COURT FILE NUMBER	**1801-09188**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
	IN THE MATTER OF SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, as amended
DOCUMENT	**BRIEF OF LAW AND ARGUMENT OF THE RECEIVER**

Clerk's Stamp
CLERK OF THE COURT
FILED
AUG 08 2018
JUDICIAL CENTRE OF CALGARY

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Kruger, Q.C. / Robyn Gurofsky / Jack R. Maslen Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9563 / (403) 232-9774 / (403) 232-9790 Facsimile: (403) 266-1395 Email: jkruger@blg.com / rgurofsky@blg.com / jmaslen@blg.com File No. 413255.63

I. INTRODUCTION

1. This Brief of Law and Argument is submitted on behalf of Ernst & Young Inc. ("**EY**"), in its capacity as the court-appointed receiver and manager (the "**Receiver**") of OpsMobil Inc., OpsMobil Group Inc. and OpsMobil Energy Services ("**OpsMobil**")[1].

2. The Receiver submits this Brief of Law and Argument in opposition to the application of Airborne Energy Solutions Inc. ("**AES**") filed on August 3, 2018 (the "**Application**"), in which AES requests (among other things) that the Court:

   (a) orders "OpsMobil, Third Eye Capital Corporation, and Ernst & Young Inc. [as Receiver] ... to specifically perform their obligations" with respect to a pre-receivership purchase and sale transaction negotiated between OpsMobil (as seller) and AES (as purchaser) (the "**Proposed Transaction**");[2]

   (b) orders that the assets, being the subject of the Proposed Transaction are vested free and clear in the name of AES;[3] and

   (c) makes a declaration that AES "is entitled to a constructive trust over the business and assets" being the subject of the Proposed Transaction.[4]

3. Critically, the Proposed Transaction contemplates that a portion of the purchase price would be payable by AES by "off-setting and assuming" prior debts owed by OpsMobil to AES' affiliates (the "**AES Set-Off**").[5] Hence, by seeking the Court's extraordinary jurisdiction to order the specific performance of the Proposed Transaction, AES is requesting that the Court affirm its ability to set-off amounts payable to the *Receiver* against pre-Receivership debts owed from *OpsMobil to AES' affiliates*. AES' request for a vesting order has the same effect.

4. Such an arrangement is, however, contrary to the plain and express language of the receivership order pronounced by the Honourable Justice B.E.C. Romaine (the "**Receivership Order**"),[6] and is contrary to established insolvency law concerning set-off and preferences.

---

[1] EY is also the court-appointed receiver and manager of Ranch Energy Corporation, 1734163 Alberta Inc., 1859821 Alberta Inc., Air Dallaire Ltd., OpsMobil Construction In., and K.L. Capital Corp (the "**Receivership Debtors**"), pursuant to the Receivership Order pronounced by Justice B.E.C. Romaine on July 19, 2018 [the *Receivership Order*] (**TAB A**).

[2] Application by AES for a Constructive Trust, Specific Performance, and an Approval and Vesting Order filed August 3, 2018 [the *Application*], para. 1(c).

[3] *Ibid*, para. 1(d).

[4] *Ibid*, para. 1(b).

[5] *See*, Section 2.2 of the Purchase and Sale Agreement between OpsMobil and AES dated December 14, 2017 [the PSA] which is Exhibit H to the Third Affidavit of Mark Horrox filed July 26 2018 [*Third Horrox Affidavit*].

[6] Receivership Order, *supra*, para. 10 (**TAB A**).

5. Likewise, AES' request for the Court to compel the Receiver to "perform [its] obligations" in respect of the Proposed Transaction, is misplaced: the Receiver was never a party to the relevant purchase and sale agreement and has no obligations thereunder that are capable of performance.

6. AES' further request for a constructive trust is inappropriate, given that: (i) a constructive trust is an "extraordinary"[7] remedy, particularly in the insolvency context; and (ii) by AES' own admission, the Proposed Transaction has never closed.[8] OpsMobil and/or the Receiver therefore have a juristic entitlement to the relevant assets.

7. The effect of AES' Application is to expropriate value from secured creditors with priority claims, and from OpsMobil's creditors as whole, without right or justification. As a result, the Receiver considered it imperative to file this Brief, in furtherance of its duties.[9]

8. In this Brief, the Receiver has not addressed AES' requests for orders regarding the ATB bank account No. 760-00182687579 (the "**Segregated Account**").[10] The Receiver will make recommendations regarding the treatment of the Segregated Account once the initial question of AES' entitlement to specific performance is addressed.

II. ISSUES

9. The Receiver considers the following issues to be essential to the disposition of the Application:

(a) whether the AES Set-Off is permissible under applicable insolvency law;

(b) whether the Proposed Transaction is an impeachable preference under Section 95 of the *Bankruptcy and Insolvency Act*;

(c) whether the Proposed Transaction should be specifically performed as against the Receiver, or at all; and

(d) whether AES is entitled to a constructive trust over the assets being the subject of the Proposed Transaction.

---

[7] *Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2013 ABQB 273 [*Scott Trial*], para. 185 (**TAB 1**), aff'd by 2015 ABCA 51 [*Scott Appeal*] (**TAB 2**), leave to appeal to SCC ref'd by 2015 CarswellAlta 2009.

[8] *E.g.* Affidavit of Kenneth I. Mizera, filed August 3, 2018 [*Third Mizera Affidavit*], para. 102, where Mr. Mizera states that AES "remains ready, willing and able to close the PSA".

[9] Under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], Section 247, the Receiver must act honestly and in good faith, and deal with property of the insolvent person or the bankrupt in a commercially reasonable manner (**TAB 3**).

[10] Application, *supra*, para. 1(e).

III. FACTUAL BACKGROUND AND PROCEDRUAL HISTORY

(i) OpsMobil, AES and TEC

10. OpsMobil is a group of private oilfield service companies, based in Calgary, Alberta, which, at all relevant times, carried on business providing construction, aviation and energy services to oil and gas companies in Western Canada.

11. AES is also a private company, based in Calgary, Alberta, and as per its website, "provides helicopter transportation services and solutions for oil, gas, forestry, and mining industries in Western Canada and the Arctic." According to AES' sole officer and director, Kenneth I. Mizera ("**Mr. Mizera**"), AES and/or its affiliates, Rilpa Enterprises Inc. ("**Rilpa**") and Classic Helicopter Ltd. ("**Classic**"), provided aircraft or other services to OpsMobil from time to time.[11]

12. In or around November or December 2015, TEC advanced certain credit facilities to OpsMobil (the "**TEC Credit Facilities**") and took security with respect thereto, including a general security interest over all of OpsMobil's present and after acquired property and undertakings (the "**TEC Security**"). The Receiver understands that as at July 10, 2018, OpsMobil was indebted to TEC for approximately $23 million.

(ii) The unconsummated Proposed Transaction

13. In or around late 2017, AES and OpsMobil began to negotiate the Proposed Transaction, which contemplated the purchase and sale by AES of OpsMobil's aerial surveillance and scanning, chemical spraying and local charter segment (the "**Business**").

14. Eventually, OpsMobil and AES entered into a confidential term sheet on or around November 21, 2017 (the "**Term Sheet**") for the Proposed Transaction. Among other things, the Term Sheet provided that:[12]

(a) **Section 1.** Closing of the Proposed Transaction would occur on December 20, 2017 or "such earlier or later date as may be agreed upon in writing" by AES and OpsMobil, and "closing" meant "the transfer of title of the Assets free and clear of all encumbrances of any nature whatsoever";

(b) **Section 3.** AES would purchase the Business from OpsMobil for a total purchase price of $3,275,000 (the "**Purchase Price**");

[11] Third Mizera Affidavit, *supra*, para. 5.

[12] Third Horrox Affidavit, *supra*, Exhibit E, Confidential Term Sheet dated November 21, 2017 [the *Term Sheet*].

(c) **Section 4**. AES would assume operatorship of the Business from November 1, 2017 until the closing of the transaction, pursuant to certain terms and conditions or warranties;

(d) **Section 5**. The Purchase Price would be "paid, in part, through the offset and retirement of the account payable owed by [OpsMobil] in the total agreed upon amount of $1,748,652.23 CAD" to affiliates of AES, namely, Rilpa and Classic (the "**AES Set-Off**", as defined above); and

(e) **Section 7**. OpsMobil would be required to "confirm [] … the consent to the transaction contemplated herein of Third Eye Capital".

15. The Term Sheet also expressly provided that it was <u>non-binding</u> and that nothing therein "or the Parties' conduct hereafter" should be construed as creating any binding obligation.[13]

16. Although Mr. Mizera, on behalf of AES, has recently described that the AES Off-Set was in satisfaction of "secured debt" owed by OpsMobil to Rilpa and Classic, for various past services,[14] such debt appears to be subordinate to TEC's security.

17. Subsequently, on or around December 14, 2017, AES and OpsMobil entered a purchase and sale agreement for the Business (the "**PSA**").[15] The PSA generally reflected the Term Sheet and, accordingly, provided (among other things) that:

(a) **Section 1.2.** Closing would occur on December 20, 2017, or such other time as may be agreed between AES and OpsMobil;

(b) **Section 1.2.** The Purchase Price was $3,275,000; and

(c) **Section 2.2.** More than one half of the Purchase Price would be paid through the AES Set-Off.

18. While the PSA was not signed or acknowledged by TEC, the PSA expressly contemplated that OpsMobil would be required to obtain the consent of its senior secured lenders, including TEC, prior to closing. Thus, Section 3.1 stated:[16]

> 3.1 Conditions Precedent of Purchaser
>
> Closing is conditional upon each of the following conditions precedent which conditions precedent have been inserted for the sole benefit of the Purchaser as follows: … (c) **<u>Prior to or concurrently on the Closing Date, Vendor will obtain and register absolute discharges of all Encumbrances registered against the Assets at the Closing Date</u>** … (emphasis added)

---

[13] *Ibid*, at p 4.

[14] Third Mizera Affidavit, *supra*, para. 5.

[15] *See generally*, the PSA, Exhibit H to the Third Horrox Affidavit, *supra*.

[16] *Ibid*, Sections 3.1 and 4.1.

Likewise, Section 4.1 stated:

> 4.1 Vendor's Covenants, Representations and Warranties
>
> The Vendor covenants, represents and warrants in favour of the Purchaser that, as of the date of this Agreement or such other time as may be specified: …
>
> (s) No Indebtedness Constituting an encumbrance. **The Vendor will not on the Closing Date have any indebtedness to any person that might by operation of law or otherwise constitute an Encumbrance on the Assets or any part of the Assets** or which could affect the tight of the Purchaser, from and after the Closing Date, to own and peacefully possess the Assets, other than the Permitted Encumbrances … (emphasis added)

19. Finally, Section 2.1 of the PSA provided that the cash portion of the Purchase Price would be "payable on the Closing Date".[17] Similarly, the PSA stated that the assets of the Business would remain "at the risk of [OpsMobil] until completion" of the Proposed Transaction.[18]

20. In connection with the PSA, AES and OpsMobil also entered a transition services agreement on December 14, 2017 (the "**TSA**"), pursuant to which AES was entitled to operate the Business pending the closing of the Proposed Transaction (as contemplated by the Term Sheet).[19]

21. In the end, the Proposed Transaction did not close on December 20, 2017. AES, OpsMobil and TEC were unable to agree and execute a "No Interest Letter" in respect of TEC's senior secured interest over the assets of the Business, as implied or expressly contemplated by the PSA and the Term Sheet. Thus, Mr. Mizera has sworn in his affidavit filed on August 3, 2018 (the "**Third Mizera Affidavit**") that:

> In accordance with the PSA OpsMobil has an obligation to deliver to AES the purchased assets and Business free and clear of any and all encumbrances. … I understand from AES's legal counsel that the TEC No Interest Letter was redrafted 11 times by legal counsel for OpsMobil, AES and TEC before the parties reached agreement on its form. Final form of such No Interest Letter was reached on or about February 5, 2018.[20] (emphasis added)

22. For the purposes of this Application, the Receiver takes no position as to the cause(s) for delays to the closing of the Proposed Transaction, given the conflicting evidence filed by AES and TEC.[21] The material fact is that the Proposed Transaction has never closed, which is undisputed.[22]

---

[17] *Ibid*, Section 2.1.

[18] *Ibid*, Section 5.1.

[19] *See*, Third Horrox Affidavit, *supra*, Exhibit I, Transition Services Agreement dated December 14, 2017 [the *TSA*].

[20] Third Mizera Affidavit, *supra*, paras. 35-37.

[21] *See e.g.*, Third Mizera Affidavit, *supra*, paras. 32-101; Third Horrox Affidavit, *supra*, paras. 37-65.

[22] For example, Mr. Mizera has stated that as at August 3, 2018 AES "remains ready, willing and able to close the PSA" (Third Mizera Affidavit, *supra*, para. 102), and Mr Horrox, for TEC, has stated that the Proposed Transaction was never consummated (Third Horrox Affidavit, *supra*, para. 65).

23. On June 6, 2018, TEC gave notice of its intention to enforce its security under Section 244(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***").[23]

24. Likewise, on or around June 6, 2018, OpsMobil and AES (through its counsel) signed a letter, whereunder OpsMobil admits that:

(a) "the PSA and TSA are, and continue to be, valid and enforceable agreements";

(b) "OpsMobil is in default of the PSA...because [TEC] ... has now refused to deliver the No Interest Letter and discharge its encumbrances"; and

(c) "OpsMobil feels it is in the best interests to complete its transaction with AES";

(the "**OpsMobil Admissions Letter**").[24]

(iii) Procedural history

25. Following TEC's notice of June 6, 2018 and the OpsMobil Admissions Letter, AES filed a Statement of Claim on June 13, 2018, naming OpsMobil and TEC as defendants (the "**Statement of Claim**") in Court Action No. 1801-08383.[25] The Statement of Claim seeks, among other things:

(a) "a judgment and direction for specific performance of the PSA transferring the assets and Business to AES free and clear of the encumbrances of TEC"; and

(b) "alternatively, a declaration that the Defendants hold the assets and Business as constructive trustee for AES".[26]

26. Subsequently, on or around June 27, 2018, TEC applied to the Court for a receivership order in respect of OpsMobil. OpsMobil opposed TEC's application and, on or around July 3, 2018, applied to the Court for an initial order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***").

27. The following orders then arose from the competing *CCAA* and receivership applications:

(a) an Order for Interim Stay on July 4, 2018 (the "**Interim Stay**"), which was granted as temporary relief pending further submissions from the parties;[27]

---

[23] Third Horrox Affidavit, *supra,* para. 60.

[24] Letter of from Michael W. Mundie (solicitor to AES) to Ryan Tobber (OpsMobil) dated June 6, 2018 [the *Admissions Letter*], being Exhibit Q to the First Affidavit of Kenneth I. Mizera dated June 9, 2018 [*First Mizera Affidavit*].

[25] Statement of Claim filed by AES as plaintiff, against OpsMobil and TEC, as defendants dated June 13, 2018 [the *Statement of Claim*], being Exhibit A to the Second Mizera Affidavit dated June 29, 2018 [*Second Mizera Affidavit*].

[26] *Ibid*, at p 13.

[27] *See*, Order for Interim Stay pronounced by Justice B.E.C. Romaine on July 4, 2018 in Court File No. 1801-09424 [the *Interim Stay*] (**TAB B**).

(b) an Initial Order under the *CCAA* on July 10, 2018 (the "**Initial Order**"), pursuant to which (i) EY was appointed Monitor over OpsMobil, and (ii) TEC's receivership application was adjourned *sine die*;[28] and finally

(c) a *CCAA* Suspension Order and the Receivership Order, both on July 19, 2018, pursuant to which, respectively, (i) the *CCAA* proceedings were indefinitely suspended (due to OpsMobil's inability to secure additional financing),[29] and (ii) EY was appointed Receiver.[30]

28. The Interim Stay, the Initial Order and the Receivership Order each contain a stay of proceedings against OpsMobil (the "**Stay of Proceedings**").[31] Consequently, any and all proceedings against OpsMobil have been stayed since July 4, 2018. The Stay of Proceedings is valid and subsisting.

29. Similarly, the Interim Stay, the Initial Order and the Receivership Order each contain a stay or suspension of the exercise of any contractual or other rights or remedies against OpsMobil, including rights of set-off (the "**Stay of Rights and Remedies**").[32] Consequently, and once more, any and all rights or remedies against OpsMobil, including rights of set-off, have been stayed or suspended since July 4, 2018, which Stay of Rights and Remedies is valid and subsisting.

IV. LAW AND ARGUMENT

30. As is more fully described below, the Receiver has concerns about the nature of the relief requested by AES in the Application since, if granted, it will significantly prejudice OpsMobil's creditors by permitting an otherwise unlawful set-off of claims and a preference in favour of AES. Indeed, the relief sought by AES constitutes "a fraud on bankruptcy law", as that phrase is used in respect of set-off and preferences.[33]

A. <u>The AES Set-Off is Not Permitted in the Receivership</u>

(i) Set-off is permitted in receiverships in narrow and circumscribed instances

31. Section 97(3) of the *BIA* regulates the set-off of claims between creditors and bankrupts, and states:

---

[28] *See*, Initial Order pronounced by Justice B.E.C. Romaine on July 10, 2018 in Court File No. 1801-09424 [the *Initial Order*] (**TAB C**).

[29] *See*, *CCAA* Suspension Order pronounced by Justice B.E.C. Romaine on July 19, 2018 in Court File No. 1801-09424 [the *Suspension Order*] (**TAB D**).

[30] Receivership Order, *supra* (**TAB A**).

[31] Receivership Order, *supra*, para. 9 (**TAB A**); Interim Stay, *supra*, para. 5 (**TAB B**); Initial Order, *supra*, para. 13 (**TAB C**).

[32] Receivership Order, *supra*, para. 10 (**TAB A**); Interim Stay, *supra*, para. 6 (**TAB B**); Initial Order, *supra*, para. 15 (**TAB C**).

[33] *Brunswick Chrysler Plymouth Ltd, Re*, 2005 NBQB 83 [*Brunswick*], para. 26 (**TAB 4**), referring to Houlden and Morawetz, *Bankruptcy and Insolvency Law* in respect of set-off.

> (3) **<u>The law of set-off or compensation applies to all claims made against the estate of the bankrupt</u>** <u>and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent</u> as if the bankrupt were plaintiff or defendant, as the case may be, **<u>except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences</u>**.[34] (emphasis added)

32. Thus, in a bankruptcy, a creditor may only set-off its provable claims against a bankrupt, by virtue of claims or amounts owing from the creditor to the bankrupt, so long as the contemplated set-off (i) is permitted under the general Canadian law regarding set-off, and (ii) does not contravene provisions of the *BIA* or provincial legislation regarding preferences.

33. To this end, it is well-established that Canadian law permits three forms of set-off, namely: (i) contractual set-off, (ii) legal set-off and (iii) equitable set-off,[35] which are described in *Re SemCanada* as follows:[36]

(a) contractual set-off permits parties to a contract to set-off such amounts as are agreed under the contract, i.e. "[c]ontractual set-off is governed by the law of contracts";[37]

(b) legal set-off is only permitted in respect of (i) liquidated debts, which are also (ii) "mutual cross-obligations", in the sense that the debts are "<u>cross-claims between the same parties and in the same right</u>",[38] and finally

(c) equitable set-off permits claims to be set-off where they are so "<u>clearly connected</u>... that it would be <u>manifestly unjust</u> to allow the plaintiff to enforce payment without taking into consideration the cross claim".[39]

34. In addition, leading authorities have also held that:

(a) contractual set-off ought to be limited to (i) debts or cross-claims arising in the "ordinary course" of the debtor's business, and (ii) contractual rights of set-off are unenforceable when "put in place on the eve of insolvency";[40] and

(b) legal set-off is not available in respect of debts arising pre and post-bankruptcy, since there is no mutuality of parties, i.e. the imposition of the trustee breaks mutuality.[41]

---

[34] *BIA*, *supra,* Section 97(3) (**TAB 3**).

[35] *Brunswick*, *supra,* para. 17 (**TAB 4**).

[36] *Re SemCanada Crude Co*, 2009 ABQB 397 [*SemCan Trial*] (**TAB 5**), aff'd by 2009 ABCA 275 [*SemCan Appeal*] (**TAB 6**).

[37] *SemCan Appeal*, *supra,* para. 14 (**TAB 6**).

[38] *SemCan Trial*, *supra,* para. 29 (emphasis added) (**TAB 5**).

[39] *SemCan Trial*, *supra,* para. 39 (emphasis added) (**TAB 5**).

[40] *Brunswick*, *supra,* paras. 39-42 (**TAB 4**).

[41] Roderick Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) [*Wood*], at p 101 (**TAB 7**); and *see* Houlden, Morawetz and Sarra, *The 2018 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) [*Annotated Houlden*], at p 614 (**TAB 8**).

35. Where a creditor fails to demonstrate its set-off is consistent with the foregoing principles, the set-off will be tantamount to a preferential "fraud on the bankruptcy law",[42] will "defeat the intent of the *BIA*",[43] and/or will otherwise be impermissible.

36. The principles applicable to set-off in bankruptcies apply equally to receiverships.[44]

(ii) The AES Set-Off contravenes insolvency law

37. In its Application, AES is asking the Court to direct the Receiver to close the Proposed Transaction according to the terms of the PSA, which include the AES Set-Off. Any such order, however, would be contrary to applicable law regarding insolvency set-off and for several reasons.

38. First, an order directing the Proposed Transaction to close would be contrary to the plain and express language of the Receivership Order regarding set-off. Namely, as described at paragraph 28 above, Paragraph 10 of the Receivership Order stays and suspends the exercise of any contractual or other rights or remedies against the OpsMobil, "including, without limitation, set-off rights".[45] The purpose of this Stay of Rights and Remedies is to preserve the assets of OpsMobil for the benefit of all its creditors. The closing of the Proposed Transaction, including the AES Set-Off, would therefore be contrary to the Receivership Order and would allow AES to inappropriately extract assets encumbered by superior claims.

39. Second, the AES Set-Off does not fall within any of the permissible forms of set-off in receiverships, and for this reason too the Proposed Transaction should not be permitted to close. In particular:

(a) **No contractual set-off**. As indicated above, contractual set-off is "governed by the law of contracts";[46] and thus, may only be asserted against parties to the relevant contract and only as contemplated in the contract. Here, the Receiver is not a party to the PSA, and AES is therefore not entitled to have the Proposed Transaction close and enforce the AES Set-Off against the Receiver.

(b) **No legal set-off**. As is also indicated above, "legal set-off" requires "mutuality" of the parties, which means that debts accruing prior to a receivership cannot be legally set-off

---

[42] *Brunswick*, *supra*, para. 26 (**TAB 4**).

[43] Annotated Houlden, *supra*, at p 617 (**TAB 8**).

[44] *Ibid*, at p 1118 (**TAB 8**); and *see*, *Re Associated Investors of Can Ltd*, 1989 CarswellAlta 362 (QB) [*Associated Investors*], para. 5 (**TAB 9**).

[45] *See* Receivership Order, *supra*, para. 10 (**TAB A**).

[46] *SemCan Appeal*, *supra*, para. 14 (**TAB 6**).

against debts accruing post-receivership; i.e. the former are owed to/from the debtor and the latter are owed to/from the receiver.[47]

Here, AES' obligation to pay the Purchase Price has not yet accrued since the transaction has not yet closed (e.g., as set out at paragraph 19 above, Section 2.1 of the PSA provides that the Purchase Price is "payable <u>on Closing</u>"). Thus, if the Court were to order the Proposed Transaction to close it would mean that AES' obligation to pay the Purchase Price will accrue *in the Receivership* and be owed *to the Receiver*, and not OpsMobil. Such obligations cannot be legally set-off against debts of OpsMobil since there is no mutuality of the parties.

Furthermore, the debts AES is seeking to set-off, against amounts owing under the PSA, are not owed by OpsMobil to AES. Rather, they are owed by OpsMobil to Rilpa and Classic.[48] So, even if AES' obligation to pay the Purchase Price accrued before the Receivership, there is no mutuality of the parties.

(c) **No equitable set-off**. Finally, the AES Set-Off cannot be justified as "equitable set-off". In particular, the debts owing from OpsMobil to Rilpa and Classic are not so "clearly connected"[49], inseparable or inextricably linked to any amounts owing from AES to the Receiver under the PSA.

40. Finally, an order directing the closing of the Proposed Transaction would fundamentally mean AES could have the claims of its affiliates, Rilpa and Classic, satisfied in priority to TEC's senior secured claims and the claims of OpsMobil's other creditors. Such relief would "defeat the intent of the *BIA*".[50]

B. <u>The Proposed Transaction is an Impeachable Preference</u>

(i) Preferential transfers of property are prohibited by Section 95 of the *BIA*

41. Section 95 of the *BIA* permits a trustee to challenge a transaction occurring prior to the bankruptcy of the debtor if it amounts to a "preference" in favour of a creditor. Thus, Section 95 of the *BIA* states (in relevant part):

> 95 (1) <u>**A transfer of property** made</u>, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered <u>**by an insolvent person**</u>
>
> <u>(a) **in favour of a creditor** who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, **with a view to giving** that creditor a preference over another creditor is void as against</u> — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is

[47] *Associated Investors, supra,* para. 5 (**TAB 9**).

[48] Third Mizera Affidavit, *supra,* para. 5.

[49] *SemCan Trial, supra,* para. 39 (emphasis added) (**TAB 5**).

[50] Annotated Houlden, *supra,* at p 617 (**TAB 8**).

three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy…

(2) **If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference** — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction …[51] (emphasis added)

42. Accordingly, pre-bankruptcy transactions may be impeached and set aside by the Court where it is established, among other things, that (i) the debtor transferred property in favour of a creditor, (ii) the transfer had the effect of giving the creditor a preference, and (iii) the debtor intended to confer a preference upon the creditor by making the transfer (which will be presumed if the transaction is a preference in fact or by effect).[52]

43. Similarly, it is well established that a transfer of assets to a creditor, in exchange for the forgiveness of debts, will have the effect of a preferring the creditor, as contemplated by Section 95. For example, in *Reference Re McMahon Co*,[53] it was held that where a creditor had taken goods from the debtor, and then attempted to set-off payment for such goods against existing debts owing to the creditor, the transaction could be impeached as preference.

44. Likewise, in *MacDonald Homes Inc. (Trustee of)*,[54] the Court determined that the transfer of property to the creditor was a preference since, among other things, the purchase price was to be paid in part by the forgiveness of debts owed by the debtor.

45. Furthermore, in *Bankruptcy and Insolvency Law*, Professor Wood, of the University of Alberta Faculty of Law, describes that:

A transaction that gives a creditor a right of set-off can also be impeached as a preference under the *BIA*. Ordinarily, a sale of property by the debtor in consideration for a promise to pay its fair value would not constitute a preference. Although the bankrupt estate no longer has the property, the trustee may recover the price from the transferee. However, the transaction may operate as a preference if the transferee is a creditor. The transaction gives rise to a new cross-obligation against which the creditor can exercise a right of set-off. **This permits the creditor to reduce the amount it owes to the debtor on the new obligation by the value of the creditor's claim against the debtor. The result is that the creditor's position is greatly improved**.[55] (emphasis added)

---

[51] *BIA*, *supra*, Section 95 (**TAB 3**).

[52] *See generally*, Wood, *supra*, at p 207 (**TAB 7**).

[53] *Reference Re McMahon Co*, 1921 CarswellOnt 32 (Sup Crt) [*McMahon*] (**TAB 10**).

[54] *Leo P Abrams & Son Ltd v MacDonald Homes Inc (Trustee of)*, 1995 CarswellOnt 930 (SCJ) [*MacDonald Homes*], aff'd by 1996 CarswellOnt (CA), leave to appeal to the SCC ref'd by 1996 WL1791761 (**TAB 11**).

[55] Wood, *supra*, at p 210 (**TAB 7**).

46. Where it is shown that a creditor has received a preference in fact or effect, the burden of proof then shifts to the creditor to refute the presumption that the transfer was intended to confer a preference, in contravention of Section 95 of the *BIA*.[56]

(ii) The Proposed Transaction contravenes Section 95 of the *BIA*

47. As noted, AES is asking the Court to direct the Receiver to close the Proposed Transaction, including the AES Set-Off. AES is therefore requesting that the Court enforce or ratify a transfer which will permit AES to "off-set[] and assum[e]"[57] prior debts owed by OpsMobil to affiliates of AES, as consideration for the Business. Such an order would, however, not only contravene the law regarding set-off (as explained above), but also contravene the spirit and intent of Section 95 of the *BIA*.

48. To begin, the structure of the Proposed Transaction, namely the AES Set-Off, constitutes a preference in effect as established by the case-law. In particular, like in *MacDonald Homes*, AES is attempting to gain ownership of the Business in exchange for the "forgiveness [of] ... accounts payable", which is "without question ... a preference"[58] and which would afford AES' affiliates better recoveries than they would otherwise receive in a distribution in the Receivership. The Proposed Transaction therefore engages the spirit and intent of Section 95 of the *BIA*.

49. Furthermore, the available record suggests that OpsMobil may have intended to prefer AES. In particular, the available record suggests that the AES Set-Off, and the Proposed Transaction more generally, was pursued by AES/OpsMobil at a time when the parties knew of OpsMobil's precarious financial state and obligations owed to other creditors. For example, AES asserts that "[o]n an overall basis closing was complicated ... by OpsMobil's lack of resources, both in terms of people and money".[59] Similarly, OpsMobil executed the OpsMobil Admissions Letter, in which OpsMobil admitted it was in breach of the PSA and committed to closing, immediately after TEC issued its 244 notice and AES/OpsMobil knew that TEC would not surrender its security over the assets of the Business.[60]

---

[56] *Ibid*, at p 211 (**TAB 7**).

[57] *See*, Section 2.2 of the PSA, Exhibit H to the Third Affidavit of Mark Horrox, *supra*.

[58] *MacDonald Homes*, *supra*, at paras. 6-7 (**TAB 11**).

[59] *See e.g.* Third Mizera Affidavit, *supra*, paras. 33.

[60] *See*, the Admissions Letter, being Exhibit Q to the First Mizera Affidavit, *supra*.

50. In short, were the Proposed Transaction to be approved, ratified or ordered by the Court, it would contravene Section 95 of the *BIA* and for this reason should not be permitted.

C. The PSA and/or the Proposed Transaction Are Not Capable of Specific Performance

(i) Specific performance is exceptional relief, especially in the insolvency context

51. It is trite law that the "existing regime of remedial law strongly favours … damages and awards specific performance only in exceptional cases", and that the "adequacy of damages test remains the primary one in determining the availability of specific relief".[61] Thus, the Supreme Court of Canada has held that "[s]pecific performance should … not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available".[62]

52. In the insolvency context, specific performance is even more exceptional because (i) "the effect of the decree will be to confer an unfair preference over other creditors"; and (ii) "it is clearly preferable to have the defendant's assets distributed fairly among the creditors under the appropriate bankruptcy or insolvency legislation".[63]

53. Similarly, the Honourable Mr. Justice Sharpe, in *Injunctions and Specific Performance*, describes that there is "no clear authority" that a defendant's insolvency means that damages are inadequate, and that other scholars have been "categorical in [] dismiss[ing] … that the defendant's insolvency could justify specific performance".[64]

54. Finally, it is established Canadian law that a pre-receivership contract cannot be specifically enforced against a receiver, unless the receiver adopts the relevant contract. Thus, the British Columbia Supreme Court held in *bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd*[65] that:

> Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. **Accordingly, there can be no action against the Receiver and Manager for specific performance.**[66] (emphasis added)

[61] Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2015) (looseleaf updated November 2015, release 24) [*Sharpe*], at pp 7-2 to 7-4 (**TAB 12**).

[62] *Semelhagi v Paramedevan*, 1996 CarswellOnt 2737 (SCC), para. 22 (**TAB 13**).

[63] Sharpe, *supra*, at p 7-15 (**TAB 12**).

[64] *Ibid*, p 7-15 (**TAB 12**).

[65] *bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd*, 2008 BCSC 897 [*Chandler*] (**TAB 14**).

[66] *Ibid*, para. 98 (**TAB 14**).

(ii) AES' request for specific performance lacks merit

55. In its Application, AES requests an order "[d]irecting OpsMobil, [] TEC, and Ernst & Young Inc. [as Receiver] … to specifically perform <u>their obligations</u> under the [PSA]".[67] The relief sought, however, lacks merit.

56. First, specific performance is a remedy for breach of contract and can therefore only be granted against parties to the contract. Here, the Receiver is not a party to the PSA, and it has not adopted or affirmed the PSA or the Proposed Transaction. Thus, the Receiver cannot be directed to "perform" its "obligations" under the PSA.

57. Second, and while the Receiver draws no conclusions as to whether OpsMobil has breached the PSA, an order for specific performance is inappropriate since damages are an adequate remedy for any breaches of the PSA. To this end, AES' own evidence is that:

(a) AES has incurred costs from operating the Business, which are "in excess of $1,689,526";[68] and

(b) AES has entered into long-term commitments in respect of the Business, and made capital investments in "in excess of $2,500,000".[69]

58. Thus, by AES' own admission, its purported losses or damages in respect of the PSA are known to it and are quantifiable, and therefore, AES' only remedy (if any) is in damages. OpsMobil's insolvency does not alter this analysis.[70]

59. Similarly, the PSA expressly or impliedly contemplated that damages <u>would be</u> an appropriate remedy since, among other things, Section 4.4 of the PSA required "each party" to "protect, indemnify and save the other party harmless" from "<u>any and all losses … whatsoever arising … as</u>

---

[67] Application, *supra,* para. 1(c) (emphasis added).

[68] First Mizera Affidavit, *supra,* para. 12.

[69] Third Mizera Affidavit, *supra,* para. 119.

[70] Sharpe, *supra,* at p 7-15 (**TAB 12**).

a result of any ... breach of warranty",[71] which included OpsMobil's warranty to transfer the assets of the Business free and clear of any encumbrances at the time of closing.[72]

60. In sum, AES' request for specific performance against the Receiver is without merit and AES' remedies in respect of the PSA (if any) are limited to damages. Quite simply, AES knew that the Proposed Transaction could only close with TEC's consent. AES took the risk of operating the Business before the Proposed Transaction closed, at a time when AES knew that OpsMobil was experiencing financial difficulty. AES ought not expect OpsMobil's other creditors to bear the consequences of its risk.

D. AES is Not Entitled to a Constructive Trust

(i) A constructive trust is exceptional relief, especially in the insolvency context

61. A constructive trust is extraordinary relief, and its purpose is to prevent or remediate unjust enrichment.[73] Thus, in *Bankruptcy and Insolvency Law of Canada*, Houlden and Morawetz describe that a plaintiff seeking a constructive trust must prove that: (i) the defendant received an enrichment, (ii) the plaintiff suffered a corresponding deprivation, and (iii) there was no juristic reason for the defendant's enrichment.[74]

62. In respect of the latter requirement, the learned authors explain that in the insolvency context: (i) the "protection of the interests of all creditors is a juristic reason for permitting an enrichment of a bankruptcy estate"; and (ii) "the valid security interest of a secured lender constitutes a juristic reason".[75]

63. Furthermore, while proof of an unjust enrichment is necessary for a constructive trust, it is not sufficient. Instead, as explained by the Alberta Court of Appeal, a "constructive trust is only

---

[71] Section 4.4 of the PSA, *supra*, states (in full):

> Subject to the limitation period with respect to representation and warranties set forth above, each party agrees to protect, indemnify and save the other party harmless from and against any and all losses, costs, expenses, damages, liabilities, claims and demands whatsoever arising or suffered by the other party as a result of any misrepresentation or breach of warranty by the first-mentioned party under this Agreement or any document certificate or other instrument delivered pursuant to this Agreement. No representation or warranty in this Agreement, nor any action taken in respect thereof, shall affect any statutory or implied warranty or covenant included or deemed to be included in the transfer or deed delivered on Closing which, unless the contrary is expressed in the transfer or deed, shall continue to be enforceable after Closing for such period as is provided by law, and despite expiry of any representation or warranty herein. (emphasis added)

[72] *See especially,* Section 4.1(s) of the PSA, Exhibit H to the Third Horrox Affidavit, *supra*.

[73] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada,* 4th ed (Toronto: Thomson Reuters Canada, 2017) (looseleaf updated 2017, release 12) [*Houlden and Morawetz Looseleaf*], at p 3-62.1 (**TAB 15**). To be clear, a constructive trust may also be ordered "for wrongful conduct", pursuant to the Supreme Court of Canada's decision in *Soulous v Korkontzilas*, 1997 CarswellOnt 1489 (SCC). However, AES's application has pleaded and relied on an "unjust enrichment": *see*, Application, paras. 2 and 7.

[74] *Ibid*, at p 3-62.1 (**TAB 15**); *see also*, *Peter v Beblow*, 1993 CarswellBC 1258 (SCC) [*Peter*], para. 3 (**TAB 16**).

[75] *Ibid*, at pp 3-62.1 to 62.2 (emphasis added) (**TAB 15**).

available to remedy an unjust enrichment where there is a 'direct link between the contribution and the property' and a 'monetary award is insufficient'. Put another way, when monetary damages are inadequate…".[76]

64. Finally, before a Court may grant a constructive trust against an insolvent debtor, it must assess "whether or not the rights of creditors and other third parties' interests might be impacted",[77] since the effect of the constructive trust will be to divert assets to a single creditor, which would otherwise be available to the creditors as a whole. Put another way, a plaintiff seeking a constructive trust against an insolvent debtor has an onus which "is not lightly undertaken".[78]

(ii) AES' assertion of a constructive trust lacks merit

65. In its Application, AES seeks as additional or alternative relief an order that the Business is held by OpsMobil and/or the Receiver in constructive trust for AES. AES has, however, failed to discharge the weighty burden applicable to such exceptional relief.

66. First, while AES has based its claims for constructive trust on unjust enrichment,[79] AES has failed to establish the three-part test applicable to unjust enrichment. In particular, AES' claim for a constructive trust means that it must prove OpsMobil has "no juristic reason" for continuing to own the Business. However, the Proposed Transaction did not close, and thus, OpsMobil is legally entitled to the Business. Indeed, as noted at paragraph 19 above, the PSA expressly provided that "[t]he assets [of the Business] shall be at the risk of [OpsMobil] until completion of this Agreement."[80] Accordingly, AES' claim for a constructive trust fails.

67. In any event, OpsMobil and/or the Receiver have an additional juristic reason for owning the Business, which is the protection of the interests of OpsMobil's creditors as a whole.[81]

68. Second, even if AES could meet the three-part test for unjust enrichment, AES is unable to meet the further (and necessary) requirement that "damages are inadequate".[82] In particular, as set out above in respect of AES' request for specific performance, any losses or damages suffered by AES

---

[76] *Scott Appeal*, *supra*, para. 23 (emphasis added) (**TAB 2**).
[77] *Ibid*, paras. 32-33 (**TAB 2**).
[78] *McKinnon, Re*, 2006 NBBR 108 [*McKinnon*], paras. 14 and 19 (**TAB 17**).
[79] *See*, Application, *supra*, paras. 2 and 7; *see also*, Third Mizera Affidavit, *supra*, paras. 126-127.
[80] *See*, Section 5.1 to the PSA, Exhibit H to the Third Horrox Affidavit, *supra*.
[81] Houlden and Morawetz Looseleaf, *supra*, at pp 3-62.1 to 62.2 (**TAB 15**).
[82] *Scott Appeal*, *supra*, para. 23 (emphasis added) (**TAB 2**).

appear to be known and quantifiable by AES. Accordingly, AES is not entitled to an order for constructive trust since damages, if warranted, are an adequate remedy.

69. Finally, it must be emphasized that an order for constructive trust will materially impact and prejudice the rights of OpsMobil's other creditors by removing assets in favour of AES. This consideration strongly militates against the Court exercising its equitable jurisdiction in favour of AES. Indeed, "[i]n the vast majority of cases, even when unjust enrichment has been established a constructive trust will not be the appropriate remedy".[83]

70. In sum, AES' claim to a constructive trust cannot succeed since (i) AES has not met the test for unjust enrichment, (ii) AES has not proven damages are inadequate, and (iii) a constructive trust would materially prejudice OpsMobil's creditors as a whole.

V. CONCLUSION

71. Through this Application, AES is attempting to 'jump the queue' without right or justification and in violation of the spirit and principles of the *BIA*. It is seeking to rely on an unconsummated purchase and sale transaction to obtain ownership of valuable assets from the OpsMobil estate. The Proposed Transaction must be considered in view of the rights of the OpsMobil creditors who would be significantly prejudiced by the transfer of the Business out of the OpsMobil estate in exchange for pre-filing debt forgiveness.

72. As a result of the foregoing, the Receiver requests that the relief sought by AES at paragraph 1 of its Application be dismissed.

73. Alternatively, in the event the Court determines the PSA is binding on the Receiver (which remains denied), then the Receiver requests that the Court directs AES to tender the full the Purchase Price under the PSA, in cash, to prevent prejudice to OpsMobil's creditors.

---

[83] *Scott Trial, supra*, para. 185 (**TAB 1**).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF AUGUST, 2018.

BORDEN LADNER GERVAIS LLP

Per: ______________________________
Robyn Gurofsky

Solicitors for the Receiver

TABLE OF AUTHORITIES

TAB	DOCUMENT
A	The Receivership Order pronounced by Justice B.E.C. Romaine on July 19, 2018.
B	Order for Interim Stay pronounced by Justice B.E.C. Romaine on July 4, 2018 in Court File No. 1801-09424.
C	Initial Order pronounced by Justice B.E.C. Romaine on July 10, 2018 in Court File No. 1801-09424.
D	*CCAA* Suspension Order pronounced by Justice B.E.C. Romaine on July 19, 2018 in Court File No. 1801-09424.
1	*Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2013 ABQB 273.
2	*Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2015 ABCA 51.
3	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
4	*Brunswick Chrysler Plymouth Ltd, Re*, 2005 NBQB 83.
5	*Re SemCanada Crude Co,* 2009 ABQB 397.
6	*Re SemCanada Crude Co,* 2009 ABCA 275.
7	Roderick Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015).
8	Houlden, Morawetz and Sarra, *The 2018 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018).
9	*Re Associated Investors of Can Ltd*, 1989 CarswellAlta 362 (QB).
10	*Reference Re McMahon Co*, 1921 CarswellOnt 32 (Sup Crt).
11	*Leo P Abrams & Son Ltd v MacDonald Homes Inc (Trustee of)*, 1995 CarswellOnt 930 (SCJ), aff'd by 1996 CarswellOnt (CA), leave to appeal to the SCC ref'd by 1996 WL1791761.
12	Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2015) (looseleaf updated November 2015, release 24).
13	*Semelhagi v Paramedevan*, 1996 CarswellOnt 2737 (SCC).
14	*bcIMC Construction Fund Corp v Chandler Homer Street Ventures Ltd*, 2008 BCSC 897.
15	Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada,* 4th ed (Toronto: Thomson Reuters Canada, 2017) (looseleaf updated 2017, release 12).

TAB	DOCUMENT
16	*Peter v Beblow*, 1993 CarswellBC 1258 (SCC).
17	*McKinnon, Re*, 2006 NBBR 108.

TAB A

Court File Number	1801-09188
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
	IN THE MATTER OF SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, as amended
	and IN THE MATTER OF SECTION 13(2) OF THE *JUDICATURE ACT*, RSA 2000, C J-2, as amended
Applicant	THIRD EYE CAPITAL CORPORATION
Respondents	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
Document	**RECEIVERSHIP ORDER**
Address for Service and Contact Information of Party Filing this Document	**STIKEMAN ELLIOTT LLP** Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Guy P. Martel / David M. Price** gmartel@stikeman.com / dprice@stikeman.com Tel: (514) 397-3163 / (403) 266-9093 Fax: (514) 397-3493 Lawyers for the Applicant, Third Eye Capital Corporation File No.: 120536-1037

Clerk's stamp

JUDICIAL CENTRE OF CALGARY
FILED
JUL 19 2018
CLERK OF THE COURT

I hereby certify this to be a true copy of the original ORDER
Dated this 19 day of JULY 2018
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: July 19, 2018

NAME OF JUDGE WHO MADE THIS ORDER: Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary, Alberta

UPON the application of Third Eye Capital Corporation ("**TEC**") to appoint a receiver and manager in respect of OpsMobil Inc., Ranch Energy Corporation, 1734163 Alberta Inc., 1859821 Alberta Inc., Air Dallaire Ltd., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc. and K.L. Capital Corp. (collectively, the "**Debtors**"); **AND UPON** having read the Application, the Affidavit of Mark Horrox, sworn June 26, 2018, filed June 27, 2018, the Affidavit of Mark Horrox, sworn July 6, 2018, filed July 9, 2018, TEC's Brief of Law and Argument and TEC's Supplemental Brief of Law and Argument; **AND UPON** reading the consent of Ernst & Young Inc. ("**E&Y**") to act as receiver and manager (the "**Receiver**") of the Debtors; **AND UPON** hearing counsel for TEC, counsel for the Debtors, counsel for the proposed Receiver, and any other counsel or other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the application for this Order is hereby abridged and service thereof is deemed good and sufficient.

LIFTING OF STAY

2. The stay of proceedings in Court of Queen's Bench of Alberta action number 1801-09424 (the "**CCAA Proceedings**") is hereby lifted so as to permit the Applicant to continue this Application against the Debtors.

APPOINTMENT

3. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**"), and section 13(2) of the *Judicature Act*, RSA 2000, c J-2, as amended, E&Y is hereby appointed Receiver, without security, of all of the Debtors' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

4. Subject to the Applicant providing the Receiver with an indemnity, on terms and conditions to be agreed, the Receiver is hereby empowered and authorized, but not

obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include the Receiver's ability to abandon, dispose of or otherwise release any interest in any of the Debtors' real property, or any right in any immoveable, and any license or authorization issued by the British Columbia Oil and Gas Commission, Alberta Energy Regulator, or any other similar government authority, in respect of such interest in real property or immoveable, including pursuant to section 14.06(4) of the BIA, notwithstanding the provisions of the *Oil and Gas Activities Act*, SBC 2008, c 36, the *Oil and Gas Conservation Act*, RSA 2000, c O-6, the *Pipeline Act*, RSA 2000, or any other similar legislation in any other province or territory;

(b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) to 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 Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtors;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

  (i) without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

  (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause, and in each such case notice under subsection 59(10) of the *Personal Property Security Act*, RSBC 1996, c 359, subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c P-7, or any other similar legislation in any other province or territory shall not be required;

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of Alberta, or any other similar government authority, notwithstanding Section 191 of the *Land Titles Act*, RSA 2000, c L-4, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed the relevant Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as receiver of the Debtors and not in its personal capacity;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person, provided that notwithstanding the terms of this Order, until further order of this Court: (i) Airborne Energy Solutions Inc. ("**AES**") shall continue to be in possession of and to operate the aerial surveillance and scanning, chemical spraying and local charter business (the "**Aircraft Assets**") that are the object of the purchase and sale agreement dated December 14, 2017 between OpsMobil Inc. and AES; and (ii) the revenues from the Aircraft Assets, including those revenues subject to the terms of the Order of the Honourable Madam Justice Eidsvik in Court of Queen's Bench of Alberta Action No. 1801-08383 pronounced on June 14, 2018 (the "**Aircraft Revenues**"), shall be dealt with as contemplated by such Order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. (i) The Debtors, (ii) 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 (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

6. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and

any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 6 or in paragraph 7 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

7. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

8. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph 8; and (ii) affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or Proceeding that is taken in respect of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OR REMEDIES

10. All rights and remedies (including, without limitation, set-off rights) against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, including, without limitation, any rights or remedies or provision that purports to effect or cause a cessation of operatorship, in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreements to which the Debtors is a party as a result of the occurrence of any default or non-performance by or the insolvency of the Debtors, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings and under no circumstances shall the Debtors be replaced as operator pursuant to any such agreements, without further order of this Court provided however that this stay and suspension does not apply in respect of any "eligible financial contract" (as defined in the BIA), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the

Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

12. All Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the

date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

14. To the extent that E&Y, as monitor to the Debtors in the CCAA Proceedings, holds funds received by the Debtors in trust accounts (the "**CCAA Trust Funds**") pursuant to paragraph 24(k) of the Order of the Honourable Madam Justice Romaine in Court of Queen's Bench Alberta Action No. 1801-08424 granted July 10, 2018 (the "**Initial CCAA Order**"), E&Y is authorized to transfer the CCAA Trust Funds to the Post Receivership Accounts to be held by the Receiver and to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

15. Subject to employees' rights to terminate their employment, all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

PERSONAL INFORMATION

16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of

such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

18. Nothing in this Order shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release, or deposit of a substance contrary to any federal, provincial or other law relating to the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.

19. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of

the Property within the meaning of any Environmental Legislation, unless the Receiver is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

20. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

21. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, except as otherwise set out herein, and subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

22. The Receiver and its legal counsel shall pass their accounts from time to time.

23. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

24. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $6,000,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, except as otherwise set out herein, and subordinate in priority to the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

25. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

26. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Annex "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

27. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

28. The Receiver shall be allowed to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

29. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

CONTINUATION OF CHARGES AND PRIORITY OF CHARGES

30. Each of the Interim Lenders' Charge, the Administration Charge and the Directors' Charge (all as defined in the Initial CCAA Order) shall, except as otherwise set out herein, continue to constitute valid and enforceable priority charges on the Property on the same terms and conditions as set out in paragraphs 36-37 and 39 of the Initial CCAA Order.

31. The priority of the charges created in the CCAA Proceedings (and continued by this Order) in relation to the Receiver's Charge and the Receiver's Borrowing Charge as created hereunder, shall be as follows:

    First – the Receivers' Borrowing Charge;

    Second – the Interim Lender's Charge, as that term is defined in the Initial CCAA Order (to the maximum amount of $1,356,000);

    Third – the Receiver's Charge;

    Fourth – the Administration Charge, as that term is defined in the Initial CCAA Order (to the maximum amount of $200,000); and

    Fifth – the Directors' Charge, as that term is defined in the Initial CCAA Order (to the maximum of amount of $100,000).

32. If it is determined by final decision of this Court that AES is entitled to the Aircraft Assets and the Aircraft Revenues, the Interim Lender's Charge, Administration Charge, Directors' Charge, Receiver's Charge and Receiver's Borrowing Charge will not attach to the Aircraft Assets and the Aircraft Revenues to the extent of that entitlement.

GENERAL

33. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

34. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

35. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

36. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

37. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

38. This Order is without prejudice to the right of ECN Aviation Inc. ("**ECN**") to apply to this Court for an Order declaring that (i) the assets of OpsMobil Group Inc. that were seized on May 11, 2018 on behalf of ECN are not subject to the provisions of this Order,

and (ii) ECN is entitled to take possession and dispose of the said assets in accordance with the *Personal Property Security Act,* RSA 2000, c P-7.

39. The Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.

40. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

41. This Order is issued and shall be filed in Court of Queen's Bench Action No. 1801-09188, and, if determined to be necessary or advisable, in the Court of Queen's Bench in Bankruptcy, which actions are not consolidated. All further proceedings shall be taken in both actions unless otherwise ordered.

42. The Receiver shall establish and maintain a website in respect of these proceedings at www.documentcentre.eycan.com (the "**Receiver's Website**") and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

43. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

i. the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

ii. any other person served with notice of the application for this Order;

iii. any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Receiver's Website;

and service on any other person is hereby dispensed with.

44. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

"B.E.C. Romaine"

Justice of the Court of Queen's Bench of Alberta

ANNEX "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. ____________________

AMOUNT $____________________

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the interim receiver and receiver and manager (the "Receiver") of all of the assets, undertakings and properties of [DEBTORS' NAMES] appointed by Order of the Court of Queen's Bench of Alberta and Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (collectively, the "Court") dated the _____ day of __________________, _______ (the "Order") made in action numbers ______________, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_________, being part of the total principal sum of $______________ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of ______ per cent above the prime commercial lending rate of Bank of _______ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ●.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _______ day of ______________, 2018.

[RECEIVER'S NAME], solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: ______________________________
Name:
Title:

TAB B

I hereby certify this to be a true copy of
the original order
dated this 5 day of July 2018

for Clerk of the Court

Clerk's stamp:

FILED
JUL 05 2018
JUDICIAL CENTRE OF CALGARY
CLERK OF THE COURT

COURT FILE NUMBER 1801-09424

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

APPLICANTS RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

RESPONDENT THIRD EYE CAPITAL CORPORATION

COURT FILE NUMBER 1801-09188

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE RECEIVERSHIP OF OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

APPLICANT THIRD EYE CAPITAL CORPORATION

RESPONDENTS RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL

ENERGY SERVICES INC. and K.L. CAPITAL CORP.

DOCUMENT	**ORDER FOR INTERIM STAY**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600 – 421 7th Ave SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1831 Facsimile: 403-695-695-3538 Email: tom.cumming@gowlingwlg.com / anthony.mersich@gowlingwlg.com File Number: V41817

DATE ON WHICH ORDER WAS PRONOUNCED: July 4, 2018

NAME OF JUDGE WHO MADE THIS ORDER: Honourable Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary

UPON the application of (1) Ranch Energy Corporation, OPS Mobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., Air Dallaire Ltd., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc. and K.L. Capital Corp. (collectively, the "**Companies**") for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "***CCAA***" and such application the "***CCAA* Application**"); and (2) the application of Third Eye Capital Corporation ("**Third Eye**") to appoint Ernst & Young Inc. ("**E&Y**") as receiver of the assets, undertakings and property of the Companies (the "**Receivership Application**"); AND UPON having read the *CCAA* Application, the Affidavit of Ryan Tobber sworn July 3, 2018, the Pre-Filing Report of Alvarez & Marsal Canada Inc., the proposed monitor in the *CCAA* Application, dated July 3, 2018, the Receivership Application, the Affidavit of Mark Horrox sworn June 28, 2018, the Affidavit of Casey Howell sworn July 4, 2018; and the Affidavit of Kenneth I. Mizera sworn June 29, 2018; AND UPON hearing counsel for the Companies and Third Eye; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Companies' application for an initial order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 is hereby adjourned to July 10, 2018 to be heard concurrently with the Receivership Application.

3. This Order is without prejudice to the respective positions of the Companies and Third Eye on the merits of the *CCAA* Application or the Receivership Application and any of the relief sought therein.

POSSESSION OF PROPERTY AND OPERATIONS

4. The Companies shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order,

   provided that notwithstanding the terms of this Order, until further Order of this Court, (i) Airborne Energy Solutions Inc. ("**AES**") shall continue to be in possession of and to operate the aerial surveillance and scanning, chemical spraying and local charter business (the "**Aircraft Assets**") that are the object of the purchase and sale agreement dated December 14, 2017 between OpsMobil and AES; and (ii) the revenues arising from the Assets will continue to be subject to the terms of the Order of the Honourable Madam Justice Eidsvik in Court of Queen's Bench of Alberta Action No. 1801-08383 pronounced on June 14, 2918 (the "**Aircraft Revenues**").

NO PROCEEDINGS AGAINST THE *COMPANIES* OR THE PROPERTY

5. Until and including July 10, 2018 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Companies, or affecting the Business or the Property of the Companies, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Companies or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, save and except for the filling and service of materials in relation to the Receivership Application.

NO EXERCISE OF RIGHTS OR REMEDIES

6. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Companies, or affecting the Business or the Property of the Companies, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

   (a) empower the Companies to carry on any business which the Companies are not lawfully entitled to carry on;

   (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the *CCAA*;

   (c) prevent the filing of any registration to preserve or perfect a security interest; or

   (d) prevent the registration of a claim for lien.

7. Nothing in this Order shall prevent any party from taking an action against the Companies where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order.

NO INTERFERENCE WITH RIGHTS

8. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Companies, except with the written consent of the Companies, or leave of this Court.

CONTINUATION OF SERVICES

9. During the Stay Period, all persons having:

   (a) statutory or regulatory mandates for the supply of goods and/or services; or

   (b) oral or written agreements or arrangements with the Companies, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Companies,

   are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Companies or exercising any other remedy provided under such agreements or arrangements. The Companies shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Companies in accordance with the payment practices of the Companies, or such other practices as may be agreed upon by the supplier or service provider, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

10. During the Stay Period, and except as permitted by subsection 11.03(2) of the *CCAA*, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Companies with respect to any claim against the directors or

officers that arose before the date hereof and that relates to any obligations of the Companies whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Companies, if one is filed, is sanctioned by this Court or is refused by the creditors of the Companies or this Court or a receiver is appointed over its Property.

CRITICAL PAYMENTS DURING THE STAY PERIOD

11. To the extent that the Companies believe necessary, Third Eye shall provide funds in accordance with the cash flows prepared by the Companies and approved by E&Y during the Stay Period up to the amount $856,000 (the "**Borrowing Limit**") to permit the Companies to pay the critical suppliers contemplated thereby (the "**Interim Borrowings**"), provided that all revenues received by any of the Companies party to and bound by the existing blocked account arrangements with Third Eye continue to be deposited in such blocked accounts, and further that a $300,000 pre-payment contemplated by the cash flows has been deposited in such blocked accounts.

12. The Interim Borrowings shall bear interest at the rate of 12% per annum, calculated and compounded monthly, and payable on the earlier of the termination of the Stay Period or further order of this Court.

13. Third Eye shall be entitled to the benefits of and is hereby granted a charge (the "**Charge**") on the Property to secure the Interim Borrowings, which charge shall not exceed an aggregate amount of the Borrowing Limit plus interest on advances under the Interim Borrowing, as security for the Interim Borrowings, the filing, registration or perfection of which Charge shall not be required, and which Charge shall be valid and enforceable for all purposes, including against any right, title or interest filed, registered, recorded or perfected subsequent to the Charge coming into existence, shall be treated as an interim charge for the purposes of section 11.2 of the *CCAA*, in the event that the *CCAA* Application is granted, and a charge under paragraph 19 of the draft order appointing a receiver, in the event that the Receivership Application is granted. If the *CCAA* Application is granted, the Charge will rank in priority to any other interim

financing charge granted pursuant to section 11.2 of the *CCAA*, provided that a party providing initial financing shall be entitled to payout such Interim Borrowings together with interest thereon and subrogate to Third Eye's position in respect of such Charge.

14. The Charge shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, provided that if it is determined by final decision of a court of competent jurisdiction that AES is entitled to the Aircraft Assets and the Aircraft Revenues, the Charge will not attach to the Aircraft Assets and the Aircraft Revenues to the extent of that entitlement.

15. The Charge shall not be rendered invalid or unenforceable and the rights and remedies of Third Eye thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (the "***BIA***"), or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the *BIA*;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) the creation of the Charge shall not shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party; and

(ii) Third Eye shall have no any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charge; and

(iii) the granting of the Charge does not and will not constitute a preference, fraudulent conveyance, transfer at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

16. Third Eye shall be treated as unaffected in any plan of compromise or arrangement filed by the Companies under the *CCAA*, or any proposal filed by the Companies under the *BIA*, with respect to the Interim Borrowings.

GENERAL

17. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Companies and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Companies as may be necessary or desirable to give effect to this Order, or to assist the Companies in carrying out the terms of this Order.

18. The Companies shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

19. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB C

Clerk's stamp:

JUDICIAL CENTRE OF CALGARY
FILED
JUL 10 2018
CLERK OF THE COURT

COURT FILE NUMBER: 1801-09424

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

I hereby certify this to be a true copy of the original order

Dated this 10 day of July 2018

for Clerk of the Court

APPLICANTS: RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

RESPONDENT: THIRD EYE CAPITAL CORPORATION

DOCUMENT: **INITIAL ORDER**

ADDRESS FOR SERVICE OF PARTY FILING DOCUMENT

Gowling WLG (Canada) LLP
1600 – 421 7th Ave SW
Calgary, AB T2P 4K9
Telephone: 403-298-1938 / 403-298-1831
Facsimile: 403-695-695-3538
Email: tom.cumming@gowlingwlg.com / anthony.mersich@gowlingwlg.com
File Number: V41817

DATE ON WHICH ORDER WAS PRONOUNCED: July 10, 2018

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Madam Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary

UPON the application of Ranch Energy Corporation, OPS Mobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., Air Dallaire Ltd., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc. and K.L. Capital Corp. (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application and the first and second Affidavit of Ryan Tobber; **AND UPON** hearing the consent of Ernst & Young Inc. to act as Monitor and upon noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants and Third Eye Capital Corporation (the "**Interim Lender**"); **AND UPON** having previously granted an interim stay order in respect of the Applicants on July 4, 2018 (the "**Interim Stay Order**"), pursuant to which a stay of proceedings in favour of the Companies was issued until and including July 10, 2018, and an emergency interim financing in an amount of $856,000 guaranteed by a super-priority charge over the assets of the Companies was provided by the Interim Lender; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are each companies to which the *CCAA* applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall, subject to the Monitor's supervision:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of business (the "**Business**") and Property; and

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order,

provided that notwithstanding the terms of this Order, until further Order of this Court: (i) Airborne Energy Solutions Inc. ("**AES**") shall continue to be in possession of and to operate the aerial surveillance and scanning, chemical spraying and local charter business (the "**Aircraft Assets**") that are the object of the purchase and sale agreement dated December 14, 2017 between OpsMobil and AES; and (ii) the revenues from the Aircraft Assets, including those revenues subject to the terms of the Order of the Honourable Madam Justice Eidsvik in Court of Queen's Bench of Alberta Action No. 1801-08383 pronounced on June 14, 2018, (the "**Aircraft Revenues**") shall be dealt with as contemplated by such Order.

5. Subject to the supervision of the Monitor and to the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges; and

(c) amounts owing to suppliers that the Monitor has determined are critical to the continued operations of the Applicants and are provided for in the Cashflows (as hereinafter defined).

6. Except as otherwise provided to the contrary herein, the Applicants shall, subject to the supervision of the Monitor, be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

   (b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

      (i) employment insurance,

      (ii) Canada Pension Plan, and

      (iv) income taxes,

   but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

   (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until a real property lease is disclaimed or resiliated in accordance with the *CCAA*, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall, in consultation with and under the supervision of the Monitor, and subject to such requirements as are imposed by the *CCAA*, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the *CCAA*), shall require authorization by this Court in accordance with section 36 of the *CCAA*;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the *CCAA*, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the *CCAA*, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the *CCAA*, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including July 20, 2018, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the *CCAA*;

(c) prevent the filing of any registration to preserve or perfect a security interest; or

(d) prevent the registration of a claim for lien.

15. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

18. Notwithstanding anything else contained in this Order, no creditor of the Applicants shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the *CCAA* and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $100,000, as security for the indemnity provided in

paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 35 and 37 herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. Ernst & Young Inc. is hereby appointed pursuant to the *CCAA* as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs and the Applicants with the powers and obligations set out in the *CCAA* or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in its dissemination to the Interim Lender and its counsel on a bi-weekly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicants in its preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than monthly, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicants in its development of the Plan and any amendments to the Plan;

(f) advise the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person;

(j) perform such other duties as are required by this Order or by this Court from time to time; and

(k) subject to paragraph 4 hereof, open trust accounts to hold all revenues and funds received by the Applicants and permit payments from such accounts to pay amounts contemplated by the 13 week cash flow projections of the Applicants which have been reviewed and approved by the Monitor (collectively, the "**Cash Flows**"), provided that the payment of such amounts are approved in advance by the Monitor.

25. Subject to paragraph 24(k) hereof, the Monitor shall not take possession of the Property. The Monitor shall take no part whatsoever in the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

26. The Monitor shall provide any creditor of the Applicants and the Interim Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

27. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the *CCAA* or any applicable legislation.

28. The Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the

Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $200,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 37 and 37 hereof.

INTERIM FINANCING

31. The Companies are hereby authorized and empowered to obtain and borrow under a credit facility from the Interim Lender in order to finance the Borrowers' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed, unless permitted by further order of this Court, a total amount of $1,356,000 (the "**Interim Financing**"), which Interim Financing includes the amount the amount of $856,000 already advanced by the Interim Lender as "Interim Borrowings" pursuant to the Interim Stay Order.

32. The Interim Financing shall be provided on terms and subject to the conditions that apply to the Interim Borrowings approved by this Court in the Interim Stay Order of July 4, 2018.

33. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations in connection with the Interim Borrowings and the Interim Financing incurred on or after the date of the Interim Stay Order, which charge shall not exceed the aggregate amount advanced on or after the date of the Interim Stay Order, plus applicable interest. The Interim Lender's Charge shall have the priority set out in paragraphs 37 and 37 hereof.

34. Notwithstanding any other provision of this Order, paragraphs 14 to 16 of the Interim Stay Order shall apply to the Interim Financing and to the Interim Lender's Charge.

VALIDITY AND PRIORITY OF CHARGES

35. The priorities of the Interim Lender's Charge, the Administration Charge and the Directors' Charge, shall be as follows:

First – Interim Lender's Charge up to the amount set out in paragraph 31 of this Initial Order;

Second – Administration Charge (to the maximum amount of $200,000); and

Third – Directors' Charge (to the maximum amount of $100,000).

36. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

37. Each of the Directors' Charge, the Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, provided that if it is determined by final decision of this Court that AES is entitled to the Aircraft Assets and the Aircraft Revenues, the Charges will not attach to the Aircraft Assets and the Aircraft Revenues to the extent of that entitlement.

38. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the Interim Lender's Charge, unless the Applicants also obtain the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

39. The Directors' Charge, the Administration Charge and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to *BIA*, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the *BIA*;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Commitment Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the Applicants entering into the Commitment Letter, or execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this order, including the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

40. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Administration Charge, the Interim Lender's Charge and the Directors' Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

41. The Monitor shall (i) without delay, publish in the Calgary Herald and the Daily Oil Bulletin, a notice containing the information prescribed under the *CCAA*; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the *CCAA*, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the *CCAA* and the regulations made thereunder.

42. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at www.ey.com/ca/ranchenergy and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials

...as are confidential and the subject of a sealing order or pending application for a sealing order.

RECEIVERSHIP APPLICATION

43. The receivership application of Third Eye Capital Corporation having Court File Number 1801-09188 is hereby adjourned *sine die.*

GENERAL

44. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

45. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

46. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

47. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

48. Each of the Applicants and the Monitor are at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever

located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

49. This Order is without prejudice to the right of ECN Aviation Inc. to apply to this Court for an Order declaring that (i) the assets of OpsMobil Group Inc. that were seized on May 11, 2018 on behalf of ECN Aviation Inc. are not subject to the provisions of this Order, and (ii) ECN Aviation Inc. is entitled to take possession and dispose of the said assets in accordance with the *Personal Property Security Act*, RSA 2000, c P-7.

50. Any interested party (including the Applicants, the Interim Lender and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB D

JUDICIAL CENTRE OF CALGARY
FILED
JUL 24 2018
Clerk's stamp
CLERK OF THE COURT

Court File Number	1801-09424
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended and IN THE MATTER OF A PLAN OF ARRANGEMENT OF RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
Applicant	THIRD EYE CAPITAL CORPORATION
Respondents	RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
Document	***CCAA* SUSPENSION ORDER**
Address for Service and Contact Information of Party Filing this Document	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Joseph Reynaud / David M. Price** jreynaud@stikeman.com / dprice@stikeman.com Tel: (514) 397-3019 / (403) 266-9093 Fax: (403) 266-9034 Lawyers for the Applicant, Third Eye Capital Corporation File No.: 120536-1037

I hereby certify this to be a true copy of the original order
Dated this 24 day of July
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: July 19, 2018

NAME OF JUDGE WHO MADE THIS ORDER: Justice B.E.C. Romaine

LOCATION OF HEARING: Calgary, Alberta

UPON the application of Third Eye Capital Corporation ("TEC") to appoint a receiver and manager over Ranch Energy Corporation, OpsMobil Inc., 1734163 Alberta Inc., 1859821

Alberta Inc., Air Dallaire Ltd., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc. and K.L. Capital Corp. (collectively, the "**Debtors**") thereby effectively terminating the within proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"); **AND UPON** the initial *CCAA* order granted on July 10, 2018 (the "**Initial Order**"); **AND UPON** having read the Application, the Affidavit of Mark Horrox, sworn June 26, 2018, filed June 27, 2018, the Affidavit of Mark Horrox, sworn July 6, 2018, filed July 9, 2018, TEC's Brief of Law and Argument and TEC's Supplemental Brief of Law and Argument; **AND UPON** having read the Report of Ernst & Young Inc. as monitor of the Debtors (the "**Monitor**"); **AND UPON** reading the consent of Ernst & Young Inc. ("**E&Y**") to act as receiver and manager (the "**Receiver**") of the Debtors; **AND UPON** hearing counsel for TEC, counsel for the Debtors, counsel for the Monitor, and any other counsel or other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the application for this Order is hereby abridged and service thereof is deemed good and sufficient.

SUSPENSION OF *CCAA PROCEEDINGS*

2. Except as expressly set out in this Order, the Order of the Honourable Madam Justice B.E.C. Romaine pronounced on July 19, 2018 concerning, *inter alia*, the appointment of E&Y as the receiver and manager (the "**Receiver**") of the assets, property and undertaking of the Debtors (the "**Receivership Order**"), and any further Order of this Court, the proceedings in the within Action in respect of the Debtors, including as set out in the Initial Order (the "***CCAA* Proceedings**"), shall, as of and from the date of the pronouncement of the within Order, hereby be suspended and of no further effect.

3. All restructuring efforts attempted pursuant to the *CCAA* Proceedings shall, from the pronouncement of this Order, cease and the Debtors shall no longer have the authority to file a plan of compromise or arrangement.

4. The Stay Period (as defined in the Initial Order) shall no longer have effect, save and except that there shall be deemed to be no gap whatsoever as between cessation of the Stay Period and any similar ordered stay of proceedings as set out in the Receivership Order.

CONTINUATION OF CHARGES CREATED IN THE *CCAA PROCEEDINGS*

5. Any and all charges created over the assets, property and undertaking of the Debtors that were created by the Initial Order (the "**Charges**") continue to bind the assets, property and undertaking of the Debtors in respect of all proper claims under the Charges accrued prior to and including the date of the pronouncement of this Order, subject to the passing of accounts, as and where required, for such respective Charges, although nothing herein shall modify any enumerated quantum for any Charge as set out in the Initial Order.

6. The Charges shall have and continue to have after the pronouncement of this Order the priority in respect of assets, property and undertaking of the Debtors as set out in the Receivership Order.

GENERAL

7. Any party affected by this Order may apply to this Court for advice and directions in the discharge of the obligations and duties set out herein, including without limitation, regarding the passing of accounts and crystallization of one or more of the Charges or the reconciliation of the provisions of this Order with provisions of the Initial Order and the Receivership Order or any subsequent order the Court may make in relation to the Debtors and the assets, property and undertaking of the Debtors.

8. This Court requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant and Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or

to assist the Applicant and Monitor and their respective agents in carrying out the terms of this Order.

9. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

i. the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

ii. any other person served with notice of the application for this Order;

iii. any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Monitor's website in the section thereof dealing with the within proceedings;

and service on any other person is hereby dispensed with.

10. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB 1

2013 ABQB 273
Alberta Court of Queen's Bench

Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.

2013 CarswellAlta 873, 2013 ABQB 273, [2013] 10 W.W.R. 551, [2013] A.W.L.D. 2930, [2013] A.W.L.D. 2932, [2013] A.W.L.D. 2956, [2013] A.W.L.D. 3004, [2013] A.W.L.D. 3005, 229 A.C.W.S. (3d) 121, 79 Alta. L.R. (5th) 172

Scott & Associates Engineering Ltd. Plaintiff and Finavera Renewables Inc. Defendant

S.L. Martin J.

Heard: February 4-14, 2013
Judgment: May 14, 2013
Docket: Calgary 0701-08472

Counsel: J.E. Fletcher for Plaintiff
P. Edwards, L. Mensch for Defendant

***S.L. Martin J.*:**

1. Introduction

1 The Plaintiff, Scott & Associates Engineering Ltd. ("Scott"), is an Alberta engineering firm and Mr. Bryan Scott is its principal. The Defendant, Finavera Renewables Inc. ("Finavera"), is a publicly-traded British Columbia company with experience in wind energy. In December 2006, Scott became interested in purchasing an Alberta wind generating project offered for sale by Penn West Petroleum Ltd. ("Penn West"). The project was to be built in two parts - Phase I (Ghost Pine) and Phase II (Lone Pine). The Phase I Ghost Pine project was subject to a joint venture agreement with Spirit Pine Energy Corp. ("Spirit Pine").

2 Scott conducted research on the project, was accepted as a qualified bidder, submitted four offers in its own name and eventually became the only entity with which Penn West was still negotiating. Penn West acknowledged that Scott had become the preferred potential purchaser of the project. However, Scott did not have the required funds or necessary financing and Scott actively sought monies from numerous sources. Eventually, Scott and Finavera were brought together by The Howard Group Inc. ("The Howard Group"). Scott and Finavera did not know each other before this introduction but they moved quickly to acquire the project, with Finavera providing the money. Finavera signed a form of Mutual Confidentiality Agreement ("MCA") in favour of Scott but Scott and Finavera did not have a formal agreement outlining their respective roles, rights, responsibilities or remuneration.

3 Nevertheless, Scott brought Finavera into the acquisition of the project: they shared information, worked together, and submitted a bid in the name of Finavera, in the same amount as in the prior Scott offers. This final bid was eventually accepted by Penn West. Differences of opinion arose between Scott and Finavera about certain matters. The tensions were such that when the purchase and sale transaction closed with Penn West, Finavera purported to have acquired the wind project on its own account. Finavera subsequently developed the project alone, hired another engineering firm to work on the project, and eventually sold the project to a third party, all without any further involvement of Scott. Scott argued that Finavera misused its confidential information, misappropriated its business opportunity and was unjustly enriched by its efforts. Scott seeks a constructive trust in the project.

4 For the reasons that follow I find that while there is no recovery for breach of contract or breach of confidence and no

business opportunity taken, Finavera has been unjustly enriched by Scott's status and efforts. In all circumstances the preferable remedy is a monetary one and Scott has not established that it merits the discretionary and exceptional remedy of a constructive trust in the project or its profits.

2. Facts: Timeline and Overview

5 The events that give rise to litigation arose over a four month period, between December 2006 and March 2007. The following is an overview to provide some context. Further relevant facts will be discussed in relation to the issues arising in this case.

6 A wind generating project or wind farm was offered for sale by Penn West. Penn West hired Phoenix Engineering Inc. ("Phoenix") to organize and supervise the bid process, manage the sale, put together the materials and protocols for the data room, and answer questions from prospective purchasers about the project.

7 Penn West provided preliminary information concerning the project in its Information Memorandum and set out the following time lines: during the week of December 2006 the Information Memorandum would be available and access to both the virtual and the physical data rooms would commence. Proposals and bids were due on January 12, 2007, with a closing date for the acquisition on January 31, 2007.

8 The Information Memorandum provided an executive summary of the project, including a list of the project's key features. It also provided a one page overview of the global, Canadian, and Alberta wind energy perspectives, a somewhat promotional discussion on the value of wind energy generally and its growth in those jurisdictions.

9 The Information Memorandum set out the bid process. In broad terms it contemplated a progression: qualified bidders would be identified by Penn West; Penn West would review any bids received; work with the best bids and eventually select the preferred potential purchaser; and try to negotiate the terms of a purchase and sale agreement.

10 Interested parties were instructed under the terms of the Information Memorandum to submit a proposal indicating: (i) a purchase price; (ii) comments, if any, on Penn West's proposed Purchase and Sale Agreement (which was available in the data room); and (iii) a review of the expected financing sources to fund the proposal.

11 In the first week of December 2006, Mr. Scott began his inquiries into the acquisition of the wind farm. From his testimony it was clear that he had limited experience in the wind industry and could not finance either the acquisition of the Penn West assets or the subsequent development of the wind farm on his own. Scott intended to put together a team, with another party putting up the funds.

12 On December 14, 2006, Phoenix provided Mr. Scott with the Alberta Wind Projects Information Memorandum dated December 13, 2006, which also attached the form of Penn West Confidentiality Agreement Scott was required to sign.

13 On December 14, 2006, Scott executed the Penn West Confidentiality Agreement. This agreement does not appear to have been executed by Penn West.

14 On December 15, 2006, Mr. Scott was granted access to the project data room operated by Phoenix.

15 On December 18, 2006, Mr. Scott sent Phoenix multiple email inquiries pertaining to the project. During the course of this correspondence, Phoenix confirmed to Mr. Scott that all of his inquiries and the information provided by Phoenix in response to such inquiries were confidential and would not be shared with any of Scott's competitors, unless they asked similar questions.

16 While looking for investors for his bid, Mr. Scott sent a draft summary of the project bid to several potential investors. For example, on December 22, 2006, Mr. Scott sent Mr. Arno Neumann his summary. On January 3, 2007, Mr. Scott sent Ms. Ellen Alston his summary, together with a preliminary financial analysis summary of the project.

17 On January 12, 2007, Scott sent Phoenix its first formal offer to purchase at a price of 3.35 million dollars. Scott listed

its “expected financing sources” of equity funding as: (i) a consortium group of Mitsubishi companies; (ii) Nordbank; (iii) John Deere; and (iv) TD Investments. It listed a source of debt financing as “Bank(s)”.

18 On January 18, 2007, Scott sent Phoenix a revised second offer to purchase at the same price, with the same expected financing sources as the first offer.

19 Following Scott’s second offer, it negotiated the details of its bid with Phoenix while concurrently pursuing multiple investors. Although Scott’s representations to both Phoenix and to its potential investors indicated that Scott had multiple investors locked in for the bid, none of Scott’s potential investors had formally committed to the project. Notably, although Scott had not secured a commitment of financing by any of its investors, it did forward a summary of the project to them.

20 In telephone conversations, Phoenix indicated to Scott that Scott was one of three potential purchasers that Penn West was considering for the acquisition.

21 On January 20, 2007, Scott sent Phoenix an informal offer via email that stated Scott and its investors would consider reducing their bid to $2.7 million.

22 On January 23, 2007, following a significant amount of correspondence between Scott and Phoenix regarding Scott and what was presented as its potential investors’ concerns over the joint venture agreement with Spirit Pine, Scott provided Phoenix with its comments and proposals on the joint venture agreement.

23 On January 31, 2007, Penn West sent Scott a letter of intent for execution, which provided for exclusivity between Scott and Penn West as vendor and purchaser during negotiations of the purchase and sale agreement by February 23, 2007.

24 On January 31, 2007, Scott executed a Mutual Confidentiality Agreement ("MCA”) with The Howard Group, another potential investor, and the party which ultimately introduced Scott to Finavera.

25 On February 5, 2007, Scott communicated an informal third offer to Phoenix by way of email. Penn West countered with a request for Scott to sign a revised letter of intent and to move up the closing of the acquisition of the project to February 16, 2007.

26 On February 6, 2007, Phoenix provided Scott with a revised third offer to execute which incorporated the changes agreed to by the parties the day before.

27 The Howard Group introduced Scott to potential investor Finavera on February 6, 2007; Scott forwarded its summary of the project, as well as other documents relating to the proposed acquisition of the project to Finavera on the same day.

28 A February 7, 2007 email from Finavera to Scott stated: “Thank you once again for opening up your opportunity to us”.

29 On February 7, 2007, Finavera signed the form of MCA provided by Scott, and Scott sent Finavera its summary of the project.

30 On February 7, 2007, Scott provided Penn West with its revised fourth offer and a formal letter of intent.

31 Following its fourth offer, Scott, The Howard Group and Finavera attempted to negotiate and settle amongst themselves the terms of their relationship for the acquisition, including who would lead negotiations with Penn West, and what their respective interests as purchasers in the project would be.

32 After heated phone calls and back and forth correspondence concerning the terms of Scott’s compensation and interest in the project, on February 9, 2007, Finavera sent Mr. Scott an email offering to pay Scott $600,000.00 for its entire interest in the project, which sum would be payable at close of the acquisition. In a February 11, 2007 letter, Scott rejected Finavera’s first offer and set out a counter-offer.

33 As a result, a February 12, 2007 email from Finavera to Scott amended their offer to include the $600,000.00 payment

to Scott as well as a commitment to retain Scott as the owner's engineer on the project following close of the acquisition. This revised proposal was accepted by Scott in an email to Finavera on February 12, 2007, and was formalized in a February 12, 2007 letter of cooperation from Finavera to Scott. This letter was also provided as evidence to Penn West of Finavera's participation in the acquisition. Scott wanted the owner's engineer contract concluded before the acquisition closed. Finavera wanted to close the sale first and then discuss the terms of the owner's engineer contract. No contract appointing Scott as the owner's engineer was ever signed, either before or after the closing.

34 The introduction of Finavera as a party to the acquisition was subsequently approved by Penn West on February 13, 2007, and confirmed in an email from Penn West to both Finavera and Scott. This email also attached a formal final offer to purchase dated February 13, 2007 for Finavera to execute, which it did with Scott's knowledge and consent. The final offer was in Finavera's name alone. Scott was not a signatory to this final offer or to the final Agreement of Purchase and Sale between Finavera and Penn West.

35 Initially Mr. Scott wanted Finavera to direct its inquiries through him to Phoenix, telling them on February 7 that he had a month of questions and communications with Phoenix already and wanted to discourage a cold call from Finavera because it could lead Phoenix "to believe that we are shopping this project around, which is not the case". However, the full record discloses that Scott was offering the project to many different groups through Scott. At some point Scott agreed that it would be easier and acceptable for Finavera and Penn West to deal directly with each other and they did so.

36 Finavera and Penn West executed the Agreement of Purchase and Sale for the acquisition of the project on February 20, 2007.

37 On February 25, 2007, Scott requested a formal offer from Finavera on its interest in the acquisition of the project. An email response from Finavera confirmed that Finavera "made an offer to you... and I am sure you have no reason to believe that we would not honor it". Finavera's Investment Proposal to its board of directors dated February 23, 2007 for example, sets out the payment of a $600,000 "development fee" to Scott at close of the acquisition.

38 A subsequent email of March 14, 2007 from Scott to Finavera again requested that Finavera and Scott sign a formal agreement, before Finavera closed the purchase with Penn West. Finavera's email response of March 15, 2007 to Scott reiterated that Finavera made Scott an offer, which offer was accepted, and Finavera would not be in a position to negotiate an agreement with Scott until close of the acquisition with Penn West.

39 During this time, Finavera continued to speak to and negotiate with Penn West and other parties, including Spirit Pine and Phoenix, without the involvement of Scott.

40 The relationship between Scott and Finavera started to deteriorate with a chain of email correspondence between the parties on March 15 and 16, 2007. This resulted in Mr. Scott sending a formal letter to the TSX Venture Exchange on March 16, 2007, alleging that Finavera was misleading the public with the information disclosed in its March 6, 2007 press release to the market. Mr. Scott also sent a formal letter of complaint against Mr. Bertan Atalay, Finavera's Chief Operations officer on March 19, 2007 to the Association of Professional Engineers and Geoscientists of BC and a letter to Finavera's Chairman on March 27, 2007 alleging the unprofessional conduct of Finavera.

41 The closing of the acquisition between Finavera and Penn West occurred on March 30, 2007, with a final purchase price for the project of $3,350,000.00.

42 Press releases from Finavera to the market announced the completion of the acquisition of the project on April 3, 2007, and the selection of Canadian engineering firm Genivar as the owner's engineer for the project. An estimated fee summary in Genivar's contract for the project dated July 23, 2007 indicates estimated total fees as owner's engineer for the project of $684.700.00.

43 A December 15, 2008 press release from Finavera announced that it had sold a portion of the wind farm project (the Ghost Pine wind project) to Ghost Pine Wind Farm LP for $4,500,000.00.

44 Scott filed its Statement of Claim with this Court on August 20, 2007. Finavera filed its Amended Statement of Defence and Amended Counterclaim on April 2, 2012, and Scott filed its Statement of Defence to Counterclaim on January 8,

2008.

3. Procedural History and Evidence at Trial

45 Finavera took a summary judgment application, which was dismissed by the chambers judge and by the Court of Appeal: *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.*, 2012 ABQB 116, [2012] A.W.L.D. 3682 (Alta. Q.B.); 2012 ABCA 181, [2012] A.W.L.D. 3565 (Alta. C.A.).

46 The trial lasted just over two weeks. Mr. Scott testified on behalf of the Plaintiff and the Defendant called Mr. Bak, its chief operating officer; Mr. Kristan Tange and Mr. James Bell from Penn West; and Mr. Philpott from Phoenix, the main person in charge of the bid process, data room and sale. It is noteworthy that the Defendant did not call Mr. Bertan Atalay, the chief operations officer for Finavera, who acted during the acquisition of the project as Finavera's main contact and the person who was most involved in negotiating with Scott. Finavera also did not call two other former employees, who had a role in Finavera's relationship with Scott.

47 There were seven binders of exhibits with documents that spanned the approximately four month time frame in which these events took place. There was much correspondence, most of which involved Mr. Scott. Mr. Scott kept his own notes of meetings as well. He testified that he made his notes after or during the various meetings. Such notes were clearly taken from his perspective but they were often the only record of various conversations or meetings.

48 While there is much material, there are relatively few facts in dispute. What divides the parties most is the legal meaning to be attributed to what happened. Any facts in dispute will be discussed in relation to the issue to which they relate.

49 It is, however, appropriate to make some general observations about the credibility and reliability of those who testified.

50 Mr. Scott felt that he had been badly treated by the Defendant and his animosity towards those involved was apparent. He was prone to long answers which simultaneously contained self-serving statements and veiled and not so veiled attacks on others. Mr. Scott was highly critical of statements made by Penn West in its Memorandum of Information, claiming they made omissions and exaggerations. A review of Mr. Scott's correspondence and testimony demonstrate a similar brand of salesmanship.

51 Mr. Scott also spent a great deal of time during his testimony outlining his various complaints about the process employed by Penn West. It is unclear what Mr. Scott thought was to be gained by criticizing the Penn West/Phoenix bid process or how it was relevant to the issues at bar. For example, Mr. Scott complained that he was exceptionally pressed for time in arranging his team and he sought ways in which to create additional time to both conduct due diligence and to attempt to secure financing. The Penn West representatives acknowledged that its proposed time lines were tight and included the Christmas period. However, they explained that they had anticipated that bidders would have had experience in the wind industry and be major players with their own financial resources for a project of this magnitude. Mr. Tange testified, and the Court accepts, that no-one was obliged to enter into this process or to continue with it if it found the time lines too onerous.

52 Mr. Scott was clearly trying to put a positive, even hopeful spin on what was occurring. In certain instances, the presentation of his evidence through the lens of his preferred or desired result worked against his credibility. For example, while he discussed that he was trying to build a team to finance the acquisition of this expensive project, he appears to have relied upon very big name players without having actually secured their firm financial commitment. At other times, his testimony was internally inconsistent. He describes the Penn West project as "a bag of garbage" and refused to answer pertinent questions on the "project" in cross examination on the basis that there was no project. This is, however, difficult to reconcile with the fact that Scott pursued such a project with fervour and tenacity at every stage, to the conclusion of the trial. Mr. Scott relied heavily on the documents, sometimes reading directly from them in chief and then again in cross-examination.

53 Mr. Bak was also principally interested in explaining Finavera's actions and perspective. He was very knowledgeable about his industry but lacked specific recollections about how the relationship with Scott evolved. He was also required to rely upon the documentary evidence.

54 Mr. Tange, Mr. Bell and Mr. Philpott had no direct interest in the litigation. They provided their own independent recollections and showed no sign of favouring either party. Each answered questions directly and with candour and professionalism. Each also was prepared to admit if and when they did not know something. None of these three were in any way shaken in cross examination.

4. The Position of the Parties

A. Overview of Scott's Claims

55 The Plaintiff claims a constructive trust over ten percent of the entire project, including its eventual development. First, it argues on the basis of a breach of confidentiality, alleging the Defendant misused the Plaintiff's confidential information to misappropriate the Plaintiff's business opportunity. The Plaintiff alleges the Defendant breached the confidentiality and non-competition provisions of the MCA. The Plaintiff further claims that the parties mutually modified the elements of an action for breach of confidence by the terms of a private contract, being the MCA, and that the elements of that action have been satisfied in the case at bar.

56 Second, the Plaintiff claims for unjust enrichment, and alleges the Defendant was enriched by not sharing with the Plaintiff the mutual benefit of the development of the project it received. The Plaintiff claims for the equitable remedy of a constructive trust, alleging an award of damages would not be adequate compensation, in part because of the Defendant's uncertain financial position.

57 The Defendant responds that the evidence does not support a claim for either a breach of confidentiality or unjust enrichment, as the elements of those causes of action are not met. The Defendant also counterclaims for misrepresentation and the economic torts of interference with economic relations and abuse of process, alleging the Plaintiff misrepresented the source of the confidential information, as well as the ownership of the project, and caused economic damage to the Defendant.

58 The Plaintiff responds to the Defendant's counterclaim that the Plaintiff acted in good faith, the Defendant has suffered no economic damage and that there is therefore no action for economic interference in economic relations, and no abuse of process.

B. Both Parties Agree there was no Contract between Scott and Finavera in Relation to How they would Approach this Project

59 The abundant email correspondence shows that Scott and Finavera were trying to establish the terms of their working relationship and how they would move forward to acquire the Penn West project.

60 Mr. Scott first tried to negotiate for a proprietary interest in the entire project: that being a 10% interest for Scott, a 15% interest for Finavera, and the remainder for the entity that would eventually provide the bulk of the financing for the actual development of the project, rather than its acquisition. Finavera rejected this arrangement and offered Scott: (i) a $600,000 payment, being 10% of the six million dollar overall acquisition cost; and (ii) the role of owner's engineer in the project after closing. Mr. Bak, the president of Finavera, testified that there was an agreement between the parties on this point in the sense that there was an offer and an acceptance with Scott that Scott would receive $600,000 and become the owner's engineer. He testified that at the time Finavera thought Scott had acquired development rights to the project and that the $600,000 payment was the purchase price for those rights.

61 Scott also wanted a formalized owner's engineer contract before the closing of the Purchase and Sale Agreement between Finavera and Penn West on March 31, 2007. Finavera disagreed, wanting to negotiate the terms of that work after they had acquired the project. Finavera thought that if they did not acquire the asset first that any such contract would not be necessary and any such negotiation would be a waste of time when they were pressed for it. There was no agreement between the parties about when the owner's engineer contract was to be completed.

62 Finavera's commitment to make Scott the owner's engineer on the project reduced over time. Initially, Finavera appeared to confer the status of owner's engineer on Scott, then it began speaking of using reasonable steps to employ Scott, and finally sent a lawyer's letter dated March 29, 2007 expressly rejecting Scott as the owner's engineer. Finavera eventually awarded the owner's engineer contract to another entity. Mr. Bak testified that Finavera looked more closely into Scott in the second week of March and found it did not have the requisite experience in the wind industry to be an owner's engineer on a project of this type. There is no evidence as to what steps were taken by Finavera to evaluate Scott's abilities to act or not act in that capacity.

63 Both parties have taken the position before this Court that no binding contractual arrangements were concluded regarding the $600,000 payment or the owner's engineer contract, despite the appearance of agreement on both points. Scott takes the position that the parties' understanding of February 12, 2007 in respect of the $600,000 payment and the owner's engineer contract was not a contract as it was void for uncertainty. Finavera argues, despite the testimony of Mr. Bak, that there was only an agreement to agree.

64 Scott appears to have made a conscious decision not to pursue a contractual remedy, even in the alternative, seeking instead a constructive trust over the entire amount of the project. Since Scott has not sued for the $600,000 payment and/or any foregone profits from the loss of the owner's engineer contract, Finavera argues it did not lead or solicit certain evidence pertinent to any such claim. Finavera argues it would be unfair for the Court to grant a contract-based remedy with respect to these discussions. I agree. A court should not impose a cause of action a plaintiff has expressly decided not to pursue.

5. Issues

65 Four general issues arise:

> A. Did Finavera breach a duty of confidence owed to Scott by misusing Scott's confidential information or misappropriating Scott's business opportunity?
>
> B. Did Finavera breach any agreement it had with Scott?
>
> C. Was Finavera unjustly enriched by Scott's actions?
>
> D. Did Scott breach any duties it owed to Finavera?

6. Did Finavera Breach a Duty of Confidence Owed to Scott by Misusing Scott's Confidential Information or Misappropriating Scott's Business Opportunity?

A. General Principles

66 The law concerning the protection of confidential information in Canada is found in several parallel legal doctrines, which include theories of equity, contract, and property, as well as a "sui generis" theory that breach of confidential information is an action unto itself. The jurisprudence is not consistent in establishing the legal basis for the protection of confidential information, or in establishing which remedies are to be attached to each individual cause of action for a breach of confidence.

67 Generally, however, Canadian courts have rejected the view that confidential information is to be treated as property, and have "been at pains to emphasize that the action is rooted in the relationship of confidence rather than the legal characteristics of the information confided." *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 (S.C.C.) at para 41.

68 Similarly, the suggestion by Sopinka J., dissenting in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), that the foundation for an action of breach of confidence is a *sui generis* hybrid of contract, equity and property theories has not been widely followed by Canadian courts. Thus, the prevalent

modern view in Anglo-Canadian jurisprudence is that a claim for breach of confidential business information is based in either contract or equity. See Justice Julie A. Thorburn & Keith G. Fairbairn, *Law of Confidential Business Information* (Toronto: Canada Law Book, 2012) at 2-2.

B. Scott's Claims

69 Scott says it told Finavera everything it knew about the project, including: that the wind farm was for sale; the documents Scott accessed from the Penn West data room; Scott's discoveries from its due diligence; Scott's conversations with Spirit Pine and Golder; Scott's summary and financial models; and Scott's bid price and negotiated contract terms.

70 From my understanding Scott argues that this transfer of information gives rise to four different types of claims. First, that Finavera breached the MCA. Second, that all of its own information, as well as all of the third party information owned by Penn West, became Scott's confidential information under the MCA. In essence, Scott claims the parties expanded by contract the definition of confidential information to give Scott greater rights. Third, Finavera took Scott's confidential information and fourth, that Finavera took Scott's business opportunity.

71 Finavera argues that there is no breach of confidentiality, that the information provided by Scott was not confidential, that such information did not give rise to an obligation of confidence to Scott on the part of Finavera, and that there was no unauthorized use of the information by Finavera. Finavera also claims for misrepresentation on Scott's part.

i. Did Finavera Breach the Mutual Confidentiality Agreement?

72 Finavera is bound by the terms of the MCA put forward by Scott, even though it was signed in an unconventional manner. Mr. Atalay signed the MCA Scott had previously entered into with The Howard Group with the notation, "As per our agreement, we honour the above terms". Mr. Bak testified that Finavera never terminated the MCA with Scott and had not advised that it was terminating this agreement.

73 The MCA includes as "Confidential Information":

> the Proprietary Data and all information, documents, data, studies, or other material which either party may disclose to the other in the course of their discussions, negotiations and communications of any sort arising from or related to the Project [...].

74 "Proprietary Data" in the MCA is defined as:

> As part of its ongoing business development efforts, SAEL and its agents and consultants have developed various financial models and entered into relationships with third parties involving contract negotiations, data and other confidential information. (SAEL is Scott)

75 Scott could include Penn West's confidential information in the MCA. Scott was essentially required by the Penn West Confidentiality Agreement to include Penn West's confidential information under the protection of his MCA with Representatives such as Finavera, The Howard Group and other potential investors. Under the Penn West Confidentiality Agreement signed on December 14, 2006, Penn West's confidential information is defined as:

> all information, whether written, electronic or oral, relating to the Wind Development Project, including without limitation all data, reports, interpretations, analysis, printouts and documents relating to the Wind Development Project, which are provided to the Recipient under this Agreement by the Vendor or its representatives <u>and all analysis, compilations, forecasts, studies or other documents prepared by the Recipient or the Representatives in connection with its or their review of the Wind Development Project</u>".
>
> (emphasis added)

76 Penn West is not alleging a breach of confidence in regard to Scott's use of Penn West's confidential information with Finavera and other third parties. However, Finavera argues that Scott was in breach of its confidentiality obligations to Penn West when it provided Penn West's information to prospective financiers and therefore does not have clean hands and does not merit equitable relief. Scott's obligations under another contract to another party, with whom Finavera lacks privity, are of no direct relevance to Scott's breach of contract claim with Finavera, but provide the larger commercial context. The focus should not be on the agreement between Scott and Penn West but the one between Scott and Finavera.

77 The starting point is, of course, that parties enjoy freedom of contract. Between themselves, Scott and Finavera are free to agree to any contractual definition of these important terms, outline what they consider to be a breach, and to stipulate available remedies.

78 *Cadbury Schweppes* at para 36 sets out that parties may choose to limit or negative general legal duties by contract:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C. C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v (S.C.C.). The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:
>
>> ...the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

79 As part of private ordering the parties are also free to augment obligations otherwise imposed by law or equity. However, in such a case their rights and remedies flow from the contract itself.

80 On a plain reading of the MCA the parties have agreed to broaden the definition of confidential information otherwise arising in the breach of confidence cases. Under the MCA, everything Scott supplied to Finavera is either its "Proprietary Data" or "Confidential Information."

81 Given this contractually expanded definition, the real issue is whether Finavera breached any contractually assumed obligation. The MCA states that the parties:

> each agree not to use any of the Confidential Information for any purpose other than the discussion, negotiation or evaluation of the Project and related investments, and further agree not to disclose to any person, the fact that they are discussing the Project or similar investments [...]
>
> and to
>
> neither use nor disclose the Confidential Information for any business, commercial, or competitive purposes or for any purpose other than the purpose of negotiation and evaluation of the Project and related investments [...].

82 Scott alleges that Finavera breached both provisions, calling them the confidentiality and the non-competition provision of the MCA respectively. Finavera argues that there is no breach, due to the lack of confidential information and the fact that Finavera only used Scott's confidential information with Mr. Scott's authorization, without any detriment to Scott.

83 In the present instance, I find that Finavera did not breach the non-competition or confidentiality provisions of the MCA: it did not use or disclose the confidential information for any purpose other than the discussion, negotiation and

evaluation of the project with Scott. In fact, in most respects the information provided by Scott to Finavera was used for exactly the purpose intended, namely to facilitate Finavera's evaluation and negotiation of the acquisition of the wind farm. As in *United Technologies Corp. v. Platform Computing Corp.* (1998), 83 C.P.R. (3d) 350, 58 O.T.C. 81 (Ont. Gen. Div.), the relationship between the parties here was such that the information was intended to be used in circumstances of mutual benefit.

84 Scott argues that Finavera should not have made an independent offer to Penn West due to the non-competition provision in the MCA. Previous offers had been in the name of Scott and the final offer, which led to the eventual purchase and sale agreement, was submitted in the name of Finavera.

85 The evidence is unclear as to exactly what conversations precipitated the substitution of Finavera as the named purchaser in the final offer to acquire the project, but the evidence is very clear that this substitution was with Scott's full knowledge and consent. Until the middle of March, the parties were working co-operatively to place the final offer before Penn West. Scott agreed to Finavera bidding in its own name, albeit on the assumption that Scott would receive a payment of $600,000 and the owner's engineer contract. Therefore, Scott cannot argue that Finavera should not have submitted its own offer because Scott agreed the final offer would be in Finavera's name alone and in fact worked with Penn West to open the door and permit this substitution.

86 Did Finavera subsequently use the confidential information in a competitive fashion after it had made the offer and by the time it signed the purchase and sale agreement with Penn West? I do not think Finavera can be described as acting in competition with Scott, or of misusing the information provided by Scott, following the offer made by Finavera to Penn West.

87 Finavera's motives and actions did not change from the time the final offer was made to the closing of the acquisition; Finavera was always working towards the goal of acquiring the project and its actions demonstrate that. What did change, however, was the relationship between the parties following the final offer made to Penn West. After closing of the purchase and sale transaction the project became Finavera's alone. Due to increasing hostility and animosity between the parties, Scott was not given a $600,000 payment or chosen as the owner's engineer on the project.

88 I therefore find that despite the breadth of the contractual definition of "Confidential Information" in the MCA there has been no breach of its specific terms, including the non-competition and confidentiality provisions. The MCA addressed only a portion of the parties' overall relationship. Scott appears to be trying to use the MCA to regulate matters that were not the subject of a contract: their overall working relationship. Given that the parties say they had no agreement for the remuneration to be supplied the MCA cannot be read to fill in any gap created by that joint admission.

ii. "Confidential Information" and the Mutual Confidentiality Agreement

89 Scott also argues that it has a claim for breach of confidence apart from the MCA. However, Scott makes the novel argument that instead of this Court asking what information is confidential under that avenue of recovery, this Court should use and incorporate the broader definition in the MCA into the otherwise existing principles to grant a constructive trust. Scott argues that the MCA operates to expand the idea of what qualifies as Scott's confidential information for the purposes of a breach of confidence action. By doing so Scott therefore essentially asserts rights and equities over the Penn West confidential information by virtue of the fact that the MCA included both Scott's confidential information and Penn West's confidential information. In essence, Scott claims the parties expanded by contract the definition of confidential information to give Scott greater rights. The effect is that the parties' agreed upon definitions become incorporated by reference into the breach of confidence action. Scott argues that the MCA definitions prevail such that everything Scott gave to Finavera is protected as either Scott's "Confidential Information" or "Proprietary Data" in a breach of confidence claim.

90 At the base of this argument is an assertion that the parties are free to stipulate what will be confidential to them in a breach of confidence action. Scott argues that the passage quoted in *Cadbury Schweppes* at para 36 stands for the proposition that parties can modify the elements of a breach of confidence by private contract. I agree that parties may create the law between them in a breach of contract action. However, any such breach will sound in contract. In contrast, there is no authority for the proposition that the parties may impose their own criteria when the action is one of breach of confidence, which has its roots in equity. While this specific point is not addressed in the case law cited, all authorities suggest that

Scott's argument is not sound. Outside a binding contract, it is not open to the parties to modify what the courts have set as the test for information having the quality of confidence for a breach of confidence action.

91 What Scott may claim under a breach of confidence action are only those things that the law, not the parties, recognize as confidential. In a breach of confidence action Scott cannot modify by contract the confidential information he has ownership over or equity in simply by including an expansive definition of such confidential information in the MCA. As in *Drake International Ltd. v. Miller* (1975), 9 O.R. (2d) 652, 61 D.L.R. (3d) 420 (Ont. H.C.): "matters do not become confidential merely because the contract states them to be so".

92 Although I accept the legal principle that a contract can limit or negate a general duty implied by tort law or by equity, it does not therefore follow that a private contract can also expand the law of tort or equity to make confidential information that which does not bear the hallmarks of confidentiality when the action is one of breach of confidence and not breach of contract. More specifically, para 36 of *Cadbury Schweppes* cited above, does not support the proposition that a party can expand the definition of confidential information in a breach of confidence action.

93 Further, given that I found there is no breach of contract, Scott is trying to combine contract, tort and equity principles to secure for itself something it did not bargain for. Scott's claims in relation to the misuse of its confidential information therefore needs to be determined under the principles established under a breach of confidence claim.

iii. Does Scott Have a Claim for Breach of Confidence?

94 The parties agree that the three elements that must be established to make out a claim for breach of confidence, established in *LAC Minerals Ltd.* at 608, are the following:

1. the information conveyed must be confidential;

2. the information must have been communicated in confidence; and

3. the information must have been misused by the party to whom it was communicated to the detriment of the party who confided it.

95 Counsel submitted numerous other authorities. Many deal with confidential information in the context of patents, manufactured goods or innovative processes. See *Cadbury Schweppes*; *Stenada Marketing Ltd. v. Nazareno* (1990), 33 C.P.R. (3d) 367, 23 A.C.W.S. (3d) 203 (B.C. S.C. [In Chambers]); *Aram Systems Ltd. v. NovAtel Inc.*, 2008 ABQB 441, 449 A.R. 288 (Alta. Q.B.).

96 In some instances a party had created a business opportunity not known to or not available to others. See *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198, 187 D.L.R. (4th) 193 (Ont. C.A.); *LAC Minerals*; *Novawest Resources Inc. v. Anglo American Exploration (Canada) Ltd.*, 2006 BCSC 769, 151 A.C.W.S. (3d) 219 (B.C. S.C.); *Pharand Ski Corp. v. Alberta* (1991), 116 A.R. 326, 80 Alta. L.R. (2d) 216 (Alta. Q.B.).

97 By contrast, the case at bar deals with a very different factual matrix. In this case a property was offered for sale in a bid system where many were invited to participate. People who came to this existing opportunity were provided with extensive materials compiled and owned by Penn West. Potential purchasers were expected to make their own evaluations and/or further enquires and satisfy themselves in the manner of their choice about the attractiveness, economics and viability of the project.

a. Most of the Information Scott Conveyed was Not its Own Confidential Information

98 Confidentiality has a contextual dimension and depends in part on processes commonly used in an industry and what data may already be in the public domain. Factors considered by the courts in determining whether certain information is classified as confidential also vary, but include whether the information: (a) is generally known or unknown to others; (b) is

known to others within the specific industry or trade, *i.e.* outside the actual business entity; (c) is known to others within or connected to the business entity; (d) is capable of acquisition elsewhere by those outside the business entity; (e) is the subject of measures to ensure that the relative secrecy of the information remains intact; and (f) in some minimum or basic way is unique, original or novel. *Law of Confidential Business Information* at 3-5-3-6.

99 In considering whether information is confidential, the case law has primarily focused on the nature of the information, and whether such information possesses the necessary quality of confidence. The issue regarding whether a plaintiff may claim a breach of confidence over information which is not its own confidential information is one which has not been judicially considered at length, and for good reason.

100 It seems to me a logical starting point that a plaintiff alleging a breach of confidence only has a right over information which he or she has created, in a very general sense, with some measure of his or her own time, skill and effort. There is no obligation of confidence, for example, where the party asserting the right had no part in creating the information but merely summarized the information made public by a third party. See *Ridgewood Resources Ltd. v. Henuset*, 1982 ABCA 79 (Alta. C.A.) at para 27, (1982), 35 A.R. 493 (Alta. C.A.), leave to appeal to SCC refused, [1982] 1 S.C.R. xii (note) (S.C.C.).

101 I turn now to particular types of information that Scott has asserted as its own confidential information.

102 The fact that the wind farm was for sale was not confidential. I accept Mr. Philpott's assertion that people in the industry knew that this wind farm was being offered for purchase. The Plaintiff read in Mr. Bak's testimony that Finavera was first told that the Penn West assets were for sale by The Howard Group. Like *Ridgewood Resources Ltd.* this information lacks the necessary quality of confidence about it. In that case, the opportunity to purchase a property was known only to a small group, but the community in which the information would have any significance was itself a small group. The Court held that among prospective purchasers of oil lands, the information was in the public domain. It did not matter that it was not known to the particular plaintiff.

103 Finavera admitted that they received confidential information from Penn West and from Scott. While a great deal of information was forwarded by Scott to Finavera, very little of that information qualifies as Scott's confidential information or work product under the above stated principles.

104 The great majority of the information Scott provided to Finavera was the confidential information of Penn West. In cross-examination, Mr. Scott recognized that the over forty documents Scott sent to Finavera outlined in Appendix A came from the Penn West data room and were not created by Scott. This is very significant. Actions for breach of confidential information are fact-specific, and a plaintiff must establish the following three elements in order to bring an action: (1) he or she has the sole right to benefit from the use of the information; (2) the defendant has wrongly appropriated the information; and (3) the plaintiff has suffered damages as a result of the breach. *Law of Confidential Business Information* at 5-1.

105 Scott claims a breach of confidence over information which is primarily Penn West's. The person suing must be someone to whom a duty of confidence is owed; as with *Ridgewood Resources Ltd.*, Scott had no part in creating most of the information in the case at bar but merely passed it along or summarized it. Therefore, there is no obligation of confidence owed by Finavera to Scott for Penn West's information. Neither can Scott establish that it had the sole right to benefit from the use of the Penn West information.

106 Scott also claimed that it created confidential information by its discovery of what it said were discrepancies between the information contained in the Memorandum of Information and the data in the Penn West data room. This claim is to be assessed in light of the testimony of the Penn West employees concerning the commercial context of a purchase and sale transaction of this type. I accept the evidence of Mr. James Bell and Mr. Kristan Tange that the purpose of the Offer of Memorandum was to interest people in the project. The Memorandum was essentially a first introduction to this opportunity and was a promotional document. Anyone seeking further information would be required to sign a Confidentiality Agreement, on the terms provided by Penn West. At that point, more detailed information would be provided to potential purchasers. This two-step process is a familiar one when dealing with the purchase and sale of assets. All potential purchasers would be expected to review the available materials and conduct their own due diligence based on the information provided in the data room, and any other sources they may elect to consult. As is common industry practice, interested bidders were expected to review the information in the data room and to conduct their own assessment, including deciding whether they required any further information.

107 Scott signed Penn West's Confidentiality Agreement and was given access to Penn West's confidential information in the data room. After reviewing what was there for all to see Scott claims its "discoveries" as its own confidential information. For example, first, Scott says it created confidential information by finding out that Penn West had a joint venture partner (Spirit Pine). Scott thought the presence of a joint venture partner was contrary to the statement in the Information Memorandum that the project "provided an opportunity to obtain 100% interest in a wind farm". As explained by the representatives from Penn West, the Penn West/Spirit Pine joint venture agreement was in the data room for all to see. Anyone reading it would immediately understand that Penn West and Spirit Pine had a joint venture and that under it Penn West had the opportunity to hold 100% of the Ghost Pine project by paying Spirit Pine a stipulated sum and transferring Spirit Pine's interest into the agreed upon overriding royalty.

108 Second, the Information Memorandum stated that this project was "ready to go". Mr. Scott outlined the many ways in which he thought this project was not ready to go, including incomplete and unsigned resource studies and various other factors. He alleged that his understanding of what else needed to be done became Scott's confidential information; it was not. I accept the evidence of Mr. James Bell and Mr. Kristan Tange from Penn West on this point. Both testified that within industry standards the project was ready to go, with Mr. Bell articulating that the term "ready to go" does not mean turnkey. Rather, it would have been understood by individuals familiar with the wind industry that at this stage of the project, any reports would be preliminary and therefore unsigned, and that it would be the obligation of the ultimate purchaser to finalize the studies at an appropriate time in the future.

109 Third, Mr. Scott said that he discovered that certain of the turbines placed by Penn West in their model were outside the areas of land that Penn West had already acquired. Mr. Philpott testified that Phoenix was well aware that certain of the turbines were marked as being on lands not then owned by Penn West. The process used by Phoenix was to put forward a model for consideration, in essence what one example of a prospective wind farm may look like. It was to be understood that this was a suggestion only. In the evidence, it was clear that Phoenix marked seven of the turbines outside the line indicating where Penn West held property; it was not a hidden part of the Phoenix model. Mr. Philpott explained that this was a way to show a prospective purchaser what a possible turbine placement might look like and that if they chose to follow that placement, what lands or rights they would need to acquire outside the existing holdings of Penn West.

110 I have mentioned but three examples of information Scott claims are confidential on the basis of asserted discoveries of discrepancies. The other information in this category also fails to qualify as Scott's confidential information. Simply stated, just because Scott knew what it learned from the Penn West data room, and Finavera did not have access to that information, does not mean that such information became Scott's confidential information.

111 Some of the limited information which was Scott's work product lacks a quality of confidence. For example, Mr. Scott prepared two preliminary financial models on the project in addition to the one provided by Penn West. Finavera claims that these figures were of no use to it as the approach taken was very basic and of little utility. The information provided by Scott was based on a generally available Government of Canada model into which Scott placed its economic assumptions. Scott did not create or modify the financial model; it merely used one that was in the public domain. The choice of the two numbers Scott placed into that model is not confidential absent proof, which is not present in the case at bar, that there was something confidential about the assumptions themselves. The evidence was that Scott's assumptions were put forward for illustrative purposes and did not contain any hidden confidential information.

112 Further, Scott claims that its efforts to optimize the economics of the project are Scott's confidential information. With respect, potential purchasers of any project would seek to improve its economics, especially one acknowledged by Penn West and Phoenix to be sub par and marginal. Whether an idea has the requisite quality of confidence depends on its nature. For example, I do not find that Scott's exploration about what type of turbines should be used is confidential because the cost, life span and output of the turbines are obvious considerations when assessing the economics of a wind farm. Similarly, even though Scott raised the possible availability of greenhouse gas credits, such involve readily available information and do not cross the threshold into confidential information. Finavera further submits that many of the ideas claimed to be Mr. Scott's were originally Mr. Philpott's and the evidence supports that assertion in part.

113 Mr. Scott also prepared a summary of the acquisition of the project entitled "Alberta Wind Farm/ An Exclusive Opportunity". This document was essentially an overview of information gathered from Penn West sources and operates more as a digest than an innovation.

114 Thus for the most part Finavera is correct that under the common law principles there is little information having the quality of confidence about it generated by Scott and most information Scott provided to Finavera was Penn West's confidential information.

115 There is also merit to Finavera's claim that Scott gave information to so many potential investors that it did not retain the necessary quality of confidence, if it ever had it. The facts reveal that Finavera was not the only entity to receive materials from Scott. Scott sent various information, including Penn West information to Mitsubishi, Nordbank, John Deere, and TD Investments, The Howard Group and at least three individuals. The evidence is not clear what went to whom or under what conditions of confidentiality. Such distribution dilutes the claim of confidentiality and despite the number of people to whom Scott sent these documents, they always were and continued to remain the confidential information of Penn West.

116 There is therefore only a small amount of Scott's information that has any quality of confidence about it that can be enforced by Scott. This includes the amount Scott bid in its offers; the few terms Scott had negotiated with Penn West outside its proposed Purchase and Sale Agreement; and information Scott requested and received from Golder Associates Ltd. ("Golder") on wildlife and other issues.

b. The Information was Communicated in Confidence

117 Scott claims that the information it provided to Finavera was communicated in confidence. Finavera responds that the information forwarded by Scott did not give rise to an obligation of confidence owed by Finavera to Scott (as opposed to Penn West), and that by forwarding Penn West's confidential information, Scott was in breach of its own Confidentiality Agreement with Penn West. Finavera also alleges that Scott misrepresented the source of its confidential information, as well as ownership of the project and that Scott represented to Finavera that it had rights in relation to the project which it was necessary for Finavera to "buy out" in order to acquire the project. Scott denies this allegation, stating that it did not misrepresent the source of its confidential information or ownership of the project, and that it had a right to assign its position as the "preferred Potential Purchaser" under clause 9 of the Confidentiality Agreement.

118 I am prepared to accept that Scott conveyed what it did in confidence. The mere act of having something like the MCA between Scott and Finavera demonstrates that both parties intended to make and accept communications in confidence.

c. The Information Must have been Misused by the Party to Whom it was Communicated to the Detriment of the Party who Confided it

119 The plaintiff has a general onus to prove the three elements of an action for breach of confidence, but on this third requirement the burden of proof is on Finavera to show that its use of the confidential information was not a prohibited use. The relevant question is what was Finavera entitled to do with any confidential information, and not what it was prohibited from using such information for: *LAC Minerals* at 642.

120 Scott claims that Finavera misused Scott's confidential information to its detriment by breaching the non-competition and confidentiality provisions in the MCA and misusing the confidential information to springboard itself into Scott's position as "Preferred Potential Purchaser" with Penn West.

121 Finavera responds that it did not misuse Scott's confidential information and goes further to state that it did not use much, or any, of the information provided by Scott.

122 I accept that Finavera has established that it eventually made project management decisions that were contrary to what Scott had researched or suggested. For example, Scott explored a certain type of larger turbine and Finavera opted for smaller ones. Scott wanted to buy out the joint venturer Spirit Pine and Finavera chose to keep them as a joint partner but converted its interest into a royalty position. In many respects, however, this argument misses the mark. The question is not only whether Finavera was entitled to use Scott's information and suggestions in the development of the project, but includes whether it was entitled to use Scott's information in its dealings with Penn West in the final offer and to eventually negotiate and close the purchase transaction.

123 For the following reasons I find that Finavera used the information provided by Scott, except Scott's basic financial models, in the negotiation and close of the acquisition of the project. First, there is evidence that Scott provided Finavera with all of Penn West's information and some of its own and the time lines were exceptionally tight and did not seem to provide Finavera with the opportunity to conduct much, if any, of its own research.

124 Second, Finavera had no independent access to Penn West's data room until much later in the process and there is no evidence that Finavera actually accessed the data room after it signed a Confidentiality Agreement directly with Penn West. Third, with very limited exceptions, Finavera produced almost no internal or independent assessments of this project. It had its own economic assessment of the project but aside from that document no other reports, assessments or opinions generated by Finavera before the Purchase and Sale Agreement was signed were in evidence. The Plaintiff read in Mr. Bak's testimony saying they did an internal engineering review of the project. However, Mr. Bak acknowledged in cross examination that the report was oral and not written, that he could not recall its contents, and that he would have simply relied on Mr. Atalay's analysis of the situation and then acted accordingly. There was no evidence of Mr. Atalay's analysis.

125 Fourth, Mr. Bertan Atalay was not called as a witness. Finavera argued that Mr. Atalay is no longer an employee, that he works outside Canada, that when asked questions he failed to answer and he is not under their control. There were extensive pertinent undertakings asking for information that would have been known to Mr. Atalay. Mr. Bak said that Mr. Atalay would have known what steps Finavera took in respect of collecting its own information and doing its own due diligence. However, Mr. Atalay did not answer any inquiries through the undertaking process and was not a witness at trial.

126 The case of *Kamitomo v. Pasula* (1983), 50 A.R. 280 (Alta. Q.B.) at paras 67-77, (1983), 29 Alta. L.R. (2d) 375 (Alta. Q.B.), provides a detailed discussion of the principles of law on adverse inference (see also *Levesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R. (3d) 425 (S.C.C.)). In *Kamitomo*, Kryczka J stated at para 69:

> The principles of law on adverse inference are well known. The leading statement is to be found in Wigmore, *Evidence in Trials at Common Law*, 1979 (Chadbourn Rev.) at vol. 2, 285, p. 192:
>
>> The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

127 I draw a negative inference from Mr. Atalay's failure to appear as a witness in respect of Finavera's use of all the materials provided by Scott. Mr. Bak, as chief executive officer of Finavera, could only testify that he relied on Mr. Atalay to conduct the engineering analysis. Since Mr. Atalay did not himself testify, Finavera cannot establish that it did not in fact rely upon the information provided by Scott. Even if not entitled to draw a negative inference the combination of the burden of proof on Finavera and the absence of evidence on this point leads to the same result.

128 Mr. Bak testified, and I accept, that Finavera did their own complex financial modelling before they would agree to the acquisition of the project. Such modelling was in evidence. While Finavera may have read the information provided by Mr. Scott, it went far beyond that basic information and I find Finavera conducted its own assessment of the finances of the project quite apart from whatever limited modelling Scott supplied.

129 The totality of the evidence leads me to the conclusion that Finavera had very little information that did not come through Scott; its assertion that it did not use the information is simply untenable. Most of the information provided by Scott to Finavera was Penn West's confidential information. Scott's claim for a breach of confidence is not satisfied with respect to Penn West's confidential information. However, Scott did provide Finavera with some of its own confidential information.

130 Scott claims the main misuse of the confidential information consisted of Finavera finalizing the Purchase and Sale

Agreement on April 3, 2007 without its participation. With respect to Scott's confidential information, Finavera responds that there was no misuse of the information; that assuming Scott's "authorization" was required, Scott authorized Finavera to acquire the assets.

131 I find that Finavera did not misuse Scott's confidential information in putting forward the final offer in its name alone, or in negotiating the terms and closing of the Purchase and Sale Agreement. These were not prohibited uses of the confidential information because I find they were done with Scott's knowledge and consent at the time the final offer was made to Penn West. The use of confidential information can not become a misuse of information retroactively; that is, at the time Finavera used the confidential information, it was done with Scott's consent and cooperation. That Scott did not receive its payment or owner's engineer contract does not support a finding of misuse of the confidential information it gave to Finavera for the express intended purposes that Finavera could make an offer to acquire the project in its name alone.

132 Scott also asserts that Finavera's acting to close the acquisition of the project without the "next step agreement" in place was an act of bad faith, and that bad faith is also a misuse of the information. I will discuss the obligation of good faith below, but I do not find that Finavera taking steps to close the purchase and sale transaction was an act of bad faith or a misuse of the information.

133 Finavera argues there has been no detriment to Scott. Scott claims as its detriment that Finavera misappropriated its unique business opportunity to participate in the development of the wind farm to Scott's exclusion. This was not a detriment to Scott at the time the final offer was made, nor at the time the purchase and sale agreement was finalized between Finavera and Penn West. Again, Scott cannot claim a detriment retroactively by alleging a breach of confidence.

134 Based on the totality of the evidence, Scott cannot establish that it is entitled to an accounting for profit or constructive trust in the project based on a breach of confidence. This is not a case that falls neatly within the case law on breaches of confidence based on the misuse of confidential information. While I am prepared to assume that Finavera used the information Scott supplied, I have concluded that only a very few pieces of information supplied by Scott were Scott's, as opposed to Penn West's, confidential information and such was used as the parties intended: that is to allow Finavera to purchase the project.

iv. Did Finavera Misappropriate Scott's Business Opportunity?

135 Scott claimed that it had the sole right to go forward in the bid process and that by closing the transaction in its own name and cutting Scott out of any remuneration that Finavera has taken a business opportunity that was rightfully Scott's.

136 There was much debate over whether Scott had "development rights" to acquire the project. This term was only loosely defined in correspondence and in Mr. Bak's testimony. Scott did not have a "right" to acquire this project resembling anything in the nature of an option or a right of first refusal. Nevertheless it enjoyed a status or position which allowed it, and by extension those working with it, to negotiate with Penn West in the process they both established and subsequently respected.

137 I find that Scott had obtained a preferential position in the bidding process and Finavera benefited from stepping into that spot. I say this understanding that under the terms of the Information Memorandum, Penn West could deal with anyone it chose. I accept the evidence of Mr. Tange that even though Penn West did not classify this as a closed bid system, and had the legal right to negotiate outside the process it established, nevertheless it wished to retain its commercial reputation and was not prepared to operate outside its bid process. Penn West rejected offers and overtures from Crestreet and Spirit Pine, its own joint venture partner on the very wind farms being sold, because they submitted their bids outside the established process.

138 Mr. Tange testified that Penn West recognized that Scott had become the "preferred potential purchaser" within its process. The fact that Scott did so by attrition, by being the only bidder remaining, does not change its status. This status had some commercial and practical value. In an email of February 7, 2007, Mr. Guedes from Finavera thanked Scott for "opening up your opportunity to us".

139 It is also clear that Finavera knew that Scott did not have any form of proprietary rights before it closed the

transaction with Penn West. In an email letter dated March 15, 2007 Finavera stated that:

> Penn West also informed us that the document you executed with them gives rights to Penn West to discuss and negotiate the sale of the Three Hills assets with any party they choose.

Finavera did not complain that it had been misled and appeared perfectly willing to take whatever Scott had and to move forward and close the Purchase and Sale Agreement with Penn West. It provided specific notice to Scott later in the letter that:

> As per the attached e-mail to you, we made an offer and you accepted the offer. As part of the conditions of our offer, we will not be in a position to negotiate an agreement with Scott Engineering until we close the sale agreement with Penn West.

140 Thus Finavera knew that Penn West could deal with anyone but confirmed its arrangement with Scott to pay $600,000. and award Scott the owner's engineer contract.

141 I have already found above that Scott allowed Finavera to bid and proceed in its name alone with full knowledge and consent. However, Scott assumed that it would receive $600,000. and become owner's engineer and neither happened. The failure to come to contractually binding terms on their respective remuneration does not mean that Finavera misappropriated Scott's opportunity.

142 Further, I reject the idea that Scott lost the opportunity to acquire this project. The evidence is clear that Scott did not lose a real opportunity to buy this wind farm, either on its own or with another investor party. Scott never had the money to acquire this opportunity on its own. Scott acknowledged it did not have the financial wherewithal to complete the acquisition of a project of this size. Mr. Scott said, in his own words, that he was trying to put together a team because he could not do it alone, technically or financially.

143 Despite testimony from Mr. Scott that he was having ongoing discussions with others, I find that the circumstances were such that Finavera was Scott's last and only avenue into this acquisition. For months Scott tried to secure multiple sources of funding. Mr. Scott made many overtures to many different potential investors including various corporations and three individuals. Scott had simply not been successful in securing funding for either the acquisition or development costs. Indeed notes sent by Scott to various potential investors such as Crestreet, shows Scott did not have funding in place when it submitted its January 12, 2007 offer. Even after potential investor Mitsubishi said that it was not prepared to proceed with this project it remained listed as a funding source. By the end of January, Scott had not secured financing for this project. In its various letters of intent and in speaking with Mr. Philpott, Scott stated that it had funding from major players such as Mitsubishi, Creststreet and John Deere. As time progressed it was evident that these named sources of funding, and others not known to Penn West (the "investor groups" referred to in Mr. Scott's emails), would not be supplying the necessary funds to purchase the project; confirming Penn West's ongoing concerns that Scott did not in fact have the requisite or professed financing in place. With deadlines looming, when Finavera was introduced to Scott on February 6, 2007 Mr. Tange from Penn West captured the situation perfectly when he testified that Mr. Scott had pulled Finavera "out of a hat".

144 I find that Scott could not do the deal alone and had no alternative potential investors to Finavera and that Scott did not lose the opportunity to work with others by choosing to work with Finavera. Given the tight timelines, and the absence of any real ability to close the transaction, Finavera did not take a business opportunity from Scott.

7. Did Finavera Breach any other Agreement it had with Scott?

145 Scott also argues that Finavera breached the terms of it calls the "Exclusivity Agreement".

146 Scott argues that there was an Exclusivity Agreement appointing Scott as the lead negotiator with Penn West and with Finavera promising to negotiate in good faith. They allege that such a contract arose from an email exchange in which Scott agreed to extend for a further 24 hour period the time Finavera had to consider whether they would go ahead with the project. I find that there was no such contract between the parties and I find against the existence of the alleged exclusivity agreement between Scott and Finavera. This extension was more of a favour or indulgence, than an agreement supported by

consideration. Scott simply extended the time it had given Finavera; there was no acceptance that Scott should become the lead negotiator in the process.

147 The extension was to Scott's benefit as well because Finavera was the only investor available. Scott and Finavera, who were previously unknown to each other, were simply feeling their way through the negotiation process. It was not clear who would lead the negotiations and both parties seemed to operate as if they were in charge. Things came to a head when Finavera disapproved of how Mr. Scott was dealing with the joint venture party, Spirit Pine. Mr. Scott wanted to buy out Spirit Pine before the purchase of the project. Finavera accepted that Spirit Pine was a joint venture participant in the project and eventually converted its interest into an overriding royalty. The twenty-four hour extension was just part of the give and take of negotiation and cannot be elevated into a commercial undertaking or a separate legal obligation.

148 The issue of good faith obligations in a commercial context exists quite apart from an email exchange where one party asserts that the parties are "dealing in good faith". I do not think it necessary to do an extensive review on whether there was a good faith obligation between the parties in the case at bar. First, the Plaintiff has not included a breach of the duty of good faith as a cause of action.

149 Topolniski J. made the following comments at paras 26, 27 and 32 of *National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc.*, 2005 ABQB 856, 390 A.R. 158 (Alta. Q.B.):

> The law in Alberta does not recognize a general duty of good faith between contracting parties.
>
> Such a duty can arise in contracts where the relationship mandates good faith dealings; for example, in insurance matters (*Kantolic v. Peace Hills General Insurance Company* (2000), 259 A.R. 319, 2000 ABQB 59) and in employment dismissals (*Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). Neither is the case here.
>
> . . .
>
> In my view, the law in Alberta does not yet recognize a general duty of good faith in the performance of a contract and this case does not fit within the category of special relationship cases where such a duty is acknowledged. (emphasis added)

See also: *Petrobank Energy & Resources Ltd. v. Safety Boss Ltd.*, 2012 ABQB 161, 534 A.R. 265 (Alta. Q.B.).

150 In addition, I am mindful of the fact that no actual contract was entered into between the parties, and I do not accept that there was an Exclusivity Agreement in existence. Further, the law seems clear on this point: a general duty of good faith cannot be said to exist in Alberta in a commercial context, even where there is a contract. By extension, I do not think it appropriate to infer an independently enforceable duty of good faith between parties in these circumstances.

8. Was Finavera Unjustly Enriched by Scott's Actions?

151 Scott's second cause of action is that Finavera has been unjustly enriched by these events, by not sharing with Scott the mutual benefit of the development of the wind farms, and by not paying Scott the $600,000 payment or for the owner's engineer contract. Scott seeks a constructive trust and/or equitable damages.

152 Unjust enrichment is a cause of action distinct from contract and tort: *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.), and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) at paras 16-25, (1997), 146 D.L.R. (4th) 214 (S.C.C.).

153 Unjust enrichment may be advanced when three elements are proved:

1. That there has been an enrichment in favour of the respondent;

2. That there has been a corresponding deprivation on the part of the claimant; and

3. That there is an absence of juristic reason for the enrichment and deprivation.

154 Finavera argues it has received no enrichment, claiming a financial loss on the project. Finavera further argues that Scott had no interest in the project of which it could have been deprived. Finavera claims a juristic reason for any benefit, alleging that it did not breach any confidence owed by it to Scott and based on its allegation that Scott lacks clean hands.

A. Was Finavera Enriched by Scott's Actions?

155 I find that Finavera was enriched by many of Scott's actions. Finavera benefited from Scott's position as preferred purchaser; Scott's bid price; Scott's gathering; forwarding, and preliminary analysis of relevant information, including asking Golder to make certain site inspections and to come forward with a proposal to finish same on the preliminary reports, and Scott's negotiation of certain terms of the acquisition of the project. Simply put, Finavera could not have acquired this project when it did without Scott and Scott's efforts.

i. Finavera Benefited from Scott's Position in the Bid Process

156 While Finavera did not misappropriate Scott's business opportunity it did take full advantage of Scott's preferential position in the Penn West bidding process. Finavera benefited from Scott's status as preferred potential purchaser and from Scott helping Finavera step into that spot. This was a position of practical and commercial value.

ii. Finavera Benefited from Scott's Offer Price and Scott's Other Confidential Information

157 The final offer in Finavera's name was for $3.35 million dollars, the same amount that Scott had determined was an appropriate purchase price for the project. The amount offered by Scott was Scott's confidential information and knowing what Scott offered to Penn West improved Finavera's position. Mr. Bak said in questioning that they tested the $3.35 million to see if it was reasonable and conducted their own evaluation. Nevertheless he admitted "we certainly accept that it came from Scott".

iii. Finavera Benefited from Scott Gathering, Forwarding and Conducting a Preliminary Analysis of Relevant Materials

158 Finavera benefited from the many things Scott did as its preliminary due diligence on the project. Scott gathered and reviewed the available information in the data room, conducted a preliminary assessment of the materials, wrote a summary and forwarded relevant information to Finavera. While I have found that this did not make the information into Scott's confidential information, Scott nevertheless expended time and effort in these activities: time and effort which directly and unquestionably benefited Finavera. Scott had multiple discussions and copious correspondence with Phoenix and others that was shared with Finavera and which meant they did not have to do this work themselves. Scott also spoke with Golder about various studies and Spirit Pine about the future of the joint venture agreement. Scott also had some information about the grid system in Alberta and how to complete a project in this province. These services played a part in allowing Finavera to step into the process and become the ultimate purchaser of the project within a very restricted time frame.

iv. Finavera Benefited from the Terms of the Letter of Intent to the Purchase and Sale Agreement

159 Finavera benefited from Scott's position as a prior offeree on the project, and from Scott's negotiations with Penn West on certain terms of the letter of intent and the Purchase and Sale Agreement. After initially reviewing the Information Memorandum, Scott requested further information to support preliminary reports in the data room. Essentially, Scott had a place in the process, the price, and certain negotiated terms of the deal. I accept that Scott negotiated the terms of the final letter of intent despite the fact that it was in the name of Finavera alone. Although the offer was only in the name of Finavera, I find that the offer was made by Finavera with Scott's assistance, effort and services.

v. Finavera Made a Profit

160 Finavera sold the project in December 2008 for total proceeds of $4,500,000. Mr. Bak testified that Finavera did not make a profit despite their public statement to the market that they held one million dollars in reserve and earned $230,000 in profit. He explained that this was not an accurate full picture as there were uncapitalized costs that ought to have been booked against the project and that Finavera in fact lost funds, especially with this lawsuit.

161 I do not accept Finavera's argument that despite the fact that it booked a small gain on its sale of the project, it in fact suffered a major financial loss. I find Finavera made a profit of $1,230,000 on the project.

162 In summary, Scott's actions, services, expertise and experience conferred multiple benefits upon Finavera and Finavera profited from them.

B. Has Scott Suffered a Corresponding Deprivation?

163 Scott has suffered a deprivation to the extent that it allowed Finavera to step into its status in the bid process and it expended time and labour performing services to the benefit of Finavera. As a result it could not work for others and did not receive any form of compensation from Finavera. Indeed, Mr. Bak acknowledged that it ended up with the Penn West assets and Scott ended up with a law suit.

164 I have rejected Scott's claim that what it really lost was the opportunity to acquire this project. I found that Scott could not afford to buy this project alone and that Finavera was the only remaining investor available to it. There is, however, a deprivation of time and effort as it dedicated itself to a project that solely benefited another company that it assisted in multiple ways.

C. Is there a Juristic Reason?

165 Determining whether there is an "absence of juristic reason" is the opportunity for the Court to consider what is fair. In the case at bar, Finavera freely accepted the benefits conferred by Scott's status and labours while Scott prejudiced itself with some expectation that it would eventually receive a benefit. These kind of circumstances make it unfair or unjust for Finavera to retain the benefit provided by Scott.

166 The Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at paras 44-46, [2004] 1 S.C.R. 629 (S.C.C.), set out a two-step analysis to determine the absence of juristic reason: the plaintiff must first show that no juristic reason from an established category exists to deny recovery, with established categories including a contract, a disposition of law, a donative intent, or other valid common law, equitable or statutory obligations. Second, in the absence of the established categories, the Court may consider the reasonable expectation of the parties and public policy considerations to assess whether recovery should be denied.

167 I find there is no juristic reason that exists in the case at bar to deny recovery, either based on the established categories of juristic reasons set out in *Garland* or based upon a review of the parties' reasonable expectations and public policy considerations.

168 I also do not accept Finavera's argument that Scott's lack of clean hands precludes his entitlement to an equitable remedy. The doctrine of clean hands is discussed in *Halsbury's Laws of Canada*, Equitable Remedies, 1st ed (Markham, ON: LexisNexis, 2012) at para HER-6 where it states that a party's right to seek equitable relief is subject to the equitable maxim that "he who comes into equity must come with clean hands". *Gerrow v. Dorais*, [2010] A.J. No. 999 (Alta. Q.B.) at para. 18, (2010), 324 D.L.R. (4th) 332 (Alta. Q.B.), revd [2011] A.J. No. 1290, 2011 ABCA 348 (Alta. C.A.). This has been endorsed by the Supreme Court of Canada in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 (S.C.C.) at para. 82. and applied in several cases. See *Maximum Ventures Inc. v. de Graaf*, [2008] B.C.J. No. 263, 2008 BCSC 199 (B.C. S.C. [In Chambers]); *Davie v. Davie Estate*, [2002] B.C.J. No. 511, 2002 BCSC 364 (B.C. S.C.); and *Werner v. Werner*, [1987] B.C.J. No. 2546 (B.C. S.C.). The principle of "unclean hands" and a plaintiff's entitlement to an

equitable remedy are also discussed in *1297835 Alberta Ltd. v. Xtreme Coil Drilling Corp.*, 2010 ABQB 539, 503 A.R. 56 (Alta. Q.B.), where the Court cited Spry, *The Principles of Equitable Remedies*, 6th ed (Toronto: Carswell, 2001) at 245-246, at para 25: "...[N]onetheless, the undesirable behaviour in question must involve more than merely a "general depravity"; it must have "an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense".

169 While neither Finavera nor Scott has acted with perfect dignity in this matter, there is no evidence that Scott comes to this Court without clean hands in the moral or legal sense. As in *Moody v. Cox*, [1917] 2 Ch. 71, [1916-17] All E.R. Rep. 548 (Eng. Ch. Div.), Finavera has not established that "the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". Scott's actions are not enough to disqualify him from an equitable remedy.

170 Neither do I accept Finavera's argument that there is a juristic reason for Finavera's enrichment. Finavera has not advanced any juristic reason to satisfy me that the enrichment Finavera benefited from was just.

D. The Appropriate Remedy

171 Scott seeks an equitable remedy in the form of a constructive trust in the project, being a ten percent ownership interest in net profits of property now owned by a third party purchaser with notice of its claims. Alternatively Scott claims equitable damages in the amount of $600,000 and a further approximately 30-34 million dollars for what Scott says it would have received under the owner's engineer contract: being 10% of the capital cost of the development of both wind farms. This is the sum Scott submits would put it in as good a position as it would have been in had there not been an improper act on the part of Finavera.

172 Finavera responds that Scott has suffered no damages: that Scott did not have the requisite financing and therefore had no chance of ever acquiring the project. Finavera responds that Scott never had any interest, or real opportunity to acquire, the project and therefore its request for proprietary remedies should be rejected. Finavera also submits that it sold the assets of the project in 2008 and Scott is pursuing a separate claim against the third party purchaser in a separate action: *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm LP* [2011 CarswellAlta 862 (Alta. Q.B.)], Docket Number 1001 01977.

173 Once an unjust enrichment has been established, as it has in the case at bar, the court has the discretion to grant an appropriate remedy. A court may order a monetary remedy consisting of an accounting for *quantum meruit*; or a proprietary remedy consisting of the imposition of a construction trust.

174 In my view the appropriate remedy is a monetary one designed to compensate Scott for the benefits conferred.

i. Monetary Remedy

175 As previously stated, I do not see that the gravamen of this case is about a breach of the duty of loyalty or a breach of the duty of confidence, but rather an unjust enrichment in the amount of Scott's efforts and the "springboard" effect that he provided for Finavera to acquire the project.

176 Both parties have expressly rejected that there was any sort of contractual or quasi-contractual obligation or relationship between them. Scott claims a constructive trust or equitable damages. It is therefore left to this Court to determine what the value of Scott's services were, absent a contract between the parties and without the introduction of any evidence concerning the value of those services.

177 Ultimately, Scott's role in this acquisition was akin to that of a broker or a "finder". He did a preliminary assessment of the project, undertook preliminary reviews of all of the documents in the data room, "shopped the deal around" to prospective investors, came up with an appropriate purchase price for the project, and introduced Penn West and Finavera to each other.

178 Even Scott's correspondence with Phoenix during the bid process presents him as a sort of broker on behalf of

investors: he consistently referred to potential investors as dictating the terms of the offer: "the investor group also wishes to continue its negotiations with the JV partner" (February 5, 2007 email of Mr. Scott); "my Calgary investment group...would offer 10% down at signing" (February 5, 2007 email of Mr. Scott); "It's their money - I obviously have to listen. Remember, I'm just the messenger" (January 24, 2007 email of Mr. Scott).

179 Little to no evidence was introduced regarding the value of the compensation paid to The Howard Group for its services in introducing Scott and Finavera, so I must determine an appropriate amount for Scott based on what I find in fact to be the role Scott played. There is some attraction to the sum of $600,000, being the amount agreed to by both parties as the "one time Development Payment" to be paid to Scott in respect of the acquisition. Finavera argues that this amount was the purchase price for "development rights" which it now argues Scott did not have. With respect Finavera knew before closing, and without complaint, that Penn West had the legal right to deal with others outside the bid process it established. Nevertheless, Penn West said, and I accept, that it would not have operated outside its bid process. Finavera's only way into the purchase at that time was through Scott, who was the preferred purchaser and the only entity Penn West was willing to negotiate with. As previously stated there was no real definition of the development rights Finavera thought it was purchasing and they got the essence of what they needed to become the purchaser.

180 I find that the appropriate award is for Finavera to pay Scott $600,000. It is the amount already agreed to by both parties in relation to Scott's compensation in this deal, and reflects how the parties themselves valued Scott's role and participation.

ii. Proprietary Remedy

181 In my view and in the totality of the circumstances this amount is an adequate remedy and Scott has not established why a court should exercise its discretion to impose a constructive trust.

182 A constructive trust may be available in cases of wrongful conduct on the part of a fiduciary (the "good conscience" cases), or in cases of unjust enrichment. However, the good conscience" line of reasoning does not apply to the facts at bar as I find that the Finavera did not owe fiduciary obligations to Scott.

183 There is an absence of the three general characteristics of a fiduciary required under *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at 136, (1987), 42 D.L.R. (4th) 81 (S.C.C.) being that: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

184 Finavera did not have scope for the exercise of some discretion or power on behalf of Scott. Finavera was not acting as Scott's agent in acquiring the project for Scott; Scott was never in a real position to purchase the project, absent a serious investor to step in as its partner. The final offer to Penn West was in Finavera's name alone, and Scott agreed to that development. Rather, Finavera was able to step into Scott's place in a very short amount of time in order to close the deal, and Scott received no compensation for its part in that. Following the final offer in the name of Finavera alone, Finavera was negotiating with Penn West on its own behalf, not on Scott's behalf. Not having the scope of discretion or power on behalf of Scott, therefore, neither is the second element of the test met. Third, the requisite "vulnerability" or "dependency" does not exist in the relationship between the parties to support the finding of a fiduciary obligation. As Binnie J. stated in *Cadbury Schweppes* at para 30, fiduciary obligations are seldom present in a commercial context between parties acting at arm's length.

185 A proprietary remedy is a powerful "extraordinary" remedy that is awarded at the discretion of the court. In the vast majority of cases, even when unjust enrichment has been established a constructive trust will not be the appropriate remedy: *LAC Minerals* at 678. For this and the following reasons, I decline to award a proprietary remedy.

186 Similarly, the unjust enrichment cases provided by Scott to this Court where a constructive trust was awarded to the plaintiffs, such as *Visagie* and *Walter Stewart Realty Ltd.*, do not lend themselves to the current facts and are distinguishable. In those cases, the parties had already agreed to the plaintiff having a proprietary interest in the respective project. In the case of *Visagie*, a formal joint venture agreement was in place. The plaintiff, who was awarded a constructive trust, had already

secured a 12% carried interest and an option for a further 12% participating interest in the project by a finalized contract with the defendant. In contrast, Scott and Finavera had no written formal agreement in place setting out their respective rights and responsibilities. Further, the verbal arrangement that was acceptable to both parties was for Scott to receive a monetary payment, not a proprietary interest in the project.

187 In *Walter Stewart Realty Ltd. v. Traber*, 1995 ABCA 307, 174 A.R. 45 (Alta. C.A.), the parties had a verbal agreement between them to give the plaintiff an interest in the property: the plaintiff was to receive a percentage of profits in the project. Although there was no formal joint venture agreement between the parties, the Court found there was an informal handshake agreement and the parties had agreed between them to a figure of 30%. Again, there is no such agreement between Scott and Finavera in the case at bar.

188 *Soulos* included facts wherein the Court found the defendant owed the plaintiff a fiduciary obligation, and the Court held that a constructive trust was "required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty": at para 50. The Court in *Soulos* relied primarily on the constructive trust as a remedy for wrongful conduct. The Plaintiff has also cited *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577 (B.C. C.A.), a wrongful conduct case which included a lengthy discussion regarding the availability of a constructive trust as a remedy for both unjust enrichment and wrongful conduct.

189 Scott maintains that a constructive trust over 10% of the profits would put Scott in as good a position as it would have been in but for Finavera's actions. Although I accept the Plaintiff's submission that funds or accounts are a proper subject for a constructive trust (*Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* at para 31), it does not therefore automatically follow that the funds in question here are an appropriate subject for a constructive trust. Similarly, while I accept the well-established legal principle submitted by the Plaintiff that trust property can be traced into the hands of third parties and recovered if the third party was not a *bona fide* purchaser for value, I do not find that principle applicable to the facts of the case at bar.

190 Scott did not have a proprietary interest in the lands of the project, and would not have formed a consortium with another seed capital investor but for Finavera's actions. Similarly, Scott's argument that an important reason to grant a proprietary remedy is to assure that the plaintiff will receive the property accorded to the holder of a right of property in a bankruptcy (*LAC Minerals* at 678) is not applicable because I find that Scott did not hold a property right in the project.

191 Scott also argued that a monetary remedy is not an appropriate remedy due to Finavera's uncertain financial situation and its potential inability to pay a damage award. However, counsel for the Plaintiff has not provided any authority for the argument that the potential insolvency of a defendant is sufficient cause for awarding the extraordinary proprietary remedy of a constructive trust.

192 In the MCA the parties agree:

> that there is not an adequate remedy at law for any breach of this Agreement; and, therefore, either party shall be entitled to specific performance and injunctive relief restraining any breach of this Agreement in addition to any other rights and remedies which it may have.

193 I accept that this language is laying the groundwork for the equitable remedies of an injunction or specific performance in relation to any breach of the MCA. However, I did not find a breach of that agreement. Further, this provision does not establish that the equities are in favour of an extraordinary remedy such as a constructive trust.

194 The cases provided by Scott do not advance the argument for a constructive trust as I find Scott has no proprietary interest in the project, and in fact it agreed with Finavera to not have a proprietary interest in the project during negotiations when it accepted a monetary payment for its part in the acquisition. For the reasons given, I find the Plaintiff is not entitled to a constructive trust over the property or profits from the wind farm. In this case, I find that a monetary award is an appropriate remedy. "Where a monetary award is sufficient, there is no need for a constructive trust": *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 997, (1993), 101 D.L.R. (4th) 621 (S.C.C.). A monetary remedy is sufficient.

10. Did Scott Breach any Duties it Owed to Finavera?

195 Finavera counterclaims against Scott alleging misrepresentation, as well as the torts of interference with economic relations and abuse of process.

A. Misrepresentation of Scott to Finavera

196 Finavera alleges misrepresentation on the part of Scott regarding the source of the confidential information and ownership of the project. Scott responds that there was no misrepresentation on its part, that it has clean hands and Finavera does not.

197 The test for negligent misrepresentation was stated in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110, (1993), 99 D.L.R. (4th) 626 (S.C.C.):

> The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

198 I do not find a misrepresentation on the part of Scott, and Finavera has not introduced evidence to this Court to establish a case for negligent misrepresentation.

199 Finavera became a party to this transaction as a prospective investor introduced to Scott by The Howard Group. Mr. Bak was not asked whether anyone from Finavera ever asked for proof of the development rights they thought Mr. Scott possessed. One would suppose that if Finavera was prepared to purchase development rights for $600,000, their due diligence would involve requesting some written confirmation from Penn West that these development rights had been granted to Scott. Despite its assertions of misrepresentation on the part of Scott, Finavera did not break off its discussion with Scott when it discovered that these development rights did not in fact exist. Instead, Finavera continued down the path to acquiring the project and continued its communication with Scott. For example, March 15, 2007 email from Mr. Atalay to Mr. Scott reiterated that Finavera had made Scott and offer and they would not be in a position to negotiate an agreement until close.

200 Finavera did not establish that Mr. Scott misrepresented his position with Penn West. He was the preferred purchaser and the term "development rights" has no prescribed content. There was no evidence that Mr. Scott said that he held anything in the nature of development rights on the project.

201 Scott represented itself as having been invited to participate in an offer to purchase the wind farm, that twelve of over sixty developer firms were short-listed to participate in the offer to purchase, and that in January 2007 proposals were received and evaluated and Scott was ultimately short-listed along with two other bidders.

202 Finavera alleges that Scott misrepresented to Finavera the source of the confidential information, as well as the ownership of the project. I find there were no actionable misrepresentations against Scott regarding the source of the confidential information and the ownership of the project. No misrepresentations arose from Scott's self description either.

203 Neither has Finavera established that it suffered any loss or damage as a result of Scott's alleged misrepresentation.

B. Interference with Economic Relations

204 Finavera alleges that Scott committed the tort of interference with economic relations. The test for interference with economic relations is set out in *Conway v. Zinkhofer*, 2008 ABCA 392 (Alta. C.A.) at para 41 and consists of: (i) an intention to injure; (ii) interference with the other party's business by illegal or unlawful means; and (iii) resultant economic loss: *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30, 227 D.L.R. (4th) 458 (Ont. C.A.) at para. 44.

205 I find there was no interference by Scott of Finavera's economic relations. Finavera did not establish Scott's intention, Scott's interference with Finavera's business by illegal or unlawful means, or that Finavera had suffered any prejudice due to Scott's actions. The Defendant has not even introduced evidence regarding which of its economic relationships were interfered with, beyond a vague assertion from Mr. Bak that Scott's actions were a factor in its difficulties raising capital in the markets. I find this counterclaim without merit and dismiss it accordingly.

C. Abuse of Process

206 Finavera alleges that Scott committed the tort of abuse of process.

207 According to *3058354 Nova Scotia Co. v. On*Site Equipment Ltd.*, 2011 ABCA 168, 505 A.R. 289 (Alta. C.A.), at para 57 the following elements must be established:

> In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 the Supreme Court of Canada indicated in obiter that punitive damages can be awarded on the basis of conduct undertaken throughout the litigation and trial. The Ontario Court of Appeal found that a tort of "abuse of process" existed and defined its constituent elements in *Harris v. GlaxoSmithKline Inc.* (2010), 78 C.C.L.T. (3d) 52, stating at para. 27:
>
>> The case law authorities establish that there are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted: *Hawley v. Bapoo* (2005), 76 O.R. (3d) 649 (Ont. S.C.J.) at para. 86, var'd (2007), 156 C.R.R. (2d) 351 (Ont. C.A.); *Metrick v. Deeb (2002)*, 14 C.C. L.T. (3d) 297 (Ont. S.C.J.) at para. 9, aff'd (2003, 172 O.A.C. 229 (C.A.), leave to appeal ref'd, [2003] S.C.C.A. No. 378, (2004) 195 O.A.C. 398n (S.C.C.); *Scintilore Explorations Ltd. v. Larache*, [1999] O.J. No. 2847 (S.C.J.); P. M. Perell, "*Tort Claims for Abuse of Process*" (2007) 33 Adv. Q. 193 at p. 193; J. Irvine, "*The Resurrection of Tortious Abuse of Process*" 47 C.C.L.T. 217.

208 I find there was no abuse of process by Scott that Finavera suffered. Although I do not accept that Mr. Scott was reporting Mr. Atalay to the professional bodies for engineers out of a sense of duty, Finavera has not introduced any evidence to support a claim for abuse of process. I find this counterclaim without merit and dismiss it accordingly.

11. Conclusion

209 Scott has proven only that it is entitled to be reimbursed for the value of the services it has provided and the status it made available to Finavera. There has been no breach of contract, no breach of confidence and no misappropriation of a business opportunity. The Plaintiff succeeds on the basis of unjust enrichment in the amount of $600,000.00. (six hundred thousand dollars).

210 The Defendant's counterclaim is dismissed.

211 If the parties can not agree on costs they may return before me within thirty days.

Action allowed in part; counterclaim dismissed.

Appendix A

While a great deal of information was forwarded by Mr. Scott to Finavera, a large amount was not the work product of Mr. Scott. In cross-examination he recognized that the following documents sent by him to Finavera came from the Penn West data room and were not created by him. Documents in this category include:

A. Files sent by Mr. Scott in multiple emails to Mr. Paul Guedes of Finavera on February 6, 2007:

Ex.Sum. - Ghost Pine Wind Resource Executive Summary

g_philpott-bus-resume-Jan-03-2007 - Mr. Gerard Philpott's resume

PAEL to AESO Dec 10, 2006

Ex. Sum.- Lone Pine Wind Resourse

Customer Proposal Signed

Ghost Pine Interconnection Proposal

Draft Interconnection Proposal Ghost Pine

AESo Stage 1 System Access Application

AESO Transmission Modelling Data Requirements - 12 April

AESO Transmission Modelling Data Requirements - 12 April

AESO Response letter Dec 10 2006

Commercial Bid Analysis

Construction Commitment Agreement (Phase I)

Customer Contribution Application of Proceeds Agreement

Draft Interconnection Proposal Ghost Pine

Ghost Pine Economics

Ghost Pine Land Schedule A - Nov 22 2006

Ghost Pine Project Schedule

Ghost Pine Project Timelines

GhostPine LeaseOptionLands

Joint Venture Agreement

JV Agmt amendment Dec 7 2006

JV Agmt Dec 10 2006

Lone Pine Land Schedule A - Nov 22 2006

LonePine LeaseOptionLands

Petrofund Amalgamation Certificate

Phase 1 Evaluation

ResourceReport GhostPine rev3 reduced

ResourceReport LonePine rev3 reduced

RP-05-518 ATCO Estimate NID Estvfinal

RP-05-518 Customer Proposal signed

RP-05-518 ghost Pine CCD Sept 19 signed

RP-05-518%20Ghost%20Pine%20CCD%20Sept%2019%20signed

Spirit Pine Preliminary Estimate DataBook

SpiritPine EIA June06

B. Files sent by Mr. Scott to Mr. Atalay at Finavera on February 8, 2007:

Ghost Pine Economics 6.2

J Agmt Dec 10 2006

Joint Venture Agreement

JV Agmt amendment Dec 7 2006

C. Files sent by Mr. Scott to Mr. Atalay at Finavera on February 12, 2007:

Phase 1 Evaluation

ResourceReport GhostPine rev3 reduced

ResourceReport LonePine rev3 reduced

PSA Jan 8 2007

Wind option Marz template Aug 2 06

Wind lease final oct 26

Wind option final Oct26

ResourceReport Ghost Pine rev3 reduced

ResoureReport LonePine rev3 reduced

TAB 2

2015 ABCA 51
Alberta Court of Appeal

Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.

2015 CarswellAlta 182, 2015 ABCA 51, [2015] 5 W.W.R. 420, [2015] A.W.L.D. 1126, [2015] A.J. No. 144, 11 Alta. L.R. (6th) 74, 249 A.C.W.S. (3d) 709, 381 D.L.R. (4th) 519, 599 A.R. 56, 643 W.A.C. 56

Scott & Associates Engineering Ltd., Appellant (Plaintiff) and Finavera Renewables Inc., Respondent (Defendant) and Scott & Associates Engineering Ltd. and Bryan G. Scott, Not Parties to the Appeal (Defendants by Counterclaim) and Finavera Renewables Inc., Not a Party to the Appeal (Plaintiff by Counterclaim)

Patricia Rowbotham, Brian O'Ferrall, Barbara Lea Veldhuis JJ.A.

Heard: September 10, 2014
Judgment: February 9, 2015
Docket: Calgary Appeal 1301-0333-AC

Proceedings: affirming *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.* (2013), 2013 CarswellAlta 873, 2013 ABQB 273, [2013] 10 W.W.R. 551, 79 Alta. L.R. (5th) 172, S.L. Martin J. (Alta. Q.B.)

Counsel: J.E. Fletcher, for Appellant
P.D. Edwards, for Respondent

***Per curiam*:**

1 Scott & Associates Engineering Ltd. appeals a trial judge's conclusion that damages and not the proprietary remedy of a constructive trust were the appropriate remedy for Finavera Renewables Inc.'s unjust enrichment: *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.*, 2013 ABQB 273, [2013] 10 W.W.R. 551 (Alta. Q.B.).

2 The appeal is dismissed.

Background

3 Near the end of the bid process, Scott was the sole bidder on two Penn West Petroleum Ltd. wind power generating assets. However, Scott needed capital to complete the purchase. It attempted to raise the necessary capital without success until it was introduced to Finavera. Scott then introduced Finavera to the prospect of purchasing these assets, including sharing with Finavera, on a confidential basis, the due diligence it conducted on the developability and potential profitability of the assets.

4 Scott and Finavera agreed that they would act in good faith in attempting to form a mutually agreeable partnership to develop the assets once acquired by Finavera. That partnership was never formed.

5 But as part of the negotiations Finavera did offer to pay Scott $600,000 for introducing it to the project. Scott accepted that offer.

6 Finavera also offered to retain Scott to be its project engineer, but that never happened.

7 Finavera purchased the wind power assets from Penn West; but unhappy differences arose between Scott and Finavera. As a consequence, Finavera refused to pay Scott for having introduced it to the project and hired a different engineer to develop the project. And no partnership, joint venture or joint ownership agreement was ever entered into.

8 Scott sued Finavera claiming breach of confidence, misappropriated business opportunity and unjust enrichment, and claimed the remedy of constructive trust or, in the alternative, damages.

9 About a year later, Finavera sold some of the assets it acquired to a third party for a profit. Scott seeks a 10% ownership interest in the net profits generated by the assets, including those assets now in the hands of the third party.

Trial Decision

10 The trial judge held that Finavera had been enriched by Scott's efforts. To quote from the trial judge's reasons:

> [155] I find that Finavera was enriched by many of Scott's actions. Finavera benefited from Scott's position as preferred purchase; Scott's bid price; Scott's gathering; forwarding, and preliminary analysis of relevant information, including asking Golder to make certain site inspections and to come forward with a proposal to finish same on the preliminary reports, and Scott's negotiation of certain terms of the acquisition of the project. Simply put, Finavera could not have acquired this project when it did without Scott and Scott's efforts.

11 The trial judge also found that Scott suffered a corresponding deprivation:

> [163] Scott has suffered a deprivation to the extent that it allowed Finavera to step into its status in the bid process and it expended time and labour performing services to the benefit of Finavera. As a result it could not work for others and did not receive any form of compensation from Finavera. Indeed, Mr. Bak [the President of Finavera] acknowledged that it ended up with Penn West assets and Scott ended up with a law suit.

12 The trial judge went on to find that there was no juristic reason which would justify Finavera's enrichment or Scott's deprivation.

13 So, Finavera was found to have been unjustly enriched by the efforts of Scott.

14 The trial judge then considered Scott's claim to the equitable remedy of a constructive trust in the form of a 10% ownership interest in the net profits from the project. She rejected that claim but did find that Scott was entitled to a judgment for the $600,000 Finavera agreed to pay Scott for introducing it to the project. A judgment for that amount was of little use to Scott because it is alleged that Finavera is on the brink of insolvency or that enforcing a judgment against it would push it into insolvency. Scott sought a proprietary remedy instead.

15 The trial judge found that she had the discretion to grant a proprietary remedy consisting of the imposition of a constructive trust, but opted for the monetary remedy instead on the basis that Scott's role in the acquisition of the wind power project was that of a finder or a broker. That is, the trial judge declined to impose a constructive trust because she was of the view that Scott had not contributed to the value of the properties in respect of which the trust was sought to be imposed.

16 Scott had also argued that a monetary remedy (damages) was not an appropriate remedy due to difficulties in enforcing a monetary judgment. The trial judge rejected the argument that such difficulties or even a potential insolvency is sufficient cause for granting the extraordinary proprietary remedy of constructive trust. She said counsel had not provided any authority in support of that proposition.

17 The trial judge dismissed Scott's breach of confidence claims: paras 94-134. She also dismissed Scott's claim that Finavera had misappropriated Scott's business opportunity (paras 135-44) because she found that Scott lacked the financial resources (and financial backers) to avail itself of the opportunity. She also rejected the claim that a fiduciary relationship existed: para 182. She also found that "Scott allowed Finavera to bid and proceed in its name alone with [Scott's] full

knowledge and consent": para 141. Finally, the trial judge declined to award any damages in respect of Finavera's decision to hire a project engineer other than Scott.

Grounds of Appeal

18 Scott argues the trial judge erred by not awarding it a constructive trust. More specifically, it submits the trial judge erred in law by failing to consider the sufficiency and enforceability of a monetary judgment and the moral quality of Finavera's conduct. Scott also argues that the trial judge erred in holding that a right to property is a prerequisite to a declaration of a constructive trust. That is, Scott argues that the trial judge failed to recognize that the declaration of a constructive trust can create a right to property when no such right previously existed.

19 In oral submissions we were advised that Scott has a pending action against the third party who purchased the wind farm asset from Finavera and that that action is awaiting the outcome of this appeal.

Standard of Review

20 "[T]he decision to order a constructive trust is a matter of discretion" and, because "ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy.": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.) at paras 54-55, in dissent but not on this point.

Analysis

21 The trial judge found that the parties' understanding immediately preceding Finavera's acquisition of the assets was that Scott would be paid $600,000 in exchange for the services it rendered in introducing the purchase opportunity to Finavera. It was also anticipated that Scott would be hired by Finavera as the project's engineer. The $600,000 agreement was reduced to writing: see reasons at paras 32 and 33. However, the parties never did come to terms on the project engineering retainer. It is also important to note that the parties agreed that for the purposes of trial no contract existed. Scott advised the court that it was not pursuing a contract action against Finavera: reasons at paras 59-64.

22 The trial judge accepted that Scott's due diligence was decisive to Finavera's decision to purchase the assets; but that fact, though necessary, did not entitle Finavera to the proprietary remedy it sought.

i. Proprietary Interest Lacking

23 A constructive trust is only available to remedy an unjust enrichment when there is a "direct link between the contribution and the property" and a "monetary award is insufficient": *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.) at 982, (1993), 101 D.L.R. (4th) 621 (S.C.C.). Put another way, when monetary damages are inadequate and when there is a direct link between the contribution which founds the action and the property in which the constructive trust is claimed, a constructive trust may be an appropriate remedy. Here, a monetary judgment may have been a problematic remedy, but the contribution which founded the action (i.e., the "finding" of the business opportunity) is not linked to the property in the sense that that finding and investigating the properties and the opportunities they presented did not improve or add value to them. The first branch of the test has not been met.

24 Although at one time it was contemplated by the parties that Scott would have a proprietary interest in the asset, no agreement was reached on this. Scott's remuneration for its efforts to secure the property was agreed to be monetary and in the form of a commission, a $600,000 cash payment and ongoing income from its project engineering services.

25 In effect, the trial judge found that ultimately Scott was a broker and was entitled to a commission for those services. Scott was found to have made no contribution to the value of the assets acquired and therefore lacked the basis for a constructive trust. Given the discretionary nature of the remedy, no error warranting our intervention has been established.

26 The uncontested evidence is that, after much heated discussion and a so-called "cooling off period", Scott agreed that Finavera would "buy us out" for "10% ... of the $6M (reference to seed capital)", that is, $600,000. To suggest now that it is entitled to a 10% interest in the "net carried interest" of the asset sold to a third party because Finavera's financial circumstances are such that a monetary award of damages might be unenforceable is not appropriate. Scott agreed to be paid in money and it is surprising that he now seeks to be compensated in another form of compensation.

ii. Moral Quality of Conduct Assessed by Parties' Expectations

27 The second focus in oral submissions was on the "moral quality" of Finavera's conduct. That is, Scott asserts that moral culpability is a factor in determining whether a constructive trust is available.

28 However, for the reasons which follow, we are of the view that in the absence of a fiduciary relationship or a relationship giving rise to confidence or a contractual relationship, it is doubtful that moral culpability — if indeed it arises on these facts — becomes a factor.

29 As noted above, the trial judge expressly found no fiduciary duty to engage the duty of loyalty. This eliminates *Soulos* and the cases awarding constructive trusts for a breach of a fiduciary duty.

30 The trial judge also expressly found no breach of confidence, which eliminates the *Lac Minerals* (*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.)) breach of confidence line of cases that considered moral quality, and on which the appellant relies.

31 And, because the parties expressly agreed not to proceed on the basis of contract, even the principles recently enunciated by the Supreme Court in *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.) (available on CanLII) do not apply. In *Bhasin*, the Supreme Court held that while a contracting party should have appropriate regard to the legitimate interests of the other contracting party, "appropriate regard" does not require the party to serve those legitimate interests in all cases. It merely requires that a party not seek to undermine those legitimate interests of the other party. In this case, the trial judge found that Finavera did not seek to undermine Scott's legitimate interests.

iii. Effect on Third Parties or Creditors

32 The fourth step of the *Soulos* test is whether or not the rights of creditors and other third parties' interests might be impacted by the court's decision to impose a constructive trust. This is an important consideration. A constructive trust, that is, a trust imposed by operation of law (i.e., not pursuant to the actions of a settlor) immediately gives the party in whose favor the trust is granted an enforceable right in the trust property. Professor Waters writes that it imposes upon the legal title holder of the property "an obligation to hold specific property for another": Donavan WM Waters, Q.C., *Waters Law of Trusts in Canada*, 3d ed (Toronto, ON: Thomson Carswell, 2005) at 454.

33 Professor Waters also states (citations omitted) at 479:

> A great deal has been written about constructive trusts in insolvency situations. ... If [the constructive trust] arises only when judgment is given, it is clear that the judge created it. The creation of such a trust, promoting the plaintiff from unsecured creditor to trust beneficiary, would seem clearly inconsistent with the *Bankruptcy and Insolvency Act*.

Whether it is inconsistent or not, we save for another day. The point is that constructive trusts cannot be declared without careful regard for their effect on the interests of third parties.

34 Counsel for Finavera argued that a declaration of a constructive trust giving Scott an interest in Finavera's property might prejudice Finavera's creditors. Scott's counsel argued that Finavera's creditors would, in fact, be better off than if Scott attempted to enforce its damages judgment. However, that is only because the assets are now in the hands of new owners (against whom a suit is pending). The thrust of Scott's argument was that the reason a constructive trust ought to be declared was to give Scott the priority accorded to the holder of a property right in a bankruptcy. For the reasons set out above, we

agree with the trial judge that no property right was created and therefore there was no need to accord Scott the priority he sought.

35 The constructive trust sought by Scott cannot be said to have arisen when the bargain was made. Had it, there might have been a different outcome. Scott was content to receive money from Finavera for his efforts. It is only now, when seeking judgment, that Scott is concerned that a constructive trust might be the only remedial response that would ensure a judgment is enforceable. Without overstating the point, if a constructive trust can be justified in commercial circumstances such as these, when the enforceability of a judgment for damages is alleged by the claimant to be an issue and the claimant initially agreed to receive a monetary payment, this could impact well-established solvency schemes.

36 The trial judge not only exercised her discretion reasonably, she did so correctly.

iv. Cases Relied Upon by the Appellant

37 With respect to the appellant's argument that this approach was endorsed by this Court in *Walter Stewart Realty Ltd. v. Traber* (1995), 174 A.R. 45, 31 Alta. L.R. (3d) 162 (Alta. C.A.), that case is distinguishable on the facts (The parties there agreed that a percentage of the profits from the real estate development was to be the basis of the "finder's" compensation). In the *Traber* case, the realtor became aware that certain land inside the City of Lethbridge, which even the City considered undevelopable, was in fact developable. The land was owned by Marathon Realty. The realtor then approached Traber as a potential financier, extracting a promise from Traber not to disclose the information he had about the potential developability of the lands. The trial judge found that it was agreed that the realtor would receive 30% of all the profits from developing the lands. Traber purchased the land from Marathon and then conveyed it to a family holding company instead of to a company in which the realtor had an interest. The realtor received nothing for his efforts. The Court awarded the realtor 30% of all the profits from the development and permitted the filing of a *lis pendens* against the property.

38 The distinguishing feature of the *Traber* case is that the parties were found to have agreed to a 30% share of the project. There was no agreement in this case for the appellant to receive a net 10% interest in the wind power project. The only agreement was to pay the appellant $600,000 for having introduced the project to the respondent. Also, the *Traber* case is distinguishable in that in *Traber* it was found as a fact that the realtor's investigation of the property in question did add to its value. The realtor discovered that the land which even the municipality considered was undevelopable was developable. The results of the realtor's investigation enhanced the value of the land. Scott's investigations simply demonstrated that there was merit in acquiring the assets. He didn't enhance their value.

39 In *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198, 132 O.A.C. 231 (Ont. C.A.), the circumstances were also distinguishable. The causes of action pleaded by claimants in *TVX Gold* were breach of a joint venture agreement, breach of confidence and breach of fiduciary duty. The respondent approached the appellant TVX proposing that TVX become the respondent's joint venture partner for the purpose of privately acquiring certain mines in Greece. TVX and the respondents entered into a joint venture funding agreement which provided that the respondent was to receive a 12 per cent carried interest. TVX then discovered that the Greek government was not prepared to allow the mines to be sold except through a public tendering process. TVX terminated its obligations under the joint venture funding agreement, as it was entitled to do under its terms, and then bid for the mines on its own in the tender process and was successful.

40 The respondents claimed the 12 per cent carried interest. The trial judge awarded that remedy and the Court of Appeal upheld the remedy on the basis that there had been a breach of confidence (as in *Lac Minerals Ltd.*).

41 There are critical differences between *TVX Gold* and this case which make the *TVX Gold* case entirely inapplicable. The remedy upheld by the Court of Appeal of Ontario was based on the successful claim of breach of confidence. As noted above, the trial judge expressly found that there was no breach of confidence. Accordingly, *TVX Gold* is distinguishable for that reason. And, as in *Traber*, there was, at one point, an enforceable agreement providing for a carried interest in the venture.

Conclusion

42 The trial judge's reasons do not disclose an error of principle. Given the discretionary nature of the remedy our intervention is not warranted.

43 The appeal is dismissed.

Appeal dismissed.

TAB 3

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Good faith, etc.

247 A receiver shall

- **(a)** act honestly and in good faith; and
- **(b)** deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Law of set-off or compensation

97 (3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

R.S., 1985, c. B-3, s. 97; 1992, c. 27, s. 41; 1997, c. 12, s. 80; 2004, c. 25, s. 58; 2005, c. 47, s. 74.

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

- **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
- **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

- **(a)** a margin deposit made by a clearing member with a clearing house; or
- **(b)** a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

R.S., 1985, c. B-3, s. 95; 1997, c. 12, s. 78; 2004, c. 25, s. 56; 2007, c. 29, s. 100, c. 36, ss. 42, 112.

TAB 4

2005 NBQB 83
New Brunswick Court of Queen's Bench

Brunswick Chrysler Plymouth Ltd, Re

2004 CarswellNB 705, 2005 NBQB 83, [2004] N.B.J. No. 533, 11 C.B.R. (5th) 10, 139 A.C.W.S. (3d) 975, 284 N.B.R. (2d) 167, 6 B.L.R. (4th) 300, 742 A.P.R. 167

In the Matter of the Bankruptcy of Brunswick Chrysler Plymouth Ltd.

In the Matter of an Application of the Trustee in Bankruptcy of Brunswick Chrysler Plymouth Ltd. for payment by DaimlerChrysler Canada Ltd.

Glennie J.

Heard: November 29, 2004
Judgment: November 29, 2004
Docket: 10573, Estate 51-114814

Counsel: R. Gary Faloon, Q.C. for Brunswick Chrysler Ltd.
André G. Richard, Q.C. for DaimlerChrysler Canada Ltd.

***Glennie J.* (orally):**

1 Brunswick Chrysler Plymouth Ltd. ("Brunswick") filed a Notice of Intention To Make a Proposal pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") in the office of the Official Receiver on February 26, 2004. Subsequently, by Court Orders dated March 25, 2004 and May 6, 2004, the time for Brunswick to file a Proposal was extended to May 7, 2004 and June 4, 2004 respectively.

2 Brunswick subsequently filed a Proposal and on July 7, 2004, the creditors of Brunswick voted against the Proposal. As a consequence, Brunswick was deemed to be bankrupt and a Certificate of Assignment in Bankruptcy was issued on July 8, 2004 pursuant to Section 57 of the BIA and Grant Thornton Limited became Trustee of Brunswick.

3 At all material times, Brunswick was a car dealer for DaimlerChrysler Canada Inc. ("DaimlerChrysler") and operated pursuant to a Sales and Service Agreement which contains a set-off provision which provides that DaimlerChrysler may apply in set-off against any amount owed to it by Brunswick any amount owing to Brunswick by DaimlerChrysler.

4 As of February 26, 2004, the date Brunswick filed its Notice of Intention to Make a Proposal, it owed DaimlerChrysler the sum of $291,563.15.

5 In November of 2003, Brunswick purchased certain tires from DaimlerChrysler for a cost of $6,049.59 inclusive of HST. After the filing of its proposal, Brunswick returned the tires to DaimlerChrysler which applied a credit against the debt of Brunswick owed to DaimlerChrysler for those tires.

6 On May 27, 2004 prior to its bankruptcy, Brunswick filed a motion seeking a Declaration that DaimlerChrysler not be entitled to set-off its post February 26, 2004 obligations to Brunswick against the pre February 26, 2004 indebtedness of Brunswick to DaimlerChrysler. Brunswick also sought an order forcing Daimler Chrysler to pay any monies owed after February 26, 2004 forthwith and continue making such payments in the future within seven days of month end.

7 Daimler Chrysler says it did not contest the application of the stay provisions found in Section 69.1 of the BIA even though there were some disagreements over what were pre-filing transactions and post-filing transactions. Daimler Chrysler says it also continued to do business with Brunswick and agreed to pay Brunswick any amounts owed to Brunswick in

conformity with its established business practices.

8 The motion was adjourned on June 2, 2004 by consent and again on June 11, 2004 when the motion was adjourned to July 8, 2004.

9 As mentioned, on July 7, 2004, the creditors of Brunswick voted against the proposal. Brunswick was deemed to be in bankruptcy and a Certificate of Assignment was issued on July 8, 2004.

10 On July 8, 2004, the motion was again adjourned but Counsel for Brunswick informed the Court that he was now acting on behalf of the Trustee in Bankruptcy for Brunswick.

11 On July 22, 2004, the Deputy Registrar in Bankruptcy issued an order that these proceedings be continued with Grant Thornton Limited, Trustee in Bankruptcy of Brunswick as an Applicant and DaimlerChrysler as Defendant.

12 Brunswick did warranty work for DaimlerChrysler for an amount of $40,315.31 in June 2004 and $11,815.14 in July up to the date of bankruptcy. The June work would normally have been paid by July 20, 2004 and the July work by August 20, 2004.

13 DaimlerChrysler asserts that it is entitled to set-off post February 26, 2004 credits in favour of Brunswick against Brunswick's pre February 26, 2004 indebtedness to DaimlerChrysler.

14 The issue to be determined is whether DaimlerChrysler is entitled to set-off post February 26, 2004 credits in favour of Brunswick against Brunswick's pre February 26, 2004 indebtedness to DaimlerChrysler.

15 Section 69.(1) of the BIA provides that a stay of proceedings is imposed by operation of law when an insolvent person files a Notice of Intention To Make a Proposal.

16 In the event of a subsequent bankruptcy, Section 97(3) of the BIA provides as follows:

> (3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of the Act respecting frauds or fraudulent preferences.

17 A right of set-off may arise by agreement (contractual set-off), by law (legal set-off) or in equity (equitable set-off).

18 The normal rules of set-off regarding mutuality, liquid debts and connected debts do not apply in the case of contractual set-off.

19 Section 97(3) of the BIA preserves set-off where two persons are both debtors and creditors of each other. See: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). The law with respect to the defences of legal set-off and equitable set-off is set out in *Abacus Cities Ltd. v. Aboussafy* (1981), 29 A.R. 607 (Alta. C.A.), applied in *Brattberg v. Royal Bank* (1987), 79 A.R. 166 (Alta. C.A.) leave to appeal refused (1987), 82 A.R. 392 (note) (S.C.C.) and in *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.).

20 *Abacus Cities Ltd. v. Aboussafy, supra*, held at page 618 that legal set-off applies to "*liquidated claims, although those claims may be unrelated.*"

21 It should be noted that Brunswick and DaimlerChrysler continued to operate pursuant to the terms and conditions of the Sales and Service Agreement during the time line from February 26, 2004, the date Brunswick filed its Notice of Intention To Make a Proposal, and July 8, 2004, the date of Brunswick's bankruptcy.

22 Unlike equitable set-off, for legal set-off there is no necessity for the debts to be connected in any manner.

23 An assignment in bankruptcy does not destroy "*mutuality*", in the case of an assignment mutuality is preserved by Section 97(3) of the BIA. See: *Allan Realty of Guelph Ltd., Re* (1979), 29 C.B.R. (N.S.) 229 (Ont. Bktcy.).

24 For set-off, there need only be mutual debts; it is immaterial that one of the debts was not actually payable at the date of bankruptcy. See: *Coopers & Lybrand Ltd. v. Lumberland Building Materials Ltd.* (1983), 50 C.B.R. (N.S.) 150 (B.C. S.C.).

25 Counsel for the Trustee argues that the refusal of DaimlerChrysler to pay the Trustee its obligations to Brunswick from February 26, 2004 to July 7, 2004 constitutes a preference in favour of DaimlerChrysler over all other unsecured creditors of Brunswick.

26 In *Bankruptcy and Insolvency Law of Canada* (Houlden and Morawetz, Looseleaf 2004-Release 5), the authors state at E20:

> It is customary in a proposal to provide that creditors dealing with the debtor after the filing of a notice of intention or a proposal shall have no right of set-off. This is done to prevent creditors from purchasing goods from the debtor and claiming a right of set-off against the amount owing to them by the debtor. Even if such a term is not contained in a proposal, it would appear that there is no right of set-off, since if such a set-off were allowed, it would be a fraud on the bankruptcy law. In *Re Coburn Felt Hat Co.* (1925), 5 C.B.R. 622 (Ont. S.C.) after the making of a proposal, an unsecured creditor purchased goods from the debtor for which he did not pay. The proposal went into default, and the debtor went into bankruptcy. The trustee applied to the creditor for payment; the creditor asserted a right of set-off. It was held that the creditor had no such right. Fisher J. said "it is of the essence of the compositions that they should be carried out in the utmost good faith, that all creditors shall be treated equally and there shall be no secret agreement or transactions whereby one creditor shall have or obtain or be given any undue advantage over other creditors.

27 I am of the view that the *Coburn* case is a classic example of a preference situation which ought to be clearly disallowed. In the case of Brunswick, in the event unsecured creditors bought motor vehicles from Brunswick after Brunswick had filed its Notice of Intention To Make a Proposal and then did not completely pay or only partially paid for those vehicles on the basis of alleged set-off, those transactions would be obvious incidents of fraudulent preferences and ought to be disallowed. Such creditors would not be acting in good faith and would not be acting in the normal course of business. That type of transaction is the mischief the legislation specifically is legislating against by referencing frauds or fraudulent preferences in the provisions of Section 97(3) of the BIA.

28 However, in the case of Brunswick and DaimlerChrysler, they were operating in the ordinary course of business in accordance with the terms of a Sales and Service Agreement which had been in place for several years prior to the filing of Brunswick of its Notice of Intention To Make a Proposal. The set-off provision was part of that agreement. In his affidavit deposed to on July 21, 2004, Daniel Hourde, the Manager of Billing and Credits for DamilerChrysler stated:

> Normally any amounts owed to Brunswick Chrysler Plymouth Ltd. by DaimlerChrysler Canada Inc. is set off against purchases (parts or services) made by Brunswick Chrysler Plymouth Ltd.

29 I am satisfied on the evidence before me that this was done in the ordinary course of business pursuant to the Sales and Service Agreement which continued in full force and effect in the period between the date Brunswick filed its Notice of Intention To Make a Proposal and February 26, 2004 and the date of its bankruptcy, July 8, 2004.

30 In its brief, DaimlerChrysler stated that it had ascertained that Brunswick did warranty work for DaimlerChrysler for an amount of $40,315.31 in June 2004 and $11,815.14 in July up to the date of bankruptcy. The June work would normally have been paid by July 20, 2004 and the July work by August 20, 2004.

31 In other words, the warranty work is not something initiated by DaimlerChrysler to try to trigger an off-set or reduce the debt owing to it by Brunswick. The warranty work would have been initiated by bone fide third party customers of Brunswick in the ordinary course of business. In my opinion, this is quite different from the situation where a creditor proactively attempts to off-set by purchasing a product or service from an insolvent person or company to try to in effect

better that creditor's position and take advantage of the insolvent person's situation. Such is not the case in the fact situation on this motion.

32 Parliament has explicitly recognized the right of set-off in Section 97(3) of the BIA unless it is fraudulent or a fraudulent preference. Although a person who is both a creditor and a debtor of a bankrupt and has a right of set-off may be in a better position in the bankruptcy than without the right of set-off, that is a consequence of set-off which is recognized by the BIA. As stated in *Husky Oil, supra*, Parliament has blessed the reordering of a creditor's priority in bankruptcy who has a right to set-off pursuant to the operation of the law of set-off.

33 *Husky Oil Operations Ltd., supra* recognizes that a person who has a right of set-off against a bankrupt does get a leg up over other unsecured creditors, ¶57-61. After discussing the opposing legal debates about whether this should be so the Court says, ¶ 60:

> While this academic debate is undoubtedly interesting, the fact remains that our Parliament has recognized in s. 97(3) of the Bankruptcy Act that the "law of set-off applies to all claims made against the estate of the bankrupt". As a result, in the bankruptcy context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Consequently, in this limited sense the party claiming set-off has Parliament's blessing for the "reordering" of his priority in bankruptcy by the virtue of the operation of the law of set-off.

34 In the *2004 Annotated Bankruptcy and Insolvency Act*, the authors Lloyd W. Houlden and Geoffry B. Morawetz write at F§109:

> A bankrupt's estate includes only the net amount of a debt owing to the bankrupt after proper allowances for the recognized common law right of set-off: *Husky Oil Operations Ltd. v. Minister of National Revenue* (1993), 22 C.B.R. (3d) 153, 116 Sask. R. 46, [1994] 1 W.W.R. 629; affirmed [1995] 10 W.W.R. 161, 128 D.L.R. (4th) 1 (S.C.C.).
>
> The object of set-off is to avoid the perceived injustice to a man who has had mutual dealings with a bankrupt of having to pay in full what he owes to the bankrupt while having to rest content with a dividend on what the bankrupt owes him. At the same time the effect of the set-off is to prefer one creditor over the general body of creditors, and accordingly, it is confined within narrow limits. The principal limiting requirement is that of mutuality. If there is no mutuality there is no set-off. The requirement of mutuality is central to bankruptcy set-off and is rigorously enforced: *Re Bank of Credit and Commerce International S.A. (No. 8)*, [1996] 2 W.L.R. 631.

35 "*Mutual*" means debts owing by the parties to each other.

36 In *D'Auteuil, Re*, 1999 CarswellQue 1170 (Que. C.A.), the debtor owed $165,583 to a creditor. The creditor filed a Notice of Intention To Make a Proposal. Following the filing of the Notice of Intention, the debtor did warranty work for the creditor for an amount of $14,000.00. The proposal was subsequently rejected and the creditor sought to set-off the $14,000.00 from the $165,583.00 owed by the debtor. The trustee opposed the set-off arguing that such a set-off would constitute a preference. The Quebec Court of Appeal held that legal set-off applied between a debtor when debts exist and are mutual at the time of bankruptcy. Set-off will apply to debts and obligations which arose in the pre-filing and post-filing period.

37 In *The Law of Set-Off in Canada*, the author, Kelly R. Palmer, writes at page 264:

> Once an agreement to set-off has been reached, it has a great deal of staying power under Canadian law. Such agreements will survive the passage into receivership, bankruptcy, and winding up, although the provisions regarding fraudulent preferences will undoubtedly apply to such agreements.

38 On the fraudulent preference issue, it should be noted that Brunswick entered into a Sales and Service Agreement with Chrysler Canada Ltd. (now DaimlerChrysler) on May 6, 1998. It was revised effective March 1, 2001 and the revised agreement contains the following set-off provision in Section 21:

SET-OFF

DAIMLERCHRYSLER may apply in set-off against any amount owed by DEALER to DAIMLERCHRYSLER or to any of DAIMLERCHRYSLER'S affiliates any amount owing to DEALER (or any assignee of DEALER) by DAIMLERCHRYSLER or any of its affiliates.

Any assignment by DEALER of its right to any amounts owed to DEALER by DAIMLERCHRYSLER or any of its affiliates shall be subject to DAIMLERCHRYSLER'S rights of set-off referred to above whether or not any of the amounts owing by DEALER to DAIMLERCHRYSLER or any of its affiliates or owing by DAIMLERCHRYSLER or any of its affiliates to DEALER (or its assignee as a result of such assignment) which may be the subject of such set-off rights arose or became due or owing before or after such assignment or notification of such assignment to DAIMLERCHRYSLER. DEALER shall not assign to any third party its rights to any amounts owed to DEALER by DAIMLERCHRYSLER or any of its affiliates, unless, prior to executing such an assignment, DEALER notifies such third party of DAIMLERCHRYSLER'S set-off rights provided for herein and obtains from such third party, and delivers to DAIMLERCHRYSLER, an acknowledgment by such third party of such set-off rights.

39 Thus, paragraph 21 of the DaimlerChrysler Sales and Service Agreement, a copy of which was provided to Brunswick by courier letter dated January 16, 2001, contains a clear right of set-off which is contractual in nature. Although there was no right of set-off contained in the original Sales and Service Agreement dated May 6, 1998 between Brunswick as dealer and Chrysler Canada Ltd., the original agreement contained an express reservation and right to Chrysler Canada Ltd. to amend the original agreement to the extent "*Chrysler Canada deemed advisable*."

40 Accordingly, there had been contractual set-off in effect between Brunswick and DaimlerChrysler for several years prior to Brunswick's Bankruptcy. In other words, contractual set-off was not put in place on the eve of insolvency which might raise preference issues.

41 Provided the set-off of accounts does not constitute a fraudulent preference and there is no fraud, the ordinary law applicable to set-off will apply. See: Houlden and Morawetz *Bankruptcy and Insolvency Law of Canada* at F§109, Volume 2 (Looseleaf) at 4-98.

42 A valid set-off will inevitably affect and alter the priorities in a bankruptcy but that is what the BIA contemplates. The right of set-off in this case arises in the ordinary course of business, dealings between DaimlerChrysler and its dealer, Brunswick, pursuant to the Sales and Service Agreement which was in effect for a considerable period of time prior to Brunswick's Bankruptcy and which agreement contains a specific set-off provision. As mentioned, it was not put in place on the eve of Brunswick's insolvency. The right of set-off is clearly preserved in Section 97(3) of the BIA. In my opinion, a valid right of set-off that arises in the ordinary course of dealings between parties does not give rise to a preference that can be set aside under the BIA.

43 In *The Law of Set-Off In Canada*, *supra*, the author writes at page 263:

> Contractual set-off is, not surprisingly, more a matter of contract law than a separate application of set-off. Consequently, the normal rules of set-off regarding mutuality, liquid debts and connected debts do not apply: within the bounds of legality and public policy, parties are free to contract whatever result they wish. Accordingly, agreements to set-off which would, aside from the agreement, not be granted relief due to the absence of the requirements of set-off, will be upheld. This allows contractual set-off to be seen as a "substantive defence; not a mere procedural shield."

44 The author goes on to state at page 264 that the evidence required to find an agreement to set-off is "*slighter*" than what may be required in other cases and refers to cases where an agreement to set-off has been inferred.

45 However, in the case of the set-off rights of DamilerChrysler with respect to the debts and obligations of Brunswick, it does not have to be inferred, it has clearly been reduced to writing and forms part of the Sales and Service Agreement.

46 Counsel for the Trustee concedes that DaimlerChrysler has a right of set-off for pre-filing debts and that there was contractual set-off prior to February 26th, 2004. However, he says there were not mutual debts owing as between Brunswick

and DaimlerChrysler as of the date of the Notice of Intention to Make a Proposal. However, it should be noted that the Sales and Service Agreement between DaimlerChrysler and Brunswick would have remained in full force and effect between the date of filing the Notice of Intention to Make a Proposal and the date of bankruptcy. Counsel for the Trustee asserts that the contractual right of set-off is now extinguished and DaimlerChrysler is left only with an argument for legal and/or equitable set-off. I disagree. As stated by Palmer in *Law of Set-Off in Canada*, contractual set-off survives a bankruptcy.

47 In *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, 2003 CarswellOnt 4016 (Ont. S.C.J. [Commercial List]), Justice Farley comments on the requirements for legal set-off at ¶ 13:

> 13 The requirements for legal set-off were stated in *Citibank Canada v. Confederation Life Insurance Co.* (1996), 42 C.B.R. (3d) 288 (Ont.Gen.Div.) at p. 298, affirmed (1998), 37 O.R. (3d) 226 (Ont.C.A.).
>
> For set-off at law to occur, the following circumstances must arise:
>
> > 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
> >
> > 2. Both debts must be mutual cross-obligations, i.e. cross-claims between the <u>same parties</u> and in the same right.
>
> (emphasis added)

48 Justice Farley then discusses the situation when a bankruptcy occurs at ¶ 14 and 15;

> 14 In a bankruptcy, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. When a bankruptcy occurs, there is a new estate created: there is the estate of the debtor under the direction and control of the debtor before the bankruptcy which is a different estate than the one post-bankruptcy where there is an estate of the bankrupt under the direction and control of the trustee in bankruptcy. Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. See *S. Piscione & Sons Ltd., Re*, [1965] 1 O.R. 515 (Ont.S.C.); *Reid, Re* (1964), 7 C.B.R. (N.S.) 54 (Ont. Bktcy.); *First Canadian Land Corp. (Trustee of) v. First Canadian Plaza Ltd.* (1991), 6 C.B.R. (3d) 308 (B.C. S.C.).
>
> 15 In *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.), at pp. 24-5, Gonthier, J. for the majority observed:
>
> > ... for a particularly thorough and helpful discussion of the issues relating to set-off in bankruptcy and insolvency, see Kelly Ross Palmer, *The Law of Set-off in Canada* (Aurora, Ont. - Canada Law Book, 1993), at pp. 157-223.
>
> At p. 186, Palmer notes:
>
> > This case, as in receivership is fairly straight forward. The assignment of the bankrupt's property to the trustee results in a change of mutuality. Accordingly, any claim which arises after the assignment will be between the claimant and the trustee and not the claimant and the bankrupt. Mutual debts will not be present and set-off not allowed.

49 However, in the case at bar we are not dealing with a situation where a creditor incurred post-bankruptcy obligations to a Trustee in bankruptcy and is trying to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. All of the debts, obligations and credits involved between Brunswick and

DaimlerChrysler took place and were incurred prior to Brunswick's bankruptcy which occurred on July 8, 2004. I am satisfied, the Bankruptcy of Brunswick resulted in the ability of DaimlerChrysler to exercise the right of set-off against Brunswick pursuant to Section 97(3) of the BIA.

50 In the present case, the obligations existing between Brunswick and DaimlerChrysler are debts for liquidated sums or money demands which can be ascertained with certainty and both debts are mutual cross-obligations that is cross claims between the same parties and in the same right, namely pursuant to the Sales and Service Agreement.

51 In my opinion, the return of the tires was in the ordinary course of business pursuant to the Sales and Service Agreement and although the set-off ought not to have taken place during the stay period, it is now validated by Section 97(3) as a consequence of Brunswick's bankruptcy.

52 There is one transaction with respect to a $6,000.00 deposit paid by Brunswick to DaimlerChrysler after Brunswick filed its Notice of Intention to Make a Proposal which is problematic and in my opinion would constitute a preference being out of the normal course of business. After February 26, 2004, Brunswick purchased parts from DaimlerChrysler on a C.O.D. basis. Regardless of the C.O.D. process, Brunswick was also required to give a deposit to DaimlerChrysler in the amount of $6,000.00, which it did by way of a certified cheque. DaimlerChrysler has not returned the cheque although requested to do so by the Trustee. The cheque has not been cashed.

53 Counsel for DaimlerChrysler argues that the $6,000.00 deposit should be considered a form of security. He characterizes it as a form of pledge.

54 The $6,000.00 deposit was by way of a certified cheque payable to DaimlerChrysler and was dated March 16, 2004.

55 Counsel for DaimlerChrysler cites the decision of our Court of Appeal in *Century Steel & Boiler Ltd., Re*, 1981 CarswellNB 62 (N.B. C.A.) where a tenant made a voluntary assignment in bankruptcy in July of 1979. The landlord held a security deposit which the tenant delivered to it when the lease was signed in December of 1977. On the occurrence of the bankruptcy, the landlord applied the security deposit to reduce its preferred claim against the bankrupt tenant's estate.

56 The trustee in *Century Steel & Boiler Ltd.* disallowed the landlord's preferred claim to the extent of the $1,900.00 deposit. In disallowing the landlord's claim, the trustee stated that the landlord had the option of either accepting the $1,900.00 deposit in lieu of all other damages sustained or returning the security deposit and presenting a claim for the full amount of the loss or damage suffered by the landlord as a result of the breach by the tenant.

57 The motions judge concluded that the security deposit had to be deducted from the landlord's preferred claim.

58 The Court of Appeal concluded that the landlord held a pledge of the security deposit or had a charge against the deposit and as such was a secured creditor to the extent of the $1,900.00 deposit. As a secured creditor, the Court held it was legally entitled to apply the deposit to compensate itself for the loss or damage the landlord had sustained from the breach by the tenant of its covenant to pay the taxes assessed against the property.

59 In my opinion, the facts of *Century Steel & Boiler Ltd.* can be readily distinguished from those in the case at bar. The security deposit in *Century Steel & Boiler Ltd.* had been paid by the tenant to the landlord at the time the lease was entered into, over a year and a half prior to the bankruptcy of the tenant.

60 In Houlden and Morawetz *Bankruptcy and Insolvency Law of Canada* (Looseleaf, Third Edition, Revised Volume 2) at page 4-98, the authors write:

> If a creditor, such as a customs broker, was holding a deposit from the debtor as security for payment of its account, and when bankruptcy occurred, the creditor set off the deposit against the amount owing to it, there might be a fraudulent preference resulting form the set-off. But apart from an unusual situation such as this, it is difficult to see how the set-off of accounts at the date of bankruptcy could constitute a fraudulent preference.

61 In my opinion, the $6,000.00 deposit issued by Brunswick to DaimlerChrysler by certified cheque dated March 16,

2004 cannot be used by DaimlerChrysler as security or as a pledge or by way of set-off. Brunswick was paying for parts and inventory on a C.O.D. basis after February 26, 2004.

62 In the case of Brunswick's security deposit of $6,000.00 to DaimlerChrysler, it was made at a time when Brunswick was clearly insolvent, almost one month after Brunswick filed its Notice of Intention to Make a Proposal. In my opinion, it would be considered to be a preference for the purposes of Section 97(3) of the BIA and can not be used as a set-off. The $6,000.00 certified cheque must accordingly be returned by DaimlerChrysler to the Trustee.

Conclusion and Disposition

63 For these reasons, with the exception of the $6,000.00 certified cheque, I conclude that DaimlerChrysler's right of set-off is confirmed and preserved by Section 97(3) of the BIA and that DaimlerChrysler is accordingly entitled to set-off its post February 26, 2004 obligations to Brunswick against the pre February 26, 2004 indebtedness of Brunswick to DaimlerChrysler.

Application allowed in part.

TAB 5

2009 ABQB 397
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 2517, 2009 ABQB 397, 179 A.C.W.S. (3d) 1028, 479 A.R. 299

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended And in the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

Romaine J

Judgment: June 30, 2009
Docket: Calgary 0801 08510

Counsel: A. Robert Anderson, Q.C., Thomas D. Gelbman and Benjamin D. Pullen, Oster, Hoskin & Harcourt LLP, for the Applicant SemCAMS Douglas Nishimura, Trevor A. Batty and David A. De Groot, Burnet Duckworth & Palmer LLP, for the Respondent Trilogy Josef A. Kruger, Borden Ladner Gervais LLP, for the Monitor, Ernest & Young Inc. Ashley Taylor, Stikeman Elliott LLP, for Bank of America

B.E. ROMAINE:

Reasons for Decision

Introduction

1 This is an application by SemCAMS ULC ("SemCAMS") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). SemCAMS brings its application in respect of a purported set-off made by Trilogy Energy LP ("Trilogy") against SemCAMS for amounts owing for raw natural gas sold by Trilogy to SemCAMS. At issue is whether Trilogy is entitled to set-off.

Relevant Facts

2 As I noted in my Reasons for Judgment in *Re SemCanada Crude Company*, [2009] A.J. No. 450, 2009 ABQB 252, SemCAMS and SemCanada Crude Company were granted initial orders pursuant to the CCAA on July 22, 2008. Subsequent bankruptcy proceedings of other affiliated companies were procedurally consolidated with proceedings under the CCAA on July 30, 2008.

3 SemCAMS is the operator of four natural gas processing plants and natural gas gathering systems and pipelines in Alberta. The four plants are known as the Kaybob South Amalgamated Plant Nos. 1 and 2 (the "KA Plant"), Kaybob South No. 3 Gas Plant (the "K3 Plant"), the West Whitecourt Gas Plant (the "WWC Plant") and the West Fox Creek Plant (the "WFC Plant"). These Plants, together with associated pipelines and gathering systems, are referred to as "Facilities"; each individually is referred to as a "Facility".

4 Trilogy is an oil and natural gas producer with properties located in the Kaybob and Grande Prairie areas of Alberta. Trilogy is a limited partnership. Its general partner is Trilogy Energy Ltd. and its limited partner is Trilogy Holding Trust. Both Trilogy Energy Ltd. and Trilogy Holding Trust are wholly owned by Trilogy Energy Trust.

5 Each Facility (other than four noted later in these reasons) is owned by various co-owners (the "Joint Owners"), each of whom owns an undivided percentage of the Facility. SemCAMS has an ownership interest (to varying degrees) in each Facility. SemCAMS also acts as the operator (and is referred to herein in such capacity as the "Operator") of each Facility pursuant to construction, ownership and operation agreements (the "CO&O Agreements"). Under the CO&O Agreements, SemCAMS as Operator maintains the Facilities and gathers and processes natural gas on behalf of the Joint Owners. Each Joint Owner is entitled to utilize a share of the throughput capacity of a Facility in proportion to its ownership interest. Any excess capacity in a Facility is allocated first to Joint Owners (then referred to as "Owners in Excess") and then used to process natural gas owned by third parties for a fee. Both capital fees and operating expenses are collected under the Gas Processing Agreement for the Joint Account for the benefit of Joint Owners.

6 Four of the Facilities are entirely owned or leased by SemCAMS and there are no CO&O Agreements associated with those Facilities. Trilogy owes $68,404.46 (approximately 1.3% of the total Trilogy indebtedness at issue in this application) with respect to these Facilities. SemCAMS concedes that Trilogy is entitled to set-off against this indebtedness, without conceding that Trilogy may be allowed to set-off further indebtedness relating to these four Facilities.

7 SemCAMS as Operator under 24 CO&O Agreements gathers and processes raw natural gas for Trilogy as a third party at 17 of the Facilities pursuant to various agreements (the "Gas Processing Agreements"). In addition, Trilogy is a Joint Owner in three of the pipeline Facilities and its raw natural gas is processed at those Facilities pursuant to the CO&O Agreements for those Facilities. In aggregate, Trilogy owes approximately $5.3 million plus interest to SemCAMS as Operator for services provided under these Agreements at all the Facilities.

8 Each Facility has a separate Joint Account which the Operator administers. The Joint Account is a separate accounting that is managed by the Operator on a Facility by Facility basis for the purpose of tracking the collections and distribution of funds among Joint Owners, third party users of the Facility and service providers to the Facility. Administering the Joint Account includes tracking all revenues and expenses for the Joint Account and the Operator is continuously debiting and crediting the Joint Account as transactions occur in respect of each Facility.

9 As part of the proceedings under the CCAA, I granted a "Joint Account Order" on October 8th, 2008 which allowed SemCAMS as Operator authority to pay out of cash flow its obligations relating to the Joint Account of each of its Facilities. In short, the Order allows SemCAMS as Operator to make payments for the benefit of the Joint Accounts that would otherwise have been stayed under the CCAA. SemCAMS submits that this Order recognizes the unique status of the Joint Accounts and the role of the Operator.

10 The details of the monthly accounting entries and adjustments that must be made for each Facility under the CO&O Agreements and the Gas Processing Agreements are set out later in these reasons.

11 In April 2008, Trilogy sold raw natural gas to SemCAMS in its own corporate capacity as buyer pursuant to an agreement called the "Inlet Purchase Agreement". Under the Inlet Purchase Agreement, ownership of the natural gas transferred to SemCAMS, rather than remaining with Trilogy as would have been the case under either a CO&O Agreement or a Gas Processing Agreement. Trilogy had been warned by SemCAMS, as Operator at the KA Plant, that excess capacity was diminishing. Trilogy entered into the Inlet Purchase Agreement to ensure that its natural gas would be processed in priority to other third parties and to other Joint Owners, rather than taking the risk that the entire throughput capacity of the Facility in question would be used by the Joint Owners. Certain amounts (approximately $4.1 million as of the filing date under the CCAA) are owing from SemCAMS to Trilogy in respect of this sale.

Issues

12 The issues in the application are whether there is a trust relationship between the Operator and the Joint Owners under the CO&O Agreements, and whether Trilogy is entitled to assert contractual, legal or equitable set-off.

Analysis

13 Trilogy has purported to exercise set-off by withholding amounts due to SemCAMS *qua* Operator under the CO&O Agreements and Gas Processing Agreements against amounts owing by SemCAMS *qua* purchaser for the purchase of natural gas under the Inlet Purchase Agreement.

14 Trilogy's purported set-off includes claims arising under three types of agreements:

a) the three Trilogy CO&O Agreements relating to the Facilities in which Trilogy is a Joint Owner;

b) the 24 Gas Processing Agreements entered into between Trilogy and SemCAMS as Operator relating to Facilities in which Trilogy is not a Joint Owner; and,

c) the Inlet Purchase Agreement.

The Trilogy CO&O Agreements

15 Under the Trilogy CO&O Agreements, whether as Joint Owner or Owner in Excess, Trilogy retains title to its natural gas at all times. SemCAMS as Operator processes Trilogy's gas on Trilogy's behalf. Once the natural gas is gathered or processed through a Facility, Trilogy takes the natural gas for its own use.

1 The Operator invoices Trilogy (as Joint Owner) for the following at each Facility in a given month:

(a) a proportionate share of operating expenses calculated on the basis of Trilogy's recent historical average throughput; and

(b) a proportionate share of capital expenditures incurred by the Joint Owners.

2 In a month where Trilogy is an Owner in Excess, the Operator would also invoice Trilogy for the following at each Facility:

(a) Trilogy's share of operating expenses incurred on behalf of Joint Owners during the month based on Trilogy's share of volume processed through the Facility; and

(b) capital fees based on throughput and gas composition as set out in the CO&O Agreement for the particular Facility.

3 Once a year, these estimated amounts invoiced will be adjusted to reflect actual throughput and composition. The Joint Owners and third party users that have underpaid at a given Facility or who have been allocated excess product (the "Equalization Payors") are invoiced for the amount they underpaid. The invoiced amount is paid to the Operator of such Facility for the sole purpose of redistribution, on a *pro rata* basis, to the Joint Owners and third parties that have overpaid at such Facility or who were under-allocated product (the "Equalization Recipients"). These payments in their totality are referred to as equalization payments ("Equalization Payments").

4 The payments made to Equalization Recipients are funded by the Equalization Payors at the applicable Facility. The Operator acts as a conduit for the redistribution of the funds, and pays out funds when sufficient Equalization Payments are received from Equalization Payors to justify distribution. The payment of Equalization Payments to Equalization Recipients is conditional upon these funds being received by the Operator from Equalization Payors.

5 All amounts owed by Trilogy pursuant to the Trilogy CO&O Agreements are to be paid to the Operator for the Joint Account, and the Operator acts as a conduit to facilitate payments.

6 In a given month, Trilogy (as a Joint Owner) may be entitled to credits from the Operator on account of operating expenses and capital fees invoiced to third party users for the previous month's throughput. Trilogy may also be entitled to credits for the sale of certain products, such as sulphur, sold by the Operator to third parties on behalf of the Joint Owners. Once a year Trilogy may also be entitled to receive an Equalization Payment following the calculation of the thirteenth month adjustment. Where funds are actually collected by the Operator for and on behalf of Trilogy, such funds are held in trust until paid to Trilogy.

The Gas Processing Agreements

16 Under these Agreements, Trilogy as a third party user retains title to its natural gas at all times. It has a lower priority of processing than an Joint Owner and can be shut out of a Facility if the Joint Owners use all of their capacity in a given month.

7 SemCAMS as Operator collects operating expenses from third party users based on throughput for the processing of natural gas for and on behalf of the Joint Owners. The Operator also collects capital fees from third party users based on rates that are set out in the CO&O Agreement for the applicable Facility or as approved by Joint Owners.

8 As a third party user, Trilogy is required to pay to the Operator the following charges in respect of each Facility at which it processes gas in a given month:

(a) the operating expenses incurred by the Joint Owners in proportion to Trilogy's proportionate share of total throughput for the Facility during the prior month; and

(b) capital fees based on throughput and composition of the natural gas processed on Trilogy's behalf during the prior month.

9 Once a year, the Operator may also invoice Trilogy to reflect Equalization adjustments.

10 When third party users are invoiced, Joint Owners are credited their proportionate share of the capital fees. At the same time, Joint Owners are also credited for their proportionate share of the operating expenses charged to third party users (for which Joint Owners were invoiced in the previous month). Both operating expenses and capital fees collected are for the Joint Account.

11 In a given month, Trilogy may also be entitled to credits from the Operator on account of the sale of certain products, such as sulphur, that the Operator sells to third parties on behalf of third party users. Moreover, once a year Trilogy may also be entitled to a credit to reflect the thirteenth month adjustment calculations, if it has overpaid throughout the year, or was under-allocated product. All funds owing to Trilogy as a third party user are debited from the Joint Account.

The Inlet Purchase Agreement

17 Pursuant to the Inlet Purchase Agreement, SemCAMS *qua* Purchaser purchased raw natural gas from Trilogy, taking title, at all inlets to the KA Plant. The Agreement provides specifically that SemCAMS will be using its Working Interest Owner capacity and priority to process this gas.

12 Trilogy does not retain title to the gas. It is processed and then sold by SemCAMS to third party purchasers. The sales price includes a premium. Capital fees and operating expenses are deducted, giving rise to one monthly payment by SemCAMS to Trilogy.

Trust Relationship

18 SemCAMS submits that the CO&O Agreements create a trust relationship between it as Operator and the Joint Owners. SemCAMS takes the position, consistent with industry practice and norms, that any funds it collects, either from Joint

Owners or from third parties, is held in trust in the Joint Account for the particular Facility.

19 SemCAMS relies on the leading Alberta case that applies the established tests for the existence of a trust to the relationship between an Operator and Joint Owners, *Bank of Nova Scotia v. Société Générale* (Canada) (1988), 87 A.R. 133 (C.A.), (commonly referred to as " *Sorrel*") at paras. 19-20.

13 The central issue in *Sorrel* was whether the 1981 Canadian Association of Petroleum Landmen Operating Procedure evinced an intention to create a trust relationship among the operator and the joint owners. In concluding that a trust relationship existed, the Court first identified the subject-matter of the trust as monies held by the operator and the object as the joint owners. Second, the Court examined the entire agreement as a whole and found certain characteristics that demonstrated an intention to create a trust relationship. As characteristics of a trust relationship "pervaded" the agreement, certainty of intention to form a trust was found to exist notwithstanding the absence of an express trust provision.

14 The indicia that demonstrated an intention to create a trust in *Sorrel* included the following (at paras. 10, 11, 13 and 17):

(a) the express intention that the operator acted for the benefit of the joint owners;

(b) the operator was vested with wide powers to act for and on behalf of the joint owners in the management and control of the jointly owned properties;

(c) the operator's authority over funds was restricted to purposes of the agreement that governed the relationship among the operator and joint owners;

(d) the funds handled by the operator could not be used for its own use, but only for the benefit of the joint owners; and

(e) each joint owner owned its proportionate share of the resources produced from the well operated for the joint account.

15 The Court in *Sorrel* also noted that the ability to commingle funds would not necessarily negate a trust relationship: para 10 & 13. Thus, Trilogy's submission that, while SemCAMS maintains a "separate accounting record" for each Facility, this is not actually a separate account, does not necessarily determine the issue of whether the CO&C Agreement creates a trust relationship. As noted by Slatter, J.A. in *Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd.*, 2009 ABCA 99, at para. 11. "(w)hether commingled or not, the trustee may only expend trust funds on purposes authorized by the trust".

20 In Brookfield, Berger, J.A. (in dissent on other issues) commented at para. 27 that "(i)t is trite law that an operator is in a fiduciary position with respect to receipts and revenues held on behalf of non-operators."

21 Nine of the CO&O Agreements contain express trust conditions. There is no difficulty in finding that they create a trust and that SemCAMS as Operator is in a fiduciary position with respect to the Joint Owners. The remaining seven CO&O Agreements do not contain the same express trust provisions, but I am satisfied that the characteristics of a trust relationship pervade all of the agreements. It is not necessary that I determine with finality whether these seven CO&O Agreements create a trust relationship, since I am satisfied that they all create a relationship in which the funds collected by the Operator are collected for the Joint Account on behalf of and for the benefit of the Joint Owners of the Facility. This includes, specifically, the three CO&O Agreements to which Trilogy is a party.

Contractual Set-Off

22 None of the Gas Processing Agreements or the Trilogy CO&O Agreements provide Trilogy with a right of set-off, expressly or implicitly, although some of the Gas Processing Agreements provide SemCAMS as Operator with a non-reciprocal set-off right with respect to any other agreement between the Operator and Trilogy as producer. All of these agreements contain "entire agreement" clauses which preclude any express or implied covenant not included within these agreements.

23 The Inlet Purchase Agreement, through a standard commodity purchase agreement attachment incorporated by reference, provides as follows:

> 10.4.b The Non-Defaulting Party shall net or aggregate, as appropriate, all: (i) Termination Payments; (ii) Costs; and (iii) Unpaid Amounts, to a single liquidated amount payable by one party to the other party (the single resulting amount being the "Net Settlement Amount").
>
> 10.4c At its sole option and without Notice to the Defaulting Party, the Non-Defaulting Party may net or setoff against any Net Settlement Amount owing by the Non-Defaulting Party to the Defaulting Party any amounts owing to the Non-Defaulting Party by the Defaulting Party *under any other agreement between the parties* (the single resulting amount being the "Final Liquidation Amount"). (emphasis added.)

24 Trilogy submits that it is clear from this language and the surrounding circumstances that it was intended that Trilogy would have the right to set-off amounts owing to SemCAMS under the Processing Agreements against amounts owing by SemCAMS to Trilogy under the Inlet Purchase Agreement. However, it is clear that SemCAMS was contracting in its own capacity as buyer of the gas under the Inlet Purchase Agreement, and was contracting as Operator of the Facilities in the Gas Processing Agreements. Trilogy submits that its relationship with SemCAMS in entering into the Gas Processing Agreements should not be defined or determined by terms of CO&O Agreements to which Trilogy was not a party, but this ignores the references in the Gas Processing Agreements to SemCAMS or its predecessor operators acting as "Operator for and on behalf of" or "as contract operator for and on behalf of" or "in its own right and also as contract operator for and on behalf of" the Joint Owners of the Facilities in question. In nearly every Processing Agreement, SemCAMS or its predecessors are defined after the recitals as "Operator" and that term is used in the balance of the Agreement.

25 Trilogy's argument also ignores the fact that part of the indebtedness sought to be set-off was incurred pursuant to CO&O Agreements with respect to Facilities in which Trilogy is itself a Joint Owner and through which it must be considered to be familiar with the role of the Operator *vis-a-vis* the other Joint Owners. Trilogy denies knowledge of SemCAMS capacity when acting as a Operator under CO&O Agreements to which it is not a party, but the deponent for Trilogy in the following exchange during cross-examination on his Affidavit made it clear that Trilogy's management understands the concept of operatorship:

Tabular or graphic material set at this point is not displayable.

26 For Trilogy to succeed on its argument that the set-off provision in the Inlet Purchase Agreement extends to the Gas Processing Agreements and the Trilogy CO&O Agreements, it would have to establish that the set-off language was broad enough to cover agreements in which SemCAMS was contracting as an Operator, or, at least, that sufficient ambiguity exists in the contract to make evidence of the surrounding circumstances or the intention of the parties a relevant consideration.

27 The Inlet Purchase Agreement read as a whole gives rise to no such ambiguity. SemCAMS as a party is contracting in its own capacity and not on behalf of Joint Owners of any of the Facilities, even the KA Plant to which the Inlet Purchase Agreement applies. In fact, the purpose of the Inlet Purchase Agreement is to avoid such an implication, which would defeat the purpose of giving Trilogy the ability to avoid the risk of being shut out of the KA Plant as a third party user inherent in the Gas Processing Agreements.

28 In conclusion on this issue, Trilogy is not entitled to assert a contractual right of set-off.

Legal Set-Off

29 Legal set-off requires liquidated debts that are mutual cross-obligations: *Canadian Imperial Bank of Commerce v. Tucker Industries Inc.* (1983), 149 D.L.R. (3d) 173 (B.C.C.A.) at para. 6, cited with approval in *Holt v. Telford*, [1987] 2 S.C.R. 193 (S.C.C.) at para. 25. Mutual cross-obligations are cross-claims between the same parties and in the same right: *Citibank Canada v. Confederation Life Insurance Co.* (1996), 1996 CarswellOnt 3219, 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at para. 35, affirmed (1998), 37 O.R. 226 (Ont. C.A.).

30 While the Trilogy indebtedness is liquidated debt, Trilogy cannot rely upon legal set-off as the SemCAMS indebtedness under the Inlet Purchase Agreement and the Trilogy indebtedness under the Trilogy CO&O Agreements and the Gas Processing Agreements are not between the same parties and not in the same right. Whether debts are in the same right depends upon whether the debtor and creditor are liable solely to each other or to each other jointly with third parties. The British Columbia Court of Appeal in *McMahon v. Canada Permanent Trust Co.* (1979), 32 C.B.R. (N.S.) 258 (B.C.C.A.) at para. 9 made the following comments on the subject of mutuality:

> ... A person in his individual capacity is not in the same right as he is when acting as trustee for another. *Hence, it is trite law that, subject to certain limited exceptions, an amount owed by a person in his capacity as trustee holding property, credits, or funds for another or others cannot combine them with, or set them off against, a personal debt owed to him in his personal capacity by the beneficiary or beneficiaries of the trust. See* Garnett v. McKewan(1872), *L.R. 8, Exch. 10. In such a case there is no mutuality as one account is held in a fiduciary capacity and the other in a personal capacity. The same situation arises where there is not a trust in the strict sense of the word, but one account is set up or exists for a "special purpose" which could be held to deprive it of "mutuality" with another account held with a different or no special purpose.* With respect to this concept, the following words of Lord Simon of Glaisdale in *National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd.*, [1972] 2 W.L.R. 455 (H.L.) at 466 are illuminating:
>
>> I would prefer to say that money is paid for a special (or specific) purpose so as to exclude mutuality of dealing within section 31 [of the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5), c.59] *if the money is paid in such circumstances that it would be a misappropriation to use it for any other purpose than that for which it is paid.* (emphasis added.)

31 Even if SemCAMS contracting as Operator was not acting as a trustee for the Joint Owners under the CO&O Agreements and the Gas Processing Agreements, it was at a minimum acting as administrator of an account set up for a special purpose. The Joint Owners would surely consider it a misappropriation if money designated for such account was used for the unauthorized purpose of setting-off SemCAMS' debt in its individual capacity.

32 Thus, whether or not SemCAMS when contracting as Operator was acting as a trustee or on behalf of a "special purpose" Joint Account, the debt owed by SemCAMS in its individual capacity under the Inlet Purchase Agreement cannot be set-off against the debt owed by Trilogy to SemCAMS as Operator under the Gas Processing Agreements or as Operator and Joint Owner under the Trilogy CO&O Agreements.

33 Trilogy submits, however, that its debt owing under the Gas Processing Agreements and the Trilogy CO&O Agreements can be set-off against SemCAMS' share of revenues in the Joint Accounts. It makes this argument on the basis of the proposition that if a party acts as an agent and debts arise between the third party and the principal, the third party is entitled to set-off the debts.

34 Trilogy relies on the case of *Royal Trust v. Holden* (1915), 8 W.W.R. 500 (B.C.C.A.). This was a matrimonial matter where a divorced husband attempted to set-off amounts owed to him by his ex-wife for amounts he was to pay to her under an agreement whereby he paid monthly maintenance payments for her benefit through a trustee. Two members of the British Columbia Appeal Court found for the husband, one on equitable grounds and the other on the basis that the question of a separate state did not really arise at all on the facts. Two other justices dissented, commenting that the maintenance payments were to be paid for a specific purpose and that mutual debts could not arise. As the Court was equally divided, the appeal by the ex-wife was dismissed. The case has been criticized as "not the strongest of decisions" (*The Law of Set-Off in Canada*, Aurora, Canada Law Book, 1993 at 232), and it is noteworthy that it involved a very simple trust with a single beneficiary. Other authority suggests that if a beneficiary's interest in a trust is not readily ascertainable, a set-off will not be allowed: *Middleton v. Pollock* (1875), L.R. 20 Eq. 29at p.34.

35 Trilogy submits that SemCAMS' share of the revenues of the Joint Accounts ought to be ascertainable. While certainly the entitlement of SemCAMS to its share of the revenues from the Facilities will ultimately be determined through the operation of the Joint Accounts, it is clear from the evidence that this accounting is complex and subject to year-end recalculation and adjustment. The interest of SemCAMS in the Joint Account of any specific Facility is not readily ascertainable, and would require accounting involving multiple Joint Owners. This complexity precludes the operation of

set-off in these circumstances.

36 Trilogy also submits that the evidence indicates that SemCAMS is being personally reimbursed for operating expenses when acting as Operator, and that therefore, Trilogy should be entitled at the least to set-off the roughly $3.5 million of debt attributable to operating expenses. Trilogy makes this argument based on certain ambiguous evidence of the president of SemCAMS when being cross-examined on his affidavits. This ambiguity was subsequently clarified in responses to undertakings and in the affidavit of the Controller of SemCAMS. It is clear that operating expenses are paid and recovered through the use of the Joint Account. Joint Owners are invoiced for total operating expenses for a given Facility in a given month, and third party users are not invoiced until the following month. Joint Owners are credited when third party users are invoiced. At this point, Joint Owners would be prejudiced by the potential of non-payment by third party users. Funds are typically received from third parties in the next month and are credited to the Joint Account.

37 In conclusion on this issue, Trilogy is not entitled to assert legal set-off.

Equitable Set-Off

38 The Supreme Court of Canada set out the principles applicable to equitable set-off in *Holt v. Telford*, [1987] 2 S.C.R. 193 at para. 33 as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063.
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim: *Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066.
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
>
> 5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.).

16 The Alberta Court of Appeal stated in *Re: Blue Range Resource Corp.* (2000), 261 A.R. 162, 84 Alta. L.R. (3d) 65, [2000] 11 W.W.R. 117 (Alta. C.A.) at para. 19 that "the important point for invoking equitable set-off is the close connection of the transactions."

39 The claims at issue in this application do not arise out of the same contract. According to the principles set out in *Telford*, this is not necessary. Equitable set-off does, however, require the cross-claims sought to be set-off by Trilogy to be so clearly connected with the claim of SemCAMS "that it would be manifestly unjust to allow [SemCAMS] to enforce payment without taking into consideration the cross-claim.": *Telford*, at para. 35. Wilson, J. for the Court in *Telford* commenting on the requirement of connection notes at para.27 that "an individual may set off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events". At para.34, she notes that "... cases involving debts that arise from the same contract or closely related contracts form an exception to the general rule". Thus, in *Telford*, even though there were two distinct mortgages, they were part of a single land exchange deal and were thus found to be sufficiently connected to meet the requirements for an equitable set-off. At para.39, Wilson, J. commented that "... [the mortgages] were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement."

40 With respect to the requirement of connection, the Court in *Telford* quotes Lord Denning in *Fed. Commerce and Navigation Co.*, *supra* at p.1078 as follows:

> But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the

same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

41 This, in this case, I must consider with respect to the requirement of connection whether the debts sought to be set-off arise from closely-related contracts or a closely-related series of events, from the same or a closely related transaction or from inter-related contracts.

42 The party asserting a claim of set-off, in this case Trilogy, has the burden of proof of establishing the close connection between the cross-claims and that it would be manifestly unjust not to allow set-off. The remedy is rooted in the need to achieve fairness between the parties: *Canada Trustco Mortgage Co. v. Sugarman* (1999), 179 D.L.R. (4th) 548 at para. 17.

43 Firstly, Trilogy submits that SemCAMS and Trilogy are parties to multiple, complex contracts relating to the processing of natural gas and that all the debts that arise under these various contracts are related. This founders on the fact that the contracts relate to 20 separate Facilities. The Joint Owners of the Facilities are not the same, even if SemCAMS acts as Operator for all of them.

44 There is no cross-accounting as between Facilities. There are 29 different contracts that were entered into over about ten years. The only relationship among the Trilogy CO&O Agreements and the Gas Processing Agreements is that all of these contracts relate to the gathering and processing of Trilogy's natural gas through various Facilities owned by different sets of Joint Owners, but all operated by SemCAMS.

45 By contrast, the Inlet Purchase Agreement is the only agreement of its kind among the others, not only because SemCAMS contracted as purchaser of the gas in its' own right, but because it is inconsistent with the pattern of contracting with an Operator for Joint Owners represented by the other contracts, and in fact was entered into deliberately to avoid that situation and its implications for security of access to processing capacity.

46 In addition, while mutuality is not required in equitable set-off, the lack of mutuality of parties distinguishes the Trilogy CO&O Agreements and the Gas Processing Agreements from the Inlet Purchase Agreement such that it cannot be said that all the debts are related.

47 Secondly, Trilogy submits that the Gas Processing Agreements and the Inlet Purchase Agreement are not distinct contractual obligations, because the Inlet Purchase Agreement incorporates and builds on certain previously existing Gas Processing Agreements. It derives this argument from the following reference in the Inlet Purchase Agreement:

> Processing Fees will be netted off, as follows:
>
> *Processing Fees*: Trilogy will be charged the same capital fees as set out in the executed processing agreements between SemCAMS ULC and Trilogy Energy L.P. listed below: [contracts listed].

17 However, this provision, read in the context of the agreement as a whole, merely references how the final price paid by SemCAMS for the natural gas it purchases in a given month is to be calculated, by deducting from the sales price certain amounts, including capital fees benchmarked to four previously executed Gas Processing Agreements and operating expenses attributable to the gas sold. There is no other reference to the Gas Processing Agreements in the Inlet Purchase Agreement and certainly nothing to suggest that any of them are incorporated into the Inlet Purchase Agreement. The Inlet Purchase Agreement is not a continuation of the Gas Processing Agreements. It is not contingent on them, and there are no cross-termination provisions.

48 Trilogy also notes that, although SemCAMS sold the gas after it was processed, the purchasers in most cases continued to be the purchasers Trilogy formerly sold to under the Gas Processing Agreements. This is true, and in fact, the Inlet Purchase Agreement provides that Trilogy will assign its existing sales contracts to SemCAMS, although it retains the right to approve new sales contracts that SemCAMS may enter into with third parties. This assignment emphasizes, rather than detracts from, the concept that SemCAMS, takes title to the gas, in contrast to the Gas Processing Agreements.

49 As noted previously, Trilogy entered into the Inlet Purchase Agreement to ensure a market for its gas by a method that was unavailable through the Gas Processing Agreements, under which it was vulnerable to being shut out of processing capacity. The Inlet Purchase Agreement thus replaced the previous Gas Processing Agreements with a different scheme that was more beneficial to Trilogy (and also to SemCAMS).

50 Trilogy submits that the Inlet Purchase Agreement contains a contractual right of set-off of fees that would otherwise have been charged under the Gas Processing Agreements. To characterize the netting provision in this way is misleading: it is in fact merely a reference to a benchmark for the purpose of a formulaic calculation of the sales price.

51 Trilogy also attempts to draw a connections between the Gas Processing Agreements and the Inlet Purchase Agreement by noting that they all relate to the processing and sale of the same natural gas, such that the result is essentially the same. This ignores the benefits that both parties derived under the Inlet Purchase Agreement that were not available under the previous Gas Processing Agreements at that Facility. The net result cannot be considered a manifestation of similarity when the purpose of the Inlet Purchase Agreement was to change how matters were conducted under the Gas Processing Agreements.

52 Thirdly, Trilogy comments that the only reason SemCAMS could enter into the Inlet Purchase Agreement was that it could take advantage of its position as a non-producing Operator with a substantial working interest in the Facilities. This is irrelevant to the question of connection.

53 Fourthly, Trilogy submits that it decided to enter into the Inlet Purchase Agreement because it thought it had the right of set-off to the Gas Processing Agreements. The intention of one party is irrelevant in the face of contractual language that does not give effect to this intention. The intention of Trilogy that there would be contractual set-off, if such intention existed, cannot show a connection among the agreements if it is not properly effected.

54 Fifthly, Trilogy submits that "having held itself out as an agent, it would be inequitable... to countenance SemCAMS strategy to retroactive (*sic*) bifurcate its debts into those *qua* Purchaser and those *qua* Operator with SemCAMS previously notifying Trilogy that this was occurring." This argument fails for a number of reasons. SemCAMS clearly contracted in its own capacity in the Inlet Purchase Agreement. Not only is that clear from the face of the contract, but the efficacy of the arrangement required it. Trilogy is not inexperienced in the gas processing field. Whether or not it considers an Operator a trustee, it understands the implications of that position. There is no evidence that it entered into the Inlet Purchase Agreement without understanding that this was an alternative to the previous Gas Processing Agreements.

55 In summary, the debts sought to be set-off do not arise from closely-related contracts. They do arise from a series of events that span approximately a decade, but do not arise from the same transaction. They involve a number of different Facilities and a number of different, albeit sometimes overlapping, Joint Owners. There can be said to be connection between the four Gas Processing Agreements relating to the KA Plant that were replaced by the Inlet Purchase Agreement (at least for the few months that the Inlet Purchase Agreement was operable), but the transactions were otherwise not connected except in the widest sense of all involving the gathering and processing of Trilogy's natural gas through Facilities operated by SemCAMS.

56 Considering all of these factors, I am not satisfied that Trilogy has established a sufficiently close connections among the debts to establish the right of equitable set-off. Even if it had, however, the debts owing by Trilogy to SemCAMS as Operator under the Trilogy CO&O Agreements and the Gas Processing Agreements must be so closely connected with the debt Trilogy owes SemCAMS under the Inlet Purchase Agreement that it would be manifestly unjust to allow SemCAMS to enforce payment without taking into account the cross-claims.

57 Given the differences in the contracts, both in purpose and in the contracting parties, it cannot be said that it would be manifestly unjust to Trilogy to enforce its indebtedness under the Inlet Purchase Agreement. The Inlet Purchase Agreement was a special-purpose contract, out of the pattern of previous contracts. In addition, the remedy of equitable set-off must not result in any form of inequity: *Canadian Trustco Mortgage Co. v. Sugarman*, *supra*, at para. 18.

58 SemCAMS submits that it would be inequitable to the Joint Owners who would be unjustly deprived of amounts rightfully owed to them if Trilogy's set-off claim is allowed. That would certainly be the case if equitable set-off was allowed

against SemCAMS in its capacity as Operator. Trilogy argues that there is no evidence that the Joint Owners would be prejudiced if Trilogy does not pay its indebtedness. The evidence of what may be the outcome of such a failure to pay must be found in the CO&O Agreements governing the relationship between SemCAMS as Operator and the Joint Owners. SemCAMS submits that if the Trilogy indebtedness turns out to be unrecoverable, there would have to be an adjustment to the Joint Account. Neither Trilogy nor SemCAMS provided an analysis of the 17 CO&O Agreements to support these arguments, as the issue arose during the course of the hearing, but it is improbable to suppose that the entire contractual risk of non-payment by Trilogy would be borne by SemCAMS if the set-off is against SemCAMS in its capacity as Operator.

59 I note that, in at least two CO&O agreements to which Trilogy is a party, the agreements provide that if the Operator has not received full payment of Joint Owner's share of costs and expenses within three months, the other Joint Owners will be billed for a proportionate share of the unpaid amount. The remedies available to an Operator will depend on the specific wording of the CO&O Agreement in issue and the details of the Facility's accounting procedure, but I am satisfied by the evidence before me that there would be some adverse impact on the other Joint Owners in a Facility if Trilogy is allowed to set-off indebtedness owed to it by SemCAMS in its personal capacity against SemCAMS as Operator.

60 If Trilogy is submitting that an equitable set-off could be effected only against SemCAMS share of to revenues from the Joint Account, as it unsuccessfully argued in an attempt to establish the mutuality necessary for legal set-off, other problems arise. If an Operator of a Facility is required by the principles of equitable set-off to facilitate set-off against the account of any Joint Owner, it would create significant difficulty to working-interest owners and Operators. Such a result would allow creditors to pursue Operators for debts owed by Joint Owners, which would materially complicate the operation of the Joint Account. Issues would arise with respect to the year-end equalization process if funds have in the meantime been paid out to creditors of Joint Owners on the basis of estimated charges and credits. This result would wreak havoc with what is understood, at the least, to be a special purpose account, and cannot be justified under the guise of equitable set-off to any greater degree than under the guise of legal set-off.

61 Trilogy seeks to bolster its argument with respect to the availability of set-off directly against SemCAMS as a Joint Owner under the CO&O Agreements by submitting that the rights and obligations of the Joint Owners are several and not joint, referencing a provision of the CO&O Agreements that confirms that there is no intention to create a partnership and that the duties, obligations and liabilities of the Joint Owners are intended to be separate and not joint. Thus, Trilogy, suggests, it should be possible to look through the CO&O Agreements to isolate SemCAMS' interest.

62 SemCAMS replies that it is clear that the Facilities are jointly owned and held in trust by the Operator for the Joint Owners and that the Trilogy indebtedness is owed to the Joint Account and is thus the property of the Joint Owners. The clause referred to by Trilogy relates to obligations among the Joint Owners and not obligations between the Joint Owners and the Operator. I accept that the Joint Account is jointly owned, and not severally as implied by Trilogy, and that, even though the capital fee portion of what is owed by third party users of the Facilities to the Joint Account may eventually be credited to SemCAMS in its capacity as Joint Owner, this does not overcome the accounting difficulties and complexities previously noted.

63 SemCAMS submits that the argument made by Trilogy in support of equitable set-off can be summarized to be that it should be possible to determine, eventually, how much of the revenues of each Facility are attributable to SemCAMS and that, therefore, fairness should apply to allow a set-off. SemCAMS points out that to allow such a set-off would result in SemCAMS being required to continue as Operator of the Facilities for no remuneration until there has been the set-off of, not just the Trilogy indebtedness in the amount of roughly $4.2 million, but also the set-off of other creditors with similar arrangements with SemCAMS in its purely corporate capacity to the extent of roughly $50 million. SemCAMS argues that it would be impossible for it to continue in its core business of acting as Operator of the Facilities under those terms and that this would jeopardize the outcome of the CCAA proceedings and creditor recovery.

64 SemCAMS submits that the Court should be cautious in assessing a set-off claim in the CCAA context, quoting the British Columbia Court of Appeal in *Cam-Net Communications v. Vancouver Telephone Co.*, [1999] B.C.J.. 2355at para. 22 (endorsed in principle by the Ontario Court of Appeal in *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 at par. 14):

> Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the CCAA compromise. A party claiming set-off, as Cam-Net notes in its factum,

realizes its claim on a dollar-fordollar basis while other creditors, who participated in the CCAA proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the CCAA reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context.

65 While this call for a CCAA court to be vigilant is consistent with the broad and purposeful interpretation of the provisions of the CCAA generally, Trilogy submits that it is not the law in Alberta, given the comment by the Alberta Court of Appeal in *Blue Range Resource Corp.*, *supra*, at para.13 that concerns about the priority of other creditors should be irrelevant in the face of s.18.1 of the CCAA. However, Paperny, J. in *Re Canadian Airlines Corp.* (2001), 294 A.R. 253, 92 Alta. L.R. (3d) 140, 14 B.L.R. (3d) 258, [2001] 7 W.W.R. 383 (Alta. Q.B.) at para. 70 commented as follows:

> Although Blue Range suggests that it is inappropriate to consider prejudice to other creditors in prohibiting set-off, the court did not go so far as to say that a court in determining a close connection is prohibited from considering whether the intention of the CCAA will be entirely defeated.

66 In considering whether it would be manifestly unjust to require Trilogy to pay its indebtedness under the Inlet Purchase Agreement, it is appropriate to take into account that there is no precedent compelling an Operator to effect set-off by substituting itself for the debtor or by "streaming-through" the set-off to its account as Joint Owner, and that the implications of such a ruling would require Operators to facilitate the collection of debts through set-off of all Joint Owners, causing material difficulty in the operation of Joint Accounts. These factors alone lead to the conclusion that, even if Trilogy were able to establish a sufficiently close connection of the Trilogy indebtedness to the indebtedness owed by SemCAMS under the Inlet Purchase Agreement, it would not be able to satisfy the test of manifest unfairness. In addition, however, it is appropriate to consider in this case on the issue of fairness of such a set-off the potentially adverse consequences of such a requirement of set-off to the ability of SemCAMS to present an acceptable plan of arrangement under the CCAA.

67 In conclusion on this issue, I find that Trilogy is unable to assert equitable set-off.

68 As I have not found any basis for Trilogy's claim of set-off, I do not need to consider whether contractual or legal set-off is available within the CCAA context as between pre-filing debts and post-filing debts.

Equalization Payments, Audit Queries and Blue Mountain

69 During the hearing, issues relating to equalization payments raised by Trilogy were adjourned *sine die* pursuant to a proposal acceptable to both parties, without prejudice to the right of SemCAMS to contest the matter at a later date.

70 Trilogy also raised the issue of an amount of money it submits it is owed relating to an audit of a particular project at the Kaybob South Plant No. 3. The audit results were presented to SemCAMS as Operator in January, 2009. Under the Gas Processing Agreement, the Operator has six months to respond, and the Agreement makes provision for resolution of any dispute arising from the audit. This issue is premature, but in any event, it would engage SemCAMS as Operator and should be dealt with pursuant to the provisions of the relevant Gas Processing Agreement.

71 Part of the indebtedness of Trilogy owing under the Gas Processing Agreements is owed by an affiliate of Trilogy, Trilogy Blue Mountain LP. Given the decisions I have reached, it is not necessary to draw a distinction between these agreements and the Gas Processing Agreements that involve Trilogy, except to note that the claim of Blue Mountain to entitlement to set-off is substantially weaker than that of Trilogy in every respect.

Conclusion

72 The application of SemCAMS for a declaration that the amounts due under the Trilogy CO&O Agreements and the Gas Processing Agreements, plus applicable interest, less the amounts due for services rendered in relation to the Facilities that are entirely owned by SemCAMS, is granted and Trilogy is not entitled to assert set-off of indebtedness owed by SemCAMS under the Inlet Purchase Agreement against this indebtedness, either existing or future. Trilogy is directed to pay this indebtedness within fifteen days of receiving an adjusted accounting of the amounts owing.

73 If the parties are unable to agree on costs, they may make submissions.

TAB 6

2009 ABCA 275
Alberta Court of Appeal

Trilogy Energy LP v. SemCAMS ULC

2009 CarswellAlta 1240, 2009 ABCA 275, [2009] A.W.L.D. 3631, [2009] A.W.L.D. 3637, [2009] A.W.L.D. 3697, 179 A.C.W.S. (3d) 1025, 460 A.R. 269, 462 W.A.C. 269, 57 C.B.R. (5th) 42

Trilogy Energy LP (Applicant / Respondent) and SemCAMS ULC (Respondent / Applicant)

Marina Paperny J.A.

Heard: August 12, 2009
Judgment: August 19, 2009
Docket: Calgary Appeal 0901-0198-AC

Counsel: B. O'Leary, D.S. Nishimura for Applicant
A.R. Anderson, Q.C., T.D. Gelbman for Respondent

***Marina Paperny J.A.*:**

Introduction

1 Trilogy Energy LP ("Trilogy") seeks leave to appeal the decision of the chambers judge in which she declined to find that Trilogy could set-off amounts owed to SemCAMS ULC ("SemCAMS") against indebtedness arising under a gas purchase agreement. The chambers judge declined to find set-off on a contractual, legal or equitable basis. The order followed a successful application by SemCAMS under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), to enforce payment of the Trilogy indebtedness. The court declared the debt due and payable.

Background

2 SemCAMS is the operator of four natural gas processing plants and related gas gathering systems and pipelines in Alberta (collectively the "Facilities", each individually a "Facility"). Trilogy is an oil and natural gas producer.

3 Each Facility is owned by a number of co-owners (the "Joint Owners"). SemCAMS has a varying percentage ownership interest in each Facility. SemCAMS acts as the Operator for each Facility pursuant to construction, ownership and operation agreements ("CO&O Agreements"). Under the CO&O Agreements, SemCAMS as Operator maintains the Facilities and gathers and processes natural gas on behalf of the Joint Owners. Each Joint Owner is entitled to use a share of the through-put capacity of a Facility in proportion to its ownership interest. Any excess capacity in a Facility is allocated first to Joint Owners (then "Owners in Excess") and then used to process natural gas owned by third parties for a fee. Both capital and operating expenses are collected under the Gas Processing Agreement ("GPA") for the Joint Account for the benefit of the Joint Owners.

4 SemCAMS as Operator under 24 CO&O Agreements gathers and processes raw natural gas for Trilogy as a third party at 17 of the Facilities pursuant to various agreements (the GPAs). In addition, Trilogy is a Joint Owner in three of the pipeline Facilities and its raw natural gas is processed at those Facilities. In aggregate, Trilogy owes approximately $5.3 million plus interest to SemCAMS as Operator for services provided under these agreements at all the Facilities.

5 Each Facility has a separate accounting that is managed by the Operator on a Facility by Facility basis for the purpose of

tracking the collection and distribution of funds among Joint Owners, third party users of the Facility and service providers to the Facility. Administering the Joint Account includes tracking all revenues and expenses for the Joint Account as transactions occur in respect of each Facility.

6 As part of the proceeding under the *CCAA*, the chambers judge granted a Joint Account Order on October 8th, 2008 which provided SemCAMS as Operator authority to pay out of cash flow its obligations relating to the Joint Account of each of the Facilities. In short, the Order allows SemCAMS as Operator to make payments for the benefit of the Joint Accounts that would otherwise have been stayed under the *CCAA*.

7 In April 2008, Trilogy sold raw natural gas to SemCAMS in its own corporate capacity as buyer pursuant to an "Inlet Purchase Agreement" ("IPA"). The purpose of the agreement was to ensure Trilogy had priority over other third parties and other Joint Owners to process its gas. Pursuant to the IPA the gas was sold to SemCAMS and title to it transferred as well. SemCAMS owes approximately $4.1 million to Trilogy in respect of this sale. Trilogy seeks to set-off this amount against monies owing by Trilogy under the CO&O Agreements and GPA.

8 Trilogy purported to exercise set-off by withholding amounts due to SemCAMS *qua* operator under the CO&O Agreement and the GPA. The chambers judge reviewed the three types of agreements under which Trilogy purported to set-off the monies: the CO&O Agreements, the GPA and IPA. She concluded, having regard to all the terms of the various agreements, that the CO&O Agreements created trust relationships in which the funds collected by the Operator are collected for the Joint Account on behalf of and for the benefit of the Joint Owners of the Facilities; that none of the GPA or the CO&O Agreements provide Trilogy with a right of set-off; and that, properly interpreted, the IPA only provides for a right of set-off of amounts owing under it or other agreements with SemCAMS in its capacity as gas purchaser, not as Owner or Operator. Accordingly, she found that Trilogy was not entitled to assert a contractual right of set-off. She also concluded that neither legal nor equitable set-off were available in the circumstances.

Test for Leave

9 The test for leave to appeal in the *CCAA* context involves a single criterion subsuming four factors: there must be serious and arguable grounds that are of real and significant interest to the parties. The factors used to assess whether this criterion is present are: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action: *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.) at paras. 15-16, citing *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]) at paras. 6-7 ("*Resurgence #1*"); *Smoky River Coal Ltd., Re*, 1999 ABCA 62, 237 A.R. 83 (Alta. C.A.) at para. 22 ("*Luscar #1*"); *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 19 ("*Resurgence #2*"); *Multitech Warehouse Direct Inc., Re*, [1995] A.J. No. 663 at para. 3, 32 Alta. L.R. (3d) 62 (Alta. C.A.).

10 An appellate court should exercises its power sparingly, given the unique role of the supervising chambers judge. Appropriate weight must be given to each of these factors in determining whether the test for leave to appeal has been met. The last two factors are generally ascribed greater weight than the first two: *Resurgence #1* at para. 46.

Analysis

Significance to the Parties and Action

11 The issue here is of significance to the parties and the action. The appeal would involve approximately $5.3 million that Trilogy is unlikely to recover should it not be entitled to set-off.

Significance to the Practice and Industry

12 Trilogy submits that leave should be granted so that this Court can lay down principles with respect to set-off in

insolvency, and oil and gas practice in Alberta. For the reasons that follow, I am not persuaded that this is so. First, the issues raised are governed by well-settled law in respect of the tests for contractual, legal and equitable set-off: *SemCanada Crude Co., Re*, 2009 ABCA 237 at para. 10, (Alta. C.A.); *McMahon v. Canada Permanent Trust Co.* (1979), 32 C.B.R. (N.S.) 258, [1980] 2 W.W.R. 438 (B.C. C.A.), at 442 ("*McMahon*"). The issue of whether an operator-joint owner relationship constitutes a trust relationship was also considered by this Court in *Bank of Nova Scotia v. Société Générale (Canada)*, [1988] 4 W.W.R. 232, 87 A.R. 133 (Alta. C.A.) ("*Sorrel*") and in *Luscar Ltd. v. Pembina Resources Ltd.* (1994), [1995] 2 W.W.R. 153, 24 Alta. L.R. (3d) 305 (Alta. C.A.) at paras. 66-70. Moreover, whether set-off in any form applies in this case will require consideration of a number of agreements, not all of which are common in the oil and gas industry. In my view, the principles of set-off, while somewhat complex, are well understood. The desirability of additional or new principles for set-off within the oil and gas industry is not apparent. The real concern here is over the application of those principles to this case, which suggests limited future applicability.

Is the Appeal prima facie Meritorious?

13 The threshold issue to be determined on an application for leave to appeal under the *CCAA* is whether the proposed appeal is *prima facie* meritorious: *Resurgence #1* at para. 35. Trilogy proposes grounds which raise questions of law and questions of mixed fact and law. They boil down to whether each of the respective tests for contractual, legal and equitable set-off were properly applied by the chambers judge. To be reviewable by this Court, Trilogy must point to an error on a question of law, a palpable and overriding error in the findings of fact, or an error in the supervising chambers judge's exercise of discretion. See *Resurgence #2* at para. 42; *Resurgence #1* at paras. 28-29. Questions of pure law are reviewable on a standard of correctness, while issues of mixed fact and law, including a judge's interpretation of the evidence as a whole, and whether or not the facts satisfy a legal test, are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 7 W.W.R. 1 (S.C.C.) at paras. 36-37 ("*Housen*").

Contractual Set-Off

14 Contractual set-off is governed by the law of contracts. Issues of contractual interpretation involving questions of law are reviewed on a correctness standard: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 (Alta. C.A.) at para. 11; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 (Alta. C.A.). However, findings of ambiguity or no ambiguity in a contract are questions of fact and a chambers judge's decision is due deference absent palpable and overriding error or an extricable error of law: *Predator Corp. v. Ricks Nova Scotia Co.*, 2002 ABCA 248, 317 A.R. 322 (Alta. C.A.) at para. 6.

15 Trilogy relies on a set-off clause that is incorporated into the IPA by reference. It provides for the set-off of any amounts owing "under any other agreement between the parties".

16 In interpreting this clause, the chambers judge found as follows (at para. 26 of her reasons: *SemCanada Crude Company Re*, 2009 ABQB 397 (Alta. Q.B.) (the "*Reasons*")):

> For Trilogy to succeed on its argument that the set-off provision in the Inlet Purchase Agreement extends to the Gas Processing Agreements and the Trilogy CO&O Agreements, it would have to establish that the set-off language was broad enough to cover agreements in which SemCAMS was contracting as an Operator, or, at least, that sufficient ambiguity exists in the contract to make evidence of the surrounding circumstances or the intention of the parties a relevant consideration.

17 The chambers judge found no ambiguity in the IPA; she instead found that SemCAMS was contracting in its personal capacity when it executed the IPA (*Reasons* at para. 27). On the other hand, she found that SemCAMS as a party to the GPA was acting in its capacity as "Operator for and on behalf of" the Joint Owners of the Facilities or "in its own right and also as contract operator for and on behalf of" the Joint Owners (*Reasons* at para. 24). The chambers judge analyzed the contracts and found that the parties to those contracts were distinct, that the contracts were not ambiguous, and therefore that the set-off clause in the IPA did not allow Trilogy to set-off against SemCAMS as Operator under the GPA and CO&O Agreements.

18 Trilogy submits that the chambers judge misinterpreted the plain words of the contract and as such made a reversible error. Trilogy submits that the meaning of the word "parties" in the IPA's set-off clause is not to be qualified by the various legal capacities SemCAMS was in, as found by the chambers judge, but rather by its ordinary and accepted meaning. However, the principles of legal set-off require the cross-obligations of the parties to be in the same right. The chambers judge's consideration of those principles in her interpretation of the IPA does not, in my view, *prima facie* disclose a reviewable error.

Legal Set-Off

19 The test for legal set-off is set out in *Telford v. Holt*, [1987] 2 S.C.R. 193 at 204, [1987] 6 W.W.R. 385 (S.C.C.) ("*Holt*"). Legal set-off requires mutual cross-obligations between the same parties and in the same right: *Citibank Canada v. Confederation Life Insurance Co.*, [1996] O.J. No. 3409, 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at para. 35, aff'd, 37 O.R. (3d) 226 (Ont. C.A.).

20 To assess whether the parties were the same and whether the debts were in the same right, so as to meet the mutuality requirement for legal set-off, the chambers judge considered the relationship and agreements between Trilogy and SemCAMS in its personal capacity under the IPA, and between Trilogy and SemCAMS in its operator capacity under the GPA. Further, the chambers judge applied the tests set out in *Sorrel* to determine whether the CO&O Agreements create trust relationships between SemCAMS as Operator and the Joint Owners. On application of the *Sorrel indicia* to the facts of this case, she found that a trust relationship existed. This was the correct test and the chambers judge's *Reasons* in this respect demonstrate no *prima facie* error.

21 In case she was found to be in error in finding a trust relationship, the chambers judge proceeded to further assess whether mutuality existed on the evidence absent a trust relationship. She applied the test in *National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd.*, [1972] 2 W.L.R. 455 at 466, as adopted in *McMahon* to determine if the Joint Account amounted to a "special purpose" account so as to deprive the debts of mutuality. Her finding that the Joint Owners would consider it a misappropriation if money designated for the Joint Account was used for the unauthorized purpose of setting-off SemCAMS's debt in its individual capacity follows logically from her analysis and application of the legal tests, and on its face does not suggest palpable or overriding error.

Equitable Set-Off

22 The chambers judge correctly set out the test for equitable set-off, being the principles laid out in *Holt* at 212. These are that [cites omitted]:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
>
> 5. Unliquidated claims are on the same footing as liquidated claims.

23 Trilogy argues that the chambers judge made several critical errors that informed her consideration of "close connection" and "manifest injustice". Firstly, Trilogy submits she incorrectly considered prejudice to other creditors, contrary to *Blue Range Resource Corp., Re*, 1999 ABCA 255, 244 A.R. 103 (Alta. C.A.), in deciding whether it would be unjust to enforce payment. However, a careful reading of her reasons makes clear that she arrived at this conclusion based on other relevant factors and so stated. (*Reasons*, para. 66.) While she did note that on the issue of fairness, were set-off to be found, it

would have "potentially adverse consequences to the ability of SemCAMS to present an acceptable plan of arrangement", she did not rely on this finding in reaching her conclusion.

24 Trilogy also argues that the chambers judge overlooked two critical facts, the terms of the Reserve Dedication Agreement and that SemCAMS owned a very high proportion of the Facilities. That she failed to consider these facts is not apparent from the record. She had the evidence on both before her and to the extent these arguments were placed before her, she was aware of them. I see no *prima facie* error in her having failed to specifically advert to their relevance in arriving at her conclusion.

25 As noted above, a supervisory judge's findings of fact in the *CCAA* context are owed particular deference given the context of such proceedings. There is no *prima facie* error in the chambers judge's application of the principles of set-off to the facts of this case. The chambers judge cited the correct law, applied it to the facts and found not only that there was no close connection, but that Trilogy entered into the IPA to ensure a market for its gas which would not have been available under the GPA; thus the IPA, far from being closely related to the GPA, in fact replaced it.

Conclusion on Merits of the Appeal

26 The applicant has made several creative arguments but they do not persuade me that the chambers judge misconstrued the agreements in question or incorrectly applied legal principles in interpreting them.

Will the Appeal Unduly Hinder the CCAA Proceedings?

27 Delay and uncertainty caused by appeals is a matter of concern in a *CCAA* proceeding: *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361, 425 A.R. 182 (Alta. C.A.) at para. 14, *Luscar #1* at para. 22.

28 In assessing whether to grant leave to appeal, the Court should consider whether the delay resulting from the appeal will entirely defeat the purpose and intention of the *CCAA*. (See *Canadian Airlines Corp., Re*, 2001 ABQB 146, [2001] 7 W.W.R. 383 (Alta. Q.B.) at para. 70.)

29 The plan is scheduled to be voted on and, if successful, to be brought forward for approval in September. While likely not fatal to the *CCAA* proceedings, I am of the view that an appeal on this point would have an adverse effect and hinder the completion of the plan if it is found acceptable to the affected creditors and the Court.

30 Accordingly, leave to appeal is denied.

Application dismissed.

TAB 7

ESSENTIALS OF
CANADIAN LAW

BANKRUPTCY AND INSOLVENCY LAW

SECOND EDITION

RODERICK J. WOOD
Faculty of Law
University of Alberta

IRWIN LAW

Published in 2015 by

Irwin Law Inc.
14 Duncan Street
Suite 206
Toronto, ON
M5H 3G8

www.irwinlaw.com

ISBN: 978-1-55221-402-2
e-book ISBN: 978-1-55221-403-9

Library and Archives Canada Cataloguing in Publication

Wood, Roderick J., author
Bankruptcy and insolvency law / Roderick J. Wood, Faculty of Law, University of Alberta. — Second edition.

(Essentials of Canadian law)
Includes bibliographical references and index.
Issued in print and electronic formats.
ISBN 978-1-55221-402-2 (paperback)—ISBN 978-1-55221-403-9 (pdf)

1. Bankruptcy—Canada. I. Title. II. Series: Essentials of Canadian law.

KE1485.W66 2015 346.7107'8 C2015-906544-5
KF1536.ZA2W66 2015 C2015-906545-3

Canada Ontario
Ontario Media Development Corporation
Société de développement de l'industrie des médias de l'Ontario

Printed and bound in Canada.

1 2 3 4 5 19 18 17 16 15

exercise the right of legal set-off. In other words, the cross-claims must be between the same parties and in the same right.

Upon the occurrence of the bankruptcy, there is a change of mutuality. A debt that arises after the bankruptcy cannot be set-off against a debt that arises before the bankruptcy.[103] This is illustrated in the following example. Suppose that C owes $1,000 to B prior to B's bankruptcy. After the bankruptcy, B becomes indebted to C for $500. C cannot set-off the two claims, since they are not mutual debts. The debt for $1,000 is no longer owed to B but has vested in the trustee. The converse also holds true. Assume that it is now B who is indebted to C prior to the bankruptcy. C cannot exercise legal set-off in respect of a debt payable to B that arises after B's bankruptcy. The claim that C holds has been transformed on bankruptcy into a claim against the trustee for a dividend to be paid out of the bankrupt estate. The requirement of mutuality of debts is lacking.[104]

The bankruptcy of the debtor does not destroy a right of set-off that is available at the date of bankruptcy.[105] However, it will operate so as to prevent legal set-off in respect of a contingent claim that does not become a debt until after the bankruptcy. Assume that C has given a personal guarantee in respect of a debt owed by B, the bankrupt. C is also indebted to B. If C has not been called upon to pay on the guarantee at the date of the bankruptcy, the obligation remains a contingent liability and cannot be set-off against the indebtedness that C owes to B.[106]

The requirement of mutuality also prevents a claimant from exercising set-off in respect of claims that have been acquired from other creditors after the bankruptcy. In this scenario, C owes a debt to B. After B's bankruptcy, C obtains an assignment of a claim of another creditor against B. The claim acquired by C is a claim against the trustee for a dividend to be paid out of the bankrupt estate. There is no mutuality, and therefore legal set-off is unavailable.[107]

The most significant difference between legal set-off and equitable set-off is that the latter allows an unliquidated claim to be set-off against a debt or other liquidated claim.[108] For this reason, equitable set-off is also referred to as "transaction set-off" in England. In order

103 *Re Air Canada* (2003), 45 CBR (4th) 13 (Ont SCJ); *Coopers & Lybrand Ltd v Lumberland Building Materials Ltd* (1983), 50 CBR (NS) 150 (BCSC).

104 *Re Kryspin* (1981), 40 CBR (NS) 67 (Ont HCJ).

105 *Re Paquet* (1997), 46 CBR (3d) 249 (Alta QB).

106 *Mitchell, Houghton Ltd v Mitchell, Houghton (Que.) Ltd* (1970), 14 CBR (NS) 301 (Ont HCJ).

107 *Northern Electric Co v Auto Service Co* (1961), 2 CBR (NS) 218 (Nfld SC).

108 *Telford v Holt*, [1987] 2 SCR 193.

- the debtor has transferred property, provided services, given a charge on property, made a payment, incurred an obligation, or suffered judicial proceedings;
- the transaction is in favour of a creditor;
- the transaction has the effect of giving the creditor a preference;
- the debtor intended to prefer the creditor over other creditors;
- the debtor was insolvent at the time of the preference; and
- the transaction occurred within a period beginning three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Each of these elements will be separately discussed below.

a) Transactions That Constitute a Preference

A preference will usually take one of three forms. First, it may involve a full or partial payment to a creditor. Second, it may involve the granting of a security interest by the debtor to a creditor to secure a previously unsecured debt. Third, it may involve the transfer of property to the creditor in satisfaction of a debt or other liability. An example of this third category of preference is where a debtor returns inventory that had been sold to it by a seller in cancellation of the purchase price.

The preference provision of the *BIA* is not limited to these usual situations but also covers a number of less common cases. A creditor who recovers money pursuant to legal proceedings may discover that its recovery is subject to impeachment by a trustee. The *BIA* provision is not limited to consensual transfers by the debtor but extends to judicial proceedings suffered by the debtor. This will cover a landlord who exercises a right of distress against the debtor's property.[64] It will also cover a debtor who consents to a judgment in order to permit a creditor to recover the claim through judgment enforcement proceedings before any of the other creditors can enforce their claims.

An interesting issue arises in connection with the operation of an after-acquired property clause in a security agreement where the secured creditor is not fully secured. This is illustrated in the following scenario:

> A secured creditor S is given a security interest in all of D's present and after-acquired personal property to secure a loan. The security is properly registered and was given while D was solvent. D later becomes insolvent. The value of D's assets is less than the amount owed to S. D makes unusually large purchases of goods from suppliers on

64 *Re Early Canadian Furniture Ltd* (1984), 50 CBR (NS) 300 (BCSC).

constitute a preference.[74] The transaction can, however, be impeached if the security interest that is granted secures past unsecured loans as well as the new advances of credit.[75] Granting a security interest to a creditor will not have preferential effect if it simply replaces an earlier valid security interest on the same property that had been created outside the relevant time period.[76]

A transaction that gives a creditor a right of set-off can also be impeached as a preference under the *BIA*.[77] Ordinarily, a sale of property by the debtor in consideration of a promise to pay its fair value would not constitute a preference. Although the bankrupt estate no longer has the property, the trustee may recover the price from the transferee. However, the transaction may operate as a preference if the transferee is a creditor. The transaction gives rise to a new cross-obligation against which the creditor can exercise a right of set-off. This permits the creditor to reduce the amount it owes to the debtor on the new obligation by the value of the creditor's claim against the debtor. The result is that the creditor's position is greatly improved. This is illustrated in the following scenario:

> The debtor (D) owes $1,000 to a creditor (C). D's assets on a bankruptcy are sufficient to afford ordinary unsecured creditors with a dividend of 10 cents on the dollar. C would therefore be entitled to recover $100. D enters into a contract with C under which D sells and delivers goods to C for $1,000 with payment to occur within thirty days. D then goes into bankruptcy. C can set-off one cross-obligation against the other. C no longer can prove for a dividend in the bankruptcy but has acquired goods worth $1,000 from D. The net effect is that C's position has been improved by $900.

d) Intention to Prefer

The debtor must have entered into the transaction "with a view to giving that creditor a preference over the other creditors." This means that the debtor must have intended to give a preference.[78] This element has given rise to the most litigation. Early cases divided on the question whether the concurrent intention of both the debtor and the creditor was required. The Supreme Court of Canada resolved this issue in

74 *Re Goldstein* (1923), 3 CBR 404 (Ont SCAD); *Re Aboud* (1940), 22 CBR 121 (Ont HCJ). These decisions also hold that there is no intention to prefer in such cases.

75 See Section B(2)(c)(ii), below in this chapter.

76 *Rahemtulla v Kushwaha*, 2013 ABQB 136.

77 *BIA*, s 97(3) makes the exercise of a right of set-off subject to the provisions of the *BIA* respecting frauds or fraudulent preferences.

78 *Re McIntosh-Marshall Equipment Ltd* (1968), 12 CBR (NS) 60 (Alta SCAD).

Hudson v Benallack.[79] The Court held that it is only the intention of the debtor that is relevant.

The *BIA* gives the trustee the benefit of an evidentiary presumption. If it is shown that the transaction had a preferential effect, it will be presumed, in the absence of evidence to the contrary, that the debtor intended to give the creditor a preference.[80] The shift in the evidential burden means that the creditor will need to adduce evidence to show that the debtor's dominant intention was not to prefer the creditor but was directed to some other purpose. Courts have applied an objective rather than a subjective test in determining the debtor's intention.[81] In other words, it is "that intention which the conduct of the parties bears when reasonably construed"[82] that is determinative rather than the debtor's "personal ruminations."[83]

Although much will depend upon the particular facts of the case at hand, it is nonetheless possible to identify certain recurring patterns in the cases where the presumption of intent has been rebutted. Four major categories of cases are discussed below, each of which contain a number of variations and subpatterns.

i) *Ordinary Course Transactions*

The presumption of preferential intent can be rebutted if it is shown that the payment or transfer was an ordinary course transaction.[84] In such a case, it is easy to draw the conclusion that the debtor simply intended to carry on business in the usual way and had no intention to prefer a creditor. In order to establish this ground, it is necessary to show that the usual pattern of payments has not been altered. A debtor who makes regular payments to suppliers, a landlord, or employees will be covered. Payments may be found to be in the ordinary course of business even if some payments are late so long as it can be shown that the supplier was receiving payment reasonably promptly for each shipment and the debtor was regularly paying for each as received.[85] This

---

79 [1976] 2 SCR 168.

80 *BIA*, s 95(2). This rebuttable presumption does not apply to a margin deposit made by a clearing member with a clearing house. See *BIA*, s 95(2.1).

81 *Re Holt Motors Ltd* (1966), 9 CBR (NS) 92 (Man QB). And see the discussion in Springman et al, above note 29 at para 20(j).

82 *Coast Wire Rope & Supply Ltd (Trustee of) v Trans Pacific Hardware Inc*, 1999 BCCA 217 at para 8.

83 *St. Anne-Nackawic Pulp Co (Trustee of) v Logistec Stevedoring (Atlantic) Inc* (2005), 13 CBR (5th) 125 at para 6 (NBCA).

84 *Deloitte & Touche Inc v White Veal Meat Packers Ltd* (2000), 16 CBR (4th) 74 (Man QB).

85 *Re Checkout Foodmarts Ltd* (1977), 24 CBR (NS) 286 (Ont HCJ.).

TAB 8

CARSWELL

THE 2018 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

THOMSON REUTERS®

A cataloguing record for this publication is available from Library and Archives Canada.

ISSN 1197-8503

ISBN 978-0-7798-8490-2 (2018 Edition)

Printed in the United States by Thomson Reuters.

TELL US HOW WE'RE DOING
Scan the QR code to the right with your smartphone to send your comments regarding our products and services. Free QR Code Readers are available from your mobile device app store. You can also email us at feedback.legaltaxcanada@tr.com

THOMSON REUTERS®

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

the same factual background of the business relationship between the bankrupt, his company and the creditor, was a discrete claim and the adverse costs award related to that discrete matter, and the claim was not sufficiently connected to the contractual relationship and series of business events as between the parties that gave rise to the proven claim of the creditor in the estate in bankruptcy. It was a claim of intentional tortious conduct and the creditor did not have an entitlement to a remedy in its own right as of the date of bankruptcy. It simply had, at most, a speculative cause of action. The claimed set-off in this matter did not fall within the ambit of s. 97(3) of the *BIA*: *King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc.*, 2012 CarswellOnt 9260, 99 C.B.R. (5th) 277, 2012 ONSC 4263 (Ont. S.C.J.).

See A.R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off" and B. Boucher, "Equitable Set-Off, Stipulation for Another and Set-Off in an Insolvency Context: The Latest Trends" in Janis Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010).

(2) — Legal Set-Off

For legal set-off, the debts had to be mutual, between the same parties and in the same capacity: *Thompson v. Big Cities Realty & Agency Co.* (1910), 21 O.L.R. 394 at 402 (Div. Ct.); *Clarkson v. Alliston (Town)* (1928), 8 C.B.R. 587 (S.C.); affirmed 10 C.B.R. 65 (Ont. H.C.). The debts could arise from transactions of a different nature, provided they could be ascertained with certainty at the relevant date: *Telford v. Holt*, [1987] 2 S.C.R. 193.

The doctrine of set-off only applies to debts that are ascertainable. An amount is "ascertainable" when the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data. When the amount to be recovered depends on the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the amount is unliquidated and is not ascertainable: *A & E Capital Funding Inc. v. Maplex General Insurance Co.* (1999), 10 C.B.R. (4th) 225, 122 O.A.C. 53 (C.A.).

For legal set-off, claims must be enforceable in debt; they must be liquidated, enforceable and mature. In addition, the claims must have accrued to the original debtor and creditor prior to any assignment of them. Unlike equitable set-off, for legal set-off there is no necessity for the debts to be connected in any manner. Tax liabilities are debts. Even though a taxpayer is appealing an assessment for tax, the assessed amount is still a debt if the taxing statute provides that the tax must be paid notwithstanding an appeal: *Re Canadian Airlines Corp.* (2001), 14 B.L.R. (3d) 258, 2001 CarswellAlta 240 (Alta. Q.B.).

An assignment in bankruptcy does not destroy "mutuality": in the case of an assignment, mutuality is preserved by s. 97(3): *Re Allan Realty of Guelph Ltd.* (1979), 29 C.B.R. (N.S.) 229, 24 O.R. (2d) 21, 6 E.T.R. 50, 97 D.L.R. (3d) 95 (S.C.); *Re Paquet, supra.*

Creditors who incur post-bankruptcy obligations to trustees cannot claim legal set-off to avoid their obligations by setting off such obligations against proven pre-bankruptcy claims against the bankrupt. There are no mutual cross obligations as the same parties are not involved in view of the insertion of the trustee into the proceedings: *Re Air Canada* (2003), 2003 CarswellOnt 4016, 45 C.B.R. (4th) 13, 39 B.L.R. (3d) 153 (Ont. S.C.J. [Commercial List]).

For set-off, there need only be mutual debts; it is immaterial that one of the debts was not actually payable at the date of bankruptcy: *Coopers & Lybrand Ltd. v. Lumberland Building Materials Ltd.* (1983), 50 C.B.R. (N.S.) 150, 49 B.C.L.R. 239, 150 D.L.R. (3d) 411 (S.C.).

Set-off does not exist for a claim that sounds in damages. The fact that the parties have provided a formula in a contract for calculating the damages or that an industry provides

(9) — Equitable Set-Off

In determining whether equitable set-off should be allowed, it is necessary to first look at the connection between the claims involved and to then consider the effect the set-off would have on the equities between the parties: *P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.).

Equitable set-off arises where there is such a relationship between the claims of the parties that it would be unconscionable or inequitable not to permit set-off: *Coopers & Lybrand Ltd. v. Lumberland Building Materials Ltd.* (1983), 50 C.B.R. (N.S.) 150, 49 B.C.L.R. 239, 150 D.L.R. (3d) 411 (S.C.); *Telford v. Holt*, [1987] 2 S.C.R. 193, 78 N.R. 321, 21 C.P.C. (2d) 1, 54 Alta. L.R. (2d) 193, [1987] 6 W.W.R. 385, 46 R.P.R. 234, 81 A.R. 385, 41 D.L.R. (4th) 385.

Equitable set-off is not permissible where its effect would be to defeat the intent of the *BIA*, by giving one creditor a preference over other unsecured creditors: *Re/Max Metro-City Realty Ltd. v. Baker (Trustee of)* (1993), 16 C.B.R. (3d) 308 (Ont. Bktcy.).

A simple connection between a claim and a cross-claim is not sufficient for equitable set-off. For equitable set-off, a cross-claim must flow out of and be inseparably connected with the dealings and transactions that give rise to the claim. A claim by former directors and officers of a debtor company for money owing pursuant to a pension plan and a deferred compensation plan was held not to be inseparably connected with a cross-claim against the directors and officers for breaches of fiduciary duty, negligence and negligent misstatements in the administration of the affairs of the debtor so as to permit equitable set-off. As a result, the directors and officers were entitled to the same dividends on their claims as had been paid to ordinary creditors on their claims, and the liquidator was not entitled to withhold payment of dividends until the actions against the directors and officers had been determined: *Canada (Attorney General) v. Confederation Life Insurance Co.* (2002), 39 C.B.R. (4th) 182, 2002 CarswellOnt 3681 (Ont. S.C.J. [Commercial List]).

The Supreme Court of Canada held that equitable set-off cannot apply in Québec in bankruptcy matters because under the *Harmonization Act*, civil law, not common law, is the suppletive law that applies with s. 97(3) of the *BIA*. Equitable set-off cannot make up for the non-application of civil law compensation: *Re D.I.M.S. Construction Inc.* (2005), 2005 CarswellQue 7955, 2005 CarswellQue 7956, [2005] 2 S.C.R. 564 (S.C.C.).

"Abatement" must be distinguished from "equitable set-off". "Abatement" is a common law doctrine that permits a creditor to show that, as a result of the debtor's breach of contract, the goods, services, or work provided by the debtor is diminished in value. "Equitable set-off" is an equitable doctrine, which permits a creditor to raise a cross-claim that is so closely connected with the debtor's claim that it would be unjust to allow a trustee to enforce payment without taking the cross-claim into account: *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 182 D.L.R. (4th) 436 (B.C. C.A.).

A claim to property of the bankrupt in the possession of a creditor does not give rise to a right of equitable set-off: *Re Nesmont Precious Metals Corp.* (2001), 28 C.B.R. (4th) 275, 2001 CarswellBC 2175 (B.C. S.C. [In Chambers]).

Although equitable set-off does not require symmetry of remedies or accounts, the creditor asserting a claim to equitable set-off must at the date of bankruptcy have an entitlement to a remedy in its own right: *Re Northland Bank*, 25 C.B.R. (3d) 166, [1994] 5 W.W.R. 610, (sub nom. *Alberta v. Northland Bank)* 93 Man. R. (2d) 138 (Q.B.).

Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated; and it is available where there has been an assignment, with no requirement of the respondents had no valid reason for not complying with it. There was no basis for objecting to the receiver as an officer of the court attempting to take measures as were necessary to deal with the debtor's assets, including obtaining access to records necessary to complete a sale of assets and deal with remaining legal issues as to ownership: *Tangerine Financial Products Limited Partnership v. Reeves Family Trust*, 2012 CarswellBC 3314, 96 C.B.R. (5th) 59, 2012 BCSC 1586 (B.C. S.C. [In Chambers]).

L§12 — Guarantors and Receivership

If a security holder acts wrongfully in the appointment of a receiver-manager, guarantors of the indebtedness of the security holder are entitled to have their obligation reduced to the extent that they are prejudiced by the actions of the secured creditor: *Golden West Restaurants Ltd. v. C.I.B.C.* (1989), 75 C.B.R. (N.S.) 170 (Sask. Q.B.).

L§13 — Set-off Against Receiver

If, prior to the appointment of a receiver-manager, there are mutual debts between the debtor company and a third party, a receiver-manager will take possession of the assets of the debtor subject to that right of set-off. If a debt is not due or has not accrued due at the time of the appointment of a receiver, set-off will not be permitted: *Canadian Imperial Bank of Commerce v. Twin Richfield Oils Ltd.* (1992), 11 C.B.R. (3d) 103, 45 E.T.R. 189, 88 D.L.R. (4th) 596 (Alta. Q.B.).

The law of set-off is the same whether a receiver is court-appointed or privately appointed: *Aboussafy v. Abacus Cities Ltd.*, 39 C.B.R. (N.S.) 1, [1981] 4 W.W.R. 660, 124 D.L.R. (3d) 150, 29 A.R. 607 (C.A.). The law of set-off is also the same as that applied in bankruptcy matters. Reference should therefore be made to F§237 "Set-Off" for a full discussion of the subject. Both legal and equitable set-off can be raised in receivership proceedings.

For an excellent review of the general principles governing set-off in receivership proceedings, see *Re Associated Investors of Can. Ltd.* (1989), 76 C.B.R. (N.S.) 185, 69 Alta. L.R. (2d) 318, [1990] 1 W.W.R. 447, 62 D.L.R. (4th) 269, 102 A.R. 249 (Q.B.).

Where assets sold by the receiver included the debtor's chose in action and an issue arose as to whether the purchaser of the assets could pursue a counterclaim against an unsecured creditor without regard to the action initiated by the unsecured creditor against the debtor, the court held that the purchaser had to recognize the original claim of the unsecured creditor as there was a mutuality of claim and counterclaim, they arose from the same transaction and it was not reasonable that the purchaser should obtain the benefit of the assignment without the detriment of the claim by the other party: *2067850 Ontario Inc. v. Pasta Amore Corp.* (2007), 2007 CarswellOnt 1377, 29 C.B.R. (5th) 242 (Ont. S.C.J.).

The Nova Scotia Supreme Court addressed the issue of set-off in the context of a court-appointed receivership that followed a *CCAA* application. The court held that set-off applied to one of two payments, based on a contractual right of set-off. A commercial contract is to be interpreted, as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; by determining the intention of the parties in accordance with the language they have used in the written document and based on the cardinal presumption that they have intended what they have said; with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and in a fashion that accords a sound commercial principles and good business sense and that avoids a commercial absurdity. Justice Hood concluded that provisions at issue were broad enough to include set-off with respect to the loan agreement even though it was not specifically mentioned, and

TAB 9

1989 CarswellAlta 362
Alberta Court of Queen's Bench

Associated Investors of Canada Ltd., Re

1989 CarswellAlta 362, [1989] A.W.L.D. 945, [1989] C.L.D. 1254, [1990] 1 W.W.R. 447, 102 A.R. 249, 17 A.C.W.S. (3d) 543, 62 D.L.R. (4th) 269, 69 Alta. L.R. (2d) 318, 76 C.B.R. (N.S.) 185

Re FIRST INVESTORS CORPORATION LTD.; Re ASSOCIATED INVESTORS OF CANADA LTD.

Berger J.

Judgment: October 5, 1989
Docket: Edmonton Nos. 8703-16334, 8703-16333

Counsel: *D.N. Tkachuk*, for Coopers & Lybrand.
R. Dunseith (agent for *R.B. White, Q.C.*), special counsel for investment contract holders.
C.K. Thietke (agent for *J. McNiven*), special counsel for investment contract holders.
B.A.R. Smith, for Collins Barrow, trustee.

***Berger J.*:**

1 In December 1987 the court was asked to adjudicate upon the following issues:

2 1. Whether outstanding loans alleged to be due and owing from investment contract holders of Associated Investors of Canada Ltd. ("A.I.C.") and First Investors Corporation Ltd. ("F.I.C.") should be set off from the full amount of the investment contracts held by the said investment contract holders.

3 2. Whether investment contract holders in First Investors Corporation Ltd. who allegedly owe outstanding loans to Principal Savings & Trust Company should have their distributions from Coopers & Lybrand Limited paid to B.I. Robertson & Associated Ltd. as liquidator for Principal Savings & Trust Company until the loan amount is repaid in full.

4 3. Whether a noteholder in Principal Group Limited can claim set-off in relation to outstanding loans allegedly due and owing to First Investors Corporation Ltd. and Associated Investors of Canada Ltd.

5 At that time I set out the general principles that govern (memorandum of decision dated 16th December 1987):

> Halsbury's Laws of England, 4th ed. (1983), defines "set-off" as follows (at p. 240, vol. 42):
>
> > 406. Meaning of 'set off'. Where A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A such that B is, to the extent of his cross-claim, entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of his claim, then B is said to have a right of set-off against A to the extent of his cross-claim.
>
> In my opinion, the legal principles which guide the application of set-off in a receivership context are:
>
> 1. There must be a "mutuality of debts". This would mean that at the point an investment contract holder claims the right of set-off, the corporation against whom he is claiming the right must owe him a debt, and he, in turn, must owe that corporation a debt. If one of the debts is actually owed to a third party, there is no mutuality of debts and set-off cannot apply: *N.W. Robbie & Co. v. Whitney Warehouse Co.*, [1963] 1 W.L.R. 1324, [1963] 3 All E.R. 613 (C.A.).

> 2. With respect to set-off, the same principles apply to a court-appointed receiver as a receiver under a debenture instrument. The principles that are applicable are those that relate to the right of set-off against an equitable assignee: *N.W. Robbie; Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660 at 663 et seq., 39 C.B.R. (N.S.) 1, 124 D.L.R. (3d) 150, 29 A.R. 607 (C.A.).
>
> 3. If the relationship between the parties is such that a right of set-off exists prior to the order appointing the receiver, the receiver takes subject to the pre-existing right. Thus set-off definitely applies to liquidated cross-claims existing at the date of the order: *Rother Iron Works v. Canterbury Precision Engineers*, [1974] Q.B. 1, [1973] 2 W.L.R. 281, [1973] 1 All E.R. 394 (C.A.); *Biggerstaff v. Rowatt's Wharf Ltd.; Howard v. Rowatt's Wharf Ltd.*, [1896] 2 Ch. 93 (C.A.).
>
> 4. A debtor can set off a debt which accrues due before the date of receivership, but is not payable until after: *Christie v. Taunton, Delmard, Lane & Co.; Re Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.
>
> 5. If a debt is not due or has not accrued due at the time of the receivership order, set-off at law will generally not be permitted: *Business Computers Ltd. v. Anglo-African Leasing*, [1977] 1 W.L.R. 578, [1977] 2 All E.R. 741 (Ch. D.); *C.I.B.C. v. Tucker Indust. Inc.*, [1983] 5 W.W.R. 602, 48 C.B.R. (N.S.) 1, 46 B.C.L.R. 8, 149 D.L.R. (3d) 172 (C.A.).
>
> 6. For debts to be set off, both debts must be enforceable by action at the time when set-off is set up: *Atl. Accept. Corp. v. Burns & Dutton Const. (1962) Ltd.*, [1971] 1 W.W.R. 84, 14 D.L.R (3d) 175 (Alta. C.A.).
>
> 7. A debtor is entitled to set off debts against obligations accruing due after the receivership order if those obligations arise as a consequence of a receiver and manager honouring contracts entered into before the order was granted: *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160 (P.C.).
>
> 8. Equitable set-off applies to cross-claims that accrue due even after the receiving order; however, equitable set-off will only apply to a claim that is directly connected to the contract giving rise to the debt or closely related to it: *C.I.B.C. v. Tucker*.

6 The issue was adjourned sine die to enable the applicants to provide sufficient material upon which an adjudication could properly be made. The receiver-manager has now filed supplementary affidavits and has provided the court with a somewhat clearer and more complete factual background.

7 Three types of set-off potentially apply: contractual, legal and equitable.

8 I am advised by counsel that all F.I.C./A.I.C. debtors signed the principal automatic loan agreement and loan advance and disclosure forms. These documents do not expressly deal with set-off nor do they appear to render inapplicable legal and equitable set-off rules. For reasons which will emerge obvious, I need not decide whether cls. 2 and 3 of the automatic loan agreement confer an ability to set off subsequent investments against a prior existing indebtedness. The clauses, however, are reproduced below, because they evidence the discretion conferred upon A.I.C. and F.I.C. to deal with securities in the manner specified therein.

> **2. Assignment Of Security**
>
> Any shares of Principal Venture Fund Ltd., Collective Mutual Fund Ltd., Principal World Fund, Inc., Principal Equity Fund, Inc., any units of Principal Growth Fund, Principal Bond Fund or Principal Equity Fund Accumulation Plan, *any term certificates, term deposits, investment contracts, promissory notes or any other investments or securities issued by any of the Principal Companies now or hereafter owned by the undersigned and any monies which the undersigned now or hereafter has on deposit with any of the Principal Companies in a savings account, chequing account or other account*, (but excluding any such securities on monies which are registered or held in the name of any of the Principal Companies as trustee or custodians for a retirement plan of the undersigned), any interest and dividends thereon and any proceeds of the foregoing, (collectively "Pledged Securities"), are hereby assigned, pledged and set over as a general and continuing collateral security to whichever of the Principal Companies advances monies to the undersigned from time to time as security for the payment to the Principal Companies or any of them of the present and future indebtedness of the undersigned to the Principal Companies, or any of them. The borrower shall retain all voting rights and the rights to all dividends and similar distributions with respect to the pledged securities. This assignment is solely

for purpose of granting security with respect to the loan and is not intended to transfer registered or beneficial ownership to the Principal Companies. The undersigned agrees not to assign any other security interest in the pledged securities without consent of one of the Principal Companies.

3. Default

If default is made in payment of any such indebtedness or if before payment is due the value of any of the Pledged Securities in the opinion of the Principal Companies, or any of them, has depreciated and further securities of sufficient value in the opinion of the Principal Companies, to cover such depreciation in value have not been deposited with the Principal Companies under this agreement, or if as a result of a change in margin requirements or loan limits by the Principal Companies or any of them, or by regulatory authority, the value of any pledged securities of the undersigned is deemed to be insufficient *or if the Principal Companies, in their discretion should consider if necessary for their protection, the Principal Companies, without notice, advertisement, demand or repayment or any other formality (all of which are hereby waived), may sell by public or private sale, redeem, or otherwise deal with the Pledged Securities in such manner as they think fit and may hold the proceeds in lieu of any Pledged Securities realized* and appropriate the same on account of such parts of the said indebtedness and liability as the Principal Companies think fit and the undersigned agrees that without limiting the generality of the foregoing, the Principal Companies shall have the power to:

(a) sell or contract to sell or redeem any or all of the Pledged Securities or any other fund or units now or hereafter managed or administered by any of the Principal Companies in which the undersigned has invested;

(b) withdraw any monies standing to the credit of the undersigned in a chequing or savings account or any other account with any of the Principal Companies;

(c) deliver any or all of the Pledged Securities hereby assigned against the sale or redemption of any such Pledged Securities.

All costs and expenses incurred by the Principal Companies in respect to the Pledged Securities and the realization thereof shall be added to the said indebtedness and liability of the undersigned and shall be a first charge upon the monies received.

9 Legal set-off requires mutuality of parties and of rights. Coopers & Lybrand was appointed receiver-manager on 30th June 1987 under the authority of the Judicature Act, R.S.A. 1980, c. J-1. Coopers & Lybrand thereby became an equitable assignee of the debtors' interests for the purposes of the law of set-off: *Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660 at 663, 39 C.B.R. (N.S.) 1, 124 D.L.R. (3d) 150, 29 A.R. 607 (C.A.). It follows that legal set-off will not avail.

10 Madam Justice Wilson speaking for the Supreme Court of Canada in *Holt v. Telford*, [1987] 2 S.C.R. 193, 54 Alta. L.R. (2d) 193, [1987] 6 W.W.R. 385, 21 C.P.C. (2d) 1, 46 R.P.R. 234, 37 B.L.R. 241, 41 D.L.R. (4th) 385, 81 A.R. 385, 78 N.R. 321, defined equitable set-off as follows [p. 203 Alta. L.R.]:

> The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

11 In my opinion, those claimants with concurrent debt obligations do not fall within the first category. Their loans were regular demand loans with no set repayment terms. As no demand was made prior to notice of appointment of Coopers & Lybrand, the outstanding loan balances could not be described as money sums which had accrued and become due.

12 In *Holt v. Telford* the court quoted with approval the following reasoning of the British Columbia Court of Appeal in *C.I.B.C. v. Tucker Indust. Inc.*, [1983] 5 W.W.R. 602, 48 C.B.R. (N.S.) 1 at 4, 46 B.C.L.R. 8, 149 D.L.R. (3d) 172. Equitable set-off was said to apply:

> ... where mutuality is lost or never existed. It can apply where the cross obligations are not debts. An equitable set-off may arise where the cross obligations arise from the same contract, though mutuality has been lost, or where the cross obligations are closely related, or where the parties have agreed that a right to set-off may be asserted between them, or where a court of equity would otherwise have permitted a set-off, as perhaps, in a case where credit was granted by a debtor to his creditor in reliance on the availability of a set-off. The terms of the debenture, the terms of the appointment of the receiver manager, the powers of the receiver manager, and his ratification or repudiation of existing contracts may all affect a claim to an equitable set-off.

13 The Supreme Court of Canada in *Telford* also appears to have approved the five general principles enunciated by the British Columbia Court of Appeal in *Coba Indust. Ltd. v. Millie's Hldg. (Can.) Ltd.*, [1985] 6 W.W.R. 14 at 22, 65 B.C.L.R. 31, 36 R.P.R. 259, 20 D.L.R. (4th) 689:

> From that review of the law, which I accept as accurate, can be extracted the following principles.
>
> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *Br. Anzani*, supra.
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: *Fed. Commerce & Navigation Ltd.*, supra.
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani.*
>
> 5. Unliquidated claims are on the same footing as liquidated claims: the *Nfld.* case, supra.

14 Accordingly, the question to be decided is whether there is a connection between the two debts that falls within the principles set out above. The relevant inquiry is best put in the context of each of the three general categories of contract holders as outlined by counsel and reflected by the affidavit of Mr. Johnson filed on 14th September 1989.

(a) Debtors who obtained loans from F.I.C./A.I.C. to purchase F.I.C./A.I.C. investment contracts

15 In my opinion, these contract holders are clearly entitled to equitable set-off. The essence of their arrangement with F.I.C./A.I.C. was to create mutual cross-obligations — the very money advanced to create the debt owing to these companies was utilized to create a debt owed from these companies. In my view, the fact that these debts may have been created by separate and apparently unrelated contracts is not a bar to set-off. Moreover, the terms of the loan advance agreement in each instance conferred a discretion upon F.I.C. and A.I.C. to set off any investment contract balance against any loan advance. The equitable ground contemplated by *Coba Indust.* has been made out; it would be manifestly unjust to refuse set-off.

(b) Debtors who used pre-existing investment contracts in F.I.C./A.I.C. to secure subsequent loans from F.I.C./A.I.C.

16 In my opinion, this category of contract holders can also claim equitable set-off on the ground that credit was granted by the debtor in reliance upon the availability of set-off: *C.I.B.C. v. Tucker*, supra. The nexus here is reinforced by the fact that at the time the initial investment contract was purchased, contract holders were apparently informed that such investment contracts could be used automatically to secure loans for up to 70 per cent of the face value of the investment contracts. Here again, the *Coba Indust.* conditions are met and set-off shall apply.

(c) Debtors who simultaneously held mutual fund loans and investment contracts in F.I.C./A.I.C. when Coopers & Lybrand was appointed

17 I am advised by counsel that there are only a very small number of investment contract holders in this area. The exact nature of these transactions is unclear, as information on this group is scant and, where provided, somewhat conflicting. On p. 4 of the Johnson affidavit filed on 14th September 1989 these contract holders are described as persons who:

> At the time of the advance by First Investors Corporation Ltd. or Associated Investors of Canada Ltd., the borrower maintained mutual funds with one or more of the other companies of the Principal Group, and sometime at a future date the borrower purchased an Investment Contract in First Investors Corporation Ltd. or Associated Investors of Canada Ltd.

18 During the course of argument, counsel for the receiver suggested certain parties within this category were in receipt of a single loan advance secured by mutual funds and that this arrangement was followed by the purchase of an F.I.C./A.I.C investment contract. The court is left to speculate as to whether the subsequent purchase was allowed as an exchange of security. Did F.I.C./A.I.C permit a borrower to substitute investment contracts for mutual funds to secure the pre-existing loan? Evidence of this would perhaps be found in a hypothecation agreement. The court is also left to ponder whether the subsequent purchase of the F.I.C./A.I.C. contract was completely unrelated to the earlier advance secured by mutual funds.

19 Mr. Tkachuk's letter dated 14th September 1989 attempts unsuccessfully to clarify what occurred with these loans after receivership:

> I have been advised that a number of AIC/FIC loans were sold to Metropolitan Trust during September, 1987. However, only four of the loans which we sold were loans where the Debtor also held an Investment Contract in AIC or FIC. In addition, the sale of the four loans was only a partial sale of the balance due and owing under each loan. More specifically, the security granted on each of the four loans consisted of a pledge of the Investment Contract in AIC/FIC and the pledge of certain mutual funds. These four loans were then split in relation to the security granted (i.e. Investment Contract v. mutual funds). The portion of the loans secured by the mutual funds were sold to Metropolitan Trust. The remaining portion of the four loans secured by the AIC/FIC Investment Contract are still being maintained by Coopers & Lybrand Limited.

20 These comments by counsel seem to suggest two further sub-categories, one of which involves Metropolitan Trust. I am advised that Metropolitan Trust did not receive notice of the application for advice and directions.

21 As I have made clear on prior occasions, the court will not adjudicate in an evidentiary vacuum. Moreover, Metropolitan Trust must be given notice. This aspect of the application, accordingly, is adjourned sine die.

Order accordingly.

TAB 10

1921 CarswellOnt 32
Ontario Supreme Court, In Bankruptcy

Reference Re McMahon Co.

1921 CarswellOnt 32, 2 C.B.R. 150

In re McMahon Company

Ex parte Betty's, Limited

Holmested, K.C., Registrar

Judgment: December 12, 1921

Counsel: *J. M. Bullen*, for the trustee, Canadian Credit Men's Assn.
W. S. Montgomery, for Betty's Ltd.

***Holmested, K.C.* (Registrar):**

1 This is an application on the part of the trustee to set aside certain transfers of goods made by the debtors to the Betty's Ltd., March 21, 22, 23 and 24, 1921, and to compel the Betty's Ltd. to pay to the trustee the value of the goods in question, such transfers being, as claimed by the trustee, a fraudulent preference within the meaning of *The Bankruptcy Act.*

2 The assignment was made by the debtors [McMahon Co.] on April 12, 1921, so that the transactions in question took place within three months of the making of the assignment.

3 Counsel for Betty's Limited claims that the transactions were in fact *bona-fide* sales made by the debtors to Betty's Ltd. without knowledge of the fact that the debtors were then insolvent. The evidence adduced in support of the claim of the trustee and in opposition thereto is conflicting on some material points to be hereafter referred to.

4 The story of the Betty's Ltd. is that the goods delivered on March 21 and 22, consisted of a quantity of pineapple which had been purchased in the preceding January. It is admitted that there was no written order for these goods, nor any written acceptance of the alleged verbal order, and that on March 21 when the first delivery was made there was in fact no enforceable contract existing between the Betty's Ltd, and the debtor company. It was claimed that an order was given by telephone in March to send on the goods and pursuant to that request the delivery of the pineapple took place on March 21 and 22 (the value thereof being $825). On March 23, the evidence of the witness for Betty's Ltd. was to the effect that he went on behalf of the Betty's Ltd. to sell goods to the debtor company but failed to sell, and was persuaded to buy jam to the amount of $660 which was in pursuance of the bargain then verbally made, delivered on March 23 and 24. The story as to the pineapple is to some extent corroborated by the witness Topping, who was in the employ of the debtor company, but there is no corroboration as to the alleged purchase of the jam by Topping. Cummings (also an employee of the debtor company) gave a wholly different complexion to the transaction; and according to his account Alexander, the manager of Betty's Ltd., came to the office of the debtor company about March 21, with a view to getting payment of his bill which the debtor company was unable to pay; and that it was then proposed that goods should be delivered by the debtor company to the Betty's Ltd. in order to square the indebtedness of the debtor company to Betty's Ltd., and that he (Cumming) then being in the position of the manager of the debtor company's business, assented to the proposal and that the goods in question were then delivered to Betty's Ltd. pursuant to that arrangement.

5 Mr. Alexander, the manager of the Betty's Ltd., very frankly admitted that in the course of a conversation in the following July he had said that if he had known the McMahon Company was insolvent he would have got enough to cover the account in full; from which it would appear that he would have had no scruple in endeavouring to carry out a transaction of the very kind which the trustee alleges the impeached transaction to have been, viz., an attempt to square the account due

Betty's Ltd. by getting a transfer of goods.

6 It is attempted to use this statement as evidence of the good faith of the Betty's Ltd. because it is said they did not in fact get goods to the full amount of their account. But there is another significant circumstance which supports the trustee's claim, namely, that the value of the goods delivered did in fact balance or nearly balance the indebtedness of the debtor company as it appeared at that time in the latter's books, and there is also the further circumstance that at about this very time there was debate and inquiry as to the true state of the account and an apparent discrepancy between the Betty's Ltd. books and those of the debtor as to the state of the account. This rather helps to show that the debtor company, then hopelessly insolvent, was endeavouring to find out the true state of the account not with a view of paying it off in the ordinary course of business, which it was unable to do, but for the purpose rather of ascertaining how much merchandise would be required to offset it.

7 It appears to me that having regard to the facts above mentioned I ought to prefer the statement of Cumming, an intelligent and, as I think, a disinterested witness, to that of Mr. Alexander.

8 There may have been conversations in January about buying pineapple between Alexander and Percy McMahon but that there was any concluded contract for any specific quantity I do not think it is possible to hold. It is admitted that not a scrap of writing can be found which in any way supports or corroborates the existence of any such contract. The books of account of the McMahon Company apparently contain no entry in January showing the sale of these goods to Betty's Ltd. I should imagine to make contracts for $875 worth of goods in that way is not a usual, but a most unusual, course of doing business; and I find as a fact that no such contract was in fact made. And I further find as a fact that the true transaction was that detailed by the witness Cummings, viz., a proposal on the part of Alexander on behalf of Betty's Ltd. to get goods from the debtor company to square the account.

9 The question remains, did Betty's Ltd. know in March when the transaction took place that the McMahon company was insolvent. Mr. Alexander denies that he did, but I am of opinion on the evidence that if he did not know, it was not from any want of information of the facts necessary to lead him properly to that conclusion. The terms of sale and purchase of goods between the two firms were stated to be thirty days' credit. As a matter of fact these terms the debtors had since the beginning of the year failed to comply with, and its indebtedness to Betty's Ltd. was long past due. This fact was well known to Mr. Alexander, and, when he made the proposal to take goods in payment, as I hold he did, I think that fact also indicates that he knew that the debtor company was in insolvent circumstances.

10 That the transfer of the goods in question did in fact give the Betty's Ltd. a preference, is beyond dispute.

11 It has not been even suggested that the transactions impeached were entered into in any way to benefit the debtor company, or to gain any benefit, or contemplated benefit, if at the time they took place, it had become perfectly clear to those concerned in that company that it could not carry on. There was not, nor is it suggested that the debtor company had, any hope that by settling the claim of the Betty's Ltd. it could continue to carry on its business; or that its capacity for paying its other creditors would be improved although it is true it staggered along for about a month longer before its final collapse.

12 My conclusion therefore is that the impeached transactions are void as against the trustee, and that Betty's Ltd. must account for the value of the goods in question to the trustee. They must also pay the trustee's costs of the application, and amount due to them irrespective of the goods whereby they sought to offset their claim.

Judgment for trustee.

TAB 11

1995 CarswellOnt 930
Ontario Court of Justice (General Division)

Leo P. Abrams & Son Ltd. v. MacDonald Homes Inc. (Trustee of)

1995 CarswellOnt 930, 35 C.B.R. (3d) 277, 57 A.C.W.S. (3d) 913

LEO P. ABRAMS & SON LTD. v. PEAT MARWICK THORNE INC., in its capacity as Trustee in the Estate of MacDONALD HOMES INC., RAYMOND STEEL LTD. and 595997 ONTARIO INC. c.o.b. as PARKWAY LANDSCAPING

Roy J.

Judgment: September 8, 1995
Docket: Doc. Ottawa 91668/95

Counsel: *Fred Seller* , for applicant.
Wayne Young , for defendant 595997 Ontario Inc.
Marc Doucet and *Justice Fogarty* , for defendant Peat Marwick Thorne Inc.

Roy J. **:**

1 This application came before me on August 21, 1995. The applicant is asking for a declaration that the transfer of the property, description as set out in para.1(a) of the application, was bona fide, being for good and valuable consideration. The respondent Peat Marwick Thorne Inc., also acting in its capacity as trustee in the estate of MacDonald Homes Inc., asked for a declaration to set aside the transfer as being a trust asset. The respondent Peat Marwick Thorne, also acting in a capacity as trustee in bankruptcy for the estate of MacDonald Homes, asked to set aside the transaction, alleging it was a fraudulent preference or conveyance. Finally, an application by the respondent Parkway Landscaping asking for a declaration their lien was good and valid and that they were not bound by the terms of their contract, which stipulated they had to put a lien on a lot-by-lot basis rather than a general lien on all the property on which they performed work.

2 At the outset, all of the parties agreed this matter should proceed summarily and on the basis of the evidence in their affidavits or in the transcripts of the cross-examination of the parties.

3 The first question to be answered, therefore, is, should this transaction be set aside as a fraudulent preference or conveyance? The facts are relatively simple. The applicant had, for approximately 10 years, been supplying appliances to MacDonald Homes. In July 1994, the applicant had been pressuring MacDonald Homes for payment of some over $118,000 owing and in fact the applicant was threatening to discontinue further supply of appliances unless he was paid. Accordingly, the vendor MacDonald Homes approached the applicant and offered to convey the property in question in satisfaction of the amounts owing to it. On or about the August 23, 1994, the applicant and MacDonald Homes entered into an agreement of purchase and sale of the property for the price of $118,364.49. No mention was made in the agreement that the purchase price would be to satisfy the debt owing to the applicant. Further, no mention was made as to whether any of the $118,000 would be by way of credit, cash, or otherwise. The property was conveyed to the applicant on October11, 1994.

4 Under s. 95 of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c.B-3, in order to raise the prima facie presumption of a fraudulent preference, the trustee must establish that:

(1) the debtor was an insolvent person at the date of the alleged preference,

(2) the transaction took place within three months of the bankruptcy, and

(3) as a result of the conveyance, transfer, etc., the creditor received a preference.

5 All parties agree MacDonald Homes was, as of August 23, 1994, insolvent. Did the transaction take place within three months of the bankruptcy? The applicant argues this transaction took place on August 23, 1994, which is the date of the offer of purchase and sale, and, therefore, was not within three months of the bankruptcy, which took place on November 25, 1994. The respondents submit the transaction took place on October 11, 1994, and, therefore, within three months of the bankruptcy.

6 In my opinion, this conveyance or transfer of property took place on October 11, 1994. To conclude otherwise, I would have to find the applicant and the vendor had a binding agreement as of August 23, 1994. In fact, what was supposedly agreed to on August 23, 1994, did not take place until October 11, 1994, the time of the transfer. On October 11, 1994, the vendor received forgiveness for his accounts payable in the amount of $99,149.45, plus cash from the applicant in the amount of $27,939.26. In other words, the transaction took place on October 11, 1994, in accordance with terms agreed to on that date, not August 23, 1994. Accordingly, a transaction took place within three months of the bankruptcy.

7 Finally, this transfer, without question, gave the creditor a preference. It follows, therefore, a prima facie presumption is raised, that there has been a fraudulent preference and the burden is upon the debtor to rebut it.

8 In this application we do not have any direct evidence of the debtor and the only evidence before me is that the debtor was not attempting to give the applicant creditor a preference over the other creditors, but only attempting to continue operating his business and required appliances from the applicant to do so.

9 In this bankruptcy, the debtor had debts in excess of his assets of approximately $4.8 million. These moneys mainly were owing to save 185 different creditors, and most, if not all, were subcontractors of the debtor. The evidence further indicates the debtor was involved with some 24 other creditors in the transfer of homes as satisfaction for moneys owing. The evidence before me indicates that Mr. Leo Abrams, the applicant, was a conscientious creditor and was doing everything possible to protect his accounts receivable. There is no evidence whatsoever to indicate he was involved with the debtor in attempting to receive preferential treatment over the other creditors.

10 As is often repeated in much of the jurisprudence, the law is not there to penalize a diligent creditor. Further, the cases clearly state the intention is that of the debtor and not the creditor. Looking at all of the evidence, and the actions of the debtor towards the applicant creditor in this case and in 24 other situations, one can only conclude he was clearly attempting to give preference to this creditor over the other creditors.

11 I therefore find that under s. 95(2) the transaction was a fraudulent conveyance.

12 Having made this finding it is not necessary to make a finding as to whether the applicant's supply of appliances was a lienable transaction.

13 Pertaining to the Parkway Landscaping matter, I find the evidence indicates this lien was registered within the time limits set out in the Act. I also find this respondent should have registered his liens on a lot-by-lot basis in accordance with his contract with MacDonald Homes and, accordingly, having filed a general lien, his lien is invalid and he is to be considered only as a trust beneficiary as all the other suppliers of labour and material on this project.

14 During the hearing of this motion, there appears to be some disagreement between the parties as to what amount would be owing to the respondent Parkway Landscaping if his general lien applies to the lot that is the subject matter of this application. I will leave it to the parties to resolve this issue among themselves.

15 As to the question of costs, because of the nature of the evidence in this case and the complexity of the issues and, further, throughout this matter it appears Mr. Abrams acted in good faith as a diligent creditor, I will not be making any order as to costs.

Order accordingly.

TAB 12

What's New

Filing copy

Please retain this notice at the front of your binder.

INJUNCTIONS and SPECIFIC PERFORMANCE

The Honourable Mr. Justice Robert J. Sharpe

Release No. 24, November 2015

What's New in this Update:

Ex parte orders: Duty to make full and frank disclosure

Failure to disclose an intention to use the granting of an *ex parte* injunction in one jurisdiction in support of an application in another is material: *Todaysure Matthews Ltd. v. Marketing Ways Services Ltd.*, [2015] EWHC 64 (Comm.), at para. 20, applying *Siporex Trade S.A. v. Comdel Commodities*, [1986] 2 Lloyd's Rep. 428 (Eng. Q.B.), at p. 437: "all facts 'which reasonably could or would be taken into account by the Judge in deciding whether to grant the application' ".
[paras. 2.40, 2.58]

CANADA LAW BOOK

Customer Relations
Toronto 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164 Fax 1-416-298-5082
www.carswell.com E-mail www.carswell.com/email

"the same spirit of commerce which led to the enforcement of contracts, also brought in the notion that money is an equivalent of everything"[4] and, as a practical matter, common law remedies were virtually confined to damages. The courts of chancery, however, provided an alternative to the money remedies in the form of specific performance and injunction. But the equity administered by the courts of chancery was only a gloss on the common law[5] and could relieve only cautiously against certain of its strictures and inadequacies. Hence, history determined that the presumptive remedy was that of the common law and that equity could extend its special form of relief only where the common law remedy was inadequate. The adequacy of damages test remains the primary one in determining the availability of specific relief[6] and will be examined in this chapter.[7]

7.20 Also to be examined in this chapter is the second major qualification on the granting of specific performance shaped by history, namely, the problem of supervision.[8] In the struggle between the courts of law and equity, chancery perceived that its authority could be undermined by rendering orders which could not be enforced. Orders involving complex or extended performance were seen to expose the courts to the risk that even imprisonment for contempt of the recalcitrant defendant might not achieve the objective of having the contract performed and hence there developed a "prejudice for historic reasons against affirmative decrees in cases calling for more than a single simple act".[9]

512, 120 E.R. 191; *Benson v. Paull* (1856), 6 El. & Bl. 273, 119 E.R. 865. The common law courts could also order delivery of a chattel in detinue in certain cases where the vendor failed to deliver upon payment which in practice, if not in theory, amounted to specific performance. The old writ of covenant described in Blackstone, *Commentaries on the Laws of England*, 16th ed., vol. 3 (London, Butterworth & Son, 1825), at pp. 156-7, amounted to a form of specific performance which was available with respect to agreements for conveyance of land.

4 Fry, *supra*, footnote 3, at pp. 4-5.

5 Maitland, *Equity, A Course of Lectures*, 2nd ed. by Brunyate (Cambridge, Harvard University Press, 1936), at pp. 16-22.

6 Laycock, *The Death of the Irreparable Injury Rule* (New York, Oxford University Press, 1991), argues forcefully that inadequacy of damages fails to explain the availability of specific performance in modern American cases and offers a formulation of the "real" reasons for withholding specific relief. *Cf.* Yorio, *op. cit.*, footnote 2, at p. 27: "the adequacy doctrine remains the linchpin of the rules governing specific performance in American law". The alternate remedy at law may not always be damages: see *Freed v. Cox* (1993), 85 Man. R. (2d) 276, 41 W.A.C. 276 (C.A.), refusing specific performance to compel disclosure of information where ordinary discovery rules provided an adequate remedy.

7 *Infra*, 7.50 to 7.330.

8 *Infra*, 7.340 to 7.530.

9 Pound, "The Progress of the Law, 1918-1919, Equity" (1920), 33 Harv. L. Rev. 420, at p. 435.

In Chapter 10, attention will be directed to the discretionary defences which come into play to defeat a claim which has otherwise met the criteria for specific relief. These represent the third qualification on the availability of specific performance. The discretionary nature of specific relief allowed the courts to consider matters and defences of particular concern to equity. Much of the modern law on mistake, misrepresentation and unconscionability was developed by chancery. Specific performance was often refused on these grounds. As noted in Chapter 10 it will now be much rarer for the court to fasten on a discretionary matter of this sort which falls short of providing a general defence to the enforcement of the contract but which is seen to render specific relief inappropriate. 7.30

While specific relief for breach of contract[10] continues to bear these distinctive marks of history, is submitted that, as with injunctions, the courts are less concerned about strictures formerly imposed on equity and are abandoning the more rigid 19th century approach in favour of one which calls for a more thorough and sensitive review of the interests of the contracting parties and the techniques available to protect those interests.[11] Without ignoring or abandoning the lessons of history, it is surely now appropriate for the courts to develop a modern rationale for specific relief. It is against this background that the rules relating to specific relief for breach of contract are examined and an attempt made to isolate and identify the advantages and disadvantages of specific relief as a remedy. 7.40

2. Inadequacy of Damages

(1) Advantages of specific performance

It has often been said that the general goal of contract remedies is so far as possible to put the plaintiff in the position he or she would 7.50

10 There is jurisdiction to order specific performance of an unperformed contractual obligation in certain cases even where the defendant is not in breach: see *Hasham v. Zenab*, [1960] A.C. 316 (J.C.), at pp. 329-30; *Bunn v. Lock* (1987), 61 O.R. (2d) 772, 46 R.P.R. 296 (C.A.), leave to appeal to S.C.C. refused 88 N.R. 237*n*.

11 See, *e.g.*, *Beswick v. Beswick*, [1968] A.C. 58 (H.L.), at p. 91, *per* Lord Pearce, quoting with approval *Coulls v. Bagot's Executor and Trustee Co. Ltd.* (1967), 119 C.L.R. 460 (Aust. H.C.), at p. 503, *per* Windeyer J.:

> There is no reason to-day for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made. The days are long past when the common law courts looked with jealousy upon what they thought was a usurpation by the Chancery court of their jurisdiction.

This theme in the substantive context is developed at length in Waddams, *The Law of Contracts*, 6th ed. (Toronto, Canada Law Book, 2010). Particular reference is made to remedial flexibility at para. 666.

have been in had the contract been performed.[12] This goal can be achieved by two methods. The first is to award the injured party compensatory damages. The second is to order the defaulting party specifically to perform its obligation. The existing regime of remedial law strongly favours the first option of damages and awards specific performance only in exceptional cases. Yet in many cases, specific relief may seem to be the only sure way to put the plaintiff in the position he or she would have been in had the contract been performed. Obviously, specific relief will not always achieve this end. The time of anticipated performance has usually passed by the date of trial and circumstances may well be such that the plaintiff will want no more than damages. However, where a practical choice between damages and specific performance remains, the latter has certain distinct advantages. The assessment of damages the innocent party has suffered can be a difficult, expensive and time-consuming task. Specific performance has the advantage of avoiding the problems and costs the parties and the judicial system must incur if damages are to be assessed. Perhaps more significant is the very real element of risk that the translation into money terms of the effect of the breach on the plaintiff may be inaccurate.[13] Some cases will present more risk than others but it cannot be denied that the element of risk of error is virtually swept away if the court is able to make an order of specific performance. The innocent party receives the very thing bargained for rather than a monetary estimate of its worth. If the matter were to be viewed from the perspective of protecting the innocent party, it might even be argued that the very fact that the plaintiff is seeking specific performance indicates that damages will be inadequate.[14] If an adequate substitute were available, and if damages would make the plaintiff whole for any loss caused by the defendant's breach, few plaintiffs would proceed with an action for specific performance. Willing performance from another will ordinarily be much preferable to grudging performance from one who has refused until forced to perform by order of the court.[14a]

---

12 See Waddams, *The Law of Damages*, looseleaf ed. (Toronto, Canada Law Book, 1998), 5.20 and 5.30. The classic statement of this principle is that of Parke B. in *Robinson v. Harman* (1848), 1 Ex. 850 at p. 855, 154 E.R. 363: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

13 For discussion of this point, see Narasimhan, "Modification: The Self-Help Specific Performance Remedy" (1987), 97 Yale L.J. 61, at pp. 65-6.

14 See Schwartz, "The Case for Specific Performance" (1979), 89 Yale L.J. 271.

14a See *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.* (2014), 377 D.L.R. (4th) 701, [2015] 1 W.W.R. 297 (B.C.C.A.), citing this paragraph at para. 49.

that extra value is extremely difficult to assess. If no account is taken of this aspect of the plaintiff's interest in performance, the expectation will not be protected and one of the basic aims of contract remedies will not be fulfilled. By requiring performance of the defendant's obligation *in specie*, the court can avoid the expensive and time-consuming task of translating the effect of the breach into money terms and, more importantly, avoid the risk of inaccurate assessment and thereby achieve a virtual guarantee of remedial adequacy in favour of the plaintiff.[44]

(7) Negative covenants

7.240 One category in which damages are presumptively considered inadequate is that of negative covenants. These cases are examined in detail in Chapter 9 where it is seen that the plaintiff will rarely be denied specific relief to enforce a negative covenant. This is partly because such orders are easily enforced against the defendant in a relatively unobtrusive manner. The availability of specific relief to enforce negative covenants also turns on the difficulty of assessing damages. Where a positive obligation is broken, the plaintiff is deprived of something the value of which can be measured. Where the defendant does something that he or she promised not to do, the impact of the wrongful act is much more difficult to measure in money terms. It is considered preferable to stop the defendant from doing what he or she promised not to do rather than to try to estimate the loss.[45]

(8) Insolvency

7.260 Damages often can be readily assessed but not so easily collected. If the defendant is unable to pay a damages award, then however accurate the assessment of the plaintiff's loss may have been, the remedy of damages can hardly be described as adequate.[46] There is surprisingly little authority on whether the defendant's insolvency will make damages "inadequate" so as to justify specific relief.[47] Fry

44 *Raymond v. Raymond Estate*, *supra*, footnote 36, citing this passage at para. 12; *Cowan v. Arnold* (2011), 980 A.P.R. 195, 380 N.B.R. (2d) 195 (Q.B.), citing this passage at para. 37.

45 *McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd.*, [1994] 10 W.W.R. 662 at p. 683, 159 A.R. 120 (Q.B.); *Certicom Corp. v. Research in Motion Ltd.* (2009), 94 O.R. (3d) 511 at para. 84, 71 C.P.R. (4th) 278 (S.C.J.); *Telesis Technologies, Inc. v. Sure Controls Systems Inc.* (2010), 195 A.C.W.S. (3d) 241, 2010 ONSC 5288 (S.C.J.), citing this passage with approval at para. 54.

46 *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.* (2009), 95 O.R. (3d) 93 at para. 103, 58 B.L.R. (4th) 60 (C.A.).

47 See, however, *Mylonas Enterprises Ltd. v. Foundation Place Inc.* (2013), 565 A.R. 55, 34 R.P.R. (5th) 199 (Alta. Q.B.) (damages inadequate and specific performance granted on the basis of the defendant's insolvency). The plaintiff's insolvency need not bar specific relief absent hardship to the defendant: see *Dyster v. Randall &*

was categorical in his dismissal of the proposition that the defendant's insolvency could justify specific performance: "this principle . . . if it were admitted, would give the Court jurisdiction by way of specific performance in all cases of contract, whether for the sale of chattels or of any other nature, which is certainly not the law of the Court".[48]

It has been noted that injunctions have been granted on the basis of the defendant's insolvency[49] where, it is argued below, different considerations apply.[50] The cases provide no clear authority. Often one finds statements confirming the award of specific performance, already justifiable on other grounds, on the basis of the defendant's insolvency and similarly, where specific relief is refused, it is sometimes said that, as the defendant is solvent, there will be no problem in collecting damages.[51] These dicta hardly provide authority for granting the remedy on the ground of insolvency alone. The difficulty with allowing the defendant's insolvency by itself to constitute the ground for specific performance is that very often the effect of the decree will be to confer an unfair preference over other creditors.[52] It is clearly preferable to have the defendant's assets distributed fairly among the creditors under the appropriate bankruptcy or insolvency legislation. This is not to say, however, that if the plaintiff's interest is otherwise specifically enforceable, a decree should not be granted. If the plaintiff has a proprietary interest in some good, then of course the defendant's insolvency provides all the more reason for granting a specific performance decree to enforce the *in specie* claim.[53] Prior proprietary claims should be recognized[54] but the fact of insolvency itself should not be used to 7.270

Sons, [1926] 1 Ch. 932. It has been held that the insolvency of the defendant does not defeat a claim of specific performance, otherwise available, provided the decree may be readily enforced against the trustee or receiver: *Freevale Ltd. v. Metrostore (Holdings) Ltd.*, [1984] Ch. 199.

48 Fry, *op. cit.*, footnote 3, at p. 30, arguing against the suggestion made in *Doloret v. Rothschild* (1824), 1 Sim. & St. 590 at p. 598, 57 E.R. 233, *per* Leach V.C., that insolvency does provide a basis for specific performance. See also Macdonald, *op. cit.*, footnote 37; *410675 Alberta Ltd. v. Trail South Developments Inc.* (2001), 293 A.R. 181, 45 R.P.R. (3d) 169 (C.A.), leave to appeal to S.C.C. refused 312 A.R. 340*n*, 293 N.R. 190*n* (defendant's insolvency not a basis for specific performance of agreement to purchase an investment property).

49 *Supra*, 1.230.

50 *Infra*, 7.280.

51 See, *e.g.*, *Dobell v. Cowichan Copper Co. Ltd. (N.P.L.)* (1967), 65 D.L.R. (2d) 440, 61 W.W.R. 594 (B.C.S.C.); *Bell v. Milner* (1956), 3 D.L.R. (2d) 202 (B.C.S.C); *Canada Starch Co. Ltd. v. St. Lawrence Starch Co. Ltd.*, [1935] O.W.N. 412 (H.C.J.).

52 For discussion of the point, see Horack, "Insolvency and Specific Performance" (1917-18), 31 Harv. L. Rev. 702; McClintock, "Adequacy of Ineffective Remedy at Law" (1932), 16 Minn. L. Rev. 233. See also, *infra*, 8.250 to 8.270.

53 See *Tailby v. Official Receiver* (1888), 13 App. Cas. 523. See also, *infra*, 8.260 and 8.270.

confer a proprietary claim in the form of a specific performance decree.

7.280 Injunctions, including cases where injunctions are sought to enforce negative covenants, fall into a different category. A prohibitive injunction will not result in the transfer from the defendant to the plaintiff of assets or property otherwise available for distribution among creditors. Moreover, it is hard to imagine an injunction being granted solely because of the defendant's insolvency. Usually the plaintiff will have some independent claim to injunctive relief that will be strengthened by the defendant's inability to pay damages.

7.290 There are cases, however, where specific performance may properly be awarded on the ground that damages are inadequate because of the defendant's insolvency without conferring any priority. Corbin argues[55] that the court should never order specific performance where performance if voluntarily made would constitute an illegitimate preference but points out that in many cases of insolvency specific performance could be granted without this effect. Spry also takes a middle ground position,[56] similar to that of Yorio who suggests that "insolvency establishes that damages are in fact inadequate" and that specific performance should follow accordingly, except where insolvency is the sole ground for specific relief and granting the remedy would give the plaintiff an undeserved preference over other creditors.[57] The plaintiff may be the defendant's only creditor and clearly no preference problems arise in that situation. The contract may remain bilateral, in the sense that a mutual exchange will be effected through specific performance. This would not result in a net diminution of the value of the assets possessed by the defendant and thus there is no reason not to protect the plaintiff. In some cases, damages may represent a greater loss than actual performance. For example, failure of the defendant to deliver some necessary item may result in colossal consequential damages for which the defendant would be liable. In such a case,

54 In *Kristian Equipment Ltd. v. Urano Rentals Ltd.* (1988), 68 Sask. R. 134 (Q.B.), a decree for specific performance was made subject to the security interest of a third party, the validity of which was to be determined in a subsequent proceeding.

55 *Corbin on Contracts*, vol. 12 (St. Paul West Publishing Co., 1993), §1156.

56 Spry, *The Principles of Equitable Remedies*, 9th ed. (Australia, Law Book Co., 2014), at pp. 70-72.

57 Yorio, *op. cit.*, footnote 2, at p. 160. See also Jones and Goodhart, *Specific Performance* (London, Butterworths, 1996) at pp. 218-26; Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed. (Oxford, Oxford University Press, 2004) at pp. 467-8. But *cf. Anders Utkilens Rederi A/S v. O/Y Lovisa Stevedoring Co. A/B*, [1985] 2 All E.R. 669 (Ch.), at p. 674, *per* Goulding J.: "Commercial life would be subjected to new and unjust hazards if the court were to decree specific performance of contracts normally sounding only in damages simply because of a party's threatened insolvency."

specific performance would have the effect of preserving assets for distribution and should be granted.

Another situation in which specific performance may be granted in the context of insolvency is where execution of an agreement to give security is sought. In such cases, specific performance is given "not necessarily because of insolvency, but rather because of the possibility of it".[58] 7.300

(9) Avoiding multiplicity of suits

Where confining the plaintiff to damages will require bringing a succession of suits, the remedy in damages may be considered inadequate and provide a basis for specific relief.[59] Equity acts "to prevent the trouble and expense of a multiplicity of actions"[60] in such cases. Avoiding a succession of suits is more often encountered as a justification for injunctive relief where it is often preferable to stop the wrongful conduct entirely rather than to put the plaintiff to the expense and inconvenience of suing, in theory on a daily basis, for each cause of action that accrues.[61] 7.310

In the case of specific performance, an example of the application of this principle is found in the enforcement of annuity contracts. The leading case is *Beswick v. Beswick*[62] where Lord Upjohn cited with approval an Irish case[63] decided in 1841 in which it was said that to force the plaintiff to sue for damages once and for all "would be compelling her to accept a certain sum, a sum to be ascertained by the conjecture of a jury as to what was the value of the annuity".[64] 7.320

It is perhaps questionable that the same reasoning should be applied today in cases of annuities, for which there is an established market. It will be recalled that, in the *Beswick* case, the problem was that the recipient of the annuity was not a party to the contract and specific performance was found to be the only way to enforce the defendant's obligation.[65] In the ordinary case between immediate parties, the plaintiff can purchase another annuity contract in the 7.330

58 Horack, *op. cit.*, footnote 52, at p. 714.
59 See also, *supra*, 1.240 and 1.250.
60 *Beswick v. Beswick*, [1968] A.C. 58 (H.L.), at p. 97, *per* Lord Upjohn.
61 *Supra*, 1.240.
62 *Supra*, footnote 60.
63 *Swift v. Swift* (1841), 3 Ir. Eq. R. 267.
64 *Supra*, at p. 276, *per* Lord Plunket L.C.
65 In relation to other contracts on this point, see *Rattrays Wholesale Ltd. v. Meredyth-Young & A'Court Ltd.*, [1997] 2 N.Z.L.R. 363 (H.C.) at p. 380: "where B has promised A to do something for the benefit of C. A can obtain a decree of specific performance requiring B to fulfil that promise to C, and if necessary an injunction in aid of the decree."

TAB 13

1996 CarswellOnt 2737
Supreme Court of Canada

Semelhago v. Paramadevan

1996 CarswellOnt 2737, 1996 CarswellOnt 2738, [1996] 2 S.C.R. 415, [1996] S.C.J. No. 71, 136 D.L.R. (4th) 1, 197 N.R. 379, 28 O.R. (3d) 639 (note), 3 R.P.R. (3d) 1, 63 A.C.W.S. (3d) 973, 91 O.A.C. 379, J.E. 96-1316, EYB 1996-67695

Sinnadurai Paramadevan and Blossom Paramadevan (Appellants) v. Bernard Semelhago (Respondent)

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: January 31, 1996
Judgment: June 20, 1996
Docket: 24325

Proceedings: Affirming (1994), 39 R.P.R. (2d) 215, 19 O.R. (3d) 479, 73 O.A.C. 295 (C.A.), which reversed (December 5, 1990), Corbett J. (Ont. Gen. Div.) [unreported].

Counsel: *John Swan* and *Barbra H. Miller*, for appellants.
Martin Sclisizzi and *Orlando Da Silva*, for respondent.

***La Forest J.* (concurring):**

1 I have had the advantage of reading the reasons of my colleague, Justice Sopinka, and I agree with his proposed disposition in the circumstances of this case. However, given the assumption under which the case was argued, I prefer not to deal with the circumstances giving rise to entitlement to specific performance or generally the interpretation that should be given to the legislation authorizing the award of damages in lieu of specific performance. In considering modification to existing law, both these interdependent factors may well require examination, and the arguments in this case were not made in those terms.

***Sopinka J.* (*Gonthier, Cory, McLachlin, Iacobucci* and *Major JJ.* concurring):**

2 This appeal concerns the principles that apply in awarding damages in lieu of specific performance. The appellant vendor refused to close a transaction for the sale of residential property to the respondent purchaser. The latter sued for specific performance and, in the alternative, damages in lieu thereof. At the commencement of the trial, the respondent elected the latter. Subsequent to the date fixed for closing, property values rose. If the closing date is the date on which damages are assessed, the respondent would not recover the increase in the value of the property he agreed to purchase. If, however, damages are assessed as of the date of trial, the question is whether the respondent is entitled to recover not only this increase but also to retain the increase in value of the residence which the respondent owned at the time of the agreement of purchase and sale and which was not sold as a result of the aborted transaction.

I. Facts

3 In August 1986, the respondent purchaser agreed to buy a house under construction in the Toronto area from the appellant vendor Sinnadurai Paramadevan for $205,000, with a closing date of October 31, 1986. To finance the purchase, the respondent was going to pay $75,000 cash, plus $130,000 which he was going to raise by mortgaging his current house. The respondent negotiated a six-month open mortgage, so that he could close the deal on the new house and then sell his old one at an appropriate time in the six months following closing. Before the closing date, the appellant vendor reneged and in

December 1986, title to the house was taken by the appellant Blossom Paramadevan. The respondent stayed in his old house which was worth $190,000 in the fall of 1986, and $300,000 at the time of the trial.

4 The respondent sued the appellants for specific performance or damages in lieu thereof and put a caution on the title. At the time of trial, the market value of the property was $325,000. The respondent elected to take damages rather than specific performance and on December 5, 1990, Corbett J. of the Ontario Court of Justice (General Division) awarded him $120,000, that being the difference between the purchase price he had agreed to pay and the value of the property at the time of trial. The appellants appealed to the Court of Appeal for Ontario on the ground that the assessment was a "windfall" because the respondent was benefiting not only from the increase in the value of the new house, but also from the gain in the value of the old house. The respondent cross-appealed against the disallowance of legal and appraisal fees. On June 17, 1994, the Court of Appeal allowed the appeal and the cross-appeal: (1994), 19 O.R. (3d) 479, 39 R.P.R. (2d) 215, 73 O.A.C. 295.

II. Judgments Below

A. Ontario Court of Justice (General Division)

5 Corbett J. concluded that she was bound by the decision of the Ontario Court of Appeal in *306793 Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79 (leave to appeal refused, [1979] 2 S.C.R. xi):

> In this case, we have evidence of various reference points with respect to the measure of damages, the first being the difference between the contract price and the value which is $120,000. This measure of damages was expressly adopted in *306793 Ontario Limited in trust v. Rimes*.
>
> . . . . .
>
> The Court held that adopting the learned trial judge's approach would not be giving a true alternative to specific performance and that the true loss was the difference between the original purchase price and the reasonable estimate of the value at the date of trial.
>
> . . . . .
>
> This approach, although it was criticized
>
> . . . . .
>
> , is still the law in Ontario today at this time.

6 Corbett J. examined the respondent's proposed assessment of damages which consisted of "a calculation of the increase in value of property between the date fixed for closing and the date of trial less the cost to gain the benefit of the increased value. He took the market value of the subject property, deducted the purchase price, deducted the carrying costs of the $130,000 mortgage for six months being $6,716.04". Corbett J. found that the respondent "would have sold his own property in order to finance the acquisition of the subject property and, therefore, had obtained the $130,000 mortgage open for six months". Corbett J. then found that the respondent "further deducted notional interest earned by [him] on the $75,000 which he was going to pay as part of the purchase price from his own money, being $30,000 less and he deducted legal costs on closing of $2,473.75 for a net amount of damages of $80,810.21". Corbett J. pointed out that this approach was specifically rejected by the Court of Appeal's decision in *Rimes* "which is binding upon me".

7 Corbett J. stated that:

> There is no question that to award damages on the basis of the *Rimes* case does result in a windfall to the plaintiff. I considered other methods of calculating the damages. For example, if the contract had been carried out, the purchaser would today be the owner of a house worth $325,000 rather than having a property worth $300,000. It would not in my view be unreasonable to calculate the loss on this basis at $25,000.
>
> I also considered a method which has less appeal than the above method, namely that the difference in the increase in value of the defendant's property when compared with the plaintiff's property might be considered. The rise in the plaintiff's property was from $190,000 to $300,000, namely $110,000 and the defendant's increased by $115,000. The defendant therefore experienced a greater increase in value which put the damages at $5,000.

Corbett J. added that she:

> might have been inclined on the facts of this case to consider that specific performance was not an appropriate remedy and to assess damages as I have indicated on some other basis. However, there is not sufficient jurisprudence for me to adopt that approach, but I will set out reasons why the question presented itself on the facts of this case.
>
> First of all, the subject property was not unique. It was a building lot under construction which would be interchangeable in all likelihood with any number of others. Second, there is no evidence in this case that the plaintiff did look for other residences or other dwellings. Third, the plaintiff in this case was going to finance the purchase with the sale of his own dwelling so that he continued to have his own dwelling in order to assist in the purchase of the property. Fourth, the plaintiff has retained his own property and received the benefit of the increase in value of that house. Fifth, both of the parties to this transaction were sophisticated dealers in real estate.

Corbett J. concluded that:

> There is no question that to award damages on the basis of the *Rimes* case does result in a windfall to the plaintiff.
>
> . . . . .
>
> I am constrained to follow the *Rimes* case so long as specific performance is a lawful remedy when Agreements of Purchase and Sale are not concluded or are, in the circumstances of this case, wrongfully not concluded.
>
> [ellipsis]
>
> I therefore find that I must award damages in the amount of the difference between the contract price and the value given close to trial; namely $120,000.

B. Ontario Court of Appeal (1994), 19 O.R. (3d) 479

8 Austin J.A., for the court, reviewed the decision in *Rimes* and concluded that "[t]hose are not the facts of the case now before the court" (p. 481). Austin J.A. stated that the object of an award of damages for breach of contract was to "put the injured party into the position in which he would have been had the contract been performed, in so far as that is possible by the payment of money". Austin J.A. concluded that the appellants' proposal that the respondent be awarded $10,000, that being the difference between the increase in the value of the new house and the increase in value of the old house, "would achieve little, if any, of this objective". Austin J.A. then considered the respondent's alternative assessment (explained above in the review of the trial decision) and concluded (at p. 482) that:

> The trial judge rejected this approach because of *Rimes*. This case, however, like most damage claims, turned on its own peculiar facts. This alternative approach attempts to track the events as the trial judge found they would have unfolded, and attempts to put the purchaser, to the extent that money can do it, in the position he would have been had the sale closed. In light of the trial judge's findings of fact, the alternative approach comes closer to the compensatory goal than does the approach followed by the trial judge.
>
> In addition to the foregoing sum [$80,810.21], the purchaser is entitled to out-of-pocket expenses of $673.75 for legal fees and $250 for appraisal fees. These items were dealt with by the trial judge, but seem to have been omitted from the formal judgment.
>
> In the result I would allow both the appeal and the cross-appeal. I would amend para. 1 of the judgment by striking out the figure $120,000 and substituting therefor the figure of $81,733.96.

III. Issue

9 What principles apply to the assessment of damages in lieu of specific performance and, further, how do those principles apply to the facts of this case?

IV. Analysis

10 The trial judge expressed reservations about the propriety of an award of specific performance in this case. While I share those reservations and will return to the question as to the circumstances under which specific performance is an appropriate remedy, this appeal should be disposed of on the basis that specific performance was appropriate. The case was dealt with by the parties in both courts below and in this Court on the assumption that specific performance was an appropriate remedy.

11 A party who is entitled to specific performance is entitled to elect damages in lieu thereof. The jurisdiction to award damages in lieu of specific performance was conferred on the Court of Chancery by *The Chancery Amendment Act, 1858* (U.K.), 21 & 22 Vict., c. 27 (known as *Lord Cairns' Act*). Although the Act was repealed, in *Leeds Industrial Cooperative Society Ltd. v. Slack*, [1924] A.C. 851, the House of Lords established that the jurisdiction to award damages in lieu of specific performance was maintained. This jurisdiction exists as part of the law of Ontario by virtue of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 99, which provides:

> *99.* A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

12 *Lord Cairns' Act* permits damages to be awarded in some circumstances in which no claim for damages could be entertained at common law. See *Leeds, supra*, and *Wroth v. Tyler*, [1974] Ch. 30, at p. 57. In cases in which damages could also be claimed at common law, the principles generally applicable are those of the common law. In *Johnson v. Agnew*, [1980] A.C. 367, at pp. 400-1, Lord Wilberforce stated that:

> (2) The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

13 The rationale for assessing the damages at the date of breach in the case of breach of contract for the sale of goods is that if the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods. The purchaser is therefore placed in the same financial situation as if the contract had been kept.

14 Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance. Given the flexibility of the rule at common law as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead (see *Wroth v. Tyler*; *Johnson v. Agnew*; and *Mavretic v. Bowman*, [1993] 4 W.W.R. 329 (B.C. C.A.)). The rationale that the innocent purchaser is fully compensated, if provided with the amount of money that would purchase an asset of the same value on the date of the breach, no longer applies. This disposition would not be a substitute for an order of specific performance. The order for specific performance may issue many months or even years after the breach. The value of the asset may have changed.

15 Moreover, the claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered. In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement. As is elaborated in *McGregor on Damages* (13th ed. 1972), at p. 149:

> Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he

> does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages.
>
> . . . . .

Thus, the claim for specific performance can be seen as reviving the contract to the extent that the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered. In this way, a claim for specific performance has the effect of postponing the date of breach.

16 For all of these reasons, it is not inconsistent with the rules of the common law to assess damages as of the date of trial. It must be remembered that the rules of the common law did not contemplate awarding damages as a substitute for specific performance. The rules of the common law must be applied in light of the statutory imperative contained in s. 99 of the *Courts of Justice Act*. The damages that are awarded must be a true substitute for specific performance. This point is forcefully made by Megarry J. in *Wroth v. Tyler*. In that case, the purchaser had contracted for the purchase of a house for £6,000. The vendor defaulted. On the closing date, the property was worth £7,500. As of the date of trial the property was worth £11,500. In assessing damages as of the date of trial, Megarry J. stated, at p. 58:

> On the wording of the section, the power "to award damages to the party injured,
>
> . . . . .
>
> in substitution for such
>
> . . . . .
>
> specific performance," at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Furthermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant. In the case before me, I cannot see how £1,500 damages would constitute any true substitute for a decree of specific performance of the contract to convey land which at the time of the decree is worth £5,500 more than the contract price.

At p. 59 Megarry J. added:

> Yet on principle I would say simply that damages "in substitution" for specific performance must be a substitute, *giving as nearly as may be what specific performance would have given*. [Emphasis added.]

17 This was also the basis upon which *Rimes* was decided by the Ontario Court of Appeal. The reasons for judgment of MacKinnon A.C.J.O. cite *Wroth v. Tyler* with approval, pointing out that that case was not overruled by *Johnson v. Agnew, supra*. I agree with that observation. In *Johnson v. Agnew*, Lord Wilberforce, speaking for the House of Lords, concluded that in view of the flexibility of the common law rule with respect to the date for the assessment of damages to which I have referred, the view taken by Megarry J. in *Wroth v. Tyler* was consistent with the common law.

18 I therefore conclude that, in the circumstances of this case, the appropriate date for the assessment of damages is the date of trial as found by the trial judge. Technically speaking, the date of assessment should be the date of judgment. That is the date upon which specific performance is ordered. For practical purposes, however, the evidence that is adduced which is relevant to enable damages to be assessed will be as of the date of trial. It is not usually possible to predict the date of judgment when the evidence is given.

19 The difference between the contract price and the value "given close to trial" as found by the trial judge is $120,000. I would not deduct from this amount the increase in value of the respondent's residence which he retained when the deal did not close. If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. Damages are to be substituted for the decree of specific performance. I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.

20 This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as

a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

21 It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240):

> Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.

22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief. See *Roberto v. Bumb*, [1943] O.R. 299 (C.A.), at p. 311; *Roy v. Kloepfer Wholesale Hardware and Automotive Co.*, [1952] 2 S.C.R. 465; *Nepean Carleton Developments Ltd. v. Hope* (1976), [1978] 1 S.C.R. 427, at p. 438. Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, the Newfoundland Court of Appeal (*per* Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:

> The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Baud Corp., N.V. v. Brook*, *(*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp)* [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

A similar position has been taken by the British Columbia Supreme Court in *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547, at p. 551.

23 The trial judge was of the view in this case that the property was not unique. She stated that, "It was a building lot under construction which would be interchangeable in all likelihood with any number of others". Notwithstanding this observation, she felt constrained by authority to find that specific performance was an appropriate remedy. While I would be inclined to agree with the trial judge as to the inappropriateness of an order for specific performance, both parties were content to present the case on the basis that the respondent was entitled to specific performance. The case was dealt with on this basis by the Court of Appeal. In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy.

24 This takes me to the deductions made by the Court of Appeal. While I have some reservations about the propriety of these deductions, there was no cross-appeal by the respondent with respect to the award of damages. No argument was

presented with respect to these deductions. My reservations relate to the basis upon which the Court of Appeal distinguished *Rimes*. In this regard, the Court stated (at p. 481):

> Those are not the facts of the case now before the court. In this case, the purchaser is not a shell and the trial judge found that the evidence established what probably would have happened had the transaction closed.

25 On my reading of the reasons of MacKinnon A.C.J.O. in *Rimes*, the principal reason for deciding not to deduct the carrying charges was that to do so would be inconsistent with adopting the date of trial as the assessment date. I am not convinced that there is an inconsistency but would prefer not to express any further opinion on the question inasmuch as there is no cross-appeal and these matters are not in issue here.

26 The Court of Appeal added out-of-pocket expenses of $673.75 for legal fees and $250 for appraisal fees, amounts which were apparently inadvertently omitted from the judgment at trial. There was no dispute about these items.

Disposition

27 In the result, the appeal is dismissed with costs.

Appeal dismissed.

TAB 14

2008 BCSC 897
British Columbia Supreme Court [In Chambers]

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.

2008 CarswellBC 1421, 2008 BCSC 897, [2008] B.C.W.L.D. 5281, [2008] B.C.W.L.D. 5336, [2008] B.C.W.L.D. 5337, [2008] B.C.W.L.D. 5338, [2008] B.C.W.L.D. 5414, [2008] B.C.J. No. 1297, 169 A.C.W.S. (3d) 102, 44 C.B.R. (5th) 171, 72 R.P.R. (4th) 68, 86 B.C.L.R. (4th) 114

bcIMC Construction Fund Corporation (Petitioner) and Chandler Homer Street Ventures Ltd., Chandler Development Group Inc., Mark Chandler, Cooper Pacific II Mortgage Investment Corporation, P3 Holdings Inc., 636455 B.C. Ltd., Lower Mainland Steel (1998) Ltd., Susan Richards Investments Ltd., Susan Freeman, and Theodore Freeman a.k.a. Ted Freeman (Respondents)

bcIMC Speciality Fund Corporation (Petitioner) and Cook and Katsura Homes Inc., Chandler Katsura Developments Inc., Mark Chandler, Chandler Development Group Inc., 636455 B.C. Ltd., BCMP Mortgage Investment Corporation, Susan Richards Investments Ltd., Theodore Freeman a.k.a. Ted Freeman, and Susan Freeman (Respondents)

Burnyeat J.

Heard: March 27, 2008; April 14, 2008; May 29, 2008; June 9, 2008
Judgment: July 9, 2008*
Docket: Vancouver H070700, H070699

Counsel: D.D. Nugent for Petitioner
H.M.B. Ferris for Bowra Group Inc., Receiver & Manager of Chandler Homer Street Ventures Ltd., Cook & Katsura Homes Inc.
S.R. Andersen for Farouk Ratansi, Salim Jiwa, Sui Chun Chao-Dietrich
G.J. Gehlen for 636455 B.C. Ltd.
A.H. Brown for Crestmark Holdings Corp.

***Burnyeat J.*:**

1 These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security ("Receiver and Manager"), of all of the assets, undertakings and properties of Chandler Homer Street Ventures Ltd. ("Chandler") and Cook and Katsura Homes Inc. ("Cook"). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: "... manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor".

2 It was further provided in each of the Orders that:

> ... no proceeding or enforcement process in any Court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> ... no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the 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 or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph.

3 Each of the Orders also provided the Receiver and Manager was empowered and authorized but not obligated to do any of the following where the Receiver considered it "necessary or desirable":

> (2)(c) manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor; ...
>
> (k) market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (l) sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof out of the ordinary course of business . . .
>
> > (ii) with the approval of this Court in respect of any transaction in which the purchase price [exceeds $10,000.00] or the aggregate purchase price exceeds [$10,000.00] ...
>
> (m) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; ...
>
> (s) take any steps reasonably incidental to the exercise of these powers.

4 In both Actions, the Receiver and Manager now applies for "Directions" concerning either to disclaim certain contracts of purchase and sale ("Contracts") or to allow it to sell the strata lots involved at current market value free and clear of any obligation of Chandler or Cook that may arise under the Contracts on the bases that the discount contained in the Contracts constitutes payment of a pre-receivership unsecured claim or that the purchase price set out under the Contracts does not represent fair market value as at the date of those Contracts.

Background

5 Action H070699 relates to a 192 unit project in Yaletown ("Vancouver Project"). Action H070700 relates to two residential towers in Richmond ("Richmond Project"), being 9188 Cook Road ("Tower I") and 633 Katsura Road ("Tower II").

6 The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) *Vancouver Project*: $59,800,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); $3,500,000.00 (second charge holder); $6,300,000.00 (third charge holder); $20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project; (b) *Richmond Project*: $25,400,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); and $20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim $30,100,000.00 against the Vancouver Project and $32,300,000.00 against the Richmond Project. Approximately $30,000,000.00 of those amounts are said to be owing to the Respondent, Theodore Freeman a.k.a. Ted Freeman.

7 The Receiver and Manager estimates that the equity that will be available on Tower I of the Richmond Project will be $3,700,000.00 prior to the application of the debt owing under collateral security. The Receiver and Manager estimates that the equity that may be available on the Vancouver Project is $3,746,000.00 prior to the application of the debt owing under collateral security. Overall, the estimated shortfall to Gibrailt Capital under its *inter alia* charge after applying all equities available would be in the neighbourhood of $3,764,000.00.

8 There were a number of pre-sales on both the Vancouver Project and on the Richmond Project with those pre-sales

occurring prior to the construction of the Projects. Because of escalating construction costs, it became apparent that the total purchase prices on the pre-sales were insufficient to allow the completion of the two Projects.

9 After a review of the pre-sales that had been arranged by Chandler and Cook, it was the opinion of the Receiver and Manager that certain Contracts should be disclaimed as the pre-sales for many of the Units were significantly below the current market value at the time of the Contracts, at the time of the appointment of the Receiver and Manager, and presently.

10 In agreements in place between the Petitioner and Chandler and between the Petitioner and Cook, the Petitioner required that there be a number of firm and binding pre-sale agreements in place and that these agreements achieve a certain minimum price determined by the Petitioner prior to providing construction financing being made available to Chandler and to Cook. Regarding the Vancouver Project, the Petitioner advised that it was prepared to advance funds and to give partial discharges of its security if the sales proposed by Chandler for units met the criteria set out in the charge of the Petitioner. The Mortgages of the Petitioner in place as against the Vancouver Project and the Richmond Project include the following provisions:

3.3 Prepayment

(a) When not in default, the Mortgagor may prepay the Principal Amount, in whole or in part, prior to the Balance Due Date.

(b) Provided that:

(i) The Mortgagor is not in default in the payment of any amount owing to the Mortgagee hereunder;

(ii) The Lands have been subdivided by a strata plan approved by the Mortgagee and filed in the appropriate Land Title Office and separate titles have been issued for each lot or strata lot ("Strata Lot") created by the said strata plan;

(iii) The Mortgagor has entered into an unconditional bona fide agreement of purchase and sale for a Strata Lot created on the Lands with a purchaser or purchasers who are at arm's length to the Mortgagor and has provided the Mortgagee with a true copy of the agreement of purchase and sale; and

(iv) The Mortgagor has paid to the Mortgagee a partial discharge fee of $75.00 for each Strata Lot discharged from the charge of this Mortgage;

the Mortgagee will grant a partial discharge of this Mortgage from title to the Strata Lots so created upon payment of all interest due and payable to the date of payment and upon payment of 100% of the Net Sale Proceeds (hereinafter defined) for each of the Strata Lots, less Extra Costs (hereinafter defined) paid for by the Purchaser over and above the gross sale price of each of the Strata Lots. "Net Sale Proceeds" means the gross arm's length sale price of an individual Strata Lot less the aggregate of the following:

A. Any net GST included within the gross sale price (i.e., GST payable less rebate to be received by the Mortgagor or a purchaser);

B. Real estate commissions;

C. Reasonable legal fees and disbursements and GST and PST applicable thereto of the Mortgagor's solicitor for acting for the Mortgagor on sales of Strata Lots;

D. Normal closing adjustments between a vendor and a purchase[r] of real estate;

together with the holdback which a purchaser of a strata lot is permitted to retain pursuant to the provisions of the ***Strata Property Act*** provided that this holdback is maintained in trust by the solicitor or notary public acting for the Purchaser or the Mortgagor on his or her undertaking to forward the holdback to the Mortgagor's solicitor once the purchaser authorizes its release, and the Mortgagor irrevocably authorizes and directs its solicitors to forward and remit such holdback(s) when received to the Mortgagee.

"Extra Costs" refers to items specifically requested and paid for by the purchaser and not included in the gross sale price of a Strata Lot.

(c) The Mortgagor shall not enter into an agreement of purchase and sale at prices less than the pro forma price list approved by the Mortgagee, without the prior approval of the Mortgagee, and the Mortgagee's obligation to provide a partial discharge of the Mortgage is conditional upon the sale prices for Strata Lots being not less than the prices listed in the price list (the "Price List") submitted by the Mortgagor to and approved by the Mortgagee or at such sale prices that the Mortgagee has approved in writing, provided that the sale price of each Strata Lot shall not be less than 95% of the listed price for such Strata Lot shown on the Price List.

11 The Petitioner takes the position that it is not prepared to grant partial discharges of its Mortgage relating to a number of the Contracts as they do not comply with that Mortgage provision. Partial discharges would be available where provisions of the Mortgage have been met.

12 The Contracts relating to these pre-sales all contained the same provisions. Those provisions include the following:

8. Completion

The completion of the purchase and sale of the Strata Lot shall take place on a date (the "**Completion Date**") to be specified by the Vendor which is not less than ten business days after the Vendor or the Vendor's Solicitors notifies the Purchaser or the Purchaser's solicitor that:

(a) the City of Vancouver [or the City of Richmond] has given permission to occupy the Strata Lot; and;

(b) the Strata Plan in respect of the Development has been or is expected to be fully registered in the New Westminster/Vancouver Land Title Office prior to the Completion Date.

10. Delay

If the Vendor is delayed from completing the Strata Lot, depositing the Strata Plan for the Development in the Land Title Office or in doing anything hereunder as a result of fire, explosion or accident, howsoever caused, act of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour materials or equipment, flood, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, unforeseen geotechnical conditions, climatic conditions, acts or omissions of third parties, interference of the Purchaser, or any other event beyond the control of the Vendor, then the time within which the Vendor must do anything hereunder, and the Purchaser's Termination Option Date will be extended for a period equivalent to such period of delay.

16. Risk

The Strata Lot is to be at the risk of the Vendor to and including the day preceding the Completion Date, and thereafter al the risk of the Purchaser and, in the event of loss or damage to the Strata Lot deemed material by the Vendor and occurring before such time by reason of fire, tempest, lightning, earthquake, flood, act of God or explosion, either party may, at its option, by written notice to the other party cancel this Agreement and thereupon the Purchaser will be entitled to repayment of the Deposit together with all interest accrued thereon and neither the Vendor nor the Purchaser shall have any further obligation hereunder. If neither party elects to cancel this Agreement, the Purchaser shall be entitled to an assignment of insurance proceeds in respect of the material loss or damage to the Strata Lot, if any. All other remedies and claims of the Purchaser in the event of such damage are hereby waived.

25. Assignment by Purchaser

The Purchaser may not assign or list for sale on MLS (Multiple Listing Service) the Purchaser's interest in this Agreement until all Deposits contemplated under this Agreement have been paid in full and thereafter may not list without the prior written consent of the Vendor,. No assignment by the Purchaser shall release the Purchaser from his/her obligations hereunder. This Agreement creates contractual rights only between the Vendor and the Purchaser and does not create an interest in the Strata Lot The Purchaser shall pay the Vendor an administration fee of $2,000 plus GST for any assignment of this Agreement or conveyance of the Strata Lot other than to the Purchaser named herein provided that the Vendor shall waive such fee for an assignment to a Spouse, child or parent of the Purchaser on receipt of evidence of such relationship satisfactory to the Vendor.

26. Liability of Purchaser

In the event of an assignment in accordance with section 25, the Purchaser will remain fully liable under the Agreement and such assignment will not in any way relieve the Purchaser of its obligations under this Agreement.

28. Contractual Rights Only

This offer and the agreement which results from its acceptance creates contractual rights only and not any interest in land.

MPC Intelligence Inc. Report

13 The Receiver and Manager obtained a February 27, 2008 "Analysis" from MPC Intelligence Inc. ("MPC") relating to both Projects. The "Analysis" for the Vancouver Project and the "Analysis" for the Richmond Project contain the following "Forward":

> The information provided in this pricing summary is intended for use by Bowra Group in the historical market analysis of the H&H development in Vancouver, BC and Garden City development in Richmond. This is not an appraisal. This report was prepared as an opinion of competitive conditions and is a past assessment of the market and the demand for such product. This is not an opinion of the market from a sales and marketing strategy perspective but a narrative of the previous climate and demand for the developments at time of launch.
>
> All information and detail within the report is compiled through public sources or through the developers and property owners associated with each project. The data is deemed to be accurate at the time of assembly and delivery of the report. Every reasonable effort will be made to compile accurate and reliable information and the data contained within the report is deemed to be that. MPC Intelligence assumes no responsibility for inaccuracies provided by the developer, agents or other reporting parties.

14 The "Analysis" of MPC for the Vancouver Project was as follows:

> ... it is obvious that there are a selection of units that have been sold for well below the market value at the time. Determining the market value for a period of time starting almost two years ago is a difficult challenge because prices in the Downtown condo market have risen so quickly. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. This does not mean that the units that were sold initially were under priced, as the overall market can shift quite quickly as was experienced when the Woodward's project sold out at $600/sq ft and instantly increased what all other projects could achieve.
>
> From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2006 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

15 The "Analysis" of MPC for the Richmond Project was as follows:

> When analyzing the sale prices of the units at Garden City there does not appear to be many units that were sold below market values. Determining the market value for a period of time starting over two years ago is a difficult challenge because prices in the Richmond condo market have rose very quickly from 2005 to 2007. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. The Richmond market is also unlike most of the other markets in the Lower Mainland when it comes to purchaser incentives. The Chinese buyer in this market almost always expects for there to be some sort of incentive or negotiation process to save money. This was seen in the second phase of Garden City with the first 20 buyers at the public grand opening receiving $5,000 off the purchase price along with no GST (4.48% value). This resulted in many of the units having credits of approximately $20,000 to $25,000. This is very typical in the Richmond market and is considered a cost of doing business.
>
> From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2005 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

16 It is clear that the two reports are not appraisals. It is the position taken on behalf of counsel for the pre-sale Contract holders that the reports are inadmissible. While I find that the reports are inadmissible for the truth of their contents, I admit them into evidence for the purpose of ascertaining the grounds upon which the Receiver and Manager is of the belief that the market value at the time of the Contracts or the current market value is such that the Receiver and Manager should be in a position to either disclaim the Contracts or to allow the sale of the strata lots involved free and clear of any obligation of Chandler and Cook that may arise under the Contracts.

Applications of the Receiver and Manager

17 Originally, the Receiver and Manager sought directions to disclaim 17 Contracts relating to the Vancouver Project and 10 Contracts relating to the Richmond Project. The Motion of the Receiver and Manager is now restricted to Strata Lots 12 and 85 of the Vancouver Project and Strata Lots 12, 46, 85, 92 and 95 of the Richmond Project. The Petitioner supports most of the applications of the Receiver and Manager. However, the Petitioner does not support the application of the Receiver and Manager to disclaim the Contract relating to Strata Lot 12 in the Vancouver Project as it is satisfied that the proposed purchase price met the minimum pre-sale criteria set in the agreement reached with Chandler.

(a) Contracts of Siu Chun Chao-Dietrich

18 Ms. Chao-Dietrich had Contracts relating to Strata Lot 46 in the Richmond Project and Strata Lot 85 in the Vancouver Project. Strata Lot 46 has been complete and ready for occupancy since late 2007. Strata Lot 85 in the Vancouver Project will not be completed until the Fall of 2008.

19 Ms. Chao-Dietrich is a former employee of Chandler and is a licensed realtor. Ms. Chao-Dietrich states that she was instrumental in arranging for the purchase by Cook of the land that later would be the site of the Richmond Project. By reason of her efforts, Ms. Chao-Dietrich claims to be entitled to a fee of $200,000.00 and that this fee remains unpaid. In a September 20, 2006 agreement with Chandler, Ms. Chao-Dietrich was to receive a further $100,000.00 "... for deferring paying the commission which you earned on July 16, 2007. The owed commission and compensate [sic] payment in total of $300,000.00 shall be discounted from the purchase price." In her March 25, 2008 Affidavit, Ms. Chao-Dietrich states that the purchase price for Strata Lot 46 of the Richmond Project was to be further reduced in order to reflect $34,800.00 in commissions on previous sales in that Project and $6,000.00 to reflect late closing expenses relating to the "...original unit of

that she was to have obtained in satisfaction of the amount owing in respect of the commission".

20 Ms. Chao-Dietrich states that Chandler verbally agreed in March of 2006 that the net purchase price of $349,000.00 for Strata Lot 85 would be made available to her. In this regard, a $100,000.00 "decorating allowance" was provided to Ms. Chao-Dietrich so that the original offer of $449,000.00 with a $5,000.00 deposit became a net offer of $349,000.00. Though Ms. Chao-Dietrich states that the price was agreed to in March of 2006, the Contract was not signed until July 6, 2007.

21 It is the position of Ms. Chao-Dietrich that the discount was not a discount for "unpaid services" but, rather, was a price equal to a similar unit on a per square foot basis of a unit in the Vancouver Project sold to "Darren", another employee of Chandler. It is said that the units sold to "Darren" and to her reflected "employer's discount" given to employees. In this regard, Ms. Chao-Dietrich notes that the Receiver and Manager has not sought to disclaim the contract relating to that other unit even though that unit is of a comparable size. In a March 3, 2008 letter to the Receiver and Manager, Ms. Chao-Dietrich states: "in order to maintain the value of the Project, giving a decorating allowance instead of discounting off the purchase price seemed to be appropriate at the time".

22 It is the position of the Receiver and Manager that the market value for Strata Lot 85 at the time of the Contract was either $399,000.00 (based on the "Contract Analysis" prepared by MPC), or $424,000.00 (based on the comments relating to that unit prepared by a realtor advising the Receiver and Manager).

23 MPC gave the following "Analysis" relating to the market value of Strata Lot 85 at the time of the Contract:

Gross Selling Price $449,900	Net Selling Price $349,900	Incentives: $100,000

This unit was under priced because the identical unit one floor above (614) sold for $50,000 more when it sold six months previously. The market would have escalated in this time and there should only be a $5,000 discount for being located one floor below.

Estimated Market Value at time of Pre Sale	$429,900
Estimated Selling Discount	$80,000

24 Regarding Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich states that the purchase price was in the aggregate of $500,800.00 but that "Much of that consideration, however, was paid by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser". After deductions, the remaining amount owing is stated to be $160,000.00. It is this amount which is shown as the sale price in the Contract. A deposit of $40,000.00 was paid in two instalments: $32,000.00 on September 20, 2006 and $8,000.00 on April 30, 2007. The Richmond Project is now complete. On August 21, 2007, Ms. Chao-Dietrich received a Notice of completion.

25 While it has not been accepted by the Receiver and Manager, the Receiver and Manager states that it has received an offer on Strata Lot 46 in the amount of $469,200.00.

26 MPC gave the following "Analysis" relating to the market value of Strata Lot 46 at the time of the Contract:

Gross Selling Price $160,000	Net Selling Price $160,000	Incentives: $0

This unit was severely under priced. An example why would be the unit below (801) selling for $283,620 more 10 months later. Another example is the unit beside it (908) which is the same plan but with a SE instead of SW exposure sold for $378,259 more than it sixteen months previous. It is assumed that unit 901 could have sold for somewhere near what 908 sold for with the increase in the market over the four months being balanced by the fact that the 08 units were more popular and commanded a higher value.

Estimated Market Value at time of Pre Sale	$417,900
Estimated Selling Discount	$257,900

27 An action for specific performance of the Contract and for damages in the alternative relating to Strata Lot 46 in the Richmond Project was commenced and Certificate of Pending Litigation No. BB0207241 was filed against the Richmond Project by Ms. Chao-Dietrich on March 7, 2008. Ms. Chao-Dietrich states that those steps were taken on the basis that: "The Receiver has indicated that he will not be completing the Contract." That action was commenced without the "written

consent of the Receiver or with leave of this Court". There is no Motion before the Court that Ms. Chao-Dietrich be at liberty to commence or to continue that action.

(b) Contract of Wayne Nikitiuk Assigned to Salim Jiwa and Farouk Ratansi

28 This Contract relates to Strata Lot 12 in the Vancouver Project. This unit is presently unfinished and is not scheduled to be finished until the Fall of 2008. Originally, Wayne Nikitiuk made an offer of $649,000.00 (excluding GST) and provided a deposit of $64,900.00. Mr. Nikitiuk was given a $32,450.00 "decorating allowance" so that the "net" purchase price reflected in the Contract was $616,550.00 (excluding GST).

29 By a July 29, 2007 assignment of the Contract between Mr. Nikitiuk and Messrs. Ratansi and Jiwa and with the consent of Chandler, the Contract was assigned to Messrs. Ratansi and Jiwa. The price paid by Messrs. Ratansi and Jiwa for that assignment was $150,900.00 and that sum has been disbursed to Mr. Nikitiuk. It was a term of the consent of Chandler that $2,000.00 of the assignment price was paid by Mr. Nikitiuk to Chandler.

30 MPC gave the following "analysis" relating to the market value of Strata Lot 12 at the time of the Contract:

Gross Selling Price $649,000	Net Selling Price $616,500	Incentives: $32,450

This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	$649,000
Estimated Selling Discount	$32,450

31 The Petitioner does not support the application to disclaim the Contract as the Contract would net $616,550.00 and this price met the minimum pre-sale criteria set by the Petitioner. In seeking to disclaim the Contract, the Receiver and Manager is of the view that the current market value of Strata Lot 12 is $730,000.00.

(c) Contracts of Crestmark Holdings Corp.

32 Applying pursuant to Rules 47 and 50 of the *Rules of Court* and the inherent jurisdiction of the Court, Crestmark Holdings Corp. ("Crestmark") seeks an order that it be at liberty to commence an action against Chandler, Cook, and the Receiver and Manager so that it may seek an order for specific performance, a Certificate of Pending Litigation and related relief in relation to August 10, 2007 Contracts relating to Strata Lots 12, 85, 92, and 95 in the Richmond Project.

33 In July of 2007, Chandler contacted Edward Wong & Associates Realty Inc. ("Wong") requesting that Wong submit a marketing proposal for the unsold units in Tower I and Tower II in the Richmond Project. On July 18, 2007, Wong signed an Exclusive Listing Agreement relating to the Richmond Project ("Listing Agreement"). 37 units in Tower I and 50 units in Tower II were unsold at the time of the Listing Agreement. The term of the Listing Agreement was to end on November 30, 2008 but Chandler had the right to terminate the Listing Agreement after December 15, 2007 if Wong had not sold 20 units by that time.

34 In accordance with the agreement in place, the Petitioner advised Chandler that it was prepared to give partial discharges of its security providing sales of the Units met the criteria set out in the Mortgage including that the gross sale price of any units was not less than 95% of the list sale price approved by the Petitioner for each phase of the construction of each phase of the Richmond Project. The list prices relating to the Strata Lots in issue were as follows: (a) Strata Lot 12 ($534,900.00); (b) Strata Lot 85 ($379,900.00); (c) Strata Lot 92 ($384,900.00); and (d) Strata Lot 95 ($498,900.00).

35 Chandler and Wong agreed to an amendment of the Listing Agreement which saw potential purchasers being offered a price discount of up to 10% off the then list price and a bonus of up to $250,000.00 to Wong. As at August 8, 2007, offers on 28 units had been received at prices discounted from between 6% to 10% and six units remained unsold. It is stated by Wong that all sales contracts showed the full list price with reductions recorded in the form of payment of cash or credit towards the purchase price on closing so that there would be no jeopardy to the pricing on the remaining unsold units.

36 In August, 2007, Chandler is stated to have requested that Wong purchase some units so that the goal of meeting the

financial commitments set by the Petitioner could be met. It is stated that, as an additional incentive for Wong to purchase. A Mr. Aguirre on behalf of Chandler offered a 50% interest in his entitlement to purchase a unit in Tower II.

37 On August 10, 2007, Wong agreed through his company (Crestmark) to purchase four units with a 15% discount from the list price. Contracts were executed to reflect the following:

> (a) Strata Lot 12 — gross sale price of $498,800.00 with a "decoration allowance" of $74,820.00 ($423,980.00 net) with a deposit of $5,000.00;
>
> (b) Strata Lot 85 — gross sale price of $418,800.00 with a "decoration allowance" of $62,820.00 ($356,180.00 net) with a deposit of $5,000.00;
>
> (c) Strata Lot 92 — gross sale price of $421,800.00 with a "decoration allowance" of $63,270.00 ($358,530.00 net) with a deposit of $5,000.00; and
>
> (d) Strata Lot 95 — gross sale price of $513,800.00 with a "decoration allowance" of $77,070.00 ($436,730.00 net) with a deposit of $5,000.00.

38 In a February 12, 2008 letter to counsel for the Receiver and Manager, counsel for Crestmark stated:

> When construction of the Development was completed and our client received notice to close the purchase of the Units, [the] ... developer agreed to extend the closing date to November 30, 2007 "or within 5 business days after the Vendor has paid the commission bonus to Edward Wong & Associates Realty Inc. in an amount of $250,000.00 plus G.S.T. whichever occurs later". The bonus has not been paid, however our client is ready, willing and able to complete the purchase of the Units forthwith.

39 On August 22, 2007, Notices of Completion relating to Strata Lots 12, 85, 92 and 95 were issued. At that time, Wong asked for payment of his bonus under the amended Listing Agreement but was advised that, due to cash flow problems, the bonus could only be paid after the sale of all units in Tower I had been completed.

40 On October 11, 2007, a further addendum to the Listing Agreement was signed providing the following:

> (a) "The Completion Date is to be extended to Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + GST whichever occurs later."
>
> (b) "Upon closing, the Purchaser may elect to apply $62,500 + GST, being part commission ... due to Edward Wong & Asso. Realty Inc. ('EWA') towards the purchase price provided EWA authorizes to do so."

41 Crestmark states that it has now agreed to waive as a condition of closing its entitlement to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots and that it is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95. In this regard, Edward Wong in his April 29, 2008 Affidavit states:

> I agree to cause both of those companies [Wong and Crestmark] to sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum. .... While my preferred completion date is June 30, 2008, Crestmark is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95 at any time. In my opinion, taking into account the value to ... [Cook] of the services I have already caused ... [Wong] to perform, it would be extremely unfair to allow the receiver to disclaim or refuse to close on the sales of Crestmark's 4 units.

42 In the circumstances, Crestmark requests that the Court lift the stay contained in paragraphs 6 and 7 of the November

28, 2007 Order to allow it to commence an action for specific performance relating to Strata Lots 12, 85, 92 and 95.

43 The Petitioner supports the application of the Receiver and Manager to disclaim the proposed sale of Strata Lots 12, 85, 92 and 95 to Crestmark as those sales are said not to meet the minimum pre-sale requirements set by the Petitioner. The Petitioner also states that: "Even if the sales are not disclaimed, ... [the Petitioner] will not be issuing partial discharges for them."

44 The MPC "Analysis" relating to the market value of Strata Lots 12, 85, 92 and 95 at the time of the Contracts was as follows:

Strata Lot 12 Gross Selling Price $649,000 Net Selling Price $616,500 Incentives: $32,450

This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	$649,000
Estimated Selling Discount	$32,450

Strata Lot 85 Gross Selling Price $418,800 Net Selling Price $355,980 Incentives: $62,820

This unit was under priced because the unit below it (1506) sold for only $5,875 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 — 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$419,900
Estimated Selling Discount	$63,920

Strata Lot 95 Gross Selling Price $513,800 Net Selling Price $436,730 Incentives: $77,070

This unit was under priced because the unit below it (1601) sold for $72,070 more than it four months before. It is assumed that 1701 should have been able to sell at a premium to 1601.

Estimated Market Value at time of Pre Sale	$519,900
Estimated Selling Discount	$83,170

Strata Lot 92 Gross Selling Price $421,800 Net Selling Price $358,530 Incentives: $63,270

This unit was under priced because the unit two levels below it (1506) sold for only $8,426 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 — 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$425,900
Estimated Selling Discount	$67,370

45 While these offers have not been accepted by the Receiver and Manager as yet, the Receiver and Manager has now received offers as follows: (a) Strata Lot 12 ($519,200.00); and (b) Strata Lot 95 ($504,200.00).

Should Contract Holders Have Been Given Notice of the Application to Appoint the Receiver and Manager?

46 It is the submission of Crestmark that, because the proposed purchasers under the Contracts were not parties to this action and were not served or given notice of the application by the Petitioner to appoint the Receiver and Manager, the November 28, 2007 Order is not binding on them and does not affect any interest in the Property held by them. In this regard, Crestmark relies on the decisions in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.) and *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.* (2006), 25 C.B.R. (5th) 199 (B.C. C.A.).

47 In *Lochson, supra*, the issue was whether Lochson as the holder of the first and second mortgages against property should be bound by an order allowing the borrowing powers of a receiver to have priority over the interest of Lochson when that order was granted to a subsequent charge holder. The Court concluded that, subject to three exceptions not applicable

here, a prior charge holder must have notice of or consent to any application purporting to grant priority to the borrowing powers of a Receiver. Of similar effect Is the decision in *Terra Nova*, *supra*, where the Court dealt with the priority of the proposed remuneration of a receiver and concluded that, because a prior charge holder had no notice of the application to appoint a receiver and manager with borrowing powers of $5,000.00, it was not bound by the priority given in that order (at para. 14).

48 I am satisfied that the decisions in *Lochson* and *Terra Nova*, both *supra*, have no application to the position of Crestmark. First, Crestmark is not a secured creditor. Second, Crestmark only takes whatever interest it may have from Chandler.

49 Assuming Crestmark is an unsecured creditor, there was no obligation to join unsecured creditors as parties or to provide them with notice of an application to appoint a receiver and manager. Once appointed, one of the duties of a receiver and manager is to ascertain what creditors have claims, the amount of those claims, and the priority of those claims. That duty is fulfilled after and not before the appointment. The secured creditor applying to appoint a receiver and manager will not have knowledge of the identity of all unsecured creditors or of the amounts owing. It would be impossible for all unsecured creditors to be given notice of an application for the appointment of a receiver and manager.

50 Assuming Crestmark has an equitable interest, that interest is by way of an assignment of the equity of redemption that was retained by Chandler or Cook when those entities mortgaged their interest in the two Projects in favour of the Petitioner. The foreclosure proceedings seek declarations that, if a certain amount is not paid to redeem the charges against the two Projects, the interest of Chandler or Cook will be foreclosed as will the interest of any parties claiming under them. As potential purchasers of an interest that Chandler and/or Cook might have in the two Projects, Crestmark would be in a position to apply to approve the sale of a particular part of the property if it could be shown that their offer represented fair market value at the time their application was made. Alternatively, Crestmark could request that the Receiver and Manager apply to Court to have their offer approved or could place its offer before the Court if the Receiver and Manager applied to Court to approve an offer which, in the view of the Receiver and Manager, represented fair market value at the time the application was made.

51 Whether Crestmark is an unsecured creditor or is a creditor claiming an interest in land, it was only after the appointment of the Receiver and Manager that the Receiver and Manager would know for certain what Contracts were in place. There was no obligation on the Petitioner, on Chandler, or on Cook to notify Crestmark or any other holders of Contracts that an application was being made to appoint a Receiver and Manager. It was not necessary to join Crestmark or any other holders of Contracts as parties to these proceedings. The preliminary position taken by Crestmark is rejected.

52 Quite properly, the Receiver and Manager has notified the holders of the Contract that applications would be made to either disclaim the Contracts or allow the Receiver and Manager to sell the Strata Lots at the current market value free of any obligation of Chandler and Cook that might arise under the Contracts so that the holders of the Contracts would be bound by any Order made. Holders of Contracts were entitled to no other notice.

Can the Receiver and Manager Disclaim Contracts?

53 I have concluded that the Receiver and Manager has the power to disclaim these Contracts. In this regard, the learned author of *Bennett on Receiverships*, 2nd Ed. (Toronto — Carswell) states:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. (at p. 341)
>
> In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third

> party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages. (at p. 342)

54 There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the company. In *New Skeena Forest Products Inc., Re* (2005), 39 B.C.L.R. (4th) 327 (B.C. C.A.), the issue was whether the receiver and manager was entitled to disclaim "executory contracts" and apply to approve a better offer. Braidwood J.A. with Oppal J.A. concurring stated:

> In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:
>
>> The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341.
>
> (at para. 16)
>
> In another leading case, *Bayhold Financial Corp. v. Clarkson* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.
>
> The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:
>
>> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or realizing upon the Assets or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>>
>> .....
>>
>>> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets ....
>>
>> [Emphasis added.]
>
> In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order.
>
> (at paras. 19-21)

55 In the *Bayhold Financial Corp. v. Clarkson Co.* [1991 CarswellNS 33 (N.S. C.A.)] decision referred to, the Court dealt with a court appointed receiver and manager and the question of whether there was personal liability for breaching contracts

entered into by the company prior to receivership. On behalf of the Court, Hallett J.A. referred to the decision in *Newdigate Colliery Ltd., Re*, [1912] 1 Ch. 468 (Eng. Ch. Div.) and stated:

> ... The *Newdigate* case is authority for the following valid proposition (p. 468):
>
>> It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.
>
> In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

56 On the question of whether there was an obligation on the receiver and manager to honour contracts which were in existence prior to the receivership, Hallett J.A. stated:

> There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:
>
>> The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.
>>
>> [Emphasis added.]
>
> The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts.
>
> (at paras. 55-6)

57 In *The Matter of the Receivership of Pope & Talbot Ltd.* [*Pope & Talbot Ltd., Re* (May 29, 2008), Doc. Vancouver Registry No. S077839 (B.C. S.C. [In Chambers])] (Vancouver Registry: S077839), Brenner C.J.S.C. in oral reasons for judgment in chambers on May 29, 2008 stated:

> The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:
>
>> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.

The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.

This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005, BCCA 154. That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:

> Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.

In Braidwood J.A.'s opinion the foregoing clause determined the issue. (at paras. 17-8)

58 I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

59 Ms. Chao-Dietrich and Messrs. Ratansi and Jiwa submit that the content of the Order appointing the Receiver is determinative of the powers available to the Receiver and Manager and that paragraph 2(c) of the Order only granted the Receiver and Manager the power to "... cease to perform any contracts of the Debtor". They submit that no performance was required under their Contracts until completion dates came into effect and that the completion dates for the purchase of Strata Lot 85 by Ms. Chao-Dietrich and the purchase of Strata Lot 12 by Mr. Jiwa and Mr. Ratansi in the Vancouver Project has not been set because the units remain unfinished. Regarding the completion date for Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich submits that the completion date was September 14, 2007, that she was ready willing and able at that time to complete the purchase, a caveat was filed when Chandler did not complete the sale, and an action seeking specific performance was commenced. In the absence of a power given to disclaim, it is the submission that the remedy that will be available for anticipatory breach of contract is both a specific performance and/or a mandatory injunction and only in the alternative, for damages.

60 While I am satisfied that the power available to the Receiver and Manager to cease to perform any Contracts is sufficient to allow the Receiver and Manager to apply to the Court to be at liberty to disclaim the Contracts, I also note that the submissions of Ms. Chao-Dietrich and Mr. Ratansi and Mr. Jiwa ignore a number of powers given to this Receiver and Manager including the power to "... cease to carry on all or any part other [sic — of the] business" of Chandler or Cook. The business of these two companies was to create, enter into contracts to sell, and to sell condominium units. The refusal to proceed to complete Contracts is included within the power given to the Receiver and Manager to cease part of the business of Chandler and Cook. The power to "cease to perform any contracts" includes the ability to advise Contract holders that the Receiver and Manager will not proceed to complete the sales contemplated by the Contracts. The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application.

61 I also note that paragraph 2(m) of the Orders appointing this Receiver and Manager is identical to the paragraph referred by the Chief Justice in *Pope & Talbot Ltd.*, *supra* and that it was this paragraph which was relied upon by the Chief Justice to conclude that the receiver there was in a position to disclaim an existing contract and proceed with an application to approve a different sale. In the circumstances, I am satisfied that the powers granted to this Receiver and Manager are sufficient to allow the Receiver and Manager to disclaim the Contracts.

62 The holders of the Contract also submit that the Receiver and Manager must maintain the goodwill of Chandler and Cook for their benefit. That submission cannot be maintained in view of the decision in *Bayhold Financial Corp.*, supra. Additionally, there is no goodwill to maintain here. First, it is clear that there will be a massive shortfall to one of the secured creditors even after both Projects have been completed and sold. Second, the unsecured debt is in excess of $30,000,000.00. Third, I anticipate that these companies were incorporated solely for the purpose of developing these two Projects so that the corporate entities will be abandoned by the shareholders once the Projects have been completed and the Units within the Projects sold.

Do the Contract Holders Have an Equitable Interest?

63 Paragraph 28 of the Contracts is specific. Any offer made and the agreement which results from the acceptance of the offer by Chandler and/or Cook creates: "... contractual rights only and not any interest in land." A similar provision was considered by Myers J. in *Romfo v. 1216393 Ontario Inc.*, [2006] B.C.J. No. 2897 (B.C. S.C.) where the clause in issue stated that the purchaser "... acknowledges and agrees that the Purchaser: (a) will not have any claim or interest in the Strata Lot, the Development or the Property until the Purchaser becomes the registered owner of the Strata Lot, and (b) the Purchaser does not now have and will not have at any time hereafter notwithstanding any default of the Vendor, any right to register this Offer or the Agreement, or any part of or right contained in this Offer to the Agreement against the Strata Lot, the Development or the Property in the Land Title Office." The effect of this provision was not determined because the plaintiffs had argued that the developer was estopped from reliance on the clause and Myers J. was of the view that estoppel issues should not be dealt with on a Rule 18A application.

64 The contract in *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.* (2007), 61 R.P.R. (4th) 277 (B.C. S.C.) contained this provision: "This offer and the agreement which results from its acceptance create contractual rights only and not any interest in land." In deciding that the certificates of pending litigation should not be discharged, Goepel J. made reference to that provision and concluded:

> The defendants submit that paragraph 2.1 of the Contracts that states the Contracts do not create "any interest in land" precludes such a claim. With respect, I disagree. At this stage the issue is not whether the plaintiffs can prove an interest in land; the issue is whether they are claiming such an interest. The Statement of Claim makes such a claim. That is all that is required to file a CPL.

65 While it would have been preferable for the clause used in *Romfo*, *supra*, to have been incorporated into these Contracts to more fully set out when and only when an equitable interest is created, I see no reason not to enforce paragraph 18 of these Contracts wherein the holders of the Contract forego any interest in land. If the Contract holders claim an equitable interest, should I ignore this clear provision in their Contracts? I have concluded that I should give effect to paragraph 28 in the Contract. The provision is clear and the Contract holders agreed to that provision when they signed the Contract. It is not submitted that Chandler or Cook is estopped from reliance on that paragraph.

66 On the assumption that I am incorrect in arriving at the conclusion that paragraph 28 determines the issue of whether they have any equitable interest, I will now consider the submissions made by the Contract holders. It is submitted on behalf of the holders of the Contracts that they have an equitable interest in the Property and the Strata Lots so that the Receiver and Manager should not be in a position to disclaim the Contracts. On this question, the Contract holders rely on the decision in *CareVest Capital Inc. v. CB Development 2000 Ltd.*, [2007] B.C.J. No. 1698 (B.C. S.C. [In Chambers]).

67 *CareVest* dealt with the fact that the prices available on 32 pre-sold units would not be sufficient to discharge the mortgages against the property. The holders of the pre-sale contracts took the position that the contracts created an equitable charge which was entitled to priority over the registered mortgage. While dismissing the application for a direction that the receiver and manager be permitted to disclaim the contracts, Pitfield J. ordered that the receiver and manager could sell each of the units but then hold in trust for CareVest and any purchasers under pre-sale contracts the excess of the sale price payable pending determination of: "... priority and/or entitlement thereto as between the pre-sale contract buyer and CareVest".

68 On the issue of whether the pre-sale buyers had an unregistered equitable charge, Pitfield J. stated:

I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.

(at para. 16)

69 The Contract holders also submit that the following statement of the learned author in *The Law of Vendor and Purchaser*, 3rd Ed. (Toronto: Thomson Canada Limited, 2007) applies:

Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that *instanter* a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion. But it is then said that although the vendor becomes a constructive trustee, he does so *sub modo* only: (1) he is not a mere dormant trustee; (2) he is a trustee having a personal and substantial interest in the property: he has a right to protect and an active right to assert that interest if anything is done in derogation of it; (3) his right to protect his own interest is paramount and overriding, and until he is bound to convey he retains for certain purposes his old dominion over the estate.

Further, the purchaser's status as equitable owner is contingent upon the contract being specifically enforceable.

It is clear, then, that the precise position in which the parties stand with respect to each other is *in fieri*, until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que trust* relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser. (at pp. 1-12 and 1-13) (footnotes omitted)

70 However, the status of a potential purchaser as having an equitable interest is contingent upon the contract being specifically enforceable: *Buchanan v. Oliver Plumbing & Heating Ltd.*, [1959] O.R. 238 (Ont. C.A.); *Cornwall v. Henson*, [1899] 2 Ch. 710 (Eng. Ch. Div.) at p. 714; *Miller v. Howard* (1914), 7 W.W.R. 627 (British Columbia P.C.) at p. 631; and *Central Trust & Safe Deposit Co. v. Snider* (1915), [1916] 1 A.C. 266 (Ontario P.C.) at p. 272. A purchaser has an equitable interest in land only as long as he or she would be entitled to specific performance of the agreement: *DiGuilo v. Boland* (1958), 13 D.L.R. (2d) 510 (Ont. C.A.); *Howard*, *supra*, at pp. 79-80; *Kimniak v. Anderson*, [1929] 2 D.L.R. 904 (Ont. C.A.); *Freevale Ltd. v. Metrostore (Holdings) Ltd.* (1983), [1984] 1 All E.R. 495 (Eng. Ch. Div.); and *St. James (Rural Municipality) v. Bailey* (1956), 21 W.W.R. 1 (Man. C.A.).

71 In *St. James*, the Court dealt with a request for a declaration that the defendants had no right, title or interest in property so that the plaintiff was entitled to a declaration that the defendants were trespassing upon the property. Regarding the question of whether a sale of property produced an equitable interest in the proposed purchaser, Adamson C.J.M. stated:

When a binding agreement for sale of lands is entered into, the immediate effect of the contract is that the purchaser acquires an equitable estate in the land": *Remedies of Vendors & Purchasers, McCaul*, 2nd ed., p. 1; *Rose v. Watson* (1864) 10 HL Cas 672, 33 LJ Ch 385; *McKillop v. Alexander* (1912) 1 W.W.R. 871, 45 S.C.R. 551; *Thorn's Canadian Torrens System*, p. 129. (at para. 18)

72 A similar statement was made by Montague J.A.:

I am of the opinion that in the light of all the circumstances in the instant case the defendants have acquired an equitable interest in the lands of such a nature that an action for trespass by the plaintiffs cannot succeed. The appeal therefore should be allowed and the action of the plaintiff dismissed with costs to the defendant Bailey.. (at para. 71)

73 The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest*, *supra*, Pitfield J. stated in this regard:

> It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.
>
> As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

74 The question which then arises is whether the holders of the Contracts have an equitable interest and, if so, whether the Receiver and Manager should still be provided with the Direction sought that it can disclaim the Contracts.

Disclaiming Contracts Relating to the Vancouver Project

75 Regarding the Contracts of Ms. Chao-Dietrich (Strata Lot 46) and Salim Jiwa and Farouk Ratansi (Strata Lot 12) relating to the Vancouver Project, construction is not complete and stratification has not occurred. A purchaser is not entitled to specific performance until the time for the completion of the contract has arrived and all conditions precedent have been met. For the Vancouver Project, this would include a filing in the Land Title Office to subdivide the existing property into the Strata Lots which will constitute the Strata Plan.

76 Until a proper subdivision plan is registered, no interest in land is created: *Nesrallah v. Pagonis* (1982), 38 B.C.L.R. 112 (B.C. S.C.) where Taylor J. concluded that the right to create a leasehold interest arose only when a duly approved subdivision plan had been registered and that no interest in land was created prior to such a registration (at para. 14). Similarly, a contingent option granted prior to a strata corporation coming into existence was found to be unenforceable: *Strata Plan VIS2968 v. K.R.C. Enterprises Inc.* (2007), 74 B.C.L.R. (4th) 89 (B.C. S.C.).

77 As well, I am satisfied that it is not possible to imply a covenant or obligation on the part of Chandler to seek and obtain subdivision approval for the Vancouver Project: *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.), being a decision involving whether a lease granted prior to subdivision approval was enforceable or not.

78 Because construction is not complete and because stratification has not taken place, Ms. Chao-Dietrich (Strata Lot 46) and Messrs. Jiwa and Ratansi (Strata Lot 12) have no equitable interest in the Vancouver Project. There is considerable construction to be undertaken by the Receiver and Manager to complete the Vancouver Project even before the preparation and filing of the documents which will be required before the subdivision plan and the Strata Plan can be registered in the Land Title Office. The property which is the subject matter of the Contracts does not yet exist. In order for it to exist, further funds must be borrowed by the Receiver and Manager, and those funds must be expended. The Receiver and Manager must "pick up" where Chandler left off. I am bound by the decisions in *New Skeena* and *Pope & Talbot*, both *supra*, so that the Receiver and Manager is in a position to disclaim the Contracts even if I could conclude that the holders of these Contracts had an equitable interest in the Contract or in the interest in land created by the Contract.

79 Even if I could conclude that Ms. Chao-Dietrich and Messrs. Jiwa and Ratansi had an equitable interest in the

Vancouver Project and the Strata Lots which will eventually be created, I could not conclude that the Receiver and Manager should not be given the power to disclaim the Contracts relating to Strata Lots 85 and 12 in the Vancouver Project.

80 In coming to this conclusion, I rely on the following related to Strata Lot 85: (a) the $100,000.00 discount made available to Ms. Chao-Dietrich would amount to now preferring Ms. Chao-Dietrich in priority to other unsecured creditors of Chandler as she would be entitled to a fee for services rendered by a reduction of the purchase price agreed to on July 6, 2007; (b) there appears to be at least some evidence that the net selling price at July 6, 2007 was significantly less than the net selling price of $349,900.00 that was to be made available to Ms. Chao-Dietrich as the net selling price acceptable to the Petitioner was significantly higher than the price made available to Ms. Chao-Dietrich; and (c) I can find no obligation on the Petitioner to provide a partial discharge of its security in order to accommodate the contemplated sale to Ms. Chao-Dietrich.

81 For Ms. Chao-Dietrich and all other holders of Contracts, the notice set out in the Disclosure Statement was clear:

> The Developer will cause and each Lender will agree to provide the partial discharge of the Construction Security in respect of any Strata Lot and its undivided interest in the Common Property sold hereunder within a reasonable period after completion of the purchase and sale thereof provided a certain minimum purchase price is obtained and upon receipt of the net purchase price (after deduction of real estate commission and usual closing costs).

82 As well, holders of Contracts signed after the security of the Petitioner was registered had notice that partial discharges would only be provided in accordance with the net sale prices established in accordance with the provisions of the security. Additionally, now that the security of the Petitioner is in default, I am satisfied that there is no obligation on the Petitioner to provide partial discharges even if the net sale prices agreed to between Chandler and/or Cook and the Petitioner were being met.

83 I provide the Direction to the Receiver and Manager that it can disclaim the Contract relating to Strata Lot 85 or, alternatively, to offer for sale that Strata Lot at current market value free and clear of any obligation of Chandler that might arise under the Contract with Ms. Chao-Dietrich.

84 Regarding the Contract relating to Strata Lot 12, I cannot be satisfied that the price at the time of the Contract was so much lower than the then current market value so that the Receiver and Manager is correct in concluding that this is a Contract which should be disclaimed. However, I am satisfied that the current market value of Strata Lot 12 is such that the Receiver and Manager should be at liberty to offer that Strata Lot for sale free and clear of any obligation of Chandler that might arise under the Contract as I am satisfied that the purchase price set out under the Contract does not reflect the current market value of Strata Lot 12.

85 In this regard, I take into account not only the view of the Receiver and Manager that the current market value is $730,000.00 but also the view of Messrs. Jiwa and Ratansi that the current market value or, at least the market value as at July 29, 2007, is far in excess of the original Contract amount of $649,000.00. In the July 29, 2007 assignment of the Contract, it was the view of Messrs. Ratansi and Jiwa that the value was $767,450.00 made up of the original offer of $649,000.00 plus the $150,900.00 that they paid to Mr. Nikitiuk for the assignment. In view of the current market value, I am satisfied that the Receiver and Manager would be subject to criticism from the creditors having security against the Vancouver Project if it proceeded to complete the sale at $649,000.00.

86 Whether or not I am correct in coming to the conclusion that Messrs. Jiwa and Ratansi do not have an equitable interest because an action for specific performance is not available to them, I provide the Direction that the Receiver and Manager will be permitted to sell Strata Lot 12 at current market value free and clear of any obligation of Chandler or Cook that might arise under the Contract originally with Mr. Nikitiuk. However, any offer on Strata Lot 12 which is accepted by the Receiver and Manager shall only be accepted subject to Court approval. Notice of any application to approve a sale shall be provided to Messrs. Jiwa and Ratansi.

Disclaiming Contracts Relating to the Richmond Project

87 The question which then arises is whether the Receiver and Manager should be allowed to disclaim the Contracts

relating to the Richmond Project. Regarding the Contract of Ms. Chao-Dietrich relating to Strata Lot 46, I am satisfied that it is in order for the Receiver and Manager to disclaim the Contract. First, the considerable discount of $340,800.00 that was made available to Ms. Chao-Dietrich for what was described as payments: "... by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser" would create a significant preference to Ms. Chao-Dietrich if the Contract was allowed to stand. Second, the "analysis" of MPC even though flawed allows me to conclude that a similar unit in the floor below Strata Lot 46 sold for $283,620.00. Third, the proposed price to Ms. Chao-Dietrich is well below the net sale price agreed to between the Petitioner and Chandler which I take to be an indication of the market value at the time. Fourth, the inability to provide a discharge of the security against Strata Lot 46. All of those factors allow me to conclude that the Receiver and Manager is not acting arbitrarily in the exercise of its discretion to request a Direction that it be at liberty to disclaim this Contract. I provide that Direction to the Receiver and Manager. If Ms. Chao-Dietrich does not volunteer to remove the Certificate of Pending Litigation filed against Strata Lot 46 in the Richmond Project, then I will hear any application on behalf of the Receiver and Manager that the Certificate of Pending Litigation be discharged from title.

88 Regarding the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95, I am satisfied that Crestmark does not have an equitable interest in those Strata Lots as the Contracts are not specifically enforceable. Even if I could be satisfied that Crestmark had an equitable interest, I would be satisfied that the Direction should be given to the Receiver and Manager that those Contracts be disclaimed.

89 The doctrine of specific performance continues to apply where a deadline has passed even in the presence of a "time is of the essence clause" where the conduct of the parties has waived the requirement to close by the given deadline and a closing date has been extended. In this regard, see *Cheema v. Chan*, [2004] B.C.J. No. 2222 (B.C. S.C. [In Chambers]).

90 Once a deadline for closing has been extended by the conduct of the parties even in the presence of a "time is of the essence" clause, the deadline must be reset with reasonable notice of the new deadline before a party can rely upon the failure to close by that date as a ground for treating the contract as being at an end or for permitting an action for specific performance. For time to be of the essence again, the person wanting a new date must specify a reasonable new completion date in such a manner that the other person would realize that he or she is now bound by the new date: *Ambassador Industries Ltd. v. Kastens* (B.C. S.C. [In Chambers]); *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145 (B.C. C.A.); and *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129 (B.C. C.A.).

91 Under the Crestmark Contracts, the original completion dates were to be not less than ten business days after Crestmark had been notified that the City of Richmond had given permission to occupy the Strata Lot and the Strata Plan was fully registered in the Land Title Office. That date would have been sometime in August or September of 2007. While the dates for completion set out in the Contracts may well have already expired, Crestmark and Chandler agreed in the October 11, 2007 Addendum that the completion date was to be extended to: "... Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + G.S.T. whichever occurs later." November 30, 2007 has passed and the sale of Strata Lots 12, 85, 92 and 95 were not completed. To date, the amount of $250,000.00 has not been paid. It is more than probable that the $250,000.00 will never be paid.

92 While Mr. Wong states that he has agreed to "sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver [a waiver of the condition to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots] and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum ....", there was nothing in evidence which would allow me to conclude that there has been an addendum executed by Crestmark amending the completion date agreed upon, there is nothing executed by Crestmark making time of the essence again, and there is nothing in evidence executed on behalf of Chandler which either changes the completion date to make time of the essence again or accepts an addendum to the Contract to provide for a completion date other than in accordance with the October 11, 2007 Addendum.

93 While I recognize that it would not be necessary for the Receiver and Manager to sign a further addendum accepting reasonable notice from Crestmark of the new date for completion, I am satisfied that it would be necessary for the Receiver and Manager to sign a further addendum relating to these Strata Lots to amend the purchase price so that the "decoration" allowances of $74,820.00 (Strata Lot 12), $62,820.00 (Strata Lot 85), $63,270.00 (Strata Lot 92), and $77,070.00 (Strata Lot 95) are removed so that the price to be paid does not reflect decoration allowances totalling $277,980.00 which were added to provide Crestmark with its "bonus". If these decoration allowances are not removed, then the unsecured amount said to be payable to either Wong or Crestmark would be available as a preference if the four sales were to complete.

94 I can find no contractual obligation requiring the Receiver and Manager to execute a further Addendum. Specific performance is not available to Crestmark. Accordingly, it is clear that an equitable interest is not available because there are further steps to be taken before it could be said that an equitable interest exists.

95 There is another reason why specific performance would not be available. There is nothing about these Strata Lots which would allow me to conclude that they are of a unique character and of particular value to Crestmark: *Behnke v. Bede Shipping Co.*, [1927] 1 K.B. 649 (Eng. K.B.). It is clear that specific performance will only be generally available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) where Sopinka J. on behalf of the majority stated:

> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:
>
> > Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

96 I cannot conclude that the Strata Lots are of an unique character and of particular value to Crestmark. Even if I could conclude that Crestmark had an equitable interest, I would also conclude that it was appropriate for the Receiver and Manager to disclaim the Contracts relating to these four Strata Lots. The four August 10, 2007 Contracts provide for "decoration" allowances totalling $277,980.00. Unless Crestmark and the Receiver and Manager are prepared to execute a further Addendum removing those decoration allowances, the significant reductions from the "gross sale price" agreed to and the significant reduction from the "minimum pre-sale requirements set by the Petitioner" allows me to conclude that, if the Contracts are not disclaimed, Crestmark and Wong will receive significant preferences not otherwise available to other unsecured creditors of Chandler or Cook. Assuming that Crestmark has an equitable interest in the four Strata Lots, equity would require that I not approve any sales which would incorporate such significant preferences. The "analysis" performed by MPC and the minimum pre-sale requirement set by the Petitioner allow me to conclude that the Contracts were at prices not in accordance with fair market value at the time of the Contracts.

97 Accordingly, I provide the Direction to the Receiver and Manager that it can disclaim the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95 of the Richmond Project or alternatively, offer for sale those Strata Lots at current market value free and clear of any obligation of Chandler that might arise under the Contracts with Crestmark.

The Application of Crestmark

98 The application is that Crestmark be at liberty to commence an action against Chandler, Cook and the Receiver Manager for specific performance. The application of Crestmark pursuant to Rules 47 and 50 of the Rules of Court and the inherent jurisdiction of the Court is dismissed to the extent that the order sought relates to an action claiming specific performance. Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. Accordingly, there can be no action against the Receiver and Manager for specific performance. Regarding the proposed action against Chandler or Cook, Crestmark will be at liberty to commence an action claiming damages against either or both of those companies. However, Crestmark will not be at liberty to commence an action against either Chandler or Cook for specific performance. Crestmark has not met the onus of establishing a reasonable cause of action is disclosed.

Costs

99 The Receiver and Manager will be at liberty to speak to the question of costs against Crestmark Holdings Corp., Farouk Ratansi, Salim Jiwa, and Sui Chun Chao-Dietrich.

Order accordingly.

Footnotes

* A corrigendum issued by the court on October 16, 2008 has been incorporated herein.

TAB 15

CARSWELL

BANKRUPTCY AND INSOLVENCY LAW OF CANADA

FOURTH EDITION

REVISED

VOLUME 2

by
The Honourable
L. W. HOULDEN, B.A., LL.B.,
formerly a Judge of The Court of Appeal for Ontario

and
The Honourable
G. B. MORAWETZ, B.A., LL.B.
of the Superior Court of Justice

and
JANIS SARRA, B.A., M.A., LL.B., LL.M., S.J.D.
of UBC Faculty of Law and the Ontario Bar

THOMSON REUTERS®

A cataloguing record for this publication is available from Library and Archives Canada.

ISBN 978-0-7798-2158-7

Printed in Canada by Thomson Reuters.

THOMSON REUTERS®

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

the bankrupt estate: *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 10 E.T.R. (2d) 68, 1995 CarswellOnt 167 (C.A.).

The purpose of a constructive trust is to prevent unjust enrichment in whatever circumstances it occurs. There are three requirements for a constructive trust: (a) an enrichment, (b) a corresponding deprivation, and (c) an absence of any juristic reason for the enrichment: *Becker v. Pettkus,* [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384; *Re Ascent Ltd.* (2006), 2006 CarswellOnt 116, 18 C.B.R. (5th) 269 (Ont. S.C.J.); *General Motors Corp. v. Peco Inc.* (2006), 2006 CarswellOnt 987, 19 C.B.R. (5th) 224 (Ont. S.C.J.). A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct: *Re Associated Investors of Canada Ltd.* (1992), 17 C.B.R. (3d) 303, 7 Alta. L.R. (3d) 212, 1992 CarswellAlta 302 (Q.B.); *Orr & Co. v. Saskatchewan Economic Development Corp.* (1994), 24 C.B.R. (3d) 196, 1994 CarswellSask 16 (Sask. Q.B.).

Absence of juristic reason means that a claimant is under no obligation, contractual, statutory or otherwise to provide work or services to the person alleged to be subject to the constructive trust: *Peter v. Beblow,* [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, 1993 CarswellBC 44, 1993 CarswellBC 1258, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621; *Chevron Canada Resources v. Nesi Energy Marketing Canada Ltd. (Trustee of)* (1998), 7 C.B.R. (4th) 143, 224 A.R. 103, 1998 CarswellAlta 531 (Q.B.). An obligation to make the contribution that leads to the enrichment — whether that obligation arises in a debtor-creditor or other contractual context or whether by reason of principles of common law or equity or by way of statutory provisions — may constitute a juristic reason: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 33 C.B.R. (3d) 161, 1995 CarswellOnt 318 (Ont. Gen. Div.).

The fundamental question to ask in considering whether there is an absence of juristic reason for the enrichment is: What were the legitimate or reasonable expectations of the parties when the deal or occurrence took place? Where a bank advances money to a creditor pursuant to a line of credit, there is a juristic reason for the enrichment, and consequently the doctrine of constructive trust has no application: *Baltman v. Coopers & Lybrand Ltd.* (1996), 43 C.B.R. (3d) 33, 1996 CarswellOnt 4337 (Ont. Gen. Div.).

Protection of the interests of all creditors is a juristic reason for permitting an enrichment of a bankrupt estate. Where, as a result of s. 70(1) of the *Bankruptcy and Insolvency Act,* the claim of an execution creditor, which had been given an undertaking that its claim would be paid from the sale of property of the bankrupt, was not paid but the proceeds were paid to the trustee for distribution to all creditors, the court held that there was a juristic reason for the enrichment: *Re MacKay* (2003), 41 C.B.R. (4th) 144, 2003 CarswellBC 599, 2003 BCSC 413 (B.C. S.C.). Similarly, the valid security interest of a secured lender constitutes a juristic reason for permitting the enrichment of the secured lenders and the corresponding deprivation of unsecured claimants in a *CCAA* proceeding; thus claimants had not made out the elements of claims for unjust enrichment: *Re Mosaic Group Inc.* (2004), [2004] O.J. No. 2323, 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.).

For a juristic reason to exist for a payment, there is no necessity for the payee to prove that there was a contractual obligation between the payor and the payee to make the payment; nor does there have to be an enforceable obligation at the time of the payment. If the payee has a commercially reasonable expectation of receiving the money that is sufficient to constitute a legitimate juristic reason for the payee's enrichment: *Toronto Dominion Bank v. Carotenuto* (1998), 101 B.C.A.C. 216, 164 W.A.C. 216, 154 D.L.R. (4th) 627, 1998 CarswellBC 23 (C.A.).

When a husband-wife relationship exists and the wife advances moneys to her husband on a number of occasions without consideration, there is an absence of juristic reason for the advances: *Re Patrick Estate* (1999), 9 C.B.R. (4th) 64, 1999 CarswellSask 74 (Sask. Q.B.), reversed (1999), 16 C.B.R. (4th) 266, 1999 CarswellSask 217, 183 Sask. R. 221 (Q.B.), but restored and affirmed (2000), 16 C.B.R. (4th) 270, 2000 CarswellSask 120, 189 Sask. R. 272, 16 W.A.C. 272 (C.A.).

In order for there to be an unjust enrichment, there must be some specific property of the bankrupt that is the subject of the enrichment: constructive trust cannot be imposed over all the property of a bankrupt: *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73, 26 O.R. (3d) 477, 10 E.T.R. (2d) 68, 1995 CarswellOnt 1167 (C.A.); *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1997), 6 C.B.R. (4th) 188, 214 A.R. 380, 1997

[*Continued on page 3-63*]

TAB 16

1993 CarswellBC 44
Supreme Court of Canada

Peter v. Beblow

1993 CarswellBC 1258, 1993 CarswellBC 44, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, [1993] R.D.F. 369, [1993] B.C.W.L.D. 1264, [1993] W.D.F.L. 721, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 39 A.C.W.S. (3d) 646, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, J.E. 93-660, EYB 1993-67100

CATHERINE PETER v. WILLIAM BEBLOW

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: November 12, 1992
Judgment: March 25, 1993
Docket: Doc. 22258

Proceedings: reversed *Peter v. Beblow* ((1990)), 1990 CarswellBC 237, 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419 ((B.C. C.A.))

Counsel: *G. William Wagner* and *R.C. Bernhardt*, for appellant.
Nuala J. Hillis and *Jessie MacNeil*, for respondent.

***McLachlin J. (La Forest, Sopinka and Iacobucci JJ.* concurring):**

1 I have had the advantage of reading the reasons of Justice Cory. While I agree with his conclusion and with much of his analysis, my reasons differ in some respects on two matters critical to this appeal: the issues raised by the requirement of the absence of juristic reason for an enrichment and the nature and application of the remedy of constructive trust.

2 In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs where one person makes a substantial contribution to the property of another person without compensation. The doctrine has been applied to a variety of situations, from claims for payments made under mistake to claims arising from conjugal relationships. While courts have not been adverse to applying the concept of unjust enrichment in new circumstances, they have insisted on adhering to the fundamental principles which have long underlain the equitable doctrine of unjust enrichment. As stated by La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, at p. 246, "... the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them."

3 The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

4 Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms as sociated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

5 Such difficulties have to some degree complicated the case at bar. At the doctrinal level, the simple question of "benefit" and "detriment" became infused with moral and policy questions of when the provision of domestic services in a quasi-matrimonial situation can give rise to a legal obligation. At the stage of remedy, the trial judge proceeded as if he were making a monetary award, and then, without fully explaining how, awarded the appellant the entire interest in the matrimonial home on the basis of a constructive trust. It is only by a return to the fundamental principles laid out in cases like *Pettkus v. Becker* and *Lac Minerals*, that one can cut through the conflicting findings and submissions on these issues and evaluate whether in fact the appellant has made out a claim for unjust enrichment, and if so what her remedy should be.

1. Is the Appellant's Claim for Unjust Enrichment Made Out?

6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment — an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment — are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

7 The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.

8 The first question is: where do these arguments belong? Are they part of the benefit — detriment analysis, or should they be considered under the third head — the absence of juristic reason for the unjust enrichment? The Court of Appeal, for example, held that there was no "detriment" on these grounds. I hold the view that these factors may most conveniently be considered under the third head of absence of juristic reason. This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289]; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

10 In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

TAB 17

2006 NBBR 108, 2006 NBQB 108
New Brunswick Court of Queen's Bench

McKinnon, Re

2006 CarswellNB 158, 2006 CarswellNB 914, 2006 NBBR 108, 2006 NBQB 108, [2006] W.D.F.L. 1814, 19 C.B.R. (5th) 253, 300 N.B.R. (2d) 395, 782 A.P.R. 395

In the Matter of the bankruptcy of David Michael McKinnon

Reg. Bray

Heard: March 17, 2006
Judgment: March 29, 2006
Docket: NB 11715, Estate No. 51-118366

Counsel: Allan Marshall — Trustee in Estate of David Michael McKinnon
Jack M. Blackier for Wendy McKinnon

Reg. Bray:

Facts

1 David Michael McKinnon, (the Bankrupt) made an assignment pursuant to section 49 of the *Bankruptcy and Insolvency Act* ("the Act") on November 1, 2004.

2 The firm of Allan Marshall and Associates was appointed Trustee of the Estate of the Bankrupt.

3 The discharge of the Bankrupt, which would otherwise have occurred on August 2, 2005, was opposed by the Trustee *inter alia* pending payment of joint equity in real property located at 5 Forestside Avenue, Rowley, New Brunswick which was valued by the Trustee at $8,066.25.

4 The Trustee arrived at this evaluation using the estimated selling price on appraisal, subtracting legal and realty fees, subtracting registered mortgages and then taking 50% of the balance because the deed indicated joint property.

5 The real property in question is a home originally occupied by the Bankrupt and his first wife, Sharon McKinnon. The Deed to the property at the time of the Bankrupt's assignment showed his name and that of Sharon McKinnon as property owners.

6 The Bankrupt and Sharon McKinnon divorced in 2000 and the latter has never waived her right to the 50% equity in the marital home.

7 The Bankrupt and his present wife, Wendy McKinnon, began a common law relationship in 2000 and married in 2002.

8 During the periods of cohabitation and marriage, Wendy McKinnon made payments to the Royal Bank on a mortgage held on the property in question.

9 Wendy McKinnon has filed a Proof of Claim in the amount of $5,404.00 which has been disallowed by the Trustee.

10 Although brought at the discharge hearing of the Bankrupt and originally framed as an opposition to the suggested equity payment condition, the true nature of the application is an appeal of a Trustee's decision. This application alleges the

existence of a constructive trust that would constitute property over which the Trustee does not have a right of distribution.

Issue

11 Do the mortgage payments tendered by Wendy McKinnon constitute a constructive trust giving rise to a right in the equity of the home that should be allowed by the Trustee having regard to the provisions of subsection 67(1) of the Act?

12 It was conceded at the hearing by counsel for Wendy McKinnon that there had been no triggering event that would give rise to any rights pursuant to the *Marital Property Act* and no argument was made on this issue.

13 If Wendy McKinnon has an interest in the equity of the property, how would the value of this be determined?

Analysis

14 The onus of proving a constructive or resulting trust falls upon the claimant and, in a bankruptcy setting, is not lightly undertaken. Furthermore the evidence must be clear, the standard of proof high: *Croteau, Re* (1985), 50 O.R. (2d) 629 (Ont. H.C.) @ p. 632); *Heffner, Re* (1986), 63 C.B.R. (N.S.) 113 (B.C. C.A.).

15 The reason for a more rigorous standard is that it is obviously in the interests of the Bankrupt and his current spouse to plead their intention to create a trust and thus shield a part of the equity in their home from the creditors in the Bankrupt's estate.

16 A constructive trust is usually pleaded when the contributions to the property are indirect and not financial. The case cited by counsel for Wendy McKinnon, that of *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), is the classic example. This was followed by others such as *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.). The years of work on a farm by a spouse without legal title to the property thereof, even in the absence of direct financial contribution, will be construed by the Court as having given rise to a trust. The reason is equitable, and remedial: the denial of unjust enrichment for which there is no juristic reason.

17 In the situation of a constructive trust it is unnecessary to prove intention as is required when pleading a resulting trust which is a right *in rem*. I assume that this was the reason for framing the relief sought in the present instance as a constructive trust. The intention of the parties was not mentioned in the affidavit of Wendy McKinnon. The Bankrupt was not called to testify on this issue and he offered no comment on his own behalf when invited to do so. This is not surprising. In all probability, in a matrimonial or common-law relationship parties do not frequently reflect upon their respective legal entitlements. Few would see their ongoing mutual responsibilities in terms of receiving an entitlement to compensation, but they would probably have an expectation of sharing assets in the event of dissolution.

18 Four elements must be proven to invoke the remedy of a constructive trust. There must be an enrichment, a corresponding deprivation, an absence of any juristic reason for the enrichment and a causal connection between the non-titled party and the asset in dispute: *Becker v. Pettkus* (supra) @ pp 848 & 852.

19 An additional consideration must be invoked at the outset: the maxim that equity must follow the law unless strict observance would result in injustice. In an insolvency context the Act provides a code by which legislators have balanced the rights of all those adversely affected by the insolvency. The legal rights of creditors established as statutory priorities should not be defeated by the Bankruptcy Court unless it would be unconscionable not to recognize the pleaded equitable remedy. The judicial discretion to grant a remedy by finding a constructive trust to correct an inequity, which may be an obvious solution in a matter involving only two parties in a marital property context, must be exercised with a little more reticence when the rights of *bona fide* third parties come into play: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.) @ p.1023.

20 On the evidence presented I have difficulty concluding that there was an enrichment. I do not doubt that Wendy McKinnon contributed mortgage payments that were owing upon the house while the Bankrupt made those owing upon the garage. No evidence was given, however, concerning the way in which other household expenses were divided. I would conclude that, during cohabitation and marriage, both parties contributed and both parties benefited from the shared

arrangement. There would be, therefore, no deprivation to Wendy McKinnon for the financial input that she made.

21 If a detriment has been suffered by Wendy McKinnon it is not caused by an enrichment to the Bankrupt but rather by the fact of insolvency. The spouse of a bankrupt suffers a detriment as do his creditors. The spouse, however, will generally have benefited from the credit extended to the bankrupt prior to his insolvency. To confer upon this spouse an advantage over the creditors, in the absence of exceptional circumstances, would be neither just nor equitable. The distribution scheme in the Act itself provides a juristic reason for not finding an unjust enrichment and for rejecting an *ex post facto* remedy imposed by the court. Upon the facts presented the equities of Wendy McKinnon, balanced against those of unsecured creditors, do not merit the remedy solicited.

22 Although the findings on the merits in the present instance do not adversely impact other interested parties, it should be noted that unsecured creditors in motions of this nature are normally served with notice of the application.

Conclusion

23 The Trustee made no error in rejecting the claim of Wendy McKinnon to an interest in the equity in the property located at 5 Forestside Avenue, Rowley, New Brunswick.

24 There will be no order as to costs.

Order accordingly.