SUPERIOR COURT

COMMERCIAL DIVISION

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-047679-143

DATE: October 7, 2016

PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

CANADIAN ROYALTIES INC.
Respondent/Plaintiff
v.

NEARCTIC NICKEL MINES INC.
Petitioner/Defendant
and
UNGAVA MINERAL EXPLORATION INC.
Petitioner/Defendant

JUDGMENT ON PETITIONERS' AMENDED MOTION IN REVOCATION OF JUDGMENT
(Art. 483(7) former C.C.P. (Art. 345(4) C.C.P.))

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[1] The Court is seized with a Motion presented by Defendants/Petitioners, Nearctic Nickel Mines Inc. ("**Nearctic**") and Ungava Mineral Exploration Inc. ("**Ungava**") (collectively the "**Defendants**") seeking the revocation of a judgment rendered on December 19th, 2014 by Mister Justice Martin Castonguay homologating a commercial Arbitration Award rendered on August 27, 2014 and an Award of Rectification dated September 24, 2014 (collectively the "**Award**") (the "**Castonguay Homologation**").

[2] The Castonguay Homologation was rendered with the consent of the Defendants.

[3] The Award was rendered by the Honourable Jean-Louis Baudouin ("**Baudouin**[1]" or the "**Arbitrator**") acting as commercial arbitrator appointed by consent of the present parties. Upon retiring from the Court of Appeal in 2008, Baudouin joined the law firm of Fasken Martineau DuMoulin ("**Fasken**") of which he is still a member.

[4] In their Amended Motion in revocation of the Castonguay Homologation (the "**Motion in revocation**"), the Defendants alleged what will be their main reason for seeking the revocation of the Castonguay Homologation:

> "5. On August 24th, 2015, the Petitioners' representative, Glen Erikson, discovered that the Arbitrator had been subject to a serious conflict of interest throughout the arbitration."

[5] The Court understands that Mr. Glen Erikson ("**Erikson**"), the president and representative of the Defendants, was involved from the outset in their business relationship with the Plaintiff, Canadian Royalties Inc. ("**CRI**"), the parties herein being contractually bound by a joint-venture agreement entered into in 2001[2] (the "**Agreement**") in virtue of which the Defendants optioned in favor of CRI a certain property belonging at the time to Ungava comprising of one mining permit and twenty-nine surrounded staked claims that were subsequently converted to 500 "map designated claims" or "CDC claims[3]" (the "**Property**"). The ultimate goal sought by the parties was that CRI would build a mine on the Property that would generate revenues and royalties.

[6] For the purposes hereof, it is not necessary to outline in detail the nature of the many disputes that have been ongoing for years between the parties, except to mention that the arbitration process held before the Arbitrator (the "**Baudouin Arbitration**") was the sixth arbitration between the same parties, not to speak of actual legal proceedings still pending before the Courts.

[7] Without getting into the merits of their disputes, the Court understands that in connection with the Agreement, the Defendants have seen over the years their undivided interest in the Property held jointly with CRI diluted to *nil* with the Award. At the outset of the Baudouin Arbitration, Ungava was still holding an undivided 20% interest as opposed to an undivided 80% interest in favour of CRI.

[8] The Arbitrator essentially ruled that CRI was entitled to a 100% interest, thus stripping the Defendants of their undivided interest in the joint-venture project because the latter had failed to satisfy joint venture cash calls made upon them by CRI in January 2008 in connection with the mine building project.

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[1] The use of last names in the judgment is meant to lighten the text. It should not be seen as a lack of respect for the individuals concerned.

[2] **I-1.**

[3] From the French "*claim désignée sur carte*".

[9] Again, the Court insists that there is no need at this juncture to enter the merits of the facts that led to the Award.

[10] The main and sole issue is whether or not the Castonguay Homologation should be revoked.

[11] The Motion in revocation was filed pursuant to article 483(7)[4] of the old *Code of civil procedure* that read as follows:

> "**483.** Likewise, where there is no other useful recourse against a judgment, the court which rendered it may revoke it at the request of one of the parties, in the following cases:
>
> (1) When the procedure prescribed has not been followed and the resulting nullity has not been covered;
>
> (2) When the judgment has decided beyond the conclusions, or when it has failed to rule on one of the essential grounds of the suit;
>
> (3) When, in the case of a minor or person of full age under tutorship or curatorship, no valid defence has been produced;
>
> (4) When judgment has been rendered upon an unauthorized consent or tender subsequently disavowed;
>
> (5) When judgment has been rendered upon documents whose falsity has only been discovered afterwards, or following fraud of the adverse party;
>
> (6) When, since the judgment, decisive documents have been discovered whose production had been prevented by a circumstance of irresistible force or because of the act of the adverse party;
>
> (7) <u>When, since the judgment, new evidence has been discovered and it appears that</u>:
>
> > <u>(a) if it had been brought forward in time, the decision would probably have been different;</u>
> >
> > <u>(b) it was known neither to the party nor to his attorney or agent and</u>
> >
> > <u>(c) it could not, with all reasonable diligence, have been discovered in time</u>."
> >
> > [Emphasis added]

[4] The article that was in force when the Motion in revocation was filed.

[12] Since January 1st, 2016, article 483 of the old *Code of civil procedure* has been replaced by article 345 of the new *Code of civil procedure* ("**C.c.p**.") that reads as follows:

> "345. A judgment may, on a party's application, be revoked by the court that rendered it if letting the judgment stand would tend to bring the administration of justice into disrepute. The judgment may be revoked, for instance, if fraud was committed by another party, if the judgment was based on false exhibits or if the production of decisive exhibits was prevented by superior force or by the act or omission of another party.
>
> As well, a judgment may be revoked if
>
> (1) the judgment adjudicated beyond the conclusions set out in the application or did not rule on one of them;
>
> (2) no valid defence was produced in support of the rights of a minor or of a person of full age under tutorship or curatorship or for whom a protection mandate has been homologated;
>
> (3) a ruling was made on the basis of invalid consent or following an unauthorized tender that was subsequently disavowed; or
>
> (4) evidence was subsequently discovered that would probably have led to a different judgment if the party concerned or its lawyer had become aware of that evidence in sufficient time, although they acted with due diligence."
>
> [Emphasis added]

[13] The Court understands that the Motion in revocation must now be determined on the provisions of article 345 (4) C.c.p.

THE CONTEXT

[14] It is useful to reproduce hereinafter the description made by the attorneys for the Defendants in the *Joint Declaration that a file is complete* filed in the Court record:

> "Ungava principally submits that on August 24, 2015, Ungava's representative (Mr. Glen Erikson) discovered that Arbitrator Baudouin had been subject to a serious conflict of interests throughout the arbitration. While it was known that Arbitrator Baudouin was a partner at Fasken Martineau DuMoulin ("Fasken"), Ungava did not know, and could not reasonably be expected to have discovered, that Fasken acted for Bank of Montreal, underwriters of the securities offering of Canadian Royalties Inc. pursuant to prospectuses of 2007 and 2008, and potentially had legal liability for advice given to said underwriters. This new evidence of a serious conflict of interest constitutes ground for revocation and ground in support of Ungava's defence because, had this new evidence been

> brought forward in time, the Judgment would have been different since the lack of independence or impartiality of an arbitrator justifies the refusal to homologate an arbitration award."

[15] To all intents and purposes, the Defendants argued that they were misled and induced into accepting Baudouin as Arbitrator, being oblivious at the time to highly relevant information that CRI and the Arbitrator failed to disclose before the latter's appointment or at any time thereafter throughout the arbitration process. Had this highly relevant information been disclosed to them in a timely fashion, it would have undoubtedly led Erikson and his then lawyer, Me Daniel M. Kochenburger ("**Kochenburger**"), to refuse the candidacy of Baudouin to act as the Arbitrator herein.

[16] Erikson claimed that he only discovered on August 24, 2015, that Fasken had acted as legal counsel for the underwriters BMO Nesbitt Burns Inc., Raymond James Ltd. and Desjardins Securities Inc. (collectively the "**Underwriters**") in connection with a March 12, 2008 Prospectus offering to raise $125,000,000 for CRI[5] (the "**2008 Prospectus**"). In fact, this offering managed to get CRI to raise $137,500,000[6]. Fasken had also acted as legal counsel for the Underwriters[7] in a 2007 public offering in virtue of which CRI had previously raised successfully $75,000,000 with a Prospectus dated July 19, 2007[8] (the "**2007 Prospectus**").

[17] According to Erikson and Kochenburger who both testified, until Erikson's discovery on August 24, 2015, neither of them knew of the link between Fasken (including Baudouin), the Underwriters and CRI. They both insisted that had they had known at the time that Fasken (of which Baudouin was a member since 2008) had acted as legal counsel and provided legal advice to the Underwriters in connection with CRI's public offerings with the 2007 and 2008 Prospectuses and the due diligence process carried out in each case, they would have never given their consent to the candidacy of Baudouin to act as sole Arbitrator in the arbitral process triggered unilaterally by CRI on December 30, 2010. The appearances of a serious potential conflict of interest would have been far too strong to ignore, in their view, given the highly litigious history of their joint-venture partnership and the close link and dealings between Fasken and CRI regarding the latter's financing requirements and the abovementioned public offerings.

The Procedural Context

[18] In their original Motion in revocation filed under the old or former *Code of civil procedure*, the Defendants were essentially seeking to revoke the Castonguay Homologation and have the parties placed in the position they were before such homologation:

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[5] **P-2.**
[6] **P-16.**
[7] In 2007, the Underwriters included Blackmont Capital Inc. as well.
[8] **P-15.**

> "RECEIVE the Motion for Revocation;
>
> SUSPEND execution of the Homologation Judgment rendered on December 19th, 2014;
>
> REVOKE the Homologation Judgment rendered on December 19th, 2014;
>
> PLACE the parties in the position in which they were previously;
>
> ORDER the reopening of the hearing in file number 500-11-047679-143;"

[19] On August 23, 2016, the Defendants amended their Motion to add allegations to substantiate their initial position without, *inter alia*, creating an additional new recourse. They, however, also sought an additional conclusion seeking the dismissal of CRI's original application for homologation as follows:

> "DISMISS the original application of the Respondent for homologation in file number 500-11-047679-143;"

[20] CRI's attorneys contested said amendments including the new conclusion. In a distinct oral judgment, the Court authorized all the amendments, save and except for the aforesaid additional conclusion seeking the immediate dismissal of CRI's application for homologation of the Award.

[21] The Defendants' new conclusion implied that the Court should rule as well on CRI's application to homologate should the Castonguay Homologation be revoked. The circumstances did not permit the Court to hold a hearing on these issues at the same time as there was simply not sufficient time to do so in the two-day hearing allocated for the Motion in revocation. The parties had already requested a three-day hearing for the Motion in revocation itself prior to the said amendments. Their request was denied and they were allocated a two-day hearing for the same. Given the prevailing circumstances and the fact that hearing of the original application to homologate the Award would undoubtedly be combined with a motion to annul the Award, it became realistically impossible to combine all said proceedings within the two days allocated for the Motion in revocation itself.

[22] The Court also based its decision on the provisions of article 348[9] C.c.p., as the circumstances did not permit the Court to decide on the Motion in revocation and the original application to homologate during the same hearing.

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[9] **348.** If, when the application for revocation is presented, the reasons given are found to be sufficient, the parties are restored to their former state and the court stays execution of the judgment; it continues the original proceeding after agreeing with the parties on a new case protocol.
If circumstances permit, the court may decide the application for revocation and the original application at the same time. [Emphasis added]

[23] Therefore, the particular amendment sought regarding the conclusion to dismiss CRI's original application to homologate the Award was denied at this juncture, subject and without prejudice to each parties' rights and recourses in that respect.

[24] In other words, should the Castonguay Homologation be revoked, the parties would then be at liberty to proceed on the merits of CRI's original application to homologate the Award subject to the right of the Defendants to oppose the same and even seek the annulment of the Award, as the case may be.

[25] On a different note, was the Motion in revocation duly served and filed within the legal delays?

[26] The Defendants served on September 8th, 2015 their Motion in Revocation and filed same the following day on the grounds of discovery of an unknown and overriding evidence of a conflict of interest which was discovered on August 24th, 2015, according to Erikson's testimony. Based on the foregoing, the Motion in revocation would have been served on the 14th day after his alleged discovery and filed on the following day.

[27] Although the applicable delay is presently of 30 days[10] after the day on which the party became aware of the evidence or fact that constitutes grounds for the revocation, as the present Motion was filed under the former Code of civil procedure (article 484), the 15-day delay then applicable is the one that had to be respected by the Defendants. Should Erikson's position be accurate with respect to the date of his alleged discovery pursuant to article 354(4) C.c.p., the Court would be satisfied that the Motion in revocation was indeed served and filed within the said 15-day legal delay.

[28] However, the lawyers for CRI argued that Erikson's alleged discovery did not fall in any event within the purview of article 345 (4) C.c.p., as had they would have acted with due diligence, the alleged relevant information in question would have easily been found by the Defendants at the outset of the arbitration process, before the appointment of Baudouin. They consequently strongly disputed that the Motion in revocation was appropriately served and filed within the legal delays as the Court should disregard the date of August 24, 2015. The Court shall address this particular issue later on in the present judgment.

THE QUESTIONS AT ISSUE

[29] Did Erikson actually discover on August 24, 2015 an unknown and overriding evidence of a conflict of interest on the part of the Arbitrator and does such a discovery constitute "*evidence* [that] *was subsequently discovered* [and] *that would probably have led to a different judgment if the party concerned or its lawyer had become aware of that evidence in sufficient time, although they acted with due diligence*" within the meaning of article 345 (4) C.c.p.?

[10] Article 347 C.c.p.

[30] Did the waivers or renunciations[11] signed by the Defendants at the outset of the arbitration process regarding the Arbitrator and his appointment prevent the application of the remedies offered by article 345 C.c.p. in the present instance?

[31] As a preliminary comment, given the decision not to proceed at the same time on the merits of CRI's original application to homologate and the present Motion in revocation, the Court wishes to stress on the importance of always bearing in mind that the present judgment does not purport to constitute a ruling on the merits of CRI's original application to homologate itself to be dealt with at a later stage if the revocation is granted.

[32] As the Court is called upon to determine whether, in light of the evidence, the Castonguay Homologation should be revoked or not pursuant to the provisions of article 345 C.c.p., any comments made and conclusions drawn by the Court in the present judgment must only be construed in the context of and for the purpose of ruling on the Defendants' Motion in revocation.

THE FACTS

[33] For the purposes hereof, the relevant facts understood and retained by the Court are the following.

[34] As previously mentioned, the parties herein have been in a joint-venture partnership since 2001 involving the Property and mining operations in Northern Quebec. Since then, they have been involved in court litigations, some apparently still pending and several arbitrations, the Baudouin Arbitration being the latest one.

[35] Their joint-venture partnership entailed the eventual building by CRI of a mine on the Property. Initially, CRI had an undivided 70% interest and the Defendants 30%.

[36] In 2007, CRI delivered a feasibility study proposing that a mine could be built on the Property at a cost of $465 million (the "**Mining Project**"). The delivery of the feasibility study entitled CRI to an additional undivided 10% interest.

[37] This event triggered an arbitration under the terms and conditions of the Agreement that was presided by Me Claude-Armand Sheppard ("**Sheppard**") and that resulted in an award favourable to CRI.

[38] On April 1st, 2009, Sheppard, acting as sole arbitrator appointed pursuant to the terms and conditions of the Agreement, rendered an award[12] (the "**Sheppard Award**") and granted to CRI, to all intents and purposes, a further undivided 10% interest in the Property, leaving the Defendants with an undivided 20 % interest down from 30%.

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[11] Simplified Protocol of Arbitration dated January 28, 2011 (**I-10**) and the Arbitration Agreement of May 11, 2011 (**I-11**).

[12] **I-29.**

[39] Back to 2007, the building of a mine by CRI on the Property entailed, *inter alia*, the financing of the estimated cost of construction of $465 million. The Court understands that CRI needed to raise the necessary funds via public offerings, loans from financial institutions and certain cash calls to be made to the Defendants pursuant to the terms and conditions of the Agreement.

[40] CRI's financing requirements led to two public offerings in 2007 and in 2008 to raise a significant portion of the money. In the same context, a non-revolving project financing debt facility of about $250,000,000 (the "**Loan**") was arranged by CRI through Bank of Montreal Capital Markets and Commonwealth Bank of Australia acting as the Co-Lead Arrangers who signed a letter of intent on October 29, 2007. The Loan was to be finalized by the end of June 2008 at the latest, in time for the construction of the mine to begin.

[41] Earlier, on July 19, 2007, the 2007 Prospectus was issued and enabled CRI to raise some $75,000,000 to be used in connection with the Mining Project. Lavery was acting as legal counsel for CRI and Fasken for the Underwriters.

[42] In the latter part of 2007, apparently unbeknownst to Ungava, CRI, who only held an undivided 70%[13] interest in the Property where the mine was to be built, sought from the Québec Ministry of Energy and Natural Resources (the "**Ministry**") the issuance of 3 mining leases covering in part the Property subject to the Agreement[14].

[43] The Ministry subsequently issued by August 2008 the three mining leases in the name of CRI as sole lessee, despite Ungava's undivided 20% or 30% interest in the same. Incidentally, once these facts were discovered later on by the Defendants, they tried unsuccessfully to get the Ministry to reverse its decision given the fact that at all relevant times, CRI never held a 100% interest in the said Property, hence a billion-dollar lawsuit in damages instituted in September 2015 by Ungava against the Ministry.

[44] The funds generated with the 2007 Prospectus together with the Loan subject to a letter of intent would not be sufficient. CRI's second public offering for $125,000,000 took place on March 12, 2008 with the second prospectus[15], namely the 2008 Prospectus. CRI was able to successfully raise an additional $137,000,000.

[45] As previously mentioned, the 2008 Prospectus was underwritten by the Underwriters BMO Nesbitt Burns, Raymond James Ltd. and Desjardins Securities Inc., who were legally represented for the purposes of the 2008 Prospectus by the law firm Fasken who conducted the necessary due diligence process for and on behalf of the Underwriters.

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[13] But claiming to be entitled to an undivided 80% interest, a fact that will be confirmed in 2009 with the Sheppard Award.
[14] **P-17.**
[15] **P-2.**

[46] Fasken acted similarly and conducted the due diligence process in the context of the 2007 Prospectus. In other words, Fasken, as lawyers for the Underwriters in both instances, was directly involved in helping raise some $217,000,000 for the benefit of CRI to be used for the Mining Project.

[47] Other than certain cash calls to the Defendants, the Loan proceeds of $250,000,000 were the last and necessary tranche of funds to help the Mining Project become a reality.

[48] On August 5, 2008, CRI issued a press release[16] announcing the suspension of the Project, and thus of the construction of the Mining Project. Although CRI was blaming the unfortunate turn of events in part on the Defendants, the Court understands that this outcome was mainly due to the Co-Lead Arrangers Bank of Montreal Capital Markets and Commonwealth Bank of Australia advising CRI in June 2008 that the Loan was no longer available. One of the reasons invoked to withdraw the Loan offer was CRI's title problem with Ungava's undivided 20-30%[17] interest that prevented the Loan to be properly secured with the Property. The withdrawal of the Loan was a fact that was not disclosed by CRI in the aforesaid press release.

[49] On August 22, 2008, Ungava was apparently still unaware that the Ministry had issued by then three mining leases in the sole name of CRI despite its own undivided 30% interest in the Property[18].

[50] This collapse of the Mining Project led to a class action being instituted in Ontario on July 15, 2010, by the investors under the 2007 and 2008 Prospectuses seeking damages and punitive damages from, among others, CRI and the Underwriters for whom Fasken was acting as legal counsel at all relevant times. The Defendants are not parties to these proceedings.

[51] According to the class action statement of claim[19]:

> "152. …all of the defendants intended that the plaintiff and the other class members would rely upon the misrepresentations and omissions particularized herein, which they did to their detriment by purchasing CRI securities pursuant to the prospectus offerings or on the secondary market.
>
> 153. The plaintiff and each class member directly or indirectly relied upon the misrepresentation and omissions particularized herein.
>
> 154. As a result of the conduct of the defendants as pleaded, the plaintiff and each class member suffered loss and damage and the defendants or any one or

[16] **P-6.**
[17] Bearing in mind that at the time, CRI was claiming to have an undivided 80% interest that led to the Sheppard Arbitration.
[18] **P-4** and **P-5**.
[19] **P-10**.

> more of them are liable to pay damages to the plaintiff and the other class members.
>
> 155. As a result of the defendants' misrepresentations, the plaintiff and the class members purchased CRI securities, whether pursuant to a prospectus offering or on the secondary market, at substantially inflated prices, and sustained losses when CRI belatedly disclosed the material misrepresentations particularized herein."
>
> [Emphasis added]

[52] This class action covers all the persons who invested in CRI pursuant to the 2007 Prospectus and the 2008 Prospectus. Although Fasken was directly involved throughout these two public offerings, they were not made co-defendants in said class action proceedings. But, all the Underwriters for whom they were acting were made co-defendants together with CRI as these legal proceedings are based on misrepresentations and omissions that they would have made in the 2007 and 2008 Prospectuses issued in the context of these two public offerings.

[53] The Court finds it very hard to believe that in January 2011, at the time and in the context of selecting and appointing Baudouin as Arbitrator, such highly relevant facts could have been ignored by CRI and by its lawyers.

The Baudouin Arbitration

[54] Although the dispute with the Defendants concerning their interest in the Mining Project was raised and alluded to in CRI's August 5, 2008 press release[20] announcing the suspension of the Mining Project, the Baudouin Arbitration was only triggered on December 30th, 2010 by CRI, who was calling again for another arbitration under the Agreement. CRI was claiming this time that it was entitled to the Defendants' remaining undivided 20 % interest in the Property retroactively to June 2009, as the latter had allegedly failed to satisfy joint venture cash calls made by CRI upon them since January 2008, a fact disputed by the Defendants before the Arbitrator.

[55] On December 30, 2010, during the 2010 Holiday season, a Notice of Arbitration was sent by CRI to the Defendants. At the time, Erikson was on vacation in Warsaw, Poland, with a limited access to means of communications. Kochenburger had only been appointed as legal counsel to the Defendants since October 2010. He had yet to familiarize himself with the history of the highly litigious relationship between the parties until then.

[56] At that time, neither Erikson nor his "new" lawyer knew that CRI was about to trigger another arbitration before the end of the year 2010.

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[20] At the time, the Simplified Protocol of Arbitration regarding the Sheppard Arbitration had been signed by the parties on April 23, 2008 and concerned the additional undivided 10% interest that CRI claimed to be entitled to thus bringing its overall undivided interest to 80%.

[57] Under the Agreement, the parties had seven days from the Notice of Arbitration to select their respective arbitrators (the "**Appointing Arbitrators**"), who then, within 14 days from the said Notice of Arbitration, had to appoint the sole arbitrator that would hear and rule on the dispute.

[58] Given the fact that Kochenburger was still somewhat unfamiliar with the Agreement and the history of the parties and given the fact that his client Erikson was abroad on holidays, the lawyer requested from Me Dimitri Maniatis ("**Maniatis**"), a lawyer for CRI, a four-day extension from Thursday January 6 to Monday January 10, 2011, in order to give them more time to submit the name of the Defendants' Appointing Arbitrator[21].

[59] That request was declined by Maniatis on January 6, 2011, being the seventh and final day for each party to designate its Appointing Arbitrator[22]. The Defendants nevertheless managed to comply with the terms and conditions of the Agreement in that respect.

[60] The Court understands that the candidacy of Baudouin was not proposed by Kochenburger or Erikson, who being from Ontario, did not know him.

[61] While the Agreement stipulated, as previously mentioned, that the two Appointing Arbitrators were to select and appoint the sole Arbitrator, and that Baudouin was indeed officially appointed as sole Arbitrator pursuant to the Agreement by the two Appointing Arbitrators on January 13, 2011[23], the Court also understands that in fact, the ultimate decision always rested directly upon CRI and the Defendants as their representatives consented on their behalf to the said appointment[24].

[62] The Court also retained from the evidence that Erikson, a retired corporate lawyer from Ontario, did not know Baudouin at the time and relied exclusively upon the advice of his new lawyer Kochenburger who, based on his own limited knowledge of the history of his clients' stormy business relationship with CRI and based on the information that he had at the time, did not voice any objections to the candidacy of Baudouin, a former Justice of the Court of appeal. In fact, Kochenburger testified that, at the time, he was unaware of any grounds to recommend that Erikson rejects the proposed candidacy of Baudouin.

[63] Erikson, acting on behalf of the Defendants, therefore gave their consent to their Appointing Arbitrator on the appointment of Baudouin as sole Arbitrator with his understanding that Baudouin's candidacy was already acceptable to CRI. Erikson indicated that he had no reasons to oppose the appointment of Baudouin at the time.

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[21] **I-3.**
[22] **I-3.**
[23] Pursuant to the Agreement, the Arbitrator had to be appointed by the appointing arbitrators within 14 days of the date of the Notice of Arbitration (December 30, 2010).
[24] **I-8.**

[64] Prior to his formal appointment on January 13, 2011, Baudouin was contacted by Maniatis by email of January 11, 2011 at 16:08[25] and was requested, *inter alia*, to make a conflict verification; Maniatis providing Baudouin with certain names described as "*the parties and their related persons are at least the following*":

> "We are writing to you in connection with the captioned arbitration matter. Our firm acts for claimants, Canadian Royalties Inc. ("CRI"), and the respondents, Ungava Mineral Exploration Inc. and Nearctic Nickel Mines Inc. (collectively "Ungava"), are represented by Me Daniel M. Kochenburger, who is reading us in copy.
>
> The parties to this arbitration would like to appoint you, if you are free of conflicts, available, and willing, as the sole arbitrator in this matter, which is a dispute between two joint-venture partners in respect of a mining property in Northern Quebec called the Expo-Ungava Property. Enclosed herewith please find the agreement between the parties dated January 12, 2001 ("Agreement"), as well as the notice of arbitration dated December 30, 2010.
>
> For purposes of your conflicts verification, the parties and their related persons are at least the following:
>
> […]"

[65] In retrospect, the names of the Underwriters were not part of that non-exhaustive list. Shouldn't CRI (and their lawyers) have included the names of the Underwriters knowing very well that Fasken had acted for them in connection with the 2007 and 2008 Prospectuses?

[66] Previously, at 15:49 on that same day, Maniatis had sent to Kochenburger the same letter as a draft[26] for his review, indicating that he wanted to send it to Baudouin on that same afternoon. Given the extremely short delay given to him by Maniatis[27], Kochenburger was not aware of any additional names to add to the list already prepared by CRI's lawyer with respect to the conflict verification process.

[67] In any event, the Court understands that the list of names provided by Maniatis to Baudouin did not contain any names that would have established a link between CRI, the Underwriters and Fasken. The documents attached to the email did not contain as well any indications of any such a link with Fasken.

[68] It must be pointed out that similar to Kochenburger who was not given any additional delay by Maniatis at the outset of the arbitration process and given an extremely short delay (only a few minutes) on January 11, 2011 to review the draft letter

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[25] **I-5.**
[26] **I-4.**
[27] Evidence shows that Baudouin acknowledged receipt of Maniatis' email (**I-5**) at 16H08 on January 11, 2011 (**I-5**).

and suggest any other names to be added to the conflict verification list submitted to Baudouin, Maniatis appeared to have exerted somewhat similar pressure on Baudouin to conduct his conflict verification very quickly[28]. On January, 12, 2011, a little more than an hour later, at 11:09, Baudouin responded to Maniatis that his conflict verification was "apparently negative" and that he would be pleased to accept the mandate, in what appears to be a somewhat apologetic tone[29].

[69] The result of Fasken's conflict verification was also confirmed in the Arbitration Award dated January 13, 2011[30], in virtue of which the Appointing Arbitrators appointed Baudouin as the sole Arbitrator (the "**Appointment Award**"):

> « **CONSIDÉRANT QUE** les parties se sont entendues entre elles, par l'entremise de leurs procureurs, afin de décider de la nomination de l'arbitre unique, Me Jean-Louis Baudouin, devant agir seul dans le présent arbitrage;
>
> **CONSIDÉRANT QUE** le 12 janvier 2011, Me Jean-Louis Baudouin a confirmé qu'il était disposé à accepter d'agir à titre d'arbitre unique dans le présente(sic) arbitrage et qu'il y avait absence de conflits d'intérêts pour ce faire; et »
>
> [Emphasis added]

[70] On January 28, 2011, not being aware of any facts to would raise grounds to object to the appointment of Baudouin as Arbitrator or to seek his recusation, Kochenburger executed the Simplified Protocol of Arbitration for and on behalf of the Defendants[31], and in March 2011, Erikson signed the Arbitration Agreement[32] with the other parties, including Baudouin.

[71] Aside the January 12, 2011 email in which Baudouin confirmed that there was no conflict of interest and the Appointment Award, the latter (and CRI) renewed those representations and assurances in the Arbitration Agreement as follows:

> "Clause 4(a): The Arbitrator may only be challenged if circumstances exist that give justifiable doubts as to the Arbitrator's impartiality or independence. The Parties are not currently aware of any circumstances that give rise to justifiable doubts as to the Arbitrator's impartiality or independence;
>
> Clause 4(b): The Arbitrator is not aware of any circumstances that may give rise to a reasonable apprehension of bias.

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[28] Email sent to Baudouin by Maniatis on January 12, 2011 at 9:43 (**I-7).**

[29] « Après une vérification un peu longue en raison du nombre de personnes impliquées celle ci se révèle apparament (sic) négative. En principe donc il me fait plaisir d'accepter è mandat. (sic) » (**I-6**).

[30] **I-8**.

[31] **I-10.**

[32] **I-11.**

> Clause 7(a)(i): Ungava and CRI confirm and agree that the Arbitrator, Jean-Louis Baudouin, and his firm, Fasken Martineau DuMoulin, are not acting nor engaged in a lawyer-client relationship nor any other fiduciary relationship with Ungava, CRI or their related persons and entities. The Parties, on their own behalf and on behalf of their related, affiliated and subsidiary corporations also acknowledge and agree that:
>
> (i) The Arbitrator is being retained in his personal capacity, and not on behalf of his law firm, though the Arbitrator has confirmed in the firm's conflicts system that there is no conflict or potential conflict which would prevent them acting as an arbitrator;"
>
> [Emphasis added]

[72] Hence, started the arbitration process that ended with the Award in September 2014 favourable to CRI's position and granting its claim that as of June 9, 2009, it "*owned an aggregate 100% right, title and interest in and to the Property"*[33].

[73] Erikson testified that although he was dissatisfied with the results and the conclusions of Baudouin's Award, he decided against contesting its subsequent homologation given his previous but recent experience in virtue of which he had unsuccessfully contested the homologation of the Sheppard Award of April 1, 2009[34] with the Supreme Court of Canada refusing, on July 19, 2012, to give leave to appeal of a judgment of the Court of appeal[35] denying the Defendants' contestation of the homologation of the Sheppard Award. Erikson added that he had retained from this experience that under Quebec law, the Courts will refrain from getting involved in the arbitration process chosen freely by the parties even if errors were made by the arbitrator in his award. Therefore, Erikson saw no valid reason or grounds to contest the application to homologate the Award presented in December 2014.

[74] The Court understands that from January 12th, 2011, when he was informed and represented that the Arbitrator was not subject to any conflict of interest until the homologation of the Award on December 19th, 2014, Erikson did not once consider nor suspect that the Arbitrator was subject to a conflict of interest situation. Erikson always accepted the Arbitrator's repeated representations and assurances (together with those of CRI) on this subject without any reservations.

Erikson's discovery of Fasken's involvement on August 24, 2015

[75] Erikson testified that on August 24th, 2015, he discovered quite fortuitously that the Arbitrator was associated with Fasken and as a result thereof, had been in a situation of conflict of interest from the very beginning of the Arbitration and throughout

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[33] **I-12** and **I-22**.
[34] **I-29**.
[35] 2012 QCCA 385.

the entire process. His discovery came about as a result of a line of enquiry which, initially, had no relation to the Arbitrator or to the Baudouin Arbitration.

[76] During the summer of 2015, Erikson was preparing to institute a lawsuit on behalf of Ungava against the Québec Ministry of Energy and Natural Resources in damages in excess of a billion dollars for unlawfully granting mineral leases to CRI on the basis that the latter had a 100% interest in said mining rights while Ungava owned 30% of said interest at the time[36], a fact apparently known by the Ministry who always failed to correct the situation despite Ungava's requests to that effect.

[77] In connection with the foregoing, Erikson was reviewing in particular documentation to use as evidence in connection with his forthcoming lawsuit and to identify potential witnesses as well. One of the element of contention was that in addition to CRI obtaining the mining leases from the Ministry on the false basis that it had a 100% interest, Erikson was concentrating his efforts on that day on the Deed of hypothec of a universality of property entered into on February 16, 2012[37], before notary Frédéric Lavigne ("**Lavigne**") between CRI as the borrower and grantor and the China Development Bank Corporation (the "**China Bank**") as the lender. The $700,000,000 hypothec was securing a loan facility granted by the China Bank to CRI who declared in the said deed being once again the sole owner of the Hypothecated Property (as defined in the said deed) which included the disputed mining leases in which the Defendants still claimed to have an undivided 20% interest following the Sheppard Award.

[78] Erikson wondered how could the notary prepare a deed incorporating such false representations on the part of CRI that it was indeed sole owner of the hypothecated property while in reality it was not at the time?

[79] Lavigne appeared to Erikson as a potential witness in his upcoming lawsuit and as he did not know him, Erikson decided to check his identity and his connections, assuming that he was the one who had, in all likelihood, prepared himself the 127-page deed of hypothec. Erikson's research led him to the law firm of Gowlings where he found Lavigne's profile that he printed on August 24, 2015[38]. Erikson pushed his search on Gowlings's website and found that a partner, Me André Lalonde ("**Lalonde**") had worked on the CRI financing with the China Bank[39]. So, the notary was working in the same law firm where another partner had been involved at the same time in the granting by the China Bank of a $352 million credit facility to CRI that was secured on its assets, including the Property in which the Defendants still had an interest.

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[36] The lawsuit was introduced on September 1, 2015.
[37] **I-23.**
[38] **I-24.**
[39] **I-25.**

[80] This discovery induced Erikson to push further his investigation that will lead him on the same day to consulting the 2008 Prospectus and subsequently, the website of Fasken.

[81] Erikson explained that he remembered that the 2008 Prospectus had been issued after CRI had requested from the Ministry, in December 2007, the mining leases where the Mining Project was going to be built, falsely representing holding a 100% interest, a fact unbeknownst to the Defendants and to himself at the time. How could CRI do that and yet acknowledge the Defendants undivided 20% interest in the 2008 Prospectus?

[82] Moreover, although the 2008 public offering successfully raised some $137,000 for CRI[40] to finance the Mining Project, a press release issued on August 5, 2008 by CRI[41] announced, to all intents and purposes, the collapse of the mine building construction project, blaming in part the Defendants given their litigious undivided 20% interest[42].

[83] The Court also understands that this outcome, namely the suspension of the Mining Project, was mainly due to the fact that the previously mentioned $250,000,000 non-revolving loan arranged by Bank of Montreal Capital Markets and Commonwealth Bank of Australia was no longer available, an information obtained by CRI in June 2008. The letter of intent issued in connection with this proposed loan had been specifically referred to in the 2008 Prospectus[43], leading prospective investors that CRI had secured that important loan.

[84] Erikson testified that one of the reasons given by the Co-Lead Arrangers to justify their withdrawal of their financing offer was the fact that CRI could not grant a hypothec on the Property as it only had an undivided 80%[44] interest at the time, hence the mention in the August 5, 2008 press release that CRI was asking its own legal counsel "*to consider all possible recourses against Nearctic for causing further harm to our shareholders*[45]. "

[85] Surely the lawyers acting for CRI and for the Underwriters in connection with the 2008 Prospectus had to be aware of CRI's attempts to obtain the mining leases in

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[40] In addition to $75,000,000 raised by CRI following the 2007 Prospectus.
[41] **P-6.**
[42] Extract from the August, 5, 2008 Press release: "Given that production from the Nunavik Nickel Project will now be delayed beyond its projected May 2010 start-up, in part because we have had to arbitrate our claims for the commencement of the joint venture and our 80% interest in the Nunavik Nickel Project, we have asked our legal advisor to consider all possible recourses against Nearctic for causing further harm to our shareholders" said Glenn J. Mullan, Chairman of the Board of Canadian Royalties."
[43] **P-2**, page 10.
[44] Bearing in mind that the Sheppard Award dealing with the 10% interest was rendered on April 1, 2009 (**I-29**).
[45] **P-6**.

question from the Ministry, claiming falsely to be the sole owner and yet, the 2008 Prospectus reflected a different outlook in that respect.

[86] This prompted Erikson to ask himself if CRI's legal advisors involved with the 2008 Prospectus, were they the same members of Gowlings that he had just identified?

[87] Again, maybe that Gowlings was already involved in 2008. How could they ignore in 2012, in the preparation of the deed of hypothec in favour of the China Bank, the incidence of the Defendants' undivided 20%[46] interest at the time?

[88] Erikson obtained and printed a copy of the 2008 Prospectus to make that particular verification and discovered that for the purpose thereof, CRI had been represented by Lavery and the Underwriters by Fasken. He also discovered that they were as well the same legal advisors for the 2007 Prospectus.

[89] At that point, Erikson did not recall which law firm Baudouin was associated to. It was never an element of any importance for him before given the representations and assurances that he had received from the outset that there was no conflict of interest situation.

[90] Erikson's curiosity having been peaked, he wanted to verify which law firm Baudouin was associated with. He remembered receiving a copy of the Award of Rectification by email from Kochenburger in September 2014. It was an email from Baudouin that Kochenburger had forwarded to him at the time[47].

[91] Upon opening it, Erikson saw that Baudouin's email bore the logo and the name of Fasken.

[92] Erikson testified that upon making this discovery:

> "*I was stunned and fell into shock after seeing the email.*"

[93] He contacted his lawyer immediately and the Motion in revocation was issued on the following September 8, 2015.

[94] The foregoing stems from Erikson's testimony at the hearing as well as his detailed explanation of his discovery of August 24, 2015 made during his examination on his affidavit of September 25, 2015 by Maniatis that was filed in the Court record and that the Court took cognizance of[48].

[95] Erikson insisted that until his discovery of August 24, 2015, he had absolutely no idea of any link or connection between Baudouin, Fasken, the Underwriters and CRI.

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[46] See Note 44 above.
[47] **I-28**.
[48] In particular pages 39 to 65.

[96] During his cross-examination, Erikson acknowledged that the name of Fasken appeared in the 2008 Prospectus at approximately four or five places[49] but explained that given his professional expertise developed as a corporate solicitor in Ontario, having prepared or having participated in dozens of prospectuses, he was very familiar with the standard form layout of information in such prospectuses. Therefore, he never read these documents in their entirety but went directly to the page or pages that were of interest to him and to his particular needs. This is exactly what he did in the present instance. In his view, the identity and the involvement of the lawyers for CRI and for the Underwriters in the context of the 2007 and 2008 Prospectuses had absolutely no bearing in the issues submitted for adjudication in the Baudouin Arbitration. He never had any need to read or take cognizance of these particular sections of the 2008 Prospectus. The same comments applied to the four places were Fasken's name appeared in the 2007 Prospectus.

Kochenburger's affidavit and cross-examination

[97] The Defendants filed an affidavit from Kochenburger dated September 6, 2016[50] to serve in lieu of his testimony, but the lawyers for CRI nevertheless insisted on cross-examining the witness, which was their right to do.

[98] Kochenburger affirmed that he acted as the lawyer for the Defendants for the entire duration of the Baudouin Arbitration and, as described previously, he detailed his involvement from December 30, 2015 upon receiving the Notice of Arbitration, including his request to extend the delay from January 6 to January 10, 2011 which was denied by Maniatis.

[99] Kochenburger did not propose the candidacy of Baudouin but when his name was submitted to him as sole Arbitrator, he was in agreement based on the information that he had at the time. Moreover, Baudouin enjoyed an excellent reputation in the legal community.

[100] It is not necessary to reiterate the other facts surrounding the appointment of Baudouin more fully set out above as Kochenburger's version of the facts corroborates the same.

[101] Kochenburger claimed that until learning of the existence of the Motion in revocation, he had absolutely no knowledge that Baudouin and his law firm Fasken may have been in a situation of conflict of interest or potential conflict of interest. Until then, he had never been informed by anyone of any fact that could have led him to such a conclusion.

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[49] 2008 Prospectus (**P-2**) Pages iii (identification of the Underwriters), 4 (under the heading "Eligibility for Investment"), 39 (under the heading "Canadian Federal Income Tax Considerations") and twice on page 44 (under the headings of "Legal matters" and "Interest of Experts").

[50] **P-18.**

[102] Kochenburger added that, prior to the Motion in revocation, he had no knowledge whatsoever of Fasken's direct involvement in the financing of the Mining Project via the 2007 and 2008 Prospectuses and therefore of any grounds that would have led him to advise his client Erikson against accepting the candidacy of Baudouin given his association with Fasken.

[103] With respect to list of names prepared by Maniatis in his letter of January 11, 2011 to Baudouin[51] for Fasken's conflict verification, Kochenburger did not know any of those names. He added that he had forwarded to Erikson Maniatis' draft letter for his comments, but to no avail as a few minutes later Maniatis was sending the same letter to Baudouin. In any event, Erikson did not provide him with any other names to be added to the conflict verification list.

[104] Then, his cross-examination shifted to the written notes dated June 9, 2014 that the lawyer submitted to Baudouin during the pleadings[52] and more particularly to his references to the 2007 and 2008 Prospectuses for the purposes of his oral arguments before the Arbitrator.

[105] Kochenburger testified that he never read in their entirety the two prospectuses in question as he never needed to and he definitely never noted any references therein to Fasken as legal counsel to the Underwriters as such references appeared in sections of the prospectuses that he did not need to look for. The lawyer added that having been acting in the field of public offerings for his entire professional life[53], he was completely familiar with prospectuses and their layout. He knew where to find in them the information that he needed and for the purposes of the Baudouin Arbitration, the information sought was totally unrelated to the legal counsels for CRI and the Underwriters.

[106] The lawyer for CRI who cross-examined Kochenburger then led the witness to pages 43 and 44 of the 2007 Prospectus[54] and asked him how he could have possibly missed the reference to Fasken appearing on page 44 under the heading "*Legal Matters*", when in his written notes at the bottom of page 24[55], the lawyer referred Baudouin to those specific pages of the 2007 Prospectus.

[107] The witness appeared a little bewildered and replied that he had simply not read that particular section as it did not contain any information that he needed or that he was looking for. Kochenburger added that had he noted the involvement of Fasken at

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[51] **I-5** (draft submitted to Kochenburger (**I-4**)).
[52] Argumentation des co-défenderesses (**I-21A**).
[53] « *J'ai baigné dans une mer de prospectus toute ma vie.* »
[54] **I-17** and **P-15**.
[55] Extract from the written notes (**I-21A**), pages 24-25: « *La compagnie décrivait bien le risque qui la guettait aux pages 43 et 44 du prospectus du 19 juillet 2007 (GE-3). Elle l'a fait aussi dans son prospectus du 12 mars 2008 en page 35 (GE-4)*. »

the time, he would have reacted immediately. He would have looked into this issue of conflict of interest and would have definitely advised Erikson in that regard against the appointment of Baudouin had he made such a discovery before. But, Kochenburger never discovered that relevant information at the time until 2015. Kochenburger's testimony ended and the witness was excused.

[108] Later on that day after the lunch recess, the lawyer for the Defendants advised the Court that Kochenburger had called him and requested the permission to re-open his testimony as he wanted to clarify certain aspects of the same.

[109] This request was met with strong objections from the lawyers for CRI.

[110] After authorizing Kochenburger to resume his testimony and hearing the latter, the Court could understand why CRI's lawyers were so determined to prevent the witness from returning to the witness bar.

[111] Kochenburger explained that upon his return from the courthouse, he just could not understand how at the time of preparing his written submissions for Baudouin, he could have missed the information (relating to Fasken) appearing at pages 43 and 44 of the 2007 Prospectus having specifically referred Baudouin to those pages.

[112] Then, he realized why and wanted to provide his findings to the Court.

[113] Kochenburger explained that his oral arguments and his written submissions were all made in French. Likewise, when he referred the Arbitrator to the 2007 and 2008 Prospectuses, he always referred him to their French versions[56]. He did not use their English versions.

[114] The witness specifically referred the Court to pages 43 and 44 of the French version of the 2007 Prospectus[57]. Bearing in mind that his argument before the Arbitrator related to the issue of risk factors, those pages of the French version deal with "*Dangers et risques liés à l'exploitation*" and other related subjects.

[115] Contrary to its English version, nowhere in those pages of the French version is reference made to "Legal Matters" and to Fasken. In fact, Kochenburger pointed out to the Court that in the French version, "*Questions d'ordre juridique*" and "*Intérêts d'experts*" only appeared at page 48, unlike the English version where they appeared at page 44. Kochenburger did not consult nor use the English version.

[116] The same applied to the French version of the 2008 Prospectus as the lawyer had referred the Arbitrator to the section entitled "*Facteurs de risque*" found at page 35 while the same information appeared at page 33 in the English version and the

[56] **P-2A** and **P-15A**.
[57] **P-15A**.

references to Fasken were at page 47 in the French version and at page 44 in the English version.

[117] In other words, Kochenburger selective use of the French version of the Prospectuses in question did not lead him anywhere near to sections mentioning Fasken, contrary to what the lawyers for CRI tried to convince the Court.

[118] The Court must point out that the testimonies of Erikson and of Kochenburger appeared, in its eyes, to be sincere, spontaneous and credible. The Court believes their explanations and is satisfied that before August 24, 2015, Erikson was not aware of the link between Baudouin and Fasken and that of Fasken with the Underwriters and CRI.

[119] In fact, the Court has uncontradicted testimony that indeed, at all relevant times, the Defendants did not know the existence of any evidence on the Arbitrator's conflict of interest or potential conflict of interest, and that until August 24, 2015 upon Erikson's fortuitous discovery.

[120] Moreover, in January 2011 at the time at which Erikson was asked to assess the candidacy of Baudouin with the aid of his new lawyer, he had not read or consulted the 2008 Prospectus for a few years.

[121] The same conclusion applies to Kochenburger and given the information that has now been brought to light regarding Fasken's prior involvement with CRI and its financing efforts for the Mining Project, there is little doubt, if any, in the mind of the Court that Kochenburger would have not recommended to Erikson the candidacy of Baudouin to act as sole Arbitrator under such circumstances, where in addition CRI and the Underwriters (represented at all relevant times by Fasken) were the object at the very same time of a class action based on the omissions and misrepresentations made by CRI and the Underwriters in the 2007 and 2008 Prospectuses.

[122] Another significant and troubling fact strikes the Court's attention.

[123] In January 2011, how could CRI and their lawyers ignore the prior involvement of Fasken with the 2007 and 2008 Prospectuses and their direct contribution to CRI's fund raising activities in connection with the Mining Project? How could they ignore the fact as well that there was an on-going class action instituted by the investors claiming omissions and misrepresentations on the part of CRI and of the Underwriters in connection with said prospectuses? Had they placed themselves in the shoes of Erikson and the Defendants, how would have they reacted if the name of Baudouin, a member of Fasken, had been proposed to them to act as sole Arbitrator in their bitter dispute in such circumstances?

[124] The answer to the last question is obvious, in the Court's opinion.

[125] The Court cannot believe for an instant that CRI and their lawyers never noted and were never aware of the potential conflict of interest situation or, at the very least, of

the strong appearance of a conflict of interest situation stemming from the association between their candidate Baudouin and his law firm Fasken, and that regardless of the stellar reputation of Baudouin in the legal community. Given their highly litigious history, CRI and their lawyers could not ignore or even reasonably believe that had these facts been made aware at the time to the Defendants, Erikson and to their new lawyer that they would had nevertheless accepted the proposed candidacy of Baudouin.

[126] What would a person reasonably informed of all those relevant facts have concluded under such circumstances?

[127] It is important to bear in mind that the appearance of conflict of interest is as compelling as the conflict of interest itself.

[128] The Court finds that for the purposes hereof, it is not necessary or even useful to examine in detail if the relationship between Fasken, the Underwriters and CRI actually resulted in a situation of conflict of interest with a member of Fasken acting as sole arbitrator in a bitter dispute between CRI and the Defendants.

[129] Suffice to say, however, that the Court is of the view, based on the evidence available, that Fasken acting for the Underwriters in the particular context of the due diligence process associated with the preparation of prospectuses for public offerings entailed the communication of information from CRI, confidential and not necessarily confidential, that would or could be reproduced in the prospectus should it be deemed necessary. In other words, as legal advisors for the Underwriters, Fasken, in proceeding with the due diligence process, was certainly privy to confidential information concerning CRI and their mining Project that was never necessarily communicated to the potential investors.

[130] The Court entirely shares the view of the lawyer for the Defendants that Fasken, acting for the Underwriters, must have received confidential information from and about CRI in 2007 and 2008 while preparing and finalizing the prospectuses in question and therefore had solicitor-client duties not only towards the Underwriters, but also towards CRI who had a convergent interest in the preparation and outcome of the 2007 and 2008 Prospectuses, including an interest in seeing the adequacy of disclosure in the prospectuses upheld, if attacked as inadequate. This is even more relevant in the context of the class action instituted against CRI and Fasken's clients, the Underwriters by the investors under the 2007 and 2008 Prospectuses.

[131] In the case of *Métro inc. v. Regroupement des marchands actionnaires inc.*[58], Mister Justice Rochette, writing on behalf of the Court of appeal, concluded as follows that there existed a "substantial relationship" between the lawyers for the underwriter (who happened to be Fasken) and Métro who was attempting to raise funds through

[58] 2004 CanLII 45935 (QC CA).

public offerings, adding that such a relationship was comparable to the one between a solicitor and client:

> "[69] Ne pas reconnaître ici l'existence d'une relation assimilable à la relation avocat-client risquerait, selon moi, d'affecter le caractère ouvert et généreux de ces échanges cruciaux entre l'émetteur et le preneur, d'inciter l'émetteur à la réserve et à la prudence, à ne divulguer que ce qui lui paraît absolument indispensable, au détriment, au bout du compte, du public acheteur de valeurs.
>
> [70] Des avocats ayant joué un rôle important auprès du preneur lors des appels à l'épargne sont au surplus, toujours chez Fasken.
>
> [71] Tous ces éléments m'amènent à conclure qu'un lien important a été démontré entre Fasken et Métro à l'occasion de l'exécution de ces mandats. »

[132] Justice Rochette added later :

> « [88] Par ailleurs, force est de constater que l'écoulement du temps n'a pas rendu les événements les plus anciens impertinents; on les invoque et on entend toujours en faire la preuve puisqu'ils seraient directement reliés à la démonstration annoncée.
>
> [89] Il faut tenir pour acquis que les gens de la direction de Métro se sont ouverts sans réserve aux avocats de Fasken sur leur situation corporative, notamment au plan financier. Les perspectives d'avenir à court et moyen terme ont normalement été exposées dans un esprit de collaboration, comme cela se devait.
>
> [90] En fait, Métro a sans doute agi, lors des appels à l'épargne, en ayant la conviction que des faits et intentions confiés et non publicisés ne pourraient éventuellement servir contre elle. Si ce ne devait pas être le cas, la perte de confiance qui en résulterait porterait gravement atteinte à l'intégrité de la profession et déconsidérerait l'administration de la justice.
>
> [91] Ainsi, nous devons inférer de ces déterminations que la présomption de transmission de renseignements confidentiels jouera, à moins que l'avocat, il s'agit ici de Fasken, convainque la Cour qu'aucun renseignement pertinent ne lui a été communiqué. Avant d'en venir là, il est à propos de trancher sommairement les autres causes d'inhabilité invoquées par Métro. »

[133] Then, Justice Rochette dealt as follows with the screening measures[59] taken by Fasken:

> « [98] À cette étape, des preuves claires et solides doivent persuader que toutes les mesures raisonnables ont été prises pour veiller à ce que l'avocat en cause ne divulgue rien aux membres du cabinet qui agissent contre son ancien client,

[59] Such as ethical walls.

> étant entendu que les simples engagements et affirmations catégoriques contenus dans des affidavits ne sont pas acceptables (arrêt MacDonald, précité).
>
> [99] À l'audience, les avocats du Regroupement ont reconnu, à toutes fins utiles, que ce fardeau relativement lourd n'avait pas été relevé. Aucune mesure concrète n'a, en effet, été prise à l'arrivée de Me Morisset chez Fasken, après que l'on ait conclu, bien rapidement, qu'un conflit n'était pas envisageable.
>
> [100] Certaines mesures ont certes été mises en place, mais seulement après qu'ait été intenté le recours du Regroupement. Il était déjà trop tard. »

[134] In the present instance, there is absolutely no evidence of any screening measures taken by Fasken to shield Baudouin from any information communicated to other members of the firm in the context of their mandates carried-out in connection with the 2007 and 2008 Prospectuses. Had there been one, the Court cannot believe that Baudouin would not have been made aware of such screening measures without necessarily knowing all the details thereof. Such knowledge on his part would have undoubtedly been raised in a timely manner with the parties to the arbitration. But, since Fasken's conflict verification was "apparently" negative, there would have been no need for any screening measures.

[135] The foregoing leads the Court to conclude that in all likelihood, the prior relationship between Fasken, the Underwriters and CRI was sufficiently substantial to warrant a full disclosure at the time of the deciding on the candidacy of Baudouin as sole arbitrator. The Court finds it mind boggling that none of this came out during Fasken's conflict verification.

[136] In any event, if there was no conflict of interest situation *per se*, a fact that the Court is not ready to accept under the present circumstances, the aura of an appearance of a serious conflict of interest situation involving Fasken would have been strong enough to induce the Defendants to err on the side of caution and reject the candidacy of Baudouin as sole arbitrator.

- **The right to choose freely a sole arbitrator, the right to refuse a particular candidate without justification and the obligation of full disclosure**

[137] The right to choose freely an arbitrator is a concept that is even more important in the context of consensual commercial arbitration.

[138] Parties to a binding arbitration having to chose a sole arbitrator that will rule on their dispute must be able to select that person freely. Under such circumstances, the right to choose freely implies the right to refuse a proposed candidate without having to justify such refusal[60].

[60] *Entreprises modernes Daveluyville inc. v. Industries Leclerc inc.*, AZ-96021144 (1995 C.S.) page 6.

[139] The Court believes that it is the strict right of the parties, especially given the fact in particular that by accepting to submit their dispute to arbitration, the parties waived, to all intents and purposes, their right to appeal the arbitrator's sentence, contrary to the situation prevailing had they resorted to submit their case in a Court of law.

[140] In *Sport Maska Inc. v. Zittrer*[61], the Supreme Court of Canada has unequivocally recognized that the parties to an arbitration are free to choose to their arbitrator:

> "[…] If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator's real function and that of a judge who has to decide a case. This judge, freely chosen by the parties, is subject to procedural constraints that cannot be applied to other forms of intervention, such as an expert who does not have to settle an issue as a judge would or render a decision as the courts generally do.
>
> [Emphasis added]

[141] Unlike the judicial process where the parties have no say or right to choose a judge, one of the most important aspects of contractual arbitration is the selection of the arbitrator by the parties, and without a doubt, the right to freely choose the arbitrator is one of the hallmarks of commercial arbitration.

[142] The Court agrees with the attorney for the Defendants that when selecting an arbitrator, there are many elements for parties to consider including, *inter alia*, experience, knowledge and reputation. A party will not take risks with an arbitrator with limited knowledge or a tarnished reputation, and even less with an arbitrator who is conflicted, potentially conflicted, or appearing to be conflicted.

[143] The considerations involved in selecting a potential arbitrator, and *a fortiori* in rejecting a potential arbitrator, are numerous and it is for each party to decide. As a result, the importance of full disclosure and informed decision is paramount. Any conflict, potential conflict or appearance of conflict can only increase the importance of full disclosure, especially so if the person to be appointed shall sit as a sole arbitrator.

[144] Consequently, choosing freely an arbitrator necessarily implies as well that such a decision must be made in an informed and enlightened manner with all relevant facts available being disclosed to all participants.

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[61] [1988] 1 S.C.R. 564, at pages 580-581.

[145] In the Court's opinion, the obligation of full disclosure does not rest solely on the proposed arbitrator but on the parties as well, especially if one party is aware of facts that if disclosed to the other side would induce that party to refuse the candidacy of the proposed sole arbitrator.

[146] The Court also agrees with the following comments made by authors J. Brian Casey and Janet Mills, in *Arbitration Law of Canada: Practice and Procedure*[62], regarding the importance of the choice of an arbitrator:

> "4.7 Choosing an Arbitrator
>
> The choice of arbitrator may be the single most important part of the arbitral process. Because the arbitration is consensual and operates to a great extent outside of the rules of procedure and practice used by the courts, the role of the arbitrator is crucial in maintaining the integrity and efficiency of the process. In an arbitration, as with any dispute, one party is usually more keen to proceed than the other. The inevitable jockeying for tactical position, strategic delaying and the adversarial stance taken by most lawyers as a result of their training in the common law court system necessitates a strong and knowledgeable arbitral tribunal. A weak arbitral tribunal is even more dangerous as there is little right of appeal or recourse. Arbitrators must be chosen with care.[63]"
>
> [Emphasis added]

[147] Another troublesome element is CRI's strategy to trigger the arbitration process with a 14-day contractual delay to complete the selection of a sole arbitrator with a Notice of Arbitration issued on December 30, 2010, during the 2010 Holiday season, at a time when people were not readily available in all likelihood. Indeed, at the time, Erikson was on holiday in Warsaw, Poland. Yet, Maniatis had no hesitation to deny to Defendants' newly appointed lawyer, Kochenburger, his request to grant him and his client Erikson a four-day extension from Thursday January 6 to Monday January 10, 2011 for the selection of the Defendants' own Appointing Arbitrator.

[148] Equally troublesome is the lack of reasonable delay granted by CRI's lawyers asking Kochenburger at 15:49 on January 11, 2011 to review a draft letter that would be addressed to Baudouin comprising a list of names for the latter's conflict verification process and Baudouin being sent the same letter at 16:08 (some 20 minutes later). The latter acknowledged receipt at 16:21 indicating that he would proceed with the conflict verification and *probably be able to get back to him tomorrow*[64]. Yet, the morning after, at 9:43, Maniatis wrote again to Baudouin indicating that he would like an answer on that same day as it was a "*time sensitive matter*". As previously mentioned, Baudouin

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[62] New York, Juris Publishing Inc., 2005, at page 117.

[63] See to the same effect J. Kenneth McEwan and Ludmila B. Herbst in *Commercial Arbitration in Canada*, Toronto, Canada Law Book (October 2015) (loose-leaf), p. 4-1.

[64] **I-7.**

replied in an almost apologetic fashion at 11:09 on that same morning, that the conflict verification was long and that the results were “apparently negative”:

> « Après une vérification un peu longue en raison du nombre de personnes impliquées celle ci se révèle apparament négative. En principe donc il me fait plaisir d'accepter è mandat. (sic) [65] »

[149] Why such haste to proceed during the Holiday season that had not yet ended? The Court cannot believe for an instant that if Kochenburger’s reasonable request for a four-day extension had been honored by Maniatis that Kochenburger would not have reciprocated to enable a proper and more thorough completion of the conflict verification process at Fasken’s.

[150] This leads to Court to question, with all due respect, the thoroughness of Fasken’s conflict search system. The Court can understand that at the time, Baudouin may not have been aware personally of his firm’s prior direct involvement in CRI’s efforts to raise funds via the 2007 and 2008 public offerings, but how could such a relevant information in the context of a conflict verification be ignored when Fasken’s own website boasts about these two public offerings mentioning CRI in no uncertain terms[66]?

> “**Canadian Royalties completes $75 million public equity offering**[67]
>
> **Client**
>
> Syndicate of underwriters led by BMO Capital Markets and including Desjardins Securities Inc., Raymond James Ltd. and Blackmont Capital Inc.
>
> July 2007
>
> On July 26, 2007, Canadian Royalties Inc. completed a marketed equity offering of an aggregate of 27,300,000 common shares for gross proceeds of approximately $75 million. The offering of the common shares was qualified by short form prospectus filed in all provinces of Canada and on a private placement basis in jurisdictions outside of Canada. A syndicate of underwriters led by BMO Capital Markets and including Desjardins Securities Inc., Raymond James Ltd. and Blackmont Capital Inc., acted in connection with the sale of the common shares issued from treasury.
>
> The underwriters were represented in Canada by Fasken Martineau with a team that included Gregory Ho Yuen, John M. Sabetti and Paula Amy Hewitt (securities/global mining).

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[65] **I-6.**
[66] **P-16.**
[67] http://www.fasken.com/en/canadian-royalties-completes-75-million-public-equity-offering/.

> **<u>Canadian Royalties completes $137.5 million convertible debenture offering</u>**[68]
>
> **Client**
>
> Syndicate of underwriters led by BMO Nesbitt Burns Inc.
>
> March 2008
>
> On March 18, 2008, Canadian Royalties Inc. completed a short form prospectus offering of $137,500,000 aggregate principal amount of convertible senior unsecured debentures due March 31, 2015, including the exercise of the over-allotment option of $12,500,000 aggregate principal amount of debentures granted to the syndicate of underwriters led by BMO Nesbitt Burns Inc. and including Raymond James Ltd and Desjardins Securities Inc.
>
> The underwriters were represented by Fasken Martineau, with a team composed of Gregory Ho Yuen, Paula Amy Hewitt and Brandon Tigchelaar (securities and global mining)."

[151] Again, under such particular non-litigious mandates, how could the name of Canadian Royalties not come up during the conflict verification process especially when the type of mandates given to Fasken in those two instances involved raising funds for the benefit of CRI and that Maniatis' own letter of January 11, 2011[69] addressed to Baudouin mentioned specifically CRI and was accompanied with a copy of the joint venture Agreement clearly involving CRI?

[152] This is even more astonishing when considering that Fasken's own clients in both public offerings were at the very same time defendants in a class action based on omissions and misrepresentations made by CRI and their own clients, the Underwriters, in connection with the 2007 and 2008 Prospectuses.

[153] The Court understands that lawyer and partner Me Gregory Ho Yuen ("**Yuen**") led the Fasken team performing due diligence for the Underwriters in respect of CRI's 2008 Prospectus[70], as well as in respect of the 2007 Prospectus[71].

[154] In January 2011, at the time that Baudouin was appointed sole Arbitrator, Yuen was a partner at Fasken and remained at Fasken several years into the Arbitration process. Excerpts of the Fasken Website confirm that Yuen remained at Fasken until at least July 25th, 2013[72], at a time when the Defendants were renewing their request to the Ministry to "correct" the Mining Leases granted to CRI solely.

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[68] http://www.fasken.com/en/canadian-royalties-completes-1375-million-convertible-debenture-offering/.
[69] **I-5**.
[70] **P-16**, page 1.
[71] **P-16**, page 10.
[72] **P-16**, page 4.

[155] In addition to Yuen, Me John M. Sabetti, a partner at Fasken, also acted for the Underwriters in respect of the Respondent's 2007 Prospectus[73] and would still be employed at Fasken[74].

[156] What is the position of CRI in this matter?

[157] In essence, the Court retains from CRI's lawyers that their main argument to contest the present Motion in revocation is that Erikson and Kochenburger did not act with *due diligence* pursuant to the provisions of article 345 (4) C.p.c., as they were in a position to and should have discovered much before August 24, 2015 the involvement of Fasken by simply reading carefully and thoroughly the 2007 and 2008 Prospectuses. Erikson and Kochenburger had the means to find, even before the appointment of Baudouin, that Fasken had been involved for the Underwriters since 2007 with the $75,000,000 and the $125,000,000 public offerings for CRI.

[158] This would suggest that the Defendants had the obligation to carry-out a due diligence process on the candidacy of Baudouin before his appointment. The Court does not agree with such a premise, especially in circumstances where Erikson was in Poland at least at the beginning of the arbitration process triggered on December 30, 2010 and the minimal delay allotted to Kochenburger and his client to decide on the candidacy of the sole arbitrator to be appointed.

[159] The Court has already indicated that it believed the testimonies and explanations of Kochenburger and Erikson, it is also satisfied that for the purposes hereof, they both acted with due diligence in this matter within the purview of article 354(4) C.c.p. The Court understands that the circumstances, as they were known to Erikson and Kochenburger, including the issues to be decided under the Arbitration process, did not lead them to make any verification regarding the lawyers that had acted for the Underwriters in the two prospectuses in question.

[160] Moreover, it was totally unreasonable for CRI's lawyers to expect the same from them, especially considering that such a position is proposed by persons who knew and were in a position, at all relevant times, to disclose such relevant information that could have had an incidence, if not a certain impact on Erikson's consent to the appointment of Baudouin as sole Arbitrator under such circumstances.

[161] Their argument that Erikson and Kochenburger should have been more "alert" and "diligent" has no influence on the Court under the present circumstances.

[162] Needless to stress the fact that the imperative provisions of article 1375 of the *Civil Code of Quebec* apply to all, including clients and their lawyers:

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[73] **P-16**, page 10.
[74] **P-16**, pages 11-12.

> "**1375.** The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished."

[163] Furthermore, if according to CRI's lawyers, Erikson and Kochenburger failed to act with due diligence by not noticing Fasken's name in the two prospectuses that were submitted to Baudouin's attention, how can they explain that the Arbitrator, being in possession of the same documents, never noticed in perusing them that Fasken acted as legal counsel for the Underwriters in both instances?

[164] As a final note on the issue of *due diligence* pursuant to article 345 (4) C.p.c., one has to bear in mind that the "discovery" contemplated in the said article relates, in the present instance, to the "discovery" of a situation of serious conflict of interest on the part of the Arbitrator.

[165] Article 345(4)[75] C.c.p. requires that a party and its lawyer, as the case may be, have acted with *due diligence* and that nevertheless they not have "discovered" the evidence before the judgment that is the subject of the Motion in revocation.

[166] The Court emphatically agrees with the Defendants' lawyer that the terms "due diligence" (or "reasonable diligence") must be interpreted in accordance with the goals of Justice, namely that procedural law must give way to substantive law and rights.

[167] The required "due diligence" concerns the actual discovery of the evidence. It does not concern the fact that the evidence was not brought forward in time, for instance, because a party did not properly evaluate its importance.

[168] In *Bédard* c. *Rainville*[76], the judge quite appropriately stated that:

> "Découvrir une preuve et apporter une preuve sont deux choses différentes. Mais, pour avoir droit à la rétractation d'un jugement, il ne suffit pas de dire qu'une preuve, malgré toute la diligence raisonnable, n'a pu être apportée en temps utile. Il faut prouver qu'une telle preuve n'a pu être découverte en temps utile."
>
> [Emphasis added]

[169] The Court also agrees with the assertion of the Defendants' lawyer that discovery of the evidence must therefore go to the very existence of the evidence, and not to its importance or relevance.

[170] To discover with due diligence a serious conflict of interest situation, Erikson and Kochenburger Petitioners had to know necessarily about its existence and, therefore,

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[75] At article 483(7)(c) of the former *Code of civil procedure*, the terms used were "reasonable diligence." instead of the current "due diligence".

[76] [1970] C.S. 533, at page 2.

they had to know that Fasken had acted for the Underwriters in this matter, a fact that the Court is satisfied that they were unaware of before August 24, 2015.

[171] The "due diligence" required to discover the conflict of interest of the Arbitrator had to be ascertained before and up until Baudouin's appointment in that capacity. It was during that period of time that CRI and the Defendants were evaluating Baudouin's qualifications to act as sole Arbitrator and suitability to serve as an independent and impartial decider. At that time, given their lack of knowledge that Fasken had been involved with the Underwriters and without any such disclosure by CRI, who was cognizant of those facts, Erikson and Kochenburger had no means to suspect the existence of a serious conflict of interest situation.

[172] Once the Arbitrator was appointed, the "due diligence" required afterwards must be adapted to this reality (i.e. that there is no situation of conflict of interest to suspect), keeping in mind that there was an ongoing duty by the Arbitrator to disclose any conflict of interest throughout the arbitration process[77].

[173] In fact, throughout the entire arbitration process, the Defendants had no reasons to doubt the accuracy and veracity of the position communicated to them by Baudouin that Fasken's conflict verification had yielded negative results, bearing in mind that at the same time, CRI was confirming in writing that it *"[was] not currently aware of any circumstances that give rise to justifiable doubts as to the Arbitrator's impartiality or independence*[78]."

[174] As the Defendants, including Erikson and Kochenburger, were reassured by the Arbitrator (and by CRI) that there was no conflict of interest, in the Court's opinion, there was no duty for them to look or search for further information in that regard. In fact, in particular Erikson and Kochenburger (a) never received any critical information from the Arbitrator regarding any conflict of interest situation and (b) relied on the information, namely the written assurances, provided by the Arbitrator (and CRI).

[175] Therefore, the Court finds that the Defendants acted with due diligence for the discovery of evidence within the meaning of article 345 C.c.p. and that such discovery was made on August 24, 2015.

[176] Under such circumstances, can the remedies offered by article 345 C.c.p. be negated by the waivers or renunciations signed by the Defendants regarding any situation of conflict of interest?

- **Waivers or renunciations of conflict of interest**

[77] Article 942.1 of the former *Code of civil procedure* (now article 626 C.c.p.).
[78] Arbitration Agreement (**I-11**), Clause 4(a).

[177] As a subsidiary argument, CRI's lawyers raised the fact that in any event, the Defendants had waived contractually any conflict of interest or appearance of conflict of interest in the Simplified Protocol of Arbitration[79] and in the Arbitration Agreement[80].

[178] On that issue, the Court is of the view that the waivers given by the Defendants in the said documents, were made in direct reliance on the express assurances and on the conflicts disclosed by Baudouin and CRI at the time they were granted. Under such circumstances, any conflict of interest on the part of the Arbitrator and of Fasken would survive any written waiver or renunciation obtained from the Defendants at the time.

[179] The Defendants received repeated written assurances or confirmation from the not only the Arbitrator but from CRI as well that no situation of conflict of interest existed at the time of his nomination and in the months thereafter[81].

[180] The Arbitral Award of January 13, 2011[82], appointing Baudouin as the sole Arbitrator, also confirmed the absence of any conflict of interest that would have prevented Baudouin from acting herein.

[181] The Court finds that at all relevant times, the Defendants, including Erikson and their lawyer Kochenburger, received express assurances which were essential and key to their consent to waive or renounce in the future.

[182] The Court entirely agrees with the position of the Defendants that under such circumstances, their waivers could only be valid for known and disclosed conflicts of interest. As such, they could not have agreed to waive situations of conflict of interest or appearance of conflict of interest that already existed unbeknownst to them.

[183] Article 1399 of the *Civil Code of Quebec* stipulates:

> "**1399.** Consent may be given only in a free and enlightened manner.
>
> It may be vitiated by error, fear or lesion."

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[79] **I-10**.

[80] **I-11**.

[81] The Court refers to:

- The email confirmation from the Arbitrator himself that there was apparently no known conflict of interest (**I-7**);
- Clause 4(a) of the Arbitration Agreement: "[t]he Parties are not currently aware of any circumstances that give rise to justifiable doubts as to the Arbitrator's impartiality or independence; [Emphasis added]
- Clause 4(b) of the Arbitration Agreement: "[t]he Arbitrator is not aware of any circumstances that may give rise to a reasonable apprehension of bias" (**I-11**); and
- Clause 7(a)(i) of the Arbitration Agreement: "the Arbitrator has confirmed in the firm's conflict system that there is no conflict or potential conflict which would prevent them acting as an arbitrator" (**I-11**).

[82] **I-8**.

[184] Based on the evidence adduced at the hearing, the Court doubts strongly that the Defendants' consent to the waivers or renunciations in question was granted in a free and enlightened manner. The Court finds that their consent was not given blindly or recklessly, as the Defendants' decision was based on the credible and compelling written assurances provided by Baudouin and even by CRI in the Arbitration Agreement, adding that at the time that CRI and their lawyers were fully aware of the circumstances that would give rise to the Arbitrator's conflict or at the very least a strong appearance of conflict. The key was that the Defendants should have received beforehand disclosure of a conflict or potential conflict situation, which they did not[83].

[185] Moreover, the context during which their consent to appoint Baudouin as sole Arbitrator was given cannot be disregarded, namely during the 2010 Holiday season, with Erikson away in Poland, and Kochenburger requesting an additional four days to appoint the Defendants' Appointing Arbitrator, that was flatly refused by Maniatis who was pressing Baudouin as well to complete his conflict verification.

[186] With all due respect, this entire situation just does not "smell" right and for the purposes hereof, the Court shall disregard the waivers or renunciations signed by the Defendants regarding the Arbitrator as such waivers or renunciations could not contemplate encompassing the present circumstances.

[187] The same concept would apply to the consent given by the Defendants with respect to the homologation of the Award by Justice Castonguay.

[188] The Court is of the same view with respect of a transaction agreement signed between the parties prior to the Defendants' discovery of facts that gave them rise to believe that their consent to appoint Baudouin as sole arbitrator was vitiated from the outset for the reasons more fully set out above.

[189] In any event, it will be up to the judge who will be called to rule on CRI's original application to homologate the Award to decide on the incidence of this transaction agreement.

[190] The Defendants have satisfied the Court that they were justified to believe and to rely upon the assurances and representations of Baudouin and of CRI and had no reasons to doubt them at the time. Based on the information at hand then, why should

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[83] Jean-Denis Gagnon, « *La convention d'arbitrage : les arbitres ou la cour ?* », *Revue du Barreau*, vol. 69, 2010, page 28 : « [55] *Mentionnons enfin qu'une partie peut renoncer à se prévaloir de la règle de l'impartialité lors d'un arbitrage civil et commercial. Pour qu'il en soit ainsi, il faut qu'elle ait été informée à l'avance, de l'existence des facteurs qui pouvaient permettre de douter de l'impartialité de l'arbitre, et qu'elle n'ait pas alors refusé qu'on lui soumette tout litige pouvant éventuellement l'opposer à son adversaire*. » [Emphasis added and reference omitted]

they have entertained any doubt regarding the results of Fasken's conflict search announced by Baudouin?

[191] Moreover, assuming that at the time of executing the Arbitration Agreement, Baudouin was not aware of the circumstances involving Fasken and CRI giving rise to a situation of conflict of interest or to a strong appearance of conflict of interest situation, this would not have relieved the Arbitrator from his ongoing duty to disclose throughout the arbitration process "*any fact that could cast doubt on the arbitrator's impartiality and justify a recusation*[84]", bearing in mind that it is only once an arbitrator is appointed that he or she may be recused.

[192] The evidence revealed that from January 2011 until the Award (September 2014), the Arbitrator never made any comments to the parties regarding Fasken's prior involvement with CRI and the latter's financing of the Mining Project in which the Defendants had an interest that was the object of the Baudouin Arbitration.

[193] With all due respect, it is somewhat odd that CRI's lawyers would blame Erikson and Kochenburger of not having acted with *due diligence* within the meaning of article 345(4) C.c.p. by failing to notice before August 24, 2015, Fasken's involvement with and for the Underwriters upon their review of the two Prospectuses in their possession since 2007 and 2008, especially since these prospectuses were filed in evidence before the Arbitrator and even brought to the latter's attention, at the very least, during Kochenburger's oral submissions.

[194] Shouldn't they have addressed the same reproach to the Arbitrator who was clearly in possession of the same documents? Based on the same reasoning of CRI's lawyers, Baudouin should have been equally bound to notice the involvement of his own law firm in connection with the 2007 and 2008 Prospectuses. As previously mentioned, under such circumstances, the Arbitrator had an ongoing obligation to disclose in a timely manner any fact that could cast doubt on his impartiality among the Parties.

[195] In the Court's opinion, the expression "*could cast doubt*" found in article 626 C.c.p. not only covers situations of conflict of interest but equally appearances of conflict of interest. In such circumstances, each case has to be assessed and determined on its own merits.

[196] The Court is of the view, based on the evidence, that like Erikson and Kochenburger, Baudouin never saw or noted the name of Fasken in the two prospectuses for the simple reason that the issues that he had to deal with did not involve directly the legal counsel of the Underwriters. In other words, in all likelihood, Baudouin did not have need to take cognizance of the portions of the two prospectuses where Fasken was mentioned, otherwise, the Court is nevertheless convinced that the

[84] Article 626 C.c.p. (formerly article 942.1 essentially to the same effet).

Arbitrator would have raised it upon his discovery of Fasken's prior involvement in this matter.

[197] The fact that the Arbitrator may have not been aware of the circumstances involving Fasken and CRI does not negate in itself the existence of a conflict of interest situation or the appearance of a conflict of interest situation. In the context of the Parties having to choose freely a sole arbitrator, the test relating to the conflict of interest rests with the Defendants' own appreciation of the facts (once and if disclosed), and not only with the Arbitrator, always bearing in mind that what was at stake at the preliminary stage of the arbitration process, was the fundamental right of the Defendants to choose freely the sole arbitrator that would rule in an impartial and binding manner on the commercial dispute that they were about to submit to him.

[198] It was at this specific time[85], in January 2011, that the issue of the Arbitrator's potential conflict or appearance of conflict was a live issue and at that time, there were no documents in the arbitration record, and certainly not the Prospectuses to alert the Defendants.

[199] Years into the Baudouin Arbitration, there were no change of circumstances in the Defendants' affairs, and no information was ever been disclosed to them regarding any potential or actual conflict by the Arbitrator and/or by CRI warranting an enquiry on their part into the independence and impartiality of the Arbitrator.

[200] The Court finds that the Defendants, including Erikson and Kochenburger, exercised due or reasonable diligence at all relevant times and were nevertheless unable to discover the evidence of a serious conflict of interest before August 24th, 2015, not knowing before then that one existed

[201] Article 345(4) C.c.p. stipulates a third element, namely the requirement that the previously unknown and undiscovered evidence "*would probably have led to a different judgment*".

[202] The "*different judgment*" in the present instance is the Castonguay Homologation being the judgment rendered on December 19th, 2014 which is the object of the revocation.

[203] Based on its findings, the Court is also of the view that the Castonguay Homologation would have "probably" been different if the Defendants had been aware at the time of the presentation of CRI's application to homologate the Award of the serious conflict of interest or, at the very least, of the appearance of a serious conflict of interest situation on behalf of Fasken and of the Arbitrator at the time of the latter's appointment in January 2011.

[85] Before the appointment of Baudouin.

[204] This conflict of interest could have constituted the grounds on which the Petitioners would have contested the homologation sought by CRI in 2014.

[205] However, although the grounds raised in the Defendants' contestation of CRI's application to homologate the Award appear *prima facie* to be serious ones, it is not up to this Court to rule thereon at this stage of the proceedings.

[206] This exercise shall have to be made by the judge who will hear on its merits CRI's application to homologate the Award, combined undoubtedly with Defendants' application to annul the said Award.

[207] It will also be up to that judge to determine if the Arbitrator's conflict of interest constituted a fundamental defect, vitiating the entire arbitration process, including his own appointment[86] and as a result thereof the Award[87].

[208] This is probably why the Legislator used the word "probably" in article 345(4) C.c.p., always bearing in mind that "probably" does not automatically and obligatorily entail that the revoked judgment will be ultimately reversed on the merits.

[209] In any event, based on the foregoing, the Court also finds that the Defendants were prevented from being heard on the issue of the homologation of the Award, given that they only subsequently discovered the evidence of a serious conflict of interest situation involving the Arbitrator and his own law firm Fasken, thus effectively depriving them of their discretion and privilege to refuse or decline the candidacy of Baudouin as sole Arbitrator at the time of his appointment.

[210] Again, the Defendants have satisfied the Court that under the present circumstances and with the new evidence that was not known to them at the time of presentation of CRI's application to homologate the Award, the outcome of the Castonguay Homologation would have "probably" been different.

[211] Upon granting the Defendants' Motion in revocation, the Court wishes to add the following comment.

[212] With all due respect for the opinion to the contrary, not only have the Defendants satisfied the Court that the provisions of article 345(4) C.c.p. find application therein, but as well, the Court is of the view, with all the facts and evidence disclosed at the hearing, that the Castonguay Homologation, if allowed to stand, would tend to bring the administration of justice into disrepute (article 345 C.c.p. *in limine*).

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[86] Bearing in mind that the same principles must apply to the actual arbitrator selection process as a party should not be deprived of its contractual right to choose freely an arbitrator it is comfortable with and expecting to be heard and governed by an independent and impartial decider.

[87] **I-22**.

[213] At the stage of the revocation of the Castonguay Homologation, the violations suffered by the Defendants of the basic principles of any arbitration proceeding cannot be upheld and receive sanctity of the courts without a closer examination of those circumstances.

[214] In closing, the lawyers for CRI have objected during Erikson's testimony to his filing of certain industry literature[88] providing further insight and guidelines into the scope of the exhaustive disclosure required of a party seeking a public offering such as CRI during a due diligence exercise conducted by the lawyers for underwriters[89].

[215] Their objection was taken under reserve by the Court and shall now be deal with.

[216] Erikson testified that in the context of his "discovery", he sought and obtained these guidelines from Investment Industry Regulatory Organisation of Canada (IIROC) to help him better understand what was the role, the duties and the obligations of the Underwriters and of their legal counsel Fasken in the context of the execution of their mandates in 2007 and 2008 relating to CRI's prospectuses and more particularly in connection with the due diligence processes that they had to carry-out for each public offering.

[217] To the extent that the filing of these guidelines by the witness served to establish the steps taken by Erikson at the time of his discovery of Fasken's involvement with the 2007 and 2008 Prospectuses and to better understand for his benefit the nature of Fasken's work as well as the existence and the extent of a serious conflict of interest situation stemming from Fasken's due diligence work for the Underwriters and CRI, there is no valid reason to maintain the objection as, in any event, the witness never tried to prove the contents of these guidelines. It only stressed or established how he came to the conclusion that Fasken and the Arbitrator had placed themselves in a serious conflict of interest situation when Baudouin accepted to act as sole Arbitrator in the present commercial dispute.

[218] CRI's objection is therefore dismissed, the Court adding that in any event, these exhibits **P-7** and **P-8** had no bearing on the Court's present decision.

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[88] February 2006: *Corporate Finance Due Diligence Guidelines*, by the Investment Industry Association of Canada (**P-7**); and
December 2014: *Guidance Respecting Underwriting Due Diligence*, by the Investment Industry Regulatory Organization of Canada (**P-8**).

[89] The first guideline was published and in effect prior to and during the preparation of the 2007 and 2008 prospectuses. The Court was informed that second and current guideline was included only in order to indicate that no substantial changes in recommended due diligence practices had been proposed since the 2006 version.

FOR THOSE REASONS, THE COURT:

[219] **GRANTS** the Motion in revocation of the Defendants/Petitioners, Nearctic Nickel Mines Inc. and Ungava Mineral Exploration Inc.;

[220] **REVOKES** the judgment rendered on December 19th, 2014 by the Honourable Martin Castonguay homologating a commercial Arbitration Award dated on August 27, 2014 and an Award of Rectification dated September 24, 2014 (the "**Homologation Judgment**");

[221] **SUSPENDS** the execution of the Homologation Judgment rendered on December 19th, 2014 in the present instance;

[222] Consequently, **ORDERS** that the parties be placed forthwith in the position in which they were prior to the Homologation Judgment just as if the said judgment had never been rendered;

[223] **ORDERS** the reopening of the hearing in court file number 500-11-047679-143 relating to the Application of Plaintiff Canadian Royalties Inc. to homologate the Award rendered on August 27, 2014 as rectified by the Award of Rectification dated September 24, 2014;

[224] **REFERS** this matter to the Coordinating Judge of the Commercial Division to set a date of hearing as soon as the Parties herein shall have filed their "*Joint Declaration that a file is complete* (Commercial Division Form)";

[225] **THE WHOLE**, with costs.

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MICHEL A. PINSONNAULT, J.S.C.

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M^tre^ Karim Renno
M^tre^ Éva Richard
Renno Vathilakis inc.
Attorneys for Petitioner/Defendant

Dates of hearing: September 15 and 16, 2016