In the Court of Appeal of Alberta

Citation: Chemtrade Electrochem Inc v Superior Plus Corporation, 2025 ABCA 31

Date: 20250131
Docket: 2301-0018AC
Registry: Calgary

Between:

Chemtrade Electrochem Inc., formerly known as Canexus Corporation

Respondent
(Plaintiff/Defendant by Counterclaim)

- and -

Superior Plus Corporation

Appellant
(Defendant/Plaintiff by Counterclaim:

The Court:

The Honourable Justice Patricia Rowbotham
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice J.C. Price
Dated the 21st day of December, 2022
Filed on the 6th day of January, 2023
(2022 ABKB 858, Docket: 1601 08867)

Memorandum of Judgment

The Court:

I. INTRODUCTION

[1] In October 2015, Superior Plus Corporation and Canexus Corporation entered into an agreement for Superior to acquire all the shares in Canexus by way of a plan of arrangement (the Agreement or the Arrangement). The parties were competitors in the specialty chemicals market, and both knew they would require competition and anti-trust regulatory approval in the United States and Canada to complete the transaction. Ultimately, the transaction did not close and another competitor, Chemtrade Electrochem Inc, acquired Canexus[1]. Litigation ensued as to whether either Superior or Canexus was entitled to a break fee arising out of their failed deal.

[2] The trial judge concluded that Superior owed Canexus a Reverse Termination Fee of $25 million: *Chemtrade Electrochem Inc v Superior Plus Corporation*, 2022 ABKB 858 (the trial decision). The Agreement provides for a Reverse Termination Fee "if the Competition Act Approval and the HSR Approval are not obtained on or prior to the Outside Date." This appeal turns on whether the trial judge erred in concluding that the HSR Approval was not obtained, and that both Competition Act Approval and HSR Approval had to be obtained to avoid the Reverse Termination Fee. There is no dispute that "HSR" refers to the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 USC § 18a (United States) but the interpretation of HSR Approval in the Agreement is hotly contested.

[3] For the reasons set out below, we allow the appeal. The trial judge's interpretation of the Agreement was unreasonable and amounts to a palpable and overriding error. She erred in allowing evidence of the parties' subjective intentions during negotiations to overwhelm the words of the Agreement.

II. FACTS AND CONTEXT

[4] To understand the decision of the trial judge and the arguments of the parties, an overview of the history of the transaction, the regulatory context and some of the applicable provisions from the Agreement is necessary. Unless otherwise indicated, capitalized terms are defined terms from the Agreement.

[1] Although Canexus is now Chemtrade, we refer to the entity as Canexus in this memorandum.

A. Lead-up to the Agreement

[5] In July 2015, Canexus was in financial difficulty and was exploring strategic alternatives, including a potential sale of the company. Superior and Chemtrade were both approached as potential purchasers. The need for Canadian and American competition and anti-trust regulatory approval was apparent to both Superior and Canexus from the outset.

[6] The negotiations between the parties came to include discussions about Superior paying a reverse termination fee if the parties did not obtain "the necessary regulatory approvals". The specific terms of the Agreement, including the formulation of the trigger for the Reverse Termination Fee and definitions relating to regulatory approvals, were left to internal and external counsel, who negotiated and exchanged a number of drafts. The parties ultimately executed the Agreement on October 5, 2015.

B. Regulatory context

[7] We say little about the Canadian competition law regime under the *Competition Act*, RSC 1985, c C-34 because it is not in issue. The following overview of the United States context comes from the expert evidence tendered by the parties at trial and is not in dispute.

[8] In the United States, both the Department of Justice and the Federal Trade Commission have jurisdiction over the anti-trust aspects of mergers and acquisitions. They share concurrent jurisdiction under Section 7 of the *Clayton Act*, which prohibits transactions that may substantially lessen competition in the relevant market: 15 USC §§ 12-27.

[9] The FTC also enforces Section 5 of the *Federal Trade Commission Act*, which prohibits "unfair methods of competition": 15 USC §§ 41-58. For each transaction, the agencies decide which of them will conduct the review.

[10] The *HSR Act* does not itself deal with the substance of whether a transaction impacts competition. Rather, it sets out the process by which the Department of Justice and the FTC conduct their reviews. Prior to the enactment of the *HSR Act* in 1976, the agencies were left to try to remedy an unlawful merger by seeking divestiture after the fact. The *HSR Act* requires parties to transactions that meet certain thresholds to notify the Department of Justice and the FTC of their deal and to then wait at least 30 days before consummating the transaction. This initial waiting period allows the relevant agency to conduct a preliminary review. Prior to the expiry of the initial waiting period, the regulator may issue a Request for Additional Information, commonly known as a "Second Request". If so, the *HSR Act* requires the parties to refrain from consummating the transaction until 30 days after both parties have certified substantial compliance with the Second Request. Once this second waiting period expires, the transaction may close unless the relevant agency challenges the transaction in court under the *Clayton Act* or the *FTC Act*. The Department of Justice and the FTC do not give positive approvals, and they do not issue "no action" letters. Rather, they either challenge the transaction in court or they do not. The agencies may agree to binding remedies with the parties so as

to allow the transaction to close without legal challenge or to resolve a legal challenge. The regulators may still challenge the transaction after it closes.

[11] Often, the 30-day period following substantial compliance with the Second Request is insufficient for the regulator to conduct its review and discuss potential remedies with the parties. Accordingly, a practice has developed whereby the relevant agency and the parties enter into a "timing agreement". Timing agreements may include an agreement by the parties not to certify substantial compliance with a Second Request before a specific time, thereby delaying the trigger for the running of the second 30-day period. They may also include an agreement that the parties will not close the transaction before a certain date even though the second 30-day period has expired, or that the parties will give a specific amount of notice to the agency before closing. Because the 30-day periods set out in the *HSR Act* are statutory, it is accepted that those periods themselves cannot be extended by agreement.

C. The Agreement

[12] Given that this appeal relates to the Reverse Termination Fee, our overview of the terms of the Agreement begins there.

[13] The Agreement permits one or both parties to terminate it in a number of circumstances. However, only two of those circumstances give rise to a Reverse Termination Fee for Canexus. The operative provision in this case is Section 8.3(2)(a):

> (2) For the purposes of this Agreement, "Reverse Termination Fee" means $25 million and "Reverse Termination Fee Event" means the termination of this Agreement:
>
> (a) by the Company or the Purchaser…if the Competition Act Approval and the HSR Approval are not obtained on or prior to the Outside Date … [Emphasis added]

[14] Pursuant to Section 1.1 of the Agreement, Competition Act Approval "means, with respect to the transactions contemplated by this Agreement, either (i) receipt by the Purchaser of an advance ruling certificate by the Commissioner of Competition under Subsection 102(1) of the Competition Act; or (ii) the expiry, termination or waiver of the waiting period under Part IX of the Competition Act and the receipt of a No Action Letter." There is no dispute that Competition Act Approval was obtained prior to the Outside Date.

[15] HSR Approval is defined in Section 1.1 of the Agreement as "the expiration or early termination of any waiting period, and any extension thereof, applicable to the completion of the transactions contemplated by this Agreement under the HSR Act." As set out above, the *HSR Act* is the United States *Hart-Scott-Rodino Antitrust Improvements Act of 1976*.

[16] Competition Act Approval and HSR Approval are two of three Key Regulatory Approvals identified in the Agreement. Key Regulatory Approvals are a subset of Regulatory Approvals, which

are defined as "any consent, waiver, permit, exemption, review, order, decision or approval of, or any registration or filing with, any Governmental Entity, or the expiry, waiver or termination of any waiting period imposed by Law or a Governmental Entity, in each case required or advisable under Laws in connection with the Arrangement, including the Key Regulatory Approvals."

[17] One of the mutual conditions precedent to completing the arrangement is that each of the Key Regulatory Approvals has been made, given or obtained on terms acceptable to the Company and the Purchaser, each acting reasonably: at Section 6.1(3). A number of the covenants given by the parties in the Agreement require them to use reasonable efforts to take the steps necessary to complete the transaction, including obtaining the Regulatory Approvals.

D. Regulatory steps in this case

[18] On October 21, 2015, the parties submitted the necessary documentation to the Department of Justice and the FTC to trigger a review and the first 30-day waiting period under the *HSR Act*. The FTC was chosen as the reviewing agency, and on November 20, 2015, the FTC issued a Second Request. On January 14, 2016, the parties entered a timing agreement with the FTC, pursuant to which they agreed not to certify substantial compliance with the Second Request until at least February 5, 2016, not to consummate the arrangement until 60 days after they substantially complied with the Second Request, and to provide 10 business days advance notice to the FTC before certifying substantial compliance with the Second Request and before consummating the transaction. By February 12, 2016, both parties had certified substantial compliance with the Second Request and the FTC did not take issue with their certifications. The parties continued working with the FTC to try to resolve the FTC's concerns and Superior offered a number of remedy packages. However, none were accepted by the FTC. On June 9, 2016, the parties gave notice to the FTC that their commitment under the timing agreement not to close the transaction would expire on June 28, 2016. On June 28, 2016, the FTC obtained a temporary restraining order and preliminary injunction from the United States District Court for the District of Columbia pursuant to the *FTC Act*, preventing the parties from closing the deal.

[19] The original Outside Date of the Agreement was March 31, 2016. That was extended by agreement to June 29, 2016. On June 30, 2016, the parties exchanged notices of termination, each claiming a Termination Fee or Reverse Termination Fee from the other. On appeal, Superior is no longer pursuing its claim for a Termination Fee from Canexus.

III. GROUNDS OF APPEAL

[20] Superior argues that the trial judge made two errors in interpreting the Agreement:

(a) The trial judge rewrote the definition of "HSR Approval", based in large part on her erroneous approach to factual matrix evidence; and

(b) The trial judge erred in interpreting "and" to mean "or" in Section 8.3(2)(a) of the Agreement such that the Reverse Termination Fee was payable unless both Competition Act Approval and HSR Approval were achieved by the Outside Date.

[21] Superior also argues that the trial judge erred in her approach to the factual matrix evidence by relying on language from Superior's non-binding proposals while refusing to consider drafts of the Agreement itself. Superior claims that the trial judge allowed her erroneous understanding of the surrounding circumstances and the parties' common understanding to overwhelm the plain language in the Agreement. We address this argument as part of the other grounds because it feeds them.

IV. STANDARD OF REVIEW

[22] Applying legal principles of contractual interpretation to the words of a particular contract, viewed in light of the factual matrix, is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 21. If the trial judge applied incorrect principles in the interpretive exercise, failed to consider a required element of a legal test or failed to consider a relevant factor, those are extricable questions of law and lead to review on a correctness standard: *Sattva* at para 53.

[23] A palpable error is one that is obvious. An overriding error is one that had a material impact on the result. In the context of contractual interpretation, an interpretation that is unreasonable, or not reasonably available to the trial judge on the record, amounts to a palpable and overriding error: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 64; *Montrose Hammond & Co v CIBC World Markets Inc*, 2020 ONCA 219 at paras 8-9.

V. ANALYSIS

A. Principles of contractual interpretation

[24] The trial judge set out a summary of the governing principles of contractual interpretation: trial decision at paras 51-56. Neither party takes issue with the trial judge's statement of principles. Rather, Superior argues that the trial judge did not apply the principles as stated. For ease of reference, we repeat some of the key governing principles here.

[25] Contracts must be read as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time" of contract formation: *Sattva* at para 47. The court looks for the meaning that the document conveys to an objective, reasonable person: *Sattva* at para 48. Surrounding circumstances are considered to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words used, but the surrounding circumstances must never be allowed to overwhelm the words of the agreement: *Sattva* at para 57. Evidence of negotiations is not itself admissible as part of the surrounding circumstances, nor are prior drafts, except where they show the factual matrix, such as

explaining the genesis and aim of the contract: *IFP* at para 85. The interpretation of any one provision must be grounded in the text and read in light of the entire agreement: *Sattva* at para 57.

B. The finding that HSR Approval was not achieved

[26] As set out above, one of the key issues on appeal is whether the trial judge erred in concluding that HSR Approval was not obtained prior to the Outside Date of June 29, 2016.

[27] As noted above, HSR Approval is defined in the Agreement as "the expiration or early termination of any waiting period, and any extension thereof, applicable to the completion of the transactions contemplated by this Agreement under the HSR Act." Superior argues the parties obtained HSR Approval on March 14, 2016, which was 30 days following the last declaration of substantial compliance with the Second Request, and therefore the date on which the second waiting period under the *HSR Act* expired. In the alternative, Superior argues that HSR Approval occurred on June 28, 2016, when the operative provisions of the timing agreement with the FTC expired.

1. Primary argument: HSR Approval obtained on March 14, 2016

[28] With respect to Superior's primary position, the trial judge held that HSR Approval was not obtained merely by virtue of the expiry of the two 30-day statutory waiting periods set out in the *HSR Act*: trial decision at para 67. She described Superior's approach as "very technical" and found that it did not give effect to the words "and any extension thereof" in the definition of HSR Approval or to the following language in Section 4.4(3) of the Agreement:

> Notwithstanding the foregoing, the Purchaser may, with the agreement of the Company not to be unreasonably withheld, enter into a timing agreement with any Governmental Entity which would have the effect of delaying the expiry of the waiting period under any applicable Laws governing the Regulatory Approvals if to do so would reasonably be expected to facilitate the receipt of the Regulatory Approvals. [emphasis in the trial decision]

[29] Superior argues that the trial judge ignored the expert evidence that timing agreements cannot extend the statutory waiting periods under the *HSR Act*. However, the trial judge expressly took that evidence into account, concluding that while the timing agreement entered with the FTC may not have extended the statutory waiting period under the *HSR Act,* it had the effect of delaying the expiry of the waiting period for the purposes of the definition of HSR Approval: trial decision at para 67.

[30] As explained below, we have concluded that the trial judge erred in her approach to the evidence of the parties' negotiations and in allowing it to overwhelm the wording of the Agreement in some respects. However, on this particular point, we find that it did not lead the trial judge to an erroneous conclusion. The trial judge's reliance on other terms of the Agreement to inform her interpretation of HSR Approval, such as Section 4.4(3), is consistent with accepted principles of contractual interpretation, as summarized above. Although the statutory periods could not themselves

be extended, the definition of HSR Approval adopted by the parties refers to a potential extension. Section 4.4(3) deals with Regulatory Approvals, of which HSR Approval is one. Section 4.4(3) contemplates timing agreements that would have the effect of delaying the expiry of a legal waiting period. It was not an error to interpret HSR Approval as taking into account any period during which the parties were unable to close due to the operation of a timing agreement.

2. Alternative argument: HSR Approval obtained on June 28, 2016

[31] In our view, the real issue in this appeal resides in Superior's alternative argument that HSR Approval was obtained on June 28, 2016 with the expiration of the timing agreement. It appears this argument was not pressed before the trial judge in the same way it was on appeal, and she did not address it directly. However, the trial decision effectively rejects the proposition that, regardless of how one sees the timing agreement, HSR Approval was achieved at the latest when the agreement not to close under the timing agreement expired on June 28, 2016, the day before the Outside Date. The trial judge concluded:

> [68] The definition of HSR Approval cannot be read in a vacuum. Considering all of the words used in the definition of HSR Approval and looking at the whole of the terms of the Agreement, including but not limited to the definitions of Key Regulatory Approvals and Regulatory Approvals, sections 4.4(3)(6) and (7), section 6.1(3) and section 8.3(2)(a), as well as the surrounding circumstances of the Agreement itself, HSR Approval as contemplated in the Agreement was not obtained on or before the Outside Date.
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> ...
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> [72] I find that HSR Approval meant that the parties would have the necessary U.S. government approval to complete the Arrangement. The definition of HSR Approval contemplates the "completion of the transaction". That did not occur. Instead, the FTC filed a complaint and an order was issued restraining the Arrangement from closing on or before the Outside Date. Consequently, the parties could not complete the Arrangement.
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> [73] I find based on a plain reading of the Agreement as a whole, considering more than just its individual words and the procedure set out in the HSR Act itself, HSR Approval was not obtained on or before June 29, 2016.

[32] There are three main planks in Superior's argument that the foregoing conclusions are erroneous:

(a) The trial judge allowed her erroneous understanding of the surrounding circumstances to overwhelm the plain language of the Agreement, which was an error of law;

(b) The trial judge re-wrote the narrow definition of HSR Approval; and

(c) Other provisions of the Agreement, such as Section 6.1, demonstrate that the parties specifically chose not to include a court challenge by the regulator as part of HSR Approval or as a trigger for the Reverse Termination Fee.

[33] In her summary of the facts, the trial judge reviewed aspects of the negotiations that led to the Agreement, including a series of non-binding proposals that Superior sent to Canexus: trial decision at paras18-30. The trial judge paid particular attention to the use of the term "regulatory approval", without specification of the *HSR Act,* in the context of the parties negotiating a reverse termination fee payable to Canexus if they failed to obtain "necessary regulatory approvals" or "regulatory approval": for example, see trial decision at paras 28, 29, 31.

[34] The trial judge went on to find that at the time they entered into the Agreement, the parties had a "common understanding" that the Reverse Termination Fee was to compensate Canexus if the transaction failed to close because "regulatory approval" was not obtained: trial decision at para 58. She held that this common understanding was in line with the primary purpose of a reverse break fee described in a journal article as being "... to compensate the seller for the time and effort spent in support of a transaction that is ultimately not consummated because of objections from antitrust regulators ....": trial decision at para 60.

[35] The apparent basis for the trial judge's conclusion about the "common understanding" of the parties is their negotiations, including the non-binding proposals, as well as some of Superior's internal documentation. As the trial judge noted, evidence of negotiations is generally not admissible unless such evidence demonstrates the factual matrix: trial decision at para 56; *IFP* at para 85. Evidence of the parties' respective understanding of the purpose of the Reverse Termination Fee in this case is evidence of subjective intent more than it is evidence of the factual matrix; it reflects negotiation, not agreement. That some of the evidence could be interpreted as revealing a mutual subjective intent at one or more points of the negotiation does not mean that intent is necessarily reflected in the Agreement as ultimately written. Notably, there is no plea of mistake in this case. Contractual interpretation is focused on the "mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva* at para 57. As one author stated, "[T]he exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 57-58.

[36] Further, even if a finding that the parties shared a "common understanding" of the purpose of the Reverse Termination Fee could be seen as evidence of the surrounding circumstances of the Agreement, the surrounding circumstances "must never be allowed to overwhelm the words" of the Agreement: *Sattva* at para 57. Surrounding circumstances do not permit the court to "deviate from the text such that the court effectively creates a new agreement": *Sattva* at para 57.

[37] We find that the trial judge permitted her understanding of the parties' subjective intentions with respect to the Reverse Termination Fee to overwhelm her reading of the Agreement to the point that she reached a palpably incorrect interpretation.

[38] The trial judge properly instructed herself to consider "all of the words used in the definition of HSR Approval": trial decision at para 68. However, all of the words in that definition are focused on one type of threshold (expiration of waiting periods) and one piece of legislation (*HSR Act*). There is no reference in the definition to court proceedings, injunctions, the *Clayton Act* or the *FTC Act*, even though the evidence of surrounding circumstances is clear that the parties and their representatives were well aware of the importance of all of these in the context of the United States anti-trust regulatory regime. Further, as discussed below, those concepts are incorporated elsewhere in the Agreement.

[39] In effect, the trial judge read the words "without challenge by the regulatory agency" into the definition of "HSR Approval". Courts must be cautious that in interpreting the words agreed to by the parties, they are not actually re-writing the parties' agreement: *Jedfro Investments (USA) Limited v Jacyk*, 2007 SCC 55 at para 34. As one author stated, albeit in the context of implying whole terms into a contract:

> It is clear that the power to imply terms into a contract is to be used cautiously, and that this power cannot be used either to rewrite the parties' contract or to contradict the express wording they have chosen.
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> ...
>
> Any implication of a term necessarily goes beyond the words expressly chosen by the parties. This endeavour is legitimate to the extent that it gives context and interpretive accuracy to the words selected, but it is illegitimate when it goes so far as to alter what the parties agreed as evidenced by the words they have chosen. This is particularly the case where the implication in question would improve the bargain for one party at the expense of the other. An implied term may not have that effect.
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> Hall at 194-195.

[40] Further, the trial judge attached significance to the words "completion of the transaction" in the definition of HSR Approval that reflects a palpable error. She appears to have reasoned that in order to give effect to those words, HSR Approval must be interpreted as precluding a court order obtained by the FTC to prevent the parties from closing the Arrangement: trial decision at para 72. Canexus's argument ascribes this reasoning to her. However, the expiration or early termination of the waiting periods under the *HSR Act* are themselves necessary for the "completion of the transaction". While those waiting periods are in effect, they prevent the parties from closing. Therefore, the phrase "completion of the transaction" does not require the expansion of HSR Approval to include steps beyond the expiry of the waiting periods set out in the *HSR Act*.

[41] In looking at the Agreement as a whole, the trial judge emphasized the definitions of Key Regulatory Approvals and Regulatory Approvals, along with Sections 4.4(3), 4.4(6), 4.4(7), 6.1(3) and 8.3(2)(a): trial decision at para 68. However, when those provisions are read with proper regard for the distinction between the defined terms Regulatory Approvals, Key Regulatory Approvals and HSR Approval, they support Superior's interpretation of the Agreement. Superior's position is that the parties recognized that United States anti-trust regulatory approval ultimately required the absence of a legal barrier to closing the Arrangement, whether that legal barrier came in the form of a statutory waiting period, a timing agreement or a court order obtained by the regulator. All of these potential legal barriers are addressed in the Agreement, but under different provisions. The language chosen by the parties reflects at least a two-tiered approach to United States anti-trust regulatory approval: 1) expiry or termination of the waiting periods under the *HSR Act*, being HSR Approval; and 2) lack of objection by the applicable regulator or resolution of any such objection, which is a Regulatory Approval, but is not HSR Approval or a Key Regulatory Approval. For the purpose of the Reverse Termination Fee only HSR Approval is relevant.

[42] As set out above, the definition of HSR Approval is, on its face, narrow and specific. The definition of Regulatory Approvals is broader. The latter is not limited to one statute and encompasses "any consent, waiver, permit, exemption, review, order, decision or approval of, or any registration or filing with, any Governmental Entity, or the expiry, waiver or termination of any waiting period imposed by Law or a Governmental Entity, in each case required or advisable under Laws in connection with the Arrangement, including the Key Regulatory Approvals." Importantly, Law includes a court order and Governmental Entity includes a court. The word "approval" does not fit particularly well with the United States anti-trust regime regardless of the words before or after it, because the regime is based on the absence of challenge as opposed to positive approval. However, the expiry or termination of a court order preventing the transaction from closing under the *Clayton Act* or the *FTC Act* fits with greater ease into the definition of Regulatory Approvals than HSR Approval, given the broader references to "Law" and "Governmental Entity" in the former.

[43] Section 4.4 of the Agreement requires the parties to use reasonable efforts to obtain all necessary Regulatory Approvals, including specifically defined Regulatory Approvals such as HSR Approval and other Regulatory Approvals. Sections 4.4(6) and 4.4(7) make clear that Regulatory Approvals include aspects of United States anti-trust law. In other words, those provisions cannot be ignored as dealing with some other type of regulatory regime. Sections 4.4(6) and 4.4(7) specifically refer to anti-trust law, and to anti-trust laws other than the Canadian *Competition Act* and the United States *HSR Act*. Moreover, they specifically refer to objections or challenges brought by Governmental Entities, which include both regulatory agencies such as the FTC and courts. Sections 4.4(6) and 4.4(7) read:

> (6) If any objections are asserted with respect to the transactions contemplated by this Agreement under any Law, or if any proceeding is instituted or threatened by any Governmental Entity challenging or which could lead to a challenge of any of the transactions contemplated by this Agreement as not in compliance with Law or as not

> satisfying any applicable legal text under a Law necessary to obtain the Regulatory Approvals, the Parties shall use their reasonable best efforts consistent with the terms of this Agreement to resolve such proceeding so as to allow the Effective Time to occur on or prior to the Outside Date.
>
> (7) In furtherance of the foregoing, the Purchaser shall ... take all actions, including agreeing to hold separate and/or to divest to a purchaser acceptable to the applicable Government Entity any of the businesses or properties or assets of the Purchaser ... and to terminate any existing relationships and contractual rights and obligations, or commit to any other behavioural or quasi-behavioural remedy (such as hold-separate, divestiture, termination, contractual or other behavioural or quasi-behavioural remedy individually or in the aggregate, a "Remedial Action"), as may be required (a) by the applicable Governmental Entity in order to resolve such objections as such Governmental Entity may have to such transactions under the Competition Act, the HSR Act or other antitrust laws or (b) by any Governmental Entity, in any action or proceeding brought by a private party or Governmental Entity challenging such transactions as violative of any of the Competition Act, the HSR Act or other antitrust laws in order to avoid the entry of, or to effect the dissolution, vacating, lifting, altering or reversal or, any order that has the effect of restricting, preventing or prohibiting the consummation of the transactions contemplated by this Agreement and so as to obtain the Regulatory Approvals as soon as reasonably practicable ... Should the Purchaser be required or elect to divest any of the Company's facilities to obtain a Regulatory Approval, the Company shall use reasonable best efforts to cooperate with and assist the Purchaser to facilitate such sale.
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> [Emphasis added]

[44] Because HSR Approval is one type of Regulatory Approval, one can read the references to Regulatory Approvals in the foregoing provisions as including HSR Approval to the extent applicable. However, the converse is not true. The content of Section 4.4, which addresses Regulatory Approvals generally, cannot be read into the narrow definition of HSR Approval. Sections 4.4(6) and 4.4(7) contemplate regulatory challenges and United States anti-trust approval under legislation other than the *HSR Act.* It is not necessary to import those concepts into HSR Approval to give effect to the regulatory or commercial reality that formed part of the surrounding circumstances of the transaction. To the contrary, all aspects of the United States anti-trust regulatory regime that the parties expected to encounter can be accounted for between Regulatory Approvals and HSR Approval; they need not all be forced into the latter. We also note that the definition of Competition Act Approval very specifically tracks the structure of the Canadian regime, with reference to both an advance ruling certificate and a No Action Letter. The definition of HSR Approval specifically tracks the realities of that legislation, with the possibility of early termination of the waiting period and an effective extension by way of a timing agreement. Yet, the interpretation adopted by the trial judge would read

into HSR Approval steps taken under distinct United States anti-trust legislation, even where those steps are adequately accounted for under Regulatory Approvals generally.

[45] Sections 6.1 and 6.2 of the Agreement, which deal with conditions precedent to closing, also distinguish Key Regulatory Approvals, which include HSR Approval, from other legal impediments to closing and from Regulatory Approvals more generally:

> **Section 6.1 Mutual Conditions Precedent**
>
> The Parties are not required to complete the Arrangement unless each of the following conditions is satisfied on or prior to the Effective Time, which conditions may only be waived, in whole or in part, by the mutual consent of each of the Parties:
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> ...
>
> (3) **Key Regulatory Approvals**. Each of the Key Regulatory Approvals has been made, given or obtained on terms acceptable to the Company and the Purchaser, each acting reasonably (and, in the case of the Purchaser, subject to compliance with Section 4.4), and each such Key Regulatory Approval is in force and has not been modified.
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> (4) **Illegality**. No Law is in effect that makes the consummation of the Arrangement illegal or otherwise prohibits or enjoins the Company or the Purchaser from consummating the Arrangement.
>
> ...
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> (6) **No Legal Action.** There is no action or proceeding (whether, for greater certainty, by a Governmental Entity or any other Person) commenced in any jurisdiction that is reasonably likely to:
>
> (a) cease trade, enjoin or prohibit or impose any limitations, damages or conditions on, the Purchaser's ability to acquire, hold, or exercise full rights of ownership over, any Common Shares, including the right to vote the Common Shares;
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> (b) prohibit the Arrangement, or the ownership or operation by the Purchaser of any material portion of the business or assets of the Company and its Subsidiaries (taken as a whole) or, except as a consequence of Section 4.4 (for greater certainty, without derogating from the rights of the Purchaser under Section 6.1(3) and Section 6.2(3)), compel the Purchaser to dispose of or hold separate any

> material portion of the business or assets of the Company and its Subsidiaries (taken as a whole) as a result of the Arrangement; or
>
> (c) materially delay the consummation of the Arrangement, or if the Arrangement is consummated, have a Material Adverse Effect.
>
> **Section 6.2 Additional Conditions Precedent to the Obligations of the Purchaser**
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> The Purchaser is not required to complete the Arrangement unless each of the following conditions is satisfied on or before the Effective Time, which conditions are for the exclusive benefit of the Purchaser and may only be waived, in whole or in part, by the Purchaser in its sole discretion:
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> ...
>
> (3) **Approvals**. All Regulatory Approvals (other than the Key Regulatory Approvals) and all other third party consents, waivers, permits, orders and approvals that are necessary, proper or advisable to consummate the transactions contemplated by this Agreement and the failure of which to obtain, individually or in the aggregate: (a) would be reasonably expected to have a Material Adverse Effect (excluding, in respect of Regulatory Approvals, clause (a)(x) of the definition of Material Adverse Effect) or to be material and adverse to the Purchaser; or (b) would reasonably be expected to materially impede or delay the completion of the Arrangement, shall have been obtained or received on terms that are acceptable to the Purchaser, acting reasonably (and, in respect of Regulatory Approvals, subject to compliance with the standard for acceptable terms established under Section 4.4).

While many commercial agreements have overlap in the form of "belts and suspenders", the trial decision does not meaningfully grapple with the significant number of provisions in the Agreement that expressly treat a legal proceeding or court injunction arising out of United States anti-trust regulatory proceedings, or lack thereof, as being distinct from HSR Approval or Key Regulatory Approvals.

[46] In our view, the interpretation adopted by the trial judge was not reasonably available and amounts to palpable and overriding error. The specification of failure to obtain HSR Approval and Competition Act Approval as the triggers for the Reverse Termination Fee in Section 8.3(2)(a) of the Agreement must be read as a choice by the parties to limit Superior's reverse break fee exposure to those tiers of anti-trust approval.

[47] In summary, we are satisfied that the trial judge's interpretation of HSR Approval and her resulting conclusion that HSR Approval was not obtained before the Outside Date amount to a

palpable and overriding error. That interpretation is the result of her understanding of the parties' subjective intentions overwhelming the words of the Agreement. The trial decision must be set aside. We find that the only reasonable interpretation of the Agreement leads to the conclusion that HSR Approval was obtained on June 28, 2016, and accordingly, Canexus's claim for the Reverse Termination Fee must fail.

C. Whether the Reverse Termination Fee was payable if only Competition Act Approval was obtained

[48] Superior argues that the Reverse Termination Fee was only triggered if neither Competition Act Approval nor HSR Approval was obtained by the Outside Date. Since Competition Act Approval was achieved, there is no Reverse Termination Fee payable. Superior argues that the trial judge erred in reading "and" disjunctively as "or" when doing so was not necessary to give effect to the Agreement or to avoid a clear absurdity.

[49] There is no palpable and overriding error in the trial judge's interpretation of Section 8.3(2)(a): trial decision at paras 78-79. The clearest and most logical interpretation of the provision is that both Competition Act Approval and HSR Approval are required to avoid the Reverse Termination Fee. In light of our conclusion above, we need not address this issue in more detail.

VI. DISPOSITION

[50] The appeal is allowed, the trial judgment of $25 million in favour of Canexus is set aside and Canexus's claim for the Reverse Termination Fee is dismissed. For clarity, nothing herein disturbs the trial judgment dismissing Superior's counterclaim.

Appeal heard on May 16, 2024

Memorandum filed at Calgary, Alberta
this 31st day of January, 2025

REGISTRAR
FILED
31 Jan 2025
Court of Appeal of Alberta
TS

Authorized to sign for: Rowbotham J.A.

Strekaf J.A.

Grosse J.A.

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