Action No.: 0601-09869

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

VECKENSTEDT HOLDINGS INC., HERB VECKENSTEDT, FRED PIPER, JOAN PIPER, LIPOTH CONSULTING, and PAUL LIPOTH

Plaintiffs

\- and -

INTEGRA INVESTMENT SERVICE LTD. and RUNDLE DEVELOPMENT COOPERATIVE

Defendants

BRIEF OF ARGUMENT AND AUTHORITIES
SPECIAL CHAMBERS APPLICATION
TO BE HEARD FEBRUARY 27, 2008 AT 2:00 PM
BEFORE MADAM JUSTICE C.A. KENT

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Solicitors for Ernst & Young Inc., in its capacity as the Court appointed Receiver and Manager of Integra Investment Service Ltd., Aurora River Tower Inc., Carling Spring Village Inc., and Carling Development (B.C.) Inc.

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I. INTRODUCTION

1. This is an application by the Receiver for the approval of a Settlement Agreement entered into by the Receiver, the Airdrie Purchaser and the Carling Parties, made as of February 6, 2008, and for the relief which necessarily follows from the other transactions contained within the Settlement Agreement, all as set out in the Approval Order, which is attached to this Brief as **TAB 1**. Whenever possible, the section of this Brief entitled "Analysis" parallels the form of Approval Order.

2. Capitalized terms used herein but not otherwise defined are given same meaning as ascribed to them in the Settlement Agreement.

II. FACTS

A. General Background

3. On August 18, 2006 Ernst & Young Inc. was appointed interim receiver over certain records of Integra.

- Seventh Report of the Receiver dated February 11, 2008 ("Seventh Report"), paragraph 1

4. On September 8, 2006 Ernst & Young Inc. was appointed Receiver over the Integra Companies.

- Seventh Report, paragraph 2

5. On May 23, 2007 Ernst & Young Inc. was appointed as Inspector of Carling under Part 18 of the *Business Corporations Act* (Alberta).

- Seventh Report, paragraph 4

B. Receiver's Reports

6. At the time of the Receiver's appointment there was considerable litigation in existence between the Integra Companies and Carling.

- Fourth Report of the Receiver dated May 22, 2007, paragraphs 31-36 and 159-187

7. One of the primary issues in the litigation between the Integra Companies and Carling is the ownership of the Fort McMurray Lands and the Airdrie Lands. Carling alleges that it is the legal and beneficial owner of those Lands, and not Aurora and Carling Spring, who are respectively the registered owners of those Lands.

- Fourth Report, paragraphs 33-34

8. The Receiver and Carling met on several occasions to discuss this litigation and both were of the view that it was not in the best interests of the Investors or other stakeholders to pursue this litigation. The Receiver and Carling decided it would be in everyone's best interest to negotiate a settlement.

- Seventh Report, paragraph 11

9. As a result, the Receiver and Carling entered into the Settlement Agreement on February 6, 2008. The main terms and conditions of the Settlement Agreement are:

   (a) Transfer of the Airdrie Lands and Fort McMurray Lands back to Carling Development Inc.;

   (b) Carling Development Inc. will sell the Airdrie Lands to the Airdrie Purchaser for $2,200,000.00;

(c) The proceeds of the sale of the Airdrie Lands will be allocated first to the payment of professional fees, second to repayment of the first mortgage registered against the Airdrie Lands, and the remaining proceeds, for the most part, will be paid to Carling Development Inc. and used by Carling Development Inc. to fund the Fort McMurray Project;

(d) The Receiver will maintain a holdback sufficient to satisfy the claim filed by 619644 Alberta Ltd., which is secured against the Airdrie Lands by caveat;

(e) The Airdrie Lands will be transferred to the Airdrie Purchaser free and clear of any encumbrances, other than Permitted Encumbrances;

(f) The Fort McMurray Lands will be transferred to Carling Development Inc., who will receive the lands subject to the Fort McMurray Permitted Encumbrances and three new charges which will be created by the Approval Order, being (i) the Professionals' Charge, (ii) the Investors' Charge, and (iii) the Fort McMurray Equity Charge;

(g) Carling and the Receiver will provide one another with releases and will discontinue the litigation between them;

(h) The relevant condition precedent of the Settlement Agreement, for the purposes of this Brief, concerns the granting of the Approval Order and, in particular, a finding from this Honourable Court in favour of the Pooled Investment Approach.

- Seventh Report, paragraph 12

10. The Settlement Agreement allows Carling to move forward with the Fort McMurray Project which will, in the view of Carling, allow Carling to repay in full the Carling Investors original investment plus some interest.

- Seventh Report, paragraph 15(a)

11. The Settlement Agreement provides potential recovery to the Integra Investors which may not otherwise be available.

- Seventh Report, paragraph 15(d)

12. The Settlement Agreement resolves numerous issues and provides vastly increased certainty to all stakeholders.

- Seventh Report, paragraph 15(e)

13. The Receiver considers the Settlement Agreement to be in the best interests of all stakeholders of the Integra Companies and Carling.

- Seventh Report, paragraph 15(a)

C. Inspector's Report

14. As required by the Memorandum of Judgment issued by this Honourable Court on October 18, 2007, the Inspector held a meeting of the Fort McMurray Investors on November 23, 2007. Eighteen of the twenty Fort McMurray Investors who submitted Proofs of Claim to the Inspector attended this meeting. Additionally, Carling Group and its counsel attended the meeting.

- Second Report, paragraphs 12-14

15. The Inspector explained to the Fort McMurray Investors that the purpose of the meeting, further to the Memorandum of Judgment issued by this Honourable Court on October 18, 2007, was to provide them with information in respect of the Direct Investment Approach as compared to the Pooled Investment Approach so that the Fort McMurray Investors could make an informed decision with respect to which approach they wanted.

- Second Report, paragraph 15

16. The Inspector provided the Fort McMurray Investors a hand-out detailing an estimate of the recoveries available if the Lands were developed, based on assumptions provided by Carling.

- Second Report, paragraph 16

17. The meeting lasted for approximately 2.5 hours and several questions were asked by Investors and answered by the Inspector and Carling.

- Second Report, paragraphs 18-19

18. The Fort McMurray Investors voted overwhelmingly in favour of the Pooled Investment Approach, with 94% by number and 97% by value voting in favour of the Pooled Investment Approach.

- Second Report, paragraphs 21-23

19. The Inspector observes that the Fort McMurray Investors are the only Carling Investors which are potentially negatively impacted by the Pooled Investment Approach.

- Second Report, paragraph 26(a)

20. Carling is in agreement with the Pooled Investment Approach. Indeed, the Settlement Agreement contains a condition precedent, in favour of Carling, that the Court has found the Pooled Investment Approach.

- Settlement Agreement, section 8.1(c)

21. Many of the Carling Investors have investments of more than one Carling project. The effect of these cross-holdings results in many Carling Investors being supportive of the Pooled Investment Approach.

- Second Report, paragraph 26(d)

22. Under the build-out scenario of the Fort McMurray Project, using assumptions provided by Carling which the Inspector has not reviewed or verified, there will be sufficient funds generated for the complete repayment of all Carling Investors and creditors, and indeed there will be significant equity available for Carling and the Receiver, who is the beneficiary of the Fort McMurray Equity Charge.

- Second Report, paragraph 34

23. The build-out of the Fort McMurray Project would be completed by Carling, however it would be subject to the oversight of an Investors' Committee, which will be comprised of the Inspector and four elected Investors.

- Second Report, paragraph 36

- Settlement Agreement, Article 7

24. If the Approval Order is granted, the Inspector will call a meeting of Carling Investors to (a) provide a general update of these proceedings and (b) constitute the Investors' Committee.

- Second Report, paragraph 42

25. The Inspector has fulfilled its current mandate as it relates to Carling Group. The Inspectorship over Carling Group Canada Inc. and Carling Financial Corporation should be terminated if the Approval Order is granted, because the effect of the Settlement Agreement and the Approval Order is to transfer substantially all of the assets of Carling Group to Carling Development Inc., and also to pool the claims of Investors against Carling Development Inc. and its assets. The Inspector can adequately monitor the affairs of Carling Group, and the interests of Investors can be adequately safe-guarded, if the Inspectorship continues in respect of Carling Development Inc. only.

- Second Report, paragraphs 44-45

26. If the Approval Order is granted, the mandate of the Inspector should be amended and restated in accordance with the Approval Order to allow the Inspector to fulfill its new mandate in respect of the oversight and completion of the Fort McMurray Project.

- Second Report, paragraph 46

27. The Inspector recommends the granting of the Approval Order.

- Second Report, paragraph 59

III. ISSUES

28. The issue in this application is whether the Settlement Agreement should be approved and, if so, whether the form of Approval Order is appropriate.

IV. ANALYSIS

29. The sub-headings contained in this part of the Brief correspond to the subheadings contained in the Approval Order. It is respectfully submitted that this Honourable Court ought to grant the Approval Order for the reasons which follow.

A. Hearing Read the Receiver's Report and the Inspector's Report

30. It is respectfully submitted that the contents of the Seventh Report and the Second Report, and all Reports previously filed by the Receiver and Inspector, are evidence and are properly before this Honourable Court.

B. Receiver's Reports

31. This Court can rely on the statements of fact contained within the Receiver's Reports, pursuant to the reasoning of Justice Farley in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*:

> As to the question of there not being any affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List -- cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-)examination

when the Receiver is willing to clarify or amplify his material when such is truly needed.

- *Mortgage Insurance Co. of Canada v. Innisfil Land Corp.* (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23 (Ont.) S.C., at paragraph 5 - **TAB 2**

32. The reasoning of Justice Farley set out above has been adopted in Alberta.

- Edmonton Region Community Board for Persons With Developmental Disabilities v. Aboriginal Partners & Youth and Society, 2004 ABQB 423, at paragraph 17 - **TAB 3**

- *Re: Big Sky Living Inc.*, 2007 ABQB 326 at paragraphs 30-32 - **TAB 4**

33. Furthermore, the Receiver cannot be cross-examined on their Reports provided it has made itself available to answer any questions which stakeholders have.

- *Edmonton Region Community Board*, supra, at paragraph 17-25

34. A receiver may only be cross-examined upon its Reports in exceptional circumstances, and when considering whether such cross-examination should be permitted, reference should be had to the following statements by Justice Lee in *Edmonton Region Community Board:*

> … cross-examining a Receiver is still an exceptional circumstance, and Receivers generally should not be subject to harassment for doing their job, even though most Receivers in doing their jobs usually offend the party against whom the receivership is ordered.

- *Edmonton Region Community Board*, supra, at paragraph 24

C. <u>Inspector's Reports</u>

35. Section 238 of the *Business Corporations Act* (Alberta) states:

A copy of the report of an inspector under section 238, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the appointment or signature of the inspector.

- Section 238, *Business Corporations Act* (Alberta) - **TAB 5**

36. The meaning of section 238 has been discussed by this Court recently:

On some issues, the Inspector provided his opinion. For example, he provided an opinion that the management fees paid to McPeak were somewhat high but probably reasonable. The inspector was not qualified as an expert, and Rule 218.1 was not complied with. However, in my view opinions of this sort expressed by the Inspector can be received by the Court. His appointment denotes a recognition of expertise, and his report removes any element of surprise. The weight to be given to the opinions expressed would depend on the particular qualifications of the inspector. In this case the Inspector is a chartered accountant, and accordingly any opinions expressed by him within the scope of that expertise should be given weight by the Court. An examination of the report shows that the Inspector did not do an independent analysis of management fees, and simply repeated what he had been told by McPeak and Skolney about the process of setting those fees. In these circumstances, the report of the Inspector is somewhat helpful in that it summarizes the evidence, but it adds little of probative value to the testimony of the witnesses themselves. The Inspector's opinion of "reasonableness" is of some value. On the other hand the Inspector did examine the accounts of the company, and gave his opinion that the funds raised on the private placement were used in a manner "not inconsistent with the Offering Memorandum disclosure." Such an opinion does deserve weight.

In my view the provision in the Act that the inspector's report is "evidence" does not mean that the rules of evidence cease to apply. The provision is primarily intended to deal with the fact that much of the inspector's report is likely to be hearsay, and to dispense with formal proof of his appointment. In each instance one must refer to the material on which the inspector relies in order to decide what weight is to be given to his report. To the extent that the inspector's report is hearsay, it may be entitled to little weight: its true probative value must be examined in a principled way. If he is merely drawing inferences from documents that are available for the Court, the report will be of little additional value. On the other hand, if the inspector conducts an independent investigation or audit, or turns his expertise to an analysis of the affairs of the company, then his report will be of considerable value. In this respect the report of the inspector might be accepted by the Court even though it comes close to expressing opinions on the issues ultimately before the Court. Normally an expert would not be entitled to testify as to conclusions of law arising from the facts, but the provision in the Act (especially s. 231(2)) relating to the appointment of the inspector may displace that rule to some extent.

- *Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446, at 37-38 - **TAB 6**

37. For these reasons it is submitted that this Court can accept and rely upon the contents of the Receiver's Reports and Inspector's Reports in respect of this application.

D. Service

38. Service of this application has been affected upon all of the stakeholders of Carling and Integra in accordance with the Order granted by this Honourable Court on February 8, 2008. Further particulars are set forth in the Service Affidavit.

E. Approval of Settlement Agreement

39. This Court has recently held, albeit in the context of different insolvency legislation, that it has ability to approve of settlement agreements involving debtors and their various stakeholders, notwithstanding the objection of some stakeholders who have an interest in the debtors' estate. The same general principles are applicable here and govern this application for approval of the Settlement Agreement.

- *Re: Calpine Energy Ltd.*, 2007 ABQB 504, generally - **TAB 7**

40. In *Calpine* the Court officer charged with monitoring the affairs of the debtors provided an analysis of the terms and effect of the settlement agreement in great detail in its reports and concluded that the settlement agreement was (1) beneficial to the debtors and their creditors, (2) provided a medium for an efficient payout of many of the creditors, (3) resolved all material disputes between the Canadian debtors and the U.S. debtors without costly and time consuming litigation, (4) settled complex priority issues, and (5) provided for the acceptance of certain claims. Additionally, the Court officer unequivocally endorsed the settlement agreement.

- Re: *Calpine*, supra, at paragraph 8 - **TAB 7**

41. The Court in *Calpine* described the general principals applicable to an application for approval of a settlement agreement, which include:

    (a) The settlement agreement must be reviewed as a whole, as it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect,

    (b) It is inappropriate to blur the distinction between compromises validly reached among the parties to the settlement agreement and the effect of those compromises on creditors who are not parties to the settlement agreement. In particular, if rights to a judicial determination of an outstanding issue have not been terminated by the settlement agreement, those rights are not compromised.

- Re: *Calpine*, supra, at paragraph 12 - **TAB 7**

42. More particularly, objecting stakeholders have no right to complain that any litigation compromised in the settlement agreement may or may not be meritorious.

- Re: *Calpine*, supra, at paragraph 15 - **TAB 7**

43. Stakeholders cannot object to the settlement agreement on the grounds that they were not involved in the negotiation of it.

- Re: *Calpine*, supra, at paragraph 34 - **TAB 7**

44. Stakeholders are not entitled to object to the settlement agreement if it does not compromise their rights, or if they have consented to the compromise of their rights.

- Re: *Calpine*, supra, at paragraph 51 - **TAB 7**

45. Here it is important to note that any claims against the parties to the Settlement Agreement will continue against them, in accordance with the Claims Process Orders previously granted by this Honourable Court, and any stakeholders advancing a claim against any of the parties to the Settlement Agreement will be entitled to maintain those claims, subject to the terms of the Claims Process Orders. Such claims are not affected by the Settlement Agreement. This is consistent with the settlement agreement which was approved by the Court in *Calpine*, which the Court approved of.

- Re: *Calpine*, supra, at paragraph 55 - **TAB 7**

46. And finally, the Court in *Calpine* identified the test to be employed when considering whether or not to approve a settlement agreement. Commencing at paragraph 59 Madam Justice Romaine states, with emphasis added:

> In *Air Canada, Re*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRA's"). He cited *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:
>
> > … I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that last legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd*.… In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4^{th}) 171 (Ont. Gen. Div. [commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the

> circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

The GRA between Air Canada and a creditor, GECC, provided, among other things, ... The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. ...

- Re: *Calpine*, supra, at paragraph 59-63 - **TAB 7**

47. And, in conclusion the Court finds, commencing at paragraph 75 of *Calpine*, with emphasis added:

That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

...

The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles ... BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue ... . <u>The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.</u>

...

The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. ... Given that complexity, it behoves all parties and this Court to proceed cautiously and with careful consideration. <u>Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian Knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.</u>

- Re: *Calpine*, supra, paragraph 75-82 - **TAB 7**

48. Based on the foregoing, it is respectfully submitted that this Honourable Court has the authority to approve the Settlement Agreement and ought to exercise its jurisdiction to do so for the following reasons:

(a) it resolves the uncertain, costly and risky litigation between Integra and Carling;

(b) it results in Releases being exchanged between the Receiver and Carling;

(c) it provides a mechanism for the potential repayment of the principal amounts owing to the Carling Investors, and something for interest;

(d) it provides for a potential recovery for the Integra estate through the Fort McMurray Equity Charge ;

(e) the test described for the Judicial approval of settlement agreements, as set out above, has been satisfied in that the Settlement Agreement is, on the whole, fair and reasonable to stakeholders, and no rights are confiscated; and

(f) the Receiver advises the Settlement Agreement is in the best interests of all stakeholders.

F. <u>Treatment of Investors</u>

49. Based on the facts set out in the Inspector's First Report, filed August 17, 2007 and in accordance with the authorities contained in the Written Submission of the Inspector filed October 1, 2007, it is respectfully submitted that the test for the pooling of Investors has been satisfied, and the Investors of Carling ought to be treated in accordance with the Pooled Investment Approach.

- First Report of the Inspector dated August 16, 2007
- Written Submissions of the Inspector, filed October 1, 2007

50. It is important to observe that the only parties whose rights are being affected by pooling are Carling, who has consented in the Settlement Agreement to the Pooled Investment Approach, and the Investors themselves who, for the reasons set out below, either consent to or are not prejudiced by, the Pooled Investment Approach.

51. The Fort McMurray Investors overwhelmingly voted in support of the Pooled Investment Approach. The Pooled Investment Approach will result in increased returns for the Airdrie Investors and the Surrey Investors, and therefore are not prejudiced by the Pooled Investment Approach.

- Inspectors Second Report - paragraphs 23 and 32

52. It is submitted that a consequence of the Settlement Agreement and the Pooled Investment Approach is that the claims of all Carling Creditors are deemed to be claims against Carling Development Inc. and not any other Carling Company, since substantially all of the assets of the Carling companies will be transferred to Carling Development Inc. pursuant to the Settlement Agreement. Furthermore, those claims should share in any distributions made by Carling Development Inc. on a *pari pasu* basis.

53. A corollary of the Pooled Investment Approach is that the claims which any Carling Investors have against Integra be vested in Carling for prosecution, subject to oversight by the Investors' Committee, and provided that any proceeds from the prosecution of those claims be distributed by the Inspector to Carling Investors on a *pari pasu* basis.

G. <u>Meeting of Carling Investors</u>

54. If the Settlement Agreement is approved and the Approval Order is granted, it is respectfully submitted that the meeting of Carling Investors required by the Order granted by this Honourable Court in these proceedings on October 4, 2007 is no longer necessary, since that meeting was designed to poll the Carling Investors and obtain their views in respect of (1) the Pooled Investment Approach versus the Direct Investment Approach

and (2) the scenario whereby the Fort McMurray Lands and Airdrie Lands would be developed versus the scenario whereby those lands would be immediately liquidated.

55. The Settlement Agreement and the Approval Order entrench (1) the Pooled Investment Approach, (2) the liquidation of the Airdrie Lands and (3) the development of the Fort McMurray Lands, and so there is no longer a need to have a meeting of Investors in respect of those issues, as required by the Order of October 4, 2007.

56. Moreover, if the Approval Order is granted and the Settlement Agreement is approved, the Carling Investors should participate in a meeting, to be called, convened and chaired by the Inspector, for the purpose of (1) providing a general update on these proceedings to the Investors, and (2) constituting the Investors' Committee.

57. Rule 390(1) of the *Alberta Rules of Court* provides this Honourable Court with the authority to vary its Order of October 4, 2007 regarding the timing and purpose of a meeting of the Investors, providing:

> Any order may be set aside, varied or discharged on notice by the judge who granted it. **[TAB 8]**

H. Transfer of the Airdrie Lands

58. The Receivership Order granted in these proceedings on September 8, 2006 specifically allows the Receiver to sell the property of Carling Springs, and to apply to this Honourable Court for vesting orders in respect of the sale of that property.

- Receivership Order at paragraphs 3(k), 3(l) and 3(m)

59. Moreover, it seems clear that a receiver has authority to sell property and convey clear title into the hands of a purchaser, pursuant to section 64 of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 **[TAB 9]**; sections 11 and 22 of the *Judicature Act*, R.S.A. 2000, c. J-2 **[TAB 10]**; section 76 of the *Law of Property Act*, R.S.A. 2000, c. L-7 **[TAB 11]**, and Rule 467 of the *Alberta Rules of Court* **[TAB 12]**.

60. It is appropriate to convey clear title to the Airdrie Purchaser in these circumstances because (1) the mortgage registered against the Airdrie Lands will be paid in full from the sales proceeds, (2) the Receiver will maintain a specific holdback for the disputed claim of 619644 Alberta Ltd., (3) all the other encumbrances registered against the Airdrie Lands should be removed because they are either (a) filings made by Carling or Integra to protect their respective positions in the litigation between them, which will be resolved and discontinued as a result of the Settlement Agreement, (b) are registrations made by Investors, who will be paid from the development of the Fort McMurray Lands, or (c) are registrations made by parties who have failed to comply with the Claims Process Orders granted by this Honourable Court in these proceedings on June 4, 2007 and/or October 4, 2007, and therefore their claims are deemed to be dismissed.

- Seventh Report, Appendix B

I. <u>Transfer of the Fort McMurray Lands</u>

61. The Receivership Order granted in these proceedings on September 8, 2006 specifically allows the Receiver to sell the property of Aurora, and to apply to this Honourable Court for vesting orders in respect of the sale of that property. The authority cited for this

proposition in the preceding section are equally applicable to the sale of the Fort McMurray Lands.

- Receivership Order at paragraphs 3(k), 3(l) and 3(m)

62. It is appropriate to convey title to Carling Development Inc. in these circumstances because (1) the Fort McMurray Permitted Encumbrances will remain on title, and will maintain their respective priority, unless they agree to subordinate to construction financing, (2) all the other encumbrances registered against the Fort McMurray Lands should be removed because they are either (a) filings made by Carling or Integra to protect their respective positions in the litigation between them, which will be resolved and discontinued as a result of the Settlement Agreement, (b) are registrations made by Investors, who will be paid from the development of the Fort McMurray Lands, or (c) are registrations made by claimants who have failed to comply with the Claims Process Orders granted by this Honourable Court in these proceedings on June 4, 2007 and/or October 4, 2007, and therefore their claims are deemed to be dismissed, and (3) Carling Development Inc. has agreed to encumber the Fort McMurray Lands with the Professionals' Charge, the Investors' Charge, and the Fort McMurray equity Charge, all of which function to protect stakeholders of Carling or Integra, as the case may be.

- Seventh Report, Appendix B

J. Role of the Inspector and Approval of Actions to Date

63. Section 232 of the *Business Corporations Act*, R.S.A. 2000, c. B-9 **[TAB 13]**, provides that the Court may make any order it thinks fit. In this regard it is submitted that the role

of the Inspector needs to change from its original mandate to facilitate the implementation of the Settlement Agreement.

64. The Inspector has complied with the Orders of this Honourable Court and has reported to this Honourable Court as required, and its actions to the date of the Approval Order ought to be approved.

65. As a result of the Settlement Agreement and Approval Order, all of the assets of Carling, and all of their liabilities, will be pooled in Carling Development Inc. There is no reason for Carling Group Canada Inc. or Carling Financial Corporation to continue to be subject to the inspectorship, and the Inspector's role ought to be amended to oversee Carling Development Inc. in the development of the Fort McMurray Project and the repayment of Investors. This amended role will serve as a safeguard for the Investors and facilitate Carling Development implementing the Fort McMurray Plan and communicating with its Investors.

66. There ought to be a stay of proceedings in place to protect the Inspector, an Officer of the Court, from frivolous claims. Any claimant with a claim that is not frivolous may apply to this Honourable Court for leave to pursue its claim.

K. <u>Investors' Committee</u>

67. An Investors' Committee ought to be created to oversee Carling Development Inc. and, in particular, its development of the Fort McMurray Project. This will allow the Investors, through Investors' Committee, to be involved with and oversee the day to day events relating to the Fort McMurray Project. Similarly, the Inspector will sit on the Investors'

Committee, as a non-voting member, and can provide its advice and views to the Investors' Committee and Carling Development.

68. The creation of an Investors' Committee will allow for the stakeholders of Carling to communicate with each other regularly and make decisions in respect of their common interests in the Fort McMurray Project in an organized way which has been prescribed by this Honourable Court. Furthermore, each of them have recourse to this Honourable Court if the Court's advice and direction is necessary.

69. Carling has consented to the proposed Investors' Committee.

L. Stay of Proceedings

70. It is appropriate to order a stay of proceedings against Carling with respect to any claims in existence prior to the date of the Approval Order, without leave of the Court first being obtained. The theory and process envisioned by the Settlement Agreement and the Approval Order is that Carling Development be given the opportunity to develop the Fort McMurray Project with a view to repaying all Carling Investors and other stakeholders of Carling from the proceeds of the sale of the developed Fort McMurray Project. Carling Development should be given the opportunity to undertake this commercial enterprise in the absence of claims or other proceedings initiated by its existing stakeholders, who have expressed their desire for Carling Development to proceed with the Fort McMurray Project.

71. Sections 17 and 18 of the *Judicature Act*, R.S.A. 2000, c. J-2 **[TAB 14]** provide this Honourable Court with the authority to grant such a stay providing, in part:

> In a proceeding
>
> (a) for the recovery of a debt or liquidated demand,
>
> (b) for the enforcement of a security or charge on land,
>
> (c) for the determination or specific performance of an agreement for the sale of land, or
>
> (d) for the possession of land,
>
> the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe....

72. Moreover, and in any event, the proposed stay of proceedings in favour of Carling Development Inc. stays only claims in existence at the date of the Approval Order, which claims will be dealt with in accordance with the Claims Process Order previously granted by this Honourable Court. Any claims which subsequently arise will not be stayed by the Approval Order.

73. If stayed, any claimant may apply to this Honourable Court for leave to pursue its claim.

M. <u>Role of the Directors</u>

74. As a result of the creation of the Investors' Committee, the powers of the directors of Carling Development should be reduced, as those powers are within the purview of the Investors' Committee. Carling Development Inc. has consented to this.

N. <u>Professional Accounts and Professionals' Charge</u>

75. The Consent Order appointing the Inspector provides that the fees and disbursements of the Inspector be treated and paid in the same manner as the fees, disbursements and costs of the Receiver, until further Order of this Court. Pursuant to the Settlement Agreement

and the Approval Order, the fees and disbursements of the Inspector will be paid from the proceeds of the sale of the Airdrie Lands, in accordance with the referenced Consent Order.

- Consent Order dated May 23, 2007, paragraph 8

76. From the date of the Approval Order the accounts of the Inspector will be paid by Carling Development Inc., being the entity subject to the inspectorship, in accordance with the applicable legislation.

- *Business Corporations Act*, section 232(3), **[TAB 13]**

77. Carling Development Inc. has consented to the accounts of the Inspector, its legal counsel, and legal counsel to Carling Development Inc. being secured by a charge against the Fort McMurray Lands in the form of the Professionals Charge.

78. It is appropriate that the Professionals' Charge secure the amounts owing to the professionals who have been involved in negotiating, drafting and completing the Settlement Agreement, applying for the Approval Order, who will be involved in the Fort McMurray Project on a going forward basis, and whose labour in that regard has been and will be designed to benefit all of the stakeholders of Carling and Integra. Additionally, in the event that there is a failure by Carling Development Inc. to complete the Fort McMurray Project, and the professionals are required to become involved in a more significant way to oversee the development of the Fort McMurray Project, or the liquidation of the Fort McMurray Lands, the professionals must have some security for their fees and disbursements, or they may elect not to act. This is in keeping with the general principle that, where a court officer is appointed to preserve, and realize property

for the benefit of all interested parties, that officer should be entitled to a charge against that property: *Robert Kowal Investments Ltd. et al. v. Deeder Electric Ltd.* (1975) 9 O.R. (2d) 84 (C.A.) **[TAB 15]**; and, generally, *Receiverships*, F. Bennett, (1st ed.), Carswell: Toronto, 1985, at 294 *ff.* **[TAB 16]**

O. Charges

79. The Approval Order creates two other charges for the protection of the stakeholders of Carling Development Inc. These are (i) the Investors' Charge, which protects the Investors, who are the primary stakeholders of Carling Development, and (ii) the Fort McMurray Equity Charge, which protects the Receiver, as the custodian of the Integra estate.

80. As a consequence of the Pooled Investment Approach, all of the Investors have a claim against Carling Development Inc. In order to safeguard the claims of those Investors, Carling Development Inc. has agreed to secure their claims against the Fort McMurray Lands by way of the Investors' Charge.

81. The Receiver is the beneficiary of the Fort McMurray Equity Charge and has negotiated this charge in order to safeguard the interests of the Integra estate. The Receiver has concluded that the Fort McMurray Equity Charge may provide some return to the Integra estate which might not otherwise be available if the claims between Integra and Carling are resolved through litigation, and that the Fort McMurray Equity Charge represents a fair and reasonable return to the Integra estate for the settlement of the litigation between Integra and Carling, and the release of the claims between them.

82. Carling has consented to both these charges being created and registered against the Fort McMurray Lands.

V. CONCLUSION

83. For the foregoing reasons it is respectfully submitted that this Honourable Court ought to approve of the Settlement Agreement and grant the Approval Order.

ALL OF WHICH is respectfully submitted this 25th day of February, 2008.

FRASER MILNER CASGRAIN LLP, solicitors for Ernst & Young Inc., in its capacity as the Court appointed Receiver and Manager of Integra Investment Service Ltd., Aurora River Tower Inc., Carling Spring Village Inc., and Carling Development (B.C.) Inc.

Per: ______________________
David Mann/David LeGeyt

Estimated time for argument: .5 hours.

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TAB 1

Action No.: 0601-09869

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

VECKENSTEDT HOLDINGS INC., HERB VECKENSTEDT, FRED PIPER, JOAN PIPER, LIPOTH CONSULTING, AND PAUL LIPOTH

Plaintiff

- and -

INTEGRA INVESTMENT SERVICES LTD. and RUNDLE DEVELOPMENT COOPERATIVE

Defendant

BEFORE THE HONOURABLE	)	AT THE CALGARY COURTS CENTRE, IN THE
	)	CITY OF CALGARY IN THE PROVINCE OF
JUSTICE C.A. KENT	)	ALBERTA ON __________, THE ______ DAY OF
	)	FEBRUARY, 2008
IN CHAMBERS		

APPROVAL ORDER

UPON THE APPLICATION of Ernst & Young Inc., in its capacity as receiver (the "Receiver") of Integra Investment Service Ltd., Aurora River Tower Inc., Carling Spring Village Inc. and Carling Development (B.C.) Inc. (collectively, "Integra"); **AND UPON HEARING READ** the Orders of this Honourable Court dated September 8, 2006 and May 23, 2007; **AND UPON HEARING READ** the Second Report of Ernst & Young Inc., in its capacity as inspector (the "Inspector") of Carling Development Inc., Carling Group Canada Inc. and Carling Financial Corporation (collectively, "Carling"), dated February 11, 2008, filed, (the "Inspector's Report") and the Seventh Report of the Receiver, dated February 11, 2008 (the "Receiver's Report"); and the Affidavit of Gail Wheatley, dated February 25, 2008, (the "Service Affidavit"); **AND UPON FINDING** that the settlement agreement among the Receiver, Carling and others, dated February 6, 2008 and attached as Appendix A to the Receiver's Report (the "Settlement Agreement") is fair and reasonable and in the best interests of the stakeholders of Integra and

Carling; **AND UPON IT APPEARING** that all interested and affected parties have been served with notice of this Application; **AND UPON HEARING** counsel for the Receiver, the Inspector, Carling and various other stakeholders;

IT IS HEREBY ORDERED AND DECLARED THAT:

Service

1. Service of notice of this Application in accordance with the particulars described in the Service Affidavit is good and sufficient.

Definitions

2. All capitalized terms not otherwise defined in this Order have the same meaning as ascribed to them in the Settlement Agreement.

Approval of Settlement Agreement

3. The Settlement Agreement, including all related transactions, is hereby approved.

4. The Receiver is authorized to execute all deeds and documents and to take all such steps, as may be necessary or advisable in the sole discretion of the Receiver, in order to give effect to the Settlement Agreement and all transactions contemplated therein.

Treatment of Investors

5. The Investors of Carling and Carling Development (B.C.) Inc. shall be treated in accordance with the Pooled Investment Approach and, without restricting the generality of the foregoing, and for greater clarification, the Investors of Carling and Carling Development (B.C.) Inc. are deemed to have claims only as against Carling Development and its property, irrespective of which corporate entity the Investor may have initially invested in and irrespective of which real estate project the Investor invested in, and it is declared that all Investors of Carling and Carling Development (B.C.) Inc. and their claims against Carling Development and its property rank *pari passu* with each other and that Investors shall share in any distributions made by Carling Development on a *pro rata* basis, irrespective of which corporate entity they initially invested in and irrespective of which real estate project they invested in.

6. In addition to the foregoing paragraph and for greater clarity, Investors shall have claims against Carling Development only and not any other Carling company. Any claims which the Investors may have against any of the Integra Companies shall be transferred, absolutely, to Carling Development, for the exclusive benefit of Carling Development, subject to the oversight powers given to the Investors' Committee in Schedule "A" to this Order, and notwithstanding paragraph 9.1 of the Settlement Agreement. The claims of Carling Development (B.C.) Inc. against the Integra Companies are hereby transferred absolutely to Carling Development, subject to the oversight powers given to the Investors' Committee in Schedule "A" to this Order, for its exclusive benefit, provided however that any realization by Carling Development from the claims transferred to it by this Order shall immediately be distributed to Investors, on a pari passu basis by the Inspector.

Meeting of Carling Investors

7. A meeting of Investors as contemplated in paragraphs 5, 6, 7, 8 and 9 of the Order granted in these proceedings on October 4, 2007 is hereby dispensed with (and the Inspector is relieved of all obligations and duties imposed upon it in respect of such meeting).

8. The Inspector is authorized and directed to call, organize and convene a meeting of the Investors within 30 days of the granting of this Order, for the purposes of: (a) providing a general update on these proceedings and discussing the Reports of the Inspector filed in these proceedings; and (b) constituting the Investors' Committee (the "Meeting").

9. The Inspector shall preside as the chair of the Meeting and is exclusively granted the authority to determine the rules of procedure governing the Meeting.

10. The Inspector is authorised and directed to undertake and implement whatever steps are necessary for the proper calling, organization and conduct of the Meeting including, but not limited to, the making of rules for the Investors to vote either in person or by proxy, whether by show of hands or ballot or otherwise.

11. The Inspector shall report the results of the Meeting to this Honourable Court.

Transfer of the Airdrie Lands

12. Upon the Receiver filing a Certificate with this Honourable Court stating that the sale of the lands legally described as:

LINC 0014 705 884
PLAN 8311887
BLOCK 1
LOT 3
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 8.1 HECTARES (20.02 ACRES) MORE OR LESS

(the "Airdrie Lands") has closed substantially in accordance with the terms of the Settlement Agreement and all consideration due and owing in respect of such sale has been tendered to the Receiver (the "Airdrie Closing Certificate"), then subject only to the Airdrie Permitted Encumbrances (as that term is defined in the Settlement Agreement) related to the Airdrie Lands:

(a) the Airdrie Lands shall be vested in the name of the Airdrie Purchaser or its nominee free of all estate, right, title, interest, royalty, rental and equity of redemption of Carling and Integra, and all persons who claim by, through, under or against any of them in respect of the Airdrie Lands;

(b) Carling and Integra, and all persons who claim by, through, under or against any of them shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity of redemption of and in the Airdrie Lands and, to the extent that any such person remains in possession or control of any of the Airdrie Lands, they shall forthwith deliver possession of same to the Airdrie Purchaser or its nominee; and

(c) the Airdrie Purchaser shall be entitled to enter into and upon, hold and enjoy the Airdrie Lands for its own use and benefit without any interference of or by Carling and Integra, or any person claiming by, through, under or against any of them and/or any of the Airdrie Lands.

13. Until further Order of this Honourable Court, the Receiver shall hold back from the net proceeds from the sale of the Airdrie Lands an amount, to be determined by the Receiver,

sufficient to satisfy the claims of the caveator under instrument no. 071 069 102, and such sale proceeds shall stand in the place and stead of the Airdrie Lands transferred pursuant to this Order for the benefit of the referenced caveator and the claims of the referenced caveator (the "Airdrie Claim") shall attach solely to the sale proceeds retained by the Receiver with the same validity, priority and in the same amounts and subject to the same defences that were or may have been available when the Airdrie Claim attached to the property itself, and the Receiver is authorized to deal with the Airdrie Claim in accordance with the Claims Process Order granted in these proceedings on June 4, 2007 or October 4, 2007, as the case may be.

14. Nothing in this Order shall prejudice the claim of the referenced caveator against Integra or the net proceeds of sale held by the Receiver pursuant to the preceding paragraph.

15. The Receiver shall repay in full the mortgage registered against the Airdrie Lands as mortgage number 021 116 959 using the proceeds from the sale of the Airdrie Lands.

16. The Registrar of the South Alberta Land Titles Registration District be and is hereby directed that, upon being presented with a certified true copy of this Order and a copy of the Airdrie Closing Certificate, to cancel the registration of all builders' liens (and related certificates of lis pendens), charges, encumbrances and any other registrations registered against the Airdrie Lands rendering such lands free and clear of all estate, right, title, interest, royalty, rental and equity of redemption of Carling and Integra, and any persons claiming by, through, under or against any of them and/or any of the Airdrie Lands, other than the Airdrie Permitted Encumbrances, including the cancellation of the following interests:

(a) mortgage number 021 116 959 in favour of Canadian Western Trust Company and Integra Investment Service Ltd., registered against the Airdrie Lands on April 9, 2002;

(b) mortgage number 031 319 771 in favour of Supreme Mortgages Ltd., registered against the Airdrie Lands on September 18, 2003;

(c) certificate of Lis Pendens number 031 429 490 registered against the Airdrie Lands on December 10, 2003;

(d) order number 031 430 602 registered against the Airdrie Lands on December 11, 2003;

(e) caveat number 031 430 603 in favour of Carling Development Inc., registered against the Airdrie Lands on December 11, 2003;

(f) certificate of Lis Pendens number 041 032 958 registered against the Airdrie Lands on January 22, 2004;

(g) amending agreement 041 328 503 registered against the Airdrie Lands on August 31, 2004;

(h) caveat number 041 388 678 in favour of Edward Kendall and Nettie Kendall, registered against the Airdrie Lands on October 13, 2004;

(i) caveat number 041 461 338 in favour of Petro Plan Safety Ltd., registered against the Airdrie Lands on December 6, 2004;

(j) caveat number 051 098 849 in favour of 916866 Alberta Ltd., registered against the Airdrie Lands on March 24, 2005;

(k) caveat number 051 101 552 in favour of Michael J. Mackin, registered against the Airdrie Lands on March 30, 2005;

(l) order number 061 111 098 registered against the Airdrie Lands on March 16, 2006;

(m) caveat number 061 259 504 in favour of Vesta Properties (Alberta) Ltd., registered against the Airdrie Lands on June 28, 2006;

(n) caveat number 061 327 806 in favour of Roy Marshall Jennix, registered against the Airdrie Lands on August 14, 2006;

(o) caveat number 071 069 102 in favour of 619644 Alberta Limited, registered against the Airdrie Lands on February 10, 2007;

(p) caveat number 071 172 327 in favour of Ernst & Young Inc., registered against the Airdrie Lands on April 11, 2007; and

(q) caveat number 071 588 185 in favour of Victor Philippe Lalonde, registered against the Airdrie Lands on December 5, 2007.

Transfer of the Fort McMurray Lands

17. Upon the Receiver filing a Certificate with this Honourable Court stating that the sale of the lands legally described as:

LINC 0017 776 759
PLAN 9121064
BLOCK 1
LOT 4
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 0.74 HECTARES (1.83 ACRES) MORE OR LESS

(the "Fort McMurray Lands") has closed substantially in accordance with the terms of the Settlement Agreement and all consideration due and owing in respect of such sale has been tendered to the Receiver (the "Fort McMurray Closing Certificate"), then subject only to the Fort McMurray Permitted Encumbrances (as that term is defined in the Settlement Agreement) related to the Fort McMurray Lands:

(a) the Fort McMurray Lands shall be vested in the name of Carling Development free of all estate, right, title, interest, royalty, rental and equity of redemption of Integra and all persons who claim by, through, under or against any of them in respect of the Fort McMurray Lands;

(b) Integra and all persons who claim by, through, under or against any of them shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity of redemption of and in the Fort McMurray Lands and, to the extent that any such person remains in possession or control of any of the Fort McMurray Lands, they shall forthwith deliver possession of same to Carling Development ; and

(c) Carling Development shall be entitled to enter into and upon, hold and enjoy the Fort McMurray Lands for its own use and benefit without any interference of or by Integra or any person claiming by, through, under or against any of them and/or any of the Fort McMurray Lands.

18. The Registrar of the North Alberta Land Titles Registration District be and is hereby directed that, upon being presented with a certified true copy of this Order and a copy of the Fort McMurray Closing Certificate, to cancel the registration of all builders' liens (and related certificates of lis pendens), charges, encumbrances and any other registrations registered against the Fort McMurray Lands rendering such lands free and clear of all estate, right, title, interest, royalty, rental and equity of redemption of Integra and any persons claiming by, through, under or against any of them and/or the Fort McMurray Lands, other than Fort McMurray Permitted Encumbrances, including the cancellation of the following interests:

(a) order number 032 483 837 registered against the Fort McMurray Lands on December 11, 2003;

(b) caveat number 032 483 838 in favour of Carling Financial Corporation, registered against the Fort McMurray Lands on December 11, 2003;

(c) caveat number 042 447 611 in favour of Wallace Pearn and Elsie Pearn, registered against the Fort McMurray Lands on October 13, 2004;

(d) caveat number 052 109 786 in favour of 916866 Alberta Ltd., registered against the Fort McMurray Lands on March 24, 2005;

(e) caveat number 052 113 320 in favour of Michael J. Mackin, registered against the Fort McMurray Lands on March 30, 2005;

(f) caveat number 052 212 963 in favour of CVM Holdings Ltd., registered against the Fort McMurray Lands on May 31, 2005;

(g) caveat number 062 102 705 in favour of CVM Holdings, registered against the Fort McMurray Lands on March 7, 2006

(h) order number 062 120 104 registered against the Fort McMurray Lands on May 16, 2006;

(i) certificate of Lis Pendens number 062 355 494 registered against the Fort McMurray Lands on August 14, 2006;

(j) order number 072 202 571 in favour of Ernst & Young Inc., registered against the Fort McMurray Lands on April 11, 2007; and

(k) caveat number 072 708 205 in favour of Victor Philippe Lalonde, registered against the Fort McMurray Lands on December 5, 2007.

19. Until further Order of this Honourable Court, the Receiver shall hold all net proceeds from the sale of the Fort McMurray Lands and such net sale proceeds shall stand in the place and stead of the Fort McMurray Lands transferred pursuant to this Order, and all claims of whatsoever nature or kind, including without limitation, all liens, claims, encumbrances, proprietary claims, trust claims, lease claims, royalty claims and interests (the "Fort McMurray Claims") shall attach solely to the sale proceeds with the same validity, priority and in the same amounts and subject to the same defences that were or may have been available when the Fort McMurray Claims attached to the property itself, and the Receiver is authorized to deal with the Fort McMurray Claims in accordance with the Claims Process Order granted in these proceedings on June 4, 2007, or October 4, 2007, as the case may be.

20. Subject to the Claims Process Orders granted in these proceedings on June 4, 2007 and October 4, 2007, nothing in this Order shall prejudice any person's claim against Integra or the net proceeds of sale held by the Receiver pursuant to the preceding paragraph.

Role of the Inspector

21. The conduct and actions of the Inspector to the date of this Order are hereby confirmed and approved, and no Proceedings may be commenced against the Inspector or its legal counsel without leave of this Honourable Court first being obtained.

22. Ernst & Young Inc. is discharged, entirely and absolutely, from its role as inspector of Carling Financial Corporation and Carling Group Canada Inc. and no Proceedings may be

commenced against Ernst & Young Inc. or its legal counsel in connection with the inspectorship of those companies without leave of this Honourable Court first being obtained.

23. The role of the Inspector in respect of Carling Development is hereby amended and restated, without security, in accordance with the terms of this Order.

24. The Inspector is, in respect of Carling Development, hereby empowered and authorized to:

(a) monitor the business and affairs of Carling Development;

(b) terminate all existing bank accounts of Carling Development and establish such new accounts as may be necessary for the Fort McMurray Project and serve as one of the joint signing authority over all such accounts;

(c) establish an accounting of, and maintain the books and records of, the Fort McMurray Project from the date of this Order;

(d) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Inspector's rights and powers;

(e) participate with, and take direction from, the Investors' Committee;

(f) serve as the Chairperson of the Investors' Committee;

(g) report to, meet with and discuss with such affected persons as the Inspector deems appropriate on any matters relating to Carling Development or the Fort McMurray Project;

(h) report to the Court at least annually and also in the event:

(i) it is directed to do so by the Investors' Committee,

(ii) a material adverse event occurs in respect of the Fort McMurray Project, and

(iii) the Inspector deems it necessary or appropriate;

(i) register a copy of this Order and any other Orders in respect of this matter on any property of Carling Development, including the Fort McMurray Lands; and

(j) to take any steps reasonably incidental to the exercise of these powers;

and in each case where the Inspector takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including Carling Development, and without interference from any other person.

Investors' Committee

25. An Investors' Committee is hereby created to oversee Carling Development and the Fort McMurray Project and other matters as further set out in Schedule "A" to this Order.

Rights and Obligations of the Inspector and the Investors' Committee

Duty to Provide Access and Co-Operation

26. (a) Carling, (b) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (c) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order, shall forthwith provide the Inspector and the Investors' Committee with such information and material as they may reasonably request in the completion of their respective mandates hereunder.

No Proceedings Against the Inspector and the Investors' Committee

27. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Inspector, its legal counsel, or the Investors' Committee except with their written consent or with leave of this Court.

No Proceedings Against the Carling Parties or their Property

28. No Proceeding in respect of claims existing on or before the date of this Order against or in respect of the Carling Parties or their property shall be commenced or continued except with the written consent of the relevant Carling Party or with leave of this Court and any and all Proceedings currently under way against or in respect of any Carling Party or their property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any person from commencing a proceeding regarding a claim that might otherwise become barred by statute.

No Exercise of Rights of Remedies

29. All rights and remedies (including, without limitation, set-off rights) against the Carling Parties are hereby stayed and suspended except with the written consent of the relevant Carling Party or leave of this Court.

General

30. The Inspector, Carling Development and the Investors' Committee may from time to time apply to this Court for advice and directions in the discharge of its or their powers and duties hereunder.

31. Nothing in this Order shall prevent the Inspector from acting in any other role in respect of Carling.

Role of the Directors

32. The directors of Carling Development shall be restricted from exercising any of the following powers in respect of Carling Development except with the prior written authorization of the Investors' Committee:

(a) seeking any filing for protection from Carling Development's creditors;

(b) selling all or substantially all of Carling Development's property;

(c) arranging for any financing in excess of $5,000;

(d) the addition, removal, or replacement of any directors or officers of Carling Development;

(e) enter into any material contracts on behalf of Carling Development;

(f) issue, redeem, convert, or otherwise amend any equity or debt of Carling Development;

(g) pledge or encumber the credit (or the assets) of Carling Development in respect of any indebtedness related to Carling Development; and

(h) dealing with any realizations upon claims transferred to Carling Development by this Order, other than to distribute those realizations to Investors on a pari passu basis.

Professional Accounts

33. Any expenditure or liability which shall properly be made or incurred by the Inspector, including the fees of the Inspector and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Inspector and its counsel, shall be allowed to it in passing its accounts. All such expenditure or liability of the Inspector, including legal fees on a solicitor-and-his-own-client basis, together with all fees and disbursements of the Carling Parties' counsel, incurred at standard rates and charges, shall form a charge on the Fort McMurray Lands in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any person, except as specifically set out herein (the "Professionals' Charge").

34. The Inspector and its legal counsel shall pass their accounts from time to time.

35. Prior to the passing of its accounts, the Inspector shall be at liberty from time to time to apply reasonable amounts against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Inspector or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court. The Inspector is also directed to allow payment from time to time of the fees and disbursements, incurred at normal rates and charges, of counsel to the Carling Parties.

Charges

36. The Professionals' Charge, the Investors' Charge and the Fort McMurray Equity Charge be and are hereby approved, shall form a charge on all of the present and after acquired property of Carling Development, including the Fort McMurray Lands, and shall have the following priority:

(a) first, the Professionals' Charge;

(b) secondly, the Investors' Charge; and

(c) thirdly, the Fort McMurray Equity Charge.

37. The aforesaid charges shall also be subject to the terms and conditions ascribed to those charges in the Settlement Agreement and shall be valid, binding, and entitled to priority without the need for any registration or perfection thereof. This Order shall be registered against title to the Fort McMurray Lands.

38. The Receiver shall also be authorized to discharge this Order (and the charges created hereunder) in whole or in part from the title or titles comprising the Fort McMurray Lands upon terms acceptable to it, acting reasonably. Without limiting the generality of the foregoing, in the event of the condominiumization (or other subdivision) of the Fort McMurray Lands, the Receiver shall be entitled to partially discharge this Order from any resulting unit titles upon the sale of condominium units on terms acceptable to the Receiver. The Registrar of the North Alberta Land Titles Registration District be and is hereby directed that, upon being presented with a discharge in the form attached hereto as Schedule "B", it shall discharge this Order from that certificate, or those certificates, of title as referenced in such discharge.

39. The Receiver shall be authorized to postpone this Order (and the charges created hereunder) to any instrument or encumbrance upon terms acceptable to the Receiver and in accordance with section 5.5 of the Settlement Agreement. The Registrar of the North Alberta Land Titles Registration District be and is hereby directed that, upon being presented with a postponement in the form attached hereto as Schedule "C', to postpone this Order to the instrument(s) or encumbrance(s) as referenced in such postponement.

40. The Registrar of the North Alberta Land Titles Registration District shall accept this Order, and any discharge or subordination submitted by the Receiver pursuant to sections 37, 38, and 39, for registration against the applicable lands forthwith and notwithstanding the requirements of section 191(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4, as amended.

New Inspectorship Proceedings

41. The Inspectorship of Carling in these proceedings is ordered to be converted into a new Action, to be commenced by the filing of this Order.

42. The Style of Cause of the Inspectorship in the new action shall hereinafter be as follows:

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF SECTION 232 AND PART 18 OF THE
BUSINESS CORPORATIONS ACT, R.S.A. 2000 c. B-9, AS AMENDED

AND

IN THE MATTER OF THE INSPECTORSHIP OF CARLING DEVELOPMENT INC.

43. The Clerk of the Court is ordered and directed to commence a new Action and create a new Court file in respect of the new Action hereby created, and the Clerk of the Court is ordered and directed to file this Order as the commencing document in that new Action.

Miscellaneous

44. All parties shall bear their own costs in respect of this Application.

45. The Inspector, the Investors' Committee, the Carling Parties, the Receiver and the Airdrie Purchaser are at liberty to re-apply for such further advice, assistance and direction as may be necessary to give full force and effect to the terms of this Order.

46. Service of this Order is hereby dispensed with, except on parties on the Service List referred to in the Service Affidavits and on the parties completing the attendance sheet at this Application. Service of this Order upon such parties may be effected by facsimile transmission

or courier delivery and, where so effected, shall be deemed received on the date transmission was confirmed or the date when the courier was sent to the address of the recipient. Service effected as aforesaid shall be good and sufficient.

____
J.C.Q.B.A.

ENTERED this ___________ day
of _________________, 2008.

____
Clerk of the Court

SCHEDULE "A" TO THE APPROVAL ORDER

INVESTORS' COMMITTEE CHARTER

This Charter of the Investors' Committee is created pursuant to paragraph __ of the Order of the Court of Queen's Bench of Alberta, dated February __, 2008, in Action # 0601-09869, as may be amended from time to time (the "Order"). Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Order.

Purpose of the Investors' Committee:

1. The purpose of the Investors' Committee is to oversee the implementation, development and completion of the Fort McMurray Project and the monetization of the Fort McMurray Project by Carling Development and to oversee the activities of Carling Development in respect of the claims of Investors transferred to Carling Development by the Approval Order.

Membership and Eligibility of the Investors' Committee

2. The Investors' Committee shall be comprised of four individuals appointed by ordinary resolution of the Investors, the Inspector and a representative of Carling Development. To be eligible to serve on the Committee, each representative of the Investors must:

   (a) be eligible to serve as a director of a publicly traded ABCA corporation;

   (b) be an Investor in Carling;

   (c) subject to (b) above, not be related to Carling; and

   (d) not be a party to any contested action or proceeding by or against Integra or Carling.

Structure and Operations of the Investors' Committee:

3. The Inspector shall serve as the chairperson of the Investors' Committee. The Investors' Committee shall meet at such times and places as are determined by the Committee chairperson; provided that meetings may be called when deemed necessary or desirable by any member of the Investors' Committee or its chairperson. The Investors' Committee shall govern its affairs by a majority vote. The chairperson shall not have a vote. The Investors' Committee may request any officer or employee of Carling Development or the Company's outside counsel, independent auditors or other consultants to attend a meeting of the Investors' Committee or to meet with any members of, or consultants to, the Investors' Committee. Members of the Investors' Committee may participate in a meeting of the Committee by means of conference call or similar communications equipment by means of which all persons participating in the meeting can hear each other. Counsel to Carling Development and the Inspector, as well as any other person invited by the chairperson, may attend any meeting of the Investors' Committee.

The chairperson shall, except as specifically set forth herein or in the Order, establish quorums and set rules for the calling, holding and recording of meetings and the nomination and appointment of replacement members.

In the event of the resignation, death or inability of an Investors' appointee on the Investors Committee to carry on, the remaining members of the Investors' Committee may appoint another Investor as a replacement representative.

The Investors Committee shall be considered dissolved at the completion of the development and monetization of the Fort McMurray Project.

Delegation to Subcommittees:

4. The Investors' Committee may, in its discretion, delegate all or a portion of its duties and responsibilities to subcommittees of the Investors' Committee.

Resources and Authority of the Investors' Committee:

5. The Investors' Committee shall have the resources and authority appropriate to discharge its duties and responsibilities, including the authority to select, retain, terminate, and approve the fees and other retention terms of special counsel or other experts or consultants, as it deems appropriate, without further order of the Court.

Investors' Committee Responsibilities:

6. The Investors' Committee shall have the following powers:

(a) to receive and review all information it requests from Carling Development;

(b) to approve all material contracts, including without limitation all arrangements for the construction financing of, and general contract for, the Fort McMurray Project;

(c) to review the bank and financial statements of Carling Development;

(d) to approve all budgets and business plans of Carling Development;

(e) to give such direction as they deem appropriate to the Inspector and Carling Development;

(f) to apply to Court for such advice and direction as they may deem necessary or appropriate;

(g) such ancillary powers as may be necessary or appropriate to give full or better effect to the mandate and powers of the Investors' Committee;

(h) to oversee the activities of Carling Development in relation to any Investor claims transferred to Carling Development by the Approval Order, and the distribution of those realizations to Investors on a pari passu basis; and

(i) the Investors' Committee shall report to the Investors no less frequently than quarterly and in such other circumstances as the Investors' Committee deems necessary or appropriate.

SCHEDULE "B" TO THE APPROVAL ORDER

PARTIAL DISCHARGE OF ORDER

LAND TITLES ACT

CANADA	)
PROVINCE OF	)
ALBERTA	)

TO: THE REGISTRAR OF THE LAND TITLES OFFICE

ERNST & YOUNG INC. (the "Receiver"), of the City of Calgary, in the Province of Alberta, does hereby **[partially] [wholly]** discharge the Approval Order which was registered in the Alberta Land Titles Office on the • day of •, 2008, as Instrument No. •, as to the following lands only:

AS SET OUT IN THE ATTACHED SCHEDULE "A"

AND THAT the Receiver is the person entitled by law to discharge the said Order, and that the same is **[partially] [wholly]** discharged.

IN WITNESS WHEREOF the Receiver has executed this **[Partial]** Discharge of Order this ______ day of •, 20•.

ERNST & YOUNG INC.

Per: ____

SCHEDULE "C"

POSTPONEMENT OF ORDER

TO: THE REGISTRAR, ALBERTA LAND TITLES OFFICE

ERNST & YOUNG, INC., being the holder of the Approval Order, registered at the Land Titles Office as instrument number • on the • day of •, 2008, hereby agrees to the postponement of its rights in and to that land described as:

LINC 0017 776 759
PLAN 9121064
BLOCK 1
LOT 4
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 0.74 HECTARES (1.83 ACRES) MORE OR LESS

including all appurtenances, accessions and fixtures thereto

to the rights in and to a certain • which • was registered in the Land Titles Office on the • day of •, 2008, as instrument number •.

IN WITNESS WHEREOF **ERNST & YOUNG, INC.** has executed these presents this ____ day of •, 2008.

ERNST & YOUNG, INC.

Per: ________________________________

Action No. 0601-09869

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

VECKENSTEDT HOLDINGS INC., HERB VECKENSTEDT, FRED PIPER, JOAN PIPER, LIPOTH CONSULTING, AND PAUL LIPOTH

Plaintiffs

- and -

INTEGRA INVESTMENT SERVICES LTD. and RUNDLE DEVELOPMENT COOPERATIVE

Defendant

APPROVAL ORDER

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
30th Floor, Fifth Avenue Place
237 – 4th Avenue S.W.
Calgary, Alberta
T2P 4X7

Solicitor: David W. Mann/David LeGeyt
Telephone: (403) 268–7097/3075
Facsimile: (403) 268-3100
File: 131079-77

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TAB 2

30 C.B.R. (3d) 100, 3 O.T.C. 23

C 1995 CarswellOnt 43

Mortgage Insurance Co. of Canada v. **Innisfil** Landfill Corp.

MORTGAGE INSURANCE COMPANY OF CANADA v. **INNISFIL** LANDFILL CORPORATION

Ontario Court of Justice (General Division -- Commercial List)

Farley J.

Heard: November 16, 1994
Judgment: January 12, **1995**
Docket: Docs. 52941/90, B38/92

Counsel: J.L. McDougall, Q.C., and N.J. Emblem, for Price Waterhouse Limited, receiver and manager of Innisfil Landfill Corporation.

R. Lindgren, for Hodgsons.

Linda McCaffrey, Q.C., for Attorney General.

M. Green, for County of Simcoe.

C. Findlay, for Town of Innisfil.

K. Thomson, for Mortgage Insurance Company of Canada.

J. Coop, for Ministry of Environment and Energy.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver -- Duties.

Receivers -- Powers -- Court-appointed receiver entitled to give report and not required to swear affidavit.

A court-appointed receiver-manager, as an officer of the court, is not required to provide a sworn affidavit with its report. Only in unusual circumstances will other parties be allowed to examine the receiver-manager on any report.

Statutes considered:

Environmental Protection Act, R.S.O. 1990, c. E.19.

Ontario Water Resources Act, R.S.O. 1990, c. O.40 --

30 C.B.R. (3d) 100, 3 O.T.C. 23

s. 53

Planning Act, R.S.O. 1990, c. P.13.

Motion by receiver-manager for directions and advice; Cross-motion by Attorney General to quash report.

Farley J.:

Endorsement on Cross-motion and Motion

Endorsement on Cross-motion by Ministry of the Attorney General

1 Ms. McCaffrey says that she does not know the nature of the relief being sought -- and that, in failing to specify, the Receiver has breached the Rules and the Practice Direction. Over and above that she complains that there is no sworn affidavit from the Receiver.

2 Mr. Thomson, for Mortgage Insurance Company of Canada, ("MICC"), characterized the relief sought as being as plain as the nose on one's face. I agree -- but then perhaps the difficulty with that metaphor is that it requires one to take a look in the mirror. The objecting parties would have a difficult time in attempting to peer into the looking glass when they are doing an imitation of an ostrich. Alice in Wonderland in comparison looks like a normal regime.

3 The question in issue was put squarely and fairly in Mr. McDougall's letter of September 23, 1994 to Ms. McCaffrey, a copy of which other counsel have in the Compendium relating to Price Waterhouse Limited's ("PWL") obligations as Receiver and Manager ("R/M") relating to the forcemain and pumping station required by the Director's (Wilfred Ng) letter of September 16, 1994 in light of PWL's lack of funds in this receivership and what the Ministry of Environment and Energy's ("MOEE") position was towards that problem.

4 As to the Practice Direction, I am puzzled by counsel's reluctance to sign the Request Form since the time was cleared for what they understood would be a directions question. I am afraid that the litigation system would be badly served if, as a regular matter, opposing parties had to be served with a complete record before agreeing to dates.

5 As to the question of there not being any affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List -- cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-)examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

6 Motion by the Ministry of the Attorney General ("AG") to quash is dismissed.

Motion of Receiver ("PWL") for Directions

7 As Mr. McDougall said this morning, he put the R/M's request for advice and directions into as plain English as

he was capable. This is as follows:

> (a) Whether, having in mind the settlement reached on July 26, 1994, it is sufficient for Price Waterhouse Limited, ("PWL"), to install the Leachate Collection System alone before applying to the Court for a discharge and termination of the receivership;
>
> (b) If it is the Court's view that PWL is obliged to install a pumping station and forcemain system, how is such an installation to be financed?

8 I do not think that I had any difficulty in understanding this request for directions (of course the proof of that pudding will be in the eating and how the R/M reacts to my advice and directions herein). I must say, however, that I was more than somewhat dismayed to hear the reaction of those truly opposing the R/M since either they did not understand the request or they refused to try to understand it. The "answers" they came back with did not fit or even resemble the "questions". Perhaps it is that these parties have been fighting each other for too long. In this regard, I must reiterate my concern for the sake of public health and safety. People like the Hodgsons should not have become pawns in this game of chess. I share the Joint Board's concern (see Joint Board's May 14, 1994 clarification):

> Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation.

9 Allow me to note several items:

10 (a) The Settlement Agreement of July 26, 1994 provides:

> 1. PWL will remain as Receiver and Manager until the Leachate Collection System as described in the Development and Operations Report dated September, 1991 by Henderson, Paddon & Associates Limited is installed and operational.
>
> 2. PWL will cause the Leachate Collection System to be installed as soon as possible, the cost of such installation to be billed to the MOEE for payment out of the balance of the security fund established for the site.
>
> 3. [PWL also agreed to do capping measures as agreed on April 25, 1994 meeting.]

11 Thus the Settlement Agreement requires PWL to complete the Leachate Collection System and the capping. Not to do so would be a breach of the settlement by PWL (unless it had just legal cause). During the period of installing the Leachate Collection System to the stage of it being operational, PWL has also agreed to remain as Receiver and Manager. One however could see PWL as the operational phase neared reality obtaining a court date for a discharge and termination of the receivership. Under the wording of the Settlement Agreement it would appear that this motion would be heard at the same time as the adjourned MOEE motion and the Hodgsons' motion given the reference in para. 5 of the Settlement Agreement to a (singular) date to be agreed upon and fixed by the Registrar of this List.

12 (b) I was also referred to the Joint Board's decision of April 5, 1994 [reported at 13 C.E.L.R. (N.S.) 170 (Ont. Joint Bd.)], its clarification of May 13, 1994 and the Director's decision of September 16, 1994 (and attachments). I understand the draft decision of July 4, 1994 circulated amongst the parties to have been materially the same for all intents. I thought it quite helpful for Mr. Coop to give me a "précis" of the immediate history and jurisdiction.

13 I further understand that PWL's position is that there are no "funds" in the receivership, at least monies of the magnitude needed to carry out the subject work -- neither the Leachate Collection System which I recall is in the neighbourhood of $800,000 nor a fortiori the forcemain and pumping station, estimated at some $2.5 million. While apparently the AG and the MOEE dispute this impecuniosity of the receivership and reserve under the settlement the right to inspect the R/M's accounts on reasonable notice, it is also clear that the MOEE agreed because of the alleged impecuniosity that the Leachate Collection System would be billed to the security fund (but subject to a motion for reimbursement). Thus, it would appear to be reasonable to assume that the same funding problem still exists in the receivership absent any new information which has thus far not been forthcoming.

April 5, 1994 Order

14 (a) p. 36 -- If [PWL as R/M] cannot or will not comply with such an order then it can approach the Court and seek a termination of the receivership.

15 (b) p. 48 (i) Given the proximity of private property and significant natural features, [PWL as R/M] and/or the Ministry should implement proper leachate mitigation immediately. (ii) Duplicate of p. 36 cited above.

16 (c) p. 49 -- The Director has a legislated mandate to uphold the purpose and provisions of the EPA (*Environmental Protection Act*) and the OWRA (*Ontario Water Resources Act*). If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed.

17 (d) p. 50 -- The Joint Board "deferred" (this apparently means "delegated") the obligation to the Director to determine detailed requirements for a leachate collection and management system. Under 1d [PWL as R/M] and the MOEE were to report back to the Joint Board within 90 days as to progress on condition 1a, b and c. [This would imply that this report should have been by early July which would in turn imply that the Director would have given his decision prior to that time.]

May 13, 1994 Clarification

18 (e) The Board's [April 4, 1994] Order requires the implementation of a leachate management system and creates responsibility on the part of the Receiver and Manager of the Innisfil Landfill (Price Waterhouse Limited) to comply with this Order. The Board draws the attention of the parties to the following passage of s. A(4) of its April 5, 1994 Reasons for Rulings and Order [at pp. 220-221]:

> A(4) The [PWL as R/M] responsibility to comply with the relevant regulatory environment and legislation is confirmed by the cited authorities and paragraph 19 of the Court Order. Given the context of the receivership and the Certificates regulating the operation of the site, other responsibilities also exist. These responsibilities involve the development, approval and timely introduction of proper leachate management and the prompt pursuit of an EPA hearing for the expanded use of the site. In the Board's opinion, the proponent's responsibilities should be viewed within this context. After considering paragraphs 3 and 19 of the Court Order, the Board believes it is reasonable and appropriate to issue an Order that is consistent with the goals and provisions of the relevant legislation and regulatory regime (eg. EPA ss. 2 and 39, OWRA s. 26(1)). If the proponent cannot or will not comply with such an order then it can approach the Court and seek the termination of the receivership.

Price Waterhouse Limited, in its role as Receiver and Manager of the Innisfil Landfill, is required to implement the Board's April 5, 1994 Order. However, the Board believes that better leachate management should be promptly implemented even if Price Waterhouse Limited discontinues its involvement with the site. The Board's Reasons for Rulings contained the following relevant comment [at p. 221]:

> If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed. Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation ....

Director's Decision September 16, 1994

19 (f) p. 7 -- PWL will require a s. 53 OWRA approval to construct the forcemain. It should apply to receive that approval and whatever further and other approvals may be required (e.g. *Planning Act*, etc.). In the interim, there may be a need to dispose of the collected leachate through alternative means [trucked leachate to the Barrie WPCP agreed as acceptable interim solution].

20 (g) [Regarding PWL's counsel's inquiry of July 5, 1994 concerning the Ministry's responsibilities in this matter and the effect of the receivership order], the Director repeats his July 15, 1994 letter. This includes:

> again, as to the extent of, and reasons for, PWL's alleged financial inability to perform the work ordered by the Joint Board, those allegations did not prevent the Board from imposing liability upon PWL. Nor do I have a discretion to change the Board's Order based on these allegations. I suggest that the issue of financial liability is one which will be addressed on the motion to Commercial Court, and you should make your submissions there.

21 [The reference to this motion would appear to be the (adjourned by settlement of July 26, 1994) motion of PWL.]

Comments

22 In discussing this advice and direction I would wish to stress that I do not consider this to be an appeal of the Board's Order (including the deferred portion to the Director which apparently forms part of the Board's Order) nor a judicial review thereof. Nothing which I say herein should be taken or interpreted as such. I wish merely to provide PWL with its requested advice and directions as it is entitled to receive from this Court. To the extent that PWL has inside or outside the receivership incurred liability by virtue of operation of the environmental legislation or a decision of the Joint Board, I make no comment save the following. Some of the Board's language in its Order is so clear that it would be difficult to imagine that there could be other than a straightforward ordinary interpretation; in certain other areas there may be some question of precise intent (in this I mean no disrespect to the Board, as I am sympathetic enough as to the question of how to interpret [court] decisions including my own).

23 Given the various "invitations" contained in the foregoing, it would not appear that the Board was advancing the proposition that PWL could not apply to the Court for a discharge and termination of the receivership until any fixed time (either calendar of fulfilment of condition -- e.g. completion and operation of the collection system or of the forcemain and pumping station). Thus, it would appear that the Settlement Agreement obligations are the only barriers to such a court application. This would appear to answer Mr. McDougall's question(a).

24 As to (b), as I have answered (a) in the way which I have I do not see that if PWL were successful in its discharge and termination motion that it would be obliged to install the forcemain and pumping station in the direct physical or physical supervisory sense. The Board would appear to have concluded that if PWL cannot or will not comply with the Board's Order, it should approach the Court and seek a termination of the receivership. It would seem a necessary implication of a successful motion in Court that PWL after termination of the receivership would not be required to directly or supervisorily physically install the forcemain and pumping station.

25 Rather if PWL does not so install the system (apparently with or without a termination of the receivership) the Board expects the MOEE to install (directly or supervisorily physical) the system.

26 That leaves the question of funding to be answered. We have seen the funding arrangement for the collection system under the Settlement Agreement. What of the rest? It would seem that if PWL continues as R/M it would be obliged to not only physically install but also to fund the work because of the Order of the Board. If the MOEE installed physically the work, then one would assume that the MOEE would initially fund it but it may well pursue PWL for reimbursement (either because it feels there are "excess" receivership funds which should have been available or because PWL has a continuing obligation under the environmental legislation or the Board Order notwithstanding the termination of the receivership).

27 That last aspect would appear to be a somewhat open question. There are parts of the Board's Order which impose an obligation on PWL but it is to me at least somewhat unclear as to whether this liability affixes to PWL (i) in its general entity capacity (and is thereby ongoing no matter what happens to the receivership) or (ii) in its R/M capacity. In this latter position, there also seem to be two paths -- (A) that a termination of the receivership and a discharge of PWL as R/M would relieve it from any ongoing responsibility not then accrued or (B) responsibility is to be fixed upon it as a result of it having been R/M at the time of the Board Order, which responsibility is not in the Board's view (and within what it sees as its jurisdiction) terminated by a Court termination of the receivership and a discharge of PWL as R/M.

28 While it appears clear that the Court Order appointing PWL as R/M contemplated in para. 11 that PWL's liability as R/M would be limited to net cash proceeds of the receivership, it may be that the Board in the proper exercise of its jurisdiction or the environmental (or other) legislation affecting the situation may impose a greater liability upon PWL. It would seem to me that PWL may find it helpful to ask for a further clarification from the Joint Board. It may be that once my endorsement has been typed up it would be of some assistance in pinpointing the areas of concern.

29 As discussed in the hearing one should clearly differentiate between the liability to do something and the liability to provide funding for it. Then there is the difference between a primary responsibility and a secondary one which comes into play if the person with the primary fails to do something on a timely basis. This later aspect also carries with it the principle of reimbursement.

30 I believe the Board is as concerned as I am that the squabbling between the MOEE/AG and PWL continues at a faster and greater rate than the physical implementation of the required systems needed for public health and safety. Cooperative efforts are far more productive; non-cooperative efforts merely raise the suspicions of the innocent party as to all future dealings (but then some always claim to be innocent and the other side non-innocent notwithstanding the overwhelming objective evidence to the contrary). I am, however, delighted to hear that notwithstanding this blowup both the MOEE/AG and PWL report that implementation of the Settlement Agreement is proceeding in a bona fide way with due dispatch.

31 In conclusion, I would merely observe that it is most helpful if the obligations of receiver/managers are spelled out (so that they can be easily known by the receiver/manager) in order that there be no unpleasant surprises of unexpected liabilities, especially if there is no realistic way to fund same. While that may be the hard result in a particular case, no doubt the law of economics (as well as fair play) will take over and there will be an absence of willing potential receiver/managers available to go into situations where they are needed. Who then will be available? Who then will be appropriately qualified? It is, of course, one thing to have a system or regime which works well -- but only on paper and another which works well in practice.

32 It should be remembered that "once bitten, infinitely shy".

33 Costs: PWL awarded $1,500 payable forthwith by MOEE/AG. I see no reason why Ms. McCaffrey could not have more cooperativelyattempted to discuss and answer to the extent feasible and reasonable the aspects of Mr.

McDougall's letter of September 23, 1994.

34 Postscript: The Board referred to paras. 3 and 19 of the Court Order. I presume this is the Order of Granger J. dated August 13, 1990. If so, I have some difficulty in relating para. 3 which appears to deal with PWL being able to examine persons under oath to be linked with PWL's responsibility under the Board's Order but I may be missing something quite obvious. As to para. 19, at first blush this would appear to relate directly to the Court Order being a *non-impedance* of the MOEE in carrying out its duties and not directly impose liability or responsibility upon PWL although I note that of course PWL as Receiver and Manager may well have some liability by virtue of its activities and the legislation referred to of the EPA and the OWRA. Again, I note that I may be missing something obvious.

Order accordingly.

END OF DOCUMENT

TAB 3

2004 ABQB 423

C2004 CarswellAlta 810

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society

Edmonton Region Community Board (Plaintiff) and Aboriginal Partners & Youth Society (Defendant)

Alberta Court of Queen's Bench

Lee J.

Heard: April 28, 2004
Judgment: June 7, 2004
Docket: Edmonton 0403-02888

Counsel: Gordon R. McKenzie, Q.C. for Plaintiff

Douglas C. Hodgson for Defendant

Laurie I. Wood for Five Individual Clients of the Applicant Society Who Have No Guardians, and Three Other Individuals Who Do Have Guardians

Reeva Parker for Office of the Public Guardian

Bryan J. Kickham for Receiver, PricewaterhouseCoopers Inc.

Subject: Corporate and Commercial; Civil Practice and Procedure

Business associations --- Legal proceedings involving business associations -- Practice and procedure in actions involving corporations -- Discovery -- Interrogatories.

Debtors and creditors --- Receivers -- Actions by and against receiver -- Practice and procedure -- General principles.

Cases considered by Lee J.:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) -- followed

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 414, 2004 ABQB 202 (Alta. Q.B.) -- referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners &

Youth Society (2004), 2004 ABQB 222, 2004 CarswellAlta 371 (Alta. Q.B.) -- referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 337, 2004 CarswellAlta 557 (Alta. Q.B.) -- referred to

Lee J.:

1 I have previously dealt with this matter in written Reasons dated March 11, 2004, March 24, 2004, and April 30, 2004, now reported at *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 202 (Alta. Q.B.), *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 222 (Alta. Q.B.), and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) respectively.

2 In this present application, counsel for the Aboriginal Partners & Youth Society ("Society") and counsel for five individual clients of the Applicant Society who have no guardians and three other individuals who do have guardians, have submitted 62 and 23 questions respectively that they seek to have answered by way of written interrogatories put before the Receiver.

3 Counsel for the Edmonton Region Community Board ("funding Board"), and counsel for the Receiver both object to these written interrogatories.

4 The present issue before me is whether the Society and counsel for certain named individual(s) can cross-examine the Receiver under oath.

5 Counsel for the funding Board had previously examined the Receiver without objection from the Receiver.

6 The Receiver now objects to answering these further questions from the Society and from the named individual(s). The Receiver points out that it is an officer of the Court, and believes that these questions are aimed at establishing the basis for a lawsuit against the Receiver by the Society. The Receiver submits that the Society should issue a Statement of Claim against it, and ask its questions as part of discoveries.

7 The Society and the named individual(s) submit that the funders have already had an opportunity to examine the Receiver, and they should have that option too.

8 The Society acknowledges that they may sue the Receiver at a later date, but that no definitive decision in that regard has been made as of yet. The named individual(s) may also take further steps against the Receiver in the future.

9 The funding Board objects to the Receiver being asked any further questions because of the pejorative nature and objectionable purpose of the questions. The funding Board points out that their questions truly sought out specific, and limited, pieces of information, unlike the present questions.

10 The funding Board points out that they would be paying the Receiver large amounts of money to answer unnecessary and improper questions. The funding Board had previously sought the Receiver's discharge, a matter that has been held in abeyance pending this decision on whether these further questions should be answered.

11 Both the funding Board and the Receiver submit that only legitimate questions clarifying statements made in the Receiver's Report, or questions about the operation of the Society by the Receiver should be permitted, but even

then only on the basis of what specific conduct of the Receiver is being questioned.

12 The funding Board also argues that if the Court directs that questions be answered, the costs involved in having those questions answered should be born by the questioners.

13 Ms. Parker for the Office of the Public Guardian takes no position with respect to this application.

Conclusion

14 I have now had an opportunity to review the questions put forward by counsel for the Society and counsel for certain named individual(s).

15 As I had previously allowed counsel for the funding Board to ask the Receiver certain questions by way of written interrogatories, the process while exceptional in nature, does not procedurally bother me. The Receiver also was happy to answer Mr. McKenzie's questions put to him by way of written interrogatories.

16 When these matters were first raised on April 28, 2004, I agreed that I would consider the questions proposed by the Society and by the named individual(s) of the Receiver, so as to be procedurally fair.

17 Farley J. in *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) approved the concept of cross-examining Receivers in some unusual cases as follows in paragraph 4: -

> 4. See *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List])) at pp. 101-2 where I stated:
>
>> As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel). Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-)examination when the Receiver is willing to clarify or amplify his material when such is truly needed. [emphasis added]
>
> The jurisprudence which I referred to included *Silver. v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.) and *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. AQ.B.) at p. 30. See also paper "Canadian Airlines - The Last Tango in Calgary" by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

18 The overriding purpose of the present list of 62 questions submitted by the Society, and 23 questions submitted by counsel for certain named individuals, seems generally however to be significantly different from those questions previously put by Mr. McKenzie on behalf of the funding Board.

19 Mr. McKenzie's 19 questions dealt with fairly straight forward matters such as whether or not the Receiver was provided with the Society's Minute Book, and whether or not there was any record in the Minute Book of Annual General Meetings of the Society and other meetings of the Society.

20 Clearly Mr. McKenzie's questions fall within Farley J.'s reference to "cooperation, communication and common sense."

21 It is also obvious that the funding Board having sought the appointment of the Receiver was not likely to sue the Receiver at a later date. The same can not be said about the Society which has acknowledged that it could launch a lawsuit against the Receiver; or about the named individual(s) who have always sided with the Society.

22 Whatever the possible underlying intention of the Society may be, I still have no difficulty with respect to questions that constitute a legitimate effort to bring forward information related to statements made by the Receiver in his Reports to the Court.

23 However while the Society, and while the named individuals through their counsel, have put forward some material before the Court previously alleging misconduct in the receivership, they have not provided me with a firm basis for most of the questions that they now propose to ask the Receiver by way in written interrogatories. Accordingly it is difficult to understand the context or basis as to why some of these questions need to be answered.

24 Furthermore cross-examining a Receiver is still an exceptional circumstance, and Receivers generally should not be subject to harassment for doing their job, even though most Receivers in doing their jobs usually offend the party against whom the receivership is ordered.

25 Also the examination of the Receiver should not be tantamount to a fishing expedition, or allow the disgruntled parties to establish the basis for their lawsuit(s) against the Receiver, at the cost of the Plaintiff funding Board which applied in the first place to have the Receiver put in place.

26 Applying these tests, I conclude that the following questions provided to me by the Society can be asked of the Receiver by way of written interrogatories: -

> 1. From whom were the "certain allegations", as indicated in the First Report of the Receiver/Manager dated February 27, 2004, made as against Aboriginal Partners & Youth Society ("APYS") and its President, Ms. Tracey Stevens, derived?
>
> 2. What steps did the Receiver/Manager take to manage and operate the business of APYS?
>
> 3. What steps did the Receiver/Manager take to provide care for the residents in the group homes and the participants in the vocational programs operated by APYS?
>
> 4. Whom did the Receiver/Manager interview?
>
> 5. Can the Receiver/Manager identify which client file was missing, and enumerate other "important records" which were missing?
>
> 6. Has that client file been located, and have the other "important records" been located?
>
> 7. Has the Receiver/Manager determined for what purpose the "average in excess of $48,000.00 per month" has been diverted?

14. What changes were implemented to the "in place" policies APYS?

15. If any changes were implemented to the "in place" policies, how were those changes relayed to APYS, following the discharge of PricewaterhouseCoopers ("PWC") in its capacity as Manager?

16. Did the Receiver/Manager inspect the individual living quarters of the clients?

17. Did the Receiver/Manager allow any other individuals into the individual client's living spaces? If so, whom?

21. Did the Receiver/Manager pay its employee, Bill Glover, from APYS monies? If so, why?

24. Provide copies of all records provided by Donna Morasse or Lisa Harder, including written documents and electronic documents.

25. Why did the Receiver/Manager interview Lydia Molinara; Did she deny being a Board member?

29. When did the "critical incident" occur that is referred to in the Receiver/Manager's preliminary report?

30. Did the Receiver/Manager review the Executive Director joy description?

31. What was the tenor of the questions asked and answered by Vicki Cowan, Donna Morasee, Lisa Harder and others involved in the interview process?

32. Did the Receiver/Manager interview clients about health and safety concerns?

36. Why did the Receiver/Manager only interview certain Board members?

37. Was Vicki Cowan paid during the period when PWC was the Receiver/Manager?

38. Did the Receiver/Manager pay Nicole (?) monies without consulting the Board?

39. Why did the Receiver/Manager freeze the Royal Bank Account?

43. What steps did the Receiver/Manager take to the investigate the client incident when it was alleged that that client had a "broken arm"?

44. When did ERCB contact the Receiver/Manager to advise of need for receivership purposes?

45. Did the Receiver/Manager interview Fire Marshall and inspectors and insurance companies about the adequacy of Mukluk Manor and living conditions?

46. Why steps did the Receiver/Manager take to investigate all facts concerning the fire at Mukluk Manor?

47. Through what means did the Receiver/Manager determine that there was a high incidence of

"AWOL" activity prior to the interviews with staff and members of APYS?

48. Did the Receiver/Manager ensure that the clients of APYS were provided their "comfort monies" on a regular and timely basis?

49. Where did the Receiver/Manager obtain information that Mukluk should have four members according to contract and where did the Receiver/Manager find APYS's policy concerning two staffing in regard to Mukluk Manor?

50. What staff member allegedly told Tracey Stevens that there was inadequate staffing in homes?

52. Why did the Receiver/Manager not interview all Board members or other staff that had information about the allegations?

53. Did the Receiver/Manager investigate the conduct of former staff who made the complaints and allegations as against APYS?

54. How did the Receiver/Manager determine expenses used in the Budget?

56. What policies and procedures did the Receiver/Manager follow in regard to issues regarding client behaviour and care during PWC's position as Receiver/Manager?

57. Did the Receiver/Manager interview or contact any individuals in Grande Prairie in regard to APYS?

59. Was the Receiver/Manager provided with notice of any Board Meetings of APYS? If so, did the Receiver/Manager attend? If not, why not?

61. Where did the Receiver/Manager obtain Ofeenow files?

62. In its capacity as Receiver/Manager, what steps did PWC take to collect outstanding accounts receivable such as Nunavut or Little Red River Cree?

27 I have concluded that the remaining questions, namely 8, 9, 12, 13, 18, 19, 20, 22, 23, 26, 27, 28, 33, 34, 35, 40, 41, 42, 51, 55, 58 and 60 put forward by the Society do not appear to be directly related to statements made by the Receiver in its Reports to the Court.

28 Nor has the Society demonstrated a valid basis for these questions, in that the Society has not disclosed to the Court what the misconduct in the receivership covered by these impugned questions actually is. The Court cannot make a determination as to whether these questions should be examined upon without that context.

29 Finally a number of the questions described above appear to have as their primary purpose a fishing expedition designed to provide the basis for a claim against the Receiver, which questions should be asked after a Statement of Claim has been issued against the Receiver, and at the expense of the Society, not the funding Board.

30 Similarly questions 6 through 21 inclusive from Ms. Wood appear to relate to a specific incident that has nothing to do with any of the issues related to the Society which have been before the Court. Ms. Wood obviously feels that the Receiver acted improperly with respect to this incident, but she should seek her remedy elsewhere than through questions to the Receiver by way of written interrogatories.

31 Accordingly questions 6 through 21 submitted by Ms. Wood will not be asked of the Receiver.

32 The following questions 1, 2, 3, 4, 5, 22, and 23 listed below can be asked of the Receiver by counsel for the named individual(s): -

> 1. On what date did PricewaterhouseCoopers ("PWC") appointed as Receiver/Manager of the Aboriginal Partners & Youth Society (APYS)?
>
> 2. What were the parameters of such appointment?
>
> 3. Specifically, was PWC responsible for the day to day operations and care of the clients of APYS on February 28, 2004 and subsequent thereto?
>
> 4. Was PWC aware of the terms and conditions of the written contracts made between the various governmental authorities and funding agencies and APYS relating to ongoing care, custody, control, supervision and protection of clients of APYS?
>
> 5. Was PWC aware of the various group homes being operated by APYS in and around the City of Edmonton, Alberta, including the two "intake residences"?
>
> 22. Was PWC aware of the "sensitive" nature of moving the APYS clients from one location to another having regard to the clients' emotional instability?
>
> 23. What steps did PWC take to ensure that advising the APYS clients that they were to be moved was handled in a competent and professional manner?

33 I have also seriously considered the funding Board's submission that the questions that the Court has directed be answered by the Receiver be at the cost of the questioner. In normal circumstances where there is a commercial receivership of a business for example where the rationale behind the questions appears to be the pursuit of some private interest, and where the questioner has some financial resources, I might well accede to the funding Board's request.

34 However in this case the Court is well aware that neither the Society, and certainly not the named individual(s), have any funds at their disposal to possibly afford the Receiver's rates. The Court is already aware through its involvement in this case that the Receiver has submitted accounts as high as $100,000.00 every month in this matter, and the Society and the named individual(s) clearly are in no position to pay the Receiver at the Receiver's hourly rates.

35 As such I am directing that the Receiver answer the questions approved above in these Reasons for Judgment, at the expense of the funding Board who put the Receiver in place initially, and that the answers to these questions be provided within a reasonable time as soon as possible.

36 If counsel for the Society, and/or counsel for the named individual(s), wish to provide me with a proper basis or foundation for the disallowed questions, I am prepared to entertain their application on notice to all parties.

37 I will require the Society's or the named individual(s)', specific basis for believing that there was misconduct in the receivership or by the Receiver, and an application specifying the remedy available or the remedy being sought. The Court can then determine whether any of these remaining question(s) should be answered.

END OF DOCUMENT

TAB 4

2007 ABQB 326, 32 C.B.R. (5th) 78, [**2007**] A.W.L.D. 2616

2007 CarswellAlta 638

Big Sky Living Inc., Re

In the Matter of the Proposed Bankruptcy of Christopher Anthony Maschek

Alberta Court of Queen's Bench

D. Lee J.

Heard: April 10, 2007
Judgment: May 15, 2007
Docket: Edmonton BK03-97916

Counsel: Roger C. Stephens for Applicants, Peter Leduc, Norman Sequin

J.H. Hockin for KPMG Receiver of Big Sky Living Inc., HSBC Bank Canada

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Debtors and creditors --- Receivers -- Conduct and liability of receiver -- General conduct of receiver

Debtor company was placed into receivership -- Debtor's assets included condominium property -- Court approved agreement whereby receiver would sell property lots to purchaser for sum of $53,000.00 per lot -- Agreement mandated that two lots could be purchased every month -- Receiver agreed to extend life of agreement by six to eight months after purchaser fell behind on agreed purchase schedule -- Shareholders applied for order to enjoin receiver to list lots and sell them to highest bidder -- Court refused to adjudicate matter until receiver filed report -- Shareholders brought application for leave to cross-examine receiver on new report -- Application dismissed -- Receiver was not required to seek further guidance from court once purchaser fell behind purchase schedule -- Receiver was within powers to extend purchase agreement -- Agreement did not have explicit expiry date or termination date -- Receiver made reasonable business decision not to trigger default clauses in agreement when lots fell in arrears -- Shareholders would retain no benefit from sale of lots to highest bidder -- Selling lots would not produce enough funds to even pay creditors in line before shareholders.

Cases considered by D. Lee J.:

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) -- considered

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) -- considered

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) -- considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135 (Ont. C.A.) -- considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

APPLICATION by shareholders for leave to cross-examine receiver on new report.

D. Lee J.:

The Application

1 The Applicants Peter Leduc and Norman Seguin applied by Notice of Motion filed on December 21, 2006 for an Order enjoining the Court appointed interim Receiver of Big Sky Living Inc. from completing the disposition of certain lands; requiring the Receiver to obtain an appraisal on those lands; and asking the Court to grant an Order to list the lands and sell them to the highest bidder.

2 The application was returnable on January 9, 2007, and I decided on that date that no relief would be granted to the Applicants until the Receiver filed the Report addressing the issues arising from the Applicants' motion. After the Receiver's report was completed, the Applicants then reapplied on April 10, 2007 for leave to cross-examine the Receiver on this recently released Fifth Report.

3 The Applicants seek to cross-examine Tim Reid of KPMG on the Fifth Report as part of their application for an Order suspending the sale of the lots that are the subject of the receivership. Although I refused tog rant their stay request it is their position that the agreement which governed the sale of the lots generally was controlled by Court Order, and that that agreement expired and was never renewed or extended by this Court. Accordingly the Applicants submit that the lots in question have been sold for a considerable period of time at prices far below market value, and that this Court will eventually be asked to rule on the propriety of those sales.

4 The Applicants argue that all of the circumstances surrounding the Receiver's control and dealings with respect to these sales should be analyzed, especially since the Fifth Report provides considerable information with respect to these developments over the past few years. It is submitted that for the Court to make a fully informed decision on these matters, the Receiver should be cross-examined on the Fifth Report so that all relevant information can be available.

Analysis

5 Pursuant to the Order of Dea, J. granted in this Court on January 22, 2003, entered March 10, 2003, the Court approved an agreement whereby the Receiver would sell the duplex/triplex lots that are the subject matter of this receivership to one 416099 Alberta Ltd. for the sum of $53,000.00 per lot, and that two lots would be purchased every month. The term of this Agreement was for a period of thirty months from the date the Receiver notified 416099 Alberta Ltd. that the Condominium Plan governing this development had been registered. The Order provided that a formal Purchase and Sale Agreement could be executed.

6 A formal agreement was entered into by KPMG and Ashton Homes Ltd. ("Ashton") as of May 8, 2003. This

Agreement confirmed the price of $53,000.00 and the term of thirty months as set out in the interim agreement which was approved by Justice Dea's Order. The formal agreement also provided that all the lots would be purchased by the end of July 2005.

7 In March 2005, KPMG wrote to Ashton and HSBC Bank Canada confirming that Ashton was in breach of the agreement and proposing an amendment and extension of this agreement to May 2006 and an increase in the purchase price to $53,500.00. There is no indication that the Applicants Messrs. Seguin and Leduc were notified of these developments at that time.

8 In correspondence dated July 22, 2005, Tim Reid, of KPMG, advised Simons & Stephens the Applicants' lawyers that the agreement was in existence until December 31, 2005; that Ashton was six to eight months behind; and that KPMG had tentatively agreed extend the agreement a further eight to twelve months. Mr. Reid indicated that Simons & Stephens should advise if it had any concerns in this regard.

9 In correspondence dated August 16, 2005, Simons & Stephens stipulated that their clients Messrs. Seguin and Leduc did not want the agreement with Ashton renewed unless Ashton agreed to pay $75,000.00 per lot and interest on the lots not yet paid for. It was also noted that the price of housing had increased dramatically over the previous three years, and that Ashton was selling the homes for approximately fifty percent more than they were in 2002 and 2003.

10 In reply correspondence dated September 15, 2005, Mr. Reid indicated that a reliable appraisal was difficult to obtain, and asked if Messrs. Seguin and Leduc had any evidence substantiating an increase in the lot prices. Mr. Reid also stated at page 2 of his letter that "If your client is not agreeable to amending the Agreement and continuing with Ashton please advise by October 7, 2005, as we will seek the Court's approval to amend the agreement."

11 In correspondence dated October 7, 2005, Simons & Stephens advised KPMG that Messrs. Seguin and Leduc would not agree to a continuation of the existing agreement, and enclosed documentation respecting the value of similar condominium developments.

12 KPMG apparently did not reply to Simons & Stephens' correspondence. There is no indication that KPMG ever re-attended at Court to obtain approval to amend the agreement, as indicated in the September 15, 2005 correspondence.

13 KPMG indicated in the Fifth Report at page 7 that it had verbally agreed that Ashton could continue to "take up lots under the Agreement", and that "the Agreement was never terminated."

14 In mid and late October 2006, there were additional communications between KPMG and counsel for the Applicants wherein it was once again brought to the attention of KPMG that these parties were of the opinion that the lots were being sold for far less than market value and that Ashton was in default.

15 Notwithstanding these protests, KPMG entered into another agreement with Ashton respecting the sale of the lots on November 30, 2006, which stipulated that the lots could be purchased for $54,000.00. Messrs. Seguin and Leduc were first provided with this agreement in the Fifth Report.

16 KPMG has included in the Fifth Report an unsigned Memorandum from Raymond Wilk to the file detailing certain steps taken to value the lots, and a copy of unsigned correspondence apparently presenting an offer to purchase the outstanding lots.

17 The Applicants are of the opinion that the improprieties in question relate to the failure of KPMG to re-attend at Court and explain why the Order of Dea, J. should be amended or extended to allow for the continued sale of lots

to Ashton, especially after KPMG specifically indicated that it would do so.

18 It is submitted that KPMG was, and remains, in breach of Justice Dea's Order in continuing to sell lots to Ashton after July 31, 2005 -- the deadline set forth in the formal Agreement of Purchase and Sale. It is submitted that KPMG acted in an improper manner in failing to obtain top dollar for the sale of the lots given the increase in the real estate market between 2001 and 2007, and the evidence of this increase presented by Seguin and Leduc to KPMG in both 2005 and 2006. It is submitted that The Fifth Report contains no explanation as to why KPMG failed to re-attend at Court and report on the default of Ashton and seek an extension of the agreement.

19 The Fifth Report mentions, at Page 6, that KPMG "had discussions with Ashton regarding rectifying the default", but that KPMG "never formally in writing terminated the Agreement." KPMG does not however allegedly identify the basis whereby it was entitled to amend and extend the Agreement, or outline the steps which were taken to continue the Agreement. The Fifth Report merely sets out that there were certain discussions between KPMG and Ashton; encloses a number of letters relating to the defaults; and concludes that the Agreement continued. It does not contain particulars of the negotiations between the parties and the decisions made to continue selling lots to Ashton.

20 It is submitted that the Fifth Report contains vague information relating to the steps taken by KPMG to properly assess the value of the lots. There appear to have been a couple of telephone calls to an appraiser and to businessmen who may or may not have shown interest in the lands. However it is submitted that there are insufficient or no particulars of when these calls were made; how KPMG came to be involved with these parties; what other research or steps were taken verify what KPMG had learned; how the decisions were made to accept this information and who made those decisions; and how KPMG dealt with the evidence provided by Seguin and Leduc regarding the increase in land prices

21 The Applicants request permission to question the Receiver on matters concerning the decision-making process governing the continued dealings between KPMG and Ashton; the relationship between the actual individuals making the decisions; Ashton's reasons for the initial and continuing default; the negotiation process which led to the "continuation" of the agreement; and the initial decision to seek the Court's permission for the extension of the Agreement and the later decision to apparently forego the promised application.

22 Similarly it is submitted that the limited steps taken to maintain a current valuation of the lands and ensure the timely sale of the lots and construction of homes thereupon warrant detailed inquiry. For example the Applicants would like to examine the Receiver on the position of Ray Wilk and his qualifications; how the Receiver came to contact Guy Bourgeois respecting the value of the lots; what the Receiver did in response to the evidence of the increased value of the lots as provided by Seguin and Leduc; whether or not any inquiries were made of Ashton as to why the prices of the homes being built upon the lots were increased; whether any other realtors were contacted by KPMG respecting marketing the development; whether any other builders were contacted with respect to taking over the development; and what problems or flaws may or may not have been associated with the development which would diminish the value of the lots and justify continuing to deal with Ashton.

23 The Applicants submit that the nature of the concerns and improprieties does not lend itself to a list of interrogatory-style questions. The Applicants at my request have submitted the following written questions. The Applicants ask that the Court however also give them the opportunity to expand upon and explore these relevant questions and areas at a cross-examination of the Receiver: --

1. Why did the Receiver never give Ashton formal notice of its default?

2. Who did the Receiver deal with at Ashton?

3. Which individual or individuals associated with the Receiver did Ashton deal with?

4. The Receiver indicates that Ashton assumed many obligations of the Receiver (Page 5, Article 3): What obligations did it assume, what was the value of these obligations, and how much money was saved?

5. The Receiver indicates that there were discussions with Ashton respecting its default (Page 6, Paragraph 2). Please provide particulars of the discussions with Ashton respecting its default. In particular, who spoke to whom, when, why, what was discussed, what was agreed upon, were any notes made or other records created, and if so please produce said notes and records.

6. In July of 2005, there was a verbal agreement to increase the purchase price to $54,000.00. Please provide particulars of the discussions with Ashton respecting this agreement. In particular, who spoke to whom, when, why, what was discussed, were any notes made or other records created, and if so please produce said notes and records.

7. Please provide the same information requested in Questions 5 and 6 above respecting the dealings with HSBC Bank Canada.

8. Why were Messrs. Seguin and Leduc never consulted respecting the issues raised by the developments outlined in Questions 5, 6, and 7 above?

9. Why did the Receiver disregard the objections of counsel for Seguin and Leduc as set forth in the correspondence of Simons and Stephens of 2005 and 2006?

10. Why did the Receiver not bring a Court application to extend the agreement after promising to do so? Who made the initial decision to make that application, when and why, and who decided to forego the application, when and why. Please produce any notes and other records relating to these two decisions.

11. Please comment on why the Receiver failed to accept Peter Leduc's offer to purchase all the lots for the same amount the Receiver was collecting from Ashton, and why it continued to sell lots to Ashton for $54,000.00, when it was demanding more money from Peter Leduc. Please provide notes and other records respecting the meeting between Peter Leduc and the Receiver.

12. On the matter of the valuation of the lots, please provide particulars of all dealings with Guy Bourgeois and all other individuals associated with their valuation. In particular, who did the Receiver deal with, why, when, what was discussed, who was involved in the discussions, and what decisions were made. Please also provide all notes associated with these discussions and dealings.

13. Why was it so difficult to obtain a proper valuation of the lands in question, especially considering that these lands had been originally appraised back in 2001. Why was it possible to appraise the lands in 2001 and impossible thereafter?

14. Please provide particulars of what steps were taken to obtain comparable sales of the lots. Who were the two parties that expressed interest in the fall of 2006? What was the nature of KPMG's past relationship with these parties and/or their principals? Did they or their principals ever buy other properties from KPMG? If so, when and what? Were there any other parties which expressed interest in developments such as the Big Sky development and could have potentially purchased the lots? If so, when and why were these opportunities not pursued?

15. Why were no Receiver reports prepared between September 22, 2003, (the date of the Fourth Report) and January 12, 2007, given the defaults of Ashton and the continued sale of lots at 2001 prices?

24 Also at my request, the Receiver has provided written answers to these proposed questions as follows: --

1. Why did the Receiver never give Ashton formal notice of its default?

The reasons are clearly set out in the Receiver's Fifth Report on pages 7 and 8.

2. Who did the Receiver deal with at Ashton?

Mr. Doug Glowicki.

3. Which individual or individuals associated with the Receiver did Ashton deal with?

Mr. Tim Reid.

4. The Receiver indicates that Ashton assumed many obligations of the Receiver (Page 5. Article 3): What obligations did it assume, what was the value of these obligations, and how much money was saved?

The obligations assumed by Ashton that would otherwise have been the responsibility of the Receiver are set out in Section 4 of the Construction Agreement attached as Appendix I to the Receiver's Fifth Report.

5. The Receiver indicates that there were discussions with Ashton respecting its default (Page 6, Paragraph 2). Please provide particulars of the discussions with Ashton respecting its default. In particular, who spoke to whom, when, why, what was discussed, what was agreed upon, were any notes made or other records created, and if so, please produce said notes and records.

All discussions the Receiver had with Ashton regarding the default are disclosed in the Receiver's Fifth Report.

6. In July of 2005, there was a verbal agreement to increase the purchase price to $54,000.00. Please provide particulars of the discussions with Ashton respecting this agreement. In particular, who spoke to whom, when why, what was discussed, were any notes made or other records created, and if so, please produce said notes and records.

All discussions in this regard were between Tim Reid and Doug Glowicki. All particulars of the discussion are disclosed in the Receiver's Fifth Report.

7. Please provide the same information requested in Questions 5 and 6 above respecting the dealings with HSBC Bank Canada.

This is not a question to clarify information in the Receiver's Report. Therefore, it is not appropriate to respond.

8. Why were Messrs. Seguin and Leduc never consulted respecting the issues raised by the developments outlined in Questions 5, 6 and 7 above?

Notwithstanding the Receiver's efforts to contact Mr Seguin, Mr Seguin has never once attempted to contact the Receiver nor did Mr Seguin respond to the Receiver's request for certain information regarding hinds transferred to a personal bank account from a Big Sky bank account. As noted in the Introduction of the Fifth Report, the Receiver filed its Second Report in connection with an application for advice and direction regarding a purported redirection of a GST refund of approximately $50,000 from a Big Sky bank account to a bank account of Norman Seguin. We continue to pursue litigation to recover these funds from Mr. Seguin. We have had numerous discussions with Mr. Leduc and have always provided written responses to Mr. Leduc's counsel as evidenced by the various correspondence appended to the Receiver's Fifth Report. Mr Leduc and Mr. Seguin were notified of the application to sell the lots to Ashton.

9. Why did the Receiver disregard the objection of counsel for Seguin and Leduc as set forth in the correspondence of Simons and Stephens of 2005 and 2006?

The reasons for proceeding as the Receiver did are set out fully in the Receiver's Fifth Report.

10. Why did the Receiver not bring a Court application to extend the agreement after promising to do so? Who made the initial decision to make that application, when and why, and who decided to forego the application, when and why. Please produce any notes and other records relating to these two decisions.

The Receiver did not promise to bring a Court application to extend the agreement There is nothing nefarious about the Receiver not bringing ap application to amend the agreement. The Receiver did not want to lose its negotiating position with Ashton, by putting in a public forum the very reason why the Receiver wanted to continue with the Ashton Agreement (see page 7 of the Report). The Court's approval was in fact not required to amend the Agreement and, in the Receiver's opinion, it was not in the Estate's best interest to precipitate a dispute with Ashton and to put that dispute into a public forum. The Order approving the sale gave the Receiver the power to execute such further documents including without limitation a formal Purchase and Sale agreement, as may be necessary to carry out the sale.

11. Please comment on why the Receiver failed to accept Peter Leduc's offer to purchase all of the lots for the same amount the Receiver was collecting from Ashton, and why it continued to sell lots to Ashton for $54,000,00, when it was demanding more money from Peter Leduc. Please provide notes and other records respecting the meeting between Peter Leduc and the Receiver.

The Receiver never received an offer from Peter Leduc to purchase the lots for the same amount the Receiver was collecting from Ashton or for any other amount. To be clear, Mr. Leduc never made an offer to purchase the lots. As noted in the last paragraph on page 8 of the Receiver's Report, Mr. Leduc, in mid October of 2006, expressed an interest in purchasing the lots and we requested that Mr. Leduc provide a formal offer. None was ever received. Further, we had serious doubts about Mr. Leduc's ability to fund the purchase of the lots and complete construction of the homes on the lots as required, as Mr. Leduc had filed a Consumer Proposal under the *Bankruptcy & Insolvency Act*, thereby admitting that he was insolvent.

12. On the matter of the valuation of the lots, please provide particulars of all dealings with Guy Bourgeois and all other individuals associated with their valuation. In particular, who did the Receiver deal with, why, when, what was discussed, who was involved in the discussions, and what decisions were made. Please also provide all notes associated with these discussions and, dealings.

All particulars of the Receiver's dealings with Bourgeois & Company are disclosed in the Receiver's Fifth Report.

13. Why was it so difficult to obtain a proper valuation of the lands in questions, especially considering that

these lands had been originally appraised back in 2001. Why was it possible to appraise the lands in 2001 and impossible thereafter?

The Receiver is not an appraiser. The reasons of Bourgeois & Company, certified appraisers, are set out in clause 4 on page 7 of the Receiver's Report.

14. Please provide particulars of what steps were taken to obtain comparable sales of the lots. Who were the two parties that expressed interest in the fall of 2006? What was the nature of KPMG's past relationship with these parties and/or their principals? Did they or their principals ever buy other properties from KPMG? If so, when and what? Were there any other parties which expressed interest in development such as the Big Sky development and could have potentially purchased the lots? If so, when and why were these opportunities not pursued?

All particulars taken to obtain comparable sales of lots are disclosed in the Receiver's Fifth Report.

15. Why were no Receiver's reports prepared between September 22, 2003, (the date of the Fourth Report) and January 12, 2007, given the defaults of Ashton and the continued sale of lots at 2001 prices?

There was nothing to report to the Court. All parties with an interest in the outcome of the Interim Receivership were satisfied with the progress being made by the Receiver. There was no "continued sale of lots at 2001 prices". All 50 lots owned by Big Sky Living Inc. were sold pursuant to an Agreement made on the 8th day of May, 2003. The Receiver acted in accordance with that Agreement. Mr. Leduc and Mr Seguin were notified of the Court application to authorize the Receiver to enter into the Agreement.

Conclusion

25 The Receiver noted in his Fifth Report that the sales agreement in question did not have an expiry date or a termination date, nor was it in effect only for a fixed term of thirty months as suggested by the Applicants. When the purchaser of the lots fell into arrears, the Receiver made a business decision not to trigger the "default" clauses in its agreement, for business reasons which the Receiver has set out in its Fifth Report.

26 In the Receiver's opinion, there was no need to attend to Court to obtain an extension, renewal. or waiver of default, as the Receiver believes that its powers contained in its appointment Order, and in the Order of Justice Dea which approved the sale, and gave it the ability to deal with a business issue as it saw fit.

27 The Receiver notes that, even at the price proposed by the Applicants of $75,000.00 per lot for those lots that were yet unsold, the Applicants would still not have any economic interest in the Estate. Assuming that HSBC Bank Canada was fully repaid on its secured loans, with interest and costs, and that the Receiver's fees and disbursements were also fully repaid, the next creditor in line to receive funds from the Estate was EngCon Holdings Ltd. which had filed a builder's lien on title to all of the lots for approximately $500,000.00 All other creditors of the Estate would have to be repaid in full before the Applicants, in their capacities as shareholders of the corporation in receivership, would receive any return on their equity in the corporation.

28 Accordingly the improprieties alleged by the Applicants are predicated upon their belief that the Receiver was obliged to seek further advice and direction from the Court once the lot purchaser fell behind, and that continuing to sell lots in accordance with the original agreement after default of the purchaser was a breach of Justice Dea's Order. I do not believe that the Receiver, was obliged to proceed as the Applicants allege.

29 Further, the "areas of inquiry" raised by the Applicants fall within the categories of "fishing expedition" and/or attempts to establish the basis of a potential lawsuit against the Receiver, which are not permissible at law.

30 The law in this area was described in my written Reasons for Judgment in *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) and 2004 ABQB 423 (Alta. Q.B.). More recent cases from the Ontario Courts have confirmed the circumstances in which an examination of a Receiver is appropriate.

31 In *Ravelston Corp., Re*, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]) Cumming, J. of the Ontario Superior Court of Justice (Commerical List) stated the following criteria at paragraphs 37 and 38: --

> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours, Inc., Re* (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)
>
> 38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:
>
>> [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates [Re Confectionately Yours*] clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

32 The Ontario Court of Appeal in 2007 ONCA 135 (Ont. C.A.) concluded that there was not reason to interfere with the motion Judge's decision in *Ravelston Corp., Re*.

33 Since all lots have been sold, there can be no lawful purpose for the Applicants' areas of inquiry, as the Receiver's future course of conduct can no longer be influenced. All that remains, if anything, is a claim by the Applicants that the Receiver should have sold lots at a higher price, which would still not result in any recovery by the Applicants.

34 The Applicants' request to cross-examine the Receiver is therefore dismissed with costs.

Application dismissed.

END OF DOCUMENT

TAB 5

Revised Statutes of Alberta 2000

Prepared and published
in accordance with the
Statute Revision Act

Volume 2

Printed and published by the Queen's Printer for Alberta
Edmonton

Absolute privilege

236 Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

1981 cB-15 s228

Solicitor-client privilege

237 Nothing in this Part affects the privilege that exists in respect of a solicitor and the solicitor's client.

1981 cB-15 s229

Inspector's report as evidence

238 A copy of the report of an inspector under section 232, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the appointment or signature of the inspector.

1981 cB-15 s230;1983 c20 s17

Part 19
Remedies, Offences and Penalties

Definitions

239 In this Part,

(a) "action" means an action under this Act or any other law;

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

TAB 6

2005 ABQB 446, 7 B.L.R. (4th) 61, **[2005]** A.W.L.D. 2683

2005 CarswellAlta 860

Envirodrive Inc. v. 836442 Alberta Ltd.

Envirodrive Inc. (Plaintiff) and 836442 Alberta Ltd., Rodney English, Glendon English and Rick Williams (Defendants / Plaintiffs by Counterclaim) and Envirodrive Inc., Texas Industries Ltd., Gary McPeak, Glynis McPeak, Sean McPeak and Jason McPeak (Defendants by Counterclaim)

836442 Alberta Ltd., Bernard Curial, Kenneth Gerrard, Brian Edwards, Brian Brownlee, Neil Molendyk, Mike Finn, Mike Cooke, Rod Connelly, Tom Connelly, Ivan Humphrey, John Skocdopole, Harry Skocdopole, Ron Skocdopole, Jonas Evan Skockdople, Glen Skocdopole, Don Macrea, Lionel Keyowski, Wayne Tarney, Dale Caron, C. Richard Williams, Warren Barber, Al Lutomsky, George Glazer, Danielle Graham, Kim Vetter, Peter D. Yamada, Rick Brunner, John English, Bonnie Leavitt, Archie Leavitt, Gary P. Leavitt, Harold Kenney, Charles "Chuck" Easy, Lewis Anthony Smith, Robert Keller and Jane Doe and Joe Doe (Applicants) and Envirodrive Inc., W. Gary McPeak, Daniel Lim, Texas Industries Ltd. and Envirodrive Systems Inc. (Respondents)

Alberta Court of Queen's Bench

Slatter J.

Heard: May 24, 2005
Judgment: June 21, 2005
Docket: Edmonton 0303-12841; Red Deer 0410-00041

Counsel: B. Vanden Brink, Q.C., P.J. Madden, Q.C. for Applicants

B.J. Kickham, Monique Petrin Nicholson for Defendants

Subject: Corporate and Commercial

Business associations --- Specific corporate organization matters -- Shareholders -- Shareholders' remedies -- Relief from oppression -- Miscellaneous issues

Defendants developed and patented alternative motor and formed A Ltd. to develop it which had 11 shareholders in addition to two directors -- A Ltd. ran out of money when M, an Edmonton businessman, proposed starting E Inc. which would raise money through private sale of stock to bring motor to market -- E Inc. had M as its sole director; later two others S and L were added -- Stock in E Inc. was issued to company owned by M -- Acquisition agreement was entered into between E Inc. and A Ltd. where E Inc. would assume A Ltd.'s debts in exchange for patents for motor and was ratified at A Ltd.'s shareholders' meeting -- M offered private placement of stock of E Inc. and raised sufficient funds to continue refining design of motor -- E Inc. eventually ran out of money after motor failed to be commercially viable for variety of reasons -- E Inc. never held shareholders' meeting except one held by court order and never provided explanation for lack of meeting -- Directors of E Inc. never sent financial statements to shareholders -- In licensing agreement kept secret from shareholders, E Inc. granted to T exclusive license to all its technologies -- T then assigned license to corporation held by M -- Minority shareholders of E Inc. commenced action for oppression -- E Inc. commenced action against A Ltd. for misrepresentation -- Action by minority shareholders allowed; action by E Inc. dismissed -- No misrepresentations were proven since whole agreement clauses were in all documents signed by parties -- Minority shareholders did not establish that M was responsible for failure of E Inc. through mismanagement -- Failure to hold meetings and provide financial information to shareholders constituted oppressive conduct -- M engaged in oppressive conduct by failing to disclose non-arm's length transactions that were in themselves not actionable -- License agreement was not commercially viable and constituted oppressive conduct and must be rescinded.

Cases considered by Slatter J.:

Alberta (Human Rights Commission) v. Alberta Blue Cross Plan (1983), [1983] 6 W.W.R. 758, 4 C.H.R.R. D/1661, 48 A.R. 192, 1 D.L.R. (4th) 301, 4 Admin. L.R. 135, 84 C.L.L.C. 17,002, 28 Alta. L.R. (2d) 1, 1983 CarswellAlta 159 (Alta. C.A.) -- referred to

Anglo-American Fire Insurance Co. v. Hendry (1913), 13 D.L.R. 686, 29 O.L.R. 33 (Ont. C.A.) -- considered

Anglo-American Fire Insurance Co. v. Hendry (1913), 48 S.C.R. 577, 50 C.L.J. 75, 15 D.L.R. 832, 1913 CarswellOnt 731 (S.C.C.) -- referred to

Ares v. Venner (1970), [1970] S.C.R. 608, 12 C.R.N.S. 349, 73 W.W.R. 347, 14D.L.R. (3d) 4, 1970 CarswellAlta 80, 1970 CarswellAlta 142 (S.C.C.) -- referred to

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) -- considered

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1989), 68 Alta. L.R. (2d) 194, 61 D.L.R. (4th) 161, (sub nom. Canadian Commercial Bank (In Liquidation), Re) 98 A.R. 353, 76 C.B.R. (N.S.) 1, [1989] 6 W.W.R. 154, 1989 CarswellAlta 353 (Alta. C.A.) -- referred to

Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206, 1973 CarswellOnt 236, 1973 CarswellOnt 236F (S.C.C.) -- considered

Canadian National Railway v. Volker Stevin Contracting Ltd. (1991), 48 C.L.R. 134, 120 A.R. 39, 8 W.A.C. 39, 1 Alta. L.R. (3d) 167, 1991 CarswellAlta 8 (Alta. C.A.) -- referred to

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom.Central Trust Co. v. Rafuse) [1986] 2 S.C.R. 147, (sub nom. Central Trust Co. v. Rafuse) 31 D.L.R. (4th) 481, (sub nom. Central Trust Co. v. Rafuse) 69 N.R. 321, (sub nom. Central Trust Co. v. Rafuse) 75 N.S.R. (2d) 109, (sub nom. Central Trust Co. v. Rafuse) 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. Central Trust Co. c. Cordon) [1986] R.R.A. 527 (headnote only) (S.C.C.) -- referred to

Chromex Nickel Mines Ltd. v. British Columbia (Securities Commission) (1991), 4 B.L.R. (2d) 189, 1991 CarswellBC 440 (B.C. S.C.) -- referred to

Clarke v. Rossburger (2001), 2001 ABCA 225, 2001 CarswellAlta 1317, 18 B.L.R. (3d) 197, 293 A.R. 223, 257 W.A.C. 223 (Alta. C.A.) -- referred to

Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc. (1997), 37 O.R. (3d) 50, 1997 CarswellOnt 4889, 1997 CarswellOnt 5180 (Ont. Gen. Div.) -- referred to

Ebrahimi v. Westbourne Galleries Ltd. (1972), (sub nom. Westbourne Galleries Ltd., Re) [1973] A.C. 360, [1972] 2 All E.R. 492, [1972] 2 W.L.R. 1289 (U.K. H.L.) -- considered

First Investors Corp., Re (1988), 58 Alta. L.R. (2d) 38, 86 A.R. 126, (sub nom. Associated Investors of Can. Ltd., Re) [1988] 4 W.W.R. 22, 1988 CarswellAlta 35 (Alta. Q.B.) -- referred to

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 1999 CarswellBC 1927, 1999 CarswellBC 1928, [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1, 176 D.L.R. (4th) 257, 245 N.R. 88, [1999] I.L.R. I-3717, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 127 B.C.A.C. 287, 207 W.A.C. 287, [1999] 3 S.C.R. 108, 50 B.L.R. (2d) 169, [2000] 1 Lloyd's Rep. 199 (S.C.C.) -- referred to

Freeman v. Lawson (1990), 797 S.W.2d 882 (U.S. Mo. Ct. App.) -- considered

Gainers Inc. v. Pocklington Holdings Inc. (2000), 2000 CarswellAlta 508, 255 A.R. 373, 220 W.A.C. 373, 81 Alta. L.R. (3d) 17, 2000 ABCA 151 (Alta. C.A.) -- referred to

Guaranty Properties Ltd. v. Edmonton (City) (2000), 2000 CarswellAlta 774, 261 A.R. 376, 225 W.A.C. 376, 2000 ABCA 215, [2001] 1 W.W.R. 278, 85 Alta. L.R. (3d) 61 (Alta. C.A.) -- considered

Gutierrez v. Tropic International Ltd. (2002), 2002 CarswellOnt 2599, 162O.A.C. 247, 63 O.R. (3d) 63, 33 B.L.R. (3d) 18 (Ont. C.A.) -- referred to

Hirt v. College of Physicians & Surgeons (British Columbia) (1985), [1985] 3 W.W.R. 350, 60 B.C.L.R. 273, 17 D.L.R. (4th) 472, 1985 CarswellBC 38 (B.C. C.A.) -- referred to

Hovsepian v. Westfair Foods Ltd. (2003), 37 B.L.R. (3d) 78, 341 A.R. 1, 22 Alta. L.R. (4th) 241, [2004] 5 W.W.R. 519, 2003 ABQB 641, 2003 CarswellAlta 1300 (Alta. Q.B.) -- referred to

ITV Technologies Inc. v. WIC Television Ltd. (2003), 2003 CF 1056, 2003 CarswellNat 4812, 239 F.T.R. 203, 29 C.P.R. (4th) 182, 2003 FC 1056, 2003 CarswellNat 2744 (F.C.) -- referred to

Jaroszuk v. Quewezance (1992), 66 B.C.L.R. (2d) 171, 12 B.C.A.C. 219, 23 W.A.C. 219, 9 C.C.L.I. (2d) 192, 38 M.V.R. (2d) 78, 1992 CarswellBC 102 (B.C. C.A.) -- referred to

John Doe v. Richard Roe (1999), 1999 ABQB 281, 1999 CarswellAlta 316, (sub nom. Doe v. Roe) 243 A.R. 146 (Alta. Q.B.) -- referred to

Keech v. Sandford (1726), 25 E.R. 223, Sel. Cas. Ch. 61, 2 Eq. Ca. Abr. 741, 22 E.R. 629 (Eng. Ch. Div.) -- referred to

Kelly v. Lundgard (2001), 2001 CarswellAlta 1072, 202 D.L.R. (4th) 385, 7 C.C.L.T. (3d) 1, [2001] 9 W.W.R. 399, 286 A.R. 1, 253 W.A.C. 1, 95 Alta. L.R. (3d) 11, 2001 ABCA 185 (Alta. C.A.) -- referred to

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. London Drugs Ltd. v. Brassart) 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. London Drugs Ltd. v. Brassart) 18 B.C.A.C. 1, (sub nom. London Drugs Ltd. v. Brassart) 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 913, 1992 CarswellBC 315 (S.C.C.) -- referred to

McNamara Construction Co. v. Newfoundland Transshipment Ltd. (2000), 2000 CarswellNfld 402 (Nfld. T.D.) -- considered

Michael Santarsieri Inc. v. Unicity Mall Ltd. (2000), 2000 MBQB 202, 2000 CarswellMan 630, 38 R.P.R. (3d) 105, 152 Man. R. (2d) 215 (Man. Q.B.) -- referred to

Mortimer Co. v. Frontenac Breweries Ltd. (1929), [1930] 1 D.L.R. 182, 1929 CarswellQue 51 (S.C.C.) -- referred to

Nagy v. Phillips (1996), 41 Alta. L.R. (3d) 58, [1996] 8 W.W.R. 681, 137 D.L.R. (4th) 715, 187 A.R. 97, 127 W.A.C. 97, 6 C.P.C. (4th) 61, 1996 CarswellAlta 657 (Alta. C.A.) -- referred to

Northwestern Mechanical Installations Ltd. v. Yukon Construction Co. (1982), 20 Alta. L.R. (2d) 156, 37 A.R. 132, [1982] 5 W.W.R. 40, 136 D.L.R. (3d) 685, 1982 CarswellAlta 95 (Alta. C.A.) -- referred to

Opron Construction Co. v. Alberta (1994), 151 A.R. 241, 14 C.L.R. (2d) 97, 1994 CarswellAlta 470 (Alta. Q.B.) -- referred to

Peso Silver Mines Ltd. v. Cropper (1966), [1966] S.C.R. 673, 56 W.W.R. 641, 58 D.L.R. (2d) 1, 1966 CarswellBC 90 (S.C.C.) -- considered

Prairie Land Corp. v. Concert Properties Ltd. (2004), 5 C.P.C. (6th) 27, 2004 ABQB 726, 2004 CarswellAlta 1285 (Alta. Q.B.) -- referred to

Queen v. Cognos Inc. (1993), 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R.(4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, 1993 CarswellOnt 801, 1993 CarswellOnt 972 (S.C.C.) -- referred to

R. v. Becket (1913), 8 Cr. App. R. 204 (Eng. Ct. of Crim. App.) -- considered

R. v. Graat (1982), [1982] 2 S.C.R. 819, 18 M.V.R. 287, 31 C.R. (3d) 289, 2 C.C.C. (3d) 365, 144 D.L.R. (3d) 267, 45 N.R. 451, 1982 CarswellOnt 101, 1982 CarswellOnt 745 (S.C.C.) -- considered

Regal (Hastings) Ltd. v. Gulliver (1942), [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.) -- referred to

Robins v. National Trust Co. (1927), [1927] A.C. 515, [1927] 2 D.L.R. 97, [1927] All E.R. Rep. 73, [1927] 1 W.W.R. 692, 1927 CarswellOnt 41 (Ontario P.C.) -- referred to

Royal Bank v. Northpark Motor & Recreation Ltd. (1991), 112 A.R. 23, 1991 CarswellAlta 746 (Alta. Master) -- referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1993), 10 Alta. L.R. (3d)440, [1993] 6 W.W.R. 749, (sub nom. Royal Bank v. Got (W.) & Associates Electric Ltd.) 142 A.R. 188, 1993 CarswellAlta 41 (Alta.

Q.B.) -- considered

Sexsmith v. Intek Inc. (1993), 1993 CarswellOnt 4049 (Ont. Gen. Div.) -- followed

Sherrard v. Jacob (1965), [1965] N.I. 151 (Eng. C.A.) -- considered

Sun Life Assurance Co. of Canada v. 2710153 Canada Ltd. (1998), 1998 ABQB 943, 1998 CarswellAlta 1047 (Alta. Master) -- referred to

Wade v. Baxter (2001), 2001 ABQB 812, 2001 CarswellAlta 1688, [2002] 3 W.W.R. 133, 98 Alta. L.R. (3d) 230, 302 A.R. 1 (Alta. Q.B.) -- referred to

Ward Estate v. Olds Aviation Ltd. (1996), [1997] 2 W.W.R. 508, 46 Alta. L.R. (3d) 177, 40 C.C.L.I. (2d) 119, 193 A.R. 133, 135 W.A.C. 133, 1996 CarswellAlta 943 (Alta. C.A.) -- referred to

Watergroup Cos. Inc. v. Stevens (1996), [1996] 5 W.W.R. 261, 140 Sask. R. 245, 25 B.L.R. (2d) 248, 1996 CarswellSask 152 (Sask. Q.B.) -- followed

Westfair Foods Ltd. v. Watt (1990), 73 Alta. L.R. (2d) 326, 48 B.L.R. 43, [1990] 4 W.W.R. 685, 106 A.R. 40, 1990 CarswellAlta 58 (Alta. Q.B.) -- considered

Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 115 A.R. 34, [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48, 5 B.L.R. (2d) 160, 1991 CarswellAlta 63 (Alta. C.A.) -- considered

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595 (S.C.C.) -- followed

Willson v. Northland Bank (1991), 82 Alta. L.R. (2d) 31, (sub nom. Northland Bank v. Wilson) 83 D.L.R. (4th) 362, 117 A.R. 284, 2 W.A.C. 284, 1991 CarswellAlta 132 (Alta. C.A.) -- referred to

400280 Alberta Ltd. v. Franko's Heating & Air Conditioning (1992) Ltd. (1995), 26 Alta. L.R. (3d) 421, [1995] 4 W.W.R. 558, 166 A.R. 241, 22 B.L.R. (2d) 50, 1995 CarswellAlta 23 (Alta. Q.B.) -- referred to

475878 Alberta Ltd. v. Help-U-Sell Inc. (2002), 2002 ABQB 769, 2002 CarswellAlta 1019, 322 A.R. 250 (Alta. Q.B.) -- referred to

3464920 Canada Inc. v. Strother (2005), 2005 BCCA 35, 2005 CarswellBC 83, 2005 D.T.C. 5059, 1 B.L.R. (4th) 302, 28 C.C.L.T. (3d) 159, 38 B.C.L.R. (4th) 159, [2005] 5 W.W.R. 108, 208 B.C.A.C. 39, 344 W.A.C. 39 (B.C. C.A.) -- referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally -- referred to

Pt. 13 -- referred to

s. 124 -- referred to

s. 132 -- referred to

s. 159 -- referred to

s. 231(2) -- referred to

s. 238 -- referred to

s. 242(2) -- referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 20 -- referred to

Securities Act, R.S.A. 2000, c. S-4

s. 92(3)(b) -- referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 218.1 -- referred to

ACTION by minority shareholders of corporation for oppression; COUNTERCLAIM by majority.

***Slatter J.*:**

1 In this action various groups of shareholders of Envirodrive Inc. sue each other, each group alleging misrepresentations by the other. In addition, the minority shareholders bring a claim under the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, alleging that the business of the company was conducted in an oppressive manner.

2 For convenience, I will refer to the Applicants in action 0410 00041 and the Defendants/Plaintiffs by Counterclaim in action 0303 12841 collectively as the "Applicants" or the "Minority Shareholders". I will refer to the Defendants by Counterclaim, other than Envirodrive Inc., as the "Defendants."

Background of the Envirodrive Motor

3 Prior to 1999 the oil and gas industry had an ongoing need in remote oilfields for a power source that could operate auxiliary equipment, such as small pumps, needed for the production of oil and gas. One solution was to use the pressure in the wellhead to operate this auxiliary equipment. Where the well produced sour gas that could not be released to the atmosphere, pressurized propane could be used for the same purpose. The problem with the existing technology was that it would vent the wellhead gas or the propane gas to the atmosphere after it had been used to power the equipment. Not only did this waste a valuable resource, it created environmental problems. With the

signing of the Kyoto Accord, the industry was interested in alternative power sources that would not have these side effects.

4 When a customer asked if there was a better way to power auxiliary equipment, Mr. Rod English and Mr. Glen English came up with an idea to resolve these problems. They envisioned a system that would utilize the pressure of wellhead gas to drive auxiliary equipment, but that would then return the spent gas into the production pipeline. Not only would this preserve the valuable production gas, it would eliminate the environmental problems associated with venting the gas to the atmosphere.

5 Rod English owned Central Valve, a company that specialized in machining and repairing valves, and one weekend in 1999 he and Glen English set about building a prototype power source that would not vent production gas to the atmosphere. With the help of the machinists employed by Central Valve, they were able to build a working model. Realizing the importance of their invention, they quickly applied for the appropriate patents. The device, which was eventually named the "Envirodrive" was described in the patents as:

> A pressurized working environment for a pneumatic device which permits emission free utilization of the potential mechanical energy of pressure differentials within compressed gas systems.

6 Rod English and Glen English arranged for the incorporation of 836442 Alberta Ltd. to develop the Envirodrive. The two of them controlled this company, but 11 others (mostly machinists and employees of Central Valve) were given small interests in recognition of their contributions. Unfortunately, refinement of the device was costly, and by the end of 2000, 836442 Alberta Ltd. was running out of money. 836442 Alberta Ltd. began to look for strategic partners. Extensive discussions were held with EPCOR, a large power generator. EPCOR was primarily interested in the carbon credits that could be obtained by the use of the Envirodrive, as it was anticipated that the Kyoto regulations would reward companies who could show reductions of carbon emissions. EPCOR actually purchased some shares of 836442 Alberta Ltd. from Glen English, in order to generate further cash that could be injected into 836442 Alberta Ltd. and used for research and development. 836442 Alberta Ltd. also commenced discussions with Natco, a large international distributor of oilfield production equipment. Natco was seen as a possible distributor of the Envirodrive.

7 In late 2000, Gary McPeak, a businessman from Edmonton, heard about the Envirodrive. McPeak proposed the incorporation of Envirodrive Inc., and the raising of funds through a private placement to take the Envirodrive to market. Eventually it was anticipated that this new corporate vehicle would be listed on a public stock exchange, to the benefit of all concerned. At this point the shareholders of 836442 Alberta Ltd. were dissatisfied with their negotiations with EPCOR, because the EPCOR proposal involved the original shareholders keeping only 10 to 30% of the new company, depending on the eventual performance of the company. 836442 accordingly commenced negotiations with McPeak.

8 McPeak represented that he could assemble a team that would take Envirodrive Inc. public. McPeak represented that he himself had extensive business experience and he would add to the team Bruce Hirsche, a lawyer with public company experience, and Glen Skolney, a chartered accountant.

9 An agreement was eventually reached. Envirodrive Inc. was incorporated on February 27, 2001. McPeak was the sole director, and a company named Carbon Credits Inc. was issued 18 million shares for nominal consideration. Carbon Credits was originally owned 70% by McPeak and 30% by Skolney, but McPeak has subsequently acquired all of the shares of this company.

10 On February 28, 2001, an Acquisition Agreement was entered into between 836442 Alberta Ltd. and Envirodrive. Inc. In return for 12 million shares of Envirodrive Inc. and the assumption of some debt, 836442 Alberta Ltd. transferred the Envirodrive patents and business to Envirodrive Inc. 836442 Alberta Ltd. essentially

transferred control of the Envirodrive business to McPeak for no cash consideration, reflecting the view that 836442 Alberta Ltd. had few prospects as it then existed. Reliance was obviously placed on the ability of McPeak to turn the business around.

11 The Acquisition Agreement had been drafted by Hirsche on the instructions of McPeak. It does not appear that 836442 Alberta Ltd. retained counsel to represent it in the transaction, nor apparently did 836442 Alberta Ltd. do any systematic due diligence. McPeak brought the 40-page Acquisition Agreement and its many Schedules to Red Deer one day, and the principals of 836442 Alberta Ltd. signed it after only cursory review. McPeak then returned to Edmonton with all of the signed copies, ostensibly to have them bound. However, he never did provide a copy of the signed Acquisition Agreement to 836442 Alberta Ltd.

12 There was initially some issue with whether 836442 Alberta Ltd. had properly approved the sale of the business. However, through the summer of 2001 the appropriate directors' and shareholders' meetings were held, and the Acquisition Agreement was ratified.

13 Steps were then taken to raise $2 million by issuing 2,666,667 common shares of Envirodrive Inc. by private placement at 75¢ a share. An Offering Memorandum dated April 12, 2001 was prepared and signed by McPeak. Under the heading "Early Stage of Development of the Envirodrive", the Offering Memorandum described the technology as follows:

> The development of the Envirodrive is in the early stages and there can be no assurance that the development of this project will result in a technology which is capable of generating significant commercial revenues.

The Offering Memorandum also warned that the shares were not publicly tradeable, and that the investment should be regarded as being highly speculative.

14 Several hundred investors bought shares in Envirodrive Inc. out of the private placement. They each signed a standard form Subscription Agreement which confirmed that they had received the Offering Memorandum, and which also contained a confirmation that the decision to purchase had not been based on any oral or written representations other than those contained in the Offering Memorandum.

15 After the completion of the private placement, Envirodrive Inc. had the funds necessary to continue with the development and marketing of the Envirodrive motor. At the time of the private placement a few Envirodrives had been sold or placed in the field as prototypes, and as problems arose, refinements were being made. In addition, potential customers suggested new or different applications to which the Envirodrive motor could be put. Envirodrive Inc. attempted to modify the motor to meet all of these demands.

16 Unfortunately, the Envirodrive motor was not a commercial success. Despite an intensive marketing effort, very few of the units were actually sold. Many that were sold were returned by the purchasers. Some of the witnesses thought that the motor was simply too big and heavy for the uses to which it was being put. Others thought that it was overpriced, both in absolute terms and compared to the equipment it was replacing. Other witnesses felt that the units were too expensive to maintain. There were problems with the seals on the units that kept the gases from escaping, and impurities in the gas were causing wear on the motors. All concerned remained very committed to the concept of an emission-free power source, but the original Envirodrive was not finding acceptance in the market.

17 As a result of this market resistance to the original Envirodrive, the decision was made to try to develop a smaller model. In the latter part of 2002, work was begun to design a mini-Envirodrive. Some of this work was initially done by Envirodrive Inc. itself, but a significant portion of the design and engineering was also

subcontracted to Dyna Industrial of Regina. McPeak arranged for this work to be done by a new company he controlled, Envirodrive Systems Inc., which had taken a license for the technology from Envirodrive Inc. Two prototype mini-Envirodrives were produced, but towards the end of 2003, before this product could be fully exposed to the market, Envirodrive Inc. ran out of money.

Corporate Activities

Directors' Meetings

18 As has previously been mentioned, Envirodrive Inc. was incorporated on February 27, 2001, the day before it signed the Acquisition Agreement with 836442 Alberta Ltd. Initially Gary McPeak was the sole director. The Acquisition Agreement gave the Minority Shareholders no right to a seat on the board. On April 10, 2001 Glenn Skolney and Daniel Lim were appointed as directors as well. There were three directors of the corporation until May of 2003, when Skolney and Lim resigned.

19 During the key times in the existence of Envirodrive Inc., there were therefore three directors: McPeak, Skolney and Lim. These three directors took an exceptionally cavalier attitude towards their responsibilities to Envirodrive Inc., a distributing corporation under the *Business Corporations Act*.

20 It appears that the three directors never did have any formal or informal directors' meeting. Indeed, it appears that McPeak never actually met Lim, and only spoke to him on the telephone a few times. Lim, despite having accepted the position of director, played absolutely no role in the operation of the company, and showed a complete indifference to it.

21 Skolney and McPeak from time to time had telephone conversations regarding the business of Envirodrive Inc. No minutes were kept of any of these discussions, no formal resolutions were prepared, and there was no record of any decisions made respecting the business of Envirodrive Inc. Since Lim was not involved these could not have been directors' meetings. Records were not even kept of the numerous non-arm's length transactions between Envirodrive Inc. and companies owned by McPeak. While non-arm's length transactions of this type may be tolerable if they are in the best interests of the corporation, the directors engaging in such transactions have an enhanced duty to ensure that those transactions are properly approved and documented.

22 After the resignation of Skolney and Lim in 2003, McPeak continued as the sole director. On March 5, 2004, after this litigation was commenced, the Honourable Mr. Justice Foster granted an interim order appointing A.W. Keith Anderson to be an independent director, and Robert A. Keller to be a director representing the interests of the Minority Shareholders. There were therefore three directors until Anderson resigned on May 30, 2004, and Keller resigned on July 20, 2004.

Shareholders' Meetings

23 There was never a normal shareholders' meeting of Envirodrive Inc. Notwithstanding that s. 132 of the *Business Corporations Act* requires that the first meeting of the shareholders be held not later than 18 months after incorporation, and that subsequent meetings be held every 15 months, no meeting was ever called. By order dated January 21, 2004, the Honourable Mr. Justice Foster ordered that a shareholders' meeting be held on February 28, 2004. That court-ordered meeting was the only shareholders' meeting of Envirodrive Inc. ever held. McPeak and Skolney offered no satisfactory explanation as to why shareholders' meetings were not held.

24 Skolney had a particularly unacceptable approach to the duty to call a shareholders' meeting. He indicated that the solicitors for the company had been instructed to call such a meeting, and he seemed to believe that making this request of the solicitors discharged the responsibility of the directors. He blamed the failure to call a shareholders'

meeting on the solicitors. Skolney testified that it was "common practice" to leave these sorts of things up to the solicitors, and that was "how it was always done". This argument is tantamount to a taxpayer saying that he did not file tax returns because "the chartered accountants always do that". Skolney, as a practicing chartered accountant, would undoubtedly know that the obligation to file is on the taxpayer, and the taxpayer cannot simply pass that obligation on to his professional advisors. Likewise, the responsibility for calling a shareholders' meeting for a distributing corporation is on the directors, and it cannot be foisted on the solicitors. In any event, on July 24, 2002 the solicitors advised they were not in a position to call a meeting, that a meeting had to be held by August 2002, and that the directors should make alternate arrangements. After this point the directors could not reasonably rely on any delegation of the duty to call a meeting.

25 The directors of Envirodrive Inc. also failed completely in their responsibilities to communicate with the shareholders. Part 13 of the *Business Corporations Act* requires that the directors approve, and then send financial statements to the shareholders. Under s. 159 the statements are to be sent to the shareholders not less than 21 days before each annual meeting. Unaudited financial statements for the period ending February 28, 2001 were included with the Offering Memorandum. Since the company had only been incorporated the day before, and since February 28 was the date of the Acquisition Agreement, this statement merely showed the effect of the acquisition of the Envirodrive assets. Thereafter no financial statements were sent to the shareholders until the shareholders' meeting of February 28, 2004 was ordered by the Court.

26 In fact Envirodrive Inc. did have financial statements:

> (a) audited financial statements for the nine-month partial year ending November 30, 2001 were prepared. They are dated and signed as of August 1, 2002;
>
> (b) audited financial statements for the full year ending November 30, 2002 were prepared. They are dated as of March 31, 2003;
>
> (c) unaudited financial statements were prepared for the year ending November 30, 2003. They appear to have been prepared in March 2004, after the shareholders' meeting was held.

The financial statements for the periods ending in 2001 and 2002 were only sent to the shareholders in 2004 along with the Notice of the court-ordered shareholders' meeting. Neither McPeak nor Skolney offered a satisfactory explanation as to why the financial statements, which were in the possession of the company, were not sent to the shareholders.

The Litigation

27 By the summer of 2003 all parties involved with Envirodrive Inc. had become disillusioned. The product had failed to find acceptance in the market. The company had run out of money. The Minority Shareholders were particularly disillusioned by the failure of McPeak to provide them with financial information, to hold shareholders' meetings, and to take steps to have the company listed on a public stock exchange. McPeak was disillusioned by the failure of the Envirodrive to find acceptance in the market.

28 On July 16, 2003, Envirodrive Inc. issued a claim (#0303 12841) against 836442 Alberta Ltd. and its principals, alleging various breaches of and misrepresentations leading up to the Acquisition Agreement. Envirodrive Inc. sought damages. This Statement of Claim was not immediately served.

29 Meantime, a number of disgruntled shareholders were organizing themselves. On January 9, 2004, they issued an Originating Notice of Motion (#0410 00041). They asked for an order declaring the Acquisition Agreement to be null and void, and the return of the Envirodrive assets to 836442 Alberta Ltd. Alternatively, they applied for an

Anton Piller Order, the appointment of an inspector to look into the affairs of the company, an injunction restraining the powers of the directors, the calling of a shareholders' meeting, and other related relief. The Applicants alleged that the affairs of the company were being conducted in a manner that was oppressive, and that unfairly disregarded their interests.

30 A number of interim orders were granted. An *Anton Piller* Order was granted on January 9, 2004. As previously indicated, a shareholders' meeting was held by Court order on February 28, 2004. Mr. Donald MacLean of PricewaterhouseCoopers Inc. was appointed an inspector under the *Business Corporations Act*, and he provided the Court with an interim report dated May 14, 2004. Additional directors were appointed.

31 Envirodrive Inc.'s Statement of Claim was eventually served in July 2004, well after many of these interim orders were granted.

32 On October 14, 2004, the Court directed that a number of issues be tried. The issues included the determination of all the issues raised in the Statement of Claim and Counterclaim, whether oppressive conduct had taken place, whether the Acquisition Agreement should be set aside, and whether other relief was available to any party. The complete list of issues is attached as an appendix to these reasons.

Unknown Applicants

33 "Jane Doe" and "Joe Doe" are described as being Applicants. There is a long established practice of naming "John Doe" defendants, in those cases where a person is alleged to have breached the rights of the plaintiff, but his true identity is unknown. When the true identity of the defendant becomes known, an application is made to substitute the correct name: see for example *Nagy v. Phillips*, [1996] 8 W.W.R. 681, 41 Alta. L.R. (3d) 58, 187 A.R. 97 (C.A.). There is however no basis for naming "John Doe" plaintiffs. Counsel have no right to commence an action on behalf of a person without his or her authority, and if "John Doe" is unknown then counsel obviously has no such instructions: *Ward Estate v. Olds Aviation Ltd.* (1996), 46 Alta. L.R. (3d) 177, 193 A.R. 133 (Alta. C.A.) at para. 44. The only true exception to this rule is where a statute allows a representative or class action, but in those cases only the representative plaintiff is named. Sometimes a known plaintiff uses a pseudonym such as "Doe" to protect privacy, but that is a different matter: see for example: *Hirt v. College of Physicians & Surgeons (British Columbia)*, [1985] 3 W.W.R. 350, 60 B.C.L.R. 273 (B.C. C.A.); *John Doe v. Richard Roe* (1999), 243 A.R. 146 (Alta. Q.B.). The claim of the Doe Applicants should accordingly be struck out.

The Evidence

34 A number of evidentiary issues arose during the trial.

Evidence of the Inspector

35 In this case an inspector was appointed under the *Business Corporations Act*. Section 238 of the *Act* says that the report of the inspector is admissible as evidence without proof of his appointment. The exact implications of that provision are unclear.

36 In this particular case the Inspector's report contains a great deal of hearsay. In some places he merely reports what he has heard from other persons. The Inspector reports: ". . . we have made no attempt to audit or otherwise verify or confirm the completeness and accuracy of the information obtained." An inspector is intended to be an investigator, not merely a recorder: *First Investors Corp., Re* (1988), 58 Alta. L.R. (2d) 38 (Alta. Q.B.). But where the inspector does merely record, without any independent assessment of the facts, his report will receive less weight. Many of the persons interviewed by the Inspector have testified, and accordingly the hearsay is harmless, but the Inspector's recitation of their stories adds little. In other places the Inspector merely summarizes the effect of

various documents that have been entered as exhibits. Again, that is harmless but it adds little to the record.

37 On some issues, the Inspector provided his opinion. For example, he provided an opinion that the management fees paid to McPeak were somewhat high but probably reasonable. The inspector was not qualified as an expert, and Rule 218.1 was not complied with. However, in my view opinions of this sort expressed by the Inspector can be received by the Court. His appointment denotes a recognition of expertise, and his report removes any element of surprise. The weight to be given to the opinions expressed would depend on the particular qualifications of the inspector. In this case the Inspector is a chartered accountant, and accordingly any opinions expressed by him within the scope of that expertise should be given weight by the Court. An examination of the report shows that the Inspector did not do an independent analysis of management fees, and simply repeated what he had been told by McPeak and Skolney about the process of setting those fees. In these circumstances, the report of the Inspector is somewhat helpful in that it summarizes the evidence, but it adds little of probative value to the testimony of the witnesses themselves. The Inspector's opinion of "reasonableness" is of some value. On the other hand the Inspector did examine the accounts of the company, and gave his opinion that the funds raised on the private placement were used in a manner "not inconsistent with the Offering Memorandum disclosure." Such an opinion does deserve weight.

38 In my view the provision in the *Act* that the inspector's report is "evidence" does not mean that the rules of evidence cease to apply. The provision is primarily intended to deal with the fact that much of the inspector's report is likely to be hearsay, and to dispense with formal proof of his appointment. In each instance one must refer to the material on which the inspector relies in order to decide what weight is to be given to his report. To the extent that the inspector's report is hearsay, it may be entitled to little weight: its true probative value must be examined in a principled way. If he is merely drawing inferences from documents that are available for the Court, the report will be of little additional value. On the other hand, if the inspector conducts an independent investigation or audit, or turns his expertise to an analysis of the affairs of the company, then his report will be of considerable value. In this respect the report of the inspector might be accepted by the Court even though it comes close to expressing opinions on the issues ultimately before the Court. Normally an expert would not be entitled to testify as to conclusions of law arising from the facts, but the provision in the *Act* (especially s. 231(2)) relating to the appointment of the inspector may displace that rule to some extent. In this case the Inspector expressed the view that there had been no oppressive conduct in the operation of the corporation, no "improprieties of any consequence", and no unjust enrichment of Mr. McPeak. These opinions are entitled to some weight.

Evidence on Value

39 No expert evidence was called on the fair market value of the various assets and services that were allegedly transferred by McPeak to Envirodrive Inc. at an over-value. The assets in question were pieces of industrial equipment and vehicles. Some of the witnesses attempted to testify to that value, but since they were not qualified as experts, and since they had not provided expert statements under Rule 218.1, the Defendants objected to their evidence.

40 In *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.) the Court discussed the ability of lay witnesses to give opinion evidence. The Court noted that the dividing line between opinion and fact is not always clear, and that many expressions of opinion are just attempts by the witness to report in a compendious way numerous individual observations of fact. Thus the police officer in *Graat* was allowed to testify that the accused was, in his opinion, intoxicated. While this appeared to be an opinion, it was really a conclusion based on numerous observed facts.

41 The Court in *Graat* also noted that there have traditionally been a number of exceptions to the general rule that a non-expert witness is not allowed to give opinion evidence. The Court set out the list of exceptions given in *Sherrard v. Jacob*, [1965] N.I. 151 (Eng. C.A.), which includes opinions on "certain questions of value". The Court did not expand on this exception, nor unfortunately does the *Sherrard* case, which simply uses the same expression.

42 Identification of these "certain issues of value" on which a lay witness may give opinion evidence is difficult. The *Civil Evidence Handbook* by Cudmore states at para. 14.13(f): "Lay evidence as to value is generally admissible", citing *Anglo-American Fire Insurance Co. v. Hendry* (1913), 29 O.L.R. 33, 13 D.L.R. 686 (Ont. C.A.) [hereinafter "*Strong*"], affirmed (*sub nom Anglo-American Fire Ins. v Hendry*) (1913), 48 S.C.R. 577, 15 D.L.R. 832 (S.C.C.) and *Mortimer Co. v. Frontenac Breweries Ltd.* (1929), [1930] 1 D.L.R. 182 (S.C.C.). These cases however have to do with the reliance on records kept in the ordinary course of business, and admit evidence that would now be admitted under the principle in *Ares v. Venner*, [1970] S.C.R. 608 (S.C.C.). For example, in *Strong* a fire loss was calculated by reference to the inventory records of the company. If this is what is meant by opinion evidence on "questions of value", it does not appear to be an exception to the opinion evidence rule at all, because the witnesses only testified as to what they extracted from the inventory records.

43 In *R. v. Becket* (1913), 8 Cr. App. R. 204 (Eng. Ct. of Crim. App.) an employee of the post office was allowed to testify in a prosecution for wilful damage that a broken window was worth more than £5. The Court held that this evidence was admissible, even though the employee was not an expert. *Cross on Evidence* (9th Edition) at pg. 526 suggests that this case is perhaps an anomaly, and that in any event it is restricted to the value of commonplace items. Thus a person might testify that they have seen the prices being asked for commonplace items in retail stores, and testify to those prices as an indication of market value.

44 The *Becket* case may be an example of a witness being allowed to give a range of value only. For example in *Becket* the witness was allowed to say that the window was worth more than the statutory threshold value of £5, but was not required to say exactly what its value was. Most persons would know, for example, that a new car is worth more than $5,000.00. In a similar way a non-expert witness might be allowed to testify that an object was no longer of any significant value, due to its destruction or deterioration. Another witness might be allowed to testify that a particular item was of great value for items of its type, because of its pristine condition. In none of these examples is the witness required to testify to an exact and precise value, or to relate value to an external standard such as "fair market value".

45 In *Royal Bank v. W. Got & Associates Electric Ltd.* (1993), 142 A.R. 188, 10 Alta. L.R. (3d) 440 (Alta. Q.B.) it was alleged that a receiver had acted in an irresponsible way in realizing on assets. A non-expert witness testified as to the value of certain work in progress. The Court held that this evidence was admissible, because it was not tendered as proof of the actual value of the work in progress. It was tendered to show the steps that the receiver had taken in deciding how to realize on the assets. Since it was reasonable for the receiver to consult with the non-expert who gave evidence, and follow his advice, the receiver was held to have acted reasonably even if the non-expert witness was arguably mistaken. The Court held however that the owner of the company could not testify as to the auction value of its inventory, because he had no experience in sales by auction. The Court stated:

> While evidence of non-expert opinion may sometimes be admissible on issues of value, that should be so only in regard to matters of common experience.

The Court also held that requiring expert evidence of value was consistent with the policy of the Rules in providing advance notice of opinion evidence. As such, *W. Got & Associates Electric Ltd.* is not authority for any general rule that lay witnesses can testify as to value.

46 It seems clear that witnesses are allowed to testify as to values of items they commonly deal in. Therefore a professional could testify as to the price he or she generally charges for his or her professional services. A merchant could testify as to the price at which he or she generally sold a particular item. From this pricing the court could infer a market value, and indeed the witness might be entitled to testify that the prices he or she charged were consistent with the market. These however may not be ideal examples of a non-expert witness testifying as to value, because in most cases witnesses of this type could show a special knowledge that would entitle them to be qualified

as an expert.

47 *Corpus Juris Secundum*, "Evidence" at paras. 595, 660 states the general American rule as follows:

> Although, there is authority to the contrary, it is generally held that an ordinary witness, having no knowledge or skill beyond that common to the community at large, is not competent to testify as to value.

The rule is subject to some exceptions in some States. For example, in *Freeman v. Lawson*, 797 S.W.2d 882 (U.S. Mo. Ct. App. 1990) that Court stated:

> An owner may testify, without further qualification, about the reasonable market value of his personal property that has been damaged or destroyed.

This exception to the general rule, to the effect that an owner of property can testify as to its value, prevails in a number of States, although often the opinion of the owner will deserve little weight. In *Freeman* a long-time farmer was allowed to testify as to the value of two bulls that had been shot by the defendant, and the farmer's evidence was preferred over that of the experts called by the defendant.

48 *Wigmore on Evidence*, Volume 3, at paras. 711, 716, 717 favours a more flexible approach. *Wigmore* would allow any witness familiar with values to testify, and leave weight to the trier of fact. *Wigmore* notes that for a witness to give meaningful evidence on value, the witness must have three qualifications:

> (a) an experiential capacity to value the object;
>
> (b) knowledge of the standard of value; and
>
> (c) knowledge of the object being valued.

Where the issue before the court is the fair market value of an item, the witness would have to know what the market value (ie. the standard of value) is. Apart from the most commonplace of items, most witnesses would not have any reliable idea of the market for any particular product. A practical effect of this may be that opinions about fair market value can only be given by duly qualified experts.

49 In this particular case the lay witnesses who proposed to testify as to the value of the industrial equipment and pickup trucks may well have had sufficient experience and knowledge to be qualified as experts to testify as to market values, and also as to the value of the specific items. Unfortunately, no evidence as introduced about the items other than the bare description given of them in the various invoices. The trucks were listed by year and model number, but very little evidence was given of their condition. The industrial equipment was described in a very generic way.

50 However, even if the witnesses tendered on the question of value in this trial did have the necessary qualifications to express an opinion on value, there is another hurdle. Our Rules of Court provide that advance notice must be given of the testimony of expert witnesses, in order to avoid surprise. No notice was given of the intention to have these witnesses speak to value, no notice was given of the substance of their opinion, and no notice was given of their qualifications to provide these opinions. In the circumstances, the Defendants were taken by surprise.

51 I concluded that the general rule is that only a properly qualified expert may give an opinion of value, at least when that opinion is tied to an external standard or measure like "fair market value". Even if the lay witnesses

tendered could have been qualified as experts, the procedural rules on advance notice of that evidence were not complied with. Accordingly, the evidence was excluded.

Internet Evidence

52 During the trial the Minority Shareholders attempted to introduce into evidence certain material that had been downloaded from the internet. This particular material came from the website of a competitor of Envirodrive Inc. It included a general description of the competitor, and also included its financial statements. This evidence was tendered to show the range of salaries that might be paid to a chief executive officer of a company like Envirodrive Inc. The Defendants objected to the introduction of this evidence.

53 The fact that this information was printed off the internet does not directly affect its admissibility. There is no particular magic in information obtained on the internet. If the basic information would be admissible under some other rule of evidence, the fact that it comes off the internet is not determinative. For example, the courts routinely take judicial notice of encyclopedias and dictionaries, which are now frequently found in electronic format. The admissibility of this information does not change because of its source.

54 On the other hand, the mere fact that something is publicly available and readily producible from the internet does not make it admissible. Such evidence must still pass the normal tests for evidence, including the hearsay rule and the opinion evidence rule. Of course, if the information is merely tendered to show that certain information was known to the public, or for a purpose other than the truth of its contents (for example in a defamation case), then the information would be admissible: *ITV Technologies Inc. v. WIC Television Ltd.*, [2003] F.C. 1056, 239 F.T.R. 203 (F.C.) at para. 23.

55 The question to ask is whether the information, if it had been obtained from some other source, would be admissible. For example, if the Minority Shareholders had tendered the annual report of this competitor, would it have been admissible? The answer is clearly that it would not. The annual report itself would be hearsay, and it could only be admitted if somebody from the company could testify as to the truth of its contents. The financial statements could only be proven in a similar way. Furthermore, the attempt to use the salary paid by the competitor as a benchmark for the proper salary to be paid to Chief Executive Officer of Envirodrive Inc. appears to be an attempt to use a type of similar fact evidence. This type of evidence calls out for cross-examination to test if it really has any probative value. Alternatively, it is an attempt to introduce opinion evidence indirectly. The internet evidence tendered was accordingly not admitted.

Misrepresentations

56 All of the parties allege that the other parties made misrepresentations to them. Some of these alleged misrepresentations are contained in the various contracts, but most are not.

Misrepresentations to Envirodrive Inc.

57 Envirodrive Inc. alleges that 836442 Alberta Ltd. and its principals made certain misrepresentations to it. They include:

> (a) Envirodrive Inc. alleges that 836442 Alberta Ltd. and its principals represented that the Envirodrive motor was a fully functional marketable product, and that Envirodrive Inc. bought the assets of 836442 Alberta Ltd. based on that representation. This is referred to in the Statement of Claim as the "Commercial Viability Representation". The Acquisition Agreement is a lengthy and detailed document, drafted by counsel for Envirodrive Inc., and it contains many representations in favour of Envirodrive Inc. Significantly, it contains no such covenant. The Acquisition Agreement defines the

"Business" being sold as "primarily involving research, development, manufacturing, and marketing", which does not imply a market-ready product. It is fair to say that at the time of the Acquisition Agreement all concerned were very positive and optimistic about the technology, and no one anticipated the problems that later arose. The principals of 836442 Alberta Ltd. undoubtedly expressed their optimism about the technology to McPeak. However, it is unrealistic to say that those expressions of optimism amounted to a representation that McPeak could reasonably believe amounted to a covenant that the technology would succeed in the marketplace. I am satisfied that McPeak and all of the others involved knew that the Envirodrive technology was at a formative stage, and that it required further testing and refinement. The Offering Memorandum, which was signed by McPeak six weeks later, said that the development of the motor was in the early stages. The Offering Memorandum stated that $400,000.00 of the capital raised would be used for research and development. The largest installation at that time was the 39 units at Zama Alberta, which was described as a "pilot project". The financial statements of November 30, 2001 also stated that the company was in a developmental stage, and that the Envirodrive motor was only a prototype. In any event, McPeak did not rely on any such representation, as he knew the Envirodrive motors were in a developmental stage;

(b) In the Acquisition Agreement 836442 Alberta Ltd. represented that the accounts receivable shown in Schedule C totalling $51,170.00 were all collectable. According to the Inspector approximately $63,000.00 of these accounts were written off. The discrepancy is not explained on the record;

(c) In the Acquisition Agreement 836442 Alberta Ltd. represented that its financial statements for the periods ending June 30, 2000 and January 31, 2001 were fair and accurate. Envirodrive Inc. alleges that this was untrue. There was no evidence presented specifically on this point. The statements showed what everyone knew: 836442 had no working capital, or significant sales, or significant assets other than its patents;

(d) In the Acquisition Agreement it was represented that no customer of the business had indicated its intention to terminate its relationship with 836442 Alberta Ltd., nor had any customer expressed dissatisfaction with the Envirodrive motor. Envirodrive Inc. alleges that 836442 Alberta Ltd. had received notice of dissatisfaction from a number of its customers, and that this representation was accordingly untrue;

By its terms, the representation by 836442 Alberta Ltd. was that there had been no loss of customers from the "Statement Date" until the Closing Date. The Statement Date is defined to be the date of the Financial Statements, which are dated June 30, 2000 and January 31, 2001. There is some ambiguity with respect to which date is intended as the base point from which changes are measured, but since the document was prepared by and at the direction of Envirodrive Inc., any ambiguity should be resolved in favour of 836442 Alberta Ltd. In any event, the purpose of a covenant respecting a change of position in the business is to catch changes that would not be readily apparent from the records and financial statements of the vendor. Accordingly, the most appropriate interpretation is that the later of the two statement dates (January 31, 2001) is the effective date;

Therefore, the effect of the covenant is that 836442 Alberta Ltd. was required to disclose any customer dissatisfaction between January 31, 2001 and the closing of the transaction on February 28, 2001. There is no evidence that any customer expressed any new dissatisfaction with the product during this time period. It is true that after the closing the product did not take off as it should have, and Phillips Petroleum, the largest customer, eventually returned most of its units. However, there is no evidence that 836442 Alberta Ltd. was aware of these developments during the relevant time period. Any dissatisfaction expressed during this period would not have amounted to more than the normal maintenance and development problems that one might expect with any new product;

(e) The Acquisition Agreement contained a representation that the inventory of 836442 Alberta Ltd., shown to be worth $25,932.00, was of full value. Envirodrive Inc. alleges that the inventory was worthless. There was no evidence presented to support this allegation, other than a bald assertion by McPeak. No particulars were given of what the inventory consisted of, and why it had no value. This allegation is not proven on a balance of probabilities;

(f) Envirodrive Inc. alleges that 836442 Alberta Ltd., Rodney English, and Glen English were in breach of their non-competition and confidentiality agreements, by providing information to competitors. There was no evidence lead to support this allegation.

Misrepresentations by McPeak to 836442 Alberta Ltd.

58 Gary McPeak is not a party to the Acquisition Agreement, although Glen English and Rod English are. There are accordingly no contractual covenants by McPeak. 836442 Alberta Ltd. however alleges that McPeak made the following misrepresentations:

(a) McPeak represented that he was an experienced businessman who was capable of taking Envirodrive Inc. public. He also represented that he could assemble a team (Hirsche and Skolney) who would be capable of taking Envirodrive Inc. public. I am satisfied that McPeak made such representations, or at least caused 836442 Alberta Ltd. and it principals to believe these representations were true. However, I am not satisfied that it has been shown that the representations were false. It is one thing to make a representation about an ascertainable fact that turns out to be untrue. It is quite another thing to make a representation about the "abilities" of an individual. The talents and abilities of any person are necessarily a matter of degree and judgment. While McPeak may not have turned out to be the super-entrepreneur that 836442 Alberta Ltd. hoped, I am not satisfied that his personal promotion amounted to a misrepresentation. There is no evidence to suggest that Hirsche and Skolney were not qualified as represented by McPeak. As I point out in the next paragraph, Envirodrive Inc. failed to go public for reasons unrelated to McPeak and his team.

(b) 836442 Alberta Ltd. and its principals allege that McPeak represented that the shares of Envirodrive Inc. would be listed on a public stock exchange, and that this would happen within a relatively short time. Various witnesses testified to McPeak mentioning time frames ranging between 6 and 24 months. The Acquisition Agreement contained the following covenant by Envirodrive Inc. (not McPeak):

> 8.6 The Purchaser [Envirodrive Inc.] will pursue the listing of its shares on a recognized stock exchange having regard to the feasibility of doing so based on viability of public markets and the opinion of the Board of Directors of the Purchaser in their sole discretion as to the most opportune time to complete a listing.

I am satisfied that from time to time McPeak and the others did discuss the possible timing of going public. However, I am not satisfied that McPeak ever made a fixed representation that the company would go public within a given period of time. In addition, most of these discussions occurred after the various share purchases had already taken place. Further, representations as to future facts are rarely actionable: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at paras. 71-2; *Kelly v. Lundgard*, 2001 ABCA 185, 95 Alta. L.R. (3d) 11, 286 A.R. 1 (Alta. C.A.), at paras. 20-21. The contingencies involved in taking a company public are so numerous that it would be unreasonable for anyone to think that another person was giving a fixed guarantee as to when that would happen. I also note that s. 92(3)(b) of the *Securities Act*, R.S.A. 2000, c. S-4 specifically prohibits representations as to when a company will be going public, precisely because going public is largely beyond the control of the issuer itself.

There was some suggestion that McPeak represented that Envirodrive Inc. would go public, when he never had any intention whatsoever of taking the company public. If a representation was made that the company would be taken public, when there was no intention whatsoever of doing so, that would potentially be actionable. However, I am satisfied that McPeak, like all the others, envisioned Envirodrive Inc. as a public company at some time in the future, to the economic benefit of all concerned. While McPeak may have given up on the idea of going public later on, at the stages that the various agreements were entered into I am satisfied that he had the present intention of taking the company public in the future.

As I have mentioned, the Envirodrive never found acceptance in the market. Certain engineering problems arose with the unit, and the company was unable to resolve them. As a result, Envirodrive Inc. never established a sustainable cashflow or a viable product line. In these circumstances it would have been virtually impossible to take the company public. This is the primary reason that the directors of Envirodrive Inc. never took any meaningful steps to take the company public. There was no misrepresentation or breach of covenant about taking the company public.

(c) While it is not pleaded, the Applicants argue that McPeak "promised and represented" that a share price between $2.50 and $7.00 could be "anticipated". It is ridiculous to suggest that speculation about the future price of the shares creates actionable rights.

Misrepresentations to the Private Placement Investors

59 A number of the investors who bought shares in the private placement testified that misrepresentations were made to them that induced them to buy shares of Envirodrive Inc. They allege that these misrepresentations were made by McPeak. The Subscription Agreements are of course between Envirodrive Inc. and the investors, and McPeak is not a party to those agreements. Some of the misrepresentations alleged are:

(a) A few of the investors testified that McPeak made representations about when Envirodrive Inc. would be publicly listed. Clause 7.23.4 of the Subscription Agreements negates reliance on any such representation. Most of these representations were clearly made after the investors had purchased their shares. As I have previously discussed, such representations about future events and possibilities rarely rise to the level of actionable misrepresentations. While I am satisfied that McPeak did from time to time speculate about when the company could go public, no investor who testified treated this as a firm representation, and no investor relied on such a representation to buy shares.

(b) The shares issued under the private placement were priced at 75¢ each. The Offering Memorandum stated that this share price had been fixed on an arbitrary basis. A few of the investors testified that McPeak told them that there was a standing offer for the patents for the sum of $30 million. If that sum is divided by the total number of shares that would be outstanding after the private placement, it would suggest that the shares had an intrinsic value in excess of 75¢. Several investors reported hearing such representations independently. McPeak did not deny making any such representation, and I am satisfied that he did. The only alternative explanation is that the witnesses conspired together to fabricate this representation, an explanation which I reject. It is also clear that there was no such offer for the patents, McPeak knew there was no such offer, and accordingly his representations were inaccurate and fraudulent.

Only three of the approximately 200 investors testified that they heard this representation. One of them (Jeff Denham) is not even a party to this litigation. Obviously only those investors who actually heard and relied on this representation are potentially entitled to relief as a result. None of them testified that this representation was the primary reason why they bought the shares. Most of them testified that they invested in Envirodrive Inc. because they believed in the technology behind the product. All of these investors also signed Subscription Agreements in which they acknowledged and covenanted that they were not relying on any representations other than those contained in the Offering Memorandum, a subject discussed in more detail later.

60 There is in any event a problem with this testimony about misrepresentations to the private placement investors. The private placement investors are not Plaintiffs in the Counterclaim. They are only parties to the Originating Notice of Motion that pleads oppressive conduct. Accordingly, none of them have claimed any remedy arising out of these alleged misrepresentations. Therefore the private placement investors are not entitled to any relief in these proceedings as a result of any misrepresentations.

Whole Agreement Clauses

61 There are three key documents underlying this litigation. The first is the Acquisition Agreement of February 28, 2001. The second is the Offering Memorandum of April 12, 2001. The third consists of the standard form of Subscription Agreement that was signed by all of the investors who bought shares as a result of the private placement.

62 Both the Acquisition Agreement and the Subscription Agreement have " whole agreement" clauses in them. The clauses in the Acquisition Agreement read:

> 9.10 Entire Agreement. This Agreement and the Schedules referred to herein constitute the entire agreement between the parties hereto and supercede all prior agreements, representations, warranties, statements, promises, information, arrangements and understandings, whether oral or written, express or implied, with respect to the subject matter hereof. None of the parties hereto shall be bound or charged with any oral or written agreements, representations, warranties, statements, promises, information, arrangements or understandings not specifically set forth in this Agreement or in the Schedules, documents and instruments to be delivered on or before the closing date pursuant to this Agreement. The parties hereto further acknowledge and agree that, in entering into this Agreement and in delivering the Schedules, documents and instruments to be delivered on or before the closing date, they have not in any way relied, and will not in any way rely, upon any oral or written agreements, representations, warranties, statements, promises, information, arrangements or understandings, expressed or implied, not specifically set forth in this Agreement or in such Schedules, documents or instruments.
>
> 9.13 Previous Agreements. This Agreement supercedes any previous agreements between the parties.

The clauses in the Subscription Agreements are shorter and read:

> 7. By executing this Agreement, the Purchaser hereby represents, warrants and covenants to, and agrees with the Corporation (and acknowledges that the Corporation, and its counsel are relying thereon) that:
>
> > 7.26 The Purchaser's decision to execute this Agreement and purchase the Common Shares hereunder has not been based upon any oral or written representations, other than as contained in the Offering Memorandum, and the within subscription is made unconditionally as a result of the Purchaser's desire to participate in the future development of the Corporation through the purchase of the Common Shares.
>
> 24. The terms of this Agreement express and constitute the entire agreement between the parties hereto as to the subject matter hereof, and no implied term of any kind shall arise by reason of anything contained in

this Agreement.

The interpretation and effect of these clauses is central to this litigation.

63 Whole agreement clauses are commonly put in formal contracts. Their purpose is quite obvious. Modern commercial agreements are lengthy and detailed, because an attempt is made to record in them each and every covenant and warranty that is exchanged between the parties. Equally importantly, an attempt is made to exclude any covenants not specifically recorded. In order to create as much certainty as possible, the parties expressly agree that any covenant or warranty not contained in the agreement will not give rise to legally binding responsibilities. Specifically, the parties agree that they will not be bound by casual representations or discussions that may have occurred prior to the signing of the formal documents.

64 The common law has always protected written agreements from collateral attack through limitations on the evidence that can be introduced to contradict such agreements. One important rule is the parol evidence rule, which bars evidence that attempts to add to, subtract from, or vary a written contract: *Northwestern Mechanical Installations Ltd. v. Yukon Construction Co.* (1982), 20 Alta. L.R. (2d) 156 (Alta. C.A.) at pg. 162; T. Mayson, *"The Use of Extrinsic Evidence in the Interpretation of Written Agreements in Alberta"* (2004), 42 Alta. Law Rev. 499.

65 There are a number of exceptions to the parol evidence rule, and they are listed in *Guaranty Properties Ltd. v. Edmonton (City)* (2000), 261 A.R.376 (Alta. C.A.) at para. 23. Under the exceptions evidence can be admitted:

> (a) to show that the contract was invalid because of fraud, misrepresentation, mistake, incapacity, lack of consideration, or lack of contracting intention;
>
> (b) in support of a claim for rectification;
>
> (c) to establish a condition precedent to the agreement;
>
> (d) to dispel ambiguities, usually by showing the factual matrix of the agreement, or by defining technical terms;
>
> (e) to establish a term implied by custom in the particular industry that would have been assumed by the parties;
>
> (e) to establish a collateral agreement, provided the collateral agreement is not inconsistent with the written agreement;
>
> (f) to show that the parties did not intend the written instrument to be the whole agreement.

Evidence is also received in support of relief sought in equity or in tort that is collaterally related to the contract. But an action in tort for misrepresentation will not succeed where the representation is inconsistent with the terms of the contract; *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.).

66 It should be noted that some of these exceptions have little application to the type of detailed and complex commercial contracts that are commonly entered into today. These contracts are not only lengthy, but they often have attached to them numerous schedules containing all of the collateral agreements made and representations relied on. Such contracts are usually signed and executed at a "closing", at which time the main document and numerous other collateral documents are signed. For this kind of contract it is very difficult to argue that there is any condition precedent to the agreement (other than any formal escrow), that there are any collateral agreements that

have not also been reduced to writing, that there are terms implied by custom, or that the executed bundle of documents is not the "whole agreement": *475878 Alberta Ltd. v. Help-U-Sell Inc.* (2002), 322 A.R. 250 (Alta. Q.B.), at para. 241; *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151, 81 Alta. L.R. (3d) 17, 255 A.R. 373 (Alta. C.A.), at paras. 15-24; *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63, 162 O.A.C. 247 (Ont. C.A.), at para. 24. The Acquisition Agreement which is the subject of this litigation is one such agreement, and there must be a strong presumption that it is intended to include all of the binding obligations between the parties.

67 Even though the parol evidence rule applies to all written contracts, many written contracts contain "whole agreement" clauses that serve the same purpose. To some extent these clauses merely repeat the parol evidence rule. However, they frequently go further and exclude some of the exceptions to the rule, particularly the exceptions for conditions precedent to the agreement, collateral agreements, implied covenants, allegations that the contract was entered into based on a representation, and allegations that the document was not intended to be the entire contract. These clauses are generally given effect, excepting that a "no representation" clause will generally not exclude proof of fraudulent misrepresentations: *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Alta. Q.B.), at paras. 710-716.

68 I have concluded that only the representation made by McPeak about a standing offer for the patents (*supra*, para. 59(b)) was fraudulent. However, this was not pleaded, so no further discussion is required (see para. 60, *supra*). While the Applicants argued there was a collateral agreement with McPeak, that was not pleaded either.

69 In this case I can see no reason why effect should not be given to the whole agreement clauses, and why they should not be interpreted to mean exactly what they say. In my view none of the alleged representations made to 836442 Alberta Ltd. by McPeak prior to the Acquisition Agreement are legally enforceable, except to the extent they are in the Acquisition Agreement. Likewise, none of the representations allegedly made by McPeak to investors prior to the signing of the Subscription Agreements can be enforced. It is true that McPeak is not a party to the Subscription Agreements, but he is the person who signed the Offering Memorandum on behalf of Envirodrive Inc. It is not a sensible interpretation of the documents that Envirodrive Inc. itself is not to be bound by any prior representations, but its directors and officers are: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.); *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.), at paras. 31-2; *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (3d) 50 (Ont. Gen. Div.). In order for a misrepresentation to be actionable, it must be relied on, and that reliance must be reasonable. In the context of the modern commercial transaction with a whole agreement clause, it is simply not reasonable for an investor to say that he or she relied on a representation by a person who is not even a party to the Subscription Agreement, in the face of the whole agreement clause.

70 Therefore, to the limited extent that this cause of action has been pleaded, I find that there were no actionable misrepresentations proven, other than those expressly included in the contracts.

Oppressive Conduct

71 The *Business Corporations Act* provides for relief if the affairs of the company are operated in a way that is oppressive or unfair, or that unfairly disregards the interests of minority shareholders:

> 242(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

The cases have restated the wording of the statute in order to apply its provisions to particular fact situations, but in the end it is the wording of the *Act* that is the touchstone for an oppression action.

72 In arguing that Envirodrive Inc. was operated in an oppressive manner, the Applicants relied heavily on what they submitted were the "reasonable expectations" of the Minority Shareholders. The cases hold that in assessing whether there has been oppression, the court can look at the overall relationship between the parties, the history of the corporation, and the broader context in which the parties operated: *Clarke v. Rossburger*, 2001 ABCA 225, 293 A.R. 223 (Alta. C.A.), at para. 56. In *Westfair Foods Ltd. v. Watt* (1990), 73 Alta. L.R. (2d) 326, 106 A.R. 40 (Alta. Q.B.), affm'd (1991), 79 Alta. L.R. (2d) 363, 115 A.R. 34 (Alta. C.A.) the following factors were mentioned:

the history and nature of the corporation, the type of interests affected, general commercial practice, the nature of the relationship between the complainant and alleged oppressor, the extent to which the impugned acts or conduct were foreseeable, the expectations of the complainant, the size, structure and nature of the corporation, and the detriment to the interests of the complainant.

The list is factually sensitive, and is not closed. The "reasonable expectations" of the parties arising from this context are one relevant factor.

73 The reasonable expectation component of oppression arises from the observation of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* (1972), [1973] A.C. 360 (U.K. H.L.) that the court should consider the "rights, expectations and obligations" of the shareholders. In *Westfair Foods Ltd. v. Watt* (1991), 79 Alta. L.R. (2d) 363, 115 A.R. 34 (Alta. C.A.), at paras. 25-27, Kerans J stated:

. . . I do accept that our tradition is that a hope for profit, as opposed to a mere desire, sometimes deserves protection.

One deserving case is where the person to whom the profit will go has nourished that hope. The company and the shareholders entered voluntarily, not by duty or chance, into a relationship. Our guides are the rules in other contexts, such as contract law, equity, and partnership law, where the courts have also considered just rules to govern voluntary relationships. In very general terms, one clear principle that emerges is that *we regulate voluntary relationships by regard to the expectations raised in the mind of a party, by the word or deed of the other*, and which the first party ordinarily would realize it was encouraging by its words and deeds. *This is what we call reasonable expectations, or expectations deserving of protection*. Regard for them is a constant theme, albeit variously expressed, running through the cases on this section or its like elsewhere. I emphasize that all the words and deeds of the parties are relevant to an assessment of reasonable expectations, not necessarily only those consigned to paper, and not necessarily only those made when the relationship first arose.

I do not for a moment suggest that that analysis about expectations deserving protection is the sole basis for rules under the statute. I think, for example, of totally unforeseen windfalls or calamities. This is not such a case, but I dare say that even in those cases the expectations of the parties are a sound starting point. And the test will always be helpful in cases where mere interests collide.

However "reasonable expectations" is not a synonym for "oppression", nor is it (as the Applicants sometimes seemed to suggest) an independent cause of action.

74 Minority shareholders cannot simply elevate their personal subjective expectations into fixed rights. Indeed in Watt the result was that the preferred shareholders had no reasonable expectation to anything above the strict rights attached to their shares. The Minority Shareholders' expectation that the company would succeed and be publicly listed and they would all be rich is not a guarantee that that would happen. Optimistic statements about the future of the company may create expectations, but they do not create legal rights. Further, their expectations cannot override other rules of law, such as the parol evidence rule, the statutory rules of corporate governance, the legal effect of the "whole agreement" clauses, and the basic rule about the enforceability of contractual covenants. Representations excluded by the whole agreement clauses cannot be repackaged as oppression. A shareholder cannot sign a contract with the corporation, and then argue that the mere enforcement of the terms of the contract is oppressive because of his or her personal expectations. Expectations about the benefits that would flow from a contract (such as the Acquisition Agreement) are not the same thing as expectations about the governance and operation of the corporation (which might found oppression). The Minority Shareholders cannot now second guess the terms of the Acquisition Agreement that gave McPeak control: the allegedly one-sided terms of the original deal are not "oppression".

75 The Applicants argued that McPeak's failure to deliver on his representations that he was capable of making Envirodrive Inc. successful, and that he would eventually list the company on a public exchange, creates oppression. The Applicants cannot in this way simply sidestep the whole agreement clauses in the various contracts. Having agreed that they were not relying on any collateral representations, they cannot now attempt to re-characterize the representations as oppression, and sue on that basis. No one can have "reasonable" expectations that are inconsistent with the terms of a contract they signed. They cannot argue that simply because their expectations have not been realized "they are entitled to have their corporation back", and that effectively the interest of the majority should be extinguished and the Acquisition Agreement rescinded. The argument that oppression is proven merely because of the disappointment of the expectations and hopes of the Minority Shareholders fails. In order to prove oppression, the Minority Shareholders must show discrete acts that unfairly disregard their rights or that are otherwise oppressive. They did identify some such acts, which are specifically considered below.

76 The Minority Shareholders complain about the small investment McPeak made to gain control of Envirodrive Inc.:

> (a) Carbon Credits put up only $100 for its shares. But the Minority Shareholders acknowledge the shares had no value at the time.
>
> (b) Texas Industries acquired a secured debt of $342,664.00 for only $1,000.00, in a transaction described *infra*, at para. 95. This was prior to the incorporation of Envirodrive Inc., and the debt was later assumed by it. The existence of and security for the debt was disclosed in the Offering Memorandum, so no investor has cause to complain about the transaction.
>
> (c) The debt owed to Texas Industries was convertible to shares at $0.03 per share (compared to $0.75 price on the private placement). This was also disclosed in the Offering Memorandum.

The basis for the Minority Shareholders' complaints is unclear. The transactions were negotiated at arm's length, and the Court is not in the business of re-setting the consideration in contracts. Just because the Minority Shareholders think, with hindsight, that McPeak got a good deal is not oppression.

77 Furthermore, as the Defendants properly point out, the whole of s. 242 is directed at "how the corporation is run" as that impacts on the rights of the shareholders. Oppression must be related to that issue, and so must any

"reasonable expectations" of the shareholders. The expectations of the shareholders arising from other factors, such as the potential of the technology of the corporation, the day to day operations, or the eventual profitability of the enterprise, do not *per se* give rise to oppression.

78 The Applicants blame the failure of Envirodrive Inc. on McPeak. They argue that his mismanagement and a failure to properly market the Envirodrive led to the failure of the company. (They also allege McPeak diverted the assets of Envirodrive Inc., an allegation that is dealt with separately below, paras. 105 - 156). The record does not bear out the Applicants' complaints. Extensive and diligent efforts were made to market the Envirodrive. The reason the Envirodrive failed was not mismanagement, but design and engineering shortcomings. Indeed, if the Envirodrive had worked as hoped this litigation would probably never have been started. In November, 2000 836442 Alberta Ltd. has projected sales of 470 units at $15,000.00 per unit in the next 12 months, for total revenues of $7 million. Thereafter sales of 60 units per month were projected, for revenues of $10.8 million per year. If those results had been achieved, the corporation would have been successful, and would have gone public.

79 Whatever else was expected of McPeak, he was never expected to provide engineering and technical expertise to the company: McPeak represented he had business experience, not technical expertise. The Minority Shareholders are undoubtedly frustrated and disappointed by the failure of the Envirodrive to find acceptance in the market, but that is not the fault of McPeak. It is also not "oppression", nor an unfair disregarding of their rights.

Secrecy in Operations

80 At a very general level, the attitude of McPeak unfairly disregarded the interests of the Minority Shareholders. For one thing, he was excessively secretive. There were many instances of this on the record. When 836442 Alberta Ltd. required some of its business records so it could claim scientific research and development credits from the Canada Revenue Agency, McPeak unreasonably obstructed that access. He would not even provide 836442 Alberta Ltd. with a copy of the Acquisition Agreement. McPeak testified that he thought 836442 Alberta Ltd. already had a copy of the agreement, but he knew this was not true, and I reject his evidence.

81 McPeak failed to call shareholders' meetings. He failed to distribute financial statements. He failed to report to the shareholders on a timely basis. He failed to hold formal directors' meetings on a regular basis. He failed to properly document the transactions of the company, particularly those which were not at arm's length. In many cases no pecuniary loss can be traced to this conduct. To a large extent the available remedy was the court-ordered shareholders' meeting of February 2004, the related disclosure, and the appointment of the Inspector.

82 McPeak seemed to think that he could run Envirodrive Inc. as if it were a private company. This is perhaps an acceptable attitude with a "one man company", where the interests of third parties are not engaged. However, once funds have been solicited from the public, the directors of the company owe a higher duty. They are no longer entitled to treat the assets of the company as their own, and they are no longer entitled to simply ignore the reporting provisions of the *Business Corporations Act*. Shortly put, McPeak's attitude towards the Minority Shareholders was condescending, disdainful, arrogant and oppressive. By acting in the highhanded manner that he did, he has brought about the suspicion of the Minority Shareholders. Much of this litigation could likely have been avoided if he had simply been candid and open with the other shareholders. Even if he can justify his actions after the fact, it was his refusal to be open during the time that the business was operating that has led to many of the present difficulties among the shareholders.

83 The Defendants argue that the failure to provide financial statements is not "oppression", citing *Sexsmith v. Intek Inc.*, [1993] O.J. No. 711 (Ont. Gen. Div.) and *Watergroup Cos. Inc. v. Stevens*, [1996] 5 W.W.R. 261, 140 Sask. R. 245 (Sask. Q.B.). It is not clear if these cases intend to state that proposition as a general rule of law, but they are both distinguishable on their facts. *Sexsmith* involved a closely held corporation in which there were no financial statements in existence; it was not a case of a company that had statements, but neglected to send them out.

The only minority shareholder was an employee and officer of the corporation for much of the relevant time, and he had access to informal financial information. This can be contrasted with Envirodrive Inc., where there were several hundred shareholders with no daily contact with the company. In Sexsmith, the court held that irregular, informal and casual operation of a small private company, without unfair disregard for the minority, did not amount to oppression.

84 Watergroup Cos. Inc. also involved a small corporation, which essentially had half a dozen shareholders, and which resulted from the merger of two other companies. Immediately after the merger there were delays in getting financial statements prepared, due to inadequacies in the accounting systems. Again this was a situation where neither group had financial statements. The absence of statements did not arise from any disregard for the minority shareholders, but rather from the inadequacies of the accounting staff and systems.

85 I agree with the conclusion in Sexsmith and Watergroup Cos. Inc. that the failure to provide financial statements due to mismanagement, poor accounting systems, or a tradition of informal operation will not amount to oppression where there has been no disregard for the interests of the minority. In many cases the appropriate remedy will be an order for production, not an oppression action. Where, however, financial statements are produced, but they are simply not distributed, that may well amount to oppression, especially where there are numerous shareholders who are not involved in day-to-day operations. This will particularly be so when the failure to report is part of an overall climate of disregard for the interests of the minority. That is especially the case where (as with Envirodrive Inc.) the financial statements disclose otherwise secret non-arm's length transactions between management and the corporation. In this case the failure to report the financial affairs of the corporation, combined with McPeak's other conduct, did unfairly disregard the interests of the Minority Shareholders.

86 McPeak may not be responsible for the engineering shortcomings of the Envirodrive, but his secretive style of governance, and the numerous non-arms length transactions he engaged in inevitably aroused the suspicious of the Minority Shareholders. His secret attempt to spin off the technology to a company owned by himself when Envirodrive Inc. failed (discussed *infra*, paras. 128 - 129) was particularly ill advised in terms of corporate governance and his fiduciary duties to the corporation.

Method of Operation

87 The Applicants complained in a general way about how McPeak operated and managed the company. The following conduct was said to amount to oppression:

(a) Failing to keep certain key persons in Envirodrive's employ, and dealing with employees in a high handed and aggressive manner;

(b) Directing the affairs of Envirodrive Inc. in such a manner as to cause its customers to lose confidence in the ability of Envirodrive Inc. to properly service its products;

(c) Making promises and representations and incurring obligations to suppliers of Envirodrive Inc. and former employees that were not fulfilled, resulting in legal actions against Envirodrive Inc.;

(d) Failing to implement minimal business management tools such as budgets, sales plans, and business plans, financing plans or simple dual signature bank controls;

(e) Not servicing the Canadian oilfield industry but rather concentrating on the more lucrative American market; and

(f) Destroying the reputation of Envirodrive Inc. by inappropriate pricing and poor customer service.

While McPeak's management style was far from ideal, it is not necessary to make findings on whether these complaints are factually well founded, because there is a big difference between mismanagement and oppression. The Minority Shareholders cannot turn a "reasonable expectation" that the corporation would be "well managed" into oppressive conduct. Just because a corporation fails, or runs out of money, or cannot compete in the marketplace does not *per se* amount to oppression. The fact that employees, contractors or suppliers of the company may have grievances against Envirodrive Inc. or McPeak is not oppressive of the minority. Such matters have an equal (or greater) effect on the majority as on the minority. There are many reasons why the Envirodrive was not a successful product, but they are not evidence of oppression.

Misrepresentations

88 One allegation of oppression is said to be misrepresentations made by McPeak at the time of the Acquisition Agreement (list of issues, Schedule A, item 1(a)). As previously discussed (*supra*, para. 75) the Applicants cannot avoid the terms of the contract by repackaging these alleged misrepresentations as oppression. Likewise, the failure to list the shares of Envirodrive Inc. was not oppression, as it resulted from the failure of the Envirodrive, and had an equally negative impact on the majority.

Legal Fees

89 One counsel represented Envirodrive Inc. and the other Defendants in this litigation. The essence of the claim is that these other Defendants misappropriated the assets of Envirodrive Inc., so there was a conflict of interest between Envirodrive Inc. and the rest of the Defendants. The real dispute was between the Minority Shareholders and McPeak and his companies, and in many ways Envirodrive Inc. was a bystander. It is not appropriate for the majority to use the funds of the corporation to defend allegations that they have engaged in misconduct vis à vis the corporation. Only if the officers and directors are successful are they entitled to indemnity: *Business Corporations Act*, s. 124; *Prairie Land Corp. v. Concert Properties Ltd.*, 2004 ABQB 726, 5 C.P.C. (6th) 27 (Alta. Q.B.), at para. 15; *Chromex Nickel Mines Ltd. v. British Columbia (Securities Commission)* (1991), 4 B.L.R. (2d) 189 (B.C. S.C.); *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1989), 68 Alta. L.R. (2d) 194 (Alta. C.A.); *Willson v. Northland Bank* (1991), 82 Alta. L.R. (2d) 31 (Alta. C.A.). They should not be allowed to side-step this rule by retaining counsel at the expense of the corporation.

90 Here the original Originating Notice asked for rescission of the Acquisition Agreement. The effect of rescission would be to deprive Envirodrive Inc. of the Envirodrive business, which would also have the effect of depriving the companies controlled by McPeak of any benefit from the Envirodrive business. As such, Envirodrive Inc. and the other Defendants had a common interest in resisting this claim. But not withstanding that fact, these substantive allegations, including those that were alleged to justify rescission of the Acquisition Agreement, related to alleged misconduct by McPeak. In circumstances like this, it would have been more appropriate for the directors to retain their own counsel. Where, as here, the same counsel has been retained, some division of responsibility for the costs of the defence might be appropriate. The record discloses that significant sums were paid for the defence of this action. To the extent they were actually paid by Envirodrive Inc. the other Defendants must reimburse it, subject possibly to some allowance for defence of the common issues. To the extent that the fees were actually paid for by the other Defendants, they are not entitled to charge the amounts back to Envirodrive Inc. except in accordance with s. 124.

Bankruptcy Proceedings

91 In 2004 McPeak attempted to petition Envirodrive Inc. into bankruptcy. This was said to be oppressive conduct. The circumstances leading up to the bankruptcy petition require further explanation.

92 In the fall of 2000, 836442 Alberta Ltd. was negotiating with EPCOR. 836442 Alberta Ltd. was running out of cash, and because EPCOR was very interested in the Envirodrive it was prepared to put up some money while negotiations were ongoing. It was eventually agreed that Glen English would sell some of his shares of 836442 Alberta Ltd. to EPCOR, and Glen English would then lend the sale proceeds to 836442 Alberta Ltd. as working capital.

93 The transaction took place as anticipated. Towards the end of 2000, Glen English realized that he had incurred a substantial capital gain as a result of the sale of his shares. He had generated a tax liability he could not fund. During the negotiations with McPeak, the tax problem was disclosed to McPeak, and he recommended to English that he consult with Skolney. Skolney advised English that one possible solution was for English to dispose of his shareholders' loan in 836442 Alberta Ltd. at a loss. This loss could be set off against the capital gain that resulted from the sale of the shares to EPCOR. After further discussions, McPeak agreed to cause his company Texas Industries to buy the shareholders' loan from English for the notional sum of $1,000.00.

94 Rod English engaged in a similar series of transactions, but for a much smaller amount.

95 By a series of agreements dated December 28, 2000, Rod and Glen English transferred their shareholders' loans in 836442 Alberta Ltd. to Texas Industries for the sum of $1,000.00. The total indebtedness of 836442 Alberta Ltd. to Texas Industries was $342,664.00, which was evidenced by a promissory note and a general security agreement.

96 At the time that the Acquisition Agreement was entered into two months later, Envirodrive Inc. covenanted to assume the responsibilities of 836442 Alberta Ltd. Accordingly, the obligations under the promissory note for $342,664.00 were transferred from 836442 Alberta Ltd. to Envirodrive Inc. The net result was that Envirodrive Inc. became obligated to Texas Industries Ltd. in that amount.

97 By 2004 Envirodrive Inc. had run out of cash, and it obviously had no ability to pay back the promissory note. By this time the shareholders' dispute was in full swing. In an attempt to recover all of the assets of Envirodrive Inc., and effectively put an end to this litigation, McPeak demanded payment under the promissory note, and triggered the charge in the security agreement. When Envirodrive Inc. could not pay, Texas Industries attempted to petition it into bankruptcy. Since Texas Industries was the only creditor of Envirodrive Inc., the petition was dismissed, because the bankruptcy judge held that where there is only one creditor, exceptional circumstances are required for a bankruptcy. As a result, the strategy of petitioning Envirodrive Inc. into bankruptcy failed.

98 The Minority Shareholders allege that it was oppressive for McPeak to call in the debt, and to attempt to petition Envirodrive Inc. into bankruptcy. They indicate that this was just an attempt by McPeak to obtain control of the Envirodrive patents. They further allege that Envirodrive Inc. was exposed to legal costs in defending the petition, although there is no evidence that Envirodrive Inc. did actually incur such costs: normally it would be the petitioning creditor that would incur costs.

99 In my view it is not generally oppressive for a shareholder, that is also a *bona fide* creditor, to attempt to realize on its security and seek repayment of the debts owed to it in accordance with their terms. There cannot be any general rule that a majority shareholder cannot enforce recovery of shareholder loans, because that would turn the majority shareholder into the unwilling banker of the minority. As I have previously noted, the oppression remedies are not designed to replace other rules of law, such as the laws between debtors and creditors. *Prima facie*, the majority shareholder who is a creditor is entitled to enforce its debts. Of course, if the majority creates an artificial default, that might be oppressive, but here Envirodrive Inc. had clearly run out of money. It is true that the effect of the enforcement of the secured debt might mean that Texas Industries eventually obtains ownership of the Envirodrive patents, which are its only remaining assets of any value. That however is simply the nature of secured debt.

100 Texas Industries is and has been a creditor of Envirodrive Inc. from the very beginning. Once this litigation is over, it is likely that Texas Industries will still be owed a significant sum of money. The minority shareholders cannot simply take the position that Texas Industries is never entitled to enforce repayment of those funds: at some point Texas Industries is entitled to exercise its rights as a secured creditor. For it to do so is not oppressive. As was clearly held in Westfair Foods Ltd. v. Watt, *supra*, the majority is entitled to exercise its legal rights even if that may operate to the detriment of the minority shareholders.

101 The Applicants argue that Texas Industries paid only $1,000.00 for a debt of $342,664.00. The Applicants argue that somehow it is illegitimate for Texas Industries to enforce the debt in the circumstances. But where a debt is assigned from one creditor to an assignee, the debtor has no interest in the consideration paid for the assignment. The debtor cannot take the position that it will only pay the consideration paid by the assignee, and that it is no longer liable for the face value of the debt. The fact is that debt, particularly the debt of distressed companies, is routinely sold at a discount to reflect the risk that there will be no repayment. Section 20 of the *Judicature Act*, R.S.A. 2000, c.J-2 provides that such assignments are legally effective, and the debtor has no standing to complain about it.

102 The Applicants further argue that there was an oral agreement between Rod and Glen English, and Texas Industries, to the effect that at some point in the future Texas Industries would reassign the debt to Rod and Glen English. As Skolney pointed out, in order to be effective for tax purposes the assignment had to be *bona fide* and final. Any secret agreement for a future reassignment of the debt would amount to a fraud on the Canada Revenue Agency. Alleging this collateral agreement obviously engages the parol evidence rule, which has already been discussed (*supra*, paras. 64 - 67). The short answer, however, is that any such issue between Rod and Glen English on the one hand, and Texas Industries on the other, is not pleaded in this action. For the purposes of this action the Court must assume that Texas Industries is the absolute owner of the debt, and that it is entitled to enforce the debt for its full face value.

103 In the result, the allegation that the attempts by McPeak to petition Envirodrive Inc. into bankruptcy were oppressive must be dismissed.

Non-Arm's Length Transactions

104 The Minority Shareholders allege that McPeak engaged in a number of non-arm's length transactions that unfairly disregarded their interests. These transactions are discussed in the next two sections. While the Applicants have not met the burden of proving that many of them were oppressive, the fact that McPeak kept them secret did unfairly disregard the interests of the Minority Shareholders.

Self-Dealing

105 The Minority Shareholders allege that McPeak engaged in non-arm's length transactions between Envirodrive Inc., and himself, his family, and companies and estates that he controls. The Minority Shareholders allege that these transactions occurred at amounts in excess of fair market value, and that the effect was to enrich McPeak and his companies at the expense of Envirodrive Inc. They argue that the transactions are oppressive and unfairly disregard their interests.

106 A number of non-arm's length transactions did take place. None of them were approved by a formal resolution of the Board of Envirodrive Inc., although a lack of corporate authority was not pleaded. In no instance did McPeak consult with Glen English, Rod English, or any of the other Minority Shareholders about these transactions. There was no documentary evidence to support the values used. With a few exceptions, no formal written contracts were prepared to document these transactions.

Burden of Proof

107 In determining whether non-arm's length transactions unfairly disregard the interests of the minority, it is important to determine whether the transactions occurred at fair market value. With the exception of the License Agreement (which is discussed in the next section) the parties presented very little evidence of the market value of the various transactions. Instead, each party asserted that the burden of proof was on the other party, and sought to rely on the burden of proof not having been met.

108 Cases seldom are and seldom should be decided on the burden of proof. The burden of proof has a procedural or tactical component, because it often determines which party should proceed first on a particular issue. However, the ultimate question is usually decided on the evidence, not on the burden of proof. The burden of proof usually only comes into play in two situations:

> (a) in situations where the evidence is exactly equally balanced: *Robins v. National Trust Co.*, [1927] A.C. 515, [1927] 1 W.W.R. 692 (Ontario P.C.). In these very rare cases the party that bears the burden of proof will not succeed;
>
> (b) where the party with the burden of proof calls insufficient evidence on the subject to show even a reasonable probability, even though the other side calls no evidence. In these situations that proponent will not meet the burden of proof, and will fail: *Jaroszuk v. Quewezance* (1992), 66 B.C.L.R. (2d) 171 (B.C. C.A.). This arises in the case of a non-suit application.

In most cases each party calls at least some evidence on the issue, and generally the decision is made based on which party has proven its position on a balance of probabilities, regardless of who technically has the burden. Tactically it is dangerous to go into a trial without calling evidence and relying on the burden of proof, because if the other side calls even a minute amount of evidence, that evidence might well carry the day if it is uncontradicted and within the realm of possibility.

109 The Minority Shareholders called absolutely no evidence on the value of the various transactions. At the very least, the Inspector's report put them on notice that such evidence would be needed. The evidence called by the Defendants on these points was weak, and amounted to circumstantial evidence from which an inference of value might be drawn. The Inspector's opinion corroborated this evidence, although it was not based on an independent investigation. While this evidence was weak, and could easily have been displaced, the fact is that the Applicants did not displace it. Accordingly, what little evidence there is on the record favours the Defendants' position that the transactions were done at fair market value.

110 The Minority Shareholders argue that where a director or other fiduciary deals with corporate assets not at arm's length, the director must demonstrate that the transactions are at fair market value. If that is the situation, then the Defendants' evidence, although weak, is sufficient to carry the day. This is because the Minority Shareholders called absolutely no evidence to rebut it.

111 On the other hand, the Defendants argue that the burden of proof is on the Minority Shareholders, since they are the ones that are attacking the transactions. If that is the case, then the Defendants are also entitled to succeed, again because they did call some evidence on the topic, however weak it might have been.

Consulting Agreement with Texas Industries Ltd.

112 Clause 8.7 of the Acquisition Agreement stated that Envirodrive Inc. would retain the services of McPeak to act as its Chief Executive Officer and Chief Operating Officer. No other details were provided, and no remuneration

was mentioned. The Offering Memorandum of April 12, 2001, which was signed by McPeak, stated that McPeak had received no consulting fee or salary for the one-month period ending March 31, 2001. A number of witnesses testified that McPeak represented or implied that he was working for Envirodrive Inc. for little or nothing. This was usually in the context of other persons asking for increases in their salaries or allowances, with McPeak representing or implying that all concerned would receive their rewards when the company finally went public.

113 Texas Industries Ltd. is a company controlled by McPeak. On March 7, 2002, it sent an invoice for management fees for the 9-month period ending November 30, 2001, in the total sum of $275,000.00. This represented a fee of $25,000.00 per month for eleven months. Since Envirodrive Inc. was only incorporated at the end of February 2001, McPeak could only have worked for it for nine months at this point. On June 28, 2002, a further invoice for $175,000.00 was sent, again representing a fee of $25,000.00 per month. These substantial fees were never disclosed to the Minority Shareholders, and were never approved by the Board. The first invoice was reflected in the 2001 financial statements, but of course those financial statements were never distributed to the shareholders. Even though the statements were audited, no comment was made on the fact that eleven months of fees were charged for nine months of work. The second invoice for $175,000.00, plus a further $125,000.00 for which there is no invoice, were recorded on the 2002 financial statement. Texas Industries actually withdrew $450,000.00 of these amounts (out of a grand total of $575,000.00), from the company.

114 The Minority Shareholders allege that these consulting fees are grossly excessive. At this same time Rick Williams, another key employee of the company, was being paid a fee of $9,500.00 per month. Mr. Smith, one of the salesmen, was being paid $5,000.00 per month. Since the Acquisition Agreement specified that McPeak was to be retained, it can only be assumed that he was entitled to some fee. It seems unreasonable to think that Williams and Smith would be paid for their efforts, but McPeak would not. It is most unfortunate that McPeak persisted in leaving the false impression that he was not receiving any compensation, as this only created suspicions and resentment when the truth came out.

115 Unfortunately, there is no clear evidence on the record as to the appropriate consulting fee for McPeak. There certainly was no agreement with the Minority Shareholders as to the amount he should be paid. The full Board of Directors never turned its mind to the issue. McPeak and Skolney testified that they talked about these fees. McPeak originally suggested $30,000.00 per month. When Skolney expressed concern over their magnitude, McPeak contacted Conroy Partners, a human resources firm, and commissioned a report on prevailing CEO compensation for similar companies. Based on these inquiries he determined that a fee of $25,000.00 per month was at the low end of the acceptable range, and Skolney concurred. It was on this basis that the fee was set and paid without Board approval.

116 The Inspector did not conduct any independent analysis of the fees, but merely reported on the process followed by McPeak and Skolney. He also reviewed a market survey report prepared for McPeak in 2004. The Inspector concluded that the fees "while perhaps somewhat high, are arguably reasonable given his responsibilities within the Company." Given that Envirodrive Inc. was a start-up company with no steady cash flow, I concur with this opinion that the fees were generous. However, the Applicants brought forward absolutely no evidence to show that the fees were unreasonable; given the contents of the Inspector's report they knew such evidence was needed. Despite being hearsay, the Conroy Report, the market survey, the Inspector's opinion, and the process used by McPeak and Skolney to set the fee provide some weak circumstantial evidence to justify the fee. Given his responsibilities, McPeak was entitled to receive more than Williams, although 2 1/2 times the salary received by Williams does seem high. However, in the absence of evidence, there is no basis upon which the Court can interfere.

117 At the end of the day this issue about management fees is just one manifestation of the secretive and somewhat cavalier manner in which McPeak ran the company. Contracts of this magnitude should have been properly documented, and approved by the Board at a formal meeting. The Minority Shareholders should have been consulted or advised. By failing to take these steps McPeak has triggered the suspicion of the Minority Shareholders. This failure to properly manage the company would have spoken against his entitlement to a generous fee. The

Minority Shareholders concede that McPeak is entitled to a reasonable fee, and ask the Court to pull a number out of the air, but absent any evidence on the market value of his services, no relief is possible. The fees actually paid to date will not be displaced, but no further fees can be paid or accrued until they are properly approved by the Board. Any accrued but unpaid fees should be reversed.

Estate of Kenneth Brown

118 McPeak was the executor of the estate of Kenneth Brown. The estate sold a 1992 Dodge truck to Envirodrive Inc. for $9,000.00. The Minority Shareholders allege that the truck was not worth that much, but presented no evidence to support that allegation. McPeak testified that at the time of this transaction he reviewed the *Truck Trader*, and similar publications where used vehicles are advertised, to ascertain fair market value. This is very weak circumstantial evidence of value, but absent any other evidence of value, no relief is possible.

Blystone Resources Inc.

119 Blystone Resources Inc. is another company controlled by McPeak. It sold a considerable amount of industrial equipment, a forklift, and two pick-up trucks to Envirodrive Inc. Only the barest description of this equipment, set out in the invoices, was before the Court. Even Mr. Forest, who worked in the shop, could not identify some of it. McPeak testified again that he reviewed industry publications and contacted suppliers of equipment to ascertain appropriate values. He discussed the values used with Skolney. The Minority Shareholders allege that all of this equipment was sold at an over-value, but presented no evidence of the market value of the equipment or the trucks. The evidence of McPeak provided weak circumstantial evidence of value, which could easily have been displaced. Absent evidence to contradict it, relief cannot be granted.

Mileage

120 On June 30, 2001, Texas Industries sent an invoice to Envirodrive Inc. for mileage. The total amount was $33,981.91, representing 75,515 km. at 45¢ per km. By this time the corporation had been in existence for four months, which for the sake of convenience can be called 120 days. The invoice accordingly implied that McPeak had been driving an average of 629 km. per day. Assuming he could maintain an average speed of 80 km. per hour, this would mean that he was driving 7.86 hours per day.

121 The invoice for mileage is clearly unreasonable, and McPeak made no effort to justify it. The payment of this invoice unfairly disregarded the interests of the Minority Shareholders, and was oppressive.

Personal Expenses

122 The evidence disclosed that McPeak had repairs done to his personal vehicle, and to the vehicles of his family, and had the cost charged back to Envirodrive Inc. McPeak made no effort to justify these transactions. They were oppressive and unfairly disregarded the interests of the Minority Shareholders. The amount involved is $2,020.57 (Exhibits 20 and 21).

Woodbridge Homes

123 Woodbridge Homes is a house building company owned by McPeak. It made use of the offices of Envirodrive Inc. in Red Deer, and apparently did not pay any rent or contribute to the operating costs of the building.

124 The use by McPeak of Envirodrive Inc. resources to further his own economic interests is contrary to his

fiduciary duties, and unfairly disregarded the interests of the Minority Shareholders. The value transferred to Woodbridge was not established on the record, and is undoubtedly modest, but this use of Envirodrive Inc. assets is indicative of McPeak's failure to appreciate that Envirodrive Inc. was not a private company. In the absence of evidence I set the value at a notional amount of $500.00. It appears that telephone expenses of $1,306.40 were charged to Envirodrive Inc., and should be refunded.

Glynis McPeak

125 From time to time Glynis McPeak provided bookkeeping and secretarial services to the company. She rendered invoices for her services. I am satisfied that the services were actually provided. The Minority Shareholders allege that Mrs. McPeak was charging more than the market value of her services, but offered no evidence in support of that. The previous office worker was paid less, but there was no evidence that she did the same work, and she was hired on a more regular basis. Mrs. McPeak worked as a consultant. Absent any evidence, no relief is possible.

Sean and Jason McPeak

126 Sean and Jason McPeak are the sons of Gary McPeak. In the later stages they worked for Envirodrive Inc. Other employees testified that they were hardworking and diligent, although they were inexperienced and untrained. Since they actually worked for the company, they were entitled to be paid. The Minority Shareholders allege that they were overpaid, but provided no evidence of that. Absent evidence, no relief is possible.

The License Agreement

127 The Minority Shareholders challenge a License Agreement granted by Envirodrive Inc. to Texas Industries. This agreement is discussed in the next section.

The License Agreement

128 By late 2002, Envirodrive Inc. realized that there was significant market opposition to the original Envirodrive motor. Customers felt that the original Envirodrive was too large, too expensive, and too difficult to maintain. Plans were formulated to develop a mini-Envirodrive.

129 Effective January 1, 2003, Envirodrive Inc. granted Texas Industries Inc. an exclusive license over all of the technology owned by Envirodrive Inc. The License was likely signed later in 2003 and back-dated. Envirodrive was to receive a license fee of 1 $^{1}/2$ % of net sales. Texas Industries promptly assigned the License to Envirodrive Systems Inc., a new corporation that had been incorporated by McPeak. The mini-Envirodrive unit was then allegedly developed by and for the benefit of Envirodrive Systems Inc., although some of the personnel of Envirodrive Inc. were used for this purpose. The License was never approved by the directors, or the shareholders, and remained a secret until after this litigation started. The Minority Shareholders challenge this non-arm's length transaction.

Expert Evidence

130 An important issue in determining whether the License Agreement unfairly disregarded the rights of the Minority Shareholders is whether the terms of the License Agreement are commercially reasonable. Both parties called expert evidence on this point. The Defendants called Mr. Jeremy Webster, a chartered accountant. The Minority Shareholders called Mr. Neil Nichols, a tax and commercial lawyer with experience with intellectual property licenses. Both of these witnesses were qualified to give expert opinion evidence on the commercial reasonableness of the terms of the License.

131 The Defendants took exception to the expert report of Nichols, arguing that it violated the following Rules that pertain to expert evidence:

(a) an expert may not be called to give evidence on the meaning of a contract;

(b) an expert may not give an opinion on a matter of domestic law; and

(c) an expert should remain independent and impartial, and should not be an advocate for any party.

The Minority Shareholders did not particularly quarrel with these propositions of law, but argued that Nichols' report did not offend them.

132 It is clear that an expert may not testify as to the meaning of a contract, except perhaps where the contract uses technical terms that require definition: *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 1 Alta. L.R. (3d) 167 (Alta. C.A.); *Sun Life Assurance Co. of Canada v. 2710153 Canada Ltd.*, 1998 ABQB 943 (Alta. Master), at para. 15; *Hovsepian v. Westfair Foods Ltd.*, 2003 ABQB 641, 22 Alta. L.R. (4th) 241, 37 B.L.R. (3d) 78 (Alta. Q.B.); at paras. 47-8; and *Michael Santarsieri Inc. v. Unicity Mall Ltd.* (2000), 152 Man. R. (2d) 215, 38 R.P.R. (3d) 105 (Man. Q.B.), at paras. 7-8. In this case the experts were asked to opine on whether the terms of the License Agreement were commercially reasonable. All experts state the assumptions they have made in forming their opinions, and in this case in order to give an opinion on value it was necessary for the experts to state their assumptions about the meaning of various portions of the meaning of the terms of the License Agreement. In some instances the assumptions were stated in a way that made it appear that the experts were giving opinions about the meaning of the contract, which would be impermissible. However, in my view, the true intent of the experts was merely to state their assumptions about the meaning and effect of the License Agreement, to support their conclusions about the reasonableness of those terms, and that is acceptable. Of course, if their assumptions about the meaning of the terms of the License turn out to be faulty, that would undermine their opinions, as it does in any case.

133 It is sometimes said that an expert cannot provide an opinion on the ultimate issue to be decided by the Court, but that general statement goes too far. It is true that an expert may not express an opinion on domestic (as opposed to foreign) law. Many of the "ultimate issue" cases are actually instances where opinions were expressed on matters of law. For example, an accident reconstruction expert can testify as to how an accident happened, and what caused it, but the expert cannot express an opinion as to whether the defendant was "negligent". The conclusion of negligence is a matter of law reserved to the trial judge: *Hovsepian v. Westfair Foods Ltd.* , *supra*, at para. 50; *Royal Bank v. Northpark Motor & Recreation Ltd.* (1991), 112 A.R. 23 (Alta. Master) at paras. 108-110; *Sherrard v. Jacob*, [1965] N.I. 151(Eng. C.A.) at pg. 156; *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (Alta. C.A.), at para. 8.

134 In this particular case the report prepared by Nichols did stray over this line. For example, Nichols came to the following conclusions:

> 5.1 Against the objective backdrop of the above licence elements which informed parties would reasonably expect to have in a licence agreement for mutual advantage, I examine the Envirodrive Licence and conclude that it is so lopsided in favour of the licensee that it is not representative of a commercial bargain for licencing technology at all, *but rather the salient shortcomings in the Envirodrive Licence, taken together, tend to show that it is a ruse and the instrument of an equitable fraud by Mr. McPeak, a director of Envirodrive Inc.*
>
> 5.2 I confine my opinion to the factual elements in or omitted from the Envirodrive Licence. These salient deficiencies, taken together and in context, tend to show that there was no commercial bargain reflecting

> the reasonable expectations of informed parties to a technology licence agreement, *and that therefore the licence is an instrument of equitable fraud (breach of trust by a fiduciary).*
>
> (emphasis added)

The emphasized portions of these passages go beyond the proper scope of an expert opinion. They do not merely state the findings of the expert, but go on to give an opinion about the legal consequences that follow from that opinion. This is the function of the trial judge, not the expert, and I have ignored these and other similar passages in the Nichols' report.

135 An expert witness should strive to be impartial and independent, and should not be an advocate for either party. The Defendants challenged Nichols' report on the basis that it was argumentative, used pejorative language, and was essentially a brief on behalf of the Minority Shareholders. The Defendants cited *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, 2000 CarswellNfld 402 (Nfld. T.D.), at paras. 4, 6:

> 4. My understanding of the purpose of expert evidence is to provide opinion evidence on matters that are beyond the common understanding of the judge or jury, that such matters engage generally technical and scientific issues which require particular expertise or training. . . . An expert, in my view, is expected to be generally objective and generally independent. I recognize that an expert is usually testifying on behalf of a party, and some slant towards that party may be expected. I also recognize that issues of this nature may on occasion go to the weight to be accorded to the evidence, but I am of the view that saying that something should go to weight should not be used simply to permit the introduction of otherwise inadmissible evidence. I do believe that when reporting as an expert, the expert and the report, if it's to be of assistance, do require a demonstration of a measure of objectivity and independence, and that is an objectivity and independence which flows from being true to the particular discipline involved. The expert or the report should not become so identified with the client's case as to change from being an assistant to being an advocate.
>
> 6. To reiterate, an expert is brought to provide specialized assistance to the Court. It is not the role of the expert, either in viva voce evidence or through a report, to be partisan, to be an advocate. Neither is it the role of the expert to interpret the law, nor to offer opinions or conclusions on matters that are outside the sphere of specialty and particular expertise of the expert. Here, looking at the report as a whole -- and when I say "a whole", I'm speaking in particular of the 73 pages written of the report -- it reads like a judgment written for McNamara. It is highly partisan and advocates McNamara's position throughout. There is a consistent use of language that I consider to be pejorative and judgmental, and for a large part, it is simply devoted to a recitation of facts as understood by the expert and the offering of conclusions based on those facts that do not require specialist's expertise. As well, there are there are [sic] numerous suggestions of proper contractual interpretation, an issue which, I believe, is properly reserved to the trial judge.

In *McNamara Construction Co.* the expert's report was found to be so partisan that it was excluded in total.

136 It is true that in places Nichols' report uses strong language, and as I have previously indicated, he draws conclusions of law. Nichols came to the conclusion that the License Agreement was not commercially reasonable, and indeed that it was so unreasonable that it was beyond argument that it was reasonable. It was in this context that Nichols used his colourful adjectives. While it might have been more appropriate if he had not done so, his report is not so partisan as to justify its exclusion. I accordingly admitted his report, reserving of course the issue of the weight to be given to it.

137 The Defendants also objected to the Nichols Report on the grounds that it went beyond being a true rebuttal report. Both the Webster and the Nichols Reports address the same issue: the commercial reasonableness of the

License. That is sufficient to make the latter a rebuttal report of the former: *Wade v. Baxter*, 2001 ABQB 812, 98 Alta. L.R. (3d) 230 (Alta. Q.B.) at para. 69. The rebuttal expert does not have to use the same assumptions and methods as the initial expert, as long as the essential issue addressed is the same.

Commercial Reasonableness of the License

138 Nichols testified that most technology licenses cover certain key topics which he identified as follows:

> 1. The Technology: defining the Technology, and whether or not it includes future developments; assurances of non-infringement or all-original work, or valid assignments in good standing.
>
> 2. The Grant of the Licence: determining the scope (use, territory and sector) and whether or not it includes technology sharing of future developments and product spinoffs (upstream and downstream licences); rights of expansion.
>
> 3. Manufacturing: approval of modifications, quality assurance, products liability and indemnification, process knowhow.
>
> 4. Marketing and Sales: the minimum thresholds for sales quota, customer lists, cooperative advertising, if financing sold with product, e.g., who provides the guarantee for floor plan financing.
>
> 5. Payments: Return Seed Money, R & D Refundable Tax Credits, who pays for cost of future development, Per Unit charge to amortize development costs, Licence Fee, Gross Royalty and Commissions.
>
> 6. Confidentiality, non-competition, non-challenge, sublicencing, permitted assignment.
>
> 7. Default Control: precise performance obligations, if the licensee defaults in its conduct or commitments, the licensee can lose the licence or some part of it; anti-dumping control.

In his report, Nichols expanded on each of these factors.

139 Nichols then examined the License Agreement, and concluded that there were numerous deficiencies in it from the perspective of the licensor. He discussed these deficiencies in detail, and summarized them as follows:

> 5.3 The particular salient deficiencies in the Envirodrive Licence which tend to show the above . . . include:
>
> (a) the scope of the Envirodrive Licence is too large: exclusive worldwide in all industrial sectors.;
>
> (b) the term of the Envirodrive Licence is too long: 20 years plus infinite renewals of 5 years each;
>
> (c) the grant of absolute rights is tantamount to a sale or transfer done by way of exchange of technology for a picayune licence fee; compare this with more realistic targets and milestones for faster development of all markets;
>
> (d) the licensee pays only a licence fee: low rate of licence fee for recovery of development costs is a farce;

(e) there is no reasonable cost-recovery of development costs: over 11.1 years to more than 100 years for cost recovery by the Corporation;

(f) there is no reasonable cost-recovery of seed money for development costs: over 16.7 years to more than 100 years for cost recovery of the seed money of the Investors;

(g) no royalties, just the licence fee;

(h) no commissions, just the licence fee;

(i) the licensee can use all defined technology and improvements for free;

(j) the licensee will own outright at no cost all improvements developed in association with the licensor;

(k) there is no upstream licence of the licensee's improvements to the licensor;

(l) the licensee will have a royalty-free licence at no cost to use any patents of any kind obtained by Envirodrive for any invention whatever;

(m) there is no consequence for default in payment;

(n) there is virtually no Default Control by licensor: thus the reversionary rights are emasculated;

(o) there is no protection of the licensor against product liability claims: not even a right to indemnification by licensee to keep the licensor whole;

(p) there is neither exclusion of liability for warranty claims nor a requirement that the licensee create a warranty reserve provision;

(q) there is no provision dealing with joint obligations to support floor plan financing or for the licensor to give none;

(r) the licensee can terminate the agreement on 60 days notice for any reason whatever, pay the licensor nothing and keep the [new] technology!

Nichols concluded that because of all these deficiencies, the License Agreement was not commercially reasonable.

140 Mr. Webster, the expert called by the Defendants, took a different approach to assessing the reasonableness of the License Agreement. He examined the published literature, and located five surveys prepared between 1992 and 2004. These surveys analyzed various samples of license agreements, providing, in part, analyses of the license fees provided for in those licenses. He concluded that the market data suggested a royalty range of between 1% and 7% for licensed technology. Because the Envirodrive technology had not been successful, it had failed to penetrate the market to any degree, and it appeared to require a considerable investment to perfect it, he concluded that the appropriate license fee for the Envirodrive technology would be at the lower end of the range. It was Webster's opinion that a fair market royalty would be between 1 and 3%, and he therefore concluded that the 1.5% license fee called for in the License Agreement was commercially reasonable.

141 Webster did not examine in detail the provisions of the License Agreement, apart from the license fee, but he

did assume that the License Agreement did not prevent Envirodrive Inc. itself from competing with its licensee. He also concluded that Envirodrive Inc. would receive license fees on any improvements to the device made by Texas Industries. Finally, he noted that the licensee agreed not to challenge the validity of the patents. These advantageous features of the license, when combined with the licensee fee of 1.5%, he concluded made the License commercially reasonable when considered in total.

142 Neither one of these two expert opinions is entirely satisfactory. Webster's opinion is largely one-dimensional, in the sense that he focuses almost exclusively on the license fee as opposed to the other provisions of the License. I also question some of his assumptions about the terms of the License.

143 The License grants Texas Industries an exclusive license. In my view it is unlikely that Envirodrive Inc. would be able to compete with its licensee under the terms of this License. It is true that Texas Industries tolerated the minimal sales of the Envirodrive that occurred after the License was signed, but at this time McPeak was in control of both companies, and had the advantage of all the cash flow. If there had been true competition between the two companies, I have no doubt that Envirodrive Inc. would not have been able to compete with Texas Industries without a fight. In any event, since Envirodrive Inc. does not receive the advantage of any further developments of the prototype, Envirodrive Inc. would necessarily be competing with an obsolete product. This particular provision provides no real advantage to Envirodrive Inc.

144 I also question whether there is any significant value in the covenant not to challenge the patent. This type of clause is standard in a technology agreement. It is difficult to conceive of one party licensing technology to another party, and then allowing the licensee to challenge the very validity of the patent.

145 Nichols' report is also not without its shortcomings. He did not have the benefit of any statistical data on average license rates, and relied instead on his own experience in negotiating such agreements. On the other hand, Nichols pointed out that Webster's selection of the 1 to 3% range was somewhat arbitrary, and that a 5% royalty rate seemed to be the median in many of the surveys, particularly those that separated out the oil and gas industry.

146 Nichols' report was also wanting in that it did not have much regard for the practical reality that Envirodrive Inc. was out of cash, and had no ability to develop the technology itself. This would have to put Envirodrive Inc. in a weak bargaining position in the marketplace, which would affect the terms that might reasonably be available. Envirodrive Inc. would also have to accept that there had been problems with the operation of the units, and that they had not been readily accepted by the market, something glossed over by Nichols.

147 Webster questioned Nichols' approach of assuming that the research and development expenses invested by Envirodrive Inc. would automatically be recoverable from the licensee. I accept Webster's point that this assumes that there was some remaining value in the research and development. Otherwise, these are sunk costs, and are not necessarily recoverable. That being said, Nichols' analysis of the length of time that would be required for Envirodrive Inc. to recover its costs is of some interest. At the end of the day, the real value that Envirodrive Inc. had was in its patents. While Envirodrive Inc. had no immediate ability to exploit those patents itself, the patents did apparently have some value, and that value should have been reflected in the License. If there was no value in the patents, there presumably would have been no reason to transfer them to Envirodrive Systems Inc.

Conclusion on the License Agreement

148 McPeak and Skolney attempted to justify the License by arguing that it was the only alternative available to Envirodrive Inc. By the fall of 2003 Envirodrive Inc. was out of money, and sales of the original Envirodrive were non-existent. Skolney and McPeak concluded that the company had very few options:

(a) go back to the existing shareholders to seek a further injection of capital;

(b) identify a new source of venture capital outside the company;

(c) turn the technology over to McPeak to develop on his own; or

(d) simply abandon the company and the technology.

McPeak and Skolney concluded that the existing investors would not put any more money into the company, although this option was never given to the shareholders. They also concluded that a new venture capital partner could not be identified unless Envirodrive Inc. had a well-developed and feasible new product to offer to the market. They therefore concluded that the only remaining solution was to turn the technology over to McPeak to allow him to develop it at his own risk. All of this was done in secret, without consulting with or informing the other shareholders, without proper Board approval, and without obtaining any independent valuations of the technology.

149 It should also be noted that at the time the License was entered into, the patents were the only significant remaining asset of Envirodrive Inc. There is a strong argument to be made that the worldwide exclusive license granted to Texas amounted to a "sale, lease or exchange of all or substantially all of the property of the corporation", and under s. 190(1) of the *Business Corporations Act* it had to be approved by the shareholders. The absence of shareholder approval was not pleaded in this case, so this issue is not directly before the Court. However, this is a factor that can be taken into account in assessing whether the business of the company was run in a manner that unfairly disregarded the interests of Minority Shareholders.

150 It is trite law that directors are fiduciaries of the company. They cannot appropriate to themselves business opportunities and assets of the corporation, at least without making full disclosure of the transaction, and at other than fair values: *400280 Alberta Ltd. v. Franko's Heating & Air Conditioning (1992) Ltd.* (1995), 26 Alta. L.R. (3d) 421, 166 A.R. 241 (Alta. Q.B.). The directors simply cannot be heard to say that the corporation does not have the funds to pursue the opportunity itself, because to accept such a rationale would put every company at the mercy of its directors: *Keech v. Sandford* (1726), 25 E.R. 223 (Eng. Ch. Div.); *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (U.K. H.L.); *3464920 Canada Inc. v. Strother*, 2005 BCCA 35, 1 B.L.R. (4th) 302 (B.C. C.A.) at para. 47. The cases have consistently rejected this argument.

151 The Defendants argue that there is no longer an absolute prohibition on directors taking up a corporate opportunity that the corporation cannot pursue, citing M. Koehnen, *Oppression and Related Remedies*, (Thomson Carswell, 2004), at pg. 252:

> What then *is* the current state of the law concerning corporate opportunities, especially when the corporation cannot or has chosen not to pursue them? The correct statement of the law, it is submitted, is that directors are permitted to pursue corporate opportunities if the corporation truly cannot or has truly chosen not to pursue them. The difficulty lies in determining whether the corporation truly cannot or does not wish to pursue them. Directors bear a heavy burden of persuading a court of this.

Koehnen cites *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) 1 (S.C.C.) at pg. 8, where the Court noted that Peso had turned down the opportunity for "sound business reasons", and allowed the directors to pursue the opportunity. In *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371 (S.C.C.) the Court stated at pg. 383:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there *may* be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for

example by reason of legal disability, to participate in the transaction. (emphasis added)

and at pp. 382-3 stated that the issue was fact specific and that rigid rules should not be laid down.

152 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, 80 D.L.R. (4th) 161 (Ont. C.A.) a corporation decided to merge the operations of a wholly owned subsidiary with those of a partly owned subsidiary. An independent committee of directors was formed to evaluate the transaction, based on valuations done by expert consultants. The transaction was approved by over two-thirds of the shareholders, but a number of shareholders dissented and challenged the transaction. The Court described the role of the reviewing judge as follows:

> 75 There can be no doubt that on an application under s. 234, the trial Judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial Judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required. That does not mean that he is not well equipped to make an objective assessment of the very factors which s. 234 requires him to assess. Those factors have been discussed in some detail earlier in these reasons.

This was said in dismissing an argument that the reviewing judge should engage in a detailed examination of the business decisions of the directors. Obviously if the transaction is shown to be at less than fair value (as happened in *Brant Investments Ltd.*) the judge should intervene. The Court however concluded that "business decisions, honestly made, should not be subjected to microscopic examination." The Defendants argue that the granting of the License should therefore not be subjected to microscopic examination.

153 In *Brant Investments Ltd.* the Court confirmed that the reviewing judge should consider the "nature of the impugned acts and the method by which they were carried out". In this case the "nature of the act" is an assignment of all the Envirodrive intellectual property (consisting of substantially all of the assets of the corporation) by two directors to another corporation owned by one of those directors. The "method" was a sale in secret, unsupported by any independent valuation, without the approval of the board of directors, much less the shareholders. Indeed the other shareholders did not discover the transaction until after this litigation commenced. This method of proceeding was calculated to disregard the interests of the minority.

154 The Defendants argue that the Minority Shareholders would not have been interested in investing in the mini-Envirodrive. Whether that is so is speculation. If the Minority Shareholders have any legitimate complaint about their "reasonable expectations" it is that they should have been consulted on this fundamental issue. By dealing with the License in the way they did (in secret, with no independent fairness evaluation, and without putting it to a vote of the shareholders) the directors of Envirodrive essentially denied the Minority Shareholders the opportunity to say "No". This unfairly disregarded their interests, and distinguishes cases like *Peso Silver Mines Ltd.* where the corporation consciously considered and then chose not to pursue the opportunity. Whatever the exceptions may be to the rule that directors may not take up corporate opportunities even when the corporation cannot, it will necessarily be a condition precedent that the corporation must have openly and fairly considered and rejected the opportunity. An especially high burden will fall on the directors when they propose to use assets of the corporation (like the Envirodrive patents) to pursue the opportunity.

155 The License has many of the shortcomings pointed out by Nichols, (*supra*, para. 139). It is one thing for a licensor to concede these points in a hard negotiation with an independent third party. It is quite another thing for the

directors to enter into this sort of agreement with themselves, without apparently even averting to the various shortcomings of the License from the point of view of Envirodrive Inc. Apart altogether from the shortcomings of the substantive terms of the License, the way in which the License was put in place unfairly disregarded the interests of the minority.

156 At the end of the day, I am more convinced by Nichols' opinion. I have concluded that the terms of the License Agreement were not commercially reasonable, and indeed they reflected a marked departure from what might be considered reasonable. The method of entering into the License Agreement unfairly disregarded the interests of the Minority Shareholders. The License Agreement was therefore an oppressive transaction, and it must be set aside. All improvements made to the technology by Envirodrive Systems Inc. must be transferred to Envirodrive Inc. Envirodrive Inc. must pay Envirodrive Systems Inc. all expenses actually incurred and paid to third parties to develop the mini-Envirodrive.

Punitive Damages

157 The Applicants claimed punitive damages, based on the misconduct of McPeak. It is clear that punitive damages can be awarded in cases of breach of fiduciary duty. However, in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (S.C.C.), the Court made it clear that punitive damages are exceptional. Punitive damages are only awarded after all compensatory damages have been calculated. Once the plaintiff has been fully compensated for its losses, the plaintiff must show a pressing need for retribution, deterrence or denunciation to justify an award of punitive damages. Litigation should not just become a lottery, with a large award of punitive damages as the ultimate jackpot.

158 The mere fact that there has been a breach of fiduciary duty is not sufficient. Once the plaintiff has been fully compensated for its losses, there is seldom justification for awarding more. There will occasionally be cases where the fiduciary has realized a profit greater than the plaintiff's losses, but in those circumstances the disgorging of the profit is usually the proper remedy. Absent an uncompensated loss, or a remaining profit in the wrongdoer, an independent actionable wrong must be shown to justify punitive damages. In the cases where punitive damages are awarded, there is generally some wilful and outrageous misconduct at play.

159 In this case the Applicants relied on the benefits that McPeak took from Envirodrive, but any benefits improperly taken will be restored by this judgment. They also complain that the conduct of McPeak had caused this litigation. The costs of litigation are dealt with in costs awards, and not generally through punitive damages, although as *Whiten* shows the boundary may sometimes be unclear. To the extent that McPeak is responsible for the cost of litigation, he will presumably be directed to pay them in due course. The Applicants also pointed to extraneous issues such as "having the R.C.M.P. tell an employee he no longer has a job, assaulting Rod English when he tried to pick up the records of 836, refusing to pay employees their expenses or salaries" and the like. Other complaints of the Applicants disclosed at best bad manners or rudeness. These matters are all completely extraneous to the breaches of fiduciary duty. An award of punitive damages is not made to reflect the Court's view of the overall character, lifestyle, or past conduct of the defendant. Such an award can only relate to any actionable wrong found by the Court.

160 The secret entering into of the License Agreement was said to support an award of punitive damages. In the end the Applicants will suffer no loss, and McPeak will achieve no gain, from the License Agreement, because it must be set aside. It appears that McPeak may have expended some funds on the development of the mini-Envirodrive, the recovery of which from Envirodrive Inc. is speculative at this point. While the entering into of the License Agreement was wilful, in the sense that it was deliberate and intentional, I am not satisfied that it resulted from any independent actionable wrong. Skolney and McPeak believed that the License Agreement was the only alternative available in the circumstances. In coming to this conclusion they erred, because as fiduciaries they were not entitled to appropriate all of the corporation's assets to themselves. Their failure to properly document and authorize the License was amateurish and disregarded the interests of the minority. However, given the nature of the

transaction, it could not have stayed secret for long. In all of the circumstances the granting of the License Agreement might have justified an award of punitive damages.

161 The Applicants have identified a number of other non-arm's length transactions, but they have not provided evidence to set aside many of them. McPeak will be required to restore any assets of Envirodrive Inc. that he took without justification. His conduct in entering into these agreements was a breach of fiduciary duty, but that in itself does not justify an award of punitive damages.

162 To the extent that McPeak earned fees, the Applicants have not proven that he was not entitled to those fees, and accordingly they cannot seek punitive damages simply on the basis that McPeak might have "profited" by working for the corporation.

163 The secretive and cavalier way in which McPeak ran the company unfairly disregarded the interests of the shareholders. To a large extent, however it caused no pecuniary loss. The shareholders received disclosure, albeit late, and in due course a shareholders' meeting was held. This type of corporate governance is obviously not to be encouraged. Since it results in no pecuniary damages, it may well have justified an award of punitive damages.

164 The Applicants also complained about late or non-disclosure of documents through the discovery process. For example, there are certain documents mentioned in correspondence or in the recitals of other documents that were never produced. It appears that some of those documents may never actually have existed, or they were never signed. It appears that the License Agreement was back-dated, although the exact date of its preparation is not clear. The failure of a party to properly comply with the Rules of Court on disclosure should be dealt with by an award of costs, not by punitive damages. While it is true that some of these documents were never produced, it seems unlikely that they would have had any effect on the outcome of the litigation. On balance, none of these complaints justify an award of punitive damages.

165 The Defendants noted that punitive damages were not pleaded, and argued that this was a bar to the claim. In *Whiten*, *supra*, at paras. 86-7, the Court made it clear that punitive damages must be pleaded. The Applicants argue that they have alleged breach of duty by a fiduciary, and that in such cases punitive damages are always at issue. However, merely because the pleadings allege some sort of misconduct does not obviate the need to specifically plead a claim for punitive damages. For this reason the Applicants are not entitled to punitive damages.

Remedies

166 The Applicants argue that McPeak "paid nothing" for his shares. This is apparently a reference to the fact that the Acquisition Agreement involved no cash consideration. It ignores the fact that McPeak (and Skolney) did put cash into the business. It also ignores the fact that the shares at the time had no value (Applicants' Brief, para. 9). The Applicants argue that the remedy for the oppression they have identified is to "expunge" McPeak's shares and shareholder loans, or in other words to expropriate without compensation his interest in Envirodrive Inc. It is not clear to me that the wide powers available to the Court in an oppression action extend to expropriating the interests of the majority and turning them over to the minority, but in any event that remedy would be inappropriate here. To the extent that McPeak diverted assets and opportunities of Envirodrive Inc., the proper remedy is to order him to return them.

167 It is also inappropriate for the Court to now try and re-evaluate the consideration that was or should have been paid under the contracts negotiated at arm's length by the parties. It is not open to the Applicants to argue that McPeak got too good a deal in the Acquisition Agreement, or the assignment of the loans, under the guise of "oppression".

168 The following remedies are granted:

(a) There are to be four directors of Envirodrive Inc. Two will be appointed by McPeak, and two by the Applicants (preferably one from the 836442 group and one from the Offering Memorandum group). The parties should try to agree on a neutral Chair, failing which they will have to operate with an even number of directors. Non-arms length transactions will require the votes of three directors;

(b) The License Agreement between Envirodrive Inc. and Texas Industries is rescinded. All the technology, including that related to the mini-Envirodrive, as well as any drawings and prototypes, must be transferred from Envirodrive Systems Inc. to Envirodrive Inc. Texas Industries, McPeak and Envirodrive Systems Inc. are entitled to be reimbursed by Envirodrive Inc. for all expenses actually incurred and paid by them to third parties relating to the mini-Envirodrive;

(c) Envirodrive Inc. is granted judgment against 836442 Alberta Ltd. for $51,170.00 (accounts receivable);

(d) Texas Industries must account for two months of consulting fees ($50,000) overcharged for the 2001 fiscal year;

(e) McPeak is not entitled to any further consulting fees unless and until they are approved by the Board;

(f) Texas Industries must refund the mileage invoice amount of $33,981.91;

(g) McPeak must refund the personal vehicle expenses of $2,020.57;

(h) McPeak must refund benefits received by Woodbridge Homes of $1,806.40 ($500 occupancy costs and $1,306.40 telephone expense);

(i) McPeak must account for any legal fees paid by Envirodrive Inc. to defend his personal position in this litigation.

(j) The claims against Glynis McPeak, Jason McPeak and Sean McPeak are dismissed;

(k) The claims arising from dealings with the estate of Kenneth Brown and Blystone Resources Inc. are dismissed;

(l) The claim for punitive damages is dismissed;

(m) The claim for recision of the Acquisition Agreement is dismissed;

(n) The claim of the "Doe" Applicants is struck;

(o) All debts owing to and by any party may be set off.

169 Within 15 days of the date of this Judgment counsel for the Applicants should send a draft formal judgment to counsel for the Defendants, who will respond within 10 days. If the form of judgment cannot be settled without delay, counsel should contact me. The parties may agree on costs, or failing that counsel may contact me within 30 days of the date of this Judgment to make arrangements to speak to costs.

Action by minority shareholders allowed; action by E Inc. dismissed.

APPENDIX

Issues Ordered to be Tried

1. The following issues are hereby directed in the within proceedings:

(a) Whether the conduct or any of the conduct referred to on the "List of Alleged Conduct" provided by the Applicants, and attached hereto as Schedule "A" occurred, and if any of the alleged conduct did occur, whether such conduct amounts to conduct that is oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Applicants in accordance with Section 242(2) of the *Business Corporations Act* of Alberta;

(b) Was the Licensing Agreement dated the 1st day of January, 2003 between Envirodrive Inc. and Texas Industries Ltd. and subsequently assigned to Envirodrive Systems Inc. oppressive or unfairly prejudicial to the interests of the Applicants;

(c) Pursuant to the relief claimed in paragraphs 1, 2 and 3 of the Originating Notice of Motion filed January 9, 2004;

(i) Did the Respondents W. Gary McPeak, Glenn Skolney and Daniel Lim, or any of them, make material misrepresentations to the Applicants as to their financial ability to manage Envirodrive Inc.;

(ii) If the Respondents, or any of them, made material misrepresentations to the Applicants, or any of them, should the Sale Agreement and related documentation made between 836442 Alberta Ltd. and Envirodrive Inc. be set aside;

(d) Whether the Sale Agreement of February 28, 2001 as between Envirodrive Inc. and 836442 Alberta Ltd., Rodney English and Glendon English, and all documentation relating to the same, should be set aside based upon the allegations of misrepresentations and related oppression action as set forth in detail in the Amended Counterclaim filed in Action No. 0303 12841.

2. The issues set out in Court of Queen's Bench Action No. 0303 12841 shall be heard concurrently with the issues set out in paragraph 1 hereof and the Defendants in that action shall file a Statement of Defence on or before the 30th day of November, 2004.

Schedule A List of Alleged Oppressive Conduct

1. To 836442 Alberta Ltd.

(a) the misrepresentations made by Gary McPeak and by Gary McPeak on behalf of Envirodrive Inc. at the time of the asset sale agreement as detailed in the Counterclaim;

(b) the inability of Gary McPeak to properly and effectively manage Envirodrive Inc.;

(c) the complete misuse of the agreements made between Gary McPeak and Rod English and Glen English concerning their shareholder's loans by utilizing the same as a basis for a Petition into bankruptcy of 836442 Alberta Ltd.;

(d) the filing of a bankruptcy applicant against 836442 Alberta Ltd. on the basis of documentation that Gary McPeak knew or ought to know did not support any such an application;

2. To 836442 Alberta Ltd. and all the minority shareholders

(a) the failure or refusal to call any shareholders meetings until directed to do so by the Court;

(b) the failure or refusal to provide financial statements to the shareholders until directed to do so by the Court;

(c) the failure or refusal to provide any financial statements to the shareholders past the November 30, 2002 financial statements;

(d) the payment of management fees to Texas Industries Ltd. without adequate supporting documentation justifying the amount of such payments;

(e) causing Envirodrive Inc. to purchase assets from Gary McPeak or corporations controlled by him at prices far in excess of the fair market value of such purchased assets;

(f) the elimination of the key employees of Envirodrive Inc. and the replacement of same with unqualified individuals in particular Jason McPeak and Sean McPeak;

(g) the payment of salaries to Glynis McPeak without adequate supporting documentation justifying the amount of such payments;

(h) the destruction of the good name and reputation of Envirodrive Inc. by inappropriate pricing and the ongoing failure to service the Envirodrive product that had been purchased by customers of Envirodrive Inc.;

(i) the appropriation of the Envirodrive patent by corporation controlled by Gary McPeak and the development, or attempted development, of alternatively technology springing from the Envirodrive patent;

(j) the failure to list Envirodrive Inc. on a listed stock exchange;

(k) the failure to consult with the directors and shareholders of Envirodrive Inc. concerning the American party who, according to Gary McPeak was prepared to pay USD $30,000,000.00 for either the Envirodrive name or its patent; and the concurrent failure to market either the Envirodrive name or the patent for USD $30,000,000.00;

(l) the complete squandering, for the benefit of Gary McPeak and his family, of $2,000,000.00 of funds invested by the Applicants;

(m) the failure of Glenn Skolney, C.A. as a director to inform the shareholders of Envirodrive Inc.

of the activities and deficiencies of Gary McPeak as set forth above.

(n) that the Respondent W. Gary McPeak breached his fiduciary duties to the shareholders of Envirodrive Inc. as an officer and director of Envirodrive Inc.

END OF DOCUMENT

TAB 7

2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68

2007 CarswellAlta 1050

Calpine Canada Energy Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

Alberta Court of Queen's Bench

B.E. Romaine J.

Heard: July 24, 2007
Judgment: July 31, 2007[FN*]
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Sean F. Collins, Jay A. Carfagnini, Fred Myers, Brian Empey, Joseph Pasquariello for CCAA Debtors

Patrick McCarthy, Q.C., Josef A. Krueger for Monitor

Robert I. Thornton, John L. Finnigan, Rachelle F. Moncur for Ad Hoc Committee

Sean F. Dunphy, Elizabeth Pillon for ULC2 Trustee

Howard A. Gorman for ULC1 Noteholders Committee

Peter H. Griffin, Peter J. Osborne for U.S. Debtors

Peter T. Linder, Q.C., Emi R. Bossio for Fund

Ken Lenz for HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz for Lehman Brothers

Rinus De Waal for Unsecured Creditors' Committee

Neil Rabinovitch for Unofficial Committee of 2nd Lien Debtholders

2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68

B.A.R. Smith, Q.C. for Alliance Pipelines

Douglas I. McLean for TransCanada Pipelines Limited

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- "Fair and reasonable"

Applicants obtained order granting them protection from their creditors under Companies' Creditors Arrangement Act ("CCAA") -- Order appointed monitor and provided for stay of proceedings against applicants and against CESC Partnership, CCNG Partnership, and CCS Limited Partnership -- Applicants and these three parties were together referred to as CCAA debtors -- Parties negotiated terms of global settlement agreement ("GSA") -- Monitor noted that GSA resolved all material issues that existed between applicants and US debtors -- Monitor concluded that GSA was beneficial to CCAA debtors and their creditors and unequivocally endorsed GSA -- CCAA applicants and US debtors brought application to this court and to United States Bankruptcy Court in joint hearing for approval of settlement of these major issues -- Application granted -- GSA was approved -- GSA was not plan of compromise or arrangement with creditors and therefore, vote by creditors was not necessary -- No rights were being confiscated under GSA -- Some claims were eliminated, but only with full consent of parties directly involved in those specific claims -- GSA resolved most of cross-border issues in reasonably equitable and rational manner, provided mechanism by which number of remaining issues could be resolved in court of one jurisdiction or other, and provided likelihood of greatly enhanced recoveries and expectation that overwhelming majority of Canadian stakeholders would be paid in full -- GSA eliminated substantial amount in claims against CCAA debtors and resolved major issues between CCAA debtors and US debtors that had stalled meaningful process in asset realization and claims resolution -- GSA unlocked Canadian proceeding and provided mechanism for resolution by adjudication or settlement of remaining issues and significant creditor claims and clarification of priorities -- GSA provided clear benefits to Canadian creditors of CCAA debtors and no creditor was worse off as result of GSA considered as whole -- While GSA did not guarantee full payment of claims, it substantially reduced risk that this goal would not be achieved -- Some risk did not make GSA unfair.

Cases considered by B.E. Romaine J.:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) -- considered

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (Que. S.C.) -- considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) -- considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- referred to

Menegon v. Philip Services Corp. (1999), 11 C.B.R. (4th) 262, 1999 CarswellOnt 3240, 39 C.P.C. (4th) 287 (Ont. S.C.J. [Commercial List]) -- considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) -- considered

Royal Bank v. Fracmaster Ltd. (1999), (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 244 A.R. 93, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) -- referred to

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) -- considered

T. Eaton Co., Re (1999), 1999 CarswellOnt 4112, 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) -- referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 -- referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally -- referred to

s. 4 -- referred to

s. 5 -- referred to

s. 6 -- referred to

s. 11 -- referred to

s. 18.6 [en. 1997, c. 12, s. 125] -- considered

APPLICATION by debtors for approval of settlement.

***B.E. Romaine J.*:**

Introduction

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

2 Both Courts approved the settlement. These are my reasons for that approval.

Background

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;

b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;

c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;

d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;

e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;

f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");

g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;

h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and

i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

> 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
>
> 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
>
> 12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
>
> 13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
>
> 14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...
>
> 17. The [GSA] is subject to the following conditions:
>
> a. The approval of both this Court and the U.S. Bankruptcy Court;
>
> b. The execution of the [GSA]; and
>
> c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the "key elements" of the GSA as follows:

> a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;
>
> b The withdrawal of the BDCs advanced by the U.S. Debtors...;
>
> c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;

d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;

e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;

ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;

iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");

v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and

vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;

g. The settlement of the Greenfield Action;

h. The withdrawal of the UL1 Indenture Trustee Marker Claim;

i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;

j The resolution of the quantum of the cross-border intercompany claims...;

k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;

l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan...;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions

made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

> a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:
>
> > ...While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.
>
> b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may

consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly $3^{1/2}$ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms

thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J. [Commercial List]) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal.".

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of $25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at paras. 11 and 23 and *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium Entertainment Corp., Re*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium Entertainment Corp., Re* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada, Re*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders

> generally: see *Northland Properties Ltd....* In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4^{th}) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, the Red Cross, under the Court's

supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> [Emphasis in *Red Cross.*]

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* sale transaction and the GSA in this case, what the *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *Air Canada, Re* and *Playdium Entertainment Corp., Re*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee

could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved.

Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Application granted.

FN*. Leave to appeal refused *Calpine Canada Energy Ltd., Re* (2007), 2007 ABCA 266, 2007 CarswellAlta 1097, 35 C.B.R. (5th) 27, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]).

END OF DOCUMENT

TAB 8

(Consolidated up to 17/2007)

ALBERTA REGULATION 390/68

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(c) if the contemplated later motion was not brought and it otherwise appears appropriate to the court to dispense with the operation of the subrule.

AR 243/96 s14

Adjournment for notice

388 If on the hearing of a motion or other application it appears that any person to whom notice has not been given ought to have had notice, the court may either dismiss the motion or application or adjourn the hearing thereof in order that notice may be given.

AR 390/68 s388

Motion to rescind or vary order

389 A party who has failed to appear on an application through accident or mistake or insufficient notice thereof, may move to rescind or vary the order before any judge within seven days from the time the order has come to his notice or within such further time as the court may allow and whether the order has been acted upon by the party issuing it or not.

AR 390/68 s389

Setting aside

390(1) Any order may be set aside, varied or discharged on notice by the judge who granted it.

(2) On consent of all parties interested the court may set aside, vary or discharge any order.

AR 390/68 s390

Death of judge

391 Where any application ought to be made to or any jurisdiction exercised by the judge by whom a cause or matter has been tried or before whom any motion has been made, if that judge dies or ceases to be a judge of the court or if for any other reason it is impossible or inconvenient that the judge should act in the matter, any other judge may hear the application or otherwise exercise jurisdiction.

AR 390/68 s391

Injunction

392(1) The plaintiff may, without leave, serve a notice of motion for an injunction and may, by leave of the court to be obtained ex parte, serve any other notice of motion upon any defendant with the statement of claim or at any time after the service of the statement of claim and before the time limited for defence of the defendant.

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tendering fulfilment of all obligations secured by the collateral, or

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

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Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make

Time of essence

21 Stipulations in contracts, as to time or otherwise, that would not heretofore have been deemed to be or have become of the essence of the contracts in a court of equity shall receive the same construction and effect as they would receive in equity.

RSA 1980 cJ-1 s22

Validity of orders

22 No order of the Court under any statutory or other jurisdiction may, as against a purchaser, and whether with or without notice, be invalidated on the ground

(a) of want of jurisdiction, or

(b) of want of concurrence, consent, notice or service.

RSA 1980 cJ-1 s23

Vexatious proceedings

23(1) When, on an application made by way of originating notice with the consent in writing of the Minister of Justice and Attorney General of Alberta, the Court is satisfied that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the Court or in any other court against the same person or against different persons, the Court may order that no legal proceedings shall, without leave of the Court, be instituted in any court by the person taking those vexatious legal proceedings.

(2) Leave shall not be given under subsection (1) unless the Court is satisfied that the proceedings are not an abuse of the process of the court and that there is on its face ground for the proceedings.

(3) The Minister of Justice and Attorney General of Alberta has the right to appear and be heard in person or by counsel on an application under subsection (1).

RSA 1980 cJ-1 s24;1994 cG-8.5 s38

Part 3
Constitutional Questions

Validity of enactment

24(1) If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Attorney General of Alberta.

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(a) a discharge of mortgage, and

(b) any other document, if any, required to enable the mortgage to be discharged,

that is in a form and contains the information satisfactory to the Registrar.

(2) No fee or expense shall be charged and no amount shall be accepted by a mortgagee for a discharge of mortgage and other document, if any, furnished under subsection (1).

(3) A mortgagee who

(a) fails to comply with subsection (1), or

(b) charges or attempts to charge any fee or expense or accepts any amount for furnishing a discharge of mortgage or other document under subsection (1),

is guilty of an offence and liable to a fine of not more than $500.

1982 c24 s4;1983 c97 s2

Vesting order

76(1) When the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest that real or personal estate in the person, and in the manner and for the estate that would be done by the deed, conveyance, transfer or assignment if executed.

(2) An order under subsection (1) has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed, conveyance, transfer, assignment or otherwise for the same estate or interest to the person in whom it is so ordered to be vested, or in the case of a chose in action, as if the chose in action had been actually assigned to that person.

RSA 1980 cL-8 s66

Relief against forfeiture

77(1) The Court on any terms it thinks proper may relieve against a forfeiture for breach of a covenant or condition in a lease to insure against loss or damage by fire when

(a) no loss or damage by fire has happened,

(b) the breach has, in the opinion of the Court, been committed through accident or mistake or otherwise without fraud or gross negligence, and

TAB 12

(Consolidated up to 17/2007)

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account for what he shall receive and to pay it as the court shall direct.

(2) A receiver shall, unless the court otherwise orders be allowed compensation.

AR 390/68 s463;277/95

Passing accounts

464(1) A receiver shall file his accounts with and pass them before the clerk of the court annually or at such other intervals as the court may direct.

(2) Thereafter within a reasonable period, the balance due on the accounts shall be paid by the receiver.

(3) The court, on application or on its own motion, may give such directions as may be proper and may require the receiver or the parties, or any of them, to attend before the court to show cause why accounts have not been filed or passed or other proper proceedings taken and may order a receiver to pay interest on any sum or may disallow the salary of a receiver or part thereof.

AR 390/68 s464

465, 466 Repealed AR 277/95 s30.

Preservation and Inspection of Property

Interim custody of property

467 Where there is a dispute respecting the title to any property, the court may make an order for the preservation or interim custody of the property or may order the amount in dispute be brought into court or otherwise secured or may order the sale of the property and the payment of the proceeds into court.

AR 390/68 s467

Detention and inspection

468 The court may, upon the application of any party and on notice to any person to be affected, whether a party to the proceedings or not, upon such terms as seem just,

(a) make any order for the detention or preservation of any property being the subject of the action or which may be evidence on any issue arising therein, and

(b) make any order for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute,

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(6) Documents in the possession of the Court relating to an application under this section or section 232 are confidential unless the Court otherwise orders.

(7) Subsections (5) and (6) do not apply to an order of the Court under this section or section 232.

1981 cB-15 s223;1983 c20 s16

Powers of the Court

232(1) On an application under section 231 or on a subsequent application, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing an inspector, fixing the remuneration of an inspector or replacing an inspector;

(b) an order determining the notice to be given to any interested person, or dispensing with notice to any person;

(c) an order authorizing an inspector to enter any premises in which the Court is satisfied there might be relevant information, and to examine any thing and make copies of any document or record found on the premises;

(d) an order requiring any person to produce documents or records to the inspector;

(e) an order authorizing an inspector to conduct a hearing, administer oaths and examine any person on oath, and prescribing rules for the conduct of the hearing;

(f) an order requiring any person to attend a hearing conducted by an inspector and to give evidence on oath;

(g) an order giving directions to an inspector or any interested person on any matter arising in the investigation;

(h) an order requiring an inspector to make an interim or final report to the Court;

(i) an order determining whether a report of an inspector should be published and, if so, designating the persons to whom all or part of the report should be sent;

(j) an order requiring an inspector to discontinue an investigation;

(k) an order requiring any person other than the corporation to pay all or part of the costs of the investigation.

(2) Unless the Court otherwise orders, an inspector shall send a copy of the inspector's report to the corporation.

(3) Unless the Court otherwise orders, the corporation shall pay the costs of the investigation.

(4) Any interested person may apply to the Court for directions on any matter arising in the investigation.

1981 cB-15 s224

Powers of inspector

233(1) An inspector under this Part has the powers set out in the order appointing the inspector.

(2) In addition to the powers set out in the order appointing the inspector, an inspector appointed to investigate a corporation may furnish information to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the corporation, any allegation of improper conduct that is the same as or similar to the conduct described in section 231(2).

(3) An inspector shall on request produce to an interested person a copy of any order made under section 231 or 232(1).

1981 cB-15 s225

Hearings by inspector

234(1) A hearing conducted by an inspector shall be heard in camera unless the Court otherwise orders.

(2) An individual who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel during the examination.

1981 cB-15 s226

Compelling evidence

235 A person shall not be excused from attending and giving evidence and producing books, papers, documents or records to an inspector under this Part on the grounds that the oral evidence or documents required of the person may tend to incriminate the person or subject the person to any proceeding or penalty, but no oral evidence so required shall be used or is receivable against the person in any proceedings thereafter instituted against the person under any Act of Alberta.

1981 cB-15 s227

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(3) The Court may grant to a defendant respecting an equitable estate or right or other matter of equity and also respecting a legal estate, right or title claimed or asserted by the defendant, all such relief against a plaintiff that the defendant has properly claimed by the defendant's pleading.

(4) The Court shall recognize and take notice

(a) of all equitable estates, titles and rights, and

(b) of equitable duties and liabilities,

appearing incidentally in the course of a proceeding, in the same manner in which the High Court of Justice in England would recognize and take notice of them in a proceeding instituted in that Court.

RSA 1980 cJ-1 s17;1991 c21 s15

Stay of proceedings

17(1) In a proceeding

(a) for the recovery of a debt or liquidated demand,

(b) for the enforcement of a security or charge on land,

(c) for the determination or specific performance of an agreement for the sale of land, or

(d) for the possession of land,

the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

(2) In a proceeding

(a) for the enforcement of a security or charge on farm land,

(b) for the determination or specific performance of an agreement for the sale of farm land, or

(c) for the possession of farm land,

the Court, notwithstanding the terms of an order or judgment previously made, shall grant a stay of proceedings when it appears that the default of the mortgagor, purchaser or other person is in whole or in part caused by the inability of the mortgagor, purchaser or other person to market grain by reason of lack of elevator space or by reason of the restrictions as to delivery of grain imposed under the *Canadian Wheat Board Act* (Canada) and the regulations under that Act.

(3) A stay granted under subsection (2) remains in force until set aside by the Court, but shall be set aside only on application after notice and on the Court being satisfied that the conditions existing at the time of the granting of the stay and by reason of which it was granted no longer exist.

RSA 1980 cJ-1 s18

Restraint by prohibition, injunction

18(1) No proceeding at any time pending in the Court shall be restrained by prohibition or injunction, but each matter of equity on which an injunction against the prosecution of the proceeding might formerly have been obtained either unconditionally or on any terms or conditions may be relied on by way of defence in the proceeding.

(2) Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending before it, and any person, whether a party or not to any proceeding at any time pending in the Court

(a) who would have been entitled formerly to apply to a court to restrain the prosecution of it, or

(b) who may be entitled to enforce by attachment or otherwise a judgment, decree, rule or order contrary to which all or part of the proceedings may be taken,

may apply to the Court by motion in a summary way for a stay of proceedings in the proceeding either generally or so far as might be necessary for the purposes of justice, and the Court shall on that application make any order that will be just.

RSA 1980 cJ-1 s19

Damages instead of injunction, specific performance

19 In all cases in which the Court has jurisdiction to entertain an application

(a) for an injunction against

(i) a breach of a covenant, contract or agreement, or

(ii) the commission or continuance of a wrongful act,

TAB 15

21 C.B.R. (N.S.) 201, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492

1975 CarswellOnt 123

Robert F. **Kowal** Investments Ltd. v. Deeder Electric Ltd.

Robert F. **Kowal** Investments Limited and Randy Construction Company Limited v. Deeder Electric Limited

Ontario Court of Appeal

Jessup, Lacourcière and Houlden JJ.A.

Judgment: April 23, **1975**

Counsel: H. L. Morphy and S. R. Block, for appellant Monte Denaburg.

J. G. Reid, Q.C., for respondents.

L. Klug, for respondent receiver.

Subject: Corporate and Commercial; Insolvency

Receivers --- Remuneration of receiver -- Remuneration -- Priority of fees.

Receivers -- By court appointment -- Winding-up of partnership -- Fees and disbursements of receiver -- Priorities.

The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. Boehm v. Goodall, [1911] 1 Ch. 155 applied. Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. In these circumstances the order permitting the receiver to borrow would ordinarily provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. Strapp v. Bull, Sons & Co.; Shaw v. London School Bd., [1895] 2 Ch. 1 applied.

The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact, that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. Greenwood v. Algesiras (Gibraltar) Ry. Co., [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: Greenwood v. Algesiras (Gibraltar)

Ry. Co., supra, applied, and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding & Engineering Co. Ltd., [1912] W.N. 66; Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd. (1972), 29 D.L.R. (3d) (Man. C.A.) applied.

The third exception is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. Re Oriental Hotels Co.; Perry v. Oriental Hotels Co. (1871), L.D. 12 Eq. 126; Re Regent's Canal Ironworks Co.; Ex parte Grissell (1875), 3 Ch. D. 411 at 427; Clark on Receivers, vol. 2, s. 640, p. 1078 applied. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category; it is not made to preserve the property for all interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

Appeal from the judgment of Holland J., 13th December 1974.

The judgment of the Court was delivered by *Houlden J.A.*:

1 This is an appeal from an order of Holland J. dated 13th December 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

2 On 30th November 1971 a charge under The Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known as 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on 1st December 1971, as instrument B-306317. By transfer of charge dated 31st December 1971, and registered in the Office of Land Titles at Toronto on 17th January 1972, as instrument B-310301, the charge was transferred to the appellant Monte Denaburg.

3 In February 1972 the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of the car wash.

4 In January 1974 serious differences arose between the partners concerning the management of the business. On 17th January 1974 the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On 7th February 1974 the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

5 By a consent judgment dated 13th March 1974 Wright J. made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver insofar as he was unable to recover them from the assets of the partnership.

6 On 9th May 1974 Goodman J. made a consent order varying the judgment of 13th March 1974. Paragraph 13 of the order of 9th May 1974 provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

7 Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

8 The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after 13th March 1974 the appellant was aware of the appointment of the receiver. From March to September 1974 the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

9 By notice of motion dated 18th October 1974 the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of 9th May 1974, and for an order that the sum so borrowed and the $25,000 already borrowed should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On 24th October 1974 Holland J. dismissed the application without written reasons.

10 By notice of motion dated 9th December 1974 the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made and obligations incurred by him. The appellant received notice of this application. On 13th December 1974 Holland J. made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

11 The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

12 The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In *Boehm v. Goodall*, [1911] 1 Ch. 155, a receiver and manager of a partnership in carrying on a business made payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington J. said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly

> incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

13 Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

14 There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.

15 The priority which is given to a receiver in this type of situation is illustrated by *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1. In that case a building company became involved in serious financial difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow £5,000 by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed £1,750 from Strapp and £2,500 from the unsecured creditors. The receiver ship worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the £4,250 that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams J., but on appeal his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the £4,250, A. L. Smith L.J. said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business

> by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred [*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; and *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75], applies, and consequently they [the receivers and managers] are entitled to be paid their charges.

16 However, the exception to the general rule enunciated in *Strapp v. Bull*, supra, has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given no notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

17 The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra; and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order: *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding and Engineering Co. Ltd.*, [1912] W.N. 66.

18 The appointment of a receiver in these circumstances is illustrated by *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) 373 (Man. C.A.). In that case, a receiver was appointed of all the undertaking, property and assets of a building company which was in the course of construction of an apartment block. There was a first mortgage on the premises of $1,100,000. Unfortunately, the sale of the building by the receiver did not realize sufficient to pay the first mortgage in full. While admitting that certain disbursements of the receiver were in order and entitled to be paid in priority to its mortgage, the first mortgagee claimed that the balance of the disbursements and the fees of the receiver should not be given priority over the mortgage.

19 Although the judgment makes no mention of whether or not the first mortgagee was served with the motion to appoint the receiver, it would seem that service must have been made on the mortgagee, since Dickson J.A. (as he then was), who delivered the judgment of the Manitoba Court of Appeal, pointed out that the first mortgagee did not appeal the order appointing the receiver. The report does not indicate either whether the secured creditor consented to or approved of the appointment of the receiver. The Court of Appeal for Manitoba held that, the appointment having been made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property, the receiver should be given priority for all his fees and disbursements over the secured creditor. Dickson J.A. said (at pp. 375-76):

> The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?

20 The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman J. of 9th May 1974, quoted supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security having priority to the registered charge of the appellant. Although the court appears to have power to create

such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: *Allan v. Man. and North Western Ry.* (1894), 10 Man. R. 143.

21 The third exception which should be noted is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision *Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411, James L.J. in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

22 In Clark on Receivers, vol. 2, s. 640, p. 1078, the law on the point is stated in this way:

> By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
>
> However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

23 Counsel for the respondents and for the receiver argued strenuously that the moneys paid by the receiver to the appellant were necessary costs of preservation of the property and hence should be given priority over the appellant's charge. However, in my opinion, the payments cannot be regarded as a necessary cost of preserving the property. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. The payments in the present case were made primarily for the benefit of the partners, and incidentally for the benefit of the unsecured creditors, but not for the benefit of the appellant. It is true that the appellant received payments on his charge, but the payments were made not to benefit the appellant; rather, they were made to prevent him from taking action to enforce his security.

24 The payments mentioned in the *Regent's Canal* case are the type of payments that in my opinion fall within the scope of payments necessary for the preservation of property for the benefit of all interested parties. If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose. Again, if the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties, including the appellant. But a payment to a mortgagee of sums to which he was legally entitled under his charge, in my judgment, falls in a different category; it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. If the order under appeal is allowed to stand, the appellant will receive little or no benefit from the payments that were made, since the receiver will have priority over his charge for those payments. I do not

think, therefore, that the third exception to the general rule has any application to the facts of this case.

25 To sum up, I can see no basis for granting the receiver priority over the appellant's charge for the sum of $24,043.26 paid by the receiver to the appellant.

26 The appeal should be allowed with costs, and the order of Holland J. of 13th December 1974 should be varied by striking out para. 2 thereof.

END OF DOCUMENT

TAB 16

RECEIVERSHIPS

by

Frank Bennett
B.A., LL.B., LL.M.
of the Ontario Bar

The Carswell Company Limited
Toronto, Canada
1985

In *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.*,[13] a court-appointed receiver of a partnership applied for his discharge and requested an order granting him priority over an existing mortgage for his remuneration, legal costs and expenditures. Part of these expenditures included payments under the mortgage. In refusing the receiver priority for the mortgage payments, which only benefitted the partners and unsecured creditors, Houlden J.A. reiterated the general rule that a receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. He then continued to set out certain exceptions relevant to the case.[14]

(1) A receiver will be able to claim priority for his expenses properly incurred by him if the security holder had applied for the appointment of the receiver or had consented thereto.[15]

(2) A receiver will be able to claim priority for his expenses properly incurred by him if he is court-appointed with authority to preserve and realize assets for the benefit of all interested parties including security holders. Ordinarily, notice of the motion to appoint a receiver or of a motion permitting the receiver to borrow will be given to security holders whose rights will be affected.[16]

This exception has recently been applied in the case of *Re Winmil Holidays Co.*,[17] where the court appointed a receiver and manager under section 27 of the Travel Agents Act[18] for the purpose of preserving and realizing the assets of the debtor for the benefit of all interested parties including the debenture holder. In this case, the receiver was entitled to receive most of its remuneration in priority to the debenture holder notwithstanding that the receiver had an indemnity from the Registrar under the Travel Agents Act.

(3) A receiver will be able to claim priority for his expenses if he can establish that he expended money for the "necessary preservation or improvement of the property". For example, these expenses include the direct costs for the

13. (1975), 9 O.R. (2d) 84 (C.A.). See also *Batten, Proffitt & Scott v. Dartmouth Harbour Commrs.* (1890), 45 Ch. D.612; *Carrick v. Wigan Tramways Co.*, [1893] W.N. 98.

14. The exceptions set out in the *Kowal Investment* case have been considered and followed in *Lochson Holdings Ltd. v. Eaton Mechanical Inc. et al.*; *Fed. Bus. Dev. Bank v. Lochson Holdings Ltd. et al.*; *Fed. Bus. Dev. Bank v. Marrick Dev. Corp.* (1983), 43 C.B.R. (N.S.) 179 (B.C.S.C.), appeal allowed (1984), 10 D.L.R. (4th) 630 (B.C.C.A.). In that case, a receiver appointed under a third mortgage in foreclosure proceedings borrowed $36,000 for renovations to the property. The holder of the first and second mortgages had no notice and no knowledge of the foreclosure proceedings. Subsequently, the prior security holder commenced its own foreclosure proceedings under which the property was sold. At common law, the court had no power to authorize a receiver's expense without the consent of prior security holders. The court reviewed the exceptions to the general rule and found that none of them applied to this situation such that the receiver was denied priority for his borrowings over the holder of the first and second mortgagee.

15. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.* [1895] 2 Ch. 1 (C.A.), where the security holders acquiesced to the receiver's course of dealings. See also *Fed. Bus. Dev. Bank v. Persic* (1981), 32 B.C.L.R. 75 (C.A.), where the security holder actively encouraged the receiver to continue his efforts to sell.

16. *Braid Bldrs. Supply & Fuel Ltd. et al. v. Genevieve Mtge. Corp.* (1972), 29 D.L.R. (3d) 373 (Man. C.A.); *Oberman v. Mannahugh Hotels Ltd.; Mannahugh Hotels Ltd. v. Oberman; Assiniboine Credit Union Ltd. v. Mannahugh Hoteis Ltd.* (1980), 34 C.B.R. (N.S.) 181 (Man. Q.B.).

17. (1984), 10 D.L.R. (4th) 572 (B.C.C.A.).

18. R.S.B.C. 1979, c. 409.

payment of taxes and necessary repairs and may include a security guard for insurance purposes. These costs benefit all parties, including prior security holders, and are made in an urgent situation where there is not sufficient time to come to the court beforehand.

(b) Assets Under Floating Charge

(i) Deemed Trusts

While this is an area of constant flux, the general rule is that most deemed trusts do not have priority over fixed charges that arise prior in time to the deemed trust claim. However, most deemed trusts, where the governing statute contains a clause that makes tracing irrelevant will have priority over assets under a floating charge that crystallizes after the deemed trust claim arises.[19] Such deemed trusts as the federal Canada Pension and unemployment insurance and the Ontario vacation pay are carved out of the debtor's after-acquired property in priority to all other claims irrespective whether the debtor failed to deduct and keep the moneys separate.

In the case where the debtor does not have sufficient cash on hand at the date of crystallization, the receiver must realize upon the assets in order to generate the proceeds required to cover the amounts under the deemed trusts.

There is no specific legislation, federal or provincial, granting the receiver priority for his costs of realization. If there are not sufficient assets which when realized will produce the full amounts under the deemed trusts, then the governments ought to permit the receiver to charge his costs of realization including his remuneration applicable thereto against the proceeds. Otherwise, the receiver might merely surrender the debtor's property to the government agency claiming the deemed trust. In most cases, however, the receiver will generate enough proceeds to at least cover his costs of realization.

(ii) Costs of Realization

Apart from statute, the receiver will be entitled to his costs of realization next in priority to the deemed trusts.[20] The costs of realization will include the actual costs related to the sale of assets and may include the receiver's costs of an abortive sale and of preserving the assets for the sale.[21] Moreover the receiver may be entitled to his remuneration connected to the sale. Such costs are usually paid in priority to the receiver's own remuneration and general costs of the administration.

(iii) Receiver and Manager's Remuneration

Remuneration is the salary or fees of the receiver together with his costs, charges and expenses.[22] Ordinarily, the receiver's remuneration comes next in priority out of the proceeds of disposition. While the receiver has a right of

19. See Chapter 8, "1. Statutory Lien and Deemed Trusts".
20. See Chapter 6, "8. Costs of Realization".
21. *Lathom v. Greenwich Ferry Co.* (1895), 72 L.T. 790.
22. See *infra* "4. Remuneration of Receiver and Manager, (a) Court Appointment" for further discussion.

Action No. 0601-09869

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

VECKENSTEDT HOLDINGS INC., HERB VECKENSTEDT, FRED PIPER, JOAN PIPER, LIPOTH CONSULTING, and PAUL LIPOTH

Plaintiffs

- and -

INTEGRA INVESTMENT SERVICE LTD. and RUNDLE DEVELOPMENT COOPERATIVE

Defendants

BRIEF OF ARGUMENT

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