

COURT OF APPEAL FOR ONTARIO

CITATION: Angus v. Port Hope (Municipality), 2017 ONCA 566

DATE: 20170704

DOCKET: C62496

Strathy C.J.O., Gillese and Pardu JJ.A.

BETWEEN

Ian Angus and Dean Ross

Applicants

(Respondent)

and

Municipality of Port Hope

Respondent

(Appellant)

Chris G. Paliare, Richard P. Stephenson and Lindsay Scott, for the appellant

Alan J. Lenczner, Q.C. and Paul-Erik Veel, for the respondent

Heard: April 18, 2017

On appeal from the judgment of Justice John R. McCarthy of the Superior Court of Justice, dated June 30, 2016, with reasons reported at [2016 ONSC 4343](#).

Gillese J.A.:

OVERVIEW

[1] In 2000, the Government of Canada (“Canada”) and the former municipalities of the Town of Port Hope, the Township of Hope, and the Municipality of Clarington (collectively, the “Municipalities”), struck a deal:

Canada would make a payment of \$10 million to each of the Municipalities in exchange for each of the Municipalities storing low-level radioactive waste (the “Waste”) at safe sites within their respective communities. The necessary regulatory approvals for the new Waste management facilities had not been obtained at the time the parties struck the deal.

[2] The parties “papered” the deal with an agreement executed by the Municipalities in December 2000 and by Canada on March 29, 2001 (the “Agreement”). This appeal is about the proper interpretation of the Agreement and, specifically, Schedule 8 to it.

[3] On January 1, 2001, Hope Township and the Town of Port Hope were amalgamated into a new entity called the Corporation of the Town of Port Hope and Hope (the “Municipality of Port Hope”).

[4] On April 12, 2001, the Municipality of Port Hope received a \$10 million cheque from Canada, which was the payment due to Hope Township under the Agreement (the “Payment”).

[5] In 2014, Ian Angus (the “Applicant”) and Dean Ross¹ brought an application (the “Application”) in which they alleged that the Municipality of Port Hope had misused the income earned on the Payment because it had failed to

¹ At the outset of the hearing, Mr. Ross acknowledged that his claim was statute-barred, so Mr. Angus alone continued with the Application. Sadly, Mr. Ross has since died.

apply that income exclusively to defray the lower tier municipal taxes or levies of ratepayers of the former Hope Township.

[6] By judgment dated June 30, 2016 (the “Judgment”), the application judge granted the Application.

[7] The application judge interpreted Schedule 8 to the Agreement as having created a non-charitable purpose trust that was saved by s. 16 of the *Perpetuities Act*, R.S.O. 1990, c. P.9. He also found that the Municipality of Port Hope had breached its duties as trustee because it failed to use the power to appoint in accordance with the strict terms of the trust.

[8] Port Hope appeals. Its core contention on appeal is that Schedule 8 of the Agreement is a contract and did not establish a trust over the Payment.

[9] Mr. Angus cross-appeals. He contends that Schedule 8 created a charitable trust, not a non-charitable purpose trust as the application judge found.

[10] As I will explain, Schedule 8 did not create a trust and the Municipality of Port Hope did not breach its duties in respect of the Payment and income earned on it. Accordingly, I would allow the appeal and dismiss the cross-appeal.

BACKGROUND

[11] Since the 1930s, the Waste has been deposited in sites around the Municipalities. Efforts were made to relocate the Waste but were not successful.

[12] In the late 1990s, the Municipalities entered into negotiations with Canada in a bid to find an alternative solution to the cleanup and long-term management of the Waste. The negotiations met with success and a deal was struck. The essence of the deal was that the parties would work together to see that new Waste management facilities were constructed in each of the Municipalities and Canada would make a \$10 million payment to each of the Municipalities in exchange for their storage of the Waste.

[13] The deal was captured in the Agreement. Although the Municipalities executed the Agreement in December 2000, Canada did not execute it until March 29, 2001.

[14] When the Agreement was executed, regulatory approval from the Canadian Nuclear Safety Commission (“CNSC”) was necessary to operate the Waste management facilities. That approval had not been obtained. It was not until 2009 that the Municipality of Port Hope received a licence from the CNSC for the Waste management facility in the former Hope Township.

[15] On December 19, 2000, Hope Township Council passed By-law 3605, which, among other things, authorized Hope Township to appoint Royal Trust Corporation to receive and hold the Payment “in trust for the exclusive benefit of the [Hope Township] ratepayers from time to time”.

[16] On January 1, 2001, the Town of Port Hope and Hope Township were amalgamated to form the Municipality of Port Hope. The Municipality of Port Hope consists of two wards. Ward 1 is the former Town of Port Hope and Ward 2 is the former Hope Township.

[17] Mr. Angus is a ratepayer within Ward 2. He was the Reeve of Hope Township at the time the Agreement was negotiated and was intimately involved in its creation. His wife is the largest residential taxpayer in Ward 2.

The Agreement

[18] The Agreement begins with an introduction (the "Introduction") that: recites some of the history leading up to the Agreement's execution; identifies the need to address the cleanup and better long-term safe management of the Waste located within the respective Municipalities; and, sets out steps to be taken to bring the potential solution to fruition. The Introduction is set out in full in Appendix A to these reasons.

[19] Articles 1.12 and 1.19 of the Agreement are of significance on this appeal. Article 1.12 permits the Agreement to be amended and Article 1.19 specifies that if there is a conflict between the Agreement's provisions and the Schedules, the Schedules take precedence.

[20] Articles 1.12 and 1.19 read as follows:

1.12 Except as otherwise expressly provided for in this Agreement, no amendment, variation or waiver of the provisions of this Agreement shall be effective unless made in writing and signed by each of the Parties hereto, either individually by counterpart or collectively. Any amendment, variation or waiver shall take effect on the date specified in the amendment, variation or waiver or, if not so specified, on the date on which the last Party executes and delivers the amendment, variation or waiver.

...

1.19 In the event of conflict or inconsistencies between the provisions of this Agreement and its Schedules, the order of precedence in descending order shall be as follows:

- the Schedules attached to the Agreement
- the Articles of the Agreement signed by the parties.

[21] Article 7 of the Agreement is also of significance to this appeal. Under article 7.1 of the Agreement, Canada agreed to make a \$10 million payment to each of the Municipalities so that the latter would be enabled to address, as they saw fit, the “impacts of the presence of long-term waste management Facilities within their communities”.

[22] Under article 7.2, the parties agreed that the payments would be dealt with in accordance with the additional terms and conditions set out in Schedules 7, 8 and 9. Those three schedules relate to the payments to each of the Town of Port Hope, Township of Hope, and Clarington, respectively. Schedules 7, 8 and 9 are set out in full in Appendices B, C and D to these reasons.

[23] Article 7 reads as follows:

7.1 Upon the approval of this Agreement by the Treasury Board, Canada's signature of the Agreement and the appropriation of funds by the Parliament of Canada for the purposes set out below, Canada agrees, in order that the Municipalities will be enabled to address, as they see fit impacts of the presence of long-term waste management Facilities within their communities, to make the following payments:

(a) A payment of Ten Million (\$10,000,000.00) Dollars to the Town of Port Hope;

(b) A payment of Ten Million (\$10,000,000.00) Dollars to the Township of Hope; and,

(c) A payment of Ten Million (\$10,000,000.00) Dollars to Clarington.

7.2 For the purposes of Article 7 and Schedules 7, 8 and 9, each of the payments referred to above may also be referred to as the "Fund" or "Funds" and the Parties agree that the Funds shall be dealt with in accordance with the additional terms and conditions as set out in Schedules 7, 8 and 9.

Schedules 7 and 9

[24] As already noted, Schedules 7, 8 and 9 relate to the \$10 million payments from Canada to each of the Town of Port Hope, Hope Township, and Clarington, respectively. Schedules 7 and 9 are substantively very similar, apart from the fact that the former relates specifically to the Town of Port Hope and the latter specifically to Clarington.

[25] Both Schedule 7 and Schedule 9 consist of four paragraphs. For illustrative purposes below, I refer to the provisions in Schedule 7. Readers are directed to Appendix D for the corresponding provisions in Schedule 9, for Clarington.

[26] In paragraph 1 of each of Schedules 7 and 9, the municipality in question (the Town of Port Hope or Clarington) agrees to hold its payment from Canada “in trust for the exclusive benefit of [its] ratepayers”. Paragraph 1 of Schedule 7 reads as follows:

1. Subject to the following provisions, Port Hope agrees to hold Canada’s payment of Ten Million (\$10,000,000.00) Dollars in trust for the exclusive benefit of the ratepayers of the area that comprises the geographic area of Port Hope as of the date of October 6, 2000.

[27] Paragraph 2 empowers the municipality to invest its payment in its discretion and, in its discretion, to expend any income earned from investing it.

2. The principal of the Fund may be invested by Port Hope in its discretion in any investment permitted by law. Any income earned from investing the Fund may be expended by Port Hope from time to time in its discretion for any purpose permitted by law.

[28] The essence of paragraph 3 was to require the municipality to repay the \$10 million to Canada if the necessary CNSC licence was refused (once the Waste in that municipality had been cleaned up and removed). Paragraph 3 of Schedule 7 reads as follows:

3. Port Hope shall pay Canada an amount equal to the opening capital of the Fund, Ten Million (\$10,000,000.00) Dollars, on the last to occur of both:

(1) the day on which a licence is refused by the [CNSC] to construct the New Port Hope Waste Management Facility as contemplated by this Agreement; and,

(2) the first day after the Historic Low-Level Radioactive Waste and the Cameco Decommissioning Waste which are identified in Schedule 1 as wastes to be accommodated in the New Port Hope Waste Management Facility have been cleaned up in accordance with the intent of this Agreement and removed from the Town of Port Hope and Hope.

[29] Paragraph 4 governed if a CNSC licence were granted. If that occurred, the municipality's obligations in favour of Canada regarding the investment and use of the Fund terminated.

4. If a licence to construct the New Port Hope Waste Management Facility is granted by the Canadian Nuclear Safety Commission, on the date of the issuance of the licence Port Hope's obligations in favour of Canada regarding the investment and use of the [F]und shall terminate.

Schedule 8

[30] Schedule 8 originally consisted of nine paragraphs. (As discussed below, it was later amended to include an additional paragraph.)

[31] In paragraph 1 of Schedule 8, Canada was to pay to the trustee appointed by Hope Township Council \$10 million to be "held in trust for the exclusive benefit" of Hope Township ratepayers.

1. Canada will pay to the trustee (“Trustee”) appointed by Hope Township Council, a grant in the amount of Ten Million (\$10,000,000.00) Dollars (hereinafter referred to as the “Opening Capital” or the “Fund”) which, subject to the following provisions, shall be held in trust for the exclusive benefit of the ratepayers from time to time of the area that comprises the geographic area of Hope Township as of the date of October 6, 2000.

[32] I will refer to the Payment together with the investment income earned on it as the “Hope Township Fund”.

[33] Paragraph 2 addresses the trustee’s powers of investment.

[34] Paragraphs 3 and 4 give the trustee a right of indemnity for its costs of administering and investing the Payment and permit it to use the income to “defray the lower tier municipal taxes or levies which otherwise would be payable” by Hope Township ratepayers, provided that the net value of the Hope Township Fund was not reduced below \$10 million.

[35] Paragraph 5 provides that the trustee “shall have at least fifty (50) times the amount of the Fund under administration during the period” in which it acts as trustee.

[36] Paragraph 6 empowers the Hope Township Council to terminate the trustee’s appointment but the Council was “thereupon” to appoint another trustee.

[37] Paragraph 7 sets out the meaning of “lower tier municipal taxes or levies”.

[38] Paragraphs 8 and 9 mimic paragraphs 3 and 4 of Schedules 7 and 9. If a CNSC licence was refused (and once the Waste facility was properly dealt with), paragraph 8 obligated Hope Township to pay Canada \$10 million. If a CNSC licence were granted, paragraph 9 operated to terminate Hope Township's obligations in favour of Canada regarding the investment and use of the Fund.

8. The Trustee shall pay Canada an amount equal to the opening capital of the Fund being Ten Million (\$10,000,000.00) Dollars on the last to occur of both:

(1) the day on which a licence is refused by the Canadian Nuclear Safety Commission to construct the New Hope Township Waste Management Facility as contemplated by this Agreement; and,

(2) the first day after the Cameco Waste – Welcome has been removed from the Township of Hope and the site of the Welcome Waste Management Facility has been cleaned up in accordance with the intent of this Agreement including, without limitation, Schedule 2.

9. If a licence to construct the New Hope Waste Management Facility is granted by the Canadian Nuclear Safety Commission, on the date of the issuance of the licence the Trustee's obligation in favour of Canada regarding the use and investment of the Fund shall terminate.

The Payment

[39] On April 12, 2001, the Municipality of Port Hope received two cheques from Canada, each in the amount of \$10 million. One of the cheques was made

payable to the “Royal Trust Corp. of Canada Former Hope Township Ward 2”. It was the Payment due to Hope Township under the Agreement.

[40] When the Payment was received, no trust agreement had been concluded between Hope Township and Royal Trust nor had such an agreement been concluded between the Municipality of Port Hope and Royal Trust.

[41] The Payment was placed on deposit with Royal Trust.

The Amendment

[42] The Agreement has been amended three times. The first amendment, made on October 7, 2003 (the “Amendment”), is the only one of relevance to this proceeding.

[43] The Amendment was necessary because neither Hope Township nor the Municipality of Port Hope was able to reach an agreement with Royal Trust (or other professional trustee) so that Royal Trust or a similar institution would act as trustee of the Hope Township Fund. The inability to reach such an agreement was not due to lack of effort but because of the significant difficulties and issues surrounding the use of a trust for the investment, management and administration of the Hope Township Fund.

[44] The Amendment empowered the Municipality of Port Hope to invest the Hope Township Fund in accordance with its investment policy and to use an investment counsellor to manage the fund.

[45] Paragraph 1 of Schedule 8, as amended, is set out below. The changes to its wording as a result of the Amendment have been underlined.

1. Canada will pay to the trustee (“Trustee”) appointed by Hope Township Council, a grant in the amount of Ten Million (\$10,000,000) Dollars hereinafter referred to as the “Opening Capital” or the “Fund” which, subject to the following provisions, shall be held in trust or, after the appointment by Council of an Investment Counsellor, on the terms set in the Investment Policy of the Municipality for the exclusive benefit of the ratepayers from time to time of the area that comprises the geographic area of Hope Township as of the date of October 6, 2000. [Emphasis added.]

[46] A new paragraph 3 was inserted into Schedule 8, as a result of the Amendment. It reads as follows:

3. In the event that an Investment Counsellor is appointed to manage the [Hope Township] Fund, the terms of that Contract and the Municipality’s Investment Policy shall apply.

Investment and Use of the Hope Township Fund

[47] Around the time that the Amendment was made and pursuant to By-law No. 43/2003, the Municipality of Port Hope appointed TAL/CIBC as investment counsel and manager of the Hope Township Fund.

[48] Since 2003, the Hope Township Fund has been invested and managed in accordance with the Municipality of Port Hope’s Council-approved investment policy. Council has treated the Payment (i.e. the original \$10 million paid by

Canada to Hope Township) as a legacy asset and has not encroached upon it. Income earned on the Payment has been used for various public purposes, including contributions to building and equipment reserves, investments in roads and community facilities, and the reduction of lower-tier municipal taxes for ratepayers. It has not been used exclusively to defray the lower-tier municipal taxes of Ward 2 ratepayers.

THE DECISION BELOW

[49] The application judge found that the Agreement met the three certainties – of intention, subject-matter and objects – required to create an express trust.

[50] With respect to certainty of intention, the application judge found that the Agreement and Schedule 8, read together, revealed a certainty of intention on the part of Canada, as the settlor of the trust, to transfer property to a trustee to hold or administer it for the benefit of an identified group and for a specific purpose. He viewed the Payment and income that would accrue on it as satisfying the certainty of subject matter requirement. He found that the objects of the trust were the ratepayers of the former Hope Township and that this description of the class of objects satisfied the certainty of objects requirement.

[51] The application judge found that the trust was constituted by Canada's delivery of the \$10 million cheque to Royal Trust on April 12, 2001. He rejected the argument that the trust was improperly constituted or failed because Royal

Trust eventually returned the Hope Township Fund to the Municipality of Port Hope. He said that by the time that fund was returned, the trust was already in existence and the failure of the Municipality of Port Hope and Royal Trust to reach an agreement on its management did not change this.

[52] The application judge concluded that the trust did not offend the alienation rule but found that it violated the rule against remoteness of vesting because it provided benefits to an unclosed class for an indeterminate period that extended beyond the perpetuity period.

Not a Charitable Trust

[53] The application judge outlined the four generally recognized charitable purposes at common law and focused on the fourth, which is “other purposes beneficial to the community”. He concluded that the tax abatements did not qualify as charitable because the arrangement was a business deal and there was no charitable intent, context, or purpose.

A Non-Charitable Purpose Trust

[54] The application judge found that the Agreement created a specific non-charitable purpose trust and that s. 16 of the *Perpetuities Act* applied. Thus, the trust was to be construed as a power to appoint the income or capital for a period of 21 years. He concluded that the Municipality of Port Hope, as *de facto* trustee,

had the power to appoint the trust's income and capital in accordance with the requirements of Schedule 8.

[55] Accordingly, in his view, the Municipality had a duty to exercise its power to appoint only to defray the lower tier taxes of ratepayers resident in Ward 2, from time to time. He found that the power could be exercised so as to encroach on the capital, without any regard to the obligation in favour of Canada to preserve the capital.

[56] The application judge noted that there was an issue as to who would be entitled to the funds after the 21 years passed on April 12, 2022. He concluded that the question was not before the court and could be determined on or after April 12, 2022.

Limitation Period and Laches

[57] The application judge considered whether the Application was out of time and concluded that it was not. He found that there was no evidence that Mr. Angus was aware prior to September 8, 2012 (two years before the Notice of Application was issued) that the Hope Township Fund was not being used for the exclusive benefit of the ratepayers of the former Hope Township.

[58] He also rejected the argument that Mr. Angus would have been aware of the use of those funds because of the inquiries made by a friend of Mr. Angus in

April 2012 and Mr. Angus' involvement with the Municipality of Port Hope's Area Rating Committee.

[59] The application judge found that Mr. Angus first discovered he had a claim on January 17, 2013, when he received a copy of a letter from counsel for the Municipality of Port Hope that opined that the obligations in the Agreement regarding the use of the money had terminated. Furthermore, he declined to find that a reasonable person in Mr. Angus' circumstances should have realized prior to September 8, 2012 that he had a claim against Port Hope.

[60] The application judge rejected the argument that the doctrine of laches or acquiescence barred the claim for equitable relief because there was no evidence that the Municipality of Port Hope would be prejudiced by the delay and the equities lay in favour of Mr. Angus.

Breach of Trust

[61] The application judge concluded that when the Municipality of Port Hope took possession of the funds previously held by Royal Trust, with knowledge of the terms of the trust, it became a *de facto* trustee.

[62] He found that the Agreement had been breached. He rejected the Municipality of Port Hope's argument that the use of the income earned on the Payment nevertheless benefited the ratepayers – it was not for the trustee to depart from the terms of the trust except with the legal authority to do so.

THE ISSUES

[63] The central issue on this appeal is whether Schedule 8 to the Agreement created a trust of the Hope Township Fund.

[64] The cross-appeal raises a single issue. If Schedule 8 created a trust, was it a charitable trust?

THE STANDARD OF REVIEW AND ITS APPLICATION

[65] The legal interpretation of the Agreement, which includes Schedule 8, is at the heart of this dispute. Because contractual interpretation involves issues of mixed fact and law, this court owes deference to the decision of the application judge, as first-instance decision maker (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-52; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 21).

[66] However, deference is not owed where the first-instance decision maker has made an extricable legal error in his or her contractual interpretation. Such errors include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor (*Sattva*, at para. 53; *Heritage Capital*, at para. 22).

[67] As I explain below, the application judge made a number of extricable legal errors. Consequently, his interpretation of Schedule 8 to the Agreement is

not owed deference by this court and it falls to this court to determine whether Schedule 8 created a trust.

ANALYSIS

[68] When interpreting a contract, the court's overriding concern is to determine the parties' intent. To do that, the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract (*Sattva*, at para. 47).

[69] In the present case, this means that the Agreement as a whole, including Schedule 8, must be read in context to determine whether Hope Township (and the Municipality of Port Hope, as its successor) was obliged to hold the Hope Township Fund in trust for the ratepayers in Ward 2. I conclude that it was not.

[70] In summary, I reason as follows.

1. The Agreement, which includes Schedule 8, is a contract. It provides context within which to interpret Schedule 8.
2. Canada's Payment to Hope Township was the discharge of its contractual obligation under article 7.1(b) of the Agreement. Canada did not make the Payment as the settlor of a trust and did not settle the Payment on trust.
3. Article 7.1(b) of the Agreement did not create a trust.

4. Pursuant to Article 7.2 of the Agreement, Hope Township had to deal with the Payment in accordance with Schedule 8.
5. Schedule 8 did not create a trust of the Payment or of the Hope Township Fund. It did not create a non-charitable purpose trust, an express trust for persons, or a charitable trust.
6. The Municipality of Port Hope did not become a trustee nor did it breach its obligations in respect of the use of the Hope Township Fund.

[71] I will now explain each of these steps of my analysis.

1. The Agreement, including Schedule 8, is a contract

[72] In my view, the Agreement is unquestionably a contract. The Agreement includes Schedule 8. Therefore, Schedule 8 is fundamentally contractual in nature. I hasten to add that is not determinative of the issue on which this appeal hinges because, within a contract, a party can create a trust. However, the Agreement warrants consideration as it provides the context within which Schedule 8 is to be interpreted.

[73] The Agreement is the written expression of the mutually beneficial commercial bargain struck between Canada and the Municipalities. Under the Agreement, Canada promised to make a \$10 million payment to each of the Municipalities and the Municipalities promised to store Waste in their respective

communities. The Agreement set out the parties' obligations in respect of obtaining the requisite regulatory approvals and spelt out what was to happen if such approvals were granted or not. And, there can be no doubt that the parties intended that the Agreement was to create legal relations. See, for example, the last sentence of the Introduction to the Agreement, which reads as follows:

THEREFORE, in consideration of the covenants hereinafter contained and other good and valuable consideration, the Parties agree as follows

[74] It follows that the Agreement, complete with its schedules, is a contract.

2. Canada did not settle the Payment on trust

[75] It will be recalled that the relevant parts of article 7 of the Agreement read as follows:

7.1 ... Canada agrees, in order that the Municipalities will be enabled to address, as they see fit impacts of the presence of long-term waste management Facilities within their communities, **to make the following payments:**

...

(b) A payment of Ten Million (\$10,000,000.00) Dollars to the Township of Hope;

...

7.2 For the purposes of Article 7 and Schedules 7, 8 and 9, each of **the payments** referred to above **may also be referred to as the "Fund" or "Funds"** and **the Parties agree that the Funds shall be dealt with in accordance with the additional terms and**

conditions as set out in Schedules 7, 8 and 9.
[Emphasis added.]

[76] On a plain reading of article 7.1(b) of the Agreement, Canada had a contractual obligation to make the Payment to Hope Township.

[77] When Canada made the Payment, it did so to satisfy its contractual obligation under article 7.1(b). Therefore, Canada could not have been acting as the settlor of a trust when it made the Payment. To settle property on trust, one must intend that the property be the subject of the trust. Here, there was no such intention because – to repeat – Canada’s intention in making the Payment was to discharge its contractual obligation under article 7.1(b) of the Agreement.

[78] Accordingly, the application judge made an extricable legal error in holding that Canada settled the Payment on trust. I return to this point below.

3. Article 7.1(b) did not create a trust

[79] Article 7.1(b) states that Canada agreed to make the Payment to enable Hope Township to address, “as [it] see[s] fit”, the impacts of the presence of the Waste facilities within its community. This provision is permissive in nature – Hope Township could use the Payment, as it saw fit, to address the impacts of the presence of Waste facilities in its community.

[80] As there are no words in article 7.1(b) that legally constrain Hope Township's use of the Payment, article 7.1(b) cannot have created a trust over the Payment.

4. Hope Township had to deal with the Payment in accordance with Schedule 8

[81] Under article 7.2 of the Agreement, the parties agreed that the Payment "shall be dealt with in accordance with" Schedule 8. Thus, the question becomes, did Schedule 8 create a trust of the Payment/the Hope Township Fund?

5. Schedule 8 did not create a trust

a. No non-charitable purpose trust

[82] The application judge found that Schedule 8 created a non-charitable purpose trust to which s. 16 of the *Perpetuities Act* applied. Consequently, he construed the purported trust as a power to appoint the capital and income in the Hope Township Fund within a period of 21 years. The application judge said that when that period expired on April 12, 2022, a further determination would have to be made as to who was entitled to any unexpended income or capital in the Hope Township Fund.

[83] In my view, the application judge erred in two ways in so finding: (i) he incorrectly applied the law governing non-charitable purpose trusts; and (ii) the finding is contrary to the parties' express intentions in the Agreement.

i. an incorrect application of the law

[84] If Schedule 8 creates a trust, it cannot be a non-charitable purpose trust because people would be the direct beneficiaries.

[85] In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 640-641, a majority of the Supreme Court of Canada recognized that non-charitable purpose trusts are a "rare species" in which funds are placed in trust not for persons but to see that a particular purpose is fulfilled. Under a non-charitable purpose trust, "people may benefit **but only indirectly**". [Emphasis added.]

[86] In *Air Products*, the majority applied this principle. In so doing, it rejected the submission that pension trusts are non-charitable purpose trusts because people are the direct beneficiaries of pension trusts.

[87] For the same reason, if Schedule 8 creates a trust, it cannot be a non-charitable purpose trust because people – the ratepayers, from time to time, in the former Hope Township – would be the direct beneficiaries. Paragraph 1 of Schedule 8, in its original form, expressly states that: the Payment "shall be held in trust for the exclusive benefit of the ratepayers from time to time of the area that comprises the geographic area of Hope Township as of the date of October

6, 2000”. And paras. 3 and 4 of Schedule 8 spell out the benefit the Ward 2 ratepayers would receive. Subject to certain limitations, the income earned on the Hope Township Fund was to be used to “defray lower tier municipal taxes or levies” that would otherwise be payable by such ratepayers.

[88] Accordingly, Schedule 8 did not create a non-charitable purpose trust because, if it created a trust, people were the direct beneficiaries.

ii. contrary to the parties’ intentions

[89] Furthermore, the application judge’s finding is contrary to the parties’ intention that the principal sum of \$10 million (i.e. the Payment) would be held intact so that it could be used indefinitely to benefit the Ward 2 ratepayers where the Waste was stored. Both paras. 3 and 4 of Schedule 8 clearly express the parties’ intention that the Payment was to be held intact indefinitely. Paragraph 3 provides that the “opening capital” (i.e. the \$10 million initial Payment) “shall not be encroached upon”. And, para. 4 provides that payments out of the Hope Township Fund “shall not” reduce the value of the fund below \$10 million.

[90] By construing Schedule 8 as a power of appointment under s. 16 of the *Perpetuities Act*, the application judge expressly empowered the Municipality of Port Hope to encroach on capital, in direct conflict with that intention.² Indeed, given the application judge’s view that a further determination would be required

² I offer no comment on the possible applicability or effect of the latter part of s. 16(1), as that matter was not squarely before this court.

at the end of the 21-year period to decide who was entitled to any unexpended money in the Hope Township Fund, his ruling created a very real incentive for the Municipality of Port Hope to spend the whole of the Hope Township Fund prior to the expiration of that period, contrary to the parties' intention that the Payment was to be held indefinitely.

[91] For these reasons, neither the Payment nor the Hope Township Fund is the subject matter of a non-charitable purpose trust.

b. No express trust for persons

[92] The application judge found that, in making the Payment, Canada was settling that money on trust. As I have explained, that is a legal error because, in making the Payment to Hope Township, Canada was fulfilling its contractual obligation under article 7.1(b) of the Agreement. Creation of an express trust requires an intention to create a trust. Canada's intention in making the Payment was to discharge its contractual obligation. Therefore, Canada's intention was not to settle the Payment on trust.

[93] As Canada did not settle the Payment on trust, if Schedule 8 had the effect of creating a trust, Hope Township – the recipient of the Payment and, therefore, its owner – had to have been the settlor.

[94] I turn then to consider whether, through Schedule 8, Hope Township created an express trust for persons.

[95] To find that an express trust for persons has been created, there must be certainty of intention, certainty of subject matter, and certainty of objects. Before considering each of the certainties, I pause to observe that the three certainties are “reflexive”. This means that although we consider the certainties one at a time, consideration of the certainty of subject matter and certainty of objects may inform (reflect back on) the matter of certainty of intention.

i. no certainty of intention

[96] It will be recalled that para. 1 of Schedule 8 originally read as follows:

- 1. Canada will pay to the trustee** (“Trustee”) appointed by Hope Township Council, a grant in the amount of **Ten Million (\$10,000,000.00) Dollars** (hereinafter referred to as the “Opening Capital” or the “Fund”) **which, subject to the following provisions, shall be held in trust for the exclusive benefit of the ratepayers from time to time of the area that comprises the geographic area of Hope Township** as of the date of October 6, 2000. [Emphasis added.]

[97] Do these words evince an intention, on the part of Hope Township, to create an express trust of the Payment for the benefit of its ratepayers from time to time (the “Ratepayers”)? Despite the use of the word “trust” and Canada’s obligation to make the Payment to the “trustee”, I conclude that they do not.

[98] Certainty of intention can be found to exist where a person who owns property transfers it to another (the trustee) with the intention that the trustee hold and manage the property for the exclusive benefit of others.

[99] Under article 7.2 of the Agreement, the parties committed to dealing with the Payment in accordance with Schedule 8. Paragraph 1 of Schedule 8 stipulates that Canada will pay to the trustee appointed by Hope Township the amount of \$10 million. This is tantamount to Hope Township directing Canada to make the Payment to a trustee, rather than to it, and amounts to Hope Township transferring property to Royal Trust. (As Royal Trust had not agreed to act as a trustee, when it received the Payment it did not do so in the capacity of a trustee, a point I will return to below.)

[100] Thus, the question becomes, does para. 1 of Schedule 8 show that Hope Township intended to divest itself of beneficial ownership of the Payment in favour of the Ratepayers?

[101] In my view, it does not. I say this for two reasons.

[102] First, at the time that the Agreement (including Schedule 8) was executed, the parties did not know whether the requisite regulatory approvals to build the Waste facilities would be granted. Hope Township knew that if the requisite approval to construct its Waste facility was not granted, it would be obliged to repay the Payment to Canada. That obligation is set out in para. 8 of Schedule 8.

[103] Accordingly, at the time that the Agreement was executed, Hope Township could not have intended to have given away beneficial entitlement to

the Payment to the Ratepayers because it knew it might later use the Payment to fulfill its obligation under para. 8 of Schedule 8. If a trust of the Payment were created, Hope Township could not have lawfully used it to fulfill its obligations under paragraph 8 of Schedule 8 because that would have been a benefit to Hope Township and not a direct benefit to the Ratepayers. In short, such a use of the Payment would have been a breach of trust. Therefore, Hope Township did not intend to create a trust over the Payment.

[104] The Applicant argues that the use of the terms “trust” and “trustee” in Schedule 8 are probative of the intention to create a trust. I agree – but they are not determinative. The intention to create a trust cannot be found given that elsewhere in Schedule 8 it is clear that Hope Township would use the Payment to fulfill its obligation to Canada if no CNSC licence were granted.

[105] The fact that para. 1 of Schedule 8 directed Canada to make the Payment to a trustee appointed by Hope Township is also not determinative of whether Hope Township intended to create an express trust in favour of its ratepayers. That direction is equally consistent with a desire on the part of Hope Township to have the Payment held and managed by a professional third party.

[106] The second reason I have concluded that the certainty of intention requirement is not met flows from the inclusion of article 1.12 in the Agreement. Article 1.12, it will be recalled, contains a very broad power of amendment.

Under its terms, the provisions of the Agreement can be amended, varied or waived. There are no limitations on the exercise of the amendment power in article 1.12. However, to be effective, an amendment must be made in writing and signed by each of the parties.

[107] The respondent suggests that the amendment power may not apply to Schedule 8. I disagree.

[108] Article 1.12 expressly provides that the provisions of “the Agreement” can be amended, varied or waived. The Agreement’s interpretation provision defines “Agreement” to include the schedules thereto. Therefore, the amendment power governs all of the Agreement, including Schedule 8. Accordingly, article 1.12 empowers the parties to amend, vary or waive the terms of Schedule 8.

[109] Under article 1.12 of the Agreement, an amendment requires the parties’ consent, in that each party must sign a proposed amendment for it to be effective. There is no requirement for the Ratepayers’ consent. The fact that the parties could vary the Agreement, including Schedule 8, without the consent of the Ratepayers, is a further indication that there was no intention to create an express trust for the Ratepayers: see Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at pp. 73-74.

[110] In my view, the application judge made an extricable legal error in failing to consider a relevant factor – namely, the amendment provision in article 1.12 – when determining whether the Agreement revealed the requisite certainty of intention. Its inclusion, as I have explained, supports the conclusion that the certainty of intention requirement was not met.

ii. no certainty of subject matter

[111] Although I have determined that the certainty of intention requirement for an express trust for persons was not met, I will briefly address whether the certainty of subject matter and certainty of objects requirements were met. I do so because of the reflexive nature of the certainties.

[112] The certainty of subject matter requirement is met if the subject matter of the trust is ascertained or ascertainable. The application judge found that there was “no doubt” that the subject matter of the purported trust was the Payment plus investment income earned on it.

[113] I respectfully disagree.

[114] Paragraph 1 of Schedule 8 says that the Payment “shall be held in trust for the exclusive benefit of the [R]atepayers from time to time”. However, that language runs afoul of the parties’ intentions in respect of the Payment. As I have explained, Hope Township could not have intended to settle the Payment on trust because it knew that it might have to use the Payment to discharge its

obligation to Canada under para. 8 of Schedule 8. If the Payment was settled on trust, Hope Township – as the settlor – could not have lawfully used money from Hope Township Fund in that way because such a payment would not have been to the benefit of the Ratepayers, the objects of the purported trust.

[115] Nor could Hope Township have conditionally settled the Payment on trust, with the condition being that it could remove the Payment from the trust if the requisite regulatory approvals were not granted. A conditional settling of property on trust fails to meet the certainty of intention requirement.

[116] Could the subject matter of the purported trust be just the investment income that was earned on the Payment and not the Payment? Perhaps – but that runs afoul of the wording of para. 1 of Schedule 8, which says that it is the \$10 million Payment that “shall be held in trust”.

[117] Thus, there is uncertainty as to the subject matter of the purported trust. Was it to be the Payment, investment income earned on the Payment, or both the Payment and investment income earned on it? We cannot know the answer to that question with any certainty.

[118] Bearing in mind that the certainties are reflexive, the lack of certainty as to the subject matter of the purported trust reinforces the conclusion that the certainty of intention requirement was not met.

iii. no certainty of objects

[119] The application judge found that the Ratepayers were the objects of the trust and ascertainable. However, he also found that the purported trust was not for individuals but, rather, was a trust for a non-charitable purpose. These conflicting findings alone show the absence of the requisite degree of certainty of objects.

[120] In any event, however, there is an insurmountable hurdle in respect of the certainty of objects requirement. As the Payment was to be held for an indefinite period of time, the class of objects – which was the Ratepayers in Ward 2 – was open and subject to constant change. Accordingly, the class consisted of an indeterminate number of people, with unidentifiable future members. Clearly, the class did not meet the certainty of objects requirement. Indeed, the application judge appeared to recognize this when he found that the purported trust was a non-charitable purpose trust. However, as I have already explained, the legal requirements for a non-charitable purpose trust were not met so the problem with the lack of certainty of objects remains.

[121] Again, because of the reflexive nature of the certainties, the lack of certainty of objects reflects back on the certainty of intention requirement and reinforces the conclusion that there was no intention to create a trust.

c. No charitable trust

[122] The application judge found that the direct provision of tax abatements for the Ratepayers, as the result of what was essentially a business deal between the Municipalities and Canada, was not a purpose that the law regards as charitable.

[123] I agree. For that reason, I would dismiss the cross-appeal.

d. Conclusion

[124] Having determined that the Agreement, including Schedule 8, is a contract and that neither created a trust, the parties' obligations under both documents are contractual in nature.

6. The Municipality of Port Hope did not breach its obligations in respect of the Hope Township Fund

[125] As we have seen, the application judge found that the Hope Township Fund was subject to a trust. The application judge thereafter reasoned as follows. When the Municipality of Port Hope took possession of the Hope Township Fund from Royal Trust, with full knowledge of the terms on which that fund had been settled, it became a *de facto* trustee of the Hope Township Fund. As a *de facto* trustee of that fund, the Municipality of Port Hope was bound by the terms of the trust and, therefore, it was obliged to use the Hope Township Fund for the exclusive benefit of the Ratepayers. The Municipality of Port Hope used some of the income from that fund for purposes other than to confer a direct

benefit on the Ratepayers. As a result, the application judge found that the Municipality of Port Hope had breached its obligations in respect of the Hope Township Fund.

[126] Respectfully, I disagree.

[127] As I have explained, the Hope Township Fund was not impressed with a trust. Therefore, when the Municipality of Port Hope took possession of it, it did not become a *de facto* trustee. And, it was under no trust obligations when it used income earned on the Hope Township Fund.

[128] Furthermore, to the extent that it can be argued that Schedule 8 imposed an obligation on the Municipality of Port Hope to create a trust of the Hope Township Fund, the Amendment is a full answer.

[129] While Schedule 8 of the Agreement originally provided that Canada was to make the Payment to a trustee, in fact, that never occurred. Despite the best efforts of Hope Township and, later, the Municipality of Port Hope, they were unable to finalize a trust agreement with Royal Trust (or other possible trustee). When Royal Trust received the Payment, it did not do so in the capacity of a trustee because it had not accepted that position.

[130] The Amendment was required because neither Hope Township nor the Municipality of Port Hope was able to conclude a trust agreement with a trustee for the investment and management of the Hope Township Fund.

[131] In that situation, based on professional advice, the Council for the Municipality of Port Hope determined that no such trust was necessary. It duly passed the Amendment.

[132] On the wording of Schedule 8, as amended, the Municipality of Port Hope was expressly authorized to use an investment counsellor to manage the Hope Township Fund in accordance with its investment policy. As a consequence, if there had been an obligation to create a trust, that obligation was extinguished.

[133] Nor did the Municipality breach its obligations in respect of the Hope Township Fund. For the reasons already given, there were no trust obligations attached to the Municipality of Port Hope's use of the Hope Township Fund. The parties' intention, as we have seen, was that the Municipality of Port Hope (as the successor to Hope Township) would hold the Payment indefinitely and use the income thereon to benefit the Ratepayers. The Municipality has done that. It has treated the Payment as a legacy asset and not encroached upon it. While the income earned on the Payment has not been used exclusively to defray the lower tier municipal taxes of the Ratepayers, the other public uses to which such funds have been put serve to indirectly benefit those Ratepayers. In the absence of a trust, there is no breach in so using the income.

CONCLUSION

[134] The Municipality of Port Hope raised a number of other issues on appeal. However, these other issues fall away as a result of my determination that the

Agreement did not impose a trust over the Hope Township Fund. Accordingly, I need not address such questions as whether the application judge erred in: finding that the Applicant had standing to enforce a trust valid only by virtue of s. 16 of the *Perpetuities Act*; failing to consider the unintended tax consequences, for both the Municipality of Port Hope and the residents of Ward 2 who had received the benefit of a tax abatement, of a determination that the Hope Township Fund was subject to a trust; and, not dismissing the Application on the basis of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B or the doctrine of laches.

[135] Having said that, I wish to expressly note that nothing in these reasons is to be taken as affirming the application judge's reasons and findings on those issues.

[136] Finally, in light of my determination of the appeal on its merits, it is unnecessary to determine whether Mr. Angus is a proper third-party beneficiary who could enforce the Agreement.

DISPOSITION

[137] Accordingly, I would allow the appeal, set aside the Judgment, and dismiss both the Application and the cross-appeal.

[138] If the parties are unable to agree on costs of the appeal and cross-appeal, I would permit them to file written submissions on those matters, to a

maximum of five pages, within fourteen days of the date of the release of these reasons.

Released: "E.E.G." July 04, 2017

"Eileen E. Gillese J.A."

"I agree. G. R. Strathy C.J.O."

"I agree. G. Pardu J.A."

APPENDIX A

INTRODUCTION

Since the 1930s, radium and uranium have been processed in the Town of Port Hope and a byproduct of this activity has been Low-level Radioactive Waste.

Over these many years, some of the Low-Level Radioactive Waste has been deposited in the Welcome Waste Management Facility in the Township of Hope, and in the Port Granby Waste Management Facility in Clarington, two waste management facilities licensed by the Canadian Nuclear Safety Commission as successor to the Atomic Energy Control Board.

In Addition, Low-Level Radioactive Waste has been known to have been deposited in various locations in the Town of Port Hope.

There is a need to address the cleanup and the better long-term safe management of this Low-Level Radioactive Waste.

Extensive efforts to relocate the Low-Level Radioactive Waste to a long-term management Facility outside of the Municipalities have not succeeded.

Clarington, the Town of Port Hope and the Township of Hope have now each proposed, subject to certain conditions, their own alternative solution to the cleanup and long-term management of the Low-Level Radioactive Waste located within their respective Municipalities and have submitted to Canada conceptual designs for new waste management facilities for each of the Municipalities.

The submissions were intended to present a potential solution to an ongoing problem and in doing so to strive to minimize the impacts on the communities and the residents, especially those in the vicinity of a proposed waste management Facility.

Canada accepts that the proposals can form the basis of a long-term solution, and, in consultation with Municipalities, and with the Municipalities' assistance and support, is prepared to proceed with the work necessary to submit the matter to the environmental assessment and regulatory review processes.

Upon the completion of the environmental assessment and the regulatory reviews of the proposals; the concurrence of the relevant Party or the Parties to continue; and, the acquisition of the sites for the facilities, Canada will proceed with the cleanup and construction work provided for in this Agreement.

Canada is prepared to mitigate the effects on the Municipalities and the property owners within the Municipalities of the work to be undertaken within each community.

In order to be able to proceed with the construction of the new facilities, Canada will have to conclude agreements to acquire the lands for the proposed sites.

Canada will also continue to support, either through the Low-Level Radioactive Waste Management Office or a successor organisation, an Environmental Monitoring Program, a Construction Monitoring Program and a Property Compliance Program.

The Parties have negotiated *Principles of Understanding* which the Parties initialled on October 6, 2000 and are now desirous of entering into this Agreement.

THEREFORE, in consideration of the covenants hereinafter contained and other good and valuable consideration, the Parties agree as follows...

APPENDIX B

SCHEDULE 7 **TOWN OF PORT HOPE FUND**

1. Subject to the following provisions, Port Hope agrees to hold Canada's payment of Ten Million (\$10,000,000.00) Dollars in trust for the exclusive benefit of the ratepayers of the area that comprises the geographic area of Port Hope as of the date of October 6, 2000.
2. The principal of the Fund may be invested by Port Hope in its discretion in any investment permitted by law. Any income earned from investing the Fund may be

expended by Port Hope from time to time in its discretion for any purpose permitted by law.

3. Port Hope shall pay Canada an amount equal to the opening capital of the Fund, Ten Million (\$10,000,000.00) Dollars, on the last to occur of both:

(1) the day on which a licence is refused by the Canadian Nuclear Safety Commission to construct the New Port Hope Waste Management Facility as contemplated by this Agreement; and,

(2) the first day after the Historic Low-Level Radioactive Waste and the Cameco Decommissioning Waste which are identified in Schedule 1 as wastes to be accommodated in the New Port Hope Waste Management Facility have been cleaned up in accordance with the intent of this Agreement and removed from the Town of Port Hope and Hope.

4. If a licence to construct the New Port Hope Waste Management Facility is granted by the Canadian Nuclear Safety Commission, on the date of the issuance of the licence Port Hope's obligations in favour of Canada regarding the investment and use of the fund shall terminate.

APPENDIX C

SCHEDULE 8
TOWNSHIP OF HOPE FUND

1. Canada will pay to the trustee ("Trustee") appointed by Hope Township Council, a grant in the amount of Ten Million (\$10,000,000.00) Dollars (hereinafter referred to as the "Opening Capital" or the "Fund") which, subject to the following provisions, shall be held in trust for the exclusive benefit of the ratepayers from time to time of the area that comprises the geographic area of Hope Township as of the date of October 6, 2000.

2. The principal of the Fund shall be invested by the Trustee in any investment permitted by law that the Trustee in its discretion considers likely will produce an increase in the net value of the Fund comprising a blend of capital appreciation and income of at least ten (10%) per cent in each calendar year ("Growth").

3. After first deducting and appropriating to the Trustee's use from the income earned from the investment of the Fund the amount required to indemnify the Trustee against the Trustee's reasonable costs incurred in administering and investing the Fund, the Trustee shall apply an amount equal to up eight (8%) per cent of the Fund in the previous calendar year to defray the lower tier municipal taxes or levies which otherwise would be payable by the ratepayers of aforesaid

geographic area of Hope Township provided that the opening capital of the Fund shall not be encroached upon by the Trustee.

4. If any portion of the growth in the Fund in any calendar year is not required to be expended to discharge the aforesaid lower tier municipal taxes or levies, the portion shall be invested as aforesaid, and the other provisions of this Schedule shall apply with all necessary changes being considered to have been made in order to give effect to the intent of sections 2 and 3 above. Provided that the Trustee shall not pay out any amount to defray lower tier municipal taxes or levies that will reduce the net value of the Fund below the amount of Ten Million (\$10,000,000.00) Dollars.

5. The Trustee appointed by Hope Township Council to administer the Fund in accordance with the above sections, shall have at least fifty (50) times the amount of the Fund under administration during the period in which he will act as Trustee of the Fund.

6. Hope Township Council from time to time may terminate the appointment of the Trustee on terms considered to be appropriate by the Council in its discretion and thereupon shall appoint another Trustee who is qualified as aforesaid to act as Trustee of the Fund during the period of the appointment. The Trustee so appointed from time to time shall be deemed to be the Trustee for the purposes of this Agreement. Except in appointing and terminating the Trustee of the Fund

from time to time, Hope Township Council shall have no authority over the investment decisions made by the Trustee.

7. For greater clarity, “lower tier municipal taxes or levies” are the annual taxes or levies imposed by Hope Township or by its successor on ratepayers who own assessed property within the geographic area of Hope Township as it exists as of the date that the Township of Hope signed this Agreement. The term “lower tier municipal taxes or levies” does not include general county or upper tier taxes or levies, special county or upper tier taxes or levies, and education taxes or levies.

8. The Trustee shall pay Canada an amount equal to the opening capital of the Fund being Ten Million (\$10,000,000.00) Dollars on the last to occur of both:

(1) the day on which a licence is refused by the Canadian Nuclear Safety Commission to construct the New Hope Township Waste Management Facility as contemplated by this Agreement; and,

(2) the first day after the Cameco Waste – Welcome has been removed from the Township of Hope and the site of the Welcome Waste Management Facility has been cleaned up in accordance with the intent of this Agreement including, without limitation, Schedule 2.

9. If a licence to construct the New Hope Township Waste Management Facility is granted by the Canadian Nuclear Safety Commission, on the date of the

issuance of the licence the Trustee's obligation in favour of Canada regarding the use and investment of the Fund shall terminate.

APPENDIX D

SCHEDULE 9
CLARINGTON FUND

1. Subject to the following provisions, Clarington agrees to hold Canada's payment of Ten Million (\$10,000,000.00) Dollars, hereinafter referred to as the "Fund", in trust for the exclusive benefit of the ratepayers of the area that comprises the geographic area of Clarington as of the date of October 6, 2000, provided that if after the date of this Agreement, the geographic area of Clarington is reduced, the fund shall be held in trust for the exclusive benefit of the ratepayers of the remaining geographic area of Clarington.

2. The principal of the Fund may be invested by Clarington in its discretion in any investment permitted by law. Any income earned from investing the Fund may be expended by Clarington from time to time in its discretion for any purpose permitted by law.

3. Clarington shall pay Canada an amount equal to the opening capital of the Fund, Ten Million (\$10,000,000.00) Dollars, on the last to occur of both:

(1) the day on which a licence is refused by the Canadian Nuclear Safety Commission to construct the New Clarington Waste Management Facility as contemplated by this Agreement; and,

(2) the first day after the Cameco Waste – Port Granby has been removed from Clarington and the site of the Port Granby Waste Management Facility has been cleaned up in accordance with the intent of this Agreement including, without limitation, Schedule 2.

4. If a licence to construct the New Port Granby Waste Management Facility is granted by the Canadian Nuclear Safety Commission, on the date of the issuance of the licence Clarington's obligations in favour of Canada regarding the investment and use of the fund shall terminate.