

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF COMSTOCK CANADA LTD., CCL REALTY INC. AND CCL EQUITIES INC.

Applicants

**MOTION RECORD
(Returnable on December 9, 2013)
(Re Sale Approval Motion)**

December 6, 2013

COX & PALMER
Suite 1500, 1 Germain Street
PO Box 1324
Saint John, New Brunswick
E2L 4H8

**Peter T. Zed, Q.C.
Patrick J.O. Dunn**
Tel: (506) 633-8900
Fax: (506) 632-8809

Solicitors for Potash Corporation of
Saskatchewan Inc.

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Lesley A. Mercer LSUC#: 54491E
Tel: (416) 869-6859
Fax: (416) 947-0866

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Court File No. CV-13-10181-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF COMSTOCK CANADA LTD., CCL
EQUITIES INC., AND CCL REALTY INC.

A F F I D A V I T

I, STEWART BROWN, of the Town of Sussex in the County of Kings and Province of New Brunswick, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the General Manager of the New Brunswick division of Potash Corporation of Saskatchewan Inc. ("PCS"), and as such have personal knowledge of the matters deposed to herein except where otherwise stated and where so stated verily believe the same to be true. I am authorized to make this affidavit on behalf of PCS.
2. In 2008, PCS embarked on a potash mine expansion in Penobsquis, New Brunswick. The expansion included the construction of a potash compaction plant which compacts potash into pellets for market and consists of a 250-foot long by 135-foot wide by 143-foot high building and the equipment within the building to process and compact potash (the "Project").
3. Comstock Canada Ltd. ("Comstock") was engaged on August 12, 2009 by PCS as the contractor for the Mechanical/Piping/HVAC/Electrical and Instrumentation portions of the Project. The Contract for the Project was between PCS and Comstock (the "Contract") and identified AMEC Americas Ltd. ("AMEC") as the Engineer and Construction Manager.
4. The Contract required Comstock to complete all its work on the Project by May 30, 2010, which it did not do. On July 21, 2010, PCS terminated the Contract due to the failure of

Comstock to complete its work and its failure to remedy several acts of default that it had been given notice of. Attached hereto and marked as **Exhibits “A” and “B”** are copies of the Notice of Default dated June 30, 2010 and Notice of Termination dated July 21, 2010, respectively.

5. As a result of Comstock’s failure to complete its work and to remedy several acts of default that it had been given notice of, PCS incurred incremental costs associated with retaining a new contractor, Lockerbie & Hole Eastern Inc., to finish Comstock’s work on the Project.
6. On August 3, 2010, Comstock commenced an action in New Brunswick against PCS and AMEC (the “**New Brunswick Action**”). Comstock claims damages against each of PCS and AMEC in the amount of \$42,964,072.00, plus punitive and/or aggravated and exemplary damages of \$5 million, interest and taxes, and an additional \$9,961,120.14 against PCS for work allegedly performed prior to termination and statutory holdback, for a total claim of approximately \$58 million against PCS.
7. Comstock’s Notice of Action with Amended Statement of Claim Attached (“**Amended Claim**”) dated October 15, 2010 is eighty-three (83) pages in length. Paragraph 24 of the Amended Claim alone is thirty-five (35) pages in length. Attached hereto and marked as **Exhibit “C”** is a copy of Comstock’s Amended Claim.
8. The allegations made by Comstock in its lengthy Amended Claim can be broadly summarized as alleging PCS breached the Contract and/or alleging negligence and/or misfeasance by PCS or AMEC: (1) during the RFP process/pre-contractual negotiations, or (2) during the administration of the Contract.
9. Attached hereto and marked as **Exhibit “D”** is a copy of PCS’s Statement of Defence and Counterclaim dated November 8, 2010.
10. Attached hereto and marked as **Exhibit “E”** is a copy of Comstock’s Reply and Defence to Counterclaim dated January 10, 2012.

11. Comstock commenced a separate action parallel to the New Brunswick Action to enforce its mechanics' lien against PCS (the "Lien Action"). Attached hereto and marked as **Exhibit "F"** is a copy of Comstock's Notice of Action with Statement of Claim Attached in the Lien Action dated November 9, 2010, in which Comstock claims \$47,714,977.00 plus interest and costs against PCS.
12. Attached hereto and marked as **Exhibit "G"** is the Statement of Defence of PCS in the Lien Action dated November 30, 2010.
13. The outcome of the New Brunswick Action and the parallel Lien Action rests on the application and interpretation of the Contract. PCS's defence is that it complied with its obligations under the Contract, that it has not breached the Contract, and that the Contract contains terms and conditions that specifically address or negate all the claims raised in Comstock's Amended Claim.
14. In addition to denying all of Comstock's claims as set out in the Amended Claim, PCS has counterclaimed against Comstock for, *inter alia*, damages representing the incremental costs of retaining a new contractor to finish the Project, and damages representing the costs to rectify deficiencies in Comstock's work.
15. I am informed by counsel for PCS and believe that, while the quantification of the Counterclaim of PCS is subject to adjustment based on any further information that may emerge at examinations for discovery and in answers to undertakings, it is currently estimated to exceed \$20 million. The final cost of the completion work contract with Lockerbie & Hole Eastern Inc. was \$34,655,798.30 (exclusive of HST), of which \$7,620,038.75 represented work outside the scope of Comstock's Contract. PCS therefore incurred \$27,035,759.55 to complete Comstock's scope of work on the compaction plant, which amount includes \$1,565,795.29 for the costs to rectify deficiencies in Comstock's work.
16. I am informed by counsel for PCS and believe that the status of the New Brunswick Action is as follows: The parties have now exchanged documents electronically, which number 143,747 documents produced by the parties after reviewing and sorting several

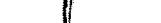
hundred thousand additional documents. The Affidavit of Documents produced by AMEC is 2,940 pages in length and the Affidavit of Documents produced by Comstock is 5,658 pages. PCS has produced an Affidavit of Documents of 2,740 pages in length and a Supplementary Affidavit of Documents of 130 pages in length.

17. The parties have undergone thirty-six (36) days of examination for discovery and continue to incur significant costs and expense.
18. I am informed by PCS's counsel and believe that counsel for Comstock has indicated that further discovery will be required, that it is Comstock's intention to file a series of motions based on the discovery to date and then to schedule even further discovery.
19. Since the New Brunswick Action was commenced in August 2010, PCS has to date incurred \$1,883,120.83 in legal fees and disbursements, including experts retained for the purposes of defending the litigation, as a result of its dispute with Comstock.
20. Pursuant to the decision of the Hon. Justice William Grant of the Court of Queen's Bench of New Brunswick dated May 10, 2011, a copy of which is attached hereto as **Exhibit "H"**, PCS has not been furnished with security for costs by Comstock.
21. In both the New Brunswick Action and the Lien Action, PCS has requested in its Statements of Defence that Comstock's claims be dismissed with costs.
22. I have reviewed the draft Approval and Vesting Order, a copy of which is attached hereto as **Exhibit "I"**, which is included in the Motion Record of the Comstock Group Returnable December 9, 2013. The draft Approval and Vesting Order refers to Litigation Claims of Comstock that are included among the Assets to be sold to HB Construction Company Ltd.
23. The New Brunswick Action is listed as one of the Litigation Claims to be assigned to the Purchaser in Schedule 6 to the Agreement of Purchase and Sale between the Comstock Group and HB Construction Company Ltd, a copy of which is attached hereto as **Exhibit "J"**.

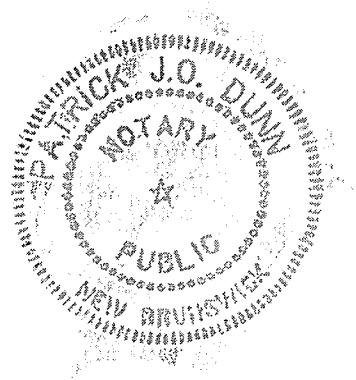
24. The draft Approval and Vesting Order, as currently proposed, will prejudice PCS in its defence of the New Brunswick Action in that, if successful, PCS will be precluded by paragraph 11 of the draft Approval and Vesting Order from recovering the significant costs incurred to date as set out in paragraph 19 above. In addition, the draft Approval and Vesting Order makes no provision to enable PCS to set off the amount of its Counterclaim against any amounts found to be owing to the Plaintiff in the New Brunswick Action.
25. I make this affidavit in support of a request by PCS to vary the terms of the draft Approval and Vesting Order as it relates to the Litigation Claims to ensure that PCS is not precluded from fully defending the New Brunswick Action and the Lien Action, including by way of set-off, and that PCS will be permitted to obtain an award of costs in accordance with the New Brunswick *Rules of Court* if successful in its defence.

SWORN TO BEFORE ME at Penobsquis)
in the County of Kings and Province of)
New Brunswick this 5th day of)
December, 2013.)

A Notary Public in and for the Province of
New Brunswick



STEWART BROWN



THIS IS EXHIBIT "A"

TO THE AFFIDAVIT OF STEWART BROWN

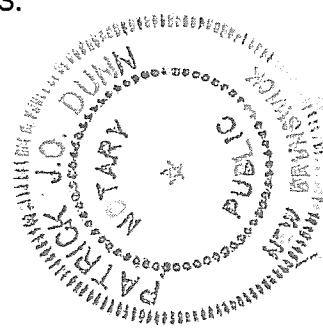
SWORN TO BEFORE ME AT PENOBSQUIS,

IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK

THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick





Potash Corporation of Saskatchewan
PCS Picadilly Project
AMEC Project No.: 156930



June 30, 2010

File No. 8.6.1 E156930-Ltr022

Comstock Canada Ltd.
3455 Landmark Road
Burlington, ON, L7M 1T4

Attention: Mr. Pete Semmens
Executive Vice President – Corporate

Subject: Notice of Default of Contractual Obligations
Potash Corporation of Saskatchewan (PCS) – Comstock Canada Ltd
(Comstock) contract number 156930-CP15 for work at the PCS Picadilly Project
in New Brunswick, Canada.

Dear Sir:

This is notice of Comstock Canada Ltd.'s (the "Contractor") default of the contractual obligations set out in the above mentioned contract, and is instruction to correct the default in the ten (10) Working Days immediately following the receipt of this notice.

Specifically, with reference to the General Conditions of the Contract, GC 48.5.1, in the opinion of the Engineer;

1. Contractor has failed, or is failing, to prosecute the Work diligently.
2. Contractor has failed, or is failing, to provide sufficient skilled and qualified labour and supervision
3. Contractor has failed, or is failing, to provide sufficient Plant or Materials or services.
4. Contractor has failed, or is failing, to complete the Work by the completion dates in the Construction Schedule.
5. Contractor is performing the Work in an inefficient manner.
6. Contractor has failed to comply with the instructions of the Engineer with respect to the contractually required format and detail of the Construction Schedule [GC 19.3.1] and the contents of notice of claims [GC 47.6.1].



Potash Corporation of Saskatchewan
PCS Picadilly Project
AMEC Project No.: 156930



Comstock Canada Ltd. is hereby instructed to correct the defaults by July 15, 2010 failing which PCS may, without prejudice to any other right of remedy PCS may have, suspend or terminate Comstock's right to continue with the Work or terminate the Contract.

Yours truly,

A handwritten signature in black ink, appearing to read 'Tony Vecchio'.

Tony Vecchio
Project Manager, AMEC Americas Limited

cc: Les Frehlich, Project Coordinator
PCS Potash – New Brunswick Division

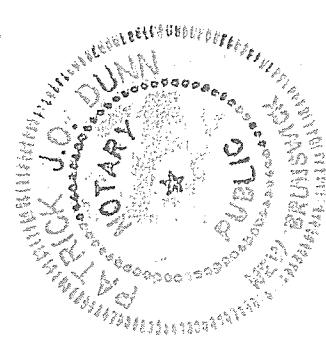
THIS IS EXHIBIT "B"

TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,

IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK

THIS 5th DAY OF DECEMBER, 2013.

Patrick Dunn
A Notary Public in and for the
Province of New Brunswick





Clark D. Bailey
Vice President Technical Services
cdbailey@potashcorp.com

July 21, 2010

Comstock Canada Ltd.
3455 Landmark Road
Burlington, ON
L7M 1T4

Sent via e-mail
Original to follow via courier

Attention: Mr. Pete Semmens
Executive Vice President – Corporate

Subject: Notice of Termination
Potash Corporation of Saskatchewan (PCS) – Comstock Canada Ltd.
(Comstock) contract number 156930-CP15 for work at the PCS
Picadilly Project in New Brunswick, Canada

Dear Sir:

We are writing further to AMEC'S letter of June 30, 2010 (No. 8.6.1 E156930-Ltr022) providing notice of Comstock's defaults of its contractual obligations. In consultation with the Engineer, we have determined that Comstock has failed to correct the defaults in the 10 Working Days following the receipt of that correspondence.

Despite PCS and AMEC's efforts to work with you, particularly over the past three months, you have failed to carry out the work in accordance with the provisions of the contract. Due to a number of such contract breaches, which continue to occur, we do not believe you have the ability or intention to complete your obligations under the contract in a timely and cost effective manner. The fact that the scheduled completion date has passed means that PCS will suffer significant losses which can only be mitigated by bringing the job to completion without further delay. In our view this can only be accomplished by terminating our contract and hiring a third party to complete the work remaining.

Accordingly, PCS is terminating the Contract with Comstock in accordance with section 46.5.2 of the contract effective immediately.

This termination is without prejudice to any other right or remedy PCS may have.

555520070

In order to effect an orderly transition, we ask that you please direct all future communications to the Mark Neis of AMEC. This would include requests for access to the site and inquiries regarding the return of equipment:

Mark.ncis@amec.com

Office: 1-506-433-1746
Cell: 1-403-618-1950

Yours truly,


Clark D. Bailey
Sr. V.P. Projects and Technical Services

CDB/nm

cc: Mark Fracchia, General Manager Potash Corp New Brunswick
Garth Moore, President, PCS Potash
Tony Vecchio, AMEC Project Manager

THIS IS EXHIBIT "C"

TO THE AFFIDAVIT OF STEWART BROWN

SWORN TO BEFORE ME AT PENOBSQUIS,

IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK

THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



Cause Number: *S/C / 404 / 10*

IN THE COURT OF QUEEN'S BENCH OF
NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

DIVISION TRIAL

CIRCONSCRIPTION JUDICIAIRE DE

ENTRE:

BETWEEN:

COMSTOCK CANADA LTD.,

Plaintiff - et -

- and -

Demandeur

**POTASH CORPORATION OF
SASKATCHEWAN INC., AND AMEC
AMERICAS LIMITED,**

Defendant

Defendeur

**NOTICE OF ACTION WITH
AMENDED
STATEMENT OF CLAIM
ATTACHED
(FORM 16A)**

**AVIS DE POURSUITE
ACCOMPAGNE
D'UN EXPOSE DE LA DEMAND
(Formule 16A)**

DESTINATAIRE:

TO: THE DEFENDANTS
POTASH CORPORATION OF
SASKATCHEWAN INC.
PCS Tower 500 - 122 First Ave.S.
Saskatoon Saskatchewan S7K 7G3
Attn: Clark D Bailey, P. Eng.
Vice President Technical Services

PAR LE DEPOT DU PRESENT AVIS
DE POURSUITE ACCOMPAGNE D'UN
EXPOSE DE LA DEMANDE, UNE
POURSUITE JUDICIAIRE A ETE
ENGAGEE CONTRE VOUS.

-AND-

AMEC AMERICAS LIMITED -
AMEC AMÉRIQUES LIMITÉE
#1 2741 Route #1 14
Penobsquis, NB E4E 5L2
Attn: Tony Vecchio

Si vous desirez presenter une defense dans
cette instance, vous-meme ou un avocat
du Nouveau-Brunswick charge de vous
re presenter devrez rediger un expose de
votre defense en la forme prescrite par les
Regles de procedure, le signifier au
demandeur ou a son avocat a l'adresse
indiquee ci-dessous et le deposer au greffe
de cette Cour avec une preuve de sa
signification et un droit de depot de

LEGAL PROCEEDINGS HAVE BEEN
COMMENCED AGAINST YOU BY

FILING THIS NOTICE OF ACTION WITH STATEMENT OF CLAIM ATTACHED.

If you wish to defend these proceedings, you or a New Brunswick lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the Plaintiff or Plaintiff's lawyer at the address shown below and, with proof of such service, file it in this Court Office, together with the filing fee of \$50.00;

(a) If you are served in New Brunswick, **WITHIN 20 DAYS** after service on you of this Notice of Action With Statement of Claim Attached, or

(b) If you are served elsewhere in Canada or in the United States of America, **WITHIN 40 DAYS** after such service, or

(c) If you are served anywhere else, **WITHIN 60 DAYS** after such service.

If you fail to do so, you may be deemed to have admitted any claim against you, and without further notice to you, **JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.**

You are advised that:

(a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;

(b) the Plaintiff, Comstock Canada Limited, intends to proceed in the English language; and

(c) your Statement of Defence must indicate the language in which you intend to proceed.

THIS NOTICE is signed and sealed for

\$50.00;

(a) **DANS LES 20 JOURS** de la signification qui vous sera faite du present avis de pour-suite accompagne

d'un expose de la demande, si elle vous est faite au Nouveau-Brunswick ou

(b) **DANS LES 40 JOURS** de la signification, si elle vous est faite dans une autre region du Canada ou dans les Etats-Unis d'Amérique ou

(c) **DANS LES 60 JOURS** de la signification, si elle vous est faite ailleurs.

Si vous omettez de le faire, vous pourrez etre repute avoir admis toute demande formulee contre vous et, sans autre avis, **JUDGEMENT POURRA ETRE RENDU CONTRE VOUS EN VOTRE ABSENCE.**

Sachez que:

(a) vous avez le droit dans la presente instance, d'emettre des documents et de presenter votre preuve en francais, en anglais ou dans les deux langues;

(b) le demandeur a l'intention d'utiliser la langue; et

(c) l'expose de votre defense doit indiquer la langue que vous avez l'intention d'utiliser.

CET AVIS est signe et scelle au nom de la Cour du Banc de la Reine par _____, greffier de la Cour a _____, ce 2010.

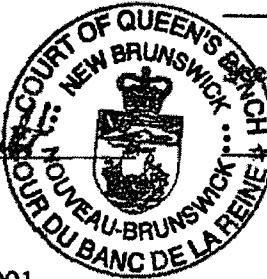
³
SIC/404/10

the Court of Queen's Bench by George S.
Theriault, Q.C., Clerk of the Court at Saint
John, New Brunswick, on the 19th day of
August, A.D. 2010.

October

_____ (greffier)

George S. Theriault, Q.C.
CLERK OF THE COURT
4th Floor
110 Charlotte St., PO Box 5001
Saint John, New Brunswick
E2L 4Y9



_____ (adresse du greffe)

George S. Theriault

AMENDED STATEMENT OF CLAIM

The Parties and Project

1. The Plaintiff Comstock Canada Ltd. (hereinafter "Comstock") is an extra-provincial body corporate carrying on business in New Brunswick. Comstock was incorporated under the laws of Ontario. Comstock carries on business predominantly in the fields of mechanical and electrical contracting throughout Canada, including New Brunswick. Comstock has been in business continuously for more than 100 years. Comstock has a registered office at 3455 Landmark Road, in the City of Burlington, Ontario.
2. The Defendant Potash Corporation of Saskatchewan Inc. (hereinafter "PotashCorp") is an extra-provincial body corporate carrying on business in New Brunswick. PotashCorp was incorporated pursuant to the laws of Canada. PotashCorp has a registered office at 122 First Avenue S, Suite 500, in the City of Saskatoon and Province of Saskatchewan.
3. PotashCorp is the world's largest potash producer and the second and third largest producer of nitrogen and phosphate, three primary crop nutrients used to produce fertilizer. PotashCorp became a publicly held corporation in or around 1989 and shares currently trade on the New York and Toronto Stock Exchanges. PotashCorp is also the owner of a mine in Penobsquis, New Brunswick called the Piccadilly Potash Mine. The Piccadilly Potash Mine has been operating since July 1983. Subsequent exploration work outlined a favourable potash reserve and the initial shaft, mine and mill feasibility studies were completed in the first half of 2007. PotashCorp is currently expanding its Piccadilly Potash Mine to mine these newly found reserves (hereinafter "Piccadilly Potash Project").
4. The Defendant AMEC Americas Limited – AMEC Amériques Limitée (hereinafter "AMEC") is an extra-provincial body corporate carrying on business in New Brunswick. AMEC was incorporated pursuant to the *Canada Business Corporations Act* R.S., 1985, c. C-44. AMEC has a registered office at 2020 Winston Park Drive, Suite 700, in the City of Oakville, Ontario.

5. AMEC is the North American arm of UK-based engineering services company AMEC plc. AMEC provides engineering, procurement services, project management, and consulting services to public and private-sector clients in the oil and gas, mining, nuclear, and industrial markets. Operations include environmental, geotechnical, and materials consulting and testing services.
6. Service *ex juris* of this amended statement of claim on PotashCorp is permitted pursuant to Rule 19 of the New Brunswick *Rules of Court*, N.B. Reg. 82-73 as it relates to:
 - (a) a contract that was made in New Brunswick,
 - (b) a contract that was made by or through an agent trading or residing in New Brunswick (namely the Defendant AMEC) on behalf of a principal (namely PotashCorp) trading or residing outside New Brunswick,
 - (c) a contract that provides that it is to be governed by or interpreted in accordance with the laws of New Brunswick,
 - (d) a contract in which the parties have agreed that the courts of New Brunswick shall have jurisdiction to entertain any action in respect of the contract,
 - (e) a claim in respect of a tort committed in New Brunswick,
 - (f) a claim against a person outside New Brunswick who is a necessary or proper party to a proceeding properly brought against a person in New Brunswick, and/or
 - (g) a claim involving a person ordinarily resident in New Brunswick, or carrying on business there.
7. At time of pleading, one of AMEC's own websites state that PotashCorp selected AMEC as its "partner" for the expansion program at the Piccadilly Potash Project. At the Piccadilly Potash Project, AMEC has provided and continues to provide engineering, procurement and construction management (hereinafter "EPCM") services for the surface facilities including a new concentrator, salt storage/load-out facility, coarse ore handling/storage system, a 30-km in-ground brine disposal pipeline and ancillary works.

AMEC's services also include EPCM services for upgrades at the Penobsquis mill, including a new compaction plant, brine storage ponds, new substation and existing concentrator modifications. The compaction plant project is the subject of this claim.

8. AMEC's resources in respect of the Project included using its Vancouver offices for mill design, its Trail BC office for procurement, and its Oakville and Saskatoon offices for project management and support as well as local personnel located in and around Penobsquis, New Brunswick.
9. The project in question is part of the Piccadilly Potash Project and is referred to in certain documents as AMEC / PCS-Contract 156930 CP15-Compaction Plant Mechanical / Piping / HVAC / Electrical and Instrumentation (hereinafter the "Project"). The contract in question is a written document described as "Contract # CP15" transmitted to Comstock on or about January 11, 2010 (hereinafter "Contract").
10. Comstock states that AMEC was at all material times and remains the authorized, implied and/or express agent of PotashCorp in respect of the Project.

Pre-Tender and Tender Submission

11. Comstock was invited to tender the Mechanical and Electrical installation works for the Project in April 2009. The invitation to bid requested proposals on a Cost Reimbursable Plus Fee Basis (hereafter "Cost Plus"), meaning that the successful bidder for the Project would be compensated for its costs of construction in accordance with pre agreed rates, mark-ups and methods of calculation. Thus the bidders' focus in that Cost Plus arrangement was on unit prices and hourly rates and less on an overall Project price because the bid was premised on these items as opposed to a total lump sum. Risks associated with a cost plus arrangement are typically less than those with a lump sum contract because in a Cost Plus arrangement, the bidding parties are assured that their Actual Costs and associated mark-ups will be reimbursed in accordance with the pre agreed rates and terms, as they are not bound to the Estimated or Provisional units or quantities contained in the Tender.

12. Later, however, PotashCorp and/or AMEC changed the tendering philosophy and called for lump sum tenders, meaning now that the focus was one lump sum for the entire scope of work for the Project rather than compensation on a Cost Plus basis. That change was an implicit, explicit or in the alternative, implied representation from PotashCorp and/or AMEC to Comstock that:

- (a) the Project design was sufficiently complete and accurate and ready for construction so that the risks associated with submitting a lump sum bid were clear and definite;
- (b) after award, there were going to be no material or substantial changes to the specified scope of work to be performed going forward;
- (c) there was a defined scope of work and that defined scope of work could be priced to a lump sum price;
- (d) Comstock could rely on the documents supplied by AMEC and/or PotashCorp to define Comstock's scope of work, including the drawings (including drawings called "IFC" described below), specifications, addenda, clarifications, memos, notes, transmittals, emails, correspondence, all other written communications dealing with the tender and the Contract (hereafter the 'Project Documents') and the work associated with that scope could be planned, scheduled and built in an orderly fashion with a view to timing and costs;

12.1 Further, AMEC transmitted to Comstock a document titled "Clarification 0002" dated May 1, 2009, which served as notice of the conversion of the bid philosophy from Cost Plus to lump sum. As part of that "Clarification" AMEC stated that it would provide a revised RFCA (being a "Request for Contract Action") that would include Issued for Construction Drawings (hereafter "IFC Drawings") on which Comstock was to base its lump sum bid. IFC Drawings were key to Comstock's work as they largely represented the scope of its work.

13. Comstock complied with the request for lump sum pricing and finalized the original tender and post tender negotiated lump sum pricing on or about July 23, 2009.

14. A brief summary of major events in respect of the Comstock's tender submission include:

Date	Brief Description
March 09	<p>PotashCorp via its agent AMEC invited Comstock to submit a <u>Cost Plus</u> bid for the work comprising the Project.</p> <p>The initial completion date for the Project was represented to be May 14, 2010.</p>
1-May-09	<p>AMEC advised Bidders via <u>Clarification 0002</u> that PotashCorp now required lump sum bids <u>thus</u> materially changing the original requirement and tender philosophy from <u>Cost Plus bids to lump sum bids</u>. <u>The lump sum bids were to be in respect of the scope of work titled "RCA 10" (RCA being "Request for Contract Action").</u></p>
3-Jul-09	<p>Comstock submitted a <u>Cost Plus</u> bid with alternative <u>lump sum</u> bid in the sum of <u>\$34,479,170</u> as a "target price".</p>
3-Jul-09 to 12-Aug-09	<p>Comstock and AMEC underwent a series of post tender negotiations, additions, and deletions to the proposed scope of work to be undertaken by Comstock. Certain of these additions, identified as <u>CP15 additional costing</u> and <u>"RCA10 – Post Tender Revisions</u>, included added scope estimated at \$637,000 and \$1,163,000 respectively <u>amongst other adjustments in price</u>.</p> <p>A negotiated and revised lump sum price was <u>arrived at of \$36,279,170</u>. <u>Article 2 of the Agreement forming part of the Contract referred to this figure as "an estimated not to exceed sum".</u></p>
12-Aug-09	<p>AMEC, on behalf of PotashCorp, issued a letter of intent to Comstock.</p>
14-Aug-09	<p>Comstock signed the letter of intent.</p>

15. Comstock's bid submission and subsequent negotiations consistently included qualifications and conditions in respect of its scope of work which formed part of the eventual Contract, namely:

- (a) that Comstock would have free and clear access for the installation of its work;
- (b) a full set of IFC Drawings, being those drawings showing the actual work to be performed by Comstock had to be received and processed by Comstock before Comstock's work would proceed;
- (c) Comstock would have full access and unrestricted use of two – one 10 tonne and one 25 tonne - overhead cranes that were being supplied and installed by AMEC and PotashCorp or others on their behalf and that both cranes would be operational from the commencement of Comstock's work in a safe, diligent and proper manner;
- (d) Comstock's price was based on the scope of work, described, provided and outlined in documents provided to Comstock by AMEC and PotashCorp up to August 12, 2009; and the specified milestone schedule dates as well as the "Contract Schedule";
- (e) Comstock's bid price was based on the Piping Line List (156930-P-EL- 001, Rev. A) and Piping Drawings 320-17-10200 through 320-17- 40010; a later negotiated bid price was premised on piping and valve lists marked as "Revision 0" and not "Revision A";
- (f) Comstock's negotiated and qualified pricing was competitive in that AMEC suggested to Comstock personnel that its price for post tender added scope identified as RCA 11 should not exceed the quoted \$1.8 million if Comstock desired to maintain an overall competitive price; and
- (g) Comstock's bid excluded costs associated with bonding, liquidated damages, other types of damages, further civil works, construction power, site services and Force Majeure items.

16. As noted above, PotashCorp and AMEC issued a letter of intent to Comstock dated August 12, 2009 which was signed by Comstock on August 14, 2009.

Project Documents

17. Through the Project Documents, Comstock contracted with PotashCorp for the construction of the Project.
18. On November 9, 2009, PotashCorp through its agent, AMEC, issued the Contract to Comstock.
19. In order to comply with AMEC's request that the Project be completed on a highly compressed schedule, Comstock committed substantial resources to ensure that it could deliver the necessary services for a fixed price on a fixed date.
20. PotashCorp and AMEC were aware that Comstock was entering into contractual relations in reliance upon their warranties and representations described herein, including those regarding the completeness and accuracy of the Project Documents including the design and representations as to the ability to complete Comstock's scope of work within the deadlines issued by AMEC and PotashCorp in the Project Documents. PotashCorp was further aware that any breach of its contractual obligations to Comstock would result in substantial damages and injury to Comstock's economic interests.
21. Comstock, in making its tender submission, relied upon the Project Documents and other representations and warranties made by the Defendants. In respect of the Project Documents,
 - (a) the express and/or implied terms of the Project Documents,
 - (b) further or in the alternative, the representations made by the Defendants at the time of Comstock's tender submission for the Project and prior to the letter of intent dated August 12, 2009.

- (c) further or in the alternative, the collateral warranties and conditions made by the Defendants as part of the Project Documents and in respect of other collateral warranties arising out of discussions, correspondence and other communications,
- (d) further or in the alternative, the representations made in the Project Documents and through discussions with the Defendants,

all served to induce Comstock into submitting its lump sum bid and entering into the Contract.

21.1 These express or implied terms, representations, conditions and/or collateral warranties included:

- (a) the price for the scope work to be performed by Comstock was \$36,279,170.35 (HST excluded);
- (b) time was material and of the essence of the Project and the Contract; GC 19.1 of the Contract stated or represented that time was material and of essence as did Art. 12 of the document titled "Instruction to Tenderer", both of which formed part of the Project Documents;
- (c) the design, engineering, plans and specifications outlining Comstock's scope of work and those portions of the Project Documents, including IFC drawings, that impacted Comstock's scope of work:
 - i. were complete and represented a fixed scope of work because, in part:
 - (1) AMEC's practice for drawings generally included preliminary / preconstruction drawings being identified as, for example, "Revision A" using alphabet references and once approved internally and submitted externally to Comstock as an IFC Drawing was referenced as an IFC Drawing and carried a numerical reference (such as "Revision 0" (zero) for example). Revisions after that were incrementally numbered and letter references were no longer used;

(2) although the lists of drawings in the Contract were not consistent, one such purported drawing list shows 72 drawings with 'alphabet' references thus indicating preconstruction or preliminary drawings and conversely shows 673 drawings with numbers referenced between zero and six thus referencing IFC Drawings. That represented that just over 90% of the drawings were IFC drawings according to AMEC's characterization and title blocks for those drawings;

(3) GC 4.4 of the Project Documents specified that a "hold" would be put on certain areas a Construction Drawing where, *inter alia*, a portion of the design was incomplete. "Holds" were identified on approximately 39 of 864 drawings provided to Comstock at time of tender and, in respect of those drawings, were limited to very discrete portions of each drawing where a "hold" was identified. As a result, the representation was that the Project Documents, to the extent they did not have "holds" represented a complete design;

(4) the Project Documents included IFC Drawings which were defined as a particular issue of a Construction Document representing that the Construction Document was "suitable for the purpose". In so doing, the use of IFC Drawings was an express term, implied term, collateral warranty or representation of Comstock's scope of work and thus did represent what was supposed to be a complete design;

ii. were not intended to evolve with the development and construction of the Project (i.e. 'design as you go') given, in part, that the Project Documents included IFC Drawings which were intended to be issued for the actual construction of Comstock's work and from which a lump sum price could be estimated and further from which Comstock could perform its work and thus not intended to materially or consistently evolve throughout the duration of the Project;

- iii. disclosed all known or planned impediments, including those relating to seismic supports for example given, in part, that the Project Documents included IFC Drawings which were to detail of Comstock's scope of work and thus should have accounted for all known or planned impediments including seismic supports and other interferences;
- iv. were constructible, meaning the design, plans and specifications were:
 - (1) capable of actual construction within:
 - a. the timelines and completion dates provided in the Project Documents;
 - b. the requirements of statutory codes, regulations and standards;
 - c. within the spaces provided without interference with other components, and
 - (2) designed in the most effective manner for construction, both as to time and as to cost given, in part, that the tender philosophy evolved from a Cost Plus tender to a lump sum tender;
- v. were compliant with all applicable codes and standards;
- vi. represented a final constructible design that did not require further material or substantial modifications, revisions, the issuance of revised drawings, redesigns, alterations, additions or deletions given, in part, that the Project Documents included IFC Drawings which were to be "suitable for the purpose", transmitted to Comstock as representing the actual work it had to perform and thus were represented to be a final constructible design;
- vii. represented a design that was fully coordinated in all aspects; for example, the electrical design was fully coordinated with the mechanical design

which was fully coordinated with the civil design so that all interferences between various components of each design had been accounted for, given, in part, that the Project Documents included IFC Drawings which were to be “suitable for the purpose” of detailing Comstock’s scope of work and thus were represented to be a fully coordinated design;

viii. were not in the form of, or based, on schematic drawings or P&ID (process and instrumentation drawings) (except for those few limited drawings that were expressly identified as P&ID drawings) that:

- (1) were not intended to be a final design for the Project;
- (2) merely showed the arrangement of process and utility equipment, without all components;

ix. were accurate in respect of dimensions and scale, locations, elevations and arrangements;

(d) if revisions in the Project Documents, including IFC Drawings, were needed, they would be made in a timely manner with respect to Comstock’s planned and scheduled performance of its work and with a view to minimizing impacts on Comstock;

(e) Comstock would have free and clear access for the installation of its work; Comstock’s bid submission included a part titled *Clarifications and Exceptions*, which was included in the Contract, or in the alternative incorporated by reference in the Contract via Comstock letter dated October 20, 2009, which was accepted by AMEC in AMEC’s November 9, 2009 written response. Those *Clarifications and Exceptions* included at item 8 “We [Comstock] require free and clear access for our installation”;

(f) Comstock’s work could commence on August 30, 2009 given, in part, that Article 2 of the Contract stated that Comstock “shall commence on Site on or before 30th day of August, 2009”;

(g) Comstock's work could be completed on or before May 14th, 2010 given, in part, that the package of tender documents provided to Comstock and forming part of the Project Documents included an express provision and/or representation that Comstock's work was to be and could be completed by May 14th, 2010 (notwithstanding that the said package referred to a different project (CP19) on the first page and the herein Project (CP15) on the second page and further that the Contract included a May 30th, 2010 completion date);

(h) Comstock would have full access and unrestricted use of two – one 10 tonne and one 25 tonne - overhead cranes that were being supplied and installed by AMEC and PotashCorp or others on their behalf. As noted above, Comstock's bid submission included a part titled *Clarifications and Exceptions*, which was included in the Contract, or in the alternative incorporated by reference in the Contract via Comstock letter dated October 20, 2009 which was accepted by AMEC in AMEC's November 9, 2009 written response. Those *Clarifications and Exceptions* stated that Comstock had assumed that it would be able to have full access and unrestricted use of the cranes;

(i) AMEC and PotashCorp would act in a professional manner and in regard to Comstock's rights and ability to perform its work in an efficient and effective manner in respect of costs and timeliness given that, in part, AMEC personnel and AMEC itself would be required to follow, *inter alia*, the New Brunswick *Engineering and Geoscience Professions Act* and its *By-Laws and Code of Ethics* that include, *inter alia*, as a keystone of professional conduct, a requirement that members discharge their duties with fairness and impartiality to all, to conduct themselves with equity, fairness, courtesy and good faith towards clients, colleagues and others and further, to avoid conflicts of interest;

(j) although AMEC was identified as the 'engineer' in the contract and was employed by PotashCorp via an EPCM contract, that AMEC even though employed by the PotashCorp, would act impartially when called on the make any opinion, decision, direction or determination in respect of Comstock given, in

part, AMEC's wide discretion in the Contract for making critical decisions and further, the New Brunswick Engineering and Geoscience Professions Act and its By-Laws and Code of Ethics described in the preceding paragraph;

- (k) AMEC would recuse itself from making decisions where the decision involved any action taken or not taken by AMEC given that such decision making would be in an obvious conflict of interest in having AMEC make a decision, direction or determination on an issue or item which was caused or contributed to by AMEC itself given, in part, the New Brunswick Engineering and Geoscience Professions Act and its By-Laws and Code of Ethics noted above which mandates avoiding conflicts on interest;
- (l) a completed set of IFC Drawings had to be received and processed by Comstock before Comstock's work would proceed. As set out above, Comstock's bid submission included a part titled Clarifications and Exceptions, which was included in the Contract, or in the alternative incorporated by reference in the Contract via Comstock letter dated October 20, 2009 which was accepted by AMEC in AMEC's November 9, 2009 written response. Those Clarifications and Exceptions stated at item 9 on page 5 of 6 that Comstock had to receive and process construction issue drawings, in other words IFC's, before Comstock's work could proceed;
- (m) Comstock's price was based on the scope of work described, provided and outlined by AMEC and PotashCorp as at July 3, 2009; in response to a July 9, 2009 letter from AMEC, Comstock replied on the very letter at item 11 that "lump sum price is based on the equipment list and drawings received as of July 3, 2009 which was accepted by AMEC;
- (n) Comstock's bid submission was based on the Piping Line List (156930-P-EL-001, Rev. A) and Piping Drawings 320-17-10200 through 320-17- 40010 (the later negotiated bid was premised on Revision "0" of these documents); in response to the same July 9, 2009 letter from AMEC, Comstock replied on the

very letter at item 13 that its lump sum tender price was based on this list and drawings:

- (o) changes to the work and requests for additional work, at AMEC's and/or PotashCorp's direction, would result in timely and equitable amendments to the Contract price and schedule for completion and Comstock would be compensated for those changes given, in part, the various provisions of the Contract and Project Documents (including the document titled "Instructions to Tenderer"), relating to changes and time being of the essence:
- (p) AMEC and PotashCorp would issue all necessary and proper IFC Drawings, revised drawings, schedules, revised schedules, master schedules, shop drawing reviews, vendor Drawings, responses and/or answers to Requests for Information (hereinafter "RFI's") from Comstock, site instructions, Change Orders, designs, specifications, plans and other such materials, in a prompt and timely fashion to permit Comstock to organize its work in an efficient and economical manner, meet the milestone and completion dates for its work and to retain, organize and manage appropriate sub-trades and suppliers given, in part, Art. 12 of the document titled "Instructions to Tenderer" and GC 19.1 of the Contract, both forming part of the Project Documents, stated that time was of the essence for the Contract:
- (q) AMEC and PotashCorp would provide Comstock with uninterrupted and reasonable access to the Project and work areas from the date of the commencement of work. As noted herein, Comstock's bid submission included a part titled Clarifications and Exceptions, which was included in the Contract, or in the alternative incorporated by reference in the Contract and which included at item 8 "We [Comstock] require free and clear access for our installation";
- (r) AMEC and PotashCorp would not impede Comstock's work and performance. Again, Comstock's bid submission included a part titled Clarifications and Exceptions, which was included in the Contract, or in the alternative incorporated

by reference in the Contract that included at item 8 "We [Comstock] require free and clear access for our installation";

- (s) AMEC and PotashCorp would provide competent project management, construction contract administration, design, coordination of works and supervisory services using personnel knowledgeable with all applicable construction management procedures and regulations, including providing additional information and instructions required for the reasonable performance of Comstock's work;
- (s.1) AMEC and PotashCorp would ensure that any changes to or late delivery of the Contract and/or Project Documents, IFC Drawings, design methodology and/or scheduling on the Project, to the extent possible, would proceed without unnecessary delays or interference and that Comstock would be fully compensated for any such delays or interferences by adjustments to the Contract price and/or extension(s) of time to perform its work given that, in part, time was of the essence and the provisions in the Contract addressing changes and extensions of time for performance of Comstock's scope of work;
- (t) AMEC and PotashCorp would co-operate with Comstock with a view to permitting Comstock to perform its contracted scope of work in the most effective manner, both as to time and cost;
- (u) there was a condition of good faith and fair dealing in respect of the Contract given, in part, the New Brunswick Engineering and Geoscience Professions Act and its By-Laws and Code of Ethics noted above includes a requirement of good faith, and
- (v) AMEC and PotashCorp would not seek to frustrate Comstock or Comstock's performance of the Contract.

21.2 To the extent the items in the preceding paragraph and subparagraphs are representations, they were made by representatives of AMEC and or PotashCorp, including Blair Borgeson, Les Frehlich, Wally Roul, Mark Thompson, Brad Thompson, Derrick

Lundrigan, Tony Vecchio, Jim Sabatier, Doug Breed, Brian Sheritt, Mark Fracchia and/or Dawne Hawthorne to representatives of Comstock including Al Wilson, Glenn Rochefort, Pete Semmens, Brian Mooney and/or Brian McLellan and were further, made in the Project Documents and further, in discussions and meetings taking place between March 2009 and August 12, 2009 being the date of the letter of intent.

21.3 In respect of the Contract, Comstock states that the Contract was unclear, ambiguous, and/or uncertain and where ambiguous, Comstock relies on the principles of *contra proferentum*. Further or in the alternative, Comstock states that the Contract was not capable of interpretation in light of the ambiguities, uncertainty of terms and/or contradictions contained therein. Further, or in the alternative, Comstock states that the Contract was sufficiently uncertain as to render the Contract void or voidable.

21.4 Additionally, GC 1.9 (GC is short form for "General Condition") stated that the headings referred to in the Contract were for convenience only and were not to affect the interpretation of the "Construction Documents". As a result, the heading employed in the Contract are not to be used for interpretation.

21.5 Particulars of the uncertain, ambiguous, conflicting, and/or irreconcilable words and terms in the Contract include:

(a) use of different capitalization for similar words, some of which were defined terms and which on a literal reading made each term mutually exclusive of the other:

- (1) in respect of the words "Contract Documents", Article 1 of the Agreement forming part of the Contract, defines the term "Contract Documents", however in Article 1.7, the term "Contract documents" is used; conversely, in the document titled *Special Conditions 015 Pre-Commissioning*, forming part of the Contract, Articles 1.1 and 2.2.3 used the words "contract documents";
- (2) The terms "Change" and "change" were used interchangeably in the Contract; by example, in GC 47.2, the term "Change", which is a defined term, is used in the same sentence and later in the same paragraph as the word "change", GC

44.2 used the words “Change in the Construction Schedule” yet GC 47.2 used the words “change to the Construction Schedule”;

- (3) GC 1.1.51 described Vendor as having a “Contract” directly or indirectly with Owner. Given that “Contract” was a defined term related to the “undertaking between OWNER and CONTRACTOR” and not involving a “Vendor, the term “Contract” as used here was ambiguous and uncertain;
- (4) GC 7.3.1 and 7.7.1 used the word “Agreement”, which is a defined term, but in this GC deals with the payment of royalties which was not part of the defined “Agreement”;
- (5) Similarly, GC 11.1.2 ended with the words “... shall be determined by Agreement” thus referring to the defined term “Agreement” but referring to it as an agreement to happen in the future;

(b) potentially contradictory or irreconcilable terms:

- (1) GC 1.1.22 defined “Final Completion” to include “Full Time Operation of all systems”; yet GC 1.1.8 defined “Commissioning” as commencing after “Final Completion”; and GC 1.1.23 defined “Full Time Operation” as a stage during “Commissioning”;
- (2) GC 1.1.27 defined “Issued for Construction” as a particular issue of a “Construction Document”; GC 1.1.9 defined “Construction Drawings” as drawings marked by AMEC as “Issued for Construction”; GC 1.1.11 defined “Contract Drawings” as the drawings listed in the Construction Documents and executed with the “Contract” but excluded “Construction Drawings”; however, a majority of the drawings listed in the Contract were marked as “Issued for Construction” drawings; thus a drawing marked “Issued for Construction” as listed in or executed with the Contract could be concurrently a “Construction Document”, a “Construction Drawing” and a “Contract Drawing”; GC 3.5.1 compounds the ambiguity and uncertainty by providing that the “Contract Drawings and other Construction Documents [emphasis added] executed with

the Contract shall not be used for the construction of the Work"; conversely, GC 8.2 stated that Comstock was to perform all "Work in strict accordance" with the "Construction Drawings, Specifications and other Construction Documents" [emphasis added];

- (3) Further GC 12.1 referred to Comstock's "Work" being "performed in accordance with the Construction Documents" [emphasis added] similarly, GC 18.3.1 stated that Comstock's "Work" was to be performed in accordance with "the Construction Drawings, Specifications and other Construction Documents [emphasis added]; yet GC 3.5.1, as noted above, stated: "...other Construction Documents [emphasis added] executed with the Contract shall not be used for the construction of the Work"; notwithstanding that the words "other Construction Documents" were not defined, in one instance some or all of the "other Construction Documents" are to be used for the "Work" and in another, "other Construction Documents" are not to be used for the "Work";
- (4) GC 47.2 deals with, in part, "an adjustment to the Contract Price"; later in the same GC, there is reference to "Contract Sum"; the words "Contract Price", although capitalized, are not defined whereas the words "Contract Sum" are defined;
- (5) GC 47.9.1 referred to "all adjustments to the Contract Sum or Changes to the Contract Schedule, Contract time or other term of the Contract shall only be made through a Contract Change Order" [emphasis added]; although the words "Contract Sum" and "Contract Schedule" were defined terms, the words "Contract time" were not; further although the words "Contract" and "Change Order" were separately defined terms, their joint use as "Contract Change Order" was not a defined term;
- (6) similarly, notwithstanding that GC 47.9.1 mandated that the "only" means to make "all" adjustments to the "Contract Sum" or "Contract Schedule" was by "Contract Change Order", GC 47.2 referenced means other than a Change Order to make "an adjustment to the Contract Price or Construction Schedule";

further GC 47.7 referred to “adjustments, if any, that thereby result to any or all of the Contract Sum, the Construction Schedule And (sic) the completion date for the Work” had to be made pursuant to GC 47.7 (dealing with Field Work Orders) and GC 47.9 (dealing with Change Orders) notwithstanding that GC 47.9.1 stated that “all adjustments” could “only” be made by Change Order;

(7) GC 3.3.2 stated, in part, “In the event an omission, error, ambiguity, inconsistency, or discrepancy appear in the Construction Documents or [emphasis added] in the documents Issued for Construction...” thus suggesting that “Issued for Construction” documents were not “Construction Documents”; however, as noted above, “Issued for Construction” was defined as a “particular issue of a Construction Document”;

(c) vague or uncertain terms and words:

(1) GC 3.7 stated that “CONTRACTOR shall keep one copy of current Construction Documents, Drawings and Specifications... at the Site”; however the term “Drawings” was not a defined term; potentially “Drawings” or “drawings” might refer to “Construction Drawings”, “Contract Drawings”, “Reference Drawings”, “Vendor Drawings”, “shop drawings” or other drawings; similarly, GC 3.6, 4.2, 6.1.1, 6.1.4, 6.1.5, 6.1.6 and 6.2.1 used the word “drawings” or “drawing” while GC 3.3.3.1, 3.3.3.2, 3.3.3.3, 3.4, 5.1, 6.1.8, 7.1.1 and Articles 1.4 and 1.5 of the Agreement use the word “Drawings”, again neither of “Drawings” or “drawings” was defined;

(2) similarly GC 3.3.3.5 addressed the Order of Precedence for Construction Documents but only referred to “The Drawings” leaving uncertain if “Construction Drawings”, “Contract Drawings”, “shop drawings” or other drawings is meant to be “The Drawings”;

(3) GC 6.1.1 used the word “Documents” which was not a defined term (although the term “Documentation” was defined) and could potentially refer to

"Construction Documents" "Field Documents", "Tender Documents", "Contract Documents" or other documents;

- (4) GC 1.1.28 defined "Materials" but in that very definition listed items including the word "Materials";
- (5) similarly, GC 11.1.1 used the words "...shall constitute a *Materials* [emphasis added] breach of the Contract" thus referring literally to the definition of "Materials";
- (6) GC 2.2 (fifth line) referred to "storage areas" yet GC 1.1.44 referred to "Storage Site" for use by Comstock for storage of "Materials" thus suggesting that "storage areas" and "Storage Site" were different and mutually exclusive terms;
- (7) GC 20.1.1 (tenth line) and GC 20.2 referred to "schedule of the values"; yet, GC 20.1.2 used the words "Schedule of Values" in its last line;
- (8) GC 20.3.2.1(b) referred to "the overall schedule" yet GC 1.1.9 defined "Construction Schedule" and GC 1.1.12 defined "Contract Schedule"; similarly, GC 20.3.3.1(e) and (g) referred only to "schedule" and "schedules" respectively leaving further uncertainty as to what was meant by "schedule" and "overall schedule";
- (9) similarly, GC 46.5.1(d) dealing with termination of the Contract for default (which was listed as one of the alleged grounds for default by AMEC on June 30th, 2010 as described below), used the words "Progress Schedule" which was not a defined term but expressly omitted the terms "Contract Schedule" and "Construction Schedule";
- (10) GC 20.3.3.1 (c) and (d) referred to "submission of schedule" suggesting it could be one or more of the "Schedule of Values" or "schedule of values" as per GC 20.1 or the "overall schedule" as per GC20.3.2.1(b) or the

"Construction Schedule" at GC 1.1.9 or the "Contract Schedule" at GC 1.1.12 or some other schedule;

- (11) GC 20.4 referred to "Construction Schedule" once and the word "schedule" 3 times but in at least 2 different contexts leaving as part of the uncertainty whether the final word "schedule" was intended to mean the "Construction Schedule", the "Contract Schedule" or the newly submitted detailed schedule of drawings or some other schedule;
- (12) as noted GC 1.9 stated that the heading in the Contract were for convenience only and were not to affect the interpretation of the "Construction Documents"; in GC 59.3 the heading is "Notice of Dissent" yet the word "Dissent" does not appear in the GC; rather, the GC uses the words "notice of the Dispute", "Dispute" being a defined term meaning "differences between the PotashCorp and Comstock; however GC 59.2 refers to "any Dispute or difference between" PotashCorp and Comstock or between AMEC and Comstock (thus expressly excluding the possibility of a difference or Dispute as between AMEC and PotashCorp); yet the defined term "Dispute" was limited to differences between PotashCorp and Comstock.

Further particulars of the uncertain, ambiguous, equivocal and conflicting terms in the Contract will be provided before trial.

Breaches

22. Comstock states that from Comstock's introduction to the Project in or about March 2009 until the time of pleading and thereafter, the conduct of PotashCorp and AMEC deviated significantly from objective market standards, legal norms (in that their respective conduct caused damages to Comstock), Comstock's reasonable expectations and/or that said conduct was inappropriate in the circumstances.
23. As a result of the impugned conduct described in the preceding paragraph and throughout this amended statement of claim, Comstock states that:

- (a) PotashCorp breached the contract in several material respects;
- (b) further or in the alternative, PotashCorp committed, in its own right or through its agent AMEC, a series of repudiatory breaches of the Contract;
- (c) further or in the alternative, PotashCorp breached the collateral warranties and/or conditions made which induced Comstock into the Contract;
- (d) PotashCorp and AMEC made misrepresentations, in the alternative negligent misrepresentations, about material elements in the Project Documents and Contract which induced Comstock into submitting a lump sum bid and into entering into the Contract;
- (e) further or in the alternative, Comstock states that AMEC undertook tortious interference with Comstock's contractual relations and economic interests with PotashCorp by inducing breach of contract by PotashCorp;
- (f) further or in the alternative, PotashCorp wrongfully repudiated the Contract; and
- (g) further or in the alternative, PotashCorp and AMEC breached their respective duties to act in good faith including having AMEC continue in its decision making powers while it was in a clear conflict of interest and in an appearance of bias and further, purportedly terminating the Contract.

24. The particulars of these breaches in the preceding paragraph are known to PotashCorp and AMEC and include:

- (a) failing to provide to Comstock as part of the Project Documents, clear, logical, coordinated, unambiguous, complete design, engineering drawings including IFC Drawings, plans and specifications for Comstock's scope of work and further or in the alternative, providing design and engineering that was not to a standard of a competent engineering firm or engineers undertaking similar work;

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- i. the plans, drawings, including IFC Drawings and specifications were not in a form that was complete or ready for construction or represented a sufficiently complete or suitable for purpose or fixed scope of work on which Comstock could proceed with work in an economical fashion;
- ii. at the time of Comstock's revised and negotiated lump sum tender submission, AMEC and/or PotashCorp represented to Comstock that the Project Documents were largely complete subject to a few holds identified on a limited number of the drawings provided to Comstock to bid upon;
- iii. only after Comstock began its work did it determine that the Project Documents were not complete and further not co-ordinated, a fact that Comstock could only determine once it began work and started receiving numerous revisions to the IFC drawings;
- iv. in effect the Project design was being completed concurrently with Comstock's work, a reality that impeded and frustrated Comstock's ability to perform its scope of work and interfered with that scope of work;
- v. the following is a list of the revised drawings and specifications received from base bid, meaning at the time of Comstock's tender submission up to April 14, 2010 (further revisions continued after April 14th, 2010), including the revision number, number of drawings issued or reissued to Comstock and the date they were issued:

Phase/Revision Number	Drawings & Specifications Revisions Issued	Date Issued
RCA 10	852	Base Bid
RCA 11 - Rev I	118	Issued Sept. 2, 2009
Rev II	45	Sept. 6, 2009

Phase/Revision Number	Drawings & Specifications Revisions Issued	Date Issued
Rev III & Rev IV	11	Sept.10, 2009
Rev V	11	Sept. 14, 2009
Rev VI	41	Sept.16/17, 2009
Rev VII	142	Sept. 18, 2009
Rev VIII	28	Sept. 22, 2009
Rev IX	37	Sept. 23, 2009
Rev X	27	Sept. 28-Oct. 2, 2009
Rev XI	81	Sept. 30-Oct 9, 2009
Rev XII	21	Aug. 27-Oct. 20, 2009
Rev XIII	14	Sept. 17-Oct. 28, 2009
Rev XIV	106	Oct. 28, 2009
Rev XV	9	Oct. 30-Nov. 2, 2009
Rev XVI	78	Nov. 5, 2009
Rev XVII	7	Nov. 6-Nov. 13, 2009
Rev XVIII	81	Nov. 18-Nov. 27, 2009
Rev XIX	69	Nov. 19-Dec. 01, 2009
Rev XX	87	Dec. 2-Dec. 8, 2009
Rev XXI	90	Nov. 17-Dec. 11, 2009
Rev XXII	93	Dec. 11-Dec. 17, 2009
Rev XXIII	223	Dec. 17-Jan. 5, 2010

Phase/Revision Number	Drawings & Specifications	Date Issued
Revisions Issued		
Rev XXIV	61	Jan. 5-Jan. 13, 2010
Rev XXV	12	Jan. 14-Jan. 19, 2010
Rev XXVI	12	Jan. 21-Feb. 2, 2010
Rev XXVII	38	Jan. 14-Feb. 9, 2010
Rev XXVIII	11	Feb. 9-Feb. 19, 2010
Rev XXIX	10	Sept. 23-Mar. 2, 2010
Rev XXX	5	Mar. 3-Mar. 15, 2010
Rev XXXI	48	Mar. 16-Mar. 30, 2010
Rev XXXII	68	Feb. 19-Apr. 7, 2010
Rev XXXIII	61	Mar. 23-April 14, 2010
TOTAL DRAWINGS and SPECIFICATIONS ISSUED up to April 14, 2010	2792	

v.1 further, AMEC released numerous IFC drawings very late in the Project and past the substantial performance date of April 15th, 2010 stated in the Contract; for example:

Transmittal Number	Transmittal Date	Drawing Number	Drawing Revision No.	Description
6023	Apr 20, 2010	320-18-7154	0	Inst: Dryer Cooler Supply Air Fan Drive End Bearing Temp-Loop Diagram
6023	Apr 20, 2010	320-18-7155	0	Inst: Dryer Cooler Supply Air Fan Opposite Drive End

<u>Transmittal Number</u>	<u>Transmittal Date</u>	<u>Drawing Number</u>	<u>Drawing Revision No.</u>	<u>Description</u>
				<u>Bearing Temp-Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7170</u>	<u>0</u>	<u>Inst:Flame Signal Strength-Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7171</u>	<u>0</u>	<u>Inst:Burner Start Cycle Initiated -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7172</u>	<u>0</u>	<u>Inst:Burner Firing Release to Auto -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7173</u>	<u>0</u>	<u>Inst:Fireye Alarm/Flame Fail -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7174</u>	<u>0</u>	<u>Inst:Remote Shutdown -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7175</u>	<u>0</u>	<u>Inst:Remote Trip -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7176</u>	<u>0</u>	<u>Inst:Fuel Select Relay -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7177</u>	<u>0</u>	<u>Inst:High Burner Duct Outlet Temperature -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7178</u>	<u>0</u>	<u>Inst:High Fluid Bed Exhaust Temperature -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7354</u>	<u>0</u>	<u>Inst:Dryer Cooler Baghouse Fan Drive End Bearing Temp. - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7355</u>	<u>0</u>	<u>Inst:Dryer Cooler Baghouse Fan Opposite Drive End Bearing Temp. - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7356</u>	<u>0</u>	<u>Inst:Dust Mix Tank Feed Chute Vibrator #1 Solenoid - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7357</u>	<u>0</u>	<u>Inst:Dust Mix Tank Feed Chute Vibrator #2 Solenoid - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7358</u>	<u>0</u>	<u>Inst:Dust Mix Tank Feed Chute Vibrator #3 Solenoid - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7359</u>	<u>0</u>	<u>Inst:Dust Mix Tank Feed Chute Vibrator #4 Solenoid - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7440</u>	<u>0</u>	<u>Inst:Nalco 3D Traser Controller #1 Fault Signal - Loop Diagram</u>

<u>Transmittal Number</u>	<u>Transmittal Date</u>	<u>Drawing Number</u>	<u>Drawing Revision No.</u>	<u>Description</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7450</u>	<u>0</u>	<u>Inst:Nalco 3D Traser Controller #2 Fault Signal - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7520</u>	<u>0</u>	<u>Inst: 61-310 #1 Air Compressor Fault Status - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7521</u>	<u>0</u>	<u>Inst:61-311 #2 Air Compressor Fault Status - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7523</u>	<u>0</u>	<u>Inst:20-310 #1 Air Dryer Fault Status -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7524</u>	<u>0</u>	<u>Inst:20-311 #2 Air Dryer Fault Status -Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7601</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #1 - DLJB 935 SV3207601 Thru SV3207602 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7603</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #2 - DLJB 935 SV3207603 Thru SV3207608 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7609</u>	<u>0</u>	<u>Inst: Wheelbrator Solenoid Box #3 - DLJB 935 SV3207609 Thru SV3207614 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7615</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #4 - DLJB 935 SV3207615 Thru SV3207620 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7621</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #5 - DLJB 935 SV3207621 Thru SV3207626 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7627</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #6 - DLJB 935 SV3207627 Thru SV3207632 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7633</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #7 - DLJB 935 SV3207633 Thru SV3207638 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7639</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid Box #8 - DLJB 935</u>

<u>Transmittal Number</u>	<u>Transmittal Date</u>	<u>Drawing Number</u>	<u>Drawing Revision No.</u>	<u>Description</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7645</u>	<u>0</u>	<u>SV3207639 Thru</u> <u>SV3207644 - Loop Diagram</u> <u>Inst:Wheelbrator Solenoid</u> <u>Box #9 - DJB 935</u> <u>SV3207645 Thru</u> <u>SV3207650 - Loop Diagram</u>
<u>6023</u>	<u>Apr 20, 2010</u>	<u>320-18-7651</u>	<u>0</u>	<u>Inst:Wheelbrator Solenoid</u> <u>Box #10 - DJB 935</u> <u>SV3207651 Thru</u> <u>SV3207656 - Loop Diagram</u>
<u>6048</u>	<u>Apr 21, 2010</u>	<u>100-12-40021</u>	<u>0</u>	<u>Building Services - Standard</u> <u>Hood Details</u>
<u>6296</u>	<u>May 11, 2010</u>	<u>156930-P-SP-16970</u>	<u>0</u>	<u>Speciality Piping Item Index</u>
<u>6327</u>	<u>May 13, 2010</u>	<u>100-16-10023</u>	<u>0</u>	<u>Bucket Elevator Pullswitch</u> <u>Mounting Details</u>
<u>6398</u>	<u>May 19, 2010</u>	<u>320-11-40250</u>	<u>0</u>	<u>Gas Train Shelter Venting</u> <u>Roof Plan, Elevations & Det.</u>
<u>6419</u>	<u>May 21, 2010</u>	<u>360-11-10200</u>	<u>0</u>	<u>Transfer house roof plan,</u> <u>elevations</u>
<u>6648</u>	<u>Jun 14, 2010</u>	<u>320-20-45057</u>	<u>0</u>	<u>Wiring Diagram Sampler</u> <u>Auto - Granular</u>
<u>6648</u>	<u>Jun 14, 2010</u>	<u>320-20-45057</u>	<u>0</u>	<u>Wiring Diagram Sampler</u> <u>Auto - Granular</u>

v.2 further, there were several key documents that AMEC revised multiple times and in some instances at a very late stage in the Project. Among these key documents were the specifications and lists used by Comstock to install their Work. Included in this list are following documents: the Electrical Equipment List (156930-E-EL-001), the Motor Schedule (156930-E-EL-028), the CP15 Instrument Cable Schedule (156930-I-EL-002), the Master Instrument List (156930-I-EL-009), the Mechanical Equipment List (156930-M-EL-001), the Ductwork Specification (156930-M-SP-15840), the Piping Line List (156930-P-EL-004), the Piping Valve List (156930-P-EL-005), and the Pipe Support Design &

Installation Specification (156930-P-SP-15094). For example,
Mechanical Equipment List (156930-M-EL-001) was originally listed as
“Revision ZE” at the time of tender. From the period from September 11,
2009 to June 8, 2010, this document was revised by AMEC 10 times.
This equated to a revision frequency of once per month during the
Project. Further, this document was changed and transmitted to
Comstock 2 weeks prior to the May 30th, 2010 completion date stated in
the Contract and then again one week after that date. The list of the
revisions from the period of August 27, 2009 to June 16, 2010 are

<u>Transmittal Number</u>	<u>Transmittal Date</u>	<u>Drawing Number</u>	<u>Drawing Revision No.</u>	<u>Description</u>
3753	Sep 11 / 2009	156930-M-EL-001	1	<u>Mechanical Equipment List</u>
4152	Oct 09 / 2009	156930-M-EL-001	2	<u>Mechanical Equipment List</u>
4500	Nov 10 / 2009	156930-M-EL-001	3	<u>Mechanical Equipment List</u>
4822	Dec 16 / 2009	156930-M-EL-001	4	<u>Mechanical Equipment List</u>
5008	Jan 14, 2010	156930-M-EL-001	5	<u>Mechanical Equipment List</u>
5386	Feb 17, 2010	156930-M-EL-001	6	<u>Mechanical Equipment List</u>
5620	Mar 15, 2010	156930-M-EL-001	7	<u>Mechanical Equipment List</u>
6048	Apr 21, 2010	156930-M-EL-001	8	<u>Mechanical Equipment List</u>
6305	May 12, 2010	156930-M-EL-001	9	<u>Mechanical Equipment List</u>
6585	Jun 08, 2010	156930-	10	<u>Mechanical Equipment</u>

		M-EL- 001		List
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v.3 as part of the revisions to drawings and specifications, AMEC transmitted drawings that were voided / superseded in an inconsistent manner given that AMEC used three different ways to do so: (1) by writing, for example, "Superseded by drawing 320-xx-xxxx" in the drawing title block, (2) changing the revision number to "VO" or (3) changing the status of the drawing from "A" (active) to "S" (superseded) or "V" (void);

vi. the impact of receiving so many revised IFC drawings and other design changes on what amounts to a continuous basis meant that Comstock could not perform its work in an economical or as planned manner, could not properly schedule or manage its work and the work of its sub-trades and could not meet the May 30th, 2010 completion date identified in the Contract;

vii. further, given the extent and timing of changes, Comstock could not capture all changes being made to the design so as to claim the changes or address how best to perform the constantly revising design for the Project;

viii. the design for the Project was undertaken on an ongoing basis and continued well after Comstock's commencement of work on the Project and in fact continued up to July 21, 2010; by example, in response to Comstock's earlier request that AMEC send mechanical and electrical engineers on site to address the multitude of ongoing and endemic design deficiencies and problems, AMEC responded on June 7, 2010 that:

- (1) it was sorry for the delay in responding to Comstock's said request;

- (2) that it had now assigned a mechanical engineer to the site to address mechanical design issues;
- (3) that it had now arranged for a direct link to an electrical engineering group from AMEC to address electrical design issues;

ix. in respect of instrumentation:

- (1) there were excessive, late, unanticipated and undisclosed (at time of Comstock's bid submission or prior to entering into the Contract) revisions to the Instrumentation Design;
- (2) in the Project Documents, the Instrumentation drawings were identified as Revision 4; as at July 21, 2010, the latest was Revision 15 (or Revision N depending on which drawings you reference) and there were likely further revisions in progress;
- (3) these continuous revisions to the Instrumentation drawings and design meant that Comstock had to price, then re-price, schedule, then reschedule, start work on Instrumentation, then stop, then restart;

x. in respect of Lube Oil Piping for Compactors:

- (1) there was a hold on Lube Oil Hoses due to lack of design/engineering (connectors and hose spec) because actual footage for hoses were not disclosed;
- (2) as of July 21, 2010, there was still no specification or diagram for these hoses and as a result, Comstock could not determine the individual lengths for these hoses;
- (3) the only available design had conflicts as between imperial and metric measurements;

xi. in respect of commissioning and testing of the specified Siemens Canada equipment and materials:

- (1) part of Comstock's original scope included commissioning and testing of Siemens equipment and materials on a cost reimbursable basis;
- (2) the Project Documents included the following reference:

“FURTHER to our SCHEDULE A COMMERCIAL SUMMARY submitted July 3, 2009, please see attached, our completed ‘Details of Budget Pricing for Testing and Commissioning by Siemens’ (which was unavailable at time of close). This pricing is estimated and will be on a cost reimbursable basis only.”

- (3) AMEC removed this work from Comstock's scope of work and awarded it to Comstock's competitor when AMEC decided that it would delete the agreed scope and special labor rates for this Cost Plus portion of the Contract;
- (4) this was a further example of AMEC and PotashCorp's inability to properly define Comstock's scope of work at time of bid and throughout the Project as Comstock's scope of work and the Project design evolved continuously when it should have been clearly defined at time of Comstock's bid submission;

xii. in respect of Hoist Well 6T Monorail (location: elevation 111 to 095);

- (1) the 6 Tonne Monorail was incapable of hoisting the 16,000 lb (8 tonne) equipment at that location which was a design error as it was under capacity for the required purpose. Comstock had to breakdown the equipment in order to hoist it;
- (2) also the hoist well would not accept the assembled pieces;

xiii. in respect of Black Bolts instead of Corrosive Resistant Bolts;

- (1) the Project design included installation of 'Black' (C/S) Bolts on the compactor platforms and major compactor units which should be stainless steel or equivalent;
- (2) When Comstock raised this with AMEC personnel, AMEC told Comstock to hush up and let things 'settle down' before replacing the black bolts and then advised that the black bolts were acceptable;

xiv. in respect of Vendor Drawings;

- (1) where equipment was being supplied by PotashCorp, vendor drawings were to be provided to Comstock;
- (2) from the period August 14, 2009, the date of the letter of intent, through June 16, 2010, a period covering transmittals numbered 3533 to 6686, AMEC did not transmit vendor drawings or vendor drawing revisions to Comstock so Comstock had no means of knowing or confirming what AMEC was communicating for PotashCorp supplied equipment; although there is a reference to "Vendor Drawings Mechanical" and "Vendor Drawings Electrical" in the Contract, there were no vendor drawing numbers with revisions listed;
- (3) the design information required for the owner supplied equipment derived from the vendor drawings and design was not coordinated with AMEC and PotashCorp's Project design;

xv. in respect of Main MCC Room

- (1) this part of the Project experienced unanticipated heat and condensation issues during winter months and humidity issues in the summer months;

(2) Comstock's scope of work including providing heat for its own forces which was done by temporary heaters with fuel supplied by PotashCorp, but not to keep PotashCorp supplied equipment heated;

(3) Comstock's Execution Plan and the Contract Schedule contemplated early installations of HVAC and power supply in order to provide heating for the building in the early stages of construction;

xvi. in respect of Miscellaneous Steel Openings;

(1) Comstock was required to undertake numerous unanticipated cuts, removals, reinstatements and reworks of open grid flooring, handrails, kick plates and miscellaneous steel to allow installations e.g., level 160 at windows and throughout the building;

(2) these came as a result of a lack of detailed engineering and design co-ordination/ project planning;

(3) as of July 21, 2010, significant removals and reinstatements were ongoing;

xvii. at Project level 130, lube/hydraulic oil works;

(1) design changes were still taking place at the end of June 2010 / beginning July 2010

(2) as of July 21, 2010 this work was still on hold pending a Change Order;

xviii. in respect of Project Design associated with natural gas;

(1) the design provided to Comstock at time of its bid submission was discovered not to work and was not to all relevant codes;

- (2) these problems were compounded by other problems associated with gas couplings, unit heaters, venting, incorrect isometric drawings and location problems including conflicts with a catwalk;
- (3) when Comstock claimed extras and changes for the unanticipated work associated with these impediments, AMEC refused to honour Comstock's time sheets and approve the associated changes;
- (4) as of July 21, 2010, Comstock could not complete work associated with natural gas due to outstanding RFI's and Design Changes;

xix. in respect of Pipe Supports;

- (1) the design associated with pipe supports was not fit for the designed purpose and had to be continuously reworked;
- (2) it took AMEC approximately 3 months to get their engineers to help to try to resolve the problems;
- (3) when Comstock sought direction from AMEC, representatives from AMEC, including Doug Breed and Brad Thompson directed Comstock to: 'Make it fit, red-line Changes and just make it work.'

xx. in respect of H.C. plates;

- (1) HC plates are a pipe hanger formed as a 6' x 4' x 3/8" plate with four holes to bolt to a beam. A U shaped bracket is welded to the plate. The U shaped bracket will accept a threaded rod with a clevis hanger to hang the pipe.
- (2) the design of these plates was not correct;
- (3) when Comstock sought direction from AMEC, representatives from AMEC, including Doug Breed, gave verbal instructions and then when Comstock sought a change on that verbal direction as it

was different than the design, AMEC denied the change to Comstock;

xxi. in respect of Process Water Installations;

- (1) at elevation 111 feet there were conflicts with other components; a further indication of an uncoordinated design;
- (2) Comstock could not make the installation fit where designed in the Project drawings;

xxii. in respect of Brine Piping;

- (1) the proposed installation of this component conflicted with other works (i.e. supports in the middle of a catwalk);

xxiii. in respect of Hydraulic System for Gates (39/4);

- (1) the design and engineering of these hydraulic gates were not to an acceptable standard;
- (2) AMEC engineers came to the site to try to resolve the design issues associated with this system; and three or four alternate design changes were attempted;
- (3) the original design had no location or dimensions for end of branch main;
- (4) there were problems associated with the design of Balance Stations;
- (5) AMEC's Mechanical Manager, Brad Thompson, was sufficiently upset at this design/engineering error that he stormed out of a Review Meeting with AMEC's Engineer and Comstock and said words to the effect: "This is a \$230,000 [AMEC] [expletive] up."

- (6) by July 21, 2010, all Stations had been installed but would not work;
- (7) for some parts, there are separate lines for supply and return but no loop;
- (8) AMEC gave Comstock a hand-written sketch for Revised Hydraulic System design/engineering in June 2010 (after the contractual completion date) which was clearly indicative of an evolving design;
- (9) Comstock was directed to install Balance Stations and related equipment as per the AMEC's original, then revised, then re-revised, then verbal instructions, sketches and/or 'models';
- (10) compounding these problems were conflicts between the AMEC / PotashCorp design and the vendor designs for the components to be supplied by PotashCorp and installed by Comstock;

xxiv. in respect of the Cooling Tower;

- (1) the preceding civil works relating to the Cooling Tower required rework during Comstock's performance of its Contract;
- (2) the preceding structural works required rework during Comstock's performance of its Contract;
- (3) the foundations and substructure were redesigned without consideration for other structural works – this became obvious when Comstock saw access ladders which were too short to permit appropriate access;
- (4) although Comstock's original plan for the work called for substantial performance of its work on or before April 15th, 2010 and final completion on or before May 30th, 2010; as of July 21,

2010, the equipment foundations for eight (8) pumps were still not completed – about one year late and the concrete tops of each had been chiseled down leaving structural rebar exposed to the elements;

- (5) the pumps were installed previously but had to be removed to allow the required elevations;
- (6) the Project Documents did not show any bases for the pumps;
- (7) rather than chipping away at the bases to make them fit, AMEC should have removed the entire base and replace it with a full and proper one;

xxv. in respect of CT Number 3 & 4;

- (1) these had 4' diameter pipe design, when it was actually 6' diameter needed, which required a 6' to 4' reducer and extra work;

xxvi. in respect of the Unit Heater at Elevation 95;

- (1) Comstock was required to place a hold on this work and then experienced delays and directions to relocate Unit Heater #1;

xxvii. in respect of the dryer unit at Elevation 95;

- (1) this element was designed incorrectly – it had the wrong orientation – it was backwards;

xxviii. in respect of the Glycol Skids at Elevation 95;

- (1) the preceding civil / structural works for the skid bases were set too high;

(2) the bases did not allow space for grouting the skids; however, AMEC instructed Comstock to install the skids directly onto the concrete without the specified grout;

xxix. in respect of Re-Route Pipes at Elevation 95;

(1) Comstock experienced undue holds and delays in respect of this piping and was, as of July 21, 2010 awaiting RFI responses and Change Orders for conflicts and engineering solutions at pressurization units 1B and gas line issues;

xxx. in respect of Natural Gas Line at Elevation 111;

(1) Comstock experienced undue holds and delays awaiting RFI responses and Change Orders for conflicts and engineering solutions at pressurization units as rerouting was required as well as issues in respect of valves had to be resolved;

xxxi. in respect of the Pressurization Unit at Elevation 111;

(1) the Project Documents omitted the venting lines from the pressurization unit which was a *Building Code* violation;

(2) as of July 21, 2010, AMEC had not prepared and issued a revised or new drawing for this significant design deficiency;

(3) Comstock experienced undue holds and delays awaiting revised design/engineering and the requisite Change Order;

xxxii. in respect of Unit Heaters

(1) Five (5) of the seven (7) unit heaters required relocation and rework. The other two (2) required extra work;

(2) with respect to unit heater #2, AMEC designed this large unit heater in a hazardous location meaning Comstock had to relocate

it;

(3) the inordinate and unanticipated delays to the unit heaters deprived Comstock of heating for those parts of the building in winter conditions;

xxxiii. in respect of Process Slurry (pumps) Elevation 95;

- (1) Comstock procured the pump base per the Project Documents;
- (2) when the pump eventually arrived at site, it became obvious it would not fit on the specified bases;
- (3) as of July 21, 2010, Comstock was being unduly held on this work awaiting a Change Order and revised design and engineering;

xxxiv. in respect of Bucket Elevators at Elevation 95:

- (1) the concrete bases (installed by others for whom AMEC and PotashCorp were responsible) were either designed incorrectly, installed incorrectly or both;
- (2) the bases required rework (chiseling to reduce the bases to required elevations leaving some structural rebar exposed);

xxxv. in respect of Piping and Services – General:

- (1) when Comstock complained about the lack of elevations noted on the IFC drawings provided by AMEC, AMEC's Bruce Thompson responded by saying: "First come, first served";
- (2) the lack of elevations on many of the IFC drawings and Project Documents did not permit detection of the fact that the design was not properly co-ordinated;

xxxvi. Slurry Tank Base at Elevation 95

- (1) this concrete base was also had to be reworked. It is the only one that was properly remediated, i.e., take out the entire concrete base and install a new one to the correct elevations and dimensions;
- (2) Comstock experienced undue holds and delays, disruption and a multitude of extra work in regards to original (aborted) installations and the revised installations after the design/engineering and concrete base errors were corrected;

xxxvii. in respect of HVAC Ducting Rework – Conflicts;

- (1) due to the lack of proper IFC Drawings, numerous clashes/conflicts between HVAC ducting were experienced by Comstock which required Comstock to reroute piping, go back and re-perform prior completed works;

xxxviii. in respect of Unit Heater #3 – Vents;

- (1) there was no routing disclosed in Project Documents;
- (2) as of July 21, 2010, Comstock was still awaiting design information for this item;

xxxix. in respect of Flake Breakers (I/W);

- (1) Comstock had to disassemble (break-down) the Flake Breakers, being certain equipment supplied by PotashCorp, in order to place them in-situ because the access design in the Project Documents was too small to allow the full units to enter;

xl. in respect of Survey Control Problems – Reference Lines;

- (1) AMEC was to provide Comstock with benchmarks to calculate lines and levels for Comstock's work;
- (2) Doug Breed from AMEC told Comstock to use the top of an

existing fire hydrant as a bench mark; this after he told Comstock to use a "base plate" inside the existing building and transfer from there;

- xli. in respect of Iron Works;
 - (1) numerous changes and RFI's experienced by Comstock;
- xlii. in respect of Drives for Bucket Elevator (5 No.) (I/W).
 - (1) the PotashCorp supplied drives had to be returned to supplier for rework; these were sent for fabrication in May 2010 and returned to the warehouse in mid June 2010;
 - (2) as of July 21, 2010, Comstock was still awaiting a Change Order for this work;
- xliii. in respect of Off-Tray Electrical in All Areas
 - (1) The Project Documents show "end of tray" in respect of tray that is to support electrical cables but the end of tray designations require further tray to be installed to support and protect cable to its eventual termination;
 - (2) The Project Documents do not show the required tray for all electrical cables;
- xliv. further and other design and engineering issues associated with:
 - (1) Various Electrical Design Changes at Cooling Tower;
 - (2) Transformer and MCC Rooms;
 - (3) Cable Lengths in the Project Documents;
 - (4) Fire Alarm System;

- (5) Grounding;
- (6) Lighting Issues;
- (7) Instrumentation Cable Lengths;
- (8) Missing Instruments for Gates (AMEC cannot locate 3 No. Solenoids for Gates);
- (9) Chutes (Mechanical);
- (10) Conveyor Transition (Elevation 302);
- (11) Belt Conveyor to Existing Works;
- (12) Rerouting of cable tray, some of which had already been installed with cables laid in;
- (13) Difficulty in installation of revised cable tray because of congestion and conflicts with other already installed equipment and tray;

(b) failing to issue or have IFC Drawings issued and transmitted in a timely manner;

PARTICULARS

- i. repeating the particulars stated above, the timing of the IFC drawings revisions was detrimental to Comstock's ability to perform its contract in an economical or as planned manner;
- ii. Comstock's bid submission and the Contract included the express provision that IFC drawings had to be received and processed by Comstock before Comstock's work would proceed;
- iii. drawings, including IFC Drawings, were released to Comstock by AMEC after the date for final completion, namely after May 30th, 2010;

(c) failing to co-operate with Comstock and failing to resolve design disputes arising during construction in a timely or effective manner or at all;

PARTICULARS

- i. by July 2010, in respect of Change Orders requested by Comstock, AMEC and PotashCorp had developed an intentional course of conduct by converting Change Order requests into a Field Work Orders and thus require Comstock to proceed with the Field Work Order without compensation; thus leaving Comstock to make a claim after the fact rather than trying to resolve the pricing of the change at issue simultaneous with the change and thus permitting Comstock to be concurrently compensated for that change;
- ii. the Field Work Orders AMEC was now imposing or intending to impose on Comstock:
 - (1) were never intended to replace Change Orders and in fact were to be limited to those items that arose from a Notice of Claim under GC 47.4 or Dispute of the Engineer's Decision under GC 47.5 of the contract; notwithstanding that GC 47.4.1 required that any claim by Comstock 'shall be dealt with pursuant to GC 47.9' which GC 47.9 deals with Change Orders and not Field Work Orders; whereas Comstock's requests were in respect of "Change Orders" as per GC 47.3.1 and GC 47.9 as they related to adjustments in the Contract Sum, the Schedule and other terms of the Contract which were to be made only through a Change Order and which could not be made via Field Work Order;
 - (2) the Change Order requests by Comstock were not relating to Notices of Claim under GC 47.4 or Disputes of Engineer's Decision under GC 47.5 but related to additional or altered scope of Comstock's work;

(3) the Change Orders requested by Comstock were not considered by AMEC pursuant to GC 48.1 re Method of Valuation of Changes as required by the Contract because AMEC was not willing to consider valuation of changes on any basis other than on a fixed price basis notwithstanding that changes could be valued in ways other than fixed price;

(4) AMEC erroneously applied Cost Plus rates to Time & Material extras and changes that belonged to the original Cost Plus tender submitted by Comstock;

(d) delaying and interfering with Comstock's work and performance of the contract with late preceding requisite civil and structural works:

PARTICULARS

- i. Comstock's bid submission and the contract were predicated upon completion of structural steel works by others hired by AMEC and/or PotashCorp and for whom AMEC and/or PotashCorp is/are responsible by September 2009 but structural steel works continued until December 2009 thus delaying and interfering with Comstock's work;
- ii. AMEC and/or PotashCorp failed to mitigate these delays and failed to adjust the Master and Contract Schedule to account for these imposed and known delays and impediments;
- iii. notwithstanding Comstock's requests for an extension of time to perform the Contract (including requests made on April 28th, 2010 and again on May 6th, 2010 and in the various schedule submissions made by Comstock showing a completion date beyond May 30th, 2010) in part attributable from the delays associated with these preceding civil works, AMEC and/or PotashCorp refused and/or failed to grant an extension of time;

(e) failing to provide Comstock with the overhead cranes in a timely manner and then when supplied, supplying same in a deficient order which resulted in numerous breakdowns of the cranes;

PARTICULARS

i. Comstock's bid submission and the contract included the following express condition:

Comstock would have full access and unrestricted use of two – one 10 tonne and one 25 tonne - overhead cranes that were being supplied and installed by AMEC and PotashCorp or others on their behalf;

ii. Comstock's strategic and economically planned methods of installation were based upon timely and proper provision of the specified overhead cranes which were to be supplied by AMEC and/or PotashCorp, namely (based on schedules provided with the Contract):

Crane Description	Install Start Date	Install End Date	Ready for Comstock
10 Tonne O/H Crane	31-Jul-09	22-Sep-09	23-Sep-09
25 Tonne O/H Crane	31-Jul-09	22-Sep-09	23-Sep-09

iii. these cranes were to be used to hoist equipment, materials and resources to the various portions and elevations of the Compactor Building forming part of the Project;

iv. Comstock's Bid Schedule included the following planned milestones for use of the overhead cranes and included the following actual milestones:

Description	Planned		Actual	
	Start	End	Start	End
Award	31-Jul-09	31-Jul-09	12-Aug-09	12-Aug-09
PotashCorp Equipment Procurement	31-Jul-09	8-Mar-10	31-Jul-09	Ongoing as at 21-July-10
Comstock Procurement	31-Jul-09	1-Feb-10	12-Aug-09	Ongoing as at 21-July-10
Installations	31-Jul-09	7-Jun-10	12-Aug-09	Projected to be 30-Oct-10
HVAC/Duct	31-Jul-09	2-Mar-10	12-Aug-09	Projected to be 30-Oct-10
10 Tonne Crane (Start)	27-Aug-09	22-Sep-09	Var.	15-Mar-10
25 Tonne Crane (Start)	27-Aug-09	22-Sep-09	Var.	Feb-10

- v. due to circumstances completely beyond Comstock's control and responsibility but fully within the responsibility of AMEC and/or PotashCorp, the 10 Tonne and 25 Tonne cranes were not provided to Comstock in accordance with the express dates specified in the Project Documents or in an operational condition;
- vi. the inordinate and unanticipated delays and problems in respect of the provision of the cranes continued between September 2009 and April 2010, a period of approximately seven (7) months;
- vii. some of the more significant crane problems and delays were:

Period	Brief Description
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September 2009	No cranes made available to Comstock.
October 2009	No cranes made available to Comstock.
November 2009	No cranes made available to Comstock. Both Cranes under repair and remedial works.
December 2009	The <u>25 Tonne</u> crane was handed over to Comstock on December 2, 2009 (71 days late = 10 weeks). The <u>10 Tonne</u> crane was still under remedial works.
January 2010	The <u>10 Tonne</u> crane was handed over to Comstock on January 28, 2010, i.e., 128 days (18 weeks) late.
February 2010	Ongoing problems with both cranes and ongoing repair works.
March & April 2010	The more significant crane problems were corrected by mid March 2010, i.e., about seven (7) months after the specified and required date;
<u>May through July, 2010</u>	<u>Ongoing problems resulting in delays in use of both cranes</u>

viii. in addition to the abnormal delays, disruption, the lack of promised cranes, the design of the cranes itself caused additional problems for the following reasons, none of which were disclosed to Comstock until after Comstock's work commenced:

- (1) the 25 Tonne crane could only utilize the hoist well in the centre of the building. This limit was never disclosed to Comstock until after Comstock's work began. Its primary function is to service the key 130 foot level;
- (2) the 10 Tonne crane, at the 216 foot elevation, utilizes the hoist well at the middle of the main building comprising the Project as well as the hoist well at the north end of the building; however, the north hoist well is situated/positioned so that the crane hook is only

14 inches from the structural steel hoist well frame rendering it virtually useless and totally unfit for the promised hoisting per the Project Documents;

- (3) when the 10 Tonne crane is operating at the centre of the building hoist well, the 25 Tonne crane cannot travel north or south because the 10 Tonne crane cable is positioned down through the centre of the building hoist well. This particular problem has arisen in recent times when Comstock attempted to hoist compactor components or hoist large cable reels;
- ix. when testing of the cranes was underway, AMEC personnel were overheard to state that a few unanticipated stops in the cranes' performance would not stop AMEC from commissioning the cranes;
- x. cranes were not designed and engineered properly and by July 21, 2010 could still not operate as per design requirements especially in respect of laterals and interlocks, etc.;
- xi. overall, the lack of the promised and specified 10 Tonne overhead crane impacted Comstock for a period of about seven (7) months;
- xii. overall, the lack of the promised and specified 25 Tonne overhead crane impacted Comstock for a period of about seven (7) months;
- xiii. severe delays and disruption due to the lack of promised cranes that dramatically displaced Comstock's strategically planned and tendered methods of working and forced Comstock to work in very uneconomic circumstances;
- xiv. excessive additional costs (labour, rentals, cranes, scaffolding and temporary hoists) because of the lack of the promised cranes and the essential (time of essence) need to progress the works with alternative means and methods;

- xv. lack of a master schedule and/or network schedule from AMEC and/or PotashCorp to help Comstock mitigate and re-schedule key Project works resulting from crane problems;
- xvi. lack of Change Orders from AMEC and/or PotashCorp to cover the direct, indirect and impact costs and reasonable extensions of time resulting from crane problems;

(f) failing to make payments to Comstock when due pursuant to the Contract;

PARTICULARS

- i. for example, in respect of Comstock's May 2010 billing:
 - (1) AMEC cut Comstock's billing by \$500,000 without due diligence and notice and without regard to the actual work performed by Comstock for that time period;
 - (2) after a review meeting, Brad Thompson from AMEC simply reversed the deduction and certified the full amount for payment;
- ii. in respect of Comstock's June 2010 billing:
 - (1) AMEC slashed the billing from approximately \$2,500,000 to \$500,000, an 80% decrease without written and timely notification and rationale for such deductions;
 - (2) AMEC's review and certification of Comstock's June draw including reducing part of that draw relating to work performed by Comstock's subcontractor Germain & Frères down to \$0.00 when Germain had had approximately 20 employees working on that Project for the relevant time period;
 - (3) AMEC deleted the values allocated for Comstock's site management personnel for Comstock's June 2010 application for

payment stating that it could not longer accept charges for those items because the May 30th completion date had passed notwithstanding that AMEC had made a “preliminary determination” for compensation to Comstock of \$2,807,270 for such items as costs to maintain site facilities after the original completion date due to the potential effect of changes in Comstock’s work;

- (4) no payment for the July 2010 Comstock application for payment was made;
- (g) failing to value, approve and pay, in the alternative, failing to properly value, approve and pay for Change Orders in a timely manner;

PARTICULARS

- i. the Contract set out 5 different means to value changes (1) lump sum (2) unit prices found in Schedule A (3) unit prices agreed upon (4) force account (5)cost reimbursable basis; AMEC exercised its discretion in a prejudicial manner vis a vis Comstock by advising Comstock that it would only accept lump sum prices for changes;
- ii. as of the end of May 2010, the following represented a status of the Change Orders involving changes to Comstock’s scope of work (independent of the delay, labour impact or other claims):

<u>Description</u> <u>Category</u>	<u>by</u>	<u>Approved</u> <u>Value (\$)</u>	<u>Pending (\$)</u>	<u>Total (\$)</u>
Drawing Revisions		1,437,281.70	987,615.14	2,424,896.84
Cancelled by AMEC		Various	Various	Various
Added Scope/Modifications		1,040,982.93	1,177,705.65	2,218,688.58

<u>Description</u> <u>Category</u>	<u>by</u>	<u>Approved</u> <u>Value (\$)</u>	<u>Pending (\$)</u>	<u>Total (\$)</u>
Heat		120,000.00	-	120,000.00
Await Decisions	AMEC	Various	Various	Various
Reroute Drains		Various	Various	Various
NG Piping		152,519.00	-	152,519.00
Offload for AMEC		150,000.00	-	150,000.00
S.M. Changes		36,226.80	14,471.45	50,698.25
Vendor Modifications		50,000.00	-	50,000.00
Commissioning		176,680.00	-	176,680.00
Work Stoppage		58,120.04	-	58,120.04
Structural Steel Modifications		350,000.00	-	350,000.00
Deletes		Various	Various	Various
Scaffolding		50,000.00	-	50,000.00
<u>Change Orders In which there were Disputes over pricing or scope or other disputed items</u>		-	109,842.00	109,842.00
Totals:		3,621,810.47	2,289,634.24	5,911,444.71

(h) failing to provide Comstock with complete, reasonable, continuous and uninterrupted access to the Project, specific work areas and construction site from the date of the commencement of work;

PARTICULARS

- i. repeating the particulars from the preceding paragraphs, the design and engineering issues in the Project Documents impeded Comstock's work and interfered with that work;
- (i) failing to provide Comstock with timely and accurate changes and revisions to the design and timely and accurate answers to RFI's and the respective impact upon the ability of Comstock to proceed with the work upon which it had originally tendered;

PARTICULARS

- i. AMEC and PotashCorp were dilatory in respect of the approvals associated with Change Orders:
 - (1) for example, notwithstanding that the Contract included an express term that time was of the essence, AMEC and PotashCorp took inordinate time in approving Change Orders including the following four Change Orders, as an example, all of which impacted Comstock's ability to perform its work (keeping in mind that the Contract completion date was May 30th, 2010):

Change Order	Date Submitted by Comstock	Date Received from AMEC	No. of Days for Approval
023	March 18, 2010	May 12, 2010	55 days
026	March 17, 2010	May 12, 2010	56 days
028	March 26, 2010	May 12, 2010	47 days
034	April 18, 2010	May 12, 2010	24 days

- ii. Comstock states that as a result of the deficient design, drawings, plans and specifications for the Project and lack of proper Project management, scheduling and coordination of the Project, it was required to:

- (1) initiate an inordinately high, yet manifestly required, number of requests for information (RFI) of AMEC, where Comstock asked for clarification in the engineering and design, which in turn required Comstock to unduly wait for answers and directions from AMEC and required Comstock to perform its work in an out of sequence, inefficient and unproductive manner;
- (2) perform an inordinately high numbers of changes, site instructions, preliminary change directives and verbal instructions addressing deficiencies in design, drawings, plans and specifications in respect of the Project and lack of proper Project management, scheduling and coordination of the Project;
- (3) to stop work on certain portions of the Project and continue on other portions of its work in an inefficient and unplanned manner as a result of:
 - a. lengthy turn-around time on Change Orders and decision-making for Change Orders and answers to Comstock's RFI's by AMEC;
 - a.1 receiving confusing and often contradictory direction from AMEC as to whether or not to proceed with work beyond Comstock's scope of work without an approved Change Order which confusion was further compounded by AMEC in its transmittal of CIC 3852 to Comstock and others dated March 24, 2010 while concurrent verbal instruction from AMEC representatives, including Doug Breed and Brad Thompson directing Comstock to perform such out of scope work with such instructions as: "make it fit, red-line Changes and just make it work";

- b. poor co-ordination of design and specifications by AMEC and/or PotashCorp requiring a high number of design revisions from the plans and specifications from which Comstock provided its bid for the work on the Project;
- c. the failure of AMEC and/or PotashCorp to address design problems in a timely fashion which interfered with Comstock's work on the Project;

thereby interfering with Comstock's work as scheduled and requiring Comstock to perform the work under contract in an out of sequence, inefficient and unproductive manner;

- (4) changes to the design by AMEC and Potash continued to such a degree that changes were made several weeks *after* the initial contract completion date of May 30th, 2010; the resultant effect being that Comstock could not have made the initial May 30th, 2010 deadline as changes were progressing at such a rate in terms of volume and to such a degree in terms of lack of timeliness that AMEC and PotashCorp were still designing components of Comstock's work after the contract completion date;
- (5) RFI's in respect of the Project included the following volume and timing which was reasonably unanticipated by Comstock at time of its bid submission and Contract and which actually increased after the original Contract substantial performance date of April 15th, 2010; further, the number of RFI's would typically decrease as the Project proceeded and yet for this Project the number of RFI's in May and June 2010, after when substantial performance of the Project was to have already been achieved, were higher than in any other preceding month being further indicative of design issues, ongoing design changes and revisions and related problems:

SUMMARY OF COMSTOCK REQUEST FOR INFORMATION (RFI) LOG

Month	No. of RFI's Issued	% of Total	Cumulative Number Issued	No. of RFI's Returned	Cumulative Number Returned	No. of RFI's Closed	Cumulative Number Closed
August 2009	3	0%	3	3	3	3	3
September 2009	39	6%	42	27	30	27	30
October 2009	34	6%	76	30	60	29	59
November 2009	47	8%	123	44	104	43	102
December 2009	26	4%	149	21	125	19	121
January 2010	34	6%	183	25	150	24	145
February 2010	38	6%	221	31	181	31	176
March 2010	66	11%	287	38	219	38	214
April 2010	83	13%	370	52	271	52	266
Totals up to Original Completion Date	370	60%		271		266	
May 2010	127	21%	497	65	336	65	331
June 2010	109	18%	606	36	372	36	367
July 2010	12	2%	618	1	373	1	368
Totals after Original Completion Date	248	40%		102		102	
Totals [Part]	618	100%		373		368	
SUMMARY							
Total RFI's issued to July 10, 2010	=	618	=	100%			
Total RFI's closed to July 10, 2010	=	368	=	60%			
Outstanding RFI's at July 2010	=	250	=	40%			

- (j) failing to procure, supply and deliver in a timely manner or at all, and delays and interferences associated with, equipment to be supplied by PotashCorp which impeded Comstock's ability to complete its Work as per its schedule and planned methods, including some such equipment that had not been ordered or provided to Comstock on or before the original Contract completion date of May 30th, 2010;
- (k) failing to properly "rough set" certain equipment and delays and interferences associated with items that were to be "rough set" by AMEC and/or PotashCorp excluding the 10 Tonne and 25 Tonne cranes but including such items identified as:
 - i. Cooler 58-301;
 - ii. 10-Drawing 320 Lump Breaker – Polishing;
 - iii. 62-301 Fan Compaction Dust Bag House;
 - iv. 62-302 Fan Compaction Polisher / Dryer;
- (l) delays and interferences associated with the Project building not being enclosed on time and/or properly;
- (m) failing to provide Comstock with an extension of time to perform the Contract from May 30th, 2010 notwithstanding that AMEC did in certain instances, grant schedule extension approval then never acknowledged the extension. For instance, in email communications referenced as CIC 4461 on May 18, 2010, Richard Bowes from AMEC responded to Comstock by stating that in respect of a Change Order, a 12 week extension to the Contract schedule end date of May 31st, 2010 (notwithstanding that the Contract stated an end date of May 30th, 2010) was accepted and a contract Change Order would follow, but AMEC refused to formalize the extension; and,
- (n) delays and interferences associated with or delays and interferences resulting from one or more of the above subparagraphs, either individually or collectively and additional scope and costs incurred by Comstock.

25. Further particulars of the breaches will be provided prior to trial.
26. In respect of the allegations of negligent misrepresentation, Comstock states that AMEC and PotashCorp owed a duty of care to Comstock to ensure that the Project Documents and all representations made therein and otherwise were true, accurate and not misleading. That duty of care manifested itself with respect to these representations because there existed a *prima facie* 'special relationship' between AMEC and PotashCorp on one side and Comstock on the other because of Comstock's reasonable and foreseeable reliance placed on the Project Documents and representations. Further, the representations made by AMEC and/or PotashCorp in question were untrue, inaccurate and/or misleading; AMEC and/or PotashCorp acted negligently in making said misrepresentations; Comstock relied, in a reasonable manner, on said negligent misrepresentations; and Comstock's said reliance was detrimental to Comstock in the sense that damages resulted.
27. For the various and numerous reasons expressed in the preceding paragraphs and in this claim, all beyond Comstock's control, the Project became radically and irrevocably altered in terms of scope of work and performance and further, the flow of Comstock's work was radically and irrevocably delayed. Comstock's work was put out of practical, economical and planned sequence by the Defendants to a sufficient degree to be a repudiation of the Contract. Although Comstock mobilized to the site upon receipt of the letter of intent, Comstock was unable to meet the contractual completion dates for the reasons set out herein and further, had to endure numerous impediments and interferences to performing its work. This dramatic shift in scheduling and timing of the work, along with the endemic and numerous design errors and/or design problems caused damages to Comstock, who was forced to abandon any tendered means to complete the work as per its tender and drastically re-plan the way its work was carried out.
28. Further, as a result of design errors and design deficiencies (as particularized above with further particulars to be provided prior to trial), Comstock had to incur additional costs for performance of its work and for added scope of work performed by Comstock for which PotashCorp has not compensated Comstock.

29. Comstock states that the various delays and numerous design errors and/or design problems (as particularized above with further particulars to be provided prior to trial) were as a result of AMEC and/or PotashCorp's failure to comply with its obligations and representations described above. Further or in the alternative, Comstock says that the various delays and numerous design errors and/or design problems were beyond the contemplation of the Contract and Project Documents and were, as a result, breaches of contract for which AMEC and/or PotashCorp are liable. Comstock says that as a direct result of the extended completion date for the Project, the numerous design errors and/or design problems and the various interferences in Comstock's work as described above, it incurred additional costs and damages.
30. In the alternative, Comstock states that the additional work, costs, expense and damages were caused by misrepresentations and/or breaches of warranties of AMEC and/or PotashCorp. Particulars of these misrepresentations and/or breaches of warranties in respect of the Defendants' administration of the Contract and in the Defendants' statements and instructions to Comstock and the actions, events and conditions for which AMEC and/or PotashCorp is responsible, have been described herein and have been provided to AMEC and/or PotashCorp and are within their knowledge.
31. As result of AMEC's and/or PotashCorp's breaches of the Contract, misrepresentations, negligent misrepresentations, breaches of duties of good faith, AMEC's tortious interference in the Contract and breaches of collateral warranties, Comstock has suffered damages and incurred costs and expenses including, but not limited to, additional labour and supervisory costs, premium, shift and overtime costs, extended site overhead costs, equipment and material costs, for which AMEC and/or PotashCorp is/are, at law, responsible.
32. Comstock says that the additional costs incurred by it as a result of undisclosed yet added scope of work, the extended completion date and the other herein described impediments were brought about by one or more of the issues described herein, either individually or collectively.
33. As a result of these various breaches, Comstock was required to:

- (a) carry out its work on an 'as when available basis';
- (b) mobilize, demobilize and then remobilize in respect of certain areas of Comstock's work and thus rework certain works two, three or more times;
- (c) work outside the scope of its tendered scope of work; and
- (d) was not permitted to carry out its work in an orderly and economical manner.

34. PotashCorp's and AMEC's refusal to perform their respective obligations in accordance with the Project Documents and the Contract and their demand for substantial change to the nature and scope of the Project constituted a radical and fundamental departure from their obligations as set out in the Contract and Project Documents. This departure went to the root of PotashCorp's contractual relationship with Comstock and its economic interests and had the effect of depriving Comstock of the entire benefit which the parties intended they would obtain from the Contract. AMEC's conduct in this regard also constituted a tortious interference with the economic interests and contractual relations between Comstock and PotashCorp and a breach of its obligations under the Contract.

Notices and AMEC's Preliminary Determination of Comstock's Claims

35. On several occasions, Comstock did provide written notice to AMEC and PotashCorp in respect of the breaches described herein, including notices on January 29, 2010, March 26, 2010 and April 16, 2010 which set out the various breaches as described herein. Further, on numerous occasions Comstock reserved its rights to claim additional monies for delays and impacts associated with the approvals of Change Orders; thus providing further notice of its intention to claim damages.

36. Comstock's April 16, 2010 notice also raised the issue of AMEC's apparent conflict of interest in that AMEC was making decisions, providing opinions, giving directions on issues which arose due to AMEC's actions or inactions.

37. In response to the April 16, 2010 notice described in the preceding paragraph, AMEC responded with a one page 'without prejudice' response on April 22, 2010.
38. In response Comstock wrote to AMEC and PotashCorp on April 28, 2010 providing further details of the items it was claiming, including costs associated with:
 - (a) delays due to lack of cranes;
 - (b) late and continuously changing IFC drawings and design;
 - (c) unresolved Change Orders;
 - (d) acceleration and overtime incurred by Comstock as a result of delays and interference;
 - (e) differing quantities between the Project Documents and the actual quantities being performed or provided by Comstock;
 - (f) extra material handling;
 - (g) claims from Comstock's subcontractors;
 - (h) other miscellaneous issues; and
 - (i) late responses to RFI's.
39. In response, AMEC provided two 1 page 'without prejudice' letters on May 4, 2010.
40. On May 6, 2010 Comstock requested a Change Order for some of the costs associated with the claim items on which it had previously provided notice.
41. On May 7, 2010, AMEC responded by requesting further details of Comstock's claim.
42. On May 14, 2010, PotashCorp wrote directly to Comstock requesting access for its "claims person", Owen McElhinney, to Comstock personnel, which access was granted by Comstock.

43. As part of the claims resolution process, representatives of PotashCorp and Comstock met in Toronto on May 21, 2010. No one from AMEC attended this 'without prejudice' meeting.
44. Subsequently, on June 11, 2010, representatives of AMEC and Comstock met in New Brunswick at which time Comstock delivered and communicated to AMEC details of its claim, including more than 2,600 pages of data and information, part of which was characterized as a "bid to construct" (meaning a calculation of the costs associated with what Comstock was actually building) and discussed Comstock's claim with a series of Comstock personnel.
45. AMEC then wrote Comstock on June 15th confirming that it would provide an "initial Determination" to its claim on or before June 18, 2010. No response was received by Comstock prior to AMEC's own set deadline of June 18, 2010. Further, AMEC's June 15th letter confirmed that Comstock's April 16th, 2010 and June 10th, 2010 letters represented a Notice of Dispute under the Contract (notwithstanding that Comstock's April 16th letter was titled "Notice of Claim") and that upon receipt of the remainder of Comstock's supporting documents and demonstration of entitlement, AMEC would prepare a "final Determination" of the items in dispute.
46. AMEC responded to the June 11, 2010 meeting and Comstock's delivery of supporting material for its claim two weeks later with a June 26, 2010 (Saturday) letter characterized by AMEC as a "preliminary determination" of Comstock's claim (notwithstanding that the Contract does not refer to "preliminary determinations") in which AMEC stated, in less than 1 and ½ pages, that Comstock's supporting data and details of its claim were still insufficient. Notwithstanding that apparent lack of supporting information in AMEC's view, AMEC made a preliminary determination that Comstock was entitled to additional compensation of \$2,807,270 subject to proper supporting documentation being provided. The letter ends with AMEC's affirmation that AMEC would be in touch with Comstock with details regarding the additional information and supporting materials Comstock would need to provide for AMEC to carry out the final review of Comstock's claims. Thus in light of AMEC's June 26th letter, Comstock was induced to believe that

AMEC would be, as it stated, in touch with Comstock as to additional details and supporting documentation AMEC felt it needed in order to make a final determination of Comstock's claim.

47. A further 8 page preliminary determination was made by AMEC on July 9, 2010 (only 10 days after AMEC had issued a Notice of Default to Comstock described below) in which AMEC recommended that Comstock was entitled to compensation for:

- (a) delays or late supplied PotashCorp equipment: \$100,000;
- (b) the lack of use and delayed use of the overhead cranes: \$457,270;
- (c) potentially unforeseen changes in Comstock's scope of work after Contract: \$1,200,000;
- (d) potential costs to maintain site facilities after the original completion date due to the potential effect of changes in Comstock's work: \$1,050,000,

for a total preliminary determination of Comstock's claims of \$2,807,270.

48. At no time did anyone from AMEC get in touch with Comstock with details regarding the additional information and supporting materials Comstock would need to provide in order that AMEC carry out the final or further review of Comstock's claims as AMEC represented it would do in its June 26, 2010 correspondence to Comstock.

49. At no time did AMEC or PotashCorp provide any notice that either was claiming any damages from Comstock. No set-off was claimed in the July 9, 2010 preliminary determination by AMEC.

50. Comstock states that AMEC's own preliminary determination demonstrates Comstock's entitlement to damages and an extension of time to perform its work in respect of:

- (a) late delivery of equipment that was supplied or to be supplied by PotashCorp;
- (b) lack of use and delayed use of the overhead cranes;

- (c) unforeseen changes to the Project design and engineering and thus to Comstock's scope of work after Contract award to Comstock that had not been compensated for; and
- (d) Comstock's extended site overheads and facilities due to delays.

AMEC's Conflict of Interest and Appearance of Bias

51. As noted above, on April 16, 2010, (and in subsequent communications) Comstock did advise PotashCorp and AMEC that AMEC was in a conflict of interest and that there was an appearance of bias in respect of AMEC's determinations, opinions, decisions and directions on Comstock's claims.
52. The only response to Comstock's concerns about AMEC's conflict of interest prior to AMEC placing Comstock on Notice of Default of June 30th, 2010, was a 1 page 'without prejudice' letter from AMEC dated May 4, 2010. A subsequent response was made by AMEC on July 9, 2010, after the Notice of Default dated June 30, 2010 was delivered, on the relative eve of the purported termination of Comstock's contract and some 84 days after the issue was raised by Comstock, in which AMEC denied any conflict of interest or reasonable apprehension of bias.
53. The same concern was echoed by Comstock on May 14, 2010 when it reiterated in writing to each of PotashCorp and AMEC that AMEC was in a conflict of interest and that there was an appearance of bias as a result of such considerations as the fact that PotashCorp and AMEC shared the same letterhead and that AMEC consistently used that joint letterhead when communicating to Comstock. The May 14, 2010 communication also acted as a Notice of Dispute under the Contract (a Notice of Dispute is referred to in GC 59.5 of the Contract although no form is suggested or required) as it stated that Comstock disputed AMEC's decisions as a result of the conflict of interest and appearance of bias.

54. Comstock states that the appearance of bias and conflict of interest arise out of the following facts: AMEC was engaged primarily as the agent for PotashCorp, to design, supervise, manage and administer the Project. In the course of administering the Project and pursuant to the Contract, AMEC was also required to assume a different role, that of judge. The Contract required that AMEC determine certain questions between Comstock and PotashCorp. These were to range from routine tasks such as certification of work for purposes of payment to the granting of time extensions and the resolution of contractual claims.

55. Given AMEC's sensitive mandate in respect of making decisions under the Contract on matters such as variations, time extensions, defective work, claims for compensation and certificates for payment, resolution of design errors, resolution of technical issues, procurement issues and warehousing problems, AMEC was bound to act as an impartial decision-maker as well as PotashCorp's agent. AMEC's discretions in the Contract were broad and various. As such, AMEC was bound to act in a fair and unbiased manner, holding the balance between PotashCorp and Comstock. This duty was implicit in the Contract which appointed AMEC to decide such questions and as a result, AMEC owed a duty to both Comstock and PotashCorp equally to act in an unbiased manner and without any reasonable apprehension of bias or any appearance of bias.

56. Comstock claimed from April 16, 2010 onwards that AMEC was in a conflict of interest, that there was an appearance of bias and that it was in breach of its duties to act impartially. Further, Comstock maintained that AMEC was estopped from making decisions or determinations, providing directions or giving opinions in respect of Comstock's claims and was further, duty bound to recuse itself from making any decision, opinion, direction or determination because:

(a) a significant number of the items raised by Comstock in its claim related to misrepresentations, inducements, wrongful actions or inactions of AMEC, especially those relating to design; so the very acts or omissions at issue in Comstock's claim were directly related to AMEC in its capacity as engineer and

designer and construction manager and yet AMEC was making decisions, determinations, directions and opinions on those very same issues;

- (b) letterhead employed by AMEC in its communications to Comstock had both AMEC and PotashCorp's logos prominently displayed thereon and further the title line of the letterhead was "Potash Corporation of Saskatchewan" making it appear that all communications were coming from both AMEC and PotashCorp jointly or that AMEC could write letters using PotashCorp letterhead; only on one occasion did AMEC use its own letterhead in communications to Comstock prior to the purported termination of the Contract and that was the letter dated June 26th, 2010 in respect of the "preliminary determination" of Comstock's claim described herein;
- (c) Comstock's claims raised specific questions about AMEC's very own engineering, procurement and construction management;
- (d) the AMEC personnel rendering decisions, directions, determinations and opinions for AMEC were the same ones who were involved in the design and project management issues relating to Comstock's claims;
- (e) AMEC and PotashCorp shared the same facilities, trailers and offices in respect of the Piccadilly Potash Project and the Project;
- (f) AMEC was awarded the contract for engineering, procurement and construction management for the complete Piccadilly Mine Project (which included the Project) which were estimated to be in excess of \$1.7 Billion and thus AMEC and Potash had an ongoing prior and concurrent lucrative relationship beyond this Project and Contract;
- (g) at all material times, AMEC was also engaged with expansion projects at PotashCorp's Lanigan, Rocanville and Cory operations, with the Rocanville project estimated at \$1.8 Billion, and a total capital value of all PotashCorp projects involving AMEC at \$4.4 Billion, further reflective of the ongoing

sweeping and lucrative relationship between AMEC and PotashCorp that went well beyond the Project and Contract here;

- (h) AMEC's own web postings identified AMEC as the selected "partner" of PotashCorp for various PotashCorp projects including this Project and thus representing that AMEC and PotashCorp were partners on the Project; and
- (i) AMEC and PotashCorp representatives had meetings and communications to the exclusion of Comstock in respect of Comstock's claims.

57. Notwithstanding Comstock's concerns about AMEC's conflict of interest and consistent communication of same to AMEC and PotashCorp, including its May 14, 2010 letter which stated that Comstock disputed all AMEC decisions because of this conflict of interest and appearance of bias (which was a Notice of Dispute as per the Contract), AMEC continued to act as the sole decision-maker on issues arising on the Project and under the Contract. As a result, the actions taken by AMEC in respect of decisions, directions, determinations and opinions should be set aside and determined not to be binding on Comstock or PotashCorp and further, constitute tortious interference with Comstock's interests in the Contract.

57.1 Further, Comstock states that PotashCorp unduly influenced, interfered with and/or usurped AMEC's decision making role in respect of the various decisions AMEC was mandated to make in respect of the Project and Comstock's claims and thus deprived Comstock of its right to an impartial review of its requests for extensions of time to perform its work and additional compensation made through its claims.

57.2 As noted above at paragraph 42, on May 14th, 2010, PotashCorp wrote Comstock advising that it had retained a "claims person", Owen McElhinney, and requested access to Comstock's facilities and personnel at the Project site. Mr. McElhinney, whose web site listed both AMEC and PotashCorp as clients, did meet and exchange information relevant to Comstock's claims with Comstock personnel on three occasions, one of which was attended by AMEC personnel (Mark Neis) who had been charged with dealing with Comstock's claims, all of which gave Comstock the impression that Mr.

McElhinney was working, in part, with AMEC on Comstock's claims and exchanging relevant information with AMEC on those claims. Further, Mr. McElhinney did use AMEC's trailer and facilities while at the Project site, thus further demonstrating an established link between Mr. Elhinney and AMEC which served to unduly influence, interfere with or usurp AMEC's role as decision-maker under the Contract.

Purported Termination of Contract by PotashCorp

58. On June 30, 2010 Comstock wrote PotashCorp as a follow up to the May 21, 2010 meeting in Toronto asking PotashCorp to re-engage in settlement discussions as Comstock personnel had not heard from PotashCorp personnel for several weeks.
59. Within an hour of transmitting the letter described in the preceding paragraph, AMEC responded with a letter to Comstock referred to as a "Notice of Default of Contractual Obligations". This letter, came only 4 days after AMEC had made a qualified preliminary determination of Comstock's claim in which it said that Comstock was entitled to additional compensation of \$2,807,270 which included, *inter alia*, compensation for delays associated with PotashCorp supplied equipment, delays associated with use of the overhead cranes and comprising less than a page and half of information, purported to place Comstock on notice of certain defaults under the Contract in respect of what was in AMEC's opinion, Comstock's :
 - (a) failure to prosecute work diligently;
 - (b) failure to provide sufficiently skilled and qualified labour and supervision;
 - (c) failure to provide sufficient Plant or Materials or services;
 - (d) failure to complete work by the completion date (May 30, 2010);
 - (e) performing the work in an inefficient manner;

(f) failure to provide a proper construction Schedule and failing to provide proper contents to notice of claims (notwithstanding that AMEC had stated in its June 26 preliminary determination that it would advise Comstock what Comstock would need to provide for AMEC to make a further determination on Comstock's claims but failed to do so).

60. No details were provided in support of these alleged defaults by Comstock. A deadline of July 15, 2010 was set for compliance.

61. No other Notice of Default was ever received by Comstock. Further no notice of any damages to be claimed against Comstock by PotashCorp or AMEC was delivered to Comstock on or before July 21st, 2010 (the date of the purported termination) or even as of the date of this amended statement of claim. Further, no notice or written direction was received by Comstock as per GC 32.3 of the Contract, directing Comstock to employ additional workers or to work overtime.

62. Comstock responded on July 6, 2010 with a letter which included:

- (a) a request of details as to how AMEC's opinion was formed in respect of the alleged defaults;
- (b) a request for a copy of the 'Progress Schedule' referred to in the Contract;
- (c) a Notice of Dissent made pursuant to GC 59.3 of the Contract made in respect of the Preliminary Determination by AMEC dated June 28, 2010 and for its failure to provide detail and in respect of the Notice of Default and further, in respect of AMEC's conflict of interest (GC 59.3 provides that should Comstock dispute the direction, decision or determination of AMEC rendered herein before (which included the Notice of Default provision at GC 46), it could issue a Notice of Dissent); and
- (d) further substantiation of Comstock's claims as required by the Notice of Dissent provisions in the Contract.

63. The Notice of Dissent was intended to take AMEC's Notice of Default through the dispute resolution provisions in the Contract and thus act as an effective stay of that Notice of Default pending the steps associated with dispute resolution in the Contract. It also required PotashCorp to provide a written response within 14 calendar days and thus on or before July 20, 2010.
64. The July 15, 2010 deadline for Comstock's compliance passed. By July 15, 2010 notwithstanding that it disagreed with and disputed the alleged defaults and had sought details of the alleged defaults, as a measure of good faith, Comstock had undertaken several steps to address the alleged defaults that were formed by AMEC's opinion. These included:
 - (a) hiring more employees so that between the June 30, 2010 Notice of Default and the July 21, 2010 purported termination, Comstock had increased its personnel from 114 workers to 154 workers; that increase in personnel was communicated to AMEC by Comstock via daily and weekly manpower data transmitted by Comstock to AMEC and in the weekly Minutes of Meetings where the number of personnel was reviewed and further, in the schedules submitted by Comstock to AMEC;
 - (b) retaining an outside schedule consultant to address AMEC's alleged concerns about scheduling. Again, AMEC was aware of this retainer and in fact, met with this scheduling consultant; and
 - (c) submitting further schedules.
65. Notwithstanding these steps taken by Comstock, AMEC tried to answer Comstock's July 6, 2010 request for details of how AMEC came to the opinion that Comstock was in default, by writing to Comstock on July 15, 2010, being the very deadline date and more than one week after Comstock's July 6th, 2010 letter requesting details of the alleged defaults. AMEC's response included an explanation that the Progress Schedule described in the Contract was incorrect and that what was meant was "Construction Schedule". However, insufficient details as to how AMEC's opinion was formed for the alleged

defaults were provided. Further, AMEC induced Comstock into believing that the process to address the outstanding claims would continue when this AMEC letter ended with the statement and representation that Comstock's claims had been, and would continue to be, dealt with separately. Comstock relied on this letter as a clear indication that Comstock would proceed with the Contract and that its claims would be further determined by AMEC.

66. On July 16, 2010, (a Friday) after the deadline for the Notice of Default had passed, AMEC wrote to Comstock only now providing details of what it believed to be the default associated with Comstock's schedule submissions. Comstock maintained throughout that it could not produce an accurate schedule because of the impediments and delays described in this pleading including holds on certain works, design deficiencies, ongoing changes to the design and RFI's.
67. At the close of business on July 21, 2010, PotashCorp sent Comstock a letter purportedly terminating the Contract and expelling Comstock from the Project.
68. PotashCorp's purported termination of the Contract was unjustified, self-serving, not made in good faith, in breach of the Contract and represented a further wrongful repudiation of the Contract because that purported termination:
 - (a) came while Comstock's rights pursuant to the Contract:
 - i. to pursue its claim via the Notice of Dispute subsisted (GC 59.5 refers to a period between 90 days and 120 days from a Notice of Dispute in which to deliver a Notice of Litigation or Arbitration – Comstock's Notice of Dispute was made on April 16, 2010 meaning the 90 to 120 days time period from that Notice of Dispute was between July 15, 2010 and August 15, 2010 and had not yet expired);
 - ii. in respect of its Notice of Dissent dated July 6, 2010 remained open awaiting a response from PotashCorp which was to come 14 calendar days from Comstock's Notice of Dissent being July 20, 2010 and which was not delivered by that deadline or ever (unless the purported termination of

July 21, 2010 was that response, albeit late); as a result PotashCorp had not followed the Contract requirements for responding to a Notice of Dissent;

- (b) was delivered only 3 business days after AMEC had provided some details of how its opinion was formed as to alleged schedule defaults on Friday, July 16, 2010;
- (c) came as a result of alleged defaults that had been waived by the conduct and representations of AMEC and/or PotashCorp;
- (d) came with insufficient time for Comstock to respond to AMEC's Friday, July 16, 2010 letter;
- (e) was made when no other details of the Notice of Default were provided, although requested;
- (f) came after the expiry of the Notice of Default;
- (g) required a newly constituted Notice of Default;
- (h) came while a Change Order e request for an extension of time to perform and additional costs associated therewith was pending and on which a preliminary determination had been made and there were representations from AMEC that further a determination(s) was going to be made;
- (i) was made without any proper investigation as to whether or not Comstock had or was addressing the alleged defaults;
- (j) was premised on an opinion from AMEC when AMEC was in a conflict of interest and AMEC had an appearance of bias and that conflict and bias had been communicated to both AMEC and PotashCorp by Comstock on several occasions;

(k) came while PotashCorp was itself in default on answering Comstock's July 6, 2010 Notice of Dissent within the requisite 14 calendar day period as per GC 59.3 of the Contract which required a response on or before July 20, 2010;

(l) came when PotashCorp and/or AMEC had committed the numerous breaches described herein;

(m) was largely premised on allegations of insufficient workers on the Project site when the Contract included an express provision that Comstock and its subcontractors would reach a peak workforce of 200 workers and that minimum peak level was maintained throughout by Comstock and its subcontractors, and for many weeks was exceeded in some instances exceeded twofold;

(n) there was no prior written direction or notice from AMEC to Comstock as per GC 32.3 of the Contract to change, increase or improve Comstock's methods or to employ additional workers or to work overtime which was effectively a condition precedent for the purported termination in respect of insufficient workers.

69. Subsequent to the purported termination, AMEC and PotashCorp would not permit Comstock, its employees or its subcontractors to return to the site to remove their respective personal property. In so doing, AMEC and PotashCorp unlawfully seized Comstock's personal property (hereinafter "Comstock's Personal Property"). As of the date of this pleading AMEC and PotashCorp are still restricting Comstock's access to its tools and equipment (Comstock's Personal Property) and those of its subcontractors and are making use of Comstock's Personal Property without Comstock's consent or pursuant to the Contract thus giving rise to a further claim for damages. As a result, AMEC and PotashCorp have wrongfully converted Comstock's Personal Property.

70. PotashCorp's purported termination of the Contract was in breach of its contractual obligations, including its duty of good faith, to take all steps necessary to give effect to the provisions and intent of the Project Documents and in breach of its common law and contractual duties to act in good faith.

71. AMEC's issuance of the Notice of Default and decision to only answer Comstock's requests for details on the date of the deadline in the Notice of Default, along with other acts and omissions by AMEC constituted tortious interference with Comstock's economic interests and with the contractual relations between PotashCorp and Comstock. At the time PotashCorp purported to terminate the Contract, all of the conditions of the Project Documents had been satisfied or waived and, to the extent that they had not been satisfied or waived, their non-satisfaction was due to the acts and/or omissions of PotashCorp and/or AMEC.
72. At the time PotashCorp purported to terminate the Contract, the items identified in AMEC's Notice of Default of June 30, 2010 had been satisfied, or were being satisfied or could have been satisfied or were waived or excused, had PotashCorp performed its contractual obligations in good faith as it was required to do.
73. In the alternative, in the event and to the extent that the alleged defaults had not been satisfied and had not been waived or excused as of the deadline, the sole reason for their non-satisfaction and non-waiver was the wrongful and deliberate conduct of PotashCorp and/or AMEC undertaken for the improper purpose of resiling from PotashCorp's contractual and common law obligations. In purporting to terminate the Contract based on the alleged defaults, PotashCorp breached its obligations to take all further action reasonably necessary or appropriate to give effect to the provisions and intent of the Contract and to permit Comstock to complete the Project.
74. PotashCorp's and AMEC's purported termination of the Contract was a contrivance, made in bad faith and for the improper purpose of trying to justify and/or excuse its unlawful conduct, including its repudiation of the Contract, and in respect of AMEC, its tortious interference with Comstock's economic interests and contractual relations. At all materials times PotashCorp and AMEC knew that PotashCorp was bound by the Project Documents, that they were not entitled to change the fundamental nature of the Project nor could PotashCorp terminate the Contract and that Comstock would suffer substantial damages if PotashCorp resiled from its obligations under the Contract.

Unjust Enrichment and *Quantum Meruit*

75. As a result of Comstock undertaking its work, PotashCorp has been enriched and Comstock has suffered a corresponding deprivation. PotashCorp has requested and received valuable materials and services but has not paid Comstock for the value of that work. There is no juristic reason to allow PotashCorp to retain, without payment, the benefits of the work carried out by Comstock at PotashCorp's request.
76. As a result of the wrongful repudiation of the Contract by PotashCorp and/or independent of that claim, Comstock is entitled to, at its election, to be paid for the work and services it provided on the basis of *quantum meruit*.

Damages

- 76.1 In or around the time of the purported termination described herein, there remained:
 - (a) \$656,894.22 (HST Included) owing to Comstock from Comstock's June 2010 application for payment,
 - (b) \$3,256,065.01 (HST included) owing to Comstock from Comstock's July 2010 application for payment,
 - (c) \$6,048,160.91 (HST included) in statutory holdback (up to and including the July 2010 application for payment),
for a total of \$9,961,120.14 (plus HST where applicable).
- 76.2 In addition, Comstock claims the sum of \$42,964,072.00 representing damages, part of which includes a calculation of the net difference between the scope of work in its lump sum bid as negotiated and the actual work it performed. The damages of \$42,964,072.00 are a currently estimated amount which is particularized as follows:

<u>Description</u>	<u>Amount</u>	<u>Amount</u>
<u>Out of sequence delivery of owner supplied equipment and materials as well as double and multi handling of same</u>		<u>\$4,258,641</u>
<u>Lack of timely and proper promised cranes (10T & 25T). Price includes costs up to April 16, 2010 only. Additional costs to end of contract to be determined</u>		<u>\$6,500,000</u>
<u>Working off scaffolding and lifts to install systems for Tray, Cable and lighting over open areas where high sections of scaffold had to be installed. These areas are not indicated on the drawings. This line item is additional labour due to the fact work performed off high levels of scaffold</u>	<u>\$515,764</u>	
<u>Additional costs for a scaffold crew to install and maintain scaffolding throughout the facility. Duration of the installation. Dedicated for the electrical crews only.</u>	<u>\$1,003,002</u>	
<u>Additional Costs for handling cable tray and light fixtures to all floors due to the overhead crane being out of commission. This includes removing and reinstalling the grating</u>	<u>\$451,199</u>	
<u>Lost productivity due to no winter heat plus the building not being closed in (AMEC did not issue a PO for temp. heat until the end of February 2010) 150 men x 12hrs x 5days x 16 weeks times 25% productivity loss</u>	<u>\$3,438,979</u>	
<u>Scaffolding crew for the above - 36,000 hours x 25%</u>	<u>\$855,804</u>	
<u>Labour for snow removal for the above</u>	<u>\$190,179</u>	
<u>Testing of MCC's by Rockwell Automation due to exposure to moisture, ice and frost because of no heat in the building.</u>	<u>\$13,280</u>	
<u>Subtotal</u>		<u>\$6,468,207</u>
<u>Switchgear alignment - the floor was very uneven and Comstock required unanticipated additional time to shim. This is for all equipment. Supplier's manual gives a 1/4" tolerance for the length of the gear. This was not the case.</u>	<u>\$102,259</u>	
<u>MCC Line-ups; the openings were not adequate for cable entry. Comstock had to rework.</u>	<u>\$206,012</u>	
<u>Seismic Bracing throughout the building for cable trays. No reference or correlation to the details shown on dimension layout drawings.</u>	<u>\$769,787</u>	
<u>Installation of additional 6" and 12" cable tray to support the cable overages</u>	<u>\$2,272,253</u>	
<u>Additional Cable supports in the cable pull room for separation of cables between trays - not shown on IFC Drawings</u>	<u>\$106,168</u>	

<u>Description</u>	<u>Amount</u>	<u>Amount</u>
<u>Equipment was installed on a platform by a crane then set in place. Additional Shipping splits for MCC's, 5kv switchgear, 600 volt switchgear. Includes bolting, handling, torquing and interconnecting wiring.</u>	<u>\$266,238</u>	
<u>Temporary Power - above what was required for the original bid.</u>	<u>\$464,899</u>	
<u>Additional cable installed above what was scheduled. Up to and including July 20, 2010</u>	<u>\$457,429</u>	
<u>Fire Alarm Pull Station Stands including FA Devices. Installation of Stands and devices that were to be installed by the Vendor as per Specification Section 156930-E-SP-16422 Sec 3.2.1</u>	<u>\$81,379</u>	
<u>Transmittal 3792 Reconciliation</u>	<u>-\$657.93</u>	
<u>Transmittal 5904 Reconciliation</u>	<u>\$2,723.61</u>	
<u>Transmittal 6023 Reconciliation</u>	<u>\$14,040.46</u>	
<u>Transmittal 4226 not originally included in first submission</u>	<u>\$217,380.13</u>	
<u>Transmittal 4819 not originally included in first submission</u>	<u>\$26,986.78</u>	
<u>Subtotal</u>		<u>\$4,986,897</u>
<u>Flake Breakers. Additional unanticipated hours required to disassemble and reassemble all Flake Breakers due to building restrictions. These items were larger than access openings. This equipment should have been brought & set by AMEC at time of structure erection as was done with other equipment.</u>	<u>\$197.082</u>	
<u>Additional Cost to rework pipe supports. Piping supports were fabricated as per AMEC details, drawings and specifications. A large number of supports had to be redesigned and fabricated to suit the piping installation.</u>	<u>\$917,576</u>	
<u>Additional Cost to install Compactor machine</u>	<u>\$185,467</u>	
<u>Additional cost to install Cable Pull (mechanical) and Flake Drains - Cable Pull drains removed from base bid. When on site, AMEC instructed Comstock to install same.</u>	<u>\$127,659</u>	
<u>Additional costs incurred while proving to AMEC that four chutes tagged MK 3201650028P were incorrectly manufactured</u>	<u>\$17,417</u>	
<u>Additional cost to install 10" flanges required to attach SS above ground storm piping to PVC underground piping</u>	<u>\$2,782</u>	
<u>Subtotal</u>		<u>\$1,447,983</u>

<u>Description</u>	<u>Amount</u>	<u>Amount</u>
<u>Bid to Construct Analysis performed for work up to April 30, 2010 as submitted to AMEC on June 11, 2010 which included acceleration (Premium Time, 2nd Shift, additional manpower, extra resources, etc.) up to April 30, 2010.</u>		<u>\$15,863,490</u>
<u>Subcontractor's claims & general and miscellaneous items (estimated).</u>		<u>\$3,000,000</u>
<u>Additional costs for additional impacts on Change Orders already provided.</u>		
<u>Comstock 9154 - Install Bracing on Surge Bin</u>	<u>\$40.680</u>	
<u>Comstock 9102 - Additional Andritz Instruments</u>	<u>\$55.255</u>	
<u>Comstock 9118 - Claim for Costs to Install Compaction Baghouse Fan 62-301</u>	<u>\$64.455</u>	
<u>Comstock 9156 - Cut out Kick Plate at Weather Hood Openings</u>	<u>\$29.719</u>	
<u>Subtotal</u>		<u>\$190,109</u>
<u>Items identified herein as Comstock Personal Property</u>		<u>\$248,745</u>
<u>Total</u>		<u>\$42,964,072</u>

77. Comstock claims against:

(a) PotashCorp for:

i. damages currently estimated in the amount of \$42,964,072 for:

- (1) breach of contract and/or breaches of collateral warranties;
- (2) in the alternative, for breach of the duty to act in good faith;
- (3) in the alternative for misrepresentation or negligent misrepresentation;

ii. in the alternative, on Comstock's election, compensation currently estimated in the amount of \$42,964,072 on the basis of *quantum meruit* for

wrongful repudiation of the Contract or independent of the wrongful repudiation of the Contract;

- iii. and/or in the alternative, compensation and/or restitution currently estimated in the amount of \$42,964,072 for unjust enrichment;
- iv. in addition to the foregoing damages, payment of the sum of \$9,961,120.14 (plus HST where applicable) as described in paragraph 76.1 above;
- v. HST on any applicable sums; and,
- vi. further, or in the alternative, a declaration that the Contract is void for uncertainty or in the alternative, voidable;

(b) AMEC for:

- i. damages currently estimated in the amount of \$42,964,072 plus HST as applicable for:
 - (1) tortious interference with contractual relations and economic interests,
 - (2) in the alternative, inducing breach of contract;
 - (3) in the alternative, misrepresentation or negligent misrepresentation;
 - (4) in the alternative, for breach of the duty to act in good faith;

(c) Both Defendants:

- i. an order requiring the Defendants to return Comstock's Personal Property to Comstock;
- ii. damages arising from the Defendants' wrongful conversion of Comstock's Personal Property (forming part of the \$42,964,072 in damages claimed);

- iii. punitive and/or aggravated and exemplary damages in the amount of \$5,000,000;
- iv. costs of this action on a solicitor and client basis;
- v. interest pursuant to ss. 45 and 46 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, as well as any applicable taxes; and
- vi. such further and other relief that this Honourable Court may deem just.

DATED at Saint John, New Brunswick, this 15th day of ^{October} August, 2010.

for R. M. Creamer
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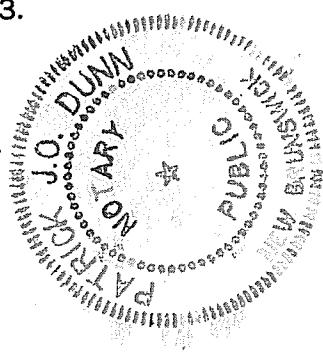
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THIS IS EXHIBIT "D"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



Cause No: S/C/404/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N:

COMSTOCK CANADA LTD.,

Plaintiff

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

- and -

RECD REC'D NOV 8 2010 FILED DEPOSE

**POTASH CORPORATION OF
SASKATCHEWAN INC., AND AMEC
AMERICAS LIMITED,**

COUR DU BANC DE LA REINE
GREFPIER / SAINT-JEAN

Defendants

STATEMENT OF DEFENCE AND COUNTERCLAIM
(Form 27C-1)

1. The Defendant, Potash Corporation of Saskatchewan Inc. (hereinafter the "Defendant" or "PCS"), admits the allegations contained in paragraphs 1, 2, 4, 5, 16, 18, 21.4, 40, 41, 42, 47, 67 of the Amended Statement of Claim.

2. The Defendant has no knowledge of the allegations contained in paragraphs 7, 8, 15(f), 37, 39, 44, 52, 56(d), 56(h), 64 and 66 of the Amended Statement of Claim and puts the Plaintiff to the strict proof thereof.

3. The Defendant denies that it committed any breach of the Contract and denies the particular breaches as alleged in paragraphs 24(a), 24(b), 24(c), 24(d), 24(e), 24(f), 24(g), 24(h), 24(i), 24(j), 24(k), 24(l), 24(m), 24(n), and all subparagraphs of said paragraphs, of the Amended Statement of Claim and otherwise has no knowledge of the allegations contained therein save as set out in this Statement of Defence and Counterclaim and puts the Plaintiff to the strict proof thereof.

4. The Defendant denies the allegations contained in paragraphs 9, 10, 11, 12, 12.1, 14, 15(a), 15(b), 15(c), 15(d), 15(e), 15(g), 17, 19, 20, 21, 21.1(a), 21.1(b), 21.1(c), 21.1(d), 21.1(e), 21.1(f), 21.1(g), 21.1(h), 21.1(i), 21.1(j), 21.1(k), 21.1(l), 21.1(m), 21.1(n), 21.1(o), 21.1(p), 21.1(q), 21.1(r), 21.1(s), 21.1(s.1), 21.1(t), 21.1(u), 21.1(v), 21.2, 21.3, 21.5, 22, 23(a), 23(b), 23(c), 23(d), 23(e), 23(f), 23(g), 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 43, 45, 46, 48, 49, 50, 51, 53, 54, 55, 56 (a), 56(b), 56(c), 56 (e), 56(f), 56(g), 56(i), 57, 57.1, 57.2, 58, 59, 60, 61, 62, 63, 65, 68, 69, 70, 71, 72, 73, 74, 75, 76, 76.1 and all subparagraphs of said paragraphs, of the Amended Statement of Claim, and any and all other allegations in the Amended Statement of Claim, save as expressly admitted herein, and the relief sought in paragraphs 76.2, and 77 of the Amended Statement of Claim.

5. With respect to paragraph 3 of the Amended Statement of Claim, the Defendant states that the existing mine is known as the Penobsquis mine while the new mine currently under construction is the Picadilly mine.

6. With respect to paragraph 9 of the Amended Statement of Claim, the Defendant states that the Agreement and the documents referenced specifically therein constitute the Contract between the parties (the "Contract").

7. With respect to paragraph 11 of the Amended Statement of Claim, the Defendant states that the Plaintiff was initially invited to bid in February of 2009. Further, while the initial tender documents contemplated a cost plus contract, it also provided a not to exceed amount of \$34,000,000.

8. With respect to paragraph 12 of the Amended Statement of Claim, the Defendant states that prior to the Plaintiff submitting its lump sum tender, it was aware that the project drawings were still subject to change and, in fact, the drawings changed during the bidding process. Further, the Plaintiff, as an experienced contractor, had the ability to assess the drawings and accordingly the state of the overall project in deciding whether to bid on the project and the amount of its bid. The Defendant pleads and relies on section 47.9.1 of the General Conditions of the Contract which contemplated significant or major changes to the scope of work:

47.9.1 Any major or significant Change to the Scope of Work or Changes to the terms of the Contract shall be authorized, documented, executed and incorporated into the Construction Documents by direct issue of a Contract Change Order. All costs shall be authorized, controlled and processed as if for the original Scope of Work.

9. With respect to paragraph 13 of the Amended Statement of Claim, the Defendant admits that the Plaintiff submitted a lump sum bid on July 23, 2009.

10. With respect to paragraph 12(d) of the Amended Statement of Claim, the Defendant states that PCS did not supply documents directly to the Plaintiff, rather documents were supplied to the Plaintiff by the Engineer. PCS denies that it made any representation or warranty outside of the Contract.

11. With respect to paragraph 14 of the Amended Statement of Claim, the Defendant states that

- a. the Plaintiff was initially invited to bid on the project in February of 2009;
- b. no completion date was provided in the initial tender documents provided to the Plaintiff;
- c. RCA 10 was introduced in July of 2009, following the Plaintiff's bid;
- d. the Plaintiff submitted a lump sum bid in July of 2009 with its cost plus bid as an alternative, and not *vice versa*; and
- e. the additional \$637,000 added to Comstock's bid price represented an amount added after Comstock sought clarifications and received answers, rather than any addition to the scope of work;

12. With respect to paragraph 15(a) of the Amended Statement of Claim, the Defendant states that prior to the contract being signed, during the clarifications stage, the Plaintiff asked for free and clear access for the installation of its work but this request was denied and the Plaintiff was advised that there would be other contractors working in the area. PCS relies on the Special Conditions of the Scope of Work which provides, at page 3, that the Plaintiff's work:

...must be coordinated with work being carried out by OTHERS as well as the OWNER'S ongoing operations. CONTRACTOR shall make due allowance for interface with any other CONTRACTORS and shall be responsible for scheduling its day to day activities in conjunction with those CONTRACTORS working concurrently on the Jobsite.

13. With respect to paragraph 15(b) of the Amended Statement of Claim, the Defendant states that the Plaintiff was to commence work on those parts of the project for which the IFC Drawings had been received and was not to wait to start work until all IFC Drawings for the entire project were received.

14. With respect to paragraph 15(c) of the Amended Statement of Claim, the Defendant states that the Plaintiff requested full and unrestricted use of the cranes, prior to submitting its July 23, 2009 bid, but such request was denied. Further, the Scope of Work, forming part of the Contract, provided that the Plaintiff was responsible for completing the final assembly, installation, testing, load testing and commissioning of the cranes prior to use.

15. With respect to paragraph 15(d) of the Amended Statement of Claim, the Defendant states that the Plaintiff received revision documents (RCA 10) on July 9, 2010.

16. With respect to paragraph 15(e) of the Amended Statement of Claim, the Defendant states that the applicable Piping Line List was 156930-P-EL-001, Rev. 0.

17. With respect to paragraph 15(g) of the Amended Statement of Claim, the Defendant states that the Plaintiff ought to have included amounts in its bid to account for the possibility of various contingencies and any damages flowing from its failure to do so are attributable solely to the Plaintiff.

18. With respect to paragraph 17 of the Amended Statement of Claim, the Defendant states that it contracted with the Plaintiff through the Agreement and the documents referenced specifically therein (the "Contract") and not the "Project Documents" as defined by the Plaintiff. The Defendant pleads and relies on Article 1 of the Agreement which provides that:

The Contract Documents shall constitute the entire agreement between the parties for the Work to be performed, and shall supersede and cancel all previous agreements between the parties in regard to the Work whether oral or in writing, whether expressed or implied.

19. With respect to paragraph 19 of the Amended Statement of Claim, the Defendant states that the schedule was not highly compressed, but rather the schedule agreed to by the parties. Further, the Plaintiff agreed to comply with the schedule and did not ask for an extension of time, even following the

clarification of various particulars prior to the Plaintiff's tender and the Plaintiff's request for free and clear access to the site having been denied. PCS has no knowledge of the Plaintiff's claim that it had committed substantial resources by November 2009 and puts the Plaintiff to the strict proof thereof.

20. With respect to paragraph 20 of the Amended Statement of Claim, the Defendant denies that it was aware that the Plaintiff was entering into contractual relations in reliance upon their warranties and representations regarding the completeness and accuracy of the Contract documents. The Defendant states that the Plaintiff was aware that the Contract Drawings and other Construction Documents were subject to change and revision and relies on the following sections of the General Conditions of the Contract:

- 3.5.1 The Contract Drawings and other Construction Documents executed with the Contract shall not be used for the construction of the Work.
- 3.5.2 OWNER shall provide CONTRACTOR, without charge, copies of Drawings and Specifications necessary to secure required permits and licenses and for record drawings. OWNER will also provide "Issued For Construction" drawings and Specifications for the performance of the Work in the quantities stated in G.C. 4.1. Additional copies shall be furnished by OWNER for cost of reproduction and applicable taxes, plus 10%, payable by CONTRACTOR to OWNER.

[...]

- 4.1.1 The Work shall be performed in accordance with the latest revision to the Construction Drawings, Specifications and other information issued to CONTRACTOR at the Site.
- 4.1.2 The drawings ENGINEER furnishes to CONTRACTOR for the actual performance of the Work are the Construction Drawings. These drawings will be marked by ENGINEER "Issued for Construction".

[...]

- 4.3 REVISED CERTIFIED INFORMATION -The Construction Drawings may be revised from time to time during the course of the Work. **Some of the Construction Drawings may be revised many times.** When written instructions have been given to CONTRACTOR pursuant to S.C. 5.0. the Construction Drawings will be revised to show the Change in the Work to which the instructions relate.

[...]

- 5.1 ISSUE OF INSTRUCTIONS - ENGINEER may furnish to CONTRACTOR, during the progress of the Work, additional instructions to supplement the Construction Documents and Contract

and Construction Drawings and Specifications as ENGINEER considers necessary or desirable for the performance of the Work. Additional instructions will be consistent with the intent of the Construction Documents. Additional instructions may be in the form of Specifications, Drawings, samples, models or other written instructions. CONTRACTOR shall comply with all additional instructions.

[emphasis added]

21. The Defendant further relies on section 3.3 of the Execution Plan contained in the Contractor's Offer which formed part of the Contract and provides as follows:

A drawing log will be compiled immediately upon award, showing all drawings that were part of the bid process as well as revisions. This log will be updated and maintained as new or revised drawings are issued. All drawings issued will only be accepted with a copy of the transmittal.

Comstock Canada Ltd. and the engineering drawing logs should be audited weekly to ensure that current drawings are being used.

[emphasis added]

22. With respect to paragraph 20 of the Amended Statement of Claim, the Defendant denies that it was aware that any breach of its contractual obligations to the Plaintiff would result in substantial damages and injury to Comstock's economic interests.

23. The Defendant states that the Contract provided a mechanism to compensate the Plaintiff for changes to the work, which mechanism was utilized during the course of the Contract work and the Defendant relies on section 47.4.2 of the General Conditions of the Contract:

47.4.2 If a Change in the Work in the opinion of CONTRACTOR justifies a claim for an addition to the Contract Sum, CONTRACTOR shall present the claim in writing to ENGINEER within seven Days of the date of receiving the written order for the Change, or of the date of receiving the Construction Drawings showing the Change. If the claim is not presented to ENGINEER within that time, CONTRACTOR shall not be entitled to compensation from OWNER. Upon receipt of the claim, ENGINEER will decide whether the claim is valid. If ENGINEER decides the claim is valid, the valuation of the claim shall be determined pursuant to G.C. 48.0.

24. With respect to paragraph 21 of the Amended Statement of Claim, the Defendant states that it did not make any representations outside of the Contract and the Defendant pleads and relies on sections 2.1.2 and 3.1.3 of the General Conditions of the Contract:

2.1.2 CONTRACTOR represents and warrants to OWNER that CONTRACTOR has not relied in entering into the Contract upon

any representations, statements or information not contained in the Contract, whether written or oral, express or implied, made or given by or on behalf of OWNER.

[...]

3.1.3 The executed Contract constitutes the entire Agreement between the parties and supersedes all prior discussions, negotiations, representations and Agreements, whether written or oral, express or implied.

[emphasis added]

25. With respect to paragraph 21.1(c) of the Amended Statement of Claim, the Defendant denies the claims therein and states that the Plaintiff was aware that the documents provided to Comstock at the time of its bid did not represent a fixed scope of work and would continue to evolve. The Defendant pleads and relies on the Scope of Work, forming part of the Contract, which provides that:

All equipment, materials and accessories shall be installed in strict accordance with the Vendor's requirements and generally acceptable practices.

[...]

The Construction Drawings outline the work that CONTRACTOR shall install as part of the contract. Specifications, Lists, General Assembly drawings, General Arrangement Drawings, VENDOR Equipment Erection and Detail Drawings as supplied, are to be used by the CONTRACTOR in conjunction with the Construction Drawings to further define the work.

[emphasis added]

26. With respect to paragraphs 21.1(c)(iv)(1)(a) and 21.1(c)(iv)(1)(b) of the Amended Statement of Claim, the Defendant states that the project was capable of being completed within the timelines agreed to by the Plaintiff and in compliance with all applicable codes, regulations and standards.

27. With respect to paragraph 21.1(c)(v) of the Amended Statement of Claim, the Defendant states that the Contract documents were in compliance with all applicable codes and standards.

28. With respect to paragraph 21.1(g) of the Amended Statement of Claim, the Defendant states that the May 30, 2010 completion date was not a representation by the Defendant. Rather, the date was proposed by the Plaintiff and was agreed to by the Defendant.

29. With respect to paragraph 21.1(i) of the Amended Statement of Claim, the Defendant states that PCS and AMEC did in fact act in a professional manner but denies that PCS made any such representation or warranty.

30. With respect to paragraph 21.1(j) of the Amended Statement of Claim, the Defendant states that the Plaintiff was aware of AMEC's role in the Project and AMEC's role was clearly set out in the Contract entered into by the parties. PCS denies that it made any representation or warranty outside of the Contract.

31. With respect to paragraph 21.1(l) of the Amended Statement of Claim, the Defendant states that the Contract provided that Cornstock's work could proceed on a particular portion of the work once IFC Drawings for that portion of the work were provided to the Plaintiff but the Plaintiff was to continue with the work even though IFC drawings had not been issued for other parts of the work or some parts of the work were on hold as per the Engineer's directions. The Defendant relies on section 4.4 of the General Conditions of the Contract:

4.4 Some Construction Drawings may be issued with certain areas of a drawing marked HOLD where the ENGINEER is waiting for information from Vendors, or where a portion of the design is incomplete for some part of the Work that CONTRACTOR is not required to do at that time; in the event CONTRACTOR shall proceed with parts of the Work not marked HOLD on the Construction Drawings.

32. With respect to paragraph 21(m) of the Amended Statement of Claim, PCS states that prior to its bid, the Plaintiff received revisions to the Contract documents up to July 9, 2009 (RCA 10) and further states that the Plaintiff was aware that the Contract documents were subject to change as specifically provided for in the Contract. The Defendant relies on section 4.3 of the General Conditions of the Contract:

4.3 REVISED CERTIFIED INFORMATION -The Construction Drawings may be revised from time to time during the course of the Work. Some of the Construction Drawings may be revised many times. When written instructions have been given to CONTRACTOR pursuant to S.C. 5.0. the Construction Drawings will be revised to show the Change in the Work to which the instructions relate.

33. With respect to paragraph 21.1(n) of the Amended Statement of Claim, the Defendant states that the applicable Piping Line List was 156930-P-EL-001, Rev. 0.

34. With respect to paragraph 21.1(o) of the Amended Statement of Claim, the Defendant states that the applicable procedure for handling changes to the work and requests for additional work and any corresponding changes to the schedule or Contract price was provided for in the Contract and PCS made no representation or warranty outside of the Contract. The Defendant relies on section 47.4.2 of the General Conditions of the Contract, reproduced above, as well as the following sections of the General Provisions:

23.1 NOTICE OF DELAY - CONTRACTOR shall immediately notify ENGINEER in writing of any occurrence which, in the opinion of CONTRACTOR, has caused or which CONTRACTOR anticipates may according to the Construction Schedule or the completion date for the entire Work; and in any event CONTRACTOR shall

notify ENGINEER in writing not later than seven Days after the occurrence which caused the alleged delay or gave rise to the anticipation of the delay. The notice must set out particulars of the cause of the delay, the expected length of the delay and the steps that CONTRACTOR has taken, is taking or intends to take to mitigate the effects of the delay. In the case of a continuing cause of delay, only one notice of delay is necessary.

- 23.2 **FAILURE TO GIVE TIMELY NOTICE - If CONTRACTOR fails to give written notice within the time required, CONTRACTOR shall not be entitled to consideration for any extension of time.**
- 23.3 **DELAY GIVING RISE TO SCHEDULE ADJUSTMENT -** In addition to submitting the notice required under G.C. 23.2, if CONTRACTOR believes that the alleged delay was occasioned through no fault of CONTRACTOR, then CONTRACTOR may also submit a written quantified request to ENGINEER for a revision to the Construction Schedule And for an extension of time for completing the Work. The request shall include complete details of the alleged delay and shall state the effect on the Construction Schedule And the completion date, if any.

[...]

- 47.4.1 Any claim by CONTRACTOR for an extension of time in regard to the Construction Schedule or the completion date validated by ENGINEER shall be dealt with pursuant to G.C. 47.9 at the time that the Changes are ordered.
- 47.4.2 If a Change in the Work in the opinion of CONTRACTOR justifies a claim for an addition to the Contract Sum, CONTRACTOR shall present the claim in writing to ENGINEER within seven Days of the date of receiving the written order for the Change, or of the date of receiving the Construction Drawings showing the Change. If the claim is not presented to ENGINEER within that time, CONTRACTOR shall not be entitled to compensation from OWNER. Upon receipt of the claim, ENGINEER will decide whether the claim is valid. If ENGINEER decides the claim is valid, the valuation of the claim shall be determined pursuant to G.C. 48.0.

[emphasis added]

35. With respect to paragraph 21.1(p) of the Amended Statement of Claim, the Defendant states that the Plaintiff was provided with the necessary information in accordance with the provisions of the Contract and states that it did not make any representations or warranties outside of the Contract.

36. With respect to paragraph 21.1(r) of the Amended Statement of Claim, the Defendant states that it did not impede the Plaintiff's work and performance and it did not make any representations or warranties outside of the Contract.

37. With respect to paragraph 21.1(s) of the Amended Statement of Claim, the Defendant denies that it made any representations or warranties outside of the Contract and in any event states that it carried out its obligations under the Contract in a competent manner.

38. With respect to paragraph 21.1(t) of the Amended Statement of Claim, the Defendant denies that it made any representations or warranties to this effect and states that it did in fact co-operate with the Plaintiff with a view to having the work carried out in the most effective manner as to time and cost.

39. With respect to paragraph 21.1(u) of the Amended Statement of Claim, the Defendant denies a fiduciary relationship existed between the parties or that it made any representations or warranties outside of the Contract and states that it dealt with the Plaintiff fairly and in good faith. The relationship between the parties was governed solely by the Contract, meaning the Agreement and the documents referenced and included therein.

40. With respect to paragraph 21.1(v) of the Amended Statement of Claim, the Defendant denies that it made any representations or warranties outside of the Contract and states that it did not seek to frustrate the Plaintiff or its performance under the Contract.

41. With respect to paragraph 21.2 of the Amended Statement of Claim, the Defendant denies that its employees made the statements outlined in paragraph 21.1 and has no knowledge of statements purportedly made by employees of AMEC. The Defendant pleads and relies on section 2.1.2 of the General Conditions of the Contract, reproduced above.

42. With respect to paragraph 21.3 of the Amended Statement of Claim, the Defendant denies the allegations therein. The Defendant states that the Plaintiff warranted that it was satisfied with the Contract documents and failed to bring any omission, error, ambiguity, inconsistency, or discrepancy to the attention of the Engineer and can not now claim against the Defendant on such basis. The Defendant pleads and relies on the following sections of the General Conditions of the Contract:

2.1.1 CONTRACTOR warrants that CONTRACTOR has examined carefully and has full knowledge of the terms and conditions of the Contract and that CONTRACTOR is satisfied as to the adequacy and sufficiency of the description of the Work as contained in the Construction Documents and is not aware of any Materials conflict or inconsistency between or among the Construction Documents

[...]

3.3.2 In the event of an omission, error, ambiguity, inconsistency, or discrepancy appear in the Construction Documents or in the documents Issue for Construction, or between any of them and any applicable laws, regulations, codes, permits or licences, CONTRACTOR before proceeding with the

Work shall bring it to the attention of ENGINEER, by notice in writing, who will decide the intent and make the necessary corrections. If CONTRACTOR fails to give such written notice to ENGINEER, CONTRACTOR shall not be able to claim for remedying the omission, error, ambiguity, inconsistency or discrepancy.

[emphasis added]

43. With respect to paragraph 21.5 of the Amended Statement of Claim, the Defendant denies that any of the examples cited by the Plaintiff constitute ambiguities or in any way confused the Plaintiff. Further, the Plaintiff entered into the Contract after having had the opportunity to seek clarifications and in fact did seek and receive clarifications from the Engineer.

44. With respect to paragraphs 24(a)(i), 24(a)(ii), 24(a)(iii), 24(a)(iv), 24(a)(v), 24(a)(vi), and 24(a)(vii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Contract specifically provided that the Contract documents were subject to change, the Plaintiff was or ought to have been aware that the Contract documents would continue to evolve. The Defendant relies on sections 2.1.1 and 3.5.1 of the General Conditions of the Contract, reproduced above, as well as the following sections of the General Conditions:

2.4 CONTRACTOR SITE INFORMATION EVALUATION AND SELF-RELIANCE - CONTRACTOR represents and warrants to OWNER that CONTRACTOR has acted and relied solely on CONTRACTOR's findings, conclusions, interpretations and opinions in evaluating the risks, contingencies and other circumstances that may be encountered and that could influence the execution of the Work.

[...]

3.1.3 The executed Contract constitutes the entire Agreement between the parties and supersedes all prior discussions, negotiations, representations and Agreements, whether written or oral, express or implied.

45. With respect to paragraph 24(a)(v.1) of the Amended Statement of Claim, the Defendant states that the substantial completion date referred to by the Plaintiff was a date chosen by the Plaintiff and not imposed by the Defendant. Further, the majority of the drawings referenced were merely loop diagrams that were not required until that portion of the work was underway, were provided at the time the Plaintiff required them, and did not represent a change to the Plaintiff's scope of work. The Defendant pleads and relies on sections 4.5 and 23.4 of the General Conditions of the Contract:

4.5 HOLDS THREATENING DELAY - If CONTRACTOR has not received revised Construction Drawings or written permission from ENGINEER that enables CONTRACTOR to proceed with construction of the part of the Work marked HOLD on the Construction Drawings at the time when that part of the Work is to be performed, the provisions of G.C. 23.5 shall apply.

[...]

23.4 **DRAWING ISSUE CAUSING DELAY** - If CONTRACTOR has not received the Construction Drawings needed for CONTRACTOR to make proper preparation to begin construction of a part of the Work on the date indicated on the Construction Schedule, CONTRACTOR shall make a written request to ENGINEER for the required Construction Drawings not earlier than 21 Days nor later than seven Days before the date indicated in the Construction Schedule. CONTRACTOR will not be entitled to an extension of time pursuant to this G.C. 23.0 based on lack of Construction Drawings unless CONTRACTOR has made a written request for the Construction Drawings as prescribed herein.

46. With respect to paragraph 24(a)(xii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the 6T Monorail was never designed to hold the cranes to hoist the equipment during construction, rather it was part of the design for the finished plant for the purpose of maintenance and repair and the Defendant never represented or warranted otherwise to the Plaintiff. Further, the Plaintiff, as a competent contractor, ought to have understood that a 6 tonne monorail could not be used to hoist equipment weighing 8 tonnes. The hoist well was similarly designed for the finished plant for the purpose of maintenance and repair and the Defendant never represented or warranted otherwise to the Plaintiff. The Defendant also pleads and relies on s. 13.1 of the General Conditions of the Contract:

13.1 CONTRACTOR shall be an independent CONTRACTOR in all respects and, except as may be otherwise provided in the Contract, shall be free of controls and supervision by ENGINEER or OWNER as to the means and methods of performing the Work, and shall have complete control of CONTRACTOR's organization and shall exercise sole direction of the Work done by CONTRACTOR's forces.

47. With respect to paragraph 24(a)(xiv) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the vendor drawings were available to the Plaintiff via the project secured website at all material times. Further, in Article 32 of the Form of Tender, the Plaintiff affirmed that it had studied the Contract Drawings set out in the Drawing List (which included the vendor drawings) and the Contract Drawings listed in the Drawing list formed part of the Contract by virtue of Article 1.7 of the Agreement for Contract dated August 12, 2009.

48. With respect to paragraph 24(a)(xv) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that a Change Order (Number 7) was issued in December of 2009 for the provision of heat beginning on January 1, 2010. Further, the Defendant pleads and relies on the Scope of Work, forming part of the Contract, under the heading "Special Conditions", at page 4 of 82, which provides that the "CONTRACTOR shall provide all winter heat as required until such time as the various permanent HVAC systems are commissioned and in service." PCS further relies on the Scope of Work under the headings "Instrumentation General" (at page 9 of 82) and "Electrical General" (page 10 of 82) which provides that "CONTRACTOR shall clean and dry out all equipment prior to

installation as they may have been exposed to humidity and dust." The Defendant pleads and relies on s. 13.5 of the General Conditions of the Contract:

13.5 Except as otherwise stipulated in the Contract, CONTRACTOR shall provide and pay for all permits, licenses, inspection fees, Materials, labour, supervision, falsework, tools, Plant, equipment, Temporary Facilities, water, light, fuel, power, overhead and everything necessary for the execution of the Work whether similar to the foregoing or not. CONTRACTOR shall give copies of all permits, licenses and inspection certificates to OWNER and in the case of inspection fees give receipts to OWNER.

49. With respect to paragraph 24(a)(xvi) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Project Drawings clearly provided for shoot work traversing the floors and the Plaintiff knew or ought to have known that this was part of the scope of work. Further, Change Orders were issued with respect to any changes to the location of the steel openings and accordingly the Plaintiff has already been compensated for any additional work in relation thereto. PCS also pleads and relies on s. 33.1 of the General Conditions of the Contract:

CONTRACTOR shall do all cutting, fitting, patching and digging that may be required to make the parts of the Work come together properly or to connect to existing facilities and the Work of Others.

50. With respect to paragraph 24(a)(xvii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Contract specifically contemplated that certain parts of the work would be on hold but that the Plaintiff was to proceed with other parts of the work. The Defendant pleads and relies on section 4.4 of the General Conditions of the Contract, reproduced above.

51. With respect to paragraph 24(a)(xl) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the vendor drawings for the flake breakers, setting out the approximate weights for the units, were available to the Plaintiff at the time of tender and the Plaintiff ought to have known that it would have to disassemble the Flake Breakers. Further, the Plaintiff had actual knowledge of this fact no later than September of 2009. PCS further pleads and relies on section 16 of the Scope of Work, forming part of the Contract, which provides that:

CONTRACTOR shall assemble, install, test and pre-commission the following OWNER supplied equipment;

[...]

#3 Single Flake Breaker 10-308
#3 Double Flake Breaker 10-309

[emphasis added]

52. With respect to paragraph 24(b) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Contract provided that Comstock's work could proceed on a particular portion of the work once IFC Drawings for that portion of the work were provided to the Plaintiff but the Plaintiff was to continue with the work even though IFC Drawings had not been issued for other parts of the work. Further, the Plaintiff failed to complete many parts of the work, for which it had the IFC Drawings, by May 30, 2010.

53. With respect to paragraph 24(c)(i) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that it complied with the relevant contractual provisions and the Plaintiff was entitled to compensation but only in the manner provided for in the contract. PCS pleads and relies on section 47.7.1 of the General Conditions of the Contract:

47.7 FIELD WORK ORDER

47.7.1 If, in the opinion of ENGINEER, a claim submitted under G.C. 47.4 and G.C. 47.5 does not contain sufficient information to enable ENGINEER to determine the validity of the claim and, in the opinion of ENGINEER, it is necessary to proceed with the Work described in the claim, ENGINEER may issue a Field Work Order authorizing the performance of that Work. Field Work Orders must be signed by ENGINEER. CONTRACTOR shall comply promptly with all Field Work Orders. The issue of a Field Work Order does not prejudice the right of CONTRACTOR to prosecute the claim or the right of OWNER to contest the claim.

54. With respect to paragraph 24(c)(ii)(1) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and agrees that the field work orders were not intended to replace change orders. PCS pleads and relies on section 47.7.1 of the General Conditions of the Contract and states that field work orders were issued in compliance with the Contract.

55. With respect to paragraph 24(c)(ii)(2) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that if the Plaintiff was asked to perform additional work, the Contract provided for a process for the Plaintiff to claim for additional compensation. If the Engineer agreed with the Plaintiff's claim, a change order would issue. If there was no agreement and the Engineer determined the work should proceed, a field work order would be issued. PCS pleads and relies on sections 47.4.1, 47.4.2 and 47.7.1 of the General Conditions of the Contract, reproduced above.

56. With respect to paragraph 24(c)(ii)(3) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Contract provided that the Engineer had sole discretion in selecting what method to utilize in valuing the work and PCS pleads and relies on section 48.1.1 of the General Conditions of the Contract:

48.1 METHOD OF VALUATION

48.1.1 Change in the Work which, in the opinion of ENGINEER, result in a valid claim for a Change to the Contract Sum pursuant to G.C. 47.9, shall, at ENGINEER'S sole discretion, be valued by:

- a) a lump sum price, justified with an estimate and agreed upon at the time of approval of the Change; or,
- b) at the unit prices, if any, set forth in Schedule A and described in the Construction Documents where, in the opinion of ENGINEER, they are applicable;
- c) If there are no unit prices or if, in the opinion of ENGINEER, the existing unit prices are not applicable, then the Change in the Work or other circumstances shall be valued at unit prices mutually agreed by the parties hereto;
- d) by force account rates established in Schedule A or subsequently agreed to at the time of approval of the Change Order; or
- e) on a cost reimbursable plus fixed fee basis if set out in Schedule A.

[emphasis added]

57. With respect to paragraphs 24(d)(i) and 24(d)(ii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that following the commencement of work on the Project, the Plaintiff lobbied for and was granted the structural steel work and compensated for such work. Accordingly, the structural steel work and its timing were within the Plaintiff's control. Further, the onus was on the Plaintiff to apply for any extension of time according to the procedure set out in the Contract and the Plaintiff failed to do so.

58. With respect to paragraph 24(d)(iii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the Plaintiff did not seek an extension of time to perform the Contract in relation to the structural steel work in accordance with the procedure set out in the Contract and in fact the Plaintiff stated that any alleged delays did not impact on their completion date.

59. With respect to paragraph 24(e)(i) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and repeats paragraph 46 of this Statement of Defence.

60. With respect to paragraph 24(e)(ii) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the start date of the Contract was not until August 31, 2009 and the Plaintiff did not expect the cranes to be available until later in the fall of 2009.

61. With respect to paragraphs 24(e)(iii), 24(e)(vii), 24(e)(viii), 24(e)(x) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the cranes were installed and designed for the purpose of use in the operational compaction plant, not for the purpose of construction. The Plaintiff's use of the cranes was ancillary to their main purpose and the Defendant never

warranted that they could be used as contemplated by the Plaintiff. The Defendant relies on section 2.2 of the General Conditions of the Contract:

2.2 **CONTRACTOR'S SITE EXAMINATION - CONTRACTOR** represents and warrants that **CONTRACTOR** has carefully examined the Site and the Site of the Work and has determined to **CONTRACTOR**'s satisfaction and accepts all conditions that may impact the performance at the Work including, without limitation: climate, present physical condition of Site, access, topography, geotechnical and other subsurface conditions, storage areas, nature and location of the Work. Site congestion, Other **CONTRACTOR**s, supervision, labour, Materials, Plant, and other things required for the proper performance and timely completion of the Work and all other conditions, contingencies and risks that may be associated with the performance and observance of **CONTRACTOR**'s obligations under the Contract.

62. With respect to paragraphs 24(e)(iv) and 24(e)(v) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the schedule to which the Plaintiff refers did not form part of the Contract but was the Plaintiff's own bid schedule.

63. With respect to paragraphs 24(e)(vi), 24(e)(xi), 24(e)(xii), 24(e)(xiii), 24(e)(xiv), 24(e)(xv), and 24(e)(xvi) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that any difficulties the Plaintiff experienced with the cranes was due to its failure to maintain the cranes, using the cranes beyond their operational limits and using the cranes in a manner for which they were not intended to be used. Through due diligence the Plaintiff could have determined the limits of the cranes.

64. With respect to paragraph 24(e) as a whole, the Defendant further states that Change Orders were granted to address any legitimate concerns with the cranes and accordingly the Plaintiff has already been compensated for any inconvenience associated with the use of the cranes.

65. With respect to paragraph 24(h) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and repeats paragraph 12 of this Statement of Defence.

66. With respect to paragraph 24(i) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the work was not to be delayed pending the approval of Change Orders and that the Plaintiff's refusal to carry out the work pending the acceptance of a Change Order was in breach of the Contract.

67. With respect to paragraph 24(i)(ii)(5) of the Amended Statement of Claim, the Defendant denies that it committed any breach of the Contract and states that the substantial completion date referred to by the Plaintiff was a date chosen by the Plaintiff and not imposed by the Defendant. Further, the various "RFI's" identified by the Plaintiff include documents which are not in fact RFIs and which had no impact on the Plaintiff's performance of its work.

68. With respect to paragraph 24 of the Amended Statement of Claim as a whole, PCS states that changes to the work were permitted under the Contract and relies on s. 47.1 of the General Conditions of the Contract:

47.1 RIGHT TO MAKE CHANGE IN THE WORK

47.1.1 At any time during the progress of the Work, OWNER or ENGINEER within the general Scope of the Contract **may make Changes by altering, adding to, or deducting from the Work without invalidating the Contract.** CONTRACTOR shall perform Change in the Work as a condition of Contract.

47.1.2 Change in the Work may be made during the actual construction of the parts of the Work affected by the Changes. CONTRACTOR will be notified of the Changes either by a written order or revised Construction Drawings from ENGINEER.

47.1.3 Drawing revisions that do not result in a net aggregate change of the quantities and are issued to CONTRACTOR prior to commencement of the Work shall not give rise to a claim. [emphasis added]

69. With respect to paragraph 24 of the Amended Statement of Claim as a whole, the Defendant further states that the Plaintiff was required pursuant to the Contract to comply with the Engineer's instructions regarding changes to the work and the Plaintiff was only entitled to compensation if the Plaintiff complied with the procedure set out in the Contract for requesting compensation and the Engineer agreed with the Plaintiff's request. The Defendant pleads and relies on sections 4.3.1 and 47.4.2 of the General Conditions of the Contract, reproduced above, as well as sections 5.1, 5.2 and 47.5 of the General Conditions:

5.1 ENGINEER may furnish to CONTRACTOR, during the progress of the Work, additional instructions to supplement the Construction Documents and Contract and Construction Drawings and Specifications as ENGINEER considers necessary or desirable for the performance of the Work. Additional instructions will be consistent with the intent of the Construction Documents. Additional instructions may be in the form of Specifications, Drawings, samples, models or other written instructions. CONTRACTOR shall comply with all additional instructions.

5.2 If CONTRACTOR considers that any additional instructions issued under G.C. 5.1 constitute a Change in the Work, CONTRACTOR shall give written notice thereof to ENGINEER before proceeding with the Work and further substantiate the claim in accordance with G.C. 47.3 and must comply with G.C. 47.4, failing which CONTRACTOR may not make or enforce any claim against OWNER in respect of the additional instructions or any Change in the Work constituted thereby.

[...]

47.5 If CONTRACTOR should Dispute a decision of ENGINEER as to whether, or to what extent, a Change in the Work justifies a Change to the Contract Sum, CONTRACTOR shall nonetheless carry out the Change in the Work. The performance of the Work shall not prejudice any claim that CONTRACTOR may have under the Contract, provided that CONTRACTOR gives ENGINEER a further written notice within 10 Days of ENGINEER'S decision that CONTRACTOR is carrying out the Change in the Work under protest.

[emphasis added]

70. With respect to paragraphs 28 and 33 of the Amended Statement of Claim, the Defendant denies the design errors and deficiencies alleged and states that the Plaintiff has been compensated, through the Change Order process or otherwise, for the work carried out including changes to the scope of its tendered work.

71. With respect to paragraph 35 of the Amended Statement of Claim, the Defendant states that the Plaintiff did not provide notice in compliance with the requirements set out in the Contract. The Defendant pleads and relies on section 47.6.1 of the General Conditions of the Contract:

47.6.1 Each notice of claim by CONTRACTOR shall be numbered sequentially and shall contain the following information:

- a) Whether the claim is for adjustment of the Contract Price or the Contract Schedule or both;
- b) A description of the Change in the Work, which may be by reference to Construction Drawings, Specifications or instructions issued by OWNER or ENGINEER;
- c) The method of valuation and the value of the adjustment to the Contract Price and the adjustment to the Contract Schedule claimed, with reasonable particulars and supporting Documentation, to the extent that necessary information is available to CONTRACTOR or would be available by the exercise of reasonable diligence, or if not so available, then an estimate of the adjustments claimed, in detail sufficient to enable ENGINEER to evaluate the proposed adjustments;
- d) A revised detailed schedule, reflecting the proposed change, if any, in the Construction Schedule.

72. With respect to paragraphs 36 and 51 of the Amended Statement of Claim, the Defendant admits that the Plaintiff sent the notice but denies that AMEC was in a conflict of interest.

73. With respect to paragraph 38 of the Amended Statement of Claim, the Defendant states that the Plaintiff did not provide notice in compliance with the requirements set out in the Contract. The Defendant pleads and relies on s. 47.6.1 of the General Conditions of the Contract reproduced above.

74. With respect to paragraph 43 of the Amended Statement of Claim, the Defendant states that the meeting referred to was not part of the claims resolution process. Rather, it was a without prejudice meeting that the Defendant's representatives attended to listen to the Plaintiff's concerns.

75. With respect to paragraph 45 of the Amended Statement of Claim, the Defendant states that regardless of the terminology employed, the Plaintiff's letters did not constitute notice in compliance with the requirements set out in the Contract.

76. With respect to paragraph 46 of the Amended Statement of Claim, the Defendant admits that the letter dated June 26, 2010 was sent to the Plaintiff but states that the Contract clearly set out what type of supporting information was required.

77. With respect to paragraph 48 of the Amended Statement of Claim, the Defendant denies the allegations therein and states that the July 9, 2010 letter referenced in paragraph 47 of the Amended Statement of Claim referred to the section of the Contract that specified what additional information was needed.

78. With respect to paragraph 53 of the Amended Statement of Claim, the Defendant states that the letterhead to which the Plaintiff objected was the same letterhead that was used in the Contract that the Plaintiff signed. Further, the Plaintiff's May 14, 2010 correspondence was not a Notice of Dispute, nor did it purport to be, and did not comply with the requirements for a Notice of Dispute under s. 59.5 of the General Conditions of the Contract.

79. With respect to paragraph 55 of the Amended Statement of Claim, the Defendant states that AMEC's role and obligations are governed by the provisions of the Contract, that AMEC's role and obligations were clear from a review of the Contract documents and the Plaintiff agreed to enter into the Contract with full knowledge of AMEC's role and obligations. The Defendant pleads and relies on sections 59.1 and 59.2 of the General Conditions of the Contract:

59.1 **ENGINEER EMPOWERED** - Pursuant to G.C. 12.0, ENGINEER is in the first instance the interpreter of the Construction Documents and empowered under the Contract to make directions, decisions and determinations in respect of the Work.

59.2 **ENGINEER'S DETERMINATION** - If any Dispute or difference shall arise between OWNER and CONTRACTOR or ENGINEER and CONTRACTOR in connection with or arising out of the Contract or the

execution of the Work, whether during the progress of the Work or after completion thereof and whether before or after termination, abandonment or breach of the Contract, the Dispute shall in the first instance be referred to ENGINEER for direction, decision or determination in accordance with the Contract.

80. With respect to paragraph 56(b) of the Amended Statement of Claim, the Defendant repeats paragraph 78 of this Statement of Defence regarding the use of the letterhead.

81. With respect to paragraph 56(c) of the Amended Statement of Claim, the Defendant admits that Comstock raised such allegations, but denies the validity of those allegations.

82. With respect to paragraph 56(f) of the Amended Statement of Claim, the Defendant states that the figure cited by the Plaintiff relates to the value of the entire Picadilly Mine Project, not just the engineering, procurement and construction management services, and the figure includes the Plaintiff's work.

83. With respect to paragraph 56(g) of the Amended Statement of Claim, the Defendant states that the figures cited by the Plaintiff relate to the value of the projects in their entirety, not just the engineering, procurement and construction management services and the Plaintiff's allegation is therefore misleading.

84. With respect to paragraph 56(i) of the Amended Statement of Claim, the Defendant admits the allegations therein but states that the Plaintiff also had meetings with AMEC to the exclusion of the Defendant.

85. With respect to paragraph 57.2 of the Amended Statement of Claim, the Defendant states that Mr. McElhinney's website also lists the Plaintiff as one of his former clients in addition to PCS and AMEC. Further, Mr. McElhinney did not exchange information with the Plaintiff's personnel but collected information on behalf of the Defendant and in no way interfered with AMEC's role and obligations under the Contract.

86. With respect to paragraph 58 of the Amended Statement of Claim, the Defendant states that the May 21, 2010 meeting was not for the purpose of settlement discussions and the Plaintiff had no reason to expect to hear from the Defendant as it was to deal with the Engineer as contemplated by the Contract.

87. With respect to paragraph 59 of the Amended Statement of Claim, the Defendant states that the Notice of Default sent by AMEC was not provided in response to the Plaintiff's letter of June 30, 2010 addressed to PCS. Further, AMEC's earlier determination was that the Plaintiff was potentially entitled to further compensation for work done in the past and in no way constituted an approval of the Plaintiff's work as a whole.

88. With respect to paragraph 60 of the Amended Statement of Claim, the Defendant states that no further details were required and agrees that the deadline for compliance was July 15, 2010.

89. With respect to paragraph 61 of the Amended Statement of Claim, the Defendant states that the termination letter specifically made note of the Defendant suffering loss due to the Plaintiff's actions and reserved the Defendant's rights.

90. With respect to paragraph 62 of the Amended Statement of Claim, the Defendant admits that the Plaintiff sent the correspondence referenced therein but denies that further details were required with respect to the Notice of Default or that the Plaintiff sent the required information to substantiate its claims.

91. With respect to paragraph 63 of the Amended Statement of Claim, the Defendant states that a Notice of Default could only be stayed by the Plaintiff substantially complying with the notice and not by issuing a Notice of Dissent. Further, the Defendant was not the decision maker and was not required to reply to the Plaintiff.

92. With respect to paragraph 65 of the Amended Statement of Claim, the Defendant states that the meaning the Plaintiff assigned to the July 15, 2010 letter and their corresponding belief was unreasonable in the circumstances.

93. The Defendant states that it was entitled to dismiss the Plaintiff for convenience further to s. 46.2 of the General Conditions of the Contract:

46.2 TERMINATION FOR CONVENIENCE - Notwithstanding any other provision of the Contract, OWNER may, for any reason, without prior notice, without cause, subject to remuneration set forth in G.C. 46.8, terminate the Contract by giving CONTRACTOR seven Days written notice to that effect and at the end of the notice period all Work under the Contract shall cease. During the notice period, CONTRACTOR shall perform such Work as may be ordered by ENGINEER to preserve the Work already completed. Within five Working Days after the Work has ceased, CONTRACTOR and ENGINEER shall meet to negotiate and agree to a sum, which shall be the complete and final settlement OWNER is obligated to pay CONTRACTOR for terminating the Contract.

94. The Defendant in fact terminated the Plaintiff for its failure to remedy the acts of default identified by the Engineer. The Plaintiff's termination was pursuant to the terms of the Contract and the Defendant pleads and relies on the following sections of the General Provisions of the Contract:

46.5.1 (a) If, in the opinion of ENGINEER:

a) CONTRACTOR fails or is failing to prosecute the Work diligently in any particular manner; or...

ENGINEER will notify CONTRACTOR that CONTRACTOR is in default of CONTRACTOR's Contractual obligations and instruct

CONTRACTOR to correct the default in the 10 Working Days immediately following the receipt of the notice.

46.5.2 If CONTRACTOR fails to correct the default in the 10 Working Days specified, OWNER may, without prejudice to any other right or remedy OWNER may have, suspend or terminate CONTRACTOR's right to continue with the Work or terminate the Contract.

[...]

46.8.1 On termination by OWNER under any provision of this G.C. 46.0, OWNER will pay to CONTRACTOR, insofar as CONTRACTOR has not been previously paid for the Work by payments on account, the sum as shall, in the opinion of ENGINEER, be sufficient to compensate CONTRACTOR for all portions of the Work properly done, Materials supplied, and the use of CONTRACTOR's Materials and Plant pursuant to G.C. 46.7, but not for any bonuses, damages or loss of anticipated profit on unexecuted portions of the Work, and OWNER will deduct therefrom the amount of any costs or damages as determined by ENGINEER incurred by OWNER as a result of any default of CONTRACTOR.

95. The Defendant states that the Plaintiff is seeking, in the within claim, compensation for changes to the work for which it did not give notice in accordance with the Contract and the Plaintiff is now estopped from bringing such claims pursuant to section 5.2 of the General Conditions of the Contract. The Defendant pleads and relies on section 23.7 of the General Conditions of the Contract:

23.7 **CUMULATIVE IMPACT OF MULTIPLE DELAYS** - Each request under G.C. 23.6 based, in whole or in part, on a particular event or circumstance specified therein must be submitted and will be determined separately. No request will be allowed under G.C. 23.6 or otherwise under the Contract for a revision to the Construction Schedule, an extension of the completion date for the Work, based upon the cumulative impact of two or more particular events or circumstances causing delay.

96. The Defendant additionally pleads and relies on the following section of the General Provisions of the Contract:

23.9 **MITIGATION** - Notwithstanding any of the provisions of this G.C. 23.0, it is a condition of relief that CONTRACTOR exercises all reasonable efforts to avoid or minimize the adverse effects of any delay, and cost therefrom, and no request in regard to delay shall be allowed if CONTRACTOR after encountering a possible delay, is able to adjust labour and equipment resources either by moving them to other parts of the Work or if unable to adjust the resources is able to reduce the

resources in relation to the delay, or otherwise, and in the opinion of ENGINEER fails to do so.

97. As to the whole of the Amended Statement of Claim, the Defendant states that PCS did not foresee that Comstock would carry out its obligations under the Contract in a manner that would result in cost overruns, project delays, and other problems with the work.

98. As to the whole of the Amended Statement of Claim, the Defendant states that the Plaintiff was aware that the scope of the work was subject to change and relies on section 47.1.1 of the General Conditions of the Contract, reproduced above.

99. As to the whole of the Amended Statement of Claim, the Defendant states that the Plaintiff, through due diligence, ought to have appreciated the scope of the work from its inquiries, document review, site visit and the provisions of the Contract. The Defendant relies on sections 2.1.1, 2.1.2, 2.2 and 2.4 of the General Conditions of the Contract, reproduced above.

100. As to the whole of the Amended Statement of Claim, the Defendant states that the Plaintiff was responsible for the manner in which it performed its obligations under the Contract and any lack of efficiency in so doing and the Defendant relies on s. 32.5.2 of the General Conditions of the Contract:

ENGINEER's approval of the manner of performing any part of the Work or any drawing, or any information regarding Materials CONTRACTOR proposes to furnish shall not relieve CONTRACTOR of the responsibility for the performance of the Work in accordance with the Contract. ENGINEER'S approval shall mean that ENGINEER has no objection to CONTRACTOR, upon CONTRACTOR'S full responsibility, using the plan or method of Work proposed, or furnishing the Materials proposed and shall not be regarded as any assumption of risk or liability by OWNER or ENGINEER and CONTRACTOR shall have sole responsibility for any errors therein and for the failure or partial failure or inefficiency or insufficiency of any plan or method of Work or Materials and equipment so approved.

101. As to the whole of the Amended Statement of Claim, the Defendant states that it did not represent or warrant to the Plaintiff that the bid price the Plaintiff selected would allow it to complete its work under the Contract in a profitable manner. The Plaintiff was solely responsible for formulating its bid-price and undertook any inherent risk that its calculations and projections were deficient.

102. As to the whole of the Amended Statement of Claim, the Defendant states that during the course of its work the Plaintiff sought and received Change Orders for any substantial changes to the work including additional work that the Plaintiff carried out, further to the relevant provisions of the Contract, and, accordingly, the issue of the Plaintiff's compensation for any changes or additions to its scope of work has been determined.

103. As to the whole of the Amended Statement of Claim, the Defendant states that it complied with its obligations under the Contract and has not breached the Contract.

104. The Defendant requests that the claim be dismissed with costs.

The Defendant wishes to proceed in the English language.

COUNTERCLAIM

105. The Defendant repeats the allegations contained in paragraphs 1 to 104 of the Statement of Defence above.

106. The Defendant pleads and relies on the Form of Tender whereby the Plaintiff agreed to diligently and faithfully perform and complete the work for the lump sum value stated therein.

107. The Defendant states that the Plaintiff represented, through its Execution Plan, that the Plaintiff would execute their plan and schedule to maintain and control the cost of the project.

108. The Defendant pleads and relies on s. 55.1.1 of the General Conditions of the Contract:

55.1.1 CONTRACTOR represents, warrants and guarantees that the Work and all Materials, products, assemblies and goods and all components and parts thereof, supplied by CONTRACTOR and Subcontractors shall be free of defects and deficiencies in design, Materials and workmanship throughout the warranty period(s) stated herein; and, CONTRACTOR further represents, warrants and guarantees to make good any and all defects and deficiencies in the Work arising from the use of improper or defective Materials or by reason of poor workmanship or inadequate design which may appear during the warranty period. CONTRACTOR is not relieved from this obligation by reason of the Certificate of Final Completion, final payment or anything contained in the Contract to the contrary.

109. The Defendant states that the Plaintiff carried out its work in a manner that resulted in cost overruns, project delays, and defects in the work.

110. The Defendant states that the Plaintiff has breached the Contract.

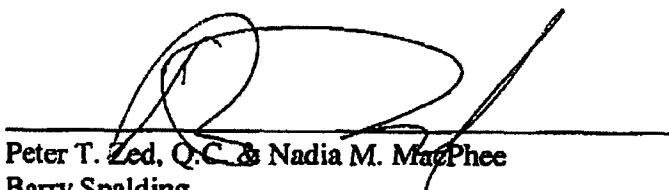
111. The Defendant states that it has incurred damages due to the Plaintiff's breach of the Contract.

112. Therefore, the Defendant claims against the Plaintiff as follows:

- i) Damages representing the incremental costs of retaining a new contractor to finish the work on the compaction plant;
- ii) Damages due to the delay in completion of the compaction plant;
- iii) Damages representing the costs to rectify deficiencies in the Plaintiff's work;
- iv) Costs, together with HST on costs;

- v) Disbursements; and
- vi) Such other relief as this Court shall deem just and equitable.

DATED at Saint John, New Brunswick, this 8th day of November, 2010.



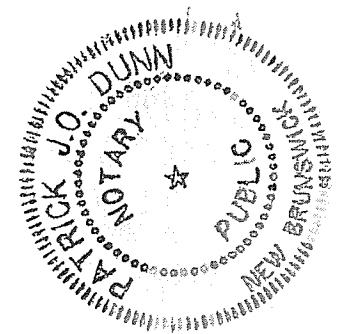
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THIS IS EXHIBIT "E"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



Court File No. S/C/404/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N:

COMSTOCK CANADA LTD.

Plaintiff

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

- and -

RECD
RECU JAN 10 2012 DEPOSEDPOTASH CORPORATION OF SASKATCHEWAN INC.,
AND AMEC AMERICAS LIMITED

Defendants

COUR DU BENCH DE LA REINE
GRAPHER, SAINT-JEAN

**REPLY AND DEFENCE TO COUNTERCLAIM OF COMSTOCK CANADA LTD.
TO THE STATEMENT OF DEFENCE AND COUNTERCLAIM
OF POTASH CORPORATION OF SASKATCHEWAN INC.**

(Form 27D)

I. REPLY

1. The Plaintiff and Defendant by Counterclaim, Comstock Canada Ltd. ("Comstock"), repeats and relies upon the allegations contained in the Amended Statement of Claim and Statement of Particulars. Unless expressly admitted herein, and except for those allegations in the Statement of Defence and Counterclaim which admit the allegations in the Amended Statement of Claim, Comstock denies all allegations in the Statement of Defence and Counterclaim.
2. As is set out in the Amended Statement of Claim and Statement of Particulars, Comstock's action relates to additional costs and damages owed to it by Potash Corporation of Saskatchewan Inc. ("PCS") and AMEC Americas Limited ("AMEC") in

connection with its work (the "Work") on the expansion of a compaction plant owned by PCS in New Brunswick (the "Project"). Capitalized terms not otherwise defined have the meaning ascribed to them in the Amended Statement of Claim.

3. Comstock's work on the Project was governed by its contract with PCS (the "Contract"). The Contract was comprised of, among other things:

- (a) The Agreement for Contract dated August 12, 2009 executed by Comstock and PCS;
- (b) Pre-contractual correspondence between the parties (the "Correspondence");
- (c) General Conditions of Contract governing work on the Project (the "General Conditions"); and,
- (d) Various drawings and specifications on which Comstock's bid was based (the "Tender Drawings").

4. Comstock states that PCS has quoted extensively from the General Conditions in its Statement of Defence and Counterclaim. To the extent such pleadings simply are extractions of the General Conditions of the Contract, Comstock admits that the clauses are contained in the Contract. However, Comstock denies that any of those clauses pled in any way limit or affect Comstock's ability to recover additional costs and damages claimed in this action.

5. Comstock further states that the portions of the Contract that are quoted in the Statement of Defence and Counterclaim do not in any way assist PCS in defence of the Comstock action or at all. Comstock denies that its claims are in any way impeded by the terms of the General Conditions or the specific contractual clauses relied on by PCS.
6. With respect to paragraph 10 of the Statement of Defence and Counterclaim, Comstock confirms that the documents were provided to it by the Engineer AMEC but denies that this allegation assists PCS in its defence to Comstock's claim.
7. Comstock states that PCS had an obligation to ensure that Comstock was provided with documents, including IFC Drawings and vendor drawings, required to complete its work in a timely and efficient manner. PCS and/or AMEC failed to provide Comstock with the information required to complete the Work in the manner contemplated at the time of tender.
8. With respect to paragraphs 13, 31, 32 and 52 of the Statement of Defence and Counterclaim, Comstock required IFC Drawings, vendor drawings, and other documents in a timely fashion so it could work efficiently. Large construction projects, such as the Project, require significant advance planning. The failure to provide drawings at all, or providing drawings that were subsequently changed (in some cases, many times) disrupted Comstock's planning and sequencing and, accordingly, forced it to incur additional costs to complete the Work.
9. With respect to paragraph 17 of the Statement of Defence and Counterclaim, Comstock specifically denies that it had any general obligation to "account for various contingencies" and, in particular, that it had any obligation to "account for" PCS/AMEC's

negligence and breach of contract in its bid. Comstock's bid was based on the documents available, and representations made, to it with respect to the Work and the conditions under which the Work would be performed. Comstock assumed, and had the right to assume, that construction of the Project would proceed in a commercially reasonable manner and in accordance with the Contract. This did not occur.

10. With respect to paragraph 20 of the Statement of Defence and Counterclaim, none of the clauses cited in that paragraph assist PCS as alleged, or at all. Although the Contract contemplated that some drawings would be revised after its execution, the nature, extent and timing of the revisions to the drawings were neither commercially reasonable nor contemplated by the Contract. Many drawings were revised several times and final versions of these drawings were not provided until after Comstock planned to perform the relevant work.
11. With respect to paragraph 47 of the Statement of Defence and Counterclaim, Comstock specifically denies that all vendor drawings were available to Comstock when needed on the project secured website, or at all. Many vendor drawings were not provided in a timely manner and caused Comstock significant delays.
12. With respect to paragraph 44 of the Statement of Defence and Counterclaim, Comstock admits that the General Conditions include the clause set out therein, but denies that it is relevant to Comstock's allegations. None of the allegations made by Comstock at paragraph 24(a)(ii) of the Amended Statement of Claim relate to matters that Comstock could have known prior to entering into the Contract. In particular, no information available to, or inspection that could have been performed by, Comstock prior to its tender

would have revealed any of the facts alleged at paragraph 24(a)(ii). The allegations made at paragraph 24(a) all relate to facts that Comstock did not know, and could not have known, until after it executed the Contract and commenced work on the Project.

13. With respect to paragraph 14 of the Statement of Defence and Counterclaim and the allegations relating to the use of the Cranes, Comstock specifically denies that its request for full and unrestricted use of a 25 tonne and a 10 tonne crane (collectively, the "Cranes") to be provided by PCS was ever denied. To the contrary, such access and use was specifically contemplated by the Contract, including the correspondence incorporated into it by reference.
14. With respect to paragraph 60 of the Statement of Defence and Counterclaim, Comstock specifically denies that the Cranes were not anticipated or required until "later in the fall of 2009" as alleged. It was a term of the Contract that Comstock would be granted access to the Cranes at or near the beginning of the Work.
15. With respect to the allegation at paragraph 61 of the Statement of Defence and Counterclaim, Comstock denies that the "main purpose" of the Cranes is relevant to this action. As is set out above, PCS agreed that Comstock would have access to functioning cranes to complete its work in accordance with its original bid price. PCS failed to meet its obligations in this regard.
16. Comstock specifically denies that PCS has provided any change order or compensation for the amounts claimed in relation to PCS' failure to provide working cranes in accordance with promised timelines as alleged at paragraph 70 of the Statement

of Defence and Counterclaim, or at all. Such change orders and compensation as were provided relate entirely to matters not included in Comstock's claim.

17. With respect to paragraph 12 of the Statement of Defence and Counterclaim, PCS, or those for whom it was responsible, was responsible for co-ordinating the Project so that Comstock could complete the work in a timely and efficient manner. PCS and AMEC failed to do so and Comstock suffered damages. The clause pled in paragraph 12 of the Statement of Defence and Counterclaim does not detract from PCS' obligation to answer any of Comstock's allegations.
18. With respect to the clauses quoted at paragraphs 18, 24 and 44 of the Statement of Defence and Counterclaim. Comstock admits that these sections are included in the General Conditions but denies that they are in any way a defence to Comstock's claim. The Contract incorporated significant documentation, including Correspondence, and Comstock relied on the representations made in and about this documentation in agreeing to enter into the Contract. Furthermore, the Contract specifically incorporated the Correspondence, which was acknowledged in a letter from AMEC (sent on behalf of and with the authorization of PCS) attaching the Contract for execution by Comstock:

I have now finalized the contract and have inserted your letter with comments as well as provide the total history from start to finish for [Comstock's bid to work on the Project].

This history includes all of the correspondence that occurred from both sides....

19. With respect to paragraph 62 of the Statement of Defence and Counterclaim, the schedule referred to was a "Contract Document" within the meaning of the Contract and, accordingly, the relevant schedule was incorporated into the Contract.
20. With respect to paragraph 19 of the Statement of Defence and Counterclaim, Comstock states that its ability to complete the Work within the timeline contemplated when the Agreement was executed was entirely dependent on PCS and AMEC fulfilling their respective obligations including, but not limited to, providing Comstock with access to the Cranes, co-ordinating the site and providing Comstock with all drawings and other information required to complete the Work.
21. With respect to paragraph 26 of the Statement of Defence and Counterclaim, Comstock states that completion of the Work in accordance with the timelines originally contemplated could have been achieved if PCS and AMEC had not breached their obligations as set out in the Amended Statement of Claim.
22. With respect to paragraph 58 of the Statement of Defence and Counterclaim, Comstock specifically denies that it stated that structural steel issues did not impact its completion date and relies on paragraph 24(d)(iii) of its Amended Statement of Claim.

23. With respect to the allegations raised in paragraph 22 of the Statement of Defence and Counterclaim, Comstock states that PCS knew, or ought to have known, that Comstock would suffer significant damages if PCS or AMEC breached their respective obligations.

24. With respect to paragraphs 34, 69, 73 and 95 of the Statement of Defence and Counterclaim, Comstock states that PCS consistently ignored the procedures set out in the General Conditions for dealing with change orders and delays and, accordingly, that PCS waived its right to rely on these procedures. Comstock states that if it had failed to fully comply with the procedures, which is not admitted but denied, such failure was occasioned due to the actions of PCS and/or AMEC. Alternatively, Comstock states that PCS, through its course of conduct, waived strict compliance with these provisions. Comstock further states that PCS is estopped, through its course of conduct, from alleging any failure to strictly comply with the provisions of the Contract.

25. To the extent Comstock had an obligation to give notice, under the Contract or otherwise, of the facts underlying the claims set out in the Amended Statement of Claim, Comstock did so in a timely and appropriate manner including in the letters referenced at paragraph 75 of the Statement of Defence and Counterclaim.

26. With respect to paragraph 68 of the Statement of Defence and Counterclaim, Comstock admits that the Contract contains the clause cited therein, which speaks for itself, but denies that the clause is any way an answer to Comstock's claims. Although PCS may have had some contractual rights to make certain changes to the Work, nothing in

the Contract eliminates or decreases PCS obligation to pay for additional work relating to such changes.

27. Comstock denies that it delayed work on the Project while it was awaiting change orders, or at all. To the extent Comstock was unable to carry out work, such inability was the result of PCS' failure to provide information needed to carry out the relevant work.
28. With respect to paragraph 70 of the Statement of Defence and Counterclaim, Comstock denies that it received compensation, through change orders or otherwise, for any of the issues set out in the Amended Statement of Claim.
29. With respect to paragraph 67 of the Statement of Defence and Counterclaim, Comstock denies that any of the requests for information ("RFIs") at issue in this action were not "in fact" RFIs as alleged therein. All of the RFIs at issue sought information required by Comstock to complete its work and PCS/AMEC's failure to respond appropriately, or at all, to these RFIs caused Comstock to suffer delays and incur extra costs.
30. Comstock denies the allegations raised in paragraph 25 of the Statement of Defence and Counterclaim. Comstock states that it was requested to, and did ultimately, provide a lump sum bid to PCS. Comstock further states that it did not agree to perform a vague or "evolving" scope of work for a fixed price lump sum contract. To the extent the scope of work changed subsequent to the award of the Contract, Comstock is entitled to be paid all costs associated with any change in the scope of work, and any and all costs associated with carrying out the work under significantly different conditions than originally contemplated.

31. With respect to paragraph 79 of the Statement of Defence and Counterclaim, the Contract contemplated that AMEC would, among other things, act as a neutral adjudicator with respect to any claims for entitlement to extra costs and evaluation of Comstock's work for payment purposes. Comstock accepted that AMEC would execute the role contemplated for it in the Contract but AMEC failed to do so either, competently or in an unbiased manner, and, as a result, Comstock suffered damages.
32. With respect to the allegations raised at paragraph 88 of the Statement of Defence and Counterclaim, dealing with the purported Notice of Default, Comstock repeats and relies on the allegations set out in its Amended Statement of Claim, and denies all allegations that the Notice of Default was proper. Comstock states that the Notice is so vague as to be meaningless and further states that PCS and/or AMEC failed to provide any particulars of the alleged defaults. Furthermore, as set out in its Amended Statement of Claim, Comstock denies that it was, in any way, in default of any of its obligations under the Contract in any event.
33. Comstock further states that the deficiencies in the purported Notice of Default deprived Comstock of an opportunity to respond to the allegation that it was in default and/or cure alleged defaults prior to termination. AMEC/PCS' letter was, in fact, simply a recitation of various clauses in the Contract that could, if breached, give rise to a right of termination.
34. Comstock further states that it responded to AMEC's purported Notice of Default with a lengthy response setting out, in detail, its position. Comstock's response specifically stated that AMEC's letter was too vague to constitute proper Notice of Default

and that Comstock required meaningful notice of its alleged defaults in order to respond to AMEC's allegations. These particulars were never provided.

35. Comstock states that in light of the fact that it was not in default of its obligations and, furthermore, that the since no Notice of Default within the meaning of the Contract was given, PCS' termination of the Contract was in breach of the Contract and PCS is liable for such breach.

36. Comstock admits that the Contract included the termination provisions cited at paragraph 93 of the Statement of Defence and Counterclaim but denies PCS ever invoked these provisions. PCS purported to terminate the Contract for cause.

37. With respect to paragraph 101 of the Statement of Defence and Counterclaim, Comstock specifically denies that the calculations underlying its bid price were in any way deficient. If not for the negligence and breach of contract identified in the Amended Statement of Claim, Comstock could have completed the Work for the price, and in the time contemplated at the time of tender and in change orders approved by PCS.

II. DEFENCE TO COUNTERCLAIM

38. Comstock repeats and relies upon all of the allegations as set out in its Amended Statement of Claim, Statement of Particulars and the Reply set out herein, which are all incorporated by reference to this Statement of Defence to Counterclaim.

39. Comstock denies all of the allegations contained in the Counterclaim.

40. Comstock states that it complied with all of its obligations under the Contract. In particular, it carried out the Work in a good and workmanlike manner. Comstock

specifically denies delay to the Work, any deficiency in the Work or any other breach of the Contract for which it is responsible.

41. Comstock specifically denies that PCS suffered any damages for which it is responsible. In the alternative, the damages claimed are remote, excessive and unmitigated. Comstock denies that PCS is entitled to any of the amounts claimed and asks that its Counterclaim be dismissed with costs.
42. Comstock further states that at the time of the wrongful termination of its Contract by PCS, it was nearing completion of the Work, notwithstanding the numerous breaches by PCS and AMEC of their respective obligations. Comstock states that it would have completed the Work in the late summer or early fall of 2010.
43. Comstock further states that subsequent to the wrongful termination, PCS entered into another contract with another subcontractor to complete the balance of the Work. Comstock states that the completion subcontract was awarded without a proper tendering process and without due regard to the status of the Work at the time of the wrongful termination. Comstock further states that no work on the completion subcontract took place until the fall of 2010, several months after Comstock's right to continue with its Work was terminated.
44. Comstock states that PCS had a duty to mitigate its damages, if any are found to exist, and failed to do so. Comstock states that to the extent PCS suffered any damages, such damages were all occasioned by its own conduct, including its conduct in awarding and administering the completion subcontract.

45. Comstock further states that, subsequent to the wrongful termination of the Contract, PCS continued to change the scope of work that was ultimately undertaken by the completion subcontractor. This additional work was not part of Comstock's scope of work. As such, Comstock states that PCS is not entitled to any additional costs to complete the Work from Comstock.

46. Comstock further states that notwithstanding PCS' allegation that the Contract was terminated in part due to not meeting the May 30, 2010 completion date, the completion of the subcontract work was not completed until 2011. Comstock states that this delay was due to the further redesign of the Project by PCS and/or AMEC, including the Work under the Contract, and other factors outside Comstock's control. As such, Comstock states that PCS is not entitled to any damages as a result of any delay in completion of the compaction plant.

47. Comstock further states that any and all damages claimed by PCS were occasioned by the actions of PCS and/or AMEC, and not as a result of any actions or alleged breach of contract by Comstock. As such, Comstock requests that the Counterclaim be dismissed.

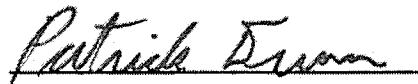
DATED at Saint John, New Brunswick, this 10th day of January, 2012.



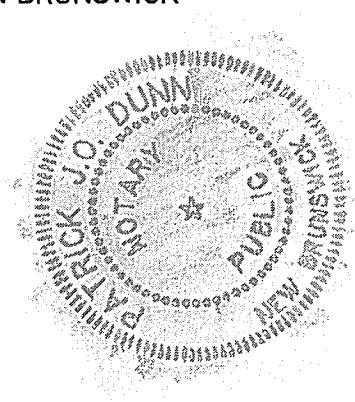
Howard M. Wise by his authorized agent Robert Creamer
Solicitors for the Plaintiff
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Fax: 416.979.1234
Email: hwise@goodmans.ca

Address for service within New Brunswick
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Lawson Creamer
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Saint John, NB E2L 2B5
Tel: (506) 633-3737
Fax: (506) 633-0465
Email: rcreamer@lawsoncreamer.com

THIS IS EXHIBIT "F"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.

A handwritten signature of "Patrick J.O. Dunn" in black ink.

A Notary Public in and for the
Province of New Brunswick



Cause Number: *S/C 596 / 10*

IN THE COURT OF QUEEN'S
BENCH OF NEW BRUNSWICK COUR DU BANC DE LA REINE
DU NOUVEAU-BRUNSWICK

TRIAL DIVISION DIVISION TRIAL

JUDICIAL DISTRICT OF SAINT JOHN CIRCONSCRIPTION JUDICIAIRE
DE

ENTRE:

BETWEEN: **Demandeur**

COMSTOCK CANADA LTD., Plaintiff - et -

- and -

POTASH CORPORATION OF SASKATCHEWAN INC., **Defendeur**

Defendant

**NOTICE OF ACTION WITH
STATEMENT OF CLAIM
ATTACHED
(FORM 16A)**

**AVIS DE POURSUITE
ACCOMPAGNE
D'UN EXPOSE DE LA DEMAND
(Formule 16A)**

TO: THE DEFENDANT
POTASH CORPORATION OF
SASKATCHEWAN INC.
PCS Tower 500 - 122 First Ave.S.
Saskatoon, Saskatchewan S7K

7G3
Attn: Clark D Bailey
Vice President Technical Services

DESTINATAIRE:

PAR LE DEPOT DU PRESENT
AVIS DE POURSUITE
ACCOMPAGNE D'UN EXPOSE DE
LA DEMANDE, UNE POURSUITE
JUDICIAIRE A ETE ENGAGEE
CONTRE VOUS.

LEGAL PROCEEDINGS HAVE
BEEN COMMENCED AGAINST YOU
BY FILING THIS NOTICE OF
ACTION WITH STATEMENT OF
CLAIM ATTACHED.

If you wish to defend these
proceedings, you or a New Brunswick

Si vous desirez presenter une
defense dans cette instance, vous-
meme ou un avocat du Nouveau-
Brunswick charge de vous
re presenter devrez rediger un
expose de votre defense en la forme

lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the Plaintiff or Plaintiff's lawyer at the address shown below and, with proof of such service, file it in this Court Office, together with the filing fee of \$50.00;

(a) If you are served in New Brunswick, **WITHIN 20 DAYS** after service on you of this Notice of Action With Statement of Claim Attached, or

(b) If you are served elsewhere in Canada or in the United States of America, **WITHIN 40 DAYS** after such service, or

(c) If you are served anywhere else, **WITHIN 60 DAYS** after such service.

If you fail to do so, you may be deemed to have admitted any claim against you, and without further notice to you, **JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.**

You are advised that:

(a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;

(b) the Plaintiff, Comstock, intends to proceed in the English language; and

prescrite par les Regles de procedure, le signifier au demandeur ou a son avocat a l'adresse indiquee ci-dessous et le deposer au greffe de cette Cour avec une preuve de sa signification et un droit de depot de \$50.00;

(a) **DANS LES 20 JOURS** de la signification qui vous sera faite du present avis de poursuite accompagne

d'un expose de la demande, si elle vous est faite au Nouveau-Brunswick ou

(b) **DANS LES 40 JOURS** de la signification, si elle vous est faite dans une autre region du Canada ou dans les Etats-Unis d'Amérique ou

(c) **DANS LES 60 JOURS** de la signification, si elle vous est faite ailleurs.

Si vous omettez de le faire, vous pourrez etre repute avoir admis toute demande formulee contre vous et, sans autre avis, **JUDGEMENT POURRA ETRE RENDU CONTRE VOUS EN VOTRE ABSENCE.**

Sachez que:

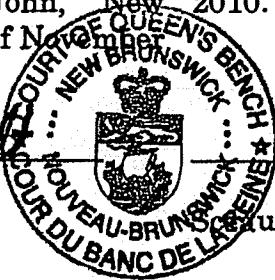
(a) vous avez le droit dans la presente instance, d'emettre des documents et de presenter votre preuve en francais, en anglais ou dans les deux langues;

(b) le demandeur a l'intention d'utiliser la langue; et

(c) your Statement of Defence must indicate the language in which you intend to proceed.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by George S. Theriault, Q.C., Clerk of the Court at Saint John, New Brunswick, on the 7th day of November A.D. 2010.

George S. Theriault
George S. Theriault, Q.C.
CLERK OF THE COURT
4th Floor
110 Charlotte St., PO Box 5001
Saint John, New Brunswick
E2L 4Y9



(c) l'expose de votre defense doit indiquer la langue que vous avez l'intention d'utiliser.

CET AVIS est signé et scellé au nom de la Cour du Banc de la Reine par ___, greffier de la Cour a ___, ce 2010.

(greffier)

_____ (adresse du greffe)

STATEMENT OF CLAIM

1. The Plaintiff ("Comstock") Comstock is an extra-provincial body corporation carrying on business in New Brunswick. Comstock is incorporated under the laws of Ontario. Comstock carries on business predominantly in the fields of mechanical and electrical contracting throughout Canada, including New Brunswick. Comstock has a registered office at 3455 Landmark Road, in the City of Burlington in the Province of Ontario.
2. The Defendant Potash Corporation of Saskatchewan Inc. ("PotashCorp") is an extra-provincial body corporate carrying on business in New Brunswick. PotashCorp is incorporated pursuant to the laws of Canada. PotashCorp has a registered office at 122 First Avenue S, Suite 500, in the City of Saskatoon in the Province of Saskatchewan and was at all times material hereto the owner of property situate at or near Penobsquis, New Brunswick bearing PID 30259402 (hereinafter the "Property"), more particularly described in a Claim for Lien filed in the Registry Office for the County of Kings on or about August 17, 2010, under number 29107399.
3. Comstock states that it had an agreement with PotashCorp whereby it would supply the mechanical and electrical installation works, building materials, labour and services which comprised of but were not limited to: mechanical systems and equipment, piping and piping systems and equipment, HVAC systems and equipment, electrical systems and equipment, instrumentation systems and equipment, related building materials and the provision,

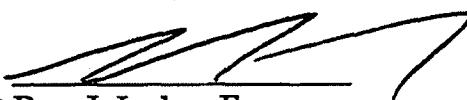
delivery, installation, attachment and incorporation thereof for the Piccadilly potash mine in Penobsquis, New Brunswick ("the Project").

4. Comstock performed its work with respect to the Project at the Property, however, PotashCorp has not paid Comstock the balance owing of \$47,714,977.00 which is due, payable and owing to Comstock plus interest. Full particulars of the amounts claimed herein have been given to PotashCorp.
5. By reason of supplying the said labour and materials as described herein, Comstock is entitled to a lien pursuant to the provisions of the *Mechanics' Lien Act* R.S.N.B., 1973, c. M-6 (hereinafter the "Act") for the sum claimed in its registered claim for lien together with judgment for additional sums claimed herein, namely interest and costs.
6. As stated above, on August 17, 2010 Comstock arranged for registration of a claim for lien as against Property bearing PID 30259402. That claim for lien is for the sum of \$47,714,977.00 ("Lien").
7. The Lien was verified by the Affidavit of Pete Semmens, Executive Vice-President of Comstock, and sworn before a Commissioner for taking Oaths/Notary Public in the Province of Ontario on August 16, 2010. A further Notice of Lien and Affidavit Verifying Notice were prepared, sworn and served to counsel for PotashCorp on or about the same day.
8. Comstock claims pursuant to section 9 of the *Act*, it has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after the Lien arose and, subject to section 9(2) of the *Act*, all claims under conveyances, mortgages and other charges and agreements for sale of land made by PotashCorp, before or after the Lien arose.
9. Comstock states that the quantum of its Lien represents the price of the materials and services it provided to the Project which remains unpaid.
10. By reason of the foregoing, Comstock claims:
 - a. a Certificate of Pending Litigation be issued in respect of the lands and premises comprising the Lien;
 - b. a declaration that it is entitled to a claim for lien;
 - c. a declaration that Comstock's claim for lien is a charge against the holdbacks required to be retained under the *Mechanics' Lien Act* and any additional amount owed by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part

performed by the services or materials that have been supplied by Comstock in relation to the lands and premises described in its claim for lien;

- d. payment by the Defendant of the sum of \$47,714,977.00 plus HST where applicable;
- e. payment of pre-judgment and post-judgment interest on any sums owing by PotashCorp to Comstock pursuant to the agreement made between Comstock and the Defendant or pursuant to the *Judicature Act*, R.S.N.B. 1973, c. J-2;
- f. priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after the Lien arose and, subject to section 9(2) of the *Act*, all claims under conveyances, mortgages and other charges and agreements for sale of land made by PotashCorp, before or after the Lien arose;
- g. its costs of this action on a substantial indemnity basis;
- h. HST on any sums owing by PotashCorp to Comstock where not already claimed but due and/or applicable;
- i. in default of payment of the sums claimed herein, all the estate and interests of PotashCorp in the lands and premises comprising Comstock's claim for lien be sold and the proceeds applied in and towards of Comstock's claim and costs;
- j. for the purposes aforesaid, all proper directions be given and accounts taken; and
- k. such further and other relief as this Honourable Court may deem just.

DATED at Saint John, New Brunswick, this 9th day of November, 2010.



For, Dan J. Leduc, Esq.
Ogilvy Renault LLP
Solicitors for the Plaintiff

Ogilvy Renault LLP
Suite 1600 - 45 O'Connor Street
Ottawa, Ontario K1P 1A4
Tel: (613)780-1536

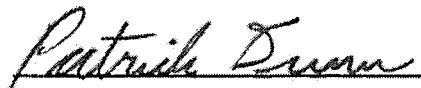
Fax: (613) 230-5459
Email: djleduc@ogilvyrenault.com

Address for service within New Brunswick:

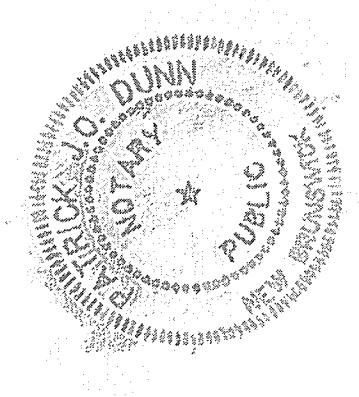
Robert M. Creamer, esq.
LAWSON CREAMER
133 Prince William Street
Harbour Building, 8th Floor
P O Box 6787, Station "A"
Saint John, NB E2L 4S2

Telephone No. (506) 633-3737
Facsimile No. (506) 633-0465
Email: rcreamer@lawsoncreamer.com

THIS IS EXHIBIT "G"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



Court File No.: S/C/596/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

COMSTOCK CANADA LTD.

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

RECD
RECU DEC 1 2010 10:00 AM
FILED
FICHÉ

COUR DU BANC DE LA REINE
GREFFIER / SAINT-JEAN

Plaintiff,

-and-

**POTASH CORPORATION OF
SASKATCHEWAN INC.**

Defendant.

STATEMENT OF DEFENCE

(Form 27A)

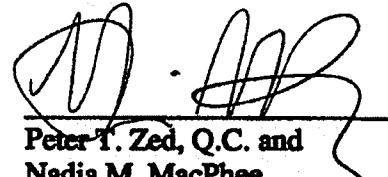
1. The Defendant, Potash Corporation of Saskatchewan Inc. (the "Defendant"), admits the allegations contained in paragraphs 1, 2, 3, 6 and 7 of the Plaintiff's Statement of Claim.
2. The Defendant denies the allegations contained in paragraphs 4, 5 and 9 as well as the relief sought in paragraph 10 of the Statement of Claim.
3. With respect to paragraph 8 of the Statement of Claim, the Defendant acknowledges the priorities set out in Section 9 of the *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6 but states that the Plaintiff's claim is without merit.
4. With respect to the Statement of Claim as a whole, the Defendant denies all allegations save as expressly admitted herein and puts the Plaintiff to the strict proof thereof.
5. The Plaintiff has brought a parallel claim, Cause No. S/C/404/10, claiming the amounts sought in the within action. The Defendant repeats paragraphs 1 to 104 of its Statement of Defence in Cause No. S/C/404/10.
6. The Defendant states that the Plaintiff's work was deficient. The Defendant has incurred costs to rectify the deficiencies in the Plaintiff's work. Should the Plaintiff be entitled to any amounts from the Defendant, which is not

admitted but expressly denied, the Defendant states that it is entitled to a set off in light of the deficiencies in the Plaintiff's work.

7. The Defendant states that the Plaintiff has already been compensated for its work carried out pursuant to the agreement between the parties.
8. In the alternative, the Defendant states that if any amounts are owed to the Plaintiff, which is not admitted but expressly denied, then the Defendant's liability to the Plaintiff is limited to the holdback amount.
9. The Defendant states that it has complied with its obligations under the *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6 including the holdback provisions in section 15 thereof.
10. The Defendant asks that the Plaintiff's claim be dismissed with costs.

The Defendant intends to proceed in the English language.

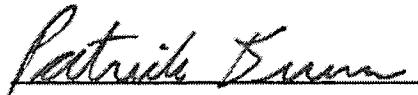
DATED at Saint John, New Brunswick this 30th day of November, 2010.



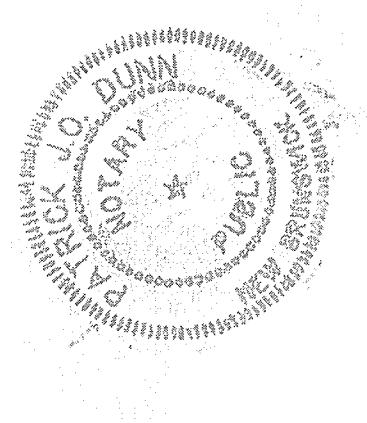
Peter T. Zed, Q.C. and
Nadia M. MacPhee
of **BARRY SPALDING**
Solicitors for the Defendant,
Potash Corporation of
Saskatchewan Inc.

BARRY SPALDING
Lawyers - Avocats
710-55 Union Street
PO Box 6010 Stn "A"
Saint John NB E2L 4R5
Telephone: (506) 633-4226
Telecopier: (506) 633-4206

THIS IS EXHIBIT "H"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



S/C/404/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

BETWEEN:

Citation: 2011 NBQB 127
Date: 2011 05 10COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

MAY 10 2011

COMSTOCK CANADA LTD.

Plaintiff

- and -

**POTASH CORPORATION OF
SASKATCHEWAN INC., and AMEC
AMERICAS LIMITED**

Defendants

BEFORE: Justice William T. Grant
HEARING HELD: Saint John
DATE OF HEARING: May 6, 2011
DATE OF DECISION: May 10, 2011

COUNSEL:

Howard Wise & Robert M. Creamer, solicitors for the Plaintiff
Frederick C. McElman, Q.C. & Debra M. Lamont, solicitors for the Defendant,
AMEC Americas Ltd.
Peter T. Zed, Q.C., solicitor for the Defendant, Potash Corporation of
Saskatchewan Inc.

DECISION**GRANT, J**

[1] The defendants in this action, Potash Corporation of Saskatchewan Inc. ("PCS") and AMEC Americas Limited ("AMEC"), each bring a motion in which they request an order be made requiring the plaintiff, Comstock Canada Ltd. ("Comstock"), to post security for costs.

BACKGROUND

[2] In the underlying action Comstock sues the defendants for damages totaling approximately \$58 million. The claim arises from a \$38 million contract in which the defendant, PCS retained Comstock to perform mechanical, piping, HVAC, electrical and instrumentation work on its new compaction plant near Penobsquis, in Kings County, New Brunswick. The defendant, AMEC is not a party to the contract but is named as both the engineer and construction manager in the contract.

[3] Comstock's work was to be completed by May 30th, 2010. That deadline was not met and when a further deadline was also not met, PCS advised Comstock it had terminated the contract. Comstock then brought this action in which it claims approximately \$10 million for work completed but for which it has not been paid, approximately \$43 million for additional costs and damages and \$5 million in punitive damages.

[4] It bases its action against PCS on, *inter alia*, breach of contract while its action against AMEC is based on tortious interference with contractual relations and economic interests, inducing breach of contract, misrepresentation, negligent misrepresentation and breach of a duty to act in good faith.

[5] The litigation is complex and will involve tens, if not hundreds of thousands of documents. Twenty to forty days have been scheduled for oral discoveries and the costs of these discoveries is estimated by all parties to be in the six figures.

[6] The defendants rely on Rules 58.01 (a) and (d) which state:
A plaintiff may be ordered to furnish security for costs where it appears that

(a) he is ordinarily resident out of New Brunswick,

...

(d) it is an association as defined in Rule 9.01 or is a corporation and there is reason to believe that it has not sufficient assets in New Brunswick to pay the costs of the defendant if ordered to do so, ...

[7] As with costs generally this is a discretionary order. In the case of ***Farrow's Metal Works Inc. v. Tritor Developments Ltd. et al***, (1988) N.B.J. No. 328, Creaghan, J. stated:

The order is discretionary to the court and may be refused in the circumstances of any case where the interests of justice would be frustrated even where the criteria for granting such an order have been met.

....

The object of Rule 58 is to insure, where the equities require, that a litigant who is forced to defend a claim against him is

**not at risk with respect to the costs of a successful defence. ...
(Underlining by Grant J.)**

[8] In the case of *Brunswick Printing v. Centennial Office Equipment et al* (1984) 59 N.B.R. 2nd 243 Richard, C.J.Q.B. stated at paragraph 27:

27 In order to succeed on a motion for security for costs under the present R. 58, a party to an action must first satisfy the requirements of either para. (a), (b), (c), (d) or (e) of R. 58.01 and must comply with R. 58.02, that is, the motion must be made after the defendant has filed his statement of defence and before the action is set down for trial. In addition, the motion for security for costs must be supported by affidavits that show:

- (a) the nature of the action;**
- (b) the nature of the defence;**
- (c) that the plaintiff does not possess property in New Brunswick that would be sufficient to cover the costs of the action; and**
- (d) that either the defendant, (here the third parties) states clearly the facts which in his opinion affords him a good defence on the merits or, alternatively states clearly the facts which in his opinion shows that the action is trivial or frivolous.**

[9] It is clear from the record that the defendants have shown that Comstock is not resident in New Brunswick so they have satisfied Rule 58.01(a). It is not as clear that Comstock has no assets in New Brunswick, as will be discussed later, but that is not a requirement the defendants must meet for their motions to succeed in any event. The motions have also been filed after the Statements of Defence were filed and before the matter has been entered for trial as required by Rule 58.02. The defendants have also filed affidavits complying with the other requirements set out in *Brunswick Printing, supra*.

[10] The threshold issue, then, in these motions is whether or not "the equities require" that I exercise my discretion to make the orders. In other words: are the defendants, or either of them, "at risk with respect to the costs of a successful defence"?

[11] The amount of security being requested by the defendants is, in PCS's case approximately \$1.7 million and in the case of AMEC approximately \$2.3 million. These amounts include both party and party costs based on Scale 3 of Tariff "A" under Rule 59 and disbursements which the defendants estimate they will incur to the end of trial. Those amounts are then multiplied by two-thirds in accordance with the formula set out in *Maryon v. NB Tel Ltd.* (1977) 16 N.B.R. 2nd 56 (C.A.) affirming 1977 16 N.B.R. 2nd 56 (N.B.Q.B.).

[12] Comstock says that it has assets in the Province of New Brunswick in the form of amounts owing to it under the contract. Those amounts include an approximately \$6 million mechanics' lien holdback, \$656,000 in claims which have been certified but not paid and \$2.8 million in claims which AMEC has recommended to PCS that they pay to Comstock.

[13] AMEC is not a party to the contract and does not owe any money to Comstock as a result of lien holdbacks or certified claims. Consequently, any costs in their favour are not secured by these amounts.

[14] With respect to PCS, it has filed a counterclaim in which it claims damages for breach of contract, its incremental costs of retaining a new contractor to finish the contract, delay and deficiencies. The amounts of those claims are not quantified in the pleadings.

[15] With respect to the \$3.5 million in certified and recommended claims, while I am not in a position to assess the merits of the counterclaim, it is not inconceivable that once it is quantified, it will exceed the amount of these claims. Thus, while it appears that the claims are not in dispute, both the merits and amounts of the counterclaim are anything but clear. Consequently, I am not prepared to find that PCS' costs would be secured by these claims.

[16] With respect to any monies owing by PCS to Comstock, section 3(1) of the ***Mechanics' Lien Act***, R.S.N.B. 1973, c. M-6 provides that once received by Comstock these monies are impressed with a trust for the benefit of the parties therein set out and until those parties are paid, Comstock cannot appropriate the funds to its own use or to any use not authorized by the trust. Consequently, while there may be monies still owing to Comstock by PCS after the counterclaim is resolved, the remaining money is subject to those trust provisions.

[17] There is no evidence before the Court as to the extent or amount of such claims, if any, but they would have priority to any claim by PCS for its costs of this litigation in my view. I therefore do not accept Comstock's submission that PCS' costs are secured by the roughly \$10 million which it claims is owed to it by PCS under the contract.

[18] Turning to the evidence of Comstock's solvency, they had revenues in excess of \$275 million in 2010 and have a history of doing large projects in New Brunswick, having employed almost 5,000 people here since 1994 in projects with an approximate aggregate value of \$184 million. They maintain offices across Canada with approximately 2,500 workers. That is all history

however and does not give the Court enough context to comment on their solvency. Curiously, while Comstock included in its evidence Information about PCS's key financial results between 2006 and 2010, it did not include a copy of its own financial statements or even a balance sheet. As such there is no evidence before the Court as to what assets it has, wherever located, to satisfy any costs order. Moreover, while their 2010 revenues appear to be large, I take judicial notice of the fact that there is no longer any such thing as a company that is too large to fail.

[19] Comstock alleges that it has the ability to satisfy any costs awards in these proceedings, if necessary, and that evidence is not contradicted. Moreover, in the case of PCS it is significant in my view that they entered into a contract to do work in New Brunswick with Comstock fully aware that Comstock was not resident in New Brunswick. The contract requires that any legal action arising from it be pursued in New Brunswick and would be governed by the laws of New Brunswick. Moreover, while it provides in General Condition No. 56 that PCS could require both a performance bond and a labour and materials payment bond, no such bond was required of Comstock. Neither is there any evidence that PCS questioned Comstock's creditworthiness before entering into the contract. After considering all of the circumstances, I find that the equities do not require that Comstock post security for PCS's costs and I therefore dismiss PCS's motion with costs as hereinafter set out.

[20] With respect to AMEC, it was not a party to the contract and was therefore not in a position, as PCS was, to secure itself financially vis a vis Comstock before this litigation arose. Consequently, I view their position as being quite different from that of PCS. Moreover, in the absence of any evidence from Comstock as to their assets that would be available, wherever

located, at the conclusion of the litigation to satisfy any costs award, I find that this is an appropriate case to order security for costs in their favour.

AMOUNT OF SECURITY

[21] AMEC urges that the party and party costs be calculated using Scale 5 of Tariff A under Rule 59 because the scale of costs is out of date and because the litigation is made more complex by the prolix Statement of Claim filed by Comstock.

[22] With respect to the currency of the tariff, in my view that is not an issue that is relevant to a motion for security as the purpose of it is not to secure full indemnity.

[23] With respect to the amended Statement of Claim, the original ran to 48 pages. When Comstock received a Demand for Particulars they not only filed a Statement of Particulars but added the particulars to their amended Statement of Claim.

[24] While the Statement of Claim is lengthy by any standard, I am not persuaded that that is a reason to base the amount of security for costs on Scale 5. It may be a justification for making an order but not for increasing the amount. In my view, Scale 3 adequately addresses any risk of collecting costs which AMEC may be facing in this litigation.

[25] Comstock submits that the party and party costs under Scale 3 are excessive and that the Court should apply Scale 1. The amount claimed by

Comstock in this action is \$58 million; documentary discovery will likely involve more than a hundred thousand documents, oral discovery will be at least four weeks and the trial will take a similar amount of time.

[26] Moreover, the two-thirds rule is designed to mitigate the harshness of any order for security for costs. Based on all these factors I am therefore satisfied that Scale 3 of Tariff "A" is the appropriate scale to use in quantifying the party and party costs in this case.

[27] The party and party costs on \$58 million using Scale 3 would be \$1,744,375. For purposes of this order I will round that number to \$1,700,000. In accordance with Rule 59.08(8.1)(b) there will be no HST on that amount.

[28] As for disbursements I find that the disbursements claimed by AMEC are largely unsubstantiated and while I realize this is only a draft bill, the largest portion of the \$1.9 million in disbursements it claims, \$1.2 million, is for three experts. That is supported by little more than a figure on a piece of paper.

[29] In my view, Comstock's estimate at tab 15 of AMEC's record is more reasonable and I accept it for purposes of this motion. The total for disbursements including HST then is \$430,000 which I will round to \$400,000.00.

[30] The total, then, for costs and disbursements that I will allow for purposes of this motion is \$2,100,000. Using the two-thirds rule, I order that Comstock post security for AMEC's costs in the amount of \$1,400,000.

[31] The parties also disagreed on the form of security. AMEC urged that if Comstock was not prepared to post cash or certified cheque then they should post a letter of credit. Comstock submits that a letter of credit would cost eight times as much as a surety bond and urged the Court to accept a surety bond as adequate security for purposes of this order. The evidence submitted by Comstock indicates that a letter of credit for \$1.4 million would cost approximately \$39,000 per year while a surety bond for that amount would cost about \$5,300 per year.

[32] AMEC argues that the bond proposed by Comstock, will not provide the level of security that a letter of credit would provide and that the draft bond proposed by Comstock from The Travelers Companies, Inc. only invites further argument over the terms of the bond.

[33] Comstock submitted evidence that this Court has accepted bonds from The Travelers in the past. It also submitted evidence that The Travelers has assets in the billions of dollars. I am not persuaded that the terms of the bond will be that difficult to finalize. If the parties cannot do it then any outstanding issues on the terms can be submitted to the Court for a further ruling. Given the large discrepancy in the costs between a bond and a letter of credit and the fact that these bonds have been accepted in other proceedings in this Court, I am satisfied that the bond proposed by Comstock with necessary modifications will adequately provide the security for costs requested by AMEC.

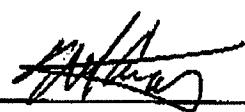
[34] Comstock also requests that any order for security be staged. AMEC submits that the proposal to stage the security has the potential to be too complex and that a single order should therefore be made. In my view, staging is appropriate given the amount involved and the fact that the costs will be incurred on an accumulating basis between now and the time of trial.

[35] With respect to the complexity of any order, rather than ordering that the second half of the security be posted on an uncertain date such as the completion of discovery, I will simply set a date for it to be posted, *viz.*, November 30th, 2012.

[36] In summary, then, PCS's motion is denied with costs to Comstock of \$1,500.00 inclusive of disbursements. AMEC's motion is granted with costs of \$1,500.00 inclusive of disbursements. Comstock is ordered to post security for AMEC's costs as follows:

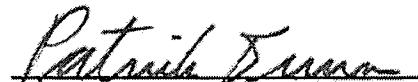
- (a) \$700,000 by way of surety bond to be filed with the Clerk of the Court within thirty days of the court signing a formal order;
- (b) \$700,000 by way of surety bond to be filed with the Clerk on or before November 30th, 2012; and
- (c) If Comstock fails to file either bond within the time set out in this order all proceedings in this action against AMEC will be stayed until further order of the Court.

[37] Counsel for AMEC is instructed to prepare an order to submit to the Court once the terms of the bond have been agreed to by the parties or finalized by the Court.

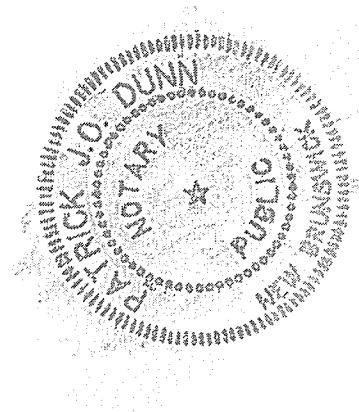


**William T Grant
Judge of the Court of Queen's Bench
of New Brunswick**

THIS IS EXHIBIT "I"
TO THE AFFIDAVIT OF STEWART BROWN
SWORN TO BEFORE ME AT PENOBSQUIS,
IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK
THIS 5th DAY OF DECEMBER, 2013.



A Notary Public in and for the
Province of New Brunswick



Schedule "A"**Court File No. CV-13-10181-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.

)

MONDAY, THE 9th DAY**JUSTICE MORAWETZ**

)

OF DECEMBER, 2013

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COMSTOCK CANADA LTD. AND CCL REALTY INC.

Applicants**APPROVAL AND VESTING ORDER**

THIS MOTION, made by Comstock Canada Ltd. ("Comstock") and CCL Realty Inc. ("CCL Realty") (collectively, the "Comstock Group") for an Order approving the sale transaction (the "Transaction") contemplated by an Agreement of Purchase and Sale (the "Sale Agreement") between Comstock and CCL Realty (the "Sellers") and HB Construction Company Ltd., an Alberta corporation (carrying on business in the Province of British Columbia under its assumed name, HBBC Construction Company Ltd.) (the "Purchaser") dated November __, 2013 and substantially as appended to the Report to Court (the "Monitor's Report") of PricewaterhouseCoopers Inc. in its capacity as the court appointed Monitor of the Comstock Group (the "Monitor") and vesting in the Purchaser the Sellers' right, title, estate and interest in and to the Assets as described in the Sale Agreement (collectively, the "Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Monitor's Report and on hearing the submissions of counsel for the Comstock Group, counsel for the Monitor, and counsel for those other parties listed on the

Counsel Slip, no one appearing for any other person on the Service List, although properly served as appears from the Affidavit of [NAME] sworn [DATE], 2013, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated, if necessary, so that this motion is properly returnable today and hereby dispenses with further service thereof.

SEALING OF CONFIDENTIAL EXHIBIT

2. **THIS COURT ORDERS** that Confidential Appendix [Letter] to the Monitor's Report be and is hereby sealed and shall remain confidential until such time as the Transaction has been closed.

DEFINITIONS

3. **THIS COURT ORDERS** that unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

APPROVAL AND VESTING

4. **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved, and the execution of the Sale Agreement is hereby authorized and approved, with such minor amendments as the Sellers and the Purchaser may deem necessary. The Sellers are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Assets to the Purchaser.

5. **THIS COURT ORDERS AND DECLARES** that upon the Monitor's delivery of a certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "Monitor's Certificate"), all of the Sellers' right, title, estate and interest in and to the Assets described in the Sale Agreement, including but not limited to the real property (the "Real Property") listed on Schedule B to hereto shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs,

mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Amended & Restated Initial Order dated July 9, 2013 and by the Lien Regularization Order dated August 7, 2013 (the "LRO"), but subject to paragraph 6, hereof; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; (iii) any Excluded Pre-Filing Accounts Payable; and (iv) those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "Encumbrances"), but not including the permitted encumbrances, easements and restrictive covenants listed on Schedule "D" and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets are hereby expunged and discharged as against the Assets.

6. **THIS COURT ORDERS AND DECLARES** that notwithstanding paragraph 5, above, the Lien Charge, as defined and provided for in the LRO, shall continue to apply and affix to the Accounts Receivable, including any Holdback (as defined in the LRO), for the benefit of those parties entitled to the Lien Charge pursuant to the LRO and with the same priority as provided for in the LRO.

7. **THIS COURT ORDERS** that any party seeking to enforce the Lien Charge as against the Purchaser must do so by way of a motion brought before this Court in these proceedings.

ASSIGNED CONTRACTS

8. **THIS COURT ORDERS** that, subject to the payment to the counterparties to the lease effective March 5, 2012 through March 5, 2015 between Comstock, as tenant, and Anna Krouse and Linda Shepherd, as landlord, in respect of the Kitimat office (the "Kitimat Office Lease") by not later than thirty (30) calendar days after the Closing Date of any amounts required to remedy any monetary defaults existing on the Closing Date, (i) the Sellers are hereby authorized and directed to assign the Kitimat Office Lease to the Buyer on Closing pursuant to Section 11.3 of the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") and in accordance with the Sale Agreement, and (ii) the assignment of the Kitimat Office Lease is hereby approved and

all such assignments shall be valid and binding upon the counterparties to such Kitimat Office Lease notwithstanding any restriction or prohibition on assignment contained therein.

9. THIS COURT ORDERS that, from and after the Closing Date, all Persons shall be prohibited from exercising any right or remedy under the Kitimat Office Lease by reason of any defaults thereunder then existing or previously committed or caused by the Sellers under, or the non-compliance of the Sellers with, any of the Kitimat Office Lease to the extent that such defaults or non-compliance arose solely by reason of the insolvency of any of the Sellers or as a result of any actions taken by any Seller in these proceedings, and all notices of default and demands given in connection with any such defaults under, or noncompliance with, any of the Kitimat Office Lease shall be deemed to have been rescinded and shall be of no further force or effect.

10. THIS COURT ORDERS AND DECLARES that, (i) no sections or provisions of any Real Property Lease that purport to provide for additional payments, penalties, charges or other financial accommodations in favour of the counterparty to such Real Property Lease shall have any force or effect with respect to any provision of this Order, (ii) no assignment of any Real Property Lease pursuant to the Sale Agreement or this Order shall in any respect constitute a default under any such Real Property Lease, and (iii) no consents from counterparty to any Real Property Lease shall be required in order to give effect to the assignment or vesting of the Real Property Lease pursuant to this Order and the Buyer shall enjoy all of the applicable Seller's rights and benefits under each such Real Property Lease as of the applicable date of assumption and assignment without the necessity of obtaining such counterparty's written consent to the assumption or assignment thereof.

LITIGATION CLAIMS

11. THIS COURT ORDERS AND DECLARES that the Purchaser shall not have any liability to any person that is or was a party to any proceeding in relation to the Litigation Claims (each, a "Litigation Party") for any costs, to the extent that such costs arise or are incurred by such Litigation Party prior to the date on which the Purchaser obtains an order of the court to continue the relevant Litigation Claim as the party in interest.

REAL PROPERTY REGISTRATIONS**Manitoba**

12. **THIS COURT ORDERS** that title to those lands and premises defined in Schedule "B" hereto as the Manitoba Real Property (the "Manitoba Real Property") shall and same is hereby vested into the name of the Purchaser, whose full post office address is TD Canada Trust Tower, 421 7th Avenue S.W., Suite 1700, Calgary, Alberta T2P 4K9, free and clear of all registered encumbrances save and except for Caveat No. 2615074/1.

13. **THIS COURT ORDERS AND DIRECTS** that upon the delivery of the Monitor's Certificate, the District Registrar of the Winnipeg Land Titles Office shall cancel existing Certificate of Title No. 2539980/1 and issue a new certificate of title in the name of HB Construction Company Ltd., as the registered owner of the Manitoba Real Property free and clear of all encumbrances except only for caveat 2615074/1 (being a right of way caveat in favour of MTS Communications Inc.) notwithstanding that the time for appeal of this order has not yet expired.

British Columbia

14. **THIS COURT ORDERS** that, for greater certainty, those lands and premises defined in Schedule "B" hereto as the BC Properties (the "BC Properties") be hereby conveyed to and vested in the Purchaser under its assumed British Columbia name, HBBC Construction Company Ltd., and that upon presentation for registration in the New Westminster Land Title Office of a certified copy of this Vesting Order, the Registrar of Land Titles (the "BC Registrar"), is hereby directed to enter HBBC Construction Company Ltd. as owner of the BC Properties, together with all buildings, fixtures, systems, interests, licences, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, in fee simple, and this Court declares that it has been proved to the satisfaction of the Court on investigation that the title of HBBC Construction Company Ltd. in and to the BC Properties is a good, safe holding and marketable title and directs the BC Registrar to register indefeasible title in favour of HBBC Construction Company Ltd. as aforesaid.

15. **THIS COURT ORDERS**, having considered the interest of third parties, that the BC Registrar is hereby directed to discharge, release, delete and expunge from title to the BC Properties all of the Encumbrances relating to the BC Properties listed in Schedule "C" hereto.

NAME CHANGE

16. **THIS COURT ORDERS** that, notwithstanding the provisions of Section 171(3) of the *Business Corporations Act* (Ontario) (the "OBCA"), the Monitor be and is hereby authorized and directed to complete, execute and file articles of amendment for and on behalf of Comstock and any officer and director of Comstock (such articles of amendment to be deemed to have been signed by a director or an officer of Comstock and executed in accordance with the OBCA when so signed by the Monitor as directed by this Court) for the sole purpose of changing the corporate name of Comstock to a corporate name that does not include the words "Comstock" (and such amendment shall be deemed to have been duly authorized by Section 168 and 170 of the OBCA (as applicable) without any shareholder or director resolution approving such amendment being required) and this Court hereby directs the Director (as defined in the OBCA) to endorse thereon a certificate of amendment upon being in receipt from the Monitor of two duplicate originals of such articles of amendment together with the prescribed fees and any other required documents under the OBCA (which the Monitor be and is hereby also authorized and directed to complete, execute and file for and on behalf of Comstock and any officer and director of Comstock if and as required) except for any such documents as have been dispensed or otherwise dealt with pursuant to the deeming provisions contained herein.

ADDITIONAL PROVISIONS

17. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Assets shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Assets with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

18. **THIS COURT ORDERS AND DIRECTS** the Sellers to pay to the Buyer (and endorse as necessary) such amounts as are required pursuant to Section 6.17.1 of the Sale Agreement.

19. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

20. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Sellers are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Sellers' records pertaining to the Sellers' past and current employees, including personal information of those employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it.

21. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Sellers and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Sellers;

the vesting of the Assets in the Purchaser pursuant to this Order and the transactions contemplated by the Sale Agreement shall be binding on any trustee in bankruptcy that may be appointed in respect of the Sellers and shall not be void or voidable by creditors of the Sellers, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Companies' Creditors Arrangement Act* (Canada), the *Bankruptcy and Insolvency Act* (Canada), or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

22. **THIS COURT ORDERS AND DECLARES** that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Sellers and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Sellers as may be necessary or desirable to give effect to this Order or to assist the Sellers and their agents in carrying out the terms of this Order.

Schedule "A" Form of Monitor's Certificate**Court File No. CV-13-10181-00CL**

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF COMSTOCK CANADA LTD., CCL
EQUITIES INC., AND CCL REALTY INC.**

Applicants

MONITOR'S CERTIFICATE

RECITALS:

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated July 9, 2013, the restructuring proceedings of Comstock Canada Ltd., ("Comstock"), CCL Equities Inc., and CCL Realty Inc. ("CCL Realty") (collectively, the "Comstock Group") were continued under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended and PricewaterhouseCoopers Inc. was appointed as the Monitor (the "Monitor").

B. Pursuant to an Order of the Court dated November ___, 2013, the Court approved the Agreement of Purchase and Sale made as of November ___, 2013 (the "Sale Agreement") between Comstock and CCL Realty (the "Sellers") and HB Construction Company Ltd., an Alberta corporation (carrying on business in the Province of British Columbia under its assumed name, HBBC Construction Company Ltd.) (the "Purchaser") and provided for the vesting in the Purchaser of the Sellers' right, title and interest in and to the Assets, which vesting is to be effective with respect to the Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Assets; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Sellers and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Monitor and the Sellers.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE COMSTOCK GROUP CERTIFIES the following:

1. The Purchaser has paid and the Sellers have received the Purchase Price for the Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Sellers and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Monitor and the Sellers.
4. This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

**PRICEWATERHOUSECOOPERS
INC., in its capacity as the Monitor of
Comstock Canada Ltd. and CCL
Realty Inc., and not in its personal or
corporate capacity**

Per: _____
Name: _____
Title: _____

Schedule "B" Real Property**BC REAL PROPERTY**

	Municipal Address	Legal Description
1.	20 Wren Street, Kitimat, BC V8C 1L1	Parcel Identifier: 011-513-161 Lot 5 Block 15 District Lot 6039 Range 5 Coast District Plan 3392
2.	37 Teal Street, Kitimat, BC V8C 1K9	Parcel Identifier: 010-059-211 Lot 9 Block 17 District Lot 6039 Range 5 Coast District Plan 3338
3.	74 Currie Street, Kitimat, BC V8C 2K2	Parcel Identifier: 007-898-797 Lot 14 Block 171 District Lot 6162 Range 5 Coast District Plan 8186
4.	94 Skeena Street, Kitimat, BC V8C 1Y9	Parcel Identifier: 011-918-748 Lot 22 Block 223 District Lot 6033 Range 5 Coast District Plan 3606

MANITOBA REAL PROPERTY

	Municipal Address	Legal Description
1.	Bannister Road, Winnipeg, MN	SP Lot 9, Plan 24342 WLTO in E ½ of 14-11-2 EPM DASSF

Schedule "C-Claims to be deleted and expunged from title to Real Property**BC REAL PROPERTY**

Mortgage CA2866235 and Assignment of Rents CA2866236 both in favour of the Bank of Montreal and registered on November 14, 2012.

**Schedule "D" Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property**

(UNAFFECTED BY THE APPROVAL AND VESTING ORDER)

BC REAL PROPERTY

Parcel Identifier: 011-513-161 Lot 5 Block 15 District Lot 6039 Range 5 Coast District Plan
3392

Building Scheme 47284-I
Restrictive Covenant 13730D
Easement 13731D

Parcel Identifier: 010-059-211 Lot 9 Block 17 District Lot 6039 Range 5 Coast District Plan
3338

Building Scheme 47284-I
Restrictive Covenant 12543D
Easement 12544D

Parcel Identifier: 007-898-797 Lot 14 Block 171 District Lot 6162 Range 5 Coast District Plan
8186

Building Scheme 53013-I
Restrictive Covenant E1459
Easement E1460
Statutory Building Scheme E2456

Parcel Identifier: 011-918-748 Lot 22 Block 223 District Lot 6033 Range 5 Coast District Plan
3606

Building Scheme 52359I
Restrictive Covenant 14956D
Easement 14957D

Court File No. CV-13-10181-00CL

IN THE MATTER OF THE **COMPANIES' CREDITORS ARRANGEMENT ACT**, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COMSTOCK CANADA LTD., CCL EQUITIES INC., AND CCL REALTY INC.

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

APPROVAL AND VESTING ORDER

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors

1 First Canadian Place
100 King Street West, Suite 1600
TORONTO, Ontario, Canada
M5X 1G5

Alex MacFarlane (LSUC No.: 28133Q)
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Lawyers for the Applicants, Comstock Canada Ltd.,
CCL Realty Inc., and CCL Equities Inc.

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THIS IS EXHIBIT "J"

TO THE AFFIDAVIT OF STEWART BROWN

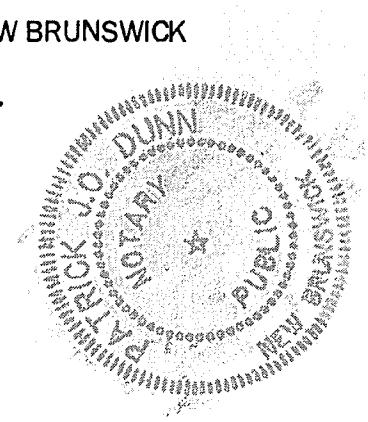
SWORN TO BEFORE ME AT PENOBSQUIS,

IN THE COUNTY OF KINGS AND PROVINCE OF NEW BRUNSWICK

THIS 5th DAY OF DECEMBER, 2013.

Patrick Brown

A Notary Public in and for the
Province of New Brunswick



SCHEDULE 6 - LITIGATION CLAIMS

1.	COMSTOCK CANADA LTD.	BROOKFIELD POWER CORPORATION/CORPORATION ENERGIE BROOKFIELD, GREAT LAKES POWER LIMITED, BRETON, BANVILLE & ASSOCIES. S.E.C.,	ONSC	06-CV-310517 PD2
2.	COMSTOCK CANADA LTD.	THE CORPORATION OF THE CITY OF LONDON and McKAY - COCKER GROUP LIMITED and McKAY-COCKER CONSTRUCTION LIMITED	ONSC	8922/12
	McKAY-COCKER GROUP LIMITED and McKAY-COCKER CONSTRUCTION LIMITED (by Counterclaim)	COMSTOCK CANADA LTD (by Counterclaim)		
3.	ELLISDON CORPORATION	WINNIPEG AIRPORTS AUTHORITY INC.,	MBARB.	
4.	COMSTOCK CANADA LTD.	ELLISDON CORPORATION	MBQB	C11101-74317
5.	COMSTOCK CANADA LTD.	POTASH CORPORATION OF SASKATCHEWAN INC., AND AMEC AMERICAS LIMITED.	NBQB	S/C/404/10

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF COMSTOCK CANADA LTD., CCL REALTY INC. AND CCL EQUITIES INC.

Court File No. CV-13-10181-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**MOTION RECORD
(RETURNABLE DECEMBER 9, 2013)
(RE SALE APPROVAL MOTION)**

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