

**IN THE MATTER OF: An arbitration pursuant to the Commercial  
Arbitration Act**

**BETWEEN:**

**MUNICIPALITY OF THE DISTRICT OF WEST HANTS  
(Initiating Party)**

**-and-**

**WINDSOR FIRE DEPARTMENT  
(Responding Party)**

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**AWARD**

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**BEFORE: Frank E. DeMont, QC, Chair**

**APPEARANCES:**

**Counsel for the Initiating Party: Peter Rogers, QC  
McInnes Cooper  
Barristers & Solicitors**

**Counsel for the Responding Party: John Shanks  
Stewart McKelvey  
Barristers & Solicitors**

**DATE OF AWARD June 26, 2017**

(Erratum – Minor amendment to correct numbering scheme)

## ***I. INTRODUCTION AND BACKGROUND:***

After providing fire services to parts of the Municipality of the District of West Hants (“West Hants”) for more than 60 years, Windsor Fire Department stopped doing so on October 23, 2015. This arbitration arises from the financial consequences of that stoppage.

Throughout those 60 years Windsor Fire Department (“Windsor Fire”), a not-for-profit society<sup>1</sup>, accumulated valuable firefighting equipment and a considerable surplus, largely paid for through contractual arrangements with West Hants. West Hants claims an interest in the accumulated surplus. Windsor Fire resists that claim saying they were paid under contract for the delivery of firefighting services, and due to their good management and the terms of the contracts, they were able to accumulate the surplus. They claim the surplus is theirs to keep.

The issue in this arbitration arises from the breakdown of the relationship between West Hants and Windsor Fire and the cessation of service delivery. The ultimate question is who owes how much money to whom?

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<sup>1</sup> Windsor Fire was incorporated as a society in July of 1994. Windsor Fire was founded in 1881.

There are some agreed facts, and there are others in dispute.

The evidence is clear that between the commencement of the service delivery until March 31, 2010, West Hants paid Windsor Fire an annual fee based on successive contracts for firefighting services.

The evidence is also clear that starting on April 1, 2010 and through until October 23, 2015, West Hants paid to Windsor Fire irregular amounts at uneven intervals, as both parties tried to work towards an agreement on terms. How much should be paid and what was being purchased – services and assets or just services?

The amounts paid are not in dispute. The issue is whether it was the right amount, too much, or too little.

Windsor Fire delivered fire services to two communities – the “Town Services” to the Town of Windsor, and the “Rural Services” to an area in the southwest part of the Municipality of the District of West Hants. Windsor Fire was the sole provider to the Town of Windsor; whereas West Hants was also served by five other fire departments.<sup>2</sup>

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<sup>2</sup> The other providers are Brooklyn, Summerville, Hantsport, Walton, and Mount Uniacke.

Until April 2010, the practice was that Windsor Fire calculated the costs of providing the rural services, including the costs of equipment, and then presented West Hants with a specified price contract. Windsor Fire then delivered the services in accordance with the terms of the contract. The parties' short-hand description for this timeframe is the "contractual period". I will use that phrase throughout this Award to reference that period.

After April 1, 2010 there were no new, formal, signed contracts. This is the beginning of the "disputed period". It ran from April 1, 2010 to October 23, 2015, the date services to West Hants were withdrawn by Windsor Fire. This disputed period includes five full fiscal years and a partial year, the "stub year" running from April 1, 2015 to October 23, 2015.

The relationship breakdown between Windsor Fire and West Hants began in about 2008 – 2009 and arose over the ownership of firefighting assets, including fire trucks, used by Windsor Fire to provide services to West Hants.

The dispute was that West Hants, having largely paid for the assets through their contract payments, believed they rightfully owned the assets, at least beneficially. Windsor Fire disputed that ownership and insisted that Windsor Fire held title to the assets both legally and beneficially.

Leading up to April 2010, the parties tried to negotiate new arrangements for payment for services including an agreement addressing the ownership issue. Those discussions continued off and on and in various forms, but by June 2014 they were unable to reach a new comprehensive agreement.

Their impasse resulted in a threatened withdrawal of services by Windsor Fire. With the best interests of the municipal citizens in mind, both parties entered into a mediation/arbitration agreement. That agreement led to an unsuccessful mediation in the spring or summer of 2015 and then to this arbitration.

West Hants, the Initiating Party, claim Windsor Fire held title to the assets *for the benefit of* West Hants. They assert that Windsor Fire holds the assets in a trust that includes the tangible assets and the financial surplus. West Hants argues that they bought the assets through the contract fees, and that the capital purchase money was funded on a straight-line basis year over year to smooth out “lumpy” capital expenses Windsor Fire would otherwise have. That approach avoided large irregular payments from West Hants, and allowed both parties to plan better.

That approach did not cause any difficulty until the asset ownership questions started to arise. West Hants’ theory is that Windsor Fire built up a capital reserve, belonging to West Hants, for the future purchase of equipment, and at the end

of the contract, the accumulated surplus was the balance of the capital reserve which entitled West Hants to a refund.

Windsor Fire disagrees with this theory. They claim the assets were accumulated as part of their obligations during the contractual period. The assets they accumulated were due to their contractual arrangements. Windsor Fire was contractually bound to provide services for certain fees, and as a part of that contract they were to provide the equipment necessary to deliver those services. They say the assets are theirs and theirs alone.

West Hants filed its Statement of Particulars in March 2016. They claim:

- A. an amount equal to the *value* of the financial and tangible assets of Windsor Fire, as at March 31, 2010, that West Hants had paid for. West Hants based this part of their claim on the theory of trusts; and
- B. an amount equal to the sum of the payments West Hants made between April 1, 2010 and October 23, 2015 *less* both the actual operating expenses to deliver the services and the capital expenditures made, less depreciation. This claim rests on their assertion that Windsor Fire was paid more than the fair costs of the services.

Windsor Fire's Response to the Statement of Particulars claims an amount of money equal to the underfunding of the services provided during the "disputed period".

During and after the hearing, the parties modified their claims. West Hants no longer seeks the value of the tangible assets. Windsor Fire no longer claims underfunding of the services during the disputed period.

Over four days of evidence, five witnesses were called; three by West Hants, namely: Cathie Osborne, West Hants Chief Administrative Officer; Shirley Pineo, a former West Hants municipal councillor, and West Hants expert witness, Lori Dolliver, CPA, CA. Windsor Fire called two witnesses: Windsor Fire Chief, Scott Burgess, and their expert witness, Aaron Wright, CPA, CA.

Ms. Dolliver and Mr. Wright, both Chartered Professional Accountants, were qualified and testified as experts to offer their opinions. Their evidence was largely to explain and elaborate on their respective reports, each setting out their opinion on the appropriate calculation methodology for assessing amounts due between the parties.

The other three witnesses explained the documentary evidence and offered their respective historic contexts to the dispute and the documents.

I was provided with more than 1,300 pages of correspondence, reports, minutes from various meetings, and financial statements and spreadsheets. Within those

documents were historic materials dating back to the formation of the relationship between the parties in the 1950s. Most of the materials related to more recent times, beginning with the discussion to explore options for a new fire station in the early 2000s and through to the present.

The evidence gives rise to three broad questions:

- (1) Did Windsor Fire hold the assets, and particularly the accumulated surplus, in trust for West Hants?
- (2) What is the time-frame under review and consideration?
- (3) Who owes what to whom and why?

## **II ISSUES:**

### ***Issue 1: Did Windsor Fire hold the assets and accumulated surplus in Trust for West Hants?***

West Hants' claim for the surplus is premised on the argument that they paid more than the firefighting services cost to deliver because they were smoothing out the costs of equipment. Paying for capital assets over time allowed West Hants to budget a consistent annual amount. It allowed Windsor Fire to plan for the orderly purchase of those same assets. The argument is that West Hants created what amounts to an "equipment reserve" for Windsor Fire to buy new equipment.

West Hants says the tangible assets accumulated during the relationship are beneficially owned by West Hants, but ultimately, they did not claim those assets or the value of those assets (except for 2016) at the hearing or in their post-hearing submissions. This was a refinement of their initial claim.<sup>3</sup>

**A. Overview of the respective positions -- Ownership:**

West Hants says that the contracts<sup>4</sup> were not an exhaustive or complete expression of the legal relations because they did not address what would happen to the assets on a wind-up of the service delivery. West Hants claims that for the time leading up to the end of the March 31, 2010 contract<sup>5</sup>, West Hants had been paying for operations and capital expenditures Windsor Fire incurred to deliver the Rural Services. West Hants believed that the capital expense part of the payments was made on the understanding that the assets bought *were legally owned by Windsor Fire but held in trust for West Hants*. Their belief was based on their knowledge that over the years, West Hants paid for most of the equipment Windsor Fire used to deliver the services to West Hants, a fact acknowledged by former Windsor Fire Chief Fred Fox<sup>6</sup> and largely undisputed at the hearing.

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<sup>3</sup> See Statement of Particulars at paragraph 12(a).

<sup>4</sup> Examples were provided for each of the years: 1954, 1963, 2007, 2008, 2009

<sup>5</sup> The three “modern” contracts put in evidence were for the years April 1, 2007 – March 31, 2008; April 1, 2008 – March 31, 2009; and April 1, 2009 – March 31, 2010. For ease of reference the contracts will be referenced by the year in which they expired, so the final contract running from April 1, 2009 – March 31, 2010 will be called the “2010 contract” and the others likewise throughout this award.

<sup>6</sup> Former Chief Fox acknowledged this in his 2007 Report which will be discussed in more detail below.

Having paid for these tangible assets they believed they beneficially owned, West Hants continued to pay into the surplus fund through the contract period to acquire additional and replacement assets going forward. The dispute arising as to ownership of the tangible assets caused West Hants to consider its ownership of the surplus.

West Hants' argument was that the assets belong to them beneficially and their value should be delivered to West Hants at the expiry of the service delivery. They argue this is the common understanding of Councillor Pineo, Warden Dauphinee, and former Chief Fox.

To succeed in demonstrating their ownership of the tangible assets and the accumulated surplus, West Hants has the legal burden and needs to demonstrate "on the balance of probabilities" that Windsor Fire held the assets in Trust. West Hants suggested that there is an implied term of contract that reflects Pineo, Dauphinee and Fox's understandings, however no evidence was called to substantiate that claim.

West Hants argued that I should find an Express Trust exists, or in the alternative either a Constructive or a Quistclose Trust<sup>7</sup> was created.

As will be seen below, I am not persuaded that any of the three types of Trusts exists.

West Hants initially claimed that upon finding a trust in its favour, I must award it the value of certain assets on the books of Windsor Fire. This position was later modified to claim only the accumulated surplus of funds held by Windsor Fire.

As a matter of accounting and arguably of contract, Windsor Fire kept the funds paid to them by West Hants in what was called the “Rural Account.” Subject to some adjustments and to some specific payments which I will turn to below, the argument West Hants made at the hearing limited their claim to the surplus funds in the Rural Account. This they claim as a capital reserve, held in Trust, and accumulated for future replacement and additions to the equipment.

Now that the relationship is over, Windsor Fire will not need to buy new equipment for the West Hants service. Therefore, the funds provided by West Hants for that specific purpose are not going to be used for that purpose, and as such, a Quistclose Trust exists. The purpose no longer able to be achieved, the funds must be returned.

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<sup>7</sup> In terms of the ancient law of Trusts, the Quistclose Trust is a relatively newer form of Resulting Trust dealt with in greater detail below.

Windsor Fire says that no trust was created, and makes its arguments why none of the types of trusts argued by West Hants could possibly have been created.

They say there was no Express Trust as there was no certainty of intention to create a trust; there was no Constructive Trust because there *was a juristic reason* for one party's enrichment and the other's deprivation.

Windsor Fire says no Resulting (Quistclose) Trust exists because there is no "purpose" for the payment which went unfulfilled nor were the trust "certainties" made explicit. Windsor Fire argues the Quistclose only applies where there is a restriction on the funds, and that it doesn't apply when the funds are not so restricted. They say the evidence is clear that Windsor Fire had full authority to use the contract payment for whatever they wanted, subject to the obligation to provide the contracted services.

Furthermore, Windsor Fire says no Quistclose Trust was established because this type of trust has not been adopted in Nova Scotia.

In their post-hearing brief <sup>8</sup>, West Hants argues I need not consider express, constructive or a 'conventional' resulting trusts, if I am convinced a Quistclose Trust exists. This argument recognizes a Quistclose Trust would imply any

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<sup>8</sup> See West Hants Post-Hearing brief at para. 21

surplus held by Windsor Fire is to be returned to West Hants. Relying on this argument, West Hants abandoned any claim for tangible assets.

I have considered each of the various trusts in the analysis below. Based on all the evidence and for the reasons that follow, I am not convinced a Trust exists, and consequently I conclude that at the end of the contractual period, on March 31, 2010, West Hants had no legal or beneficial interest in the Windsor Fire assets.

***B. Trust Analysis:***

But for the Quistclose Trust, each of the types of trusts argued by West Hants have long common law traditions and extensive consideration by courts and academics. There are clear requirements to be met before a Trust can be established.

***(i) Express Trust:***

An express trust is created when there is:

- an unequivocal intention to create a trust;
- a clear object of the trust;
- and a certain subject matter of the trust.

These are known as the “Three Certainties” – certainty of *Intention, Object, and Subject*.

Certainty of intention may be expressed in words or inferred by the words or deeds of the parties. There is no need for specific or technical words so long as the intention to create a trust can be found or inferred. Often there is clear language that will “express” the intention to create a trust, words like “...in trust for...” or “...held for the benefit of...”.<sup>9</sup>

The “object” is typically described as a person, persons, or purposes for which the trust is established, in this case the object would be West Hants.

The subject matter is the property or fund held in trust for the benefit of the object. In this case the subject would be the firefighting equipment and the accumulated surplus.

To create an express trust one party, described as the “settlor”, must transfer property to a Trustee to be held for the benefit of the object of the Trust, called the beneficiary (the beneficiary may be a settlor or a third party).

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<sup>9</sup> See West Hants Post-Hearing Brief, at para. 28

The difficulty this case presents to West Hants is to demonstrate evidence of the first certainty, that of the *Intention to Create* the trust. West Hants says the evidence is clear that an express trust was created.

West Hants relies in part on the evidence contained in the 2007 Report prepared by former Chief Fred Fox.

**(a) *The 2007 Fox Report:***

Shirley Pineo testified that everyone from West Hants believed that Windsor Fire held the assets for West Hants. She testified that former Windsor Fire Chief Fred Fox understood that West Hants paid for equipment and therefore must have ownership. Ms. Pineo relied on her recollections over her 22 years on Municipal Council and her participation on various Fire Services Committees.

According to Pineo's testimony, she, West Hants, and Chief Fox were of one mind. They all understood that Windsor Fire owned the assets but held them for West Hants. This, she claimed, is supported by the 2007 Report<sup>10</sup> Chief Fox wrote to Town of Windsor Chief Administrative Officer, Louis Couthinho. In that report, Fox advised Couthinho of his belief in the inherent unfairness to West Hants because West Hants had paid for the assets yet had no legal title.

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<sup>10</sup> Exhibit 2, Tab 10, P. 818 at p. 822

On the strength of Fox's comments suggesting that West Hants might remove "the apparatus and equipment from our station that they have paid for..." Ms. Pineo and West Hants understood that Fox had acknowledged the express trust which Ms. Pineo and her colleagues had long believed to exist. According to West Hants, Fox confirmed the beneficial ownership of West Hants in the Rural equipment.

While the language typically found in Trusts – language like "beneficial ownership", or "in trust for" – was not used, nevertheless, according to West Hants an express trust is exactly what was understood by Chief Fox and West Hants. West Hants claims this report is evidence of that clear expression of intent.

Windsor Fire says that the position taken by Fox in the 2007 Report is nothing more than his effort to persuade Couthinho to work with West Hants to build a new fire station in the Town of Windsor. They also argue that Fox's comment was premised on the precondition of dissolution of Windsor Fire into two services<sup>11</sup> – one for the Town and the other being hived off to West Hants. Because this dissolution did not happen, the condition precedent for the application of Fox's assertion was never met. To Windsor Fire, Fox's comment is not the clear declaration of a Trust as West Hants argues. Windsor Fire says the contracts

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<sup>11</sup> This argument is based on the constating documents of Windsor Fire that on wind-up, any surplus would be delivered to an organization with similar objects as Windsor Fire.

speak to the ownership, wherein they state that Windsor Fire is “the owner of certain firefighting equipment”.

Windsor Fire, through Chief Burgess, confirms their position that Chief Fox and the Windsor Fire Executive were at odds over the 2007 report. Burgess says the executive did not see or approve the report before it was sent to Coutinho and delivered (by Fox) to West Hants. Upon learning of its content, the Windsor Fire executive, Fox’s colleagues, disagreed with the assertion that West Hants *could* take the equipment if the service agreement ended.

West Hants says the question of ownership of the assets did not arise between the 1950s and 2008. West Hants says that is because for almost 60 years the parties simply did not contemplate what would happen to the accumulation of assets in the hands of Windsor Fire. This was *due to the common understanding between Chief Fox and West Hants* as described by former Councillor Pineo. She testified:

...if his [Fox’s] fire department had ever disbanded we would get back in proportion to what we had paid and that he always referred to them as “our trucks” ... anything we purchased or put money towards.

Ms. Pineo testified that ownership only became an issue in about 2008 or 2009 when two circumstances changed. First, Chief Fox became ill and Chief Burgess took over as interim chief, and second, the municipal accounting rules changed

requiring inclusion of all municipal assets on their respective financial statements. The result of these two changes was that West Hants wanted to include the fire equipment on their books and Chief Burgess refused to acknowledge their ownership. He told West Hants the assets belonged to Windsor Fire.

Windsor Fire says the argument about ownership did not surface during the first 50 years of services because ownership was dealt with in *each contract*, annually, with the line in the agreements that reads: “Whereas the Windsor Fire Department is the owner of certain fire fighting [sic] equipment...”

Windsor Fire asserts nothing could be more clear – ownership did not come up prior to 2008 because it was clearly spelled out in each contract. They say this line, in each contract, is clear evidence *against* the intent to create an express trust.

In late 2008 when Chief Burgess took over from Fox, West Hants learned that Burgess and the rest of the Windsor Fire executive and leadership did not have the same understanding as West Hants attributed to Fox. According to both Ms. Pineo and Chief Burgess, this is when the difficulty really began. On this one point, Pineo and Burgess do agree. The exchanges of documents, the presentations at meetings, and the parties’ clearly divergent views are recorded in the documentary evidence and were testified to by both Ms. Pineo and Chief Burgess.

The divergent views were expressed in clear terms at a meeting of the Joint Fire Advisory Committee<sup>12</sup> (“JFAC”) of February 24, 2009.<sup>13</sup> The meeting minutes note a discussion between Ms. Shirley Pineo, then a member of the West Hants Council and the JFAC, and Chief Scott Burgess, Windsor Fire Chief. The minutes reflect the opposing views on ownership:

Interim Chief Burgess notes that this situation is not the same as with the other fire departments they have; the WFD is a contracted service. Councillor Pineo advised that the auditor is expecting to see all assets (trucks) that West Hants owns and a summary of where the money they give to the WFD every year goes. *Interim Chief Burgess said that the trucks have been purchased from many different funds and that West Hants had no ownership of the trucks and they will be provided service based on what is being received as a contracted service.* When asked if Interim Chief Burgess was going against what Chief Fox reported, Interim Chief Burgess noted he was not sure what was being referred to.

(my emphasis)

According to West Hants, Chief Fox’s 2007 Report is a “clear acknowledgement”<sup>14</sup> by Windsor Fire, through its chief at the time, that West Hants had a beneficial interest in the assets, because they paid for them through the contract *and therefore they could remove them from the Windsor Fire station.*

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<sup>12</sup> The Joint Fire Advisory Committee was a committee comprised of members from West Hants, the Town of Windsor and the Windsor Fire leadership. It was established by early 2008.

<sup>13</sup> Exhibit 1, tab 4, p. 353

<sup>14</sup> West Hants post-hearing submission, para. 31

This ownership of the assets is important because it represents the basis for the accumulation of the surplus fund. West Hants paid Windsor Fire under the contract, which allowed Windsor Fire to build the surplus fund that was used to buy equipment. If West Hants owns the equipment purchased, how can it not own the funds used to pay for the equipment? In other words, if West Hants demonstrates ownership of the firefighting equipment, they must also own the underlying funds used to buy it.

Windsor Fire resists this interpretation. They say that Fox was only being a “diplomat”, trying to make peace between the disagreeing participants, Town of Windsor CAO Louis Couthinho and West Hants. They argue that West Hants’ reading would place “an artificial interpretation upon these words”.<sup>15</sup> Windsor Fire says Chief Fox’s words were conditional -- based on the premise “if the Windsor Fire was ever to be split into two separate organizations...”. Windsor Fire says when looked at in the proper context, Fox was contemplating a dissolution of Windsor Fire, and because that didn’t happen the language isn’t helpful to this arbitration.

The evidence demonstrates that Chief Fox, in his February 2008 annual report, recommends ownership of all equipment (including the Town of Windsor equipment) to be held by Windsor Fire *as Trustees for West Hants and the Town*

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<sup>15</sup> Windsor Fire post-hearing submission, para. 37

*of Windsor.*<sup>16</sup> This recommendation is pointless if Windsor Fire had already acknowledged it held the equipment as Trustee for West Hants. There can be no point to Fox's recommendation for change if it is not in fact a change. The only reasonable interpretation of this latter report is that it is an acknowledgement by Fox that Windsor Fire did *not* hold the assets in trust for West Hants.

After review of Fox's two reports, I accept the context of the 2007 report as urged by Windsor Fire. I accept that Fox's earlier report was meant to be a conditional statement, premised on the dissolution of the two services. I find that Fox was contemplating that if Windsor Fire were to dissolve, Windsor Fire's incorporating documents and its not-for-profit status would have required Windsor Fire to pay any surplus "to some other charitable organization in Canada, having objects similar to those of the Society." In the mind of Chief Fox in 2007, West Hants fire services best fit that requirement, especially given his knowledge of the source of the funds that allowed for Windsor Fire to accumulate those assets.

I am not persuaded that it is more likely than not that Chief Fox was confirming the existence of a long established express trust, nor was he engaging in the settling of a trust at that time. While no express language is required, a certainty of intention is. This 2007 report does at all not satisfy the certainty of intention requirement, without which there can be no express trust.

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<sup>16</sup> See Exhibit 2, Tab 10, page 1061

It is also instructive, and I find comfort in my conclusion above, that Chief Fox wrote the 2008 report before the dispute came clearly into focus in 2009 when Chief Burgess (who succeeded Chief Fox in October 2008) advised Councillor Pineo that West Hants did not own any of the apparatus, equipment or assets.

**(b) Trust arising from the Contract Language:**

West Hants argues the contract language specifying that “The Municipality shall pay to the Windsor Fire Department *Rural Account...*” confirms that the contract payments are an acknowledgement of an express trust. West Hants suggests these are words that I should interpret as implying a trust. West Hants says this is evidence of intention of West Hants to impose and Windsor Fire to accept an obligation to keep the West Hants funds segregated in the Rural Account, therefore separate from Windsor Fire’s general funds. To West Hants, this segregation of funds is clear indicia of a trust. The logic asserted is that there is no point to keep the West Hants payments separate from Windsor Fire general funds unless the segregation was important for some purpose. Arguably, the only logical purpose is to preserve the trust relationship.

Windsor Fire suggests that the West Hants assertion gives the language an inappropriate interpretation, and that this Rural Account is simply Windsor Fire’s operating account for the Rural Services Division, nothing more, nothing less.

Based on the contract language supporting West Hants's argument, a scant few words referencing payment into the Rural Account, I do not agree that this is the expression of an obligation or imperative to hold funds in trust. I am not persuaded it is the expression of an intention to create a Trust and that I can or should infer such. It is just as likely to be interpreted as a means whereby Windsor Fire ensured the funds they received were not used for Windsor Fire to serve the Town of Windsor or to keep it separate from their explicit "trust fund" as reported on their Financial Statements.<sup>17</sup>

I do not accept, on the balance of probabilities, that this is a 'clear expression of intent' to create a Trust, particularly in contrast to the express language of ownership also contained in the contract documents. Had a Trust been the agreed intention of the parties, I would have expected more than a rather cryptic reference, and I would not have expected language of the opposite intention in the recital. Furthermore, I would have expected to see language prohibiting other funds being put into that account.

Finally, the language seems to impose a duty on West Hants, not Windsor Fire. The language is unambiguous: "The Municipality [West Hants] shall pay to the Windsor Fire Department Rural Account the following..." There is no contract language that says Windsor Fire must keep the payments in the Rural Account,

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<sup>17</sup> See for example Exhibit 2, Tab 8, p. 506 or 519.

not add to it, or not transfer it for any purpose whatsoever. The burden of the clause is on West Hants, not Windsor Fire.

The evidence of segregation of funds is not persuasive of the establishment of a trust. I find West Hants' argument that segregation of the funds establishes a trust must fail.

***(c) Trust Arising from the "Not for Profit"  
status of Windsor Fire:***

According to West Hants, the trust argument is strengthened by the fact that Windsor Fire is a not-for-profit enterprise as demonstrated in their constating documents. Windsor Fire is not permitted to make a profit. Therefore, any surplus must belong to West Hants. West Hants argues the surplus could only arise if West Hants was overfunding the not-for-profit Windsor Fire, to build a capital reserve.

West Hants' position, therefore, is that any surplus maintained at the end of the relationship is no longer required to smooth out funding for equipment purchases and must be returned to Windsor Fire.

Windsor Fire says West Hants' argument fails to appreciate the clear language of Windsor Fire's Memorandum of Association in its full context, as contained in the non-profit language<sup>18</sup>:

Provided that nothing herein contained shall permit the Society to carry on any trade, industry or business and the Society shall be carried on *without purpose of gain to any of the members and that any surplus or any accretions of the Society shall be used solely for the purpose of the society and promotion of its objects.*

(my emphasis)

This language restricts gain to "any of the members" but clearly acknowledges that there may be a "surplus" or "accretions".<sup>19</sup>

Despite West Hants' heavy reliance on this not-for-profit argument, I am not persuaded it demonstrates the intention to create a Trust. Nor am I persuaded that in law, Windsor Fire is in violation of their Memorandum of Association as a not-for-profit because they have created a surplus or accretion. Clearly the Memorandum of Association permits some level of surplus or accretions.

The contracts between the parties in the evidence acknowledged Windsor Fire's ownership. The language in the recital is incontrovertible. West Hants was aware that title to assets was held by Windsor Fire, if not from the language of the contract, certainly because they knew they did not have title. That Windsor Fire

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<sup>18</sup> Exhibit 1, Tab 6, p. 421

<sup>19</sup> "Accretion" is defined as "the process of growing by organic enlargement; continued growth" OED (1971) p. 67

was permitted to own property should be no surprise to West Hants. They were aware that Windsor Fire bought the first Rural Services firetruck with a loan guaranteed by members of Windsor Fire Department. West Hants had been privy to the financial statements of Windsor Fire over the years.

By 2007 or 2008, the relationship had been largely unchanged over more than 50 years. To conclude that a Trust arose without any change in the relationship, words, or deeds, necessitates that it must have been in existence for those 50 years. That is a postulation not supported by the evidence.

I am not satisfied that by words or deeds the parties intended to create an Express Trust. The party's agreement specified Windsor Fire's ownership. The language purported to demonstrate segregation is not persuasive. Chief Fox's reports, even interpreted in the most favourable light possible for West Hants, fail to persuade. When weighed in the full context of the relationship between West Hants and Windsor Fire, the evidence strongly supports the conclusion that Windsor Fire received funds to provide a service and did so. Part of the fee paid by West Hants for that service was sufficient to allow Windsor Fire to accumulate assets.

West Hants' efforts to characterize the 50-year legal relationship as a Trustee/Beneficiary relationship is, but for the single ambiguous reference to the Rural Account, unsupported by any persuasive evidence in the later contracts

and not supported by anything at all in evidence of the early stages of the relationship. The early contracts do not reference the Rural Account.

The applicable law is not in dispute. There is no need for special language to create an express trust<sup>20</sup>, but there must be evidence from which it can be inferred that a trust was intended. The evidence in this case is insufficient to establish an Express Trust.

***(ii) Constructive Trust:***

In the event I did not find an Express Trust had been established, West Hants argued for a Constructive Trust. This is a trust imposed in circumstances arising from the parties' relations. It is found where there is a breach of an equitable obligation or arising from an unjust enrichment. In this case West Hants argues there is an unjust enrichment of Windsor Fire.

There are three elements of a Constructive Trust:

- an enrichment of one party;
- a resulting deprivation of another party; and
- no juristic reason for the enrichment and deprivation.

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<sup>20</sup> See *Hessian, Re*, [1996] NSJ 419 para 18, and as referenced in the West Hants post-hearing brief at para 26.

Enrichment and deprivation in the sense used in constructive trusts are virtually two sides of the same coin, as noted by Mr. Justice Cory in *Peter v. Beblow*.<sup>21</sup> For one party to have an enrichment, it is “almost invariable” that the other will have a deprivation.

A “juristic reason” is an “underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced.”<sup>22</sup>

In this case, I conclude there *was a juristic reason* for the enrichment and deprivation – namely contracts to deliver the fire services for a fee. Therefore, the test for Constructive Trust is not satisfied.

The contracts in evidence provide Windsor Fire was to deliver fire protection services as described in the contracts. West Hants was to pay for those services. Until March 31, 2010, each party did as they had contracted. As required in the various contracts, West Hants paid their fees. From those fees, Windsor Fire was required to cover the operating costs and to provide equipment.<sup>23</sup> Windsor Fire did both.

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<sup>21</sup> [1993] 1 S.C.R. 980 at p. 1012.

<sup>22</sup> See *Canada (Attorney General) v. Confederation Life Insurance Co.*, 1995 CanLII 7097 (ON SC) at p. 77; (1995), 24 O.R. (3d) 717, para 206. In that case, R.A. Blair, J. discusses the historical development of the meaning of “juristic reason”.

<sup>23</sup> See for example, Exhibit 1, Tab 1, pp. 1-5 and Articles 1 and 12

For Windsor Fire's "enrichment" the juristic reason was the series of contracts.

They called for the delivery of a service at a certain price. The service was delivered and the price paid. Windsor Fire's ability to accumulate a surplus was, in their view, a testament to their thrift or efficiency or both, in the delivery of the service. The fact is Windsor Fire did accumulate a surplus, and they did so operating within the contractual arrangements. That is clearly an "underlying justification, grounded in a legal base..." or a juristic reason.

Chief Burgess summarized the relationship as he believed it to be, when he wrote to Jerry Wood, CFO of West Hants, in June 2009<sup>24</sup> :

Also you are aware that any overages and differences in operations are allocated to be used for capital purchases when these purchases take place. This gives us incentive to be very economical in our operations as we do not lose the money if it is not spent as with other municipal departments who sometimes run off and spend these funds so as to keep their next years budget where it should be. We can use these surplus funds, if any, to compound on our capital reserves. As you have seen in the past this works and is proven for us at WFD.

Windsor Fire was careful and frugal with resources. The contractual arrangements didn't impact budgets, but allowed them to "compound [their]

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<sup>24</sup> Exhibit 1, Tab 2, p. 46

capital reserves.” This had been their approach for many years and had allowed them to accumulate reserves.

The evidence disclosed that leading up to 2008 or 2009, West Hants was under an unspoken misapprehension – they believed they owned, beneficially, the equipment that was purchased. Yet in spite of that belief, until the differences were made explicit by Chief Burgess, West Hants didn’t ask the question that arose or should have arisen, on review of the annual contracts. They apparently didn’t consider what the language in the contract meant. The language was there for all to read in the 1964 contract: “Windsor Fire Department are owners of certain fire fighting equipment...” The language is not ambiguous. It is a clear statement of ownership.

The above-mentioned line was in the 1964 contract, and it was in the 2008, 2009, and 2010 contracts. I can only conclude, based on the consistency of the contract language in this recital, including the typographical error -- “fire fighting” rather than “firefighting”, that the line was included in each of the contracts, in one form or another, from 1964 forward. It is counterintuitive to think otherwise.

West Hants argues that a contract is not inconsistent with a constructive trust. Referencing *Waters’ Law of Trusts in Canada* (4<sup>th</sup> Ed), West Hants says that the

contractual relationship doesn't preclude a trust.<sup>25</sup> While that is so, when the evidence is examined, I find that I am not in agreement with the proposition put forward by West Hants on this point. They state in their brief:

...WFD was under an obligation to use the Municipality's funds for a clear purpose: rural fire services. WFD had the discretion under the contract to use the funds to acquire capital assets, but it did not have the power to keep the unexpended funds once WFD ceased to provide the service.<sup>26</sup>

The above position of West Hants is not supported by the evidence, and in particular, there is not specific language on point in the contracts. The contracts did not speak to the process or legal rights on the termination of the contract, nor to Windsor Fire's powers relating to any unexpended funds. There is no language that speaks to what is to be done on the wind-up of the service delivery. There is no language that required anything to be done with the funds except the requirement that West Hants "pay [the funds] to the Windsor Fire Department Rural Account...". This language read in its usual and ordinary sense imposes an obligation on West Hants, not Windsor Fire. Without evidence of any obligations on Windsor Fire restricting their use of the contract fees, I cannot conclude there was a Constructive Trust between West Hants and Windsor Fire.

***(iii) Quistclose Trust:***

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<sup>25</sup> West Hants post-hearing brief at para. 23.

<sup>26</sup> Ibid paragraph 24.

West Hants argues in the alternative, a “Quistclose” trust came into existence as a result of (a) the advancement of funds for a specific purpose; and (b) the specific purpose for the funds was not or could not be carried out.

The origins of the Quistclose Trust are from two seminal cases, *Barclay v. Quistclose Investments Ltd.*<sup>27</sup>, and *Twinsectra Ltd v. Yardley and others*<sup>28</sup>.

The “Quistclose” trust arises in circumstances where there is an advancement of funds from Party A to Party B for Party B to use for a specified purpose. If that purpose is not carried out or cannot be carried out, Party A is entitled to receive its money back because its initial transfer is conditional upon its use for the specified purpose.

Quistclose as lender provided funds to a borrower, Rolls Razor, *for a specific purpose* – paying Rolls Razor’s previously declared dividend. The funds were placed in Rolls Razor’s bank account at Barclay’s Bank. Barclay’s knew of the restricted purpose of the borrowed funds. When Rolls Razor financially failed prior to the payment of the dividend, Barclay’s seized the funds in the bank account to use them to pay Rolls’ debts to Barclay’s. Quistclose sued Barclay’s, and the House of Lords held that Barclay’s retained the funds as a trustee for Quistclose. The House of Lords decided the funds were not part of Rolls’ assets,

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<sup>27</sup> [1970] A.C. 567

<sup>28</sup> [2002] 2 A.C. 164

because they were provided by Quistclose for a specific purpose that was not and could not be completed. The “Quistclose Trust” was established – funds provided for a specific purpose that can’t be fulfilled revert to the owner pursuant to a Quistclose trust.

Twinsectra, decided in 2002, expanded on the doctrine recognized in Quistclose. In Twinsectra, funds were lent by Twinsectra to Yardley. Through a roundabout course, the funds landed in Yardley’s second solicitor’s account, via the first solicitor who had been provided the funds for a specific purpose, which was to purchase property. Accounting for certain undertakings of the first solicitor, the court found the funds remained the property of Twinsectra until used to purchase the property.

West Hants noted in their brief (at para 48), quoting from *Oosterhoff on Trusts*, 8<sup>th</sup> ed. at p 554, that the expanded Quistclose Trust “can apply to gifts, loans and other payments made on condition that the money be used only for a specific purpose.” Twinsectra was an expansion on the Quistclose trust, also extending Quistclose to broader or less well defined “purposes”. Twinsectra applied the Quistclose purpose to the purchase of property – not a specific property.

West Hants says there was a condition on the purpose under which the money was given to Windsor Fire, namely to provide fire services and to properly equip

Windsor Fire. If not used for the purpose, the Quistclose Trust would require Windsor Fire to return the money not used for that stated purpose.

Windsor Fire refer in their brief to the 2013 Ontario Court of Appeal case *Ontario (Training, Colleges and Universities) v. Two Feathers Forest Products LP*, 2013 ONCA 598<sup>29</sup>. In *Two Feathers* the Court of Appeal declined to find a Quistclose Trust because the funding agreement in that case “specifically identifies the nature of the relationship between the parties” as one of debtor/creditor, not of a trust. The Court applied the “cardinal rule” of interpreting commercial contracts – that the parties have “intended what they said”.<sup>30</sup>

Secondly, and more pertinent to this case, the Court concluded that Two Feathers had significant discretion in the use of the “largest part of those monies.” Having found that discretion, based on the language of the agreement, the Court of Appeal decided that the “monies were essentially ‘at the free disposal’ of Two Feathers”.

The summary of the reasons of Feldman, JA for the Ontario Court of Appeal are instructive and applicable in this case. Feldman, JA notes that the purpose of the funds was specified, there was no evidence of intention to create a trust

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<sup>29</sup> At para 120

<sup>30</sup> See *Two Feathers* at paras 27 and 32.

relationship, and Two Feathers had “significant discretion” in its use of the funds. Feldman, JA writes at paragraph 39:

[39] ...Although the funds provided were intended to be used only for the purpose described in the funding agreement, there is no basis to infer a mutual intention that the funds were to be held on trust for the Ministry. To the contrary, under the budget attached to the funding agreement, the recipient, Two Feathers, had significant discretion to spend the majority of the funds as long as it was for the general purpose stated...

As was clear from the evidence in this case, during the contractual period Windsor Fire was free to use the funds paid to them by West Hants in any manner they wanted, but were bound to deliver contracted the services. West Hants acknowledged that the funds were provided to smooth out “lumpy” capital expenses Windsor Fire might have, but Windsor Fire was at liberty to buy and sell the equipment as it saw fit. While Chief Fox did keep West Hants apprised of the funding decisions Windsor Fire made, West Hants concedes that Windsor Fire may not have had the *legal obligation* to do so (see West Hants Brief, para 10).

At paragraph 24 of their brief, West Hants states: “WFD had the discretion under the contract to use the funds to acquire capital assets, but *it did not have the power to keep the unexpended funds once WFD ceased to provide the service.*” This statement is not correct.

A review of the contracts provides no guidance on what the annual payment is to be used for. The only restriction is that West Hants had to pay it into the Rural Account. Windsor Fire did have contractual obligations with West Hants, namely that in exchange for certain payments by West Hants, Windsor Fire would provide fire services. Once West Hants made the payment to Windsor Fire, the funds were no longer the Municipality's funds but rather Windsor Fire's.

As Windsor Fire had no restriction on spending the funds, the first element of the Quistclose Trust is missing, namely a restriction on the "free disposal" of the funds. (see *Two Feathers* at para 17).

There is no doubt the Quistclose Trust has a requirement for the three certainties: intention to create, subject matter and object.<sup>31</sup> As examined above under consideration of the Express Trust, no intention to create a trust has been established. Finding no intention under an Express Trust leads me to find no intention under a Quistclose Trust.

Windsor Fire argued the Quistclose Trust has not been adopted in Nova Scotia. I do not need to address this issue because two important elements of a Quistclose Trust are missing; namely, the restriction on the use of the funds, and the intention to create a trust.

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<sup>31</sup> See *Westar Mining Ltd. (Re)*, [2003] BCCA 11 at paragraph 12 (Tab 9 West Hants Book of Authorities)

**C. Conclusion Issue 1:**

Having arrived at the conclusion there was no trust relationship between the parties specifically respecting the Express Trust (no certainty of intention), the Constructive Trust (there was a juridical reason for the enrichment) and the Quistclose Trust (no restriction on the free disposal of the funds and no intention to create), I find that at the end of the contractual period, West Hants had no legal or beneficial ownership in the assets of Windsor Fire.

***Issue 2: What is the time-frame for review and consideration?***

The intention of the parties with respect to the Arbitration Agreement was to include the period up until the termination of services. This interpretation is not controversial.

Windsor Fire says that up to the end of March 2010 there were contractual arrangements which govern the relationship between the parties. Therefore, the time-frame for my consideration of the financial consequences of the relationship ending should start when the contractual period ended. According to Windsor Fire I should consider only from April 1, 2010 to October 23, 2015.

Windsor Fire argues that the contracts were honoured, completed, and then fell into history. It is only at the end of the contractual period and going forward that is subject to the Arbitration Agreement.

Where West Hants' views are divergent from those of Windsor Fire is over the contractual period. West Hants says the appropriate time-frame for review is from the outset of the services to the end, January 1954 to October 23, 2015.

West Hants says the contracts were subject to a trust relationship. As I have found no trust exists, I infer their alternative argument to be that because they were paying for equipment to which they held no ownership and which resulted in a significant accumulation of assets in Windsor Fire, they overpaid for services all along. Thus, if I am to review how much was paid or overpaid, I should also consider the period governed by the written contracts.

These arguments were the parties' positions in respect of Windsor Fire's preliminary motion on jurisdiction. Windsor Fire argued in the preliminary motion that I was without jurisdiction to consider the historical contractual period. They relied on the Interim Fire Services and Mediation/Arbitration Agreement.<sup>32</sup> The Agreement states that Windsor Fire and West Hants "...will attempt to mediate the issue of payment of past fees for services..." This,

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<sup>32</sup> Exhibit 1, Tab 1, p. 12, dated June 26, 2014

according to Windsor Fire, is the past fees from no earlier than April 1, 2010 and forward (and which include by inference, fees up to the termination of services). Their argument was that the period before April 1, 2010 was governed by contract.

Windsor Fire was unsuccessful on that motion because at that time<sup>33</sup> I had insufficient factual background to determine the intentions of the parties.

At the merits hearing, Windsor Fire renewed this argument. They again urged me to set the time-frame around the dispute to the post-contractual period, the so-called “disputed period”. They said there is no need to consider the 50 years of history because with *all the evidence now before me* it is clear the contracts were properly performed by Windsor Fire and now concluded.

In light of all the evidence presented, I conclude, for the reasons that follow, that the agreement to arbitrate, and more importantly the contract between the parties to continue with the services after March 31, 2010, provides me with the factual matrix to accept Windsor Fire’s argument that the proper time-frame for commencement of the financial consideration between the parties is April 1, 2010 onward.

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<sup>33</sup> The preliminary award was published November 2, 2016

A chronological review of the agreements sets the factual background and provides the evidence for factual findings required to address this issue.

**A. 1954 – 1965:**

It is clear that from a period in 1954 through to sometime in the mid-1960's there was a contractual relationship between the parties. The essence of these contracts are found at Exhibit 4, Tab 36, pages 1315 and 1316, attached to the Walter Stephens report ("Stephens Report"). Those two contracts (although replicas only) provide for Windsor Fire to deliver fire protection to areas of West Hants as detailed in the contracts.

The first contract was for the period between January 1954 to December 1958, and was renewable for another five years, running until December 1963. The second contract ran for one year beginning January 1964 and was renewable for one year.

The 1954 agreement specifies that Windsor Fire "has purchased certain fire equipment known as a "triple combination fire engine."<sup>34</sup> It further specifies that if the contract is not renewed the equipment *may be purchased by West Hants,*

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<sup>34</sup> See Exhibit 4, Tab 36, p. 1313

and there is a mechanism for valuation. We also know that some of the membership of Windsor Fire took out a loan to pay for that equipment, and this was to be reimbursed by Windsor Fire from the West Hants payments.

The second contract, signed in 1964, states: “Whereas the Trustees by resolution of the Windsor Fire Department *are owners of certain firefighting equipment hereinafter set forth...*” It is important to note that the reference to “Trustees” is to the Trustees of Windsor Fire, not *as Trustees for* West Hants.

There is a gap in the evidence in the form of written contracts for the period from the end of the second contract (December 31, 1964, but subject to a “further term of one year”) to 2007. The result is that it is unclear how many renewals of the 1964 contract occurred or when it was replaced with a new document.

**B. 1966 – 2002:**

We have no evidence as to the terms of any contract(s) that may have governed the party’s relations in this interregnum. Based on the uncontradicted evidence of Chief Burgess, there was always a contract in place up until 2010. Based on the language of the contracts we do have in evidence, I have no difficulty whatsoever in accepting this testimony.

**C. 2002 – 2007:**

We know based on the 2007 Fox Report<sup>35</sup> that the parties were at that time “...in year five of a five-year contract...”. Although no copy of the five-year contract has been put in evidence, it is a safe conclusion based on Chief Fox’s 2007 report that such a contract did exist. Notwithstanding the lack of information about its terms, it is safe to infer the terms were similar to those in the contracts in evidence – both before and after this time-frame.

**D. 2007 – 2010:**

As Chief Fox was writing his 2007 report, the parties were on the verge of signing a deal commencing at the start of fiscal 2007. In evidence is a contract commencing April 1, 2007 and running until the end of the fiscal year, March 31, 2008. We know the parties signed two more successive one year contracts for fiscal 2008 – 09 and fiscal 2009-10. These three contracts are found at Tab 1, Exhibit 1, pages 1 through 11.<sup>36</sup>

It is evident that the same template was used for each contract as the same typographical error appears in all three -- “hereinafter” is mistakenly printed as

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<sup>35</sup> Supra, see page 823.

<sup>36</sup> Nothing turns on the evidence as presented of unsigned, partially unsigned or undated examples of the contracts. There was agreement by the parties that the samples provided were an accurate reflection of the contractual arrangements for those periods.

two words. There is good reason to conclude there were few substantial changes in the agreements between the 1954 contract (page 1313), the 1964 contract (page 1315) and the 2008 through 2010 contracts. As Mr. Shanks aptly puts it in Windsor Fire's post-hearing submissions "a significant portion of the 2007, 2008 and 2009 fire services contracts remain strikingly similar to the original contracts dating from 1954 and 1964...".<sup>37</sup> I agree, the language is notably similar.

None of the contracts in evidence make any reference to a beneficial or legal ownership of West Hants, nor have they led me to conclude that a Trust exists. To the contrary, the recital clause in each of the three modern contracts specifically states that "Windsor Fire Department is the owner of certain fire fighting equipment hereinafter set forth". As noted above, the 1964 contract uses unmistakably similar language.<sup>38</sup>

The language of ownership in the contracts is unambiguous, if incomplete. Each of the contracts note that the assets listed belong to Windsor Fire. There is no distinction between beneficial or legal title to the equipment.

On the balance of probabilities, I am satisfied that Windsor Fire was the owner of the assets throughout the contractual period. I am satisfied that the

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<sup>37</sup> Windsor Fire post hearing submissions at paragraph 17.

<sup>38</sup> See Exhibit 4, Tab 36, page 1315.

contractual arrangements were as the parties negotiated them, each seeking a benefit from their part in the contract. I find that the contracts, up to March 31, 2010 were an expression of the agreements between West Hants and Windsor Fire – a fee for service arrangement. I am satisfied that the respective parties met their legal burdens under the contracts. Consequently, I accept Windsor Fire’s argument that the starting point for the financial considerations must begin after the contractual period ends.

A new legal framework began once the contractual period ended. This is the “disputed period”, characterized by an increased intensity in the disagreements between the parties and a lack of certainty respecting ownership of the assets and what fees to be paid for services. To be clear, this is not an era without a legal relationship, but rather one without a complete written contractual arrangement.

As will be seen below, the contract in the disputed period can be summarized as:

- Windsor Fire will provide the traditional services;
- West Hants and Windsor Fire would agree on a price (dependent on ownership of assets); and
- Failing an agreement, they would mediate or arbitrate the “fair” price for the services provided.

The Mediation/Arbitration Agreement (along with a multitude of correspondence) informs the terms of the post-contractual relationship. In particular, the Mediation/Arbitration Agreement recognizes the without prejudice nature of the payments and the uses for those payments – operating and capital expenses.

***E. Conclusion Issue 2:***

I conclude, based on the terms of the contracts and the Mediation and Arbitration Agreement that the proper time-frame for consideration of “past fees” is the period from April 1, 2010 to October 23, 2015. To delve into the contractual period, as pointed out by Windsor Fire, would be to probe the already performed contracts, which is not provided for in those contracts, nor is it a jurisdiction I find was given to me by the Mediation/Arbitration Agreement of June 2014.

***Issue 3: Who owes what to whom, and why?***

I have concluded that no trust relations exist between the parties and the period for my financial review is limited by contract and the Arbitration Agreement. I conclude that starting in April of 2010 there was a new contractual arrangement between Windsor Fire and West Hants, characterized as set out above. The remaining consideration centers on the two distinct phases of the disputed period, namely the period from April 1, 2010 to March 31, 2015, a period where

there are annual financial statements, and the period from April 1, 2015 to October 23, 2015, the stub year.

The analysis of each phase is distinct and therefore considered separately.

***A. Overview and Contractual Arrangements:***

Throughout the disputed period West Hants made payments for services as follows:

| <b>Year</b>  | <b>Station 1</b> | <b>Station 2<sup>39</sup></b> | <b>Total<sup>40</sup></b> |
|--------------|------------------|-------------------------------|---------------------------|
| 2011         | 433,100          | 80,000                        | \$513,100                 |
| 2012         | 473,100          | 85,000                        | \$558,100                 |
| 2013         | 473,100          | 85,000                        | \$558,100                 |
| 2014         | 496,650          | 85,000                        | \$581,650                 |
| 2015         | 433,000          | 80,000                        | \$513,000                 |
| 2016         | 246,905          | 44,925                        | \$287,866                 |
| <b>Total</b> | <b>2,555,855</b> | <b>459,925</b>                | <b>\$3,011,816</b>        |

In these years, the parties agreed Windsor Fire would provide services but they were unable to agree on an amount to be paid for the services. The amount above is what was paid by West Hants subject to an agreement on the appropriate fees

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<sup>39</sup> Station 2 is a substation of Windsor Fire owned by the Southwest Hants Fire Society and until October 23, 2015, operated by Windsor Fire under the contract.

<sup>40</sup> Amounts have been taken from Windsor Fire Financial Statements and Wright Report at Chart 12.

– an agreement that was never reached. That appropriate fee is what I am to determine.

To come to a determination of what is owed, Windsor Fire argues that “Even during the dispute period, where no signed contract exists, the terms of the payment for the service and the terms by which the service would be provided *still existed between the parties.*”<sup>41</sup>

I am left to determine the terms of contract based on the best evidence provided.

***(i) Contract terms in disputed period:***

The starting place to determine the amounts due for services provided is a consideration of the contract between the parties within the disputed period. This will settle what was to be delivered and therefore what the terms of payment should be.

After April 1, 2010, the services Windsor Fire provided did not change. Windsor Fire was still responsible for the same geographic area and the same services (suppression, education, purchasing etc.), and they were still required to provide the equipment for service delivery.

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<sup>41</sup> See Windsor Fire Brief (J. Shanks) paragraph 132.

What was in issue was the amount due for the services.

The essence of the disputed period legal relations was that Windsor Fire would continue to provide the services as they always had and the parties would negotiate and agree on a fair price for those services. The Exhibit books are replete with evidence of the discussions back and forth as to what was to be paid<sup>42</sup>, when it was to be paid, and what happened when West Hants refused to pay unless provided with receipts.

What is clear from the evidence is that Windsor Fire was to provide the “service traditionally provided...”<sup>43</sup> What the evidence does not demonstrate is the second part of Windsor Fire’s assertion, “and the payment offered by West Hants constituted an agreement...” (West Hants Brief para. 106). The agreed terms were that *until otherwise resolved*, West Hants would pay specified amounts. Those amounts were “without prejudice” to an agreement or determination of the appropriate amounts due for the delivery of fire services, which would by necessity include some capital expenditures.

Both parties made claims in their pleadings as to the amounts due – West Hants claimed overpayment, and Windsor Fire claimed an underpayment.<sup>44</sup>

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<sup>42</sup> See Exhibit 1, Tabs 2, 3 and 4

<sup>43</sup> Suzan Frazer letter Exhibit 1, Tab 2, p. 57 and see also West Hants Brief para. 106.

<sup>44</sup> West Hants Statement of Particulars at 12(b); Windsor Fire Response to Statement of Particulars at 22(c)

Windsor Fire refused West Hants' request to provide details of receipts to prove the costs. West Hants wanted this information as a gauge for how much *should be paid* on a cost based service. The reasons proffered were that the arrangements were "fee for services" not a cost recovery basis, and that the request was not consistent with the past contractual arrangements.

Windsor Fire had been asked or required to provide capital budgets prior to this request. Windsor Fire resisted doing so because they believed West Hants might start to quibble about the capital requirements. Windsor Fire had the view that they understood what means and what equipment was required to deliver the services, and contractually, it was in their sole discretion. Unable to agree on the price, the parties ultimately agreed to mediate, and failing mediation, they agreed to arbitrate.

As noted above, West Hants payments from 2010 forward were made "without prejudice", a phrase they took to preserve their right to revisit the past 50 or more years to determine what should have been paid (based on a determination of Windsor Fire's ownership of equipment). This caveat amounts to nothing more than a reservation of rights held by West Hants *at that time or to accrue in the future*, rights to argue about what amount was due in relation to the payments they were then making "without prejudice". Without Prejudice cannot revive non-existent or expired rights.

During the disputed period, West Hants was generally paying based on an amount they had paid, pursuant to past contracts. An amount which they had agreed to in the past contracts, ostensibly under the belief they were contributing to their own capital base. Once their asset ownership was in question, they disputed the contract amount to be paid. By 2010 it was abundantly clear that capital assets ownership was the main issue between the parties. Therefore, West Hants paid the prior amount, without prejudice, based on the understanding that the price would be sorted out with Windsor Fire. They would pay and later agree on what was owed by whom concerning the services and the necessary capital outlays in light of the resolution of the asset ownership question. If West Hants didn't own the assets purchased, they believed they should contribute less to the cost of the services. They believed they shouldn't continue to build an asset base for Windsor Fire, if it was not for West Hants' benefit.

The without prejudice language was preserving that argument for West Hants.

In the disputed period the parties arrived at a level of services and a valuation mechanism for those services. The parties concluded that mechanism was to be negotiation, followed by mediation and then arbitration if necessary. The services to be provided would not be changed.

This arbitration is about the amounts due and is the result of that valuation mechanism.<sup>45</sup>

To answer the question without a granular review of the receipts (as requested of Windsor Fire by West Hants in 2010), I must consider what should be included and excluded in assessing appropriate fees for services during the disputed period.

At the merits hearing and in their arguments and briefs, the parties focussed on the significant items for my consideration, namely: the Chief's salary; the professional costs arising from this dispute; an unexpended \$250,000 Capital Grant from the Province of Nova Scotia; capital expenditures in the disputed period; and the "stub year" expenses.<sup>46</sup>

### ***(ii) Expert Evidence***

The appropriate costs for services were argued by the parties' respective experts.

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<sup>45</sup> See for further detail refer to letters at Exhibit 1, Tab 2 as follows: Suzan Frazer letter, p. 57; Cheryl Chislett letter, p. 75; Cheryl Chislett letter, p. 90; John Shanks letter, p. 98 at p. 99; Scott Burgess letter, p. 114 at page 115; Scott Burgess letter, p. 117; Jerry Wood letter, p. 119; and Interim Fire Services and Mediation/Arbitration Agreement, Exhibit 1, Tab 1, p. 12 (particularly Articles 3, 4 & 5).

<sup>46</sup> The Stub year capital expenses are included in the dispute period consideration of CapEx.

For Windsor Fire, Mr. Wright compared West Hants service costs to other Municipalities and to West Hants' other service providers<sup>47</sup>. His conclusion was that West Hants was well served for the costs as paid, based on his chosen metrics. He concludes that Windsor Fire provided the services in the lower cost range for such services.

I am not persuaded that these comparisons are fair to West Hants as they fail to consider the advantages and disadvantages Windsor Fire has or may have over other service providers. For example, West Hants has paid for an accumulation of capital assets belonging to Windsor Fire and further benefits from the relationship Windsor Fire has with the Town of Windsor. Certainly West Hants must be given consideration for the equipment contribution.

Additionally, Mr. Wright acknowledged the lack of absolute objectivity in his methods. While comparators provide an important means to evaluate costs, they are not absolute. As pointed out by Mr. Wright, each comparator will have “unique challenges...”<sup>48</sup>.

Without comparing ‘apples to apples’, which in the circumstances is impossible, I am not persuaded that a comparison between Windsor Fire and other service

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<sup>47</sup> The other services are Brooklyn, Summerville, Hantsport, Walton, and Mount Uniacke (see Charts 8, 9, and 10 of Exhibit 4, Tab 37.

<sup>48</sup> Collins Barrow (Wright) Report dated November 22<sup>nd</sup> 2016, at p. 7

providers to West Hants provides a complete answer to the costing problem. For example, an assessment based on cost per dwelling unit will depend on the complexity of delivering fire services to those dwelling units. Factors such as distance between units, locations of the units, area in which the dwellings are situate, even factors such as the quality of roads will impact the costs. These are just examples of the unique challenges comparators can't fully answer. Cost as a percentage of gross revenue or assessed value (or a combination of several metrics) likewise don't fully address the problems. Some municipalities have higher assessed values or bigger taxation bases. Absent financial statements including actual expenses these proxies might be suitable. In this circumstance, they only serve useful as a guide.

As with Windsor Fire's analysis, West Hants' approach has weaknesses. It too doesn't provide an entirely acceptable or appropriate solution. West Hants has provided their argument regarding the value for services based on several metrics including: a cash flow analysis; a comparison of West Hants funding to Windsor Fire operating expenses; and a comparison of Rural Services costs to Town Services costs. The latter two comparisons are similar to Mr. Wright's approach.

West Hants' cash flow analysis is generally premised on the not-for-profit status of Windsor Fire. The argument is that any accumulation of surplus represents overpayment for services delivered. Thus, the accumulated cash flow represents the level of excess funding by West Hants.

Ms. Dolliver advised that “Cash flow is a cumulative number starting with the opening cash of the prior year...” The process Ms. Dolliver employed was to adjust the cash flow by adding in and deducting out various adjustments. Over time, West Hants argues, the approach demonstrates that West Hants paid too much.

The amount paid in excess of the *true value of the services* is equal to the adjusted accumulated surplus at the termination of services. As the service delivery did not end at a year end, Ms. Dolliver acknowledges the need to adjust for the stub year.

Ms. Dolliver also used a comparison approach. She considered the increase in the Rural cost against the Town of Windsor costs, as well as the increase to costs of Windsor Fire compared to increase in charges to West Hants. Her comparison approach is similar to Wright’s comparisons to other municipalities.

In this case, we have the actual costs of the services taken from the Windsor Fire financial statements. These are actual amounts paid to deliver the Rural Service. All that is required to come to a “fair cost” is to make the determinations as to what is reasonably included, what is appropriately “in” and “out” of the costs as reported. This exercise is an assessment of the appropriateness of including the Chief’s salary, the professional fees, and some of the other expenses and capital expenditures.

As will be explained below, I have concluded that the Chief's salary is a reasonable cost for the delivery of services, but the professional fees are not. As for the capital expenditures ("CapEx"), there was no quarrel respecting the years between 2010 and 2015. It is only in 2015 and 2016 that the CapEx was widely divergent from the traditional amounts spent.<sup>49</sup> I have treated the CapEx as included in West Hants costs for the years up to 2015, and only partly "in" for 2016 based on the amortization and depreciation of capital costs and equipment over several years.<sup>50</sup>

***B. April 1, 2010 – March 31, 2015:***

***(i) Expenses:***

***(a) Chief's Salary:***

The Chief's salary began in the early 2000's during Fred Fox's tenure as Chief. In 2001, West Hants was offered an opportunity to contribute to the salary. They declined and clearly stated that they opposed their funds being used to pay the Chief. West Hants' rationale was two-fold:

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<sup>49</sup> See for example 2009 CapEx is \$61,594 (Exhibit 2, Tab 8. P. 467) while in 2015 it is \$158,300.00 and \$139,700 for 2016.

<sup>50</sup> West Hants abandoned its claim for consideration of 2015 CapEx. See West Hants brief at paragraph 20

- They believed that they should not be paying one chief in Windsor Fire and not the others in their companion fire departments (Brooklyn, Summerville, etc); and
- They believed they had no control over the Chief, no ability to provide directions, as that power rested with the Town of Windsor.<sup>51</sup>

The reasons adopted were an expression of West Hants' values, and their position remained unchanged through to the termination of services in 2015. Nevertheless, monies paid by West Hants did pay a portion of the Chief's salary from 2001 up to March 31, 2010.

Due to the grouping of costs in the financial statements, the expense attributed to West Hants by Windsor Fire for the Chief's salary is an estimate based on a 50% split between West Hants and the Town of Windsor.

The amounts below have been extracted by Ms. Dolliver from the Wages and Salaries Expense in Windsor Fire's financial statements.

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<sup>51</sup> See Minutes of Municipality of West Hants February 24, 2014 – Exhibit 1, Tab 3, p. 226.

| <b>Year</b> | <b>Chief's Salary 50%<sup>52</sup></b> | <b>Wages &amp; Salaries</b> |
|-------------|--|-----------------------------|
| 2011        | \$39,200                               | \$57,276                    |
| 2012        | \$37,200                               | \$62,138                    |
| 2013        | \$37,700                               | \$62,127                    |
| 2014        | \$38,500                               | \$62,948                    |
| 2015        | \$38,500                               | \$64,491                    |
| 2016        | \$40,600 <sup>53</sup>                 | \$65,508                    |

The rounded total that the Rural Account paid toward the Chief's salary in the disputed period excluding the stub year is \$191,000.

Windsor Fire's position was succinctly described by Chief Burgess. He testified that the number of volunteers in Windsor Fire is greater than the total number of employees of the Town of Windsor. That is a persuasive argument for the need for a professional chief.

I conclude that West Hants should pay a share of the Chief's salary as part of the costs of services for the disputed years because it is clearly part of Windsor Fire's method of carrying out its contractual obligations. The Chief's salary is no different than the requirements for sufficient fire suppression materials, adequate fuel for their trucks, rent, and telephone. This was the model that

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<sup>52</sup> The Chief's salary is included in the expert's calculations as 50% of the overall cost and the other half is paid for by the Town of Windsor, per the testimony of Chief Burgess. See Dolliver Report Exhibit 5. The reason Wages and Salaries are not more than double the Chief's salary is because 50% of the Chief's salary is paid directly by the Town of Windsor.

<sup>53</sup> Estimated based on the average percentage of Chief's salary of "Wages and salaries" from financial statements. (Average percentage = 61.97 x 2016 Wages and Salaries of \$65,508 = \$40,595)

Windsor Fire chose to deliver the services from 2001 forward, as was their contractual right.

Although West Hants did not agree to pay a chief, they did nothing about negotiating any change to their contract for services. Without such a change, West Hants had no power to dictate whether or not Windsor Fire paid a chief or not.

I conclude that the Chief's salary is an expense properly included in the West Hants costs *despite their protests in 2001 and after*. The 2016 Chief salary will be prorated as part of the stub year analysis below.

**(b) Professional Fees:**

Windsor Fire's professional fees went from \$3,996 in 2009 to \$73,188 in 2014 and \$85,741 in 2015. In 2016 they were \$53,482.

West Hants says they shouldn't pay the increased costs of Windsor Fire's legal and accounting fees beyond the basic amount charged in 2009. West Hants argues that the professional fees above the base or normalized amount were not spent to deliver fire services to West Hants.<sup>54</sup> This is a contractual argument.

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<sup>54</sup> West Hants post-hearing submissions at paragraphs 101-105, post-hearing submissions.

As I have concluded the contract was, as of April 1, 2010, that West Hants was to pay a fee to be agreed (or decided) for the delivery of services – the same services as previously provided, the burden falls to Windsor Fire to demonstrate how the professional fees cost was a part of delivery of the fire services.

They did not meet this burden.

Arguing for inclusion, Windsor Fire says that the fees were reasonably incurred, predictable, and agreed to in the Mediation/Arbitration Agreement. They also argue there was no restriction on the use of funds from West Hants. Their expert, Mr. Wright, notes in his report, “It would be inappropriate to suggest that the Windsor Fire reimburse the MWH [West Hants] for funds already disbursed in its efforts to resolve the issues between the two parties.”

I do not come to the same conclusion as Mr. Wright on this point.

While professional fees are likely reasonable, predictable and understandable, Windsor Fire is bound by the contractual arrangements they made (or let evolve). Just as they argue the contract provides for their ownership of the assets, those same contracts *do not* provide for the professional fee costs to dispute the ownership of the assets. That is not part of the cost to deliver the West Hants fire services.

Mr. Shanks argued that the Mediation/Arbitration Agreement contemplated these costs. He points to the line in paragraph 11, “Mediation of the future terms for provision of fire services will be conducted by West Hants staff and professional advisors, and WFD Executive Members and professional advisors...” I cannot come to the same conclusion as Windsor Fire. This is a recognition that professionals would be required, not an agreement that West Hants will be responsible for Windsor Fire’s professional fees.

Professional services fees beyond the normalized amount (\$4,000) are not necessary for the delivery of fire services, therefore, they should not be included as a part of the dispute period costs. There is no benefit to the fire service recipients (citizens) of West Hants for this cost. Unlike the Chief’s salary costs, professional fees, while necessary to resolve the ownership and costs issues, do not help to put out fires.

Windsor Fire’s second argument on this point was that there was no restriction on the expenditure of the funds received from West Hants. This is correct, but only *during the contractual period*. In the disputed period, when the professional fees were incurred, the agreement required delivery of the traditional fire services to West Hants. Providing for arguments over who owns what assets after the termination of services is in no meaningful way connected to the delivery of those

fire services. I am not persuaded the professional fees were part of what West Hants and Windsor Fire contracted for in 2010 and thereafter.

Windsor Fire makes the additional argument that West Hants 'started it' by getting advice from lawyer, Suzan Frazer. While true, professional fees was not negotiated as part of the post March 31, 2010 contract.

I would exclude professional fees as a service delivery cost. Consequently, I deduct the excess professional fees of \$235,100<sup>55,56</sup> from the calculation of Windsor Fire's service delivery costs.

The amount due by West Hants for services over the disputed period shall not include \$231,100.00 professional fees. \$49,500.00 of this amount is attributed to the stub year below.

There is no contractual basis for Windsor Fire to claim all the assets, largely paid for by West Hants resources over the years, and seek to burden West Hants with the costs of disputing their ownership and dissolution of the services.

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<sup>55</sup> The normalized professional fees are taken from the Dolliver Report, Exhibit 5 at Appendix 1, and reduced by the 2010 amount of \$1500 as it was an expense within the contractual period.

<sup>56</sup> The amount includes the stub year at \$49,500 (\$53,482 - \$4000 = \$49,500 rounded and normalized)

**(c) Provincial Grant:**

In 2009 Windsor Fire received a provincial grant of \$250,000 to purchase equipment. This amount is included in Windsor Fire's "deferred income".<sup>57</sup> The evidence disclosed the commitment by West Hants to contribute an equal share of the municipal contribution. The obvious conclusion is that the grant was given for both services: the Town of Windsor and the Rural Service. This commitment for the West Hants contribution was noted in the Joint Fire Advisory Committee Meeting minutes dated January 16, 2008.<sup>58</sup>

Chief Fox in his 2008 annual report commented that West Hants and the Town of Windsor were fortunate to have received \$250,000 to "replace various equipment that are either no longer NFPA compliant, are worn out, or otherwise...".<sup>59</sup>

Had Windsor Fire purchased the equipment in 2009 or thereabouts, this funding would simply have fallen into the contractual period assets. As Windsor Fire received this funding with a specific purpose for which it must be spent (as recorded in the Financial statements and the minutes and report noted above), it is clear the funds were received for a described purpose and segregated (if only on the balance sheet) for that purpose. This appears consistent with a Quistclose

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<sup>57</sup> See note, 4 Windsor Fire Financial Statements YE 2010 at Exhibit 2, Tab 8, p. 480

<sup>58</sup> See Exhibit 1, Tab 4, p. 240 – item 4 (a)

<sup>59</sup> **Cite for report**

Trust. As I conclude these funds are held in trust for the Town of Windsor and West Hants equally, I therefore conclude that \$125,000 of the Provincial Grant should be attributed to the credit of West Hants, subject to it being spent on eligible equipment as specified in the original grant.

***(d) Capital Expenses:***

The Capital Expenditure of Windsor Fire (CapEx) appears to have been within the discretion of Windsor Fire. They were required to fit up their department with whatever equipment was necessary to deliver the services, but always within the general allocation of funds provided by West Hants. Windsor Fire expressed pride in delivering the services in a cost-effective way<sup>60</sup>, ensuring sufficient money from the annual contract amounts were available for apparatus and equipment (Capital) purchases.

The amounts of CapEx in each of the disputed period years are:

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<sup>60</sup> See comments on the West Hants Fire Services Draft Financial Reporting Policy-Chief Burgess, at Exhibit 1, Tab 2, p. 46 wherein Chief Burgess expressed pride in the economical delivery of services at section 4

| <b>Year</b> | <b>Total Paid By West Hants</b> | <b>CapEx</b> |
|-------------|---------------------------------|--------------|
| 2010        | \$474,000 <sup>61</sup>         | 45,000       |
| 2011        | \$513,100                       | 76,200       |
| 2012        | \$558,100                       | 28,300       |
| 2013        | \$558,100                       | 57,200       |
| 2014        | \$581,650                       | 37,900       |
| 2015        | \$513,000                       | 158,300      |
| 2016        | \$287,800                       | 139,700      |

I find it extraordinary that Windsor Fire had a capital spend of \$158,000 and \$139,000 in the final two years of service delivery. The evidence was that Ms. Osborne, West Hants CAO, had alerted Windsor Fire to exercise “restraint” on capital expenditures. This step was taken due to the fragile relations and concerns about the future of the relationship.

It is difficult for Windsor Fire to argue it exercised its historic care in use of resources when its capital spend in 2015 was more than \$100,000 greater than the average in the preceding five years. The 2016 spend was more than \$90,000 greater than that average. Considering the average spend for the entire disputed period, that is including the two big years in the average, the 2015 over-spend was still more than \$80,000 over the average and 2016 was more than \$62,000 over the average. This is not restraint, and absent evidence of any explanation, I find it is excessive.

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<sup>61</sup> The 2010 amount is included on for comparison purposes, to demonstrate the relationship between the contractual period amount (2010) and the amounts paid in the disputed period.

Evaluating the assets purchased<sup>62</sup> I cannot conclude that Windsor Fire needed to spend as they did to provide fire services to West Hants.

The stub year part of the \$139,700 in Windsor Fire's 2016 CapEx is \$97,714.<sup>63</sup>

Windsor Fire includes in stub year CapEx the "Renovations to Town's WFD Room" at \$23,000. It is for Windsor Fire to decide to spend that amount. It is another matter entirely to expect West Hants to pay that cost. I do not accept that charge as a legitimate cost for West Hants and therefore must exclude it from the CapEx calculation.

Similarly, absent any meaningful explanation, I decline to include the 2016 CapEx in respect to the "Hose line training system" at \$34,898 and the "mobile radios and antenna" at \$25,444. This reduces the 2016 CapEx from \$97,714 to \$14,372. At a three-year depreciation rate<sup>64</sup>, I attribute \$4,790.00 to West Hants' account for 2016.

**C. April 1, 2015 – October 23, 2015 (stub year):**

**(i) Expenses:**

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<sup>62</sup> See Exhibit 2, Tab 9, pp. 816-817

<sup>63</sup> See Exhibit 2, Tab 9, page 817 – CapEx for April 1, 2015 to October 23, 2015.

<sup>64</sup> Roughly equal to 30% Vehicle rate under Income Tax Act, Class of Depreciable Property.

I must decide the fair cost to be included in West Hants' stub year expenses.

Windsor Fire had expenses (exclusive of CapEx dealt with above) for the delivery of fire services. As Windsor Fire is a 'not-for-profit' society, they should deliver the services to West Hants on a break-even or small surplus basis.

Because Windsor Fire did not 'close the books' on services delivery to West Hants at October 23, 2015 but accounted for the full fiscal year, I must consider the nature and extent of the expenses and the manner of accounting for the partial year in deciding what is the proper amount due for the delivery of those services.

Through their cross-examination of Chief Burgess, West Hants pointed out the lack of clarity in respect to the expenses for the stub year as a part of the 2016 expenses.

***(a) Approaches of Experts:***

The detailed discussion in evidence and argument centered on the expenses set out in the financial statements for the year ending March 31, 2016.<sup>65</sup> Both experts commented on their respective views as to the proper approach for considering the allocation of stub year expenses.

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<sup>65</sup> Exhibit 2, Tab 8, p. 548 and in particular, see p. 559.

For West Hants, Ms. Dolliver suggested an approach that takes the average of the most recent three years and then prorated for 206/365ths of the year. By this method, Ms. Dolliver concludes that West Hants should have paid \$160,776 for the stub year services but instead paid \$287,866. She, therefore, calculates an overpayment of \$127,090.

Mr. Wright for Windsor Fire says the expenses as set out in the 2016 Financial Statements reflect the proper expense calculation. He considered the amounts and believes those included that could or should have been reduced have been so reduced. Furthermore, expenses that were not impacted by the end of the service delivery are appropriately reflected. For example, Windsor Fire argues “honorariums and weekend duty” charges were lower in the stub year, as were “office and administration” expenses.

I am not at all persuaded by Mr. Wright’s approach. I prefer Ms. Dolliver’s approach, but I have considered specific stub-year items of particular interest below.

***(b) Operational Expenses:***

In the following table the specific expenses for the stub year are contrasted against the presumptive expectation of 206/365ths (56%) of an average over

2016 and the three previous years. This is similar to the analysis done by Ms. Dolliver.

| <b>Expenditures</b>          | <b>2016</b>      | <b>2015</b>      | <b>2014</b>      | <b>2013</b>      | <b>Average</b>   | <b>56% Average</b> |
|------------------------------|------------------|------------------|------------------|------------------|------------------|--------------------|
| Honorarium and weekend duty  | 46,912           | 62,825           | 60,878           | 56,733           | 56,837           | \$31,828           |
| Wages and salaries           | 65,508           | 64,491           | 62,948           | 62,127           | 63,769           | \$35,710           |
| Vehicle operations           | 114,265          | 74,825           | 49,299           | 71,525           | 77,479           | \$43,387           |
| Supplies and small equipment | 13,710           | 14,079           | 13,105           | 23,040           | 15,984           | \$8,950            |
| Office and administration    | 11,781           | 22,554           | 19,945           | 14,613           | 17,223           | \$9,645            |
| Rent                         | 7,504            | 7,504            | 7,504            | 7,504            | 7,504            | \$4,202            |
| Utilities                    | 3,052            | 10,343           | 9,924            | 8,745            | 8,016            | \$4,488            |
| Telephone and dispatch       | 8,150            | 10,833           | 9,912            | 8,781            | 9,419            | \$5,274            |
| Training                     | 33,976           | 20,753           | 14,872           | 21,278           | 22,720           | \$12,723           |
| Professional fees            | 53,482           | 85,741           | 73,188           | 17,398           | 57,452           | \$32,173           |
| Insurance - administrative   | 6,740            | 12,827           | 11,565           | 11,390           | 10,631           | \$5,953            |
| Interest and bank charges    | 2,193            | 1,843            | 2,559            | 3,637            | 2,558            | \$1,432            |
| HST expense                  | 14,152           | 16,906           | 10,610           | 6,935            | 12,151           | \$6,804            |
| Travel and conventions       | 892              | 721              | 1,659            | 5,596            | 2,217            | \$1,241            |
| Maintenance                  | 8,842            | 4,542            | 6,781            | 10,672           | 7,709            | \$4,317            |
| Fire prevention/education    | 1,724            | 3,842            | 3,117            | 1,430            | 2,528            | \$1,415            |
| Miscellaneous                | 3,383            | 3,479            | 6,640            | 3,775            | 4,319            | \$2,418            |
| Fire fighters' awards        | 2,460            | 3,993            | 6,086            | 5,695            | 4,559            | \$2,552            |
| <b>Totals</b>                | <b>\$398,726</b> | <b>\$422,101</b> | <b>\$370,592</b> | <b>\$340,874</b> | <b>\$383,073</b> | <b>\$214,512</b>   |

Based on the above table it would be reasonable to expect to see a 2016 stub year cost at \$214,512. There were explanations in evidence suggesting that some amounts require adjustments.

Professional fees will be adjusted in accordance with the discussion above, \$53,482 is reduced to \$4,000.

For the reasons that follow, I will adjust Honorarium and Weekend duty, Wages and Salaries, Vehicle Operations, Training, and Maintenance.

**(c) *Honorarium and Weekend duty***

I have included in the reasonable stub year costs for West Hants the “Honorarium and Weekend duty” expense at 56% of the average. The evidence is not clear as to what amount of this expense is attributable to firefighter costs, which Chief Burgess said were eliminated, and executive honoraria, which was not excluded. This is likely why the 2016 actual amount is less than the average. I have used 56% of the average -- \$31,828. ( $\$56,837 \times .56 = \$31,828$ ).

**(d) *Wages and Salaries for Wind-Up Costs:***

Chief Burgess testified that it was only at the year end, March 31, 2016, that the Chief and fire maintenance employee salaries (for clarity referred to by Mr. Rogers as the “custodian”) were no longer attributed to West Hants as an expense. This was a decision that Windsor Fire made because the executive was, as Chief Burgess put it, “wrapped up in hours and hours” of work on the West Hants issue.

The analysis here is a parallel to the professional fees analysis above. This expense was not required to suppress fires, or to educate the public on fire prevention.

In the absence of direct evidence on the amount to be attributed to the Chief's salary and that of the Custodian, I have reduced the 2016 expense for wages and salaries, which was consistent with the prior three years, to 56% of the expense reported. While not a precise calculation, the number of days in the stub year as a percentage of the full year is the best proxy I have. Wages and salary expense is therefore reduced to \$35,710 ( $\$63,769 \times .56 = \$35,710$ ).

The post-October 23, 2015 amounts for the Chief and the Custodian, as well as those allowances taken for the "hours and hours" of work by the executive should be removed from the stub year costs. This is not to suggest that hours and hours weren't required by Windsor Fire, but rather to reflect that those costs are part of Windsor Fire's general expenses and not a fire service delivery cost.

***(e) Vehicle Operations -- Expenses as Capital:***

The vehicle operations line was acknowledged to be higher than prior years due to specific issues described by Chief Burgess, namely, a custom water pipe and new axle on the aerial ladder at more than \$30,000; and springs on the tanker

which cost \$6-\$8,000. Chief Burgess described the increased cost in 2016 because of a “whole multitude of things.”

I find part of the costs of vehicle operations in the stub year to be a capital expense rather than an operational expense. This characterization is typically an accounting decision, but in the circumstances, I must decide what should properly be charged to West Hants as an expense, and what should not. Therefore, I must determine if the characterization of these operational expenses is fair.

Because the value of the upgrades to the equipment has extended the natural life of these assets, and the amount of the expenses are significant, in my view, these expenditures should not be attributed to one year. Rather, I find they should be capitalized over an appropriate amortization period. Extrapolating from the testimony of Chief Burgess suggests a minimum of \$55,000 be included as a capital cost.<sup>66</sup>

I have considered a three-year amortization period as appropriate, and would apply that rate to this expense. Therefore, I will reduce the amounts charged to West Hants for the Vehicle operations expense by \$55,000 (the isolated capital costs) and then add back \$18,150, that being the current year expensed portion.

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<sup>66</sup> Windsor Fire Vehicle operations expense was \$106,142 in 2016 (excluding Station 2). It was \$62,013 in 2015 and \$44,822 in 2014 (both exclusive of Station 2). Chief Burgess testified that tanker springs cost “probably cost about \$6-\$8k”, that the Ariel ladder, waterpipe, axle and rims “30 some thousand dollars”; and the first response pumper “there was a tune of, I think, like, \$19k”.

The Vehicle operations expense for the stub year based on 56% of the average is \$43,387. That amount plus the current year capital expense of \$18,150 is \$61,500.

***(f) Training:***

I have reviewed all the expenses and compared to the 2016 financial results (and prior years) I find some results surprising. For instance, Training costs were up more than 60 percent from 2015. The Chief's testimony in an effort to explain was that there were courses booked in the Spring, some at more than \$600 per member and some that cost "thousands of dollars".

Chief Burgess explained that some courses were booked before the decision to terminate services was made or communicated. While that may be, there was no meaningful explanation why the sudden jump to almost \$34,000 in 2016, \$13,000 more than the prior year and \$15,000 more than the prior three years' average.

The training expense for Windsor Fire is in addition to the Town of Windsor's expenditure of \$10,000 on training.

This sudden and significant jump in training costs required a better explanation than was provided. Consequently, I will reduce the training expense to an amount equal to 56% of the average. Training in the stub year will be included at \$12,723.

***(g) Maintenance:***

Another example of dramatic increases is in “Maintenance” for the satellite firehouse, Station 2. The total amount for Maintenance in 2015 was \$4,500. Yet for roughly 2/3rds of 2016, the maintenance cost for Station 2 was more than \$8,800. In the absence of any persuasive explanation, this amount is unsupported, especially considering the evidence that the station (owned by the Southwest Hants Fire Society) was left entirely empty of all supplies, equipment, and apparatus on October 23, 2015. Based on the average and 56% of the year, I substitute a maintenance expense for Station 2 in the amount of \$4,317 ( $\$7,709 \times .56 = \$4,317$ ). Added to the \$688 for the Rural Account (which seems an appropriate amount in the circumstance) amounts to a total maintenance for the stub year of \$5,005. I allow this amount.

***D. Conclusion Issue 2: Summary of stub year charges***

I have considered all the 2016 expenses and concluded that the stub year

expenses to West Hants should include amounts shown as allowed in the table below. These amounts fall into three categories: those I have addressed specifically, those at 56% of the average, and those that have not been adjusted from the 2016 amount:

| <b>Expenditures</b>          | <b>2016</b>      | <b>Allowed<sup>67</sup></b> |
|------------------------------|------------------|-----------------------------|
| Honorarium and weekend duty  | 46,912           | 31,800                      |
| Wages and salaries           | 65,508           | 35,700                      |
| Vehicle operations           | 114,265          | 61,500                      |
| Supplies and small equipment | 13,710           | 9,000                       |
| Office and administration    | 11,781           | 9,600                       |
| Rent                         | 7,504            | 7,500                       |
| Utilities                    | 3,052            | 3,100                       |
| Telephone and dispatch       | 8,150            | 8,100                       |
| Training                     | 33,976           | 12,700                      |
| Professional fees            | 53,482           | 4,000                       |
| Insurance - administrative   | 6,740            | 6,700                       |
| Interest and bank charges    | 2,193            | 2,200                       |
| HST expense                  | 14,152           | 14,200                      |
| Travel and conventions       | 892              | 900                         |
| Maintenance                  | 8,842            | 5,000                       |
| Fire prevention/education    | 1,724            | 1,700                       |
| Miscellaneous                | 3,383            | 3,400                       |
| Fire fighters' awards        | 2,460            | 2,500                       |
| <b>TOTALS</b>                | <b>\$398,726</b> | <b>\$219,600</b>            |

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<sup>67</sup> All amounts allowed have been rounded to the nearest \$100

West Hants was largely successful at demonstrating that in 2015 and 2016 Windsor Fire did not overly concern itself with maintaining its demonstrated thriftiness of prior years. I find that Windsor Fire made the choice to abandon its frugality while West Hants was still responsible for the charges. I have come to this conclusion based on the testimony of Chief Burgess. West Hants suggested Chief Burgess lacked credibility. I would not agree with that characterization, but did find his testimony was not particularly even-handed. This is not to suggest that he wasn't truthful, but rather that he wasn't very generous to the views taken by West Hants, as is his right.

To demonstrate this point, I offer the following example. When asked if Windsor Fire provided invoices to Ms. Dolliver, Chief Burgess testified that Windsor Fire had "no obligation to provide them." While I am not persuaded this is an accurate statement of the contractual arrangements, for certain, the risk of not doing so was the potential for adverse inferences to be drawn.

Chief Burgess was asked if he knew in the spring of 2015 that the "relationship with West Hants was in severe jeopardy" He replied "Sir, I can honestly answer I did not know we were terminating services until 8:00 pm on August 20th." I find Chief Burgess was answering the question he wanted to answer, not the question asked. These are a few examples of the less than charitable approach Burgess adopted.

This point is emphasized because I am troubled by the level of discord between what I would expect from Windsor Fire, a dedicated group of community volunteers, and what appears to be their view towards a long-time service partner. What I observed in review of the testimony and all the correspondence is an apparent lack of appreciation that despite Windsor Fire's legal right to the assets, those assets were accumulated both by the hard work of Windsor Fire *and the generous spirit of West Hants.*

### **III SUMMARY AND CONCLUSIONS:**

For the reasons stated, I find that as of March 31, 2010 West Hants has no lawful interest in the assets of Windsor Fire, notwithstanding that they contributed the bulk of the financial resources that allowed Windsor Fire to accumulate those assets. West Hants had a contractual relationship that called for certain payments to Windsor Fire and that allowed Windsor Fire to provide the contracted services.

Up until March 31, 2014, Windsor Fire was careful to use the resources well. To their credit, throughout the many years of service, they accumulated a significant pool of assets.

In 2010 West Hants and Windsor Fire could no longer agree that West Hants would pay as they had in the past. This was the only conclusion West Hants could come to once they realized the contractual language that “Windsor Fire Department is the owner of certain fire fighting [sic] equipment...” was a reality insisted on by Windsor Fire. This realization was stark and problematic for West Hants. They were not able to include what they had believed were their assets, on their books.

West Hants discovered that after many years of payments they owned nothing. They wanted to change that and tried to negotiate with Windsor Fire to reach a solution. They proposed they would own the assets and Windsor Fire would continue to use them to provide services. These discussions did not result in agreement.

As municipal governments in Nova Scotia were being modernized, West Hants tried to move forward with what they believed was the proper course of action, inclusion of assets they paid for on their books. This met with resistance from Windsor Fire.

In 2010, West Hants would not enter a new contract on the same terms as before. They wanted to have an acknowledged ownership of the assets. Windsor Fire was unwilling to change their approach.

The result was the parties both operated ‘under protest’ and without prejudice to their rights. Eventually, they agreed that Windsor Fire would continue to provide the same services they had in the past and West Hants would pay what they had paid in the past, subject to their right to claim they had overpaid, based on the results of the asset ownership question. Windsor Fire reserved their right to claim an underpayment.

I have found that West Hants does not have any interest in the assets as at March 31, 2010, because there is no contractual right to such ownership and because West Hants has failed to persuade me that the assets were held in trust by Windsor Fire for West Hants.

Having dismissed that part of West Hants’ claim, I then considered if West Hants had paid enough, too much, or too little for the services received between April 1, 2010 and March 31, 2015 (the disputed period) *and* between April 1, 2015 and October 23, 2015 (the stub year).

I have concluded that West Hants should not be paying for the professional fees cost of Windsor Fire relating to the dispute because they are not part of the contracted delivery of services. However, I have concluded that West Hants should be paying for the costs of the Chief’s salary up to the date of the service termination because it was reasonably necessary to deliver the services. I can

find no basis, contractual or otherwise, to attribute the Chief's salary or other wages for latter part of 2016 year as this was not a contracted service and the service had terminated.

West Hants has paid slightly over \$3,000,000 between April 1, 2010 and October 23, 2015. From that amount, I have deducted \$517,200, that being the total of the following deductions:

|                           |                  |
|---------------------------|------------------|
| ➤ Professional Fees       | \$231,100        |
| ➤ CapEx (2016)            | \$ 92,900        |
| ➤ Stub year <sup>68</sup> | \$ 68,200        |
| ➤ Capital Grant           | <u>\$125,000</u> |
| <b>TOTAL</b>              | <b>\$517,200</b> |

#### **IV. ORDER:**

I would take this opportunity to thank counsel for their thorough and professional presentations and conduct throughout. It is once again clear evidence that parties can disagree without being disagreeable.

I will specifically retain jurisdiction to address any mathematical errors, and to address the concern that I may have misinterpreted the evidence in relation to the Account Receivable on the 2016 Financial Statement of Windsor Fire

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<sup>68</sup> This amount is calculated by deducting the stub year amounts awarded from the stub year payments.  
\$287,866 - \$219,600 = \$68,266 (rounded to \$68,200)

referenced therein at note 6. The parties will know if this amount remains outstanding and if so, I believe it would be a set-off against the Order above. I will leave it to counsel to address this amount between themselves and if it can't be resolved through discussions, I will hear the parties on this point.

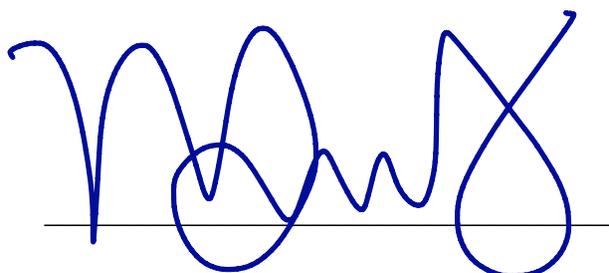
If indeed I have made mathematical errors, I trust counsel will bring them to my attention.

This retention of jurisdiction is not an invitation to further submission, nor will I entertain such, but rather an expression that I may have overlooked or misunderstood matters in a way the parties, jointly, would not wish.

I have concluded that West Hants overpaid Windsor Fire for the disputed period in the amount of \$517,200. I order that amount be reimbursed by Windsor Fire to West Hants.

In light of the mixed success in considering neither party pursued an argument on costs, no costs are awarded.

Dated at New Glasgow, Nova Scotia June 26, 2017.

A handwritten signature in blue ink, consisting of several large, overlapping loops and curves, positioned above a horizontal line.

Frank E. DeMont, Q.C.

Chairman