations of the parties.

Further, at paragraph 16, the Alberta Court of Appeal states:

> Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for an exercise of such power.

74 In this province, a case dealing with similar principles is *McKinlay Motors Ltd. v. Honda Canada Inc.*,

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[1989] N.J. No. 332 (Nfld. T.D.)), wherein Mr. Justice Wells made the following statement at paragraph 78:

> I am satisfied that had good faith and fairness been exercised in the allocations, McKinlay would have proceeded much more quickly with the renovations and expansion. In the circumstances their delay is understandable. The expenses of operating their business had remained the same, but the reduced allocation of cars threatened the financial viability of the company itself.

Further, at paragraph 80 Mr. Justice Wells states:

> For the reasons given, I find that Honda acted in bad faith under the agreement. It is obviously an implied term of any such agreement that the parties act toward each other in their business dealings, in good faith. I find therefore that the use of the allocation system in respect of McKinlay in 1983 and 1984, was not in good faith, and was sufficiently serious to constitute a breach of the agreement and entitle McKinlay to judgment and damages on that portion of its claim.

75 This refusal to act in good faith has also been canvassed in the article of *Shannon Kathleen O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments*" (2007) 86 No. 2 Can. Bar Review 193. Professor O'Byrne is a member of the Faculty of Law at the University of Alberta. In her article she differentiates contracts dealing with good faith doctrine into two separate categories such as contracts including good faith by operation of law, as category number one. She refers to contracts including good faith based on parties' intentions as category number two contracts.

76 For the purpose of the present case, the good faith referred to as it relates to the facts of this case would be a category number two scenario where the intention of the parties at the formation of the Agreement is imperative. This is what both the *McKinlay Motors* and the *Mesa Operating* cases were referring to. In the present case, I do not find that there was an exercise of bad faith or anything as strong as wrongdoing on the part of Sea Crest, so much as an indifference to the terms of clause 5.01 and its impact on McDonald (i.e., lack of good faith). Sea Crest did not carry out the terms of clause 5.01 and if one looks at the actual numbers for the last three to four years of the Agreement, it is obvious that it was intentionally done. As a result of the breach of clause 5.01, were there resultant damages suffered by Clarenville Ice?

Is Clarenville Ice Entitled to Damages?

77 One of the issues raised at trial was whether Clarenville Ice actually suffered damages. Another question is whether McDonald, Sr. and Clarenville Ice, as Plaintiffs are able to claim for damages from Sea Crest for damages suffered by Clarenville Ice where Clarenville Ice & Refrigeration Ltd. was not a party to the Agreement between Sea Crest and McDonald. McDonald, Sr. argues that Clarenville Ice is a third party beneficiary and McDonald who was the co-owner of Clarenville Ice could sue through the company and himself for any damages lost by Clarenville Ice because Clarenville Ice is specifically set out in the Agreement between the vendors, the purchaser and the Company and CSL.

78 I am satisfied that Clarenville Ice can recover on the basis of the present case law, including the case of *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), and also the case of *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.). In *Kitimat (District) v. Alcan Inc.*, [2006] B.C.J. No. 376 (B.C. C.A.), the Court sets out the exception to privity of contract rule after citing several authorities. The Court states at paragraph 66 as follows:

> The principled exception to the doctrine of privity described in London Drugs and Fraser River depends fundamentally on the contracting parties' intention to benefit the third party where such a mutual intention is expressed, or can reasonably be inferred. "The relevant functional inquiry is whether the doctrine should be

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relaxed in the given circumstances": London Drugs, supra at 227.

At paragraph 72, Finch, C.J. further states:

> The principled exception to the doctrine of privity of contract depends on the intention of the parties and two factors must be considered:
>
> > (a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
> >
> > (b) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties

The answer to both questions in this case is yes. In fact, clause 5.01 is specifically set out to benefit Clarenville Ice. The Defendants admit as much but says, "Yes, but depending on business conditions we may or may not need storage or ice". Clause 5.01 was specifically added to the Agreement to benefit Clarenville Ice and Sea Crest, to benefit for ice storage. There is no question that both parties had an interest in clause 5.01.

Has the Breach of Contract Resulted in Damages to Clarenville Ice?

79 If Sea Crest had maintained normal business and relations over the five years, based on past performance, what would Clarenville Ice have reasonably expected to gain in sales from Sea Crest?

80 The Plaintiff McDonald, through Clarenville Ice, was expected to mitigate damages where possible. In the first year after the sale Sea Crest continued on in the normal business and relations. It was in the second and third year that services became reduced. The Statement of Claim was issued in December of 2004 by Clarenville Ice, with two years still to run in the Agreement. Sea Crest was aware that Clarenville Ice intended to enforce the provisions of clause 5.01. In the last two years, no attempt at compliance was made by Sea Crest to the provisions of clause 5.01.

81 Evidence introduced through Percy McDonald as exhibits JPM #8, JPM #9 and JPM #10 show the actual sales figures of Clarenville Ice between 2003 and 2007. He also set out the figures for the two years before the sale of the shares of Sea Crest set out in the Agreement. These figures were not seriously challenged by the Defendants.

82 The Plaintiffs retained Mr. Gabriel Gregory, a private consultant in the fishery, with a Bachelor of Commerce from Memorial University of Newfoundland. He holds a C.M.A. designation since 1984. Mr. Gregory has worked managing operations for numerous fish companies for over a 25-year period. He worked with FPI, employing 5,000 employees with $160 million in sales during the 80's and he was vice president of operations between 1990 and the year 2000, as well as executive vice president of Atlantic Operations in 2000 and 2001. He was also president of Beothic Fish Processors Limited in 2002-2003. Mr. Gregory has completed consulting work with the Quinlan Group of Companies between 2004 and 2007.

83 Mr. Gregory was accepted by both the Plaintiffs and the Defendants as an expert in the field of analyzing fish companies' profitability. Mr. Gregory was asked to assess the lost profits from the figures provided by Clarenville Ice for the years 2002/2003 to 2006/2007. His report, exhibit GG #3, the Gregory Report, sets out losses based on specific criteria.

84 I am satisfied after reviewing his evidence and his report that the criteria used and the assumptions made by Mr. Gregory were based on sound accounting principles.

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85 Based on the actual sales of ice and cold storage for the two years prior to the sale, Mr. Gregory used this average to calculate the actual sales and the difference to calculate losses to Sea Crest.

86 In relation to ice sales, on the basis of the quantitative analysis done by Mr. Gregory, based on average sales for the two years prior to the sale of Sea Crest shares to Sea Crest Holdings, which was done by averaging year and month, Sea Crest lost $72,100 sales over the years 2002/2003 through to 2006/2007. The loss for each is set at tab 1, page 2 of the Gregory Report. Tab 2, pages 1-3 shows using capacity of three machines at 85% capacity gave Clarenville Ice the ability to produce 25.5 tons per day.

87 If Sea Crest had purchased the same ice over the five years as it had purchased for the average of the two years previous, Clarenville Ice had the capacity, even considering what it did sell to others, to meet these average sales to Sea Crest for the five years the contract clause ran. In considering the lost sales, Mr. Gregory sets off any increased sales above the average sales for the two years previous. The comparisons for ice are reasonable because it includes the peak months' sales from April to December of each year. It is interesting in that out of the 40 months over the five-year period, from April to November between 2002/2003 to 2006/2007, which was the period of the Agreement, ice sales were negative or less than average for 35 out of the 40 months. In the five months where Sea Crest actually purchased more than the average, Clarenville Ice had the capacity to provide more ice, if Sea Crest had made the orders from Clarenville Ice.

88 The average ice sale loss per year was 291.5 tons. The losses also factored in the price increases from $45 per ton in 2002/03 and 2003/04 to $50 per ton in 2005 - 2007, GG #3 tab 1, page 2.

89 In relation to cold storage capacity, Mr. Gregory's analysis was again computed by calculating a yearly and monthly average of cold storage for the two years prior to the sale of Sea Crest shares. It compared the average cold storage used by Sea Crest between 2000/02 to the cold storage sales to Clarenville Ice from 2002 to 2007. It showed that for the first year of cold storage sales, Sea Crest actually used more cold storage than in the two previous years' average by $7,216 in additional revenue to Sea Crest. However, in the years 2003/04 to 2006/07 the last four years of the life of clause 5.01, sales of fish storage was non-existent. The Gregory Report at tab 1 shows that the average of the two years prior was 3,218,600 pounds. In the year 2002/03 Sea Crest cold storage usage was 4,180,798 pounds. However, in the year 2003/04 it stored only 469,999 pounds, the equivalent of a couple of truck loads of product. In 2004/05 there was no cold storage from Sea Crest. In the year 2005/06, which was referred to earlier, there was cold storage of 6,800 pounds being a "hot load", as referred to by witnesses. In 2005/06 there was no cold storage. Essentially, the figures show that after the end of the first year of the Agreement Sea Crest stopped using Clarenville Ice for any cold storage.

90 According to the evidence produced in the Gregory Report, this stoppage resulted in a loss of $91,519 in cold storage revenues to Clarenville Ice (refer tab 1, page 2). Mr. Gregory again used a reasonableness test to determine whether Clarenville Ice had the capacity to at least provide cold storage, had Sea Crest requested the same. He again used the average maximum storage of Sea Crest by month and was able to conclude that had Sea Crest ordered on average what it had requested for cold storage in the two years prior to the sales, considering other cold storage being used by competitors, Sea Crest or other clients of Clarenville Ice, Clarenville Ice would have been able to provide such cold storage. Total loss calculated by Mr. Gregory for loss of cold storage sale to Clarenville Ice was $91,519. This included giving credit to Sea Crest for the additional income to Clarenville Ice for the year 2002/03 in the amount of $7,216 (ref. tab 1, page 2 of GG#3).

91 Out of a total of 60 months of the Agreement, where clause 5.01 was in effect, Clarenville Ice was able to meet Sea Crest's request in year one of the Agreement (2002/03) for July, August, September, October, November, December, January and February. Out of the other 48 months that the contract ran, there was only one month when Clarenville Ice could not meet the request of Sea Crest. This was the month of July of 2004/05 where Sea Crest would request more than Clarenville Ice's capacity for that month. This month was credited in Gregory's calculation.

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92 In that month, Mr. Gregory gave a credit of up to 297,200 pounds, when calculating the loss that Clarenville Ice actually incurred.

93 For all other months, Clarenville Ice did have the capacity to provide the average of the sales to Sea Crest for the two years prior, had Sea Crest made such orders. The figures are telling, in that they clearly show that Sea Crest used other facilities for their cold storage. One of those facilities was Quality Bait in Carbonear. The Sullivans admitted this in their evidence. It is clear that Sea Crest did not use the facilities of Clarenville Ice for the last four years of the Agreement and this is quite obvious from all of the evidence produced at trial (ref. exhibits MS#1, MS#2, MS#3, MS#4, MS#5, and MS#6). The figures in MS#7, being the finished product by species and pounds per location, was telling in the need for cold storage and ice. This document was sealed by the Court for privacy interest and is not a public document.

Other Damages Suffered by Clarenville Ice

94 The Gregory Report also calculated damages using a similar methodology in calculating handling costs, loading and unloading fees, and withdrawal fees (refs. tab 1, page 14, and tab 4 and tab 5 of Summary GG#3).

95 Of the period from 2002/03 to 2006/07 Clarenville Ice lost $35,499 in handling fees. There were losses of $3,575 for loading and unloading fees. There were losses of $2,625 in withdrawal fees. I accept the reasonableness of the averaging of these fees with the two years prior for the sales of shares on an average per month and average per year basis as being reasonable. I accept the margins used by Mr. Gregory as reasonable in relation to his calculations and even though there were factors that may have affected a daily or weekly calculation of these charges, what was used was reasonable from an accounting perspective. The overall numbers used were representative of Clarenville Ice's losses for these charges. Other charges listed were calculated in the same manner to amount to $13,375. The total losses over the five-year period added up to $218,700. After arriving at that figure, Mr. Gregory set out incremental expenses, which he calculated based on discussions with the owner in reviewing the expenses and the balance sheet provide by Clarenville Ice to him.

96 Although these calculations were based on some subjective decisions of Mr. Gregory, which were discretionary in nature, I am satisfied that the proper accounting principles were used by Mr. Gregory. The defense questioned some of these discretionary decisions on the basis of fixed as opposed to variable costs.

97 I accept the figure presented in the amount of $18,213, which concluded that based on information provided and set out at tab 6 of the Gregory Report, as a reasonable amount for incremental cost.

98 The Defence claims this figure is low, considering that Clarenville Ice managed to do more business in each of the five years after the purchase of the shares of Sea Crest by Sea Crest Holdings. This amount was a little over 1.2 million pounds.

99 The Defendants argue that because Clarenville Ice had greater sales than prior to the transfer, there were no losses to Clarenville Ice. This is not the correct measure of damages. The fact that Clarenville Ice was able to grow its operation by getting new business does not take away from the facts, as supported in the Gregory Report, that Clarenville Ice had storage capacity available and ice production capacity available to accommodate the needs of Sea Crest, Sea Crest Holdings and CSL for the years the Agreement ran and clause 5.01 was enforceable. Clarenville Ice could have taken the average sales for the two years prior to the sale and more besides, had Sea Crest requested. After year one, there was no cold storage or very little requested by Sea Crest to use Clarenville Ice for cold storage. It is telling that this took place after Sea Crest completed its operational review of its total operation. Blaine Sullivan and Martin Sullivan readily admitted the changes they intended to make and did make after the first full year of the agreement.

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Reduction of Losses for Year 2002/03

100 The Plaintiffs claim for losses in the last four years of the Agreement. Mr. Gregory did an analysis on five years. I believe it is reasonable to deduct from his figures set out in his report of total losses of $200,567 the amount of $8,850, because the evidence clearly shows that for the year 2002/03 to the end of March 31st there was not much change in ice sales of ice. There was a bit of an increase in cold storage, so one would be hard put to conclude that a breach occurred much before 2003/04 year. For that reason, I would conclude that Sea Crest will pay $191,717 for damages.

101 Prejudgment interest for the 2003/04, 2004/05, 2005/06 and 2006/07 should be calculated on any adjustment, to reflect that judgment interest for a fiscal year of Clarenville Ice as opposed to calendar year.

Aggravated or Punitive Damages

102 Although the Plaintiffs argue that the breach of contract was a continuous breach, I do not believe that the case warrants aggravated damages. The Plaintiffs argue that although the Statement of Claim was issued and two years were left to run, the Defendants did not see fit to pay. Therefore, aggravated damages should be paid. One can argue that because this was an interpretation of the wording of one clause of the much larger agreement, consideration for the sale of the shares did pass hands and as such there was no bad faith.

103 The Defendants did have the choice of breaching the contract and paying damages if they felt bound by other corporate considerations and to other shareholders of Sea Crest or Sea Crest Holdings. These were business decisions. I do not believe Sea Crest should be punished for making those types of considerations. To do so would be a signal to managers which may prevent them from acting in the best interest of its company and obligations to its shareholders.

Costs

104 Based on the evidence presented and the success of the Plaintiffs to this action, the First Plaintiff is entitled to its costs on a solicitor client basis for one counsel.

Action allowed.

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