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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	**THIRD EYE CAPITAL CORPORATION**
RESPONDENTS	**RANCH ENERGY CORPORATION, OPSMOBIL 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., AND K.L. CAPITAL CORP.**
DOCUMENT	**REPLY BRIEF OF PREDATOR OIL BC LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP 3500, 855 – 2nd Street S.W. Calgary, AB T2P 4J8 Attention: Ryan Zahara Matthew J. Summers Telephone: 403-260-9628 403-260-9677 Facsimile: 403-260-9700 Email: ryan.zahara@blakes.com matthew.summers@blakes.com File Ref.: 180308/1

To be Heard in Justice Chambers,
on the 7th day of November, 2018 at 2:00 p.m.
Before the Honourable Justice K.M. Horner

TABLE OF CONTENTS

I. INTRODUCTION

1. Predator files this Reply Brief in response to the Brief of the Receiver filed on October 31, 2018 (the "**Receiver's Brief**") and the Brief of TEC filed on October 31, 2018 ("**TEC's Brief**"). Capitalized terms not otherwise defined in this document have the same meaning ascribed to them in Predator's Brief of Argument ("**Predator's Brief**") filed on October 17, 2018.

2. The central issue in this Application is whether Ernst & Young Inc., in its capacity as receiver and manager (the "**Receiver**") of Ranch Energy Corporation ("**Ranch**"), requires licenses and permits to operate certain oil and gas assets of Ranch (the "**Assets**"). In order ot operate the Assets, those licenses and permits must be in the Receiver's name, in the name of Ranch, or in the name of Predator Oil BC Ltd. ("**Predator**") and available to the Receiver, which would grant the Receiver the right to operate the Assets in Predator's name.

3. If the Receiver requires licenses and permits to operate the Assets of Ranch, then the Receiver must obtain access to those licenses and permits. Such licenses and permits could be obtained either directly from the British Columbia Oil and Gas Commission (the "**BC OGC**") through the issuance of new permits, through a BC OGC order authorizing the operation of the Assets by the Receiver, or by obtaining access to the licenses and permits currently held by Predator (the "**Permits**").

4. Predator has consistently advised the Receiver throughout the receivership process that Predator's position is that the Receiver cannot operate the Assets without the Permits. Nothing in the receivership order dated July 19, 2018 (the "**Receivership Order**"), which appointed the Receiver, allows the Receiver to carry on business that Ranch itself is not otherwise lawfully entitled to carry on.[1] The Receivership Order authorizes the Receiver to apply for licenses or permits on its own behalf or on behalf of Ranch.[2] However, nothing in the Receivership Order states that the Receiver may operate the Assets in breach of the OGAA or without the Permits.

5. Predator has never taken the position that the asset purchase and sale agreement dated May 8, 2017 ("**APSA**"), the trust agreement executed on June 16, 2017 (the "**Original Trust Agreement**"), or the trust agreement executed on July 10, 2017 (the "**Amended Trust**

[1] Receivership Order of Justice Romaine, dated July 19, 2018 at para 10.

[2] Receivership Order of Justice Romaine, dated July 19, 2018 at para 4(p).

Agreement" and together with the Original Trust Agreement, the "**Trust Agreement**") provided Predator with rights to operate the Assets. In fact, Predator has explicitly acknowledged that it has no economic interest in the Assets and that its preference is not to operate the Assets. Predator's sole and primary concern is that the Assets are operated in compliance with the *Oil and Gas Activities Act* (British Columbia) (the "**OGAA**").[3]

6. Nothing in the evidence or the arguments presented by the Receiver and Third Eye Capital Corporation ("**TEC**") explains where the Receiver obtains its authority to operate the Assets without access to the Permits. There is no provision of the OGAA or the Receivership Order that corrects this state of affairs.

7. Predator seeks a remedy from this Court that would bring the operation of the Assets back into compliance with the OGAA and its regulations, which is Predator's primary concern. Predator also believes that it is owed the amount of the outstanding post-receivership Trust Fees, which are owed by the estate of Ranch to Predator pursuant to the Trust Agreement.

II. ISSUES

8. In response to the arguments raised in the Receiver's Brief and TEC's Brief, Predator wishes to clearly set out its position on the following issues:

(a) Predator has standing to bring this Application pursuant to section 248 of the *Bankruptcy and Insolvency Act* ("**BIA**"), and an order granted in accordance with section 248 is made notwithstanding any stay of proceedings in the Receivership Order (pursuant to section 250 of the BIA).[4] Therefore, Predator's requested relief does not require the stay to be lifted.

(b) Predator informed the Receiver that it was operating the Assets under the Permits and pursuant to the terms of the Trust Agreement mere days after the Receivership Order was issued. The Receiver failed to elect to affirm or disclaim the Trust Agreement in a reasonable time despite being informed of such, and continued to use the Permits to operate the Assets for months before issuing the Disclaimer Notice. If the Receiver had advised of its position in respect of the

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[3] *Oil and Gas Activities Act*, SBC 2008, c 36 [***OGAA***].

[4] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***], ss 248, 250 **[TAB 1]**.

Permits in a reasonable time, then both Predator and the BC OGC could have addressed this issue with the Court at a much earlier point in the proceedings.

(c) The APSA explicitly states that Predator is to hold the Permits in trust for Ranch subject to the Trust Agreement, and the Trust Agreement explicitly states that it is made to effect the transaction contemplated in the APSA. Therefore, the APSA and Trust Agreement are inextricably linked and any trust obligation in the APSA cannot exist independent of the Trust Agreement. Nor can the APSA alone provide the Receiver with the authority to operate the Assets using Predator's Permits;

(d) The Receiver's continued operation of the Assets in violation of the OGAA and the Receivership Order creates both known and potential risks to Predator, as well as to Predator's directors and officers, in the form of statutory and civil liability; and

(e) The Receiver's current regulatory predicament has occurred with the full knowledge and direct acquiescence of TEC. The present circumstances are largely due to TEC's insistence on refusing to fund any amounts to the Receiver and advancing its own goals within the receivership proceedings.

III. BACKGROUND

9. On May 8, 2017, Predator and Ranch entered into the APSA. Article 6.6(a) of the APSA expresses an intention that Predator hold the Permits in trust for Ranch pursuant to a trust agreement, which provides the basis for which Predator and Ranch entered into the Trust Agreement.[5] Article 8.3 of the APSA also imposes a series of more general obligations on Predator in respect of the Assets, including a generalized trust obligation in Article 8.3(b).[6]

10. On June 16, 2017, Predator, Ranch, and OpsMobil entered into the Original Trust Agreement to create the trust contemplated in Article 6.6 of the APSA.

11. On July 10, 2017, Predator, Ranch, and OpsMobil entered into the Amended Trust Agreement. The Preamble of the Amended Trust Agreement makes clear that the Original Trust

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[5] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "A" at 24.

[6] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "A" at 28-29.

Agreement (and now the Amended Trust Agreement) was the vehicle by which the parties intended to document the intention of Predator to hold the Permits in trust for Ranch, as well as to provide specific authorization to Ranch to operate the Assets using Predator's Permits.[7]

12. TEC was aware of and involved in the amendment of the Original Trust Agreement to create the Amended Trust Agreement.[8] Moreover, the structure of the transaction, including the separation of the Permits from the Assets, was thoroughly vetted and ultimately approved by TEC as it advanced the funds to Ranch to close the transaction with Predator.[9]

IV. PREDATOR HAS STANDING TO BRING THIS APPLICATION

13. Both the Receiver's Brief and TEC's Brief argue that Predator does not have standing to seek an order from this Court directing the Receiver to comply with the OGAA, the Receivership Order and/or the terms of the Trust Agreement. In other words, the Receiver and TEC are effectively arguing that the Court cannot review the conduct of the Receiver in order to determine if the Receiver is operating in compliance with the Receivership Order because Predator has not properly framed its application. It would be inappropriate, however, to allow the Receiver to shield itself from the scrutiny of determining whether it is acting outside of its duties or powers, which are confined to the limits imposed by the Receivership Order.[10]

14. Predator does have standing to bring this Application pursuant to sections 248 of the BIA, which is consistent with Predator's Application filed on October 17, 2018. That Application specifically relied on the BIA and requested relief that is available pursuant to section 248. Requesting relief explicitly available under the BIA does not constitute a collateral attack on the Receivership Order.

A. Operation of Section 248 of the BIA

15. Section 248 of the BIA allows Predator, as creditor, to seek an order from this Court directing the Receiver to do something, or refrain from doing something, in accordance with the Receiver's statutory duties.[11]

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[7] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "B" at 1-2.

[8] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at paras 24, 26.

[9] Brief of Law and Argument of Third Eye Capital Corporation, filed on October 31, 2018 at Exhibit "A" at paras 40-41, 44.

[10] Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Carswell, 2011) at 38-40 **[TAB 2]**.

[11] BIA, s 248 **[TAB 1]**.

16. Section 250 of the BIA empowers this Court to make an order pursuant to section 248 despite anything in the Receivership Order, including notwithstanding that there is a stay of proceedings pursuant to the Receivership Order.[12] Therefore, there is no requirement to have the stay of proceedings lifted prior to seeking relief pursuant to section 248 of the BIA.

17. A section 248 order is justified in the circumstances because the Receiver is acting outside of the scope of the Receivership Order and/or failing to carry out its duties pursuant to section 247 of the BIA, which requires the Receiver to deal with the Assets in a commercially reasonable manner.

18. It is Predator's position that the Receiver, by operating the Assets without the Permits (or any other authorization from the BC OGC) and outside of the powers provided to it under the Receivership Order, is not acting in a commercially reasonable manner. Predator also submits that it is not commercially reasonable for the Receiver to take the benefit of the Permits and attempt to retroactively disclaim the Trust Agreement (despite benefitting from the use of the Permits to operate the Assets up to the date of the Disclaimer Notice).

19. The operation of section 248 of the BIA, as described above, is supported by the comments of Thorburn J. of the Ontario Superior Court of Justice in ***Romspen*** (wherein Thorburn J. amended a receivership order pursuant to section 248):

> [40] Section 247 of the *Bankruptcy and Insolvency Act* provides that the Receiver "shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner."
>
> [41] Section 248 provides that,
>
> Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a Receiver or a creditor, is satisfied that the secured creditor, the Receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,
>
> > (a) directing the secured creditor, Receiver or insolvent person, as the case may be, to carry out that duty, or
> >
> > (b) restraining the secured creditor or Receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out, or both.

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[12] BIA, s 250 **[TAB 1]**.

> [42] Section 250 provides that an application may be made under section 248 notwithstanding any order of a court. Where there is any inconsistency between an order made under the Act or a court order, the order made under the Act prevails to the extent of the inconsistency.
>
> ...
>
> [58] I note that section 247(a) of the *Bankruptcy and Insolvency Act* requires the Receiver to deal with the property of an insolvent person, "in a commercially reasonable manner". Repaying the blanket mortgage at the rate of 12% interest before repaying the other borrowing costs at 24% interest is not commercially reasonable.
>
> [59] Section 250 of the *Bankruptcy and Insolvency Act* enables the court to make an order under section 248 notwithstanding that the Receivership Order has been made.[13]

B. The Amendment of Predator's Application

20. Predator's Application filed on October 17, 2018 states that this Application was being brought pursuant to the BIA and "[s]uch further and other rules as counsel may advise and this Honourable Court may permit." While Predator believes that this reference to the BIA and/or other rules is sufficient to frame an application pursuant to section 248 of the BIA, Predator, out of an abundance of caution, and to address any procedural concerns raised by the Receiver and TEC, also filed an Amended Application in conjunction with this Reply Brief. The Amended Application explicitly references and relies on sections 247, 248, and 250 of the BIA as the grounds for bringing this Application.

21. The amendment of the Application has no effect on the substance, argument, or requested relief sought as part of the Application (all of which was already consistent with an application brought pursuant to the BIA, including section 248).

V. THERE IS A REAL RISK TO PREDATOR IF THE ASSETS ARE OPERATED IN VIOLATION OF THE OGAA

22. The Receiver's continued operation of the Assets without a permit and in violation of section 21 of the OGAA poses a real and direct risk to Predator. That risk extends beyond the vulnerability of Predator's currently outstanding BC OGC security deposit. There is also the potential risk of further statutory and civil liability to both Predator and its director and officers.

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[13] ***Romspen Investment Corp v Edgeworth Properties***, 2014 ONSC 4340 [***Romspen***] at paras 40-42, 58-59 **[TAB 3]**.

23. The BC OGC's Oil and Gas Operations Manual is clear that Predator, as permit holder, can be held responsible for any negative outcome related to the Assets associated with the Permits:

> Permit holders must comply with the requirements imposed by the statutes and regulations of the province of B.C. and the guides, policies, and information letters issued by the Commission. Once approved, permit holders bear responsibility for all permit holder obligations (as defined in OGAA), including outcomes of actions of contracted personnel in carrying out permitted oil and gas activities on behalf of the company.[14]

24. For example, there is the potential for Predator to be held liable, as permit holder, for any violations of section 21 of the OGAA. Each violation of section 21 could result in liability for Predator and its officers and directors of either imprisonment or a fine not exceeding $1,500,000.00 per day, or both:

> **Offences**
>
> **86** **(1)** A person who contravenes section <u>21</u>, 35 (1), 36 (1), 37 (1) or (2), 39 (3), 40, 61 or 81, or in relation to an order issued under section 49, section 82, commits an offence and is <u>liable on conviction to a fine not exceeding $1 500 000 or to imprisonment for not more than 3 years</u>, or to both.
>
> ...
>
> **(8)** If a contravention continues <u>for more than one day</u>, the offender is liable to a <u>separate penalty</u>, without notice and without a separate count being laid, <u>for each day that the contravention occurs</u>.
>
> ...
>
> **(11)** If a corporation commits an offence under this Act, a <u>director or officer of the corporation</u> who authorized, permitted or acquiesced in the offence also commits the offence.[15]

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[14] BC Oil and Gas Commission, *Oil and Gas Activity Operations Manual*, v 1.21 (September 2018) at 19, 27 **[TAB 4]**.

[15] OGAA, s 86 [Emphasis added] **[TAB 5]**.

25. The same potential for liability applies to a violation of section 35(1) of the OGAA, which constitutes one of the specific "permit holder obligations (as defined in OGAA)" referenced in the Oil and Gas Operations Manual:

> **Obligations in carrying out oil and gas activities**
>
> **35 (1)** In carrying out oil and gas activities and related activities, a permit holder, an authorization holder or a person entering land under section 23 must minimize
>
> > **(a)** damage and disturbance to the sites of those activities, and
> >
> > **(b)** waste.[16]

26. There is also a risk of further civil liability to Predator in the event of a negative outcome associated with the Permits and/or the Assets. This liability could potentially stem from the Receiver's inability to claim under any of its insurance policies when operating the Assets.

27. It is not clear that any insurance policy that is held by the Receiver would be valid if the Receiver does not have access to the Permits, operates the Assets in contravention of section 21 of the OGAA, or does not have the authorizations necessary from the BC OGC to operate the Assets in compliance with the OGAA. The insurance policy held by Predator is unlikely to cover the Receiver's operation of the Assets if that operation is in violation of the OGAA and the Receivership Order. Therefore, in the event of an incident arising with the Assets, there is both the real and substantial potential for the BC OGC to pursue Predator, as permit holder, to recover any amounts that otherwise should have been covered by the insurance held by the Receiver.

28. All of this potential for liability is of great concern to Predator and its directors and officers. The operation of the Assets must be brought into compliance with the OGAA in order to mitigate any further risk of such liability.

VI. THE TRUST AGREEMENT WAS DISCLAIMED AS OF THE DATE OF DISCLAIMER NOTICE

29. The Receiver's Brief takes the position that the Disclaimer Notice merely notified Predator that the Receiver had no intention of adopting the Trust Agreement as of the date of the Receivership Order. This position is based on the argument that the Receiver obtained no

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[16] OGAA, s 35 [Emphasis added] **[TAB 5]**.

value from the Trust Agreement or the Permits for the approximately two and a half months between the date of the Receivership Order and the date of the Disclaimer Notice. This argument is itself premised on the position that Ranch and the Receiver did not require the use of the Permits during that time because they are some kind of unique "*de facto*" operator that is able to operate without a permit or without the permission of the BC OGC[17].

30. However, considering that Ranch and the Receiver do, in fact, require either a permit or authorization from the BC OGC to operate the Assets, the Receiver has clearly been operating the Assets in Predator's name and using Predator's Permits. This issue could have been addressed on far more reasonable timelines if the Receiver had advised Predator and the BC OGC earlier in the proceedings that its view was that the Trust Agreement and the Permits were unnecessary for the operation of the Assets (and potentially some resolution could have been reached).

31. Within days of the Receivership Order being granted, Predator provided the Receiver with notice that the Receiver was making use of Permits by operating the Assets. This notice was also repeated on several occasions since the date of the Receivership Order, including on July 25, August 9, August 24, September 14, and September 28.[18]

32. Despite being advised on multiple occasions that it was Predator's position that the Receiver required the Permits under the terms of the Trust Agreement to operate the Assets, the Receiver never informed Predator that it was considering disclaiming the Trust Agreement until Predator received the Disclaimer Notice minutes prior to the application to approve the sales process for the Assets (the "**Sales Process**"). Predator specifically advised the Receiver and the Court at the sales process application that it reserved all of its rights in respect of te disclaimer of the Trust Agreement.

33. The Receiver has provided no explanation for why the issue surrounding the Trust Agreement and the Permits could not have been addressed at the same application on reasonable notice to the affected parties. The Sales Process materials themselves, for which

[17] Fourth Report of the Receiver dated October 24, 2018 (the "**Fourth Report**") at paragraph 30 and the Receiver's Brief at paragraph 34

[18] Affidavit of Ryan Tobber, sworn on October 16, 2018 at Exhibits "E", "J", "L", "O", "P".

the Receiver sought approval of on October 2, 2018, explicitly referenced the Trust Agreement and that the Permits were held in Predator's name.[19]

A. The Receiver Did Not Disclaim the Trust Agreement in a Reasonable Time

34. The Receiver's Brief cites the decision of the British Columbia Supreme Court in ***Pope*** as authority for, among other things, the proposition that "in order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication."[20]

35. In ***Pope***, Brenner C.J.S.C. also found that a receiver must make an election on whether to disclaim a contract in a "reasonable time" if the receiver is being supplied with goods or services pursuant to that contract:

> [22] If goods or services are being supplied, the receiver will be forced to complete this assessment and make its decisions within a reasonable time. But where no actual services or goods are being supplied, it is my view that the onus of taking a step rests with the other contracting party. It would have been a simple procedure for Westcoast to apply to the court for an order requiring the receiver to make its election. Other parties in this case did just that.[21]

36. In the present circumstances, the Receiver has operated the Assets and made use of Predator's Permits since the date of the Receivership Order. Predator first addressed this point and indicated it would require payment pursuant to the Trust Agreement six days after the Receivership Order was granted. However, the Receiver continued to make use of the Permits for more than two months before it disclaimed the Trust Agreement, during which time the Receiver alleges it was considering whether to disclaim the Trust Agreement.

37. Such a sequence of events suggests that the Receiver was not acting in a commercially reasonable manner in disclaiming the Trust Agreement with little or no notice to affected parties. As a result, the Disclaimer Notice does not, in Predator's submission, constitute the disclaimer of the Trust Agreement in a "reasonable time." The Receiver's actions therefore constituted

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[19] Order Approving Sale and Investment Solicitation Process of Justice Macleod, dated October 2, 2018 at Schedule "A" at paras 10-11 **[Tab 6]**.

[20] ***Re Pope & Talbot Ltd***, 2009 BCSC 17 [***Pope***] at para 15 **[TAB 7]**.

[21] ***Pope*** at paras 15-22 **[TAB 7]**.

affirmation by implication and the Receiver should not be able to disclaim the Trust Agreement retroactive to the date of the Receivership Order.

VII. AUTHORIZATION FROM PREDATOR TO USE THE PERMITS DOES NOT EXIST INDEPENDENT OF THE TRUST AGREEMENT

38. Both the Receiver's Brief and TEC's Brief argue that the disclaimer of the Trust Agreement does not affect Predator's obligation to hold the Permits in trust. Nor does it prevent Ranch from operating the Assets on behalf of Predator. Predator, however, has provided evidence through Ryan Tobber that the Trust Agreement provided the contractual and administrative framework necessary in order to allow Ranch to utilize the Permits to operate the Assets with the consent of Predator.[22]

39. In its Fourth Report, the Receiver specifically advised that it concluded the Trust Agreement was not the source of Ranch's authority to operate the Assets.[23] The Receiver, however, provided no evidence in respect of the source of its authority to operate the Assets. Similarly, the Receiver's Brief argues that the Receiver has operated the Assets in conjunction with the BC OGC and on a *de facto* basis based on the Receivership Order and the status quo in place as of the date of the Receivership Order. Neither of these submissions addresses the issue of whether the Receiver requires Predator's Permits to operate the Assets.

40. Predator, for the reasons outlined, continues to assert that the Receiver must be relying upon Predator's Permits to operate the Assets, and any attempt to obtain the benefit of those Permits without paying any of the corresponding obligations associated with the Trust Agreement is not commercially reasonably. In fact, the result of this position is to unjustly favor and benefit the position of the secured creditor TEC at the expense of Predator. This is the same secured creditor who is controlling what funds are made available to the Receiver for the operation of the Assets.

41. Further, the position of TEC is based on the argument that a valid trust is created solely by the APSA, and does not require the additional terms set out in the Trust Agreement. This argument is inconsistent with Receiver and TEC's previous statements and actions, including

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[22] Affidavit of Ryan Tobber, sworn on October 16, 2018 at para 25.

[23] Fourth Report of the Receiver at para 30.

the attempts to acquire the Permits from Predator on several occasions, as well as the clear intention of the parties pursuant to the APSA.[24]

42. The Trust Agreement was integral to the completion of the successful transaction surrounding the sale of the Assets to Ranch. Under the terms of the APSA title to the Assets had been conveyed and transferred in accordance with the terms of the APSA and were being operated by Ranch without the Permits being properly transferred into Ranch's name. Ranch did not have the appropriate licensee management rating to enable to the transfer of the Permits into its name at that time. As the beneficial ownership of the Permits had been conveyed through the terms of the APSA, the Trust Agreement was the mechanism established by agreement of all parties to allow Ranch to benefit from the use of the regulatory license to operate.

43. The circumstances that gave rise to the Trust Agreement are not uncommon and are put in place to manage the time period between closing and the obtaining of regulatory approval to transfer licenses or permits. It is clear from the terms of the Trust Agreement that the arrangement established thereunder would be in place for some period of time, as the Outside Date was set at May 31, 2019. This time period for the sale of the Assets is in direct contrast to the specific provisions of the ASPA, which was relied on by TEC for the proposition that the Receiver still has access to the Permits. Those provisions of the ASPA are not consistent with the intent of the parties or the overarching structure that was put in place by the parties on closing of the sale of the Assets to Ranch in order to operate the Assets.

A. No Justification for Altering the Status Quo in Respect of the Permits

44. The Receiver has provided no justification for why it unilaterally altered the status quo in respect of the Permits by terminating the Trust Agreement. If the Receiver's view was that it did not need the Trust Agreement, and could operate based on the APSA alone or some other arrangement with BC OGC, the Receiver could have stated as much prior to or at the time of the Disclaimer Notice.

45. Instead, the Receiver provided no information at the time of the disclaimer as to how or why the Receiver believed it had the authority to operate the Assets without the Permits. In fact, the materials the Receiver relied on in court to commence the Sales Process, which was

[24] Affidavit of Ryan Tobber sworn on October 16, 2018 at paras 30, 38.

approved on the same day the disclaimer occurred, specifically referenced the Trust Agreement and how the Permits were held in trust by Predator pursuant to that agreement.[25]

46. Further, and contrary to the arguments in the Receiver's Brief, there is nothing inconsistent or inappropriate about Ranch operating the Assets on behalf of and in the name of Predator pursuant to the Permits and the Trust Agreement. To Predator's knowledge, this arrangement is not in contravention of the OGAA and the BC OGC has been aware of and acquiesced to this arrangement for some time. The BC OGC has also thus far refused to issue new permits to Ranch or provide an interim operating order to the Receiver to allow it to operate the Assets.

47. Neither party disputes that BC OGC holds the ultimate decision in relation to the Permits and can cancel those at any time. However, the BC OGC can also issue an order allowing a party who is a permit holder to operate assets in a variety of circumstances. For example, section 49 of the OGAA contains broad powers of the BC OGC to issue an order to an agent or contractor of a permit holder that specifies, among other things, that a person suspend or resume an oil and gas activity or any aspect of an oil and gas activity.[26]

48. The provisions relied on by the Receiver to demonstrate that Predator is no longer fit to hold the Permits are not applicable to the present circumstances. For example, section 24(4) of the OGAA only applies where a person is submitting an application for a permit or authorization, which Predator is not doing.[27] As well, section 34(2) of the OGAA only relates to the required ownership, interest, or authorization where the permit holder is attempting to begin or carry out an oil gas activity where it is not the owner.[28] Predator has clearly stated it does not want to operate the Assets and if it is required to do so it will surely require a specific authorization from the BC OGC.

49. The operation of Section 34(2) of the OGAA is also subject to section 39 of the OGAA. Section 39 relates to a suspension of activity if, among other things, the permit holder ceases to be the owner of the petroleum and natural gas rights or the holder of the location in respect of

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[25] Order Approving Sale and Investment Solicitation Processat of Justice Macleod, dated October 2, 2018 at Schedule "A" at para 10 **[Tab 6]**.

[26] OGAA, s 49(4)(d) **[TAB 5]**.

[27] Brief of the Receiver, filed on October 31, 2018 at Tab 12.

[28] Brief of the Receiver, filed on October 31, 2018 at Tab 12.

the well.[29] Again, Predator is not seeking to operate the Assets (except as a last resort) and the requirement to suspend operations when Predator ceases to own any of the petroleum and natural gas rights does not invalidate the Permits that have already been issued to Predator because Predator is no longer operating the Assets. Section 39(2) of the OGAA further provides that the commission, on application by a permit holder, may approve the continuation of the permit holder's oil and gas activities and related activities so the BC OGC retains the discretion to allow operations in this circumstance.

50. Certain sections of the OGAA itself also appear to contemplate an arrangement similar to that established by the Trust Agreement, albeit indirectly. For example, sections 26 and 62 of the OGAA appear to contemplate that parties other than the permit holder may be conducting the operations associated with oil and gas activities.

51. Section 26 defines "associate" as, among other things, an agent of the applicant or permit holder.[30] Section 26(2) further provides that the commission may make a decision under subsection 26(1), including to cancel a permit, where the permit holder or an associate of the permit holder does any number of the items listed in subsections 26(2)(a) to (f). This includes if an associate contravenes the OGAA or the *Petroleum and Natural Gas Act*.[31] This section effectively allows the BC OGC to suspend, cancel or amend a permit as it sees fit in response to a contravention of the Act by an associate of a permit holder. By implication, this would appear to cover off the circumstances where an associate is conducting oil and gas activities as agent for the permit holder, similar to what Ranch has been doing since it acquired the Assets.

52. Similarly, section 62(3) of the OGAA specifically provides that, if an employee, contractor, or agent of a permit holder contravenes a provision referred to in subsection 62(1) in the course of carrying out the employment, contract, or agency, the permit holder also contravenes the provision and can be held responsible for that contravention.[32] This provision implicitly accepts that there will be circumstances where it is not the permit holder, but its agent or contractor, who is conducting operations associated with the assets (but the BC OGC will ultimately hold the permit holder responsible for the actions of its agent or contractor nonetheless).

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[29] Brief of the Receiver, filed on October 31, 2018 at Tab 12.
[30] OGAA, s 26 **[TAB 5]**.
[31] *Petroleum and Natural Gas Act*, RSBC 1996, c 361.
[32] OGAA, s 62 **[TAB 5]**.

53. Further, the arrangement between Predator and Ranch is conceptually similar to existing and judicially accepted schemes designed to hold fishing licences in trust for the person with the beneficial interest in the license. The decision of the unanimous Newfoundland Court of Appeal in ***Loder*** is authority for the proposition that there is nothing wrong with holding fishing licences in trust:

> There is no express or regulatory prohibition against a transfer of the beneficial interest in a fishing licence issued under the *Fisheries Act*, R.S.C. 1985, c. F-14, and numerous cases have accepted the propriety of trust agreements respecting such fishing licences. It was a reasonable inference from the case law that the Department of Fisheries and Oceans was aware of the widespread prevalence of trust agreements relating to fishing licences and the enforceability of such agreements. In the circumstances, the chambers judge erred in declining to enforce the trust agreement: *Loder v. Citifinancial Canada Inc.* (2007), 2007 CarswellNfld 382, 38 C.B.R. (5th) 234 (N.L. C.A.).[33]

54. In ***Loder***, both the Trial Court and the Court of Appeal acknowledged that it was accepted practice to hold a fishing licence in trust for a beneficiary to effect the licence's transfer to another party.[34] The disagreement was over whether the license could be held in trust for the express purpose of circumventing the regulations stipulating who may hold a license. The unanimous Newfoundland Court of Appeal held that a trust agreement providing the beneficial interest in a license to another party should be upheld, regardless of the purpose of the trust, so long as there is no statutory or regulatory provision explicitly prohibiting such an arrangement.[35]

55. The reasoning of the Court of Appeal in ***Loder*** can be applied to the present circumstances. The BC OGC is aware of the Trust Agreement and has at least implicitly acquiesced to the arrangement between Predator and Ranch for the operation of the Assets since their acquisition by Ranch. Further, the Receiver cannot point to any provision of the OGAA that expressly prohibits the operation of the Assets by Ranch or the Receiver pursuant to the terms of the Permits and the Trust Agreement.

56. There are also no specific provisions in the OGAA that Predator is aware of that prevents Predator from holding the Permits in its name and providing authority to Ranch as its agent to operate the Assets on Predator's behalf. Due to the commercial realities requiring such

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[33] L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, the Bankruptcy and Insolvency Act, Part IV (ss. 67-68.1) (WestLaw) **[TAB 8]**, citing ***Loder v Citifinancial Canada Inc***, 2007 NLCA 78 [***Loder***] **[TAB 9]**.

[34] ***Loder*** at para 13-15 **[TAB 9]**.

[35] ***Loder*** at paras 21-26 **[TAB 9]**.

agreements, there is no reason why the arrangement underlying the Trust Agreement should be found invalid or used as rationale by the Receiver and TEC for why the Trust Agreement could and should be disclaimed or is not necessary for the operation of the Assets.

B. The Trust Agreement and the APSA Must Be Read Together

57. The provisions of the APSA alone cannot bring Ranch and the Receiver into compliance with the OGAA. This is because the APSA and the Trust Agreement were entered into together and were not meant to operate separately or independently. The Trust Agreement was put into place to effect the interim arrangement referenced in the APSA, whereby Ranch would operate the Assets in Predator's name pursuant to the Permits held by Predator until such time as Ranch could obtain a transfer of those Permits into its name. And while the Trust Agreement does not explicitly deal with operation of the Assets, it was the mechanism by which the parties attempted to codify their understanding for the use of the Permits by Ranch during this period after closing and conveyance of the interests in the Assets to Ranch.

58. It is clear from the APSA and the Trust Agreement that both Predator and Ranch intended that the Permits be held in trust in accordance with certain terms and conditions. And both Predator and Ranch did not intend the Permits to be held in trust solely based on the terms and conditions of the APSA (or else they would not have agreed to <u>two</u> iterations of a trust agreement). This clear intention that the APSA and the Trust Agreement be read together is exemplified based on the following examples:

(a) Article 6.6 of the APSA outlines the explicit intention of the parties that Predator hold the permits in trust subject to the Trust Agreement.[36]

(b) Article 8.3 of the APSA does not explicitly state that the Permits are to be held in trust pursuant to the APSA. Instead, Article 8.3(b) only states that Predator will hold "title to the Assets, or any portion thereof, in trust for the Purchaser..." The term "Assets" is defined in the APSA as including the term "Miscellaneous Interests", which includes the defined term "Title and Operating Documents," which itself contains the defined term "Permits." However, "Assets" is merely a catch-all definition referring to almost everything materially relevant to the transaction. It would not have been clear to the parties that Article 8.3(b) was

[36] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "A" at 24.

creating a trust over specifically the Permits, or providing Ranch with the explicit authority to utilize those Permits for the operation of the Assets without having to pay any of the corresponding obligations set out in the Trust Agreement.[37]

(c) The Preamble of the Amended Trust Agreement explicitly states that the agreement stems from the APSA. This specific intention to hold the Permits in trust is also realized in Article 2 of the Amended Trust Agreement, which explicitly states that it is the Permits that are to be held in Trust.[38]

59. The Trust Agreement contains the terms of the trust as intended by the parties. The removal of those terms through the disclaimer of the Trust Agreement by the Receiver destroys the trust and the basis upon which the use of the Permits was agreed to by Predator. It is also evident that the parties to the APSA and the Trust Agreement never meant for those agreements to be considered separately or apart. They are effectively pieces of the same transaction, which was established to ensure the Assets were operated in substantial compliance with the OGAA until Ranch could get the Permits transferred into its name.

60. Predator would never have agreed to allow Ranch to operate the Assets under the terms of the APSA for an indefinite period of time (which appears to be what TEC is arguing) and for no reasonable consideration. The Trust Agreement, as previously argued in Predator's Brief dated October 17, 2018, was understood to be necessary for the proper operation of the Assets by Ranch, and Predator was to be compensated for the benefit obtained by Ranch from the operation of those Assets under its Permits. The alternative was to have Ranch post the necessary security deposit (which it could not do) or dramatically improve the liability management rating associated with Assets such that it could accept a transfer of the Permits (which it also did not have sufficient funds to do).

61. The idea that the APSA and the Trust Agreement must be read together and are inextricably linked is not novel or unique to the present circumstances. For example, in the pension trust context, a majority of the Supreme Court of Canada in ***Buschau*** held that a trust agreement could not be terminated without regard to the termination requirements of the pension plan from which that trust agreement stemmed.[39] The reasoning was that, among other

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[37] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "A" at 28-29.

[38] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at Exhibit "B" at 4.

[39] ***Buschau v Rogers Communications Inc***, 2006 SCC 28 [***Buschau***] at para 29 **[TAB 10]**.

things, the trust agreement had expressly been made part of the pension plan in a provision of the plan itself, and the pension plan was attached to the trust agreement in the trust agreement's preamble. While ***Buschau*** is factually distinguishable from the present circumstances, its conceptual similarities are useful in informing this Court in respect of why the Trust Agreement cannot be considered separate and apart from the APSA.

62. In other words, the Trust Agreement should be considered as part of the overall transaction set out in the APSA and, if the Trust Agreement can be independently disclaimed, there are insufficient provisions providing for the trust obligations associated with the Permits and how those Permits can be utilized by Ranch in the APSA. Therefore, in the absence of the Trust Agreement, and as a result of the lack of certainty in Article 8.3 of the APSA, there can be no valid trust over the Permits.

63. Ranch (and by extension the Receiver) has dismantled the structure that was put in place to ensure that the Assets were operated in accordance with the OGAA in Predator's name under the Permits. The Receiver's continued operation of the Assets appears to be without recourse to valid Permits in violation of section 21 of the OGAA and must be remedied.

VIII. THIRD EYE CAPITAL HAS CONTROLLED RANCH'S COMPLIANCE SINCE THE CLOSING OF APSA

64. Both the Receiver's Brief and TEC's Brief commit a great deal of space to the alleged contributions of Mr. Tobber in creating the Receiver's current regulatory predicament. Predator, however, did not change the status quo by attempting to terminate the Trust Agreement, and Predator was always prepared to allow the operation of the Assets in accordance with the terms of the Trust Agreement. It has been TEC's pre- and post-receivership actions that have been an important contributor to the present situation.

A. TEC's Pre-Receivership Actions

65. At the time of the APSA transaction, Predator was not owned or controlled by Mr. Tobber; it was an independent third party entity.[40] Therefore, the reason and rationale behind the purchase of the Assets by Ranch, including the structure of the transaction whereby the Permits were split out from the ownership of the Assets, was agreed to by independent arms-

[40] Brief of Law and Argument of Third Eye Capital Corporation, filed on October 31, 2018 at Exhibit "A" at para 51; Affidavit of Ryan Tobber, sworn on July 8, 2018 (excluding exhibits) at paras 7, 45 **[TAB 11]**.

length parties. Further, TEC, as lender to Ranch and OpsMobil, signed off on the APSA and the structure of the transaction and advanced the funds to close the sale.

66. As demonstrated from the existing evidence, TEC has not treated Ranch or OpsMobil as a normal lender otherwise would. As Mark Horrox recently admitted during questioning, and as Mr. Tobber has made clear in his previous affidavits, it was TEC that was directly controlling the day-to-day spending of Ranch and OpsMobil prior to the receivership.[41] If Mr. Tobber, as a director and officer of Ranch, did not have sufficient funds to either post a security deposit or improve the liability management rating of Ranch in order to initiate the Permit transfer process prior to the Receivership Order, then it was largely because TEC refused to make sufficient funds available for the Permit transfer process to occur and declined to pursue a transaction to allow Ranch to acquire the Permits.[42]

67. Ranch has not had free access to its cash since July 10, 2017, and was in default under the terms of its lending agreement with TEC from March 26, 2018.[43] TEC could have enforced its security at any time prior to the Receivership Order, and was well aware of the issues surrounding the Permits for over a year before the Receiver was appointed. Further, and as noted in TEC's Brief, the issues surrounding the Permits were also raised during Ranch's CCAA proceedings by Mr. Tobber, as well as directly with TEC prior to filing its receivership application.

68. Despite TEC's previous refusal to allow Ranch to obtain the Permits through normal processes, and despite being represented by legal counsel at all times, TEC is now attempting to use the Receiver to have Ranch avoid fulfilling Ranch's contractual requirements in respect of the use of the Permits for the operation of the Assets.

B. TEC's Post-Receivership Actions

69. Following the Receivership Order, and with the appointment of the Receiver, TEC now continues to control the funds provided to Ranch through the funding of the Receiver. TEC also continues to withhold funds for certain costs directly associated with the Receiver's ongoing operation of the Assets, of which the Receiver claims it does not have the monies to pay and

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[41] Transcript of Oral Questioning of Mark Tristan George Horrox, dated October 4, 2018, at 27, 32-43 **[TAB 12]**; Affidavit of Ryan Tobber, sworn on July 8, 2018 (excluding exhibits) at paras 30-38 **[TAB 11]**.

[42] Affidavit of Ryan Tobber, sworn on July 8, 2018 (excluding exhibits) at para 12 **[TAB 11]**

[43] Affidavit of Ryan Tobber, sworn on July 8, 2018 (excluding exhibits) at paras 32-33 **[TAB 11]**.

which costs may not necessarily be in TEC's self-interest to pay. These withheld funds include monies for the payment of the Trust Fees owed to Predator in respect of the ongoing use of the Permits.

70. While TEC is free to refuse to fund certain amounts necessary for the operation of the Assets, the Receiver is still required to pay the costs associated with its ongoing operation of the Assets. As the Alberta Court of Appeal highlighted in ***Northern Badger***, which Predator continues to rely on purely for general principles and not for factual analogies (contrary to the assertions in TEC's Brief), it is trite law that the Receiver has a duty to act honestly and in good faith and to deal with the Assets in a commercially reasonable manner.[44] While the Receiver had no obligation to continue to operate the Assets upon taking possession of Ranch's property, its decision to do so means that the Receiver must now operate the Assets in an commercially reasonably manner, including in compliance with the OGAA.

71. In other words, if TEC will not provide the funds necessary to properly operate the Assets in accordance with the OGAA, the Receiver has the option to seek additional funding from other sources or to cease operating the Assets if it believes it is insufficiently funded. It would not be fair or commercially reasonable to allow the Receiver operate the Assets contrary to the OGAA, or to take the benefit of the Permits without paying Predator the obligations associated with those Permits, just because TEC will not provide the Receiver with the funding to do so.

72. The Receiver's obligation to pay debts necessary for the proper operation of the Assets includes the payment of the Trust Fees owed from the date of the Receivership Order until the date of the Disclaimer Notice. TEC's failure to fund all of the necessary obligations related to the operation of the Assets does not provide the Receiver with a commercial reason to disclaim the Trust Agreement and leave such obligations unsatisfied.

IX. RECEIVER'S CASH FLOW PROJECTIONS

73. The Receiver has recently provided two cash flow projections contained in its Second Report and the Fourth Report. There are significant variances between these forecasts and it is not clear the reasoning for the changes.

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[44] ***Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd***, 1991 ABCA 181, leave to appeal to the SCC refused [***Northern Badger***] at paras 37-40 **[Tab 13]**.

74. The Receiver has reported an estimated 28% reduction in oil and gas receipts for the recently forecast period and an estimated 31% increase in operating costs. Furthermore, four cost categories have been removed from the latest version, which makes it more difficult to understand the new forecasts and the changes from the previous version. The result of these changes appears to be a 265% increase in cash usage for the forecasted period. There is no obvious explanation provided by the Receiver for this increase.[45]

75. Ranch had three main processing and transportation service providers: TransCanada Pipeline (Wildboy District), Enbridge (Fort St John District), and Tidewater (Wildboy District). Based on the historical transportation costs, including the firm service capacity, it appears the Receiver has been forecasting to pay TransCanada and Enbridge but not Tidewater. It is unclear why these processing costs are not included in the Receiver's cash flow estimates.

76. The Fourth Report did not contain a current statement of receipts and disbursements, as was provided in the Second Report. Based on the information provided, it is very difficult to reconcile the cash flow forecasts with the actual balances. The statement provided in the Second Report, which was up to September 21, 2018, indicated the Receiver's borrowings were at $3,514,000.00.

77. The Sixth Horrox Affidavit states that TEC has funded $6,000,000.00 as of October 24, 2018.[46] Then, the Fourth Report states the Receiver intends on borrowing an additional $2,000,000.00, which would put the total borrowing at $8,000,000.00.[47] Based on the information provided, it is not possible to understand the actual borrowings to date and if the Receiver intends to borrow beyond the current approved borrowing limit of $7,000,000.00.

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[45] Attached is a side-by-side comparison of the Receiver's two cash flow forecasts from the Second and Fourth Report of the Receiver **[TAB 14]**.

[46] Sixth Affidavit of Mark Horrox, sworn on October 24, 2018 at paras 63(e), 65.

[47] Fourth Report of the Receiver at para 49.

X. CONCLUSION

78. For the aforementioned reasons, Predator respectfully requests that this Honourable Court provide the directions outlined in Predator's Application in respect of bringing the operation of the Assets into compliance with the OGAA (which is Predator's primary concern).

79. Predator also respectfully requests that this Court, should it see fit to do so, provide the relief outlined in its Application in respect of payments for amounts outstanding to Predator under the terms of the Trust Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of November, 2018.

BLAKE, CASSELS & GRAYDON LLP

Ryan Zahara
Counsel to Predator Oil BC Ltd.

TABLE OF AUTHORITIES/REFERENCES

TAB	DESCRIPTION
1	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
2	Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Carswell, 2011).
3	*Romspen Investment Corp v Edgeworth Properties*, 2014 ONSC 4340.
4	BC Oil and Gas Commission, *Oil and Gas Activity Operations Manual*, v 1.21 (September 2018).
5	*Oil and Gas Activities Act*, SBC 2008, c 36.
6	Order Approving Sale and Investment Solicitation Process of Justice Macleod, dated October 2, 2018.
7	*Re Pope & Talbot Ltd*, 2009 BCSC 17.
8	L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (WestLaw).
9	*Loder v Citifinancial Canada Inc*, 2007 NLCA 78.
10	*Buschau v Rogers Communications Inc*, 2006 SCC 28.
11	Affidavit of Ryan Tobber, sworn on July 8, 2018 (excluding exhibits).
12	Transcript of Oral Questioning of Mark Tristan George Horrox, dated October 4, 2018.
13	*Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, leave to appeal to the SCC refused.
14	Side-by-Side Comparison of the Cash Flow Forecasts from the Second and Fourth Report of the Receiver.

TAB 1

Most Recently Cited in: Ontario Securities Commission v. Paramount Equity Financial Corporation et al., 2018 ONSC 4326, 2018 CarswellOnt 12179, 62 C.B.R. (6th) 47 | (Ont. S.C.J. [Commercial List], Jul 23, 2018)

R.S.C. 1985, c. B-3, s. 248

s 248.

Currency

248.

248(1)Powers of court

Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

248(2)Idem

On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

Amendment History

1992, c. 27, s. 89(1)

Currency

Federal English Statutes reflect amendments current to October 17, 2018
Federal English Regulations are current to Gazette Vol. 152:21 (October 17, 2018)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

Most Recently Cited in: Romspen Investment Corp. v. Edgeworth Properties, 2014 ONSC 4340, 2014 CarswellOnt 9980, 243 A.C.W.S. (3d) 21, 16 C.B.R. (6th) 81 | (Ont. S.C.J., Jul 18, 2014)

R.S.C. 1985, c. B-3, s. 250

s 250.

Currency

250.

250(1)Right to apply to court

An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

250(2)Where inconsistency

Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(a) the security agreement or court order under which the receiver acts or was appointed, or

(b) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

Amendment History

1992, c. 27, s. 89(1)

Currency

Federal English Statutes reflect amendments current to October 17, 2018

Federal English Regulations are current to Gazette Vol. 152:21 (October 17, 2018)

TAB 2

BENNETT
on
RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL®

but need only notify the debtor that an appointment has been made once the security became enforceable.

2. DUTIES AND POWERS OF THE RECEIVER

Among the amendments to the *Bankruptcy and Insolvency Act* in 1992, Parliament enacted Part XI to cover secured creditors and receivers. Where the secured creditor or security holder has security covering all or substantially all of the debtor's assets and the debtor is insolvent, Part XI applies to the receivership. While there are minimal requirements under this Part,[14] the receiver has a duty to notify all creditors within 10 days of its appointment. If requested by creditors, the receiver must send several reports. First of the reports, the receiver must send a preliminary report to the creditors setting out the name of each creditor, the amount owing and the total, the list of assets and their book value, and the intended plan of action. Second, every six months, the receiver must submit an interim report containing an interim statement of receipts and disbursements, a statement of property which has not been disposed of, and any other significant information about the receivership.

Last, the receiver sends a final report with a statement of accounts containing a final statement of receipts and disbursements, an explanation about the distribution of sale proceeds, details of the disposition not accounted for, and any other significant information about the receivership.[15] As codified, the receiver must act honestly and in good faith, and deal with the debtor's property in a commercially reasonable manner.[16] Part XI applies to both a court-appointed receiver and a privately appointed receiver. In addition, the common law duties continue to apply in a situation where Part XI is not invoked or where Part XI is silent.

(a) Court Appointment

The duty of a court-appointed receiver whether appointed under either or both section 47 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* is a duty to the court as an officer to discharge the powers honestly and *bona fide.* The receiver's duty is also that of a fiduciary to all interested parties involving the debtor's assets, property, and undertaking. For example, the receiver must not fail to pay taxes or insurance premiums and must not commit waste so as to imperil the property and prejudice the security of prior encumbrancers or dissipate the equity which would otherwise be available to subordinate encumbrancers and to the debtor.

In England, the duties of a court-appointed receiver are well-summarized in the leading case of *Parsons et al. v. Sovereign Bank of Canada*,[17] wherein the court stated:

14 See Chapter 16.

15 Section 246 of the *Bankruptcy and Insolvency Act.*

16 Section 247.

17 [1913] A.C. 160 at p. 167, 9 D.L.R. 476, 1912 CarswellOnt 770 (Ont. P.C.).

> A receiver and manager appointed ... is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.

In Canada, the duties of a court-appointed receiver are set out in *Ostrander v. Niagara Helicopters Ltd. et al:*[18]

> A very clear distinction must be drawn between the duties and obligations of a receiver-manager ... appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest.

The court appoints the receiver even though the motion is initiated by the security holder. The receiver as a court officer is therefore not an agent of the security holder nor the secured creditor nor that of the debtor. The court-appointed receiver has a general duty to preserve the goodwill and property of the debtor unless otherwise provided in the order.[19]

The receiver's duties are essentially to comply with the powers provided in the order. These duties are owed not only to the court but they are also owed to all interested parties, including the debtor and its shareholders.[20]

In view of the fiduciary relationship of the court-appointed receiver to the debtor and to the creditors, the receiver has a duty to exercise such reasonable care, supervision, and control of the debtor's property as an ordinary man would give to his or her own.[21] If the receiver fails to provide this standard of care, the receiver may be liable for negligence.

Federal and provincial legislation governing corporations contain prescribed duties, which are generally consistent with the duty of care to act honestly and in good faith as well as to deal with the debtor's property in a commercially reasonable manner.[22] These statutory duties govern:

(1) notifying the appropriate Registrar or Director of Companies of the appointment;
(2) taking possession;
(3) opening bank accounts;
(4) maintaining accounts of transactions; and
(5) notifying creditors.

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18 (1973), 1 O.R. (2d) 281 at p. 286, 19 C.B.R. (N.S.) 5, 40 D.L.R (3d) 161 (Ont. H.C.) followed in *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14, 1982 CarswellSask 452 (Sask. Q.B.) and *Royal Bank of Can. v. Vista Homes Ltd.* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CanLII 879 (B.C. S.C.).

19 *Re Newdigate Colliery, Ltd.; Newdegate v. The Company*, [1912] 1 Ch. 468 (C.A.).

20 *Parsons et al. v. Sovereign Bank of Can.*, [1913] A.C. 160, 9 D.L.R. 476, 1912 CarswellOnt 770 (Ont. P.C.); *T.D. Bank v. Fortin et al.*, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111, 26 C.B.R. (N.S.) 168 (B.C. S.C.). The above passages were referred to in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 78 Sask. R. 87, 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241 (Sask. C.A.).

21 *Plisson v. Duncan* (1905), 36 S.C.R. 647, 1905 CarswellNWT 132 (S.C.C.).

22 See Chapter 15 "Specific Types of Receiverships".

In the typical motion for a court-appointed receiver, or receiver and manager, the order includes the following powers to the receiver:

(1) to take possession of the collateral or charged premises or any part thereof;
(2) to manage, operate, and generally carry on the business and undertaking of the debtor, including the power to dispose of assets in the debtor's ordinary course of business;
(3) to require the debtor to deliver to the receiver all the assets, property, and undertaking including all books, documents, contracts, papers, computer records, and records of any kind;
(4) to institute and prosecute all suits, proceedings, and actions for the proper protection of the assets, property, and undertaking and likewise to defend all suits, proceedings, and actions instituted against the debtor and the receiver;
(5) to sell, lease, or mortgage all or substantially all the assets, property, and undertaking with approval of the court;
(6) to settle or compromise any indebtedness owing to the debtor;
(7) to purchase or lease machinery and equipment as may be necessary for the improvement and enhancement of the debtor's operation;
(8) to borrow moneys for the purpose of preserving the assets, property, and undertaking of the debtor and for the purpose of carrying on the business of the debtor; and
(9) to make application to the court for further advice and directions.

As the court-appointed receiver derives the powers from the order itself, it is most apparent that the order, from the security holder's view, should be as broad as possible to allow the receiver flexibility in dealing with the assets of the debtor. On the other hand, the debtor may attempt to restrict such powers. These powers may not necessarily coincide with those set out in the instrument in the event of a private appointment. The authority of the court-appointed receiver is restricted to the powers set out in the order. Thus, the order ought to contain all the powers afforded to a receiver in the security instrument together with such additional powers as the court may grant.[23]

(b) Private Appointment

The duties of a privately appointed receiver are primarily owed to the security holder who holds the instrument under which the receiver is appointed. Apart from any surplus assets or surplus proceeds realized from the sale of assets, the receiver does not have a fiduciary duty to the debtor or to the creditors.[24] The receiver's duty

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23 See *Montreal Trust Co. v. Atlantic Accept. Corp. et al., Montreal Trust Co. v. Premier Finance Corp.*, [1966] 2 O.R. 213, 56 D.L.R. (2d) 301, 1966 CarswellOnt 77 (Ont. C.A.), where the court reviewed the scope of the power to sell and realize the assets in a situation where such assets included "a vast number of individual accounts receivables secured choses in action". The court approved a "realization" in some form other than by way of sale, transfer, or exchange even though the method of realization was silent in the security instrument.

24 *620630 Saskatchewan Ltd. v. PricewaterhouseCoopers Inc.* (2003), 235 Sask. R. 239, 43 C.B.R. (4th) 311 (Sask. Q.B.).

TAB 3

2014 ONSC 4340
Ontario Superior Court of Justice

Romspen Investment Corp. v. Edgeworth Properties

2014 CarswellOnt 9980, 2014 ONSC 4340, 16 C.B.R. (6th) 81, 243 A.C.W.S. (3d) 21

Romspen Investment Corporation, Applicant and Edgeworth Properties et al, Respondents

J. Thorburn J.

Heard: June 17, 2014
Judgment: July 18, 2014
Docket: CV-11-9452-00CL

Counsel: Lisa Corne, M. Brzezinski for Applicant / Responding Party on this Motion, Romspen
Seema Aggarwal, J. Dietrich for Respondent / Moving Party on this Motion, Edgeworth Group
Steven Weisz for Monitor Grant Thornton Limited
Craig Mills for Receiver MNP Ltd

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

Related Abridgment Classifications

Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Varying receivership order — Respondents E Inc. successfully brought application to commence proceedings under Companies' Creditors Arrangement Act — CCAA proceedings were approved and receiver was appointed — E Inc. held residual interest from sale of receivership properties after satisfaction of any charges granted under receivership order and discharge of security interest of third party mortgagees — Applicant acquired first priority position of certain of third party mortgagees and was lender in respect of receiver's borrowings — Applicant applied proceeds from sale of receivership properties to total amounts secured by receiver's charges and borrowing charges in respect of receivership property sold, to any first mortgage related to such receivership property and to applicant's cross-collateralized mortgage (blanket mortgage) in respect of all receivership properties — E Inc. brought application to vary receivership order so that proceeds from sale of receivership properties provided for payment of total amounts secured by receiver's borrowing charges in respect of other receivership properties before payment of applicant's blanket mortgage — Application granted — Receivership order was amended — Receivership order provided that charges were granted on receivership property such that position of first mortgagees of one receivership property was not enhanced by receiver's borrowing in respect of another receivership property — If surplus proceeds were applied to receiver's other borrowings before applicant's blanket mortgage, monitor estimated that it would result in as much as $875,000 becoming available in CCAA proceeding to benefit of subordinate creditors — Interpretation of allocation of proceeds was not what parties intended when receivership order was granted and that new facts had arisen since receivership order was issued which made it apparent that proposed allocation was not commercially reasonable — At time receivership order was rendered, no one knew that there would be lengthy delay in selling condominium units.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Miscellaneous

Varying receivership order — Respondents E Inc. successfully brought application to commence proceedings under Companies' Creditors Arrangement Act — CCAA proceedings were approved and receiver was appointed — E Inc. held residual interest from sale of receivership properties after satisfaction of any charges granted under receivership order and discharge of security interest of third party mortgagees — Applicant acquired first priority position of certain of third party mortgagees and was lender in respect of receiver's borrowings — Applicant applied proceeds from sale of receivership properties to total amounts secured by receiver's charges and borrowing charges in respect of receivership property sold, to any first mortgage related to such receivership property and to applicant's cross-collateralized mortgage (blanket mortgage) in respect of all receivership properties — E Inc. brought application to vary receivership order so that proceeds from sale of receivership properties provided for payment of total amounts secured by receiver's borrowing charges in respect of other receivership properties before payment of applicant's blanket mortgage — Application granted — Receivership order was amended — Receivership order provided that charges were granted on receivership property such that position of first mortgagees of one receivership property was not enhanced by receiver's borrowing in respect of another receivership property — If surplus proceeds were applied to receiver's other borrowings before applicant's blanket mortgage, monitor estimated that it would result in as much as $875,000 becoming available in CCAA proceeding to benefit of subordinate creditors — Interpretation of allocation of proceeds was not what parties intended when receivership order was granted and that new facts had arisen since receivership order was issued which made it apparent that proposed allocation was not commercially reasonable — At time receivership order was rendered, no one knew that there would be lengthy delay in selling condominium units.

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Cases considered by *J. Thorburn J.*:

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

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — considered

s. 22 — considered

s. 25 — considered

s. 81.4(4) [en. 2005, c. 47, s. 67] — considered

s. 81.6(2) [en. 2005, c. 47, s. 67] — considered

s. 247 — considered

s. 247(a) — considered

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s. 250 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 59 — considered

R. 59.06 — considered

R. 59.06(1) — considered

R. 59.06(2) — considered

APPLICATION by E Inc. to vary receivership order so that proceeds from sale of receivership properties provided for payment of total amounts secured by receiver's borrowing charges in respect of other receivership properties before payment of applicant's blanket mortgage.

***J. Thorburn J.*:**

1. Relief Sought

1 Edgeworth Properties Inc. is the primary holding and operating company of the Edgeworth Group.

2 The Edgeworth Group applied to the court to commence proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Campbell J. approved the CCAA proceedings and appointed a Receiver.

3 The Edgeworth Group holds the residual interest from the sale of the Receivership properties after satisfaction of any charges granted under the Receivership Order and the discharge of the security interest of the third party mortgagees.

4 Romspen acquired the first priority position of certain of the third party mortgagees and is the lender in respect of the Receiver's borrowings.

5 To date, Romspen has applied the proceeds from the sale of the Receivership properties as follows,

a) first, to the total amounts secured by the Receiver's charges and borrowing charges in respect of the Receivership property sold;

b) second, to any first mortgage related to such Receivership property (which was acquired by Romspen from the third party mortgagee in question); and

c) third, to Romspen's cross-collateralized mortgage in respect of all of the Receivership properties (the blanket mortgage).

6 Edgeworth Group seeks to vary the Receivership Order so that the proceeds from the sale of the Receivership properties are applied as follows,

a) first to the total amounts secured by the Receiver's charges and the Receiver's borrowing charges in respect of the Receivership property sold;

b) second to the total amounts secured by any first mortgage related to the Receivership property sold;

c) third to the total amounts secured by the Receiver's borrowing charges in respect of the other Receivership properties;

d) fourth to the total amounts secured by the mortgage held by Romspen that is cross-collateralized across all of the Receivership properties (the blanket mortgage); and

e) last to the Monitor in the concurrent CCAA proceeding for application in the concurrent proceeding.

7 In the alternative, Edgeworth seeks an order pursuant to section 248 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, directing Romspen and the Receiver to apply proceeds and deeming the proceeds to have been applied in the manner set out in paragraph 4 above.

8 Edgeworth claims this would be consistent with the overarching reason for having both a CCAA proceeding and a Receivership, which is to maximize the recovery for all creditors.

9 Edgeworth claims that applying the surplus proceeds available after payment in full to the third party mortgagees, to Romspen's blanket mortgage (which bears interest at 12%) before applying them to the Receiver's other borrowings (which bear interest at 24%) will result in fewer funds flowing from the Receivership proceeding to the CCAA proceeding.

2. The Issue

10 Edgeworth and Romspen do not agree on the order of the payment of proceeds. Romspen's blanket mortgage bears interest at 12% while the Receiver's other borrowings bear interest at 24%.

11 Romspen claims the Receivership Order requires that the blanket mortgage be repaid first. Romspen relies on sections 22 and 25 of the Receivership Order.

12 Edgeworth claims the only commercially reasonable result is for the Receiver's other borrowings to be repaid before the blanket mortgage. Edgeworth claims Romspen's proposed allocation of proceeds creates a result that was not intended by the parties.

13 The key issues to be determined are whether,

a) the Receivership Order finally determined the order of the allocation of proceeds,

b) whether the Receivership Order creates a result that was not intended by the parties, and

c) whether the Receivership Order should be varied to take into account new evidence and /or the fact that it would result in an allocation of proceeds that is not commercially reasonable as required by section 248 of the *Bankruptcy and Insolvency Act*.

3. Background Facts

14 Romspen opposed the initial application for CCAA proceedings and brought a cross motion for foreclosure proceedings based on the Model Receivership Order. The third party mortgagees objected to Romspen's proposal because they did not want the Receiver's borrowings in respect of one property to enhance the third party mortgagee's position with respect to another Receivership property.

15 Prior to the Receivership Order, Romspen was critical of Edgeworth management for being "slow and ineffective in achieving sales of units in the Spruce Ridge condominium project."

16 On November 10, 2011, the Court issued an Order, which was subsequently amended, granting the Companies the protection of a stay of proceedings until December 12, 2011, appointing Grant Thornton Limited as the Companies'

Monitor under the CCAA, appointing Eagle Ridge Capital Corporation as the Companies' Chief Restructuring Organization, and appointing MNP Ltd as Receiver of the Companies' 16 properties.

17 Paragraph 22 of the Receivership Order grants to the Receiver certain charges on the Receivership properties to secure the Receiver's fees and disbursements. It provides that, "the Receiver shall be entitled to and are hereby granted a charge on each Debtor's Receivership Property in respect of the Debtor Specific Expenses for such Debtor's Receivership Property and a proportional share of the General Expenses, which share shall be allocable to the Receivership Property according to the proportion which the first-ranking Third Party Mortgagee's individual principal outstanding loan in relation to such Debtor's Receivership Property represents of the principal amount outstanding to the Third Party Mortgagees in the aggregate, as of the date of this Order. Each Debtor Specific Charge shall form a first charge on the Receivership Property to which it relates, in priority to all security interest, trust, liens, charges and encumbrances, statutory or otherwise, in favour of any Person..."

18 Paragraph 25 grants to the Receiver certain charges on the Receivership properties to secure the Receiver's borrowings to fund the Receivership provided the amount does not exceed $1 million for all of the properties except Spruce Drive and $1 million for Spruce Drive. "... each Receivership Property shall be and is hereby charged by way of a fixed and specific charge as security for the payment of the monies borrowed in relation to such Receivership Property together with interest and charges thereon, in priority to all security interests, trust, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subordinate in priority to the Receiver's Charge and the charges as set out in subsections 14.06(7), 81.4(4) and 81.6(2) of the BIA."

19 In accordance with paragraph 6 of the Receivership Order, the Edgeworth Group holds the residual interest from the sale of the Receivership properties after satisfaction of any charges granted under the Receivership Order and the discharge of the security interests of the third party mortgagees.

20 On April 13 and August 3, 2012, the Court issued orders permitting Romspen and Firm Capital Mortgage Inc. to commence judicial sale or foreclosure proceedings in respect of certain of Edgeworth's properties subject to their respective security.

21 Romspen acquired the first priority position of certain of the third party mortgagees and is the lender in respect of the Receiver's borrowings.

22 The Receiver received two offers for one of the significant properties, the Spruce Ridge property: the first offer was received in late 2011 and rejected by the Receiver, and the second offer was approved by the Court and the closing is pending. In the 12th Report, the Receiver states that, "the Receiver's remediation efforts increased recoveries by approximately $2.3 million over the CPIV [first] Offer." This report was prepared before taking into account the cost of borrowing.

23 The Spruce Ridge Drive condominiums were not sold for approximately two years due to the need for extensive remedial work and further delays occasioned through dealings with the Canadian Mortgage and Housing Corporation.

4. The Effect of the Order

24 Applying the surplus proceeds to the blanket mortgage (with an interest rate of 12% per annum) before applying them to the Receiver's borrowings in the respect of the other Receivership properties (with an interest rate of approximately 24% per annum) results in fewer residual funds flowing from the Receivership proceeding to the CCAA Proceeding and the subordinate creditors.

25 If by contrast, the surplus proceeds are applied to the Receiver's other borrowings before the blanket mortgage, (as Edgeworth suggests) the Monitor estimates that this would result in as much as $875,000 becoming available in the CCAA proceeding to the benefit of the subordinate creditors. Romspen would still recover interest owing in respect of the Receiver's borrowings and the blanket mortgage.

26 The Monitor notes that with the benefit of hindsight, the Edgeworth Group's estate "would have been in a marginally better financial position had the Receiver pursued the [first] CPIV Offer in late 2011...This is the case as the [second] Platinum offer, while resulting in a $2.3 million higher gross realization, required the Receiver to borrow funds from Romspen for a longer period of time, such that the net realization from the [second] Platinum offer is slightly less than the estimated net realization that might have been achieved from the CPIV Offer." The Monitor goes on to say that, "[a]ssuming the 'interest dispute' is decided in favour of the Applicants, the [second] Platinum offer would have likely yielded a marginally better net realization than the [first] CPIV Offer."

5. The Positions of the Parties

27 Edgeworth claims that,

a) at the time the Receivership Order was granted, it was not envisaged or intended that the surplus proceeds would be applied first to the blanket mortgage and then to the Receiver's other borrowings;

b) it took much longer to dispose of the Spruce Ridge properties than the parties envisaged and the Receiver was therefore required to borrow funds from Romspen for a longer period that originally contemplated;

c) Edgeworth did not delay in bringing this motion. The Monitor's counsel corresponded several times with the Receiver's counsel to request an accounting of Romspen's debt and the application of funds. A motion was brought to require Romspen to provide such information. In the Monitor's November 7, 2013 report, the Monitor notes that the information is required to "assess and analyze the appropriateness of the application of funds from the Receivership and Foreclosure Proceedings and assess and analyze the fees and interest charged";

d) if Edgeworth's request is granted, Romspen will still recover interest at the agreed rate; and

e) Section 247 of the *Bankruptcy and Insolvency Act* requires the Receiver to deal with the property of an insolvent person in a commercially reasonable manner and Romspen's proposal is not commercially reasonable.

28 Edgeworth therefore seeks an Order that the surplus proceeds of the Receivership be applied first to the Receiver's other borrowings (for which the interest is 24%) and then to the blanket mortgage (which bears interest at 12%). Edgeworth suggests that this should be done by varying the Receivership Order, by making an Order pursuant to section 248 of the *Bankruptcy and Insolvency Act*, or by invoking the equitable doctrine of unjust enrichment to grant restitution.

29 Romspen takes the position that the Receivership Order is clear. There is no error or omission and there are no new facts that would require reconsideration of the Receivership Order. Romspen claims there are important policy reasons for holding that absent an error or omission, orders should be enforced. Romspen further claims it would be unfair, after the parties came to an agreement, for the court to impose changes to the agreement merely because the risk taken by Romspen turned out to benefit it.

30 Romspen claims that Edgeworth is effectively seeking consolidation of its estates and it claims that consolidation affects the substantive rights of debtors and creditors. This should not be done where it unfairly prejudices one particular creditor. (*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449, [2006] O.J. No. 1195 (Ont. S.C.J. [Commercial List]) at para 78.)

31 Finally, Romspen claims that Edgeworth's motion should be denied because it has known for 14 months that Romspen has been accruing interest and took no action until it became apparent that there was surplus income and potential for Romspen to benefit at the expense of Edgeworth.

32 The Monitor supports the position taken by Edgeworth.

33 The Receiver takes no position on this motion.

6. The Law

The Importance of Finality

34 Absent exceptional circumstances, orders are final as it is in the interests of the parties and the community that there be definite and discernible ends to legal disputes. (*Tsaoussis (Litigation Guardian of) v. Baetz*, [1998] O.J. No. 3516, 41 O.R. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused, (1999), [1998] S.C.C.A. No. 518 (S.C.C.).)

35 The court in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 240, held that, "[a] judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation."

36 In *Shire International Real Estate Investments Ltd., Re*, 2011 ABQB 654, [2012] A.W.L.D. 1632 (Alta. Q.B.), at paras. 1-3, Kent J. held that, "once some properties had been sold and their portion of DIP financing crystallized, trying to readjust the DIP allocation to make it more fair, would make it even less fair for the remaining unsold properties." As such, he refused to make any reallocation.

The Process by which an Order Can be Amended or Set Aside

37 The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provide a limited set of circumstances where an order can be varied or set aside. Rule 59.06(1) provides that,

> An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

Rule 59.06(2) provides that a party who seeks to have an order set aside on the basis of facts arising or discovered after it was made may bring a motion.

Setting Aside an Order on the Basis of New Facts

38 New facts will only justify setting aside an order where the evidence might well have altered the judgment and could not with reasonable diligence have been discovered sooner. (*Hall v. Powers* (2005), 80 O.R. (3d) 462 (Ont. S.C.J.), at para 12.) If that hurdle is cleared, the court will then consider whether there is prejudice to other parties who may have relied on the order.

39 The onus is on the party who seeks to vary the order to establish that another creditor will not be adversely affected. (*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]), at para 78.).

The Receiver's Obligations as Provided for in the Bankruptcy and Insolvency Act

40 Section 247 of the *Bankruptcy and Insolvency Act* provides that the Receiver "shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner."

41 Section 248 provides that,

> Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a Receiver or a creditor, is satisfied that the secured creditor, the Receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,
>
> > (a) directing the secured creditor, Receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or Receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out, or both.

42 Section 250 provides that an application may be made under section 248 notwithstanding any order of a court. Where there is any inconsistency between an order made under the Act or a court order, the order made under the Act prevails to the extent of the inconsistency.

7. Analysis and Conclusion

43 The Court appoints Receivers to manage the affairs of a company in a commercially reasonable manner.

44 The Receivership Order provides that charges be granted on a Receivership property by Receivership property basis such that the position of first mortgagees of one Receivership property is not enhanced by the Receiver's borrowing in respect of another Receivership property. This would seem to indicate that the court did not intend that Romspen's blanket mortgage would be repaid before the Receiver's other borrowings.

45 Rule 59 of the *Rules of Civil Procedure* enables a party to vary an order where there is a matter upon which the court did not clearly adjudicate or where there is an error or omission.

46 The following points, taken together, satisfy me that Romspen's interpretation of the allocation of proceeds is not what the parties intended when the Receivership Order was granted and that new facts have arisen since the Receivership Order was issued which make it apparent that Romspen's proposed allocation is not commercially reasonable.

47 Firstly, Romspen's affiant states that,

> [T]he allocation method expressed in the Receivership Order made eminent good sense as each landowning Debtor was a separate, single purpose company with distinct assets, liabilities and stakeholders ... and <u>the notion of levering assets of one estate to benefit stakeholders of a separate estate was understandably unworkable</u> and it is for that reason that the Receivership Order did not provide for a blanket, consolidated borrowing charge against all of the Edgeworth Group's assets. (emphasis added)

48 Secondly, prior to the issuance of the Receivership Order, the third party mortgagees made it clear that they did not agree with the proposed Romspen order because they did not want the Receiver's borrowings in respect of one property to prime another.

49 Thirdly, as noted by the Monitor, if Romspen is entitled to have the monies borrowed at 12% interest paid back before the monies borrowed at a 24% interest rate, the Edgeworth Group's estate, "would have been in a marginally better financial position had the Receiver pursued the [first] CPIV Offer in late 2011 ... This is the case as the [second] Platinum offer, while resulting in a $2.3 million higher gross realization, required the Receiver to borrow funds from Romspen for a longer period of time, such that the net realization from the Platinum offer is slightly less than the estimated net realization that might have been achieved from the [first] CPIV Offer." The Receiver's decision to reject the first offer and accept the second is commercially reasonable only if the proceeds are allocated as proposed by Edgeworth.

50 Fourthly, if the surplus proceeds are applied to the Receiver's other borrowings before the blanket mortgage, (as Edgeworth suggests) the Monitor estimates that this will result in as much as $875,000 becoming available in the CCAA proceeding to the benefit of the subordinate creditors.

51 Fifthly, at the time the Receivership Order was rendered, no one knew there would be a lengthy delay in selling the Spruce Ridge Condominium units. On the contrary, Romspen was critical of Edgeworth management for being, "slow and ineffective in achieving sales of units in the Spruce Ridge condominium project." The fact that it took the Spruce Ridge property two years to sell was not and could not have been anticipated at the time of the Receivership Order.

52 Sixthly, the objective in approving CCAA proceedings and appointing a Receiver is to maximize the value of the company's assets and sell the properties. The allocation of proceeds proposed by Romspen is inconsistent with this objective.

53 These factors are consistent with Edgeworth's interpretation that the Receivership Order was not intended to operate so that the blanket mortgage would be repaid before the Receiver's other borrowings.

54 Moreover, Edgeworth did not delay in bringing this matter forward. Romspen failed to comply with the Monitor's repeated written requests for information, which required a motion to compel Romspen to provide the information. Once the information was obtained, the Monitor and Edgeworth brought the issue to the court's attention without delay.

55 Finally, Romspen will not be prejudiced as it will still recover interest owing in respect of the Receiver's borrowings and the blanket mortgage at the proposed lending rate.

56 I appreciate the general need for certainty and finality in the issuance of court orders. However, in this case, the allocation of proceeds was not finally decided, Romspen's proposed allocation is inconsistent with the evidence available as to the intention of the parties at the time the Receivership Order was issued, and new facts are available regarding the timing of the sale of significant proceeds which was not available at the time the Receivership Order was issued.

57 Therefore, in accordance with Rule 59.06 of the *Rules of Civil Procedure*, the Receivership Order of November 10, 2011 is amended to provide as follows:

The proceeds from the sale of the Receivership properties shall be applied,

(a) first to the total amounts secured by the Receiver's charges and the Receiver's borrowing charges in respect of the property sold;

(b) second to the total amounts secured by any first mortgage related to the Receivership property sold;

(c) third to the total amounts secured by the Receiver's borrowing charges in respect of the other Receivership properties;

(d) fourth to the total amounts secured by the mortgage held by Romspen that is cross-collateralized across all of the Receivership properties; and

(e) last to the Monitor in the concurrent CCAA proceeding for application in the concurrent proceeding.

58 I note that section 247(a) of the *Bankruptcy and Insolvency Act* requires the Receiver to deal with the property of an insolvent person, "in a commercially reasonable manner". Repaying the blanket mortgage at the rate of 12% interest before repaying the other borrowing costs at 24% interest is not commercially reasonable.

59 Section 250 of the *Bankruptcy and Insolvency Act* enables the court to make an order under section 248 notwithstanding that the Receivership Order has been made. In the event I am incorrect that the Receivership Order can and should be amended, an Order shall be granted to apply to proceeds in a commercially reasonable manner as set out in paragraph 57.

60 If the parties are unable to agree on costs, they may provide written submissions of no more than three pages, within fifteen days.

Application granted.

TAB 4

Chapter 3 Permit Holder Responsibilities

3. Permit Holder Responsibilities

This chapter provides an overview of permit holder obligations common amongst all oil and gas activity types.

Permit holders must obtain approval (as defined in OGAA) before starting any oil and gas or associated activity(s) and should maintain ongoing dialogue with the Commission and stakeholders throughout the life cycle of the project. This includes operational and reporting requirements and continued engagement as defined in the manuals and guidelines.

Permit holders must comply with the requirements imposed by the statutes and regulations of the province of B.C. and the guides, policies, and information letters issued by the Commission. Once approved, permit holders bear responsibility for all permit holder obligations (as defined in OGAA), including outcomes of actions of contracted personnel in carrying out permitted oil and gas activities on behalf of the company.

When completing an application and/or submitting additional reports, companies must provide engineering and technical information on activities carried out during the proposed term. Companies must provide true and accurate information and not knowingly omit relevant information. All data, attachments and requirements must be complete and accurate. If an agent or contractor submits information on behalf of the company, the applicant remains accountable for the accuracy of submission.

Please Note:

This manual is written as a whole and provided to industry in sections to allow permit holders to access activity chapters. It is prudent of the permit holder to review the manual in its entirety and be aware of the content in other sections of the manual.

Industry Standards

Permit holders should first and foremost adhere to the statutes and regulations of B.C. In addition, permit holders should have working knowledge and implement industry and professional standards, industrial practices, safety codes of practice and industry guiding principles. Some of these guiding standards are the foundations for sections and related requirements, such as the Canadian Standards Association and America Society of Mechanical Engineers. Others such as the Canadian Association of Petroleum Producers, Canadian Energy Pipeline Association, the Canadian Fuels Association and the International Organization for Standardization may be adopted by industry to ensure a strong focus on workplace safety and preventing accidents.

3.1 Associated Oil and Gas Activity

Associated oil and gas activities are related activities. Section 1 of Oil and Gas Activities Act defines oil and gas related activity as an activity:

- That, under a specified enactment, must not be carried out except as authorized under the specified enactment or that must be carried out in accordance with the specified enactment.
- The carrying out of which is required for or facilitates the carrying out of an oil and gas activity.

Permit holders must have an approval under the Petroleum and Natural Gas Act or Land Act for the use of Crown Land. The Commission does not issue authorizations for associated oil and gas activities on private land. Consider any additional regulations and requirements when operating borrow pits, mines, land farms and camps as follows:

- Work in and around a worksite borrow pit (defined as the excavation of clay, gravel, rock, shale, sand or soil used for the construction of oil and gas infrastructure) are subject to WorkSafeBc regulations.
- All oil and gas aggregate operations are considered a mining activity under the Mines Act and are subject to the requirements of the Health, Safety and Reclamation Code for Mines in British Columbia. WorkSafeBC regulations do not apply.

An oil and gas aggregate operation requires a Mines Act Permit in addition to a Licence of Occupation to occupy and use Crown land.

3.2 Environmental Stewardship

Companies must adhere to the Environmental Protection and Management Regulation (EPMR) of the Oil and Gas Activities Act (OGAA) in order to conduct oil and gas activities.

The Environmental Protection and Management Regulation (EMPR) establishes the regulatory requirements for stewardship of environmental values and features in the course of carrying out oil and gas activities on Crown land. The EPMR does not apply to oil and gas activities on private land.

The Commission's Environmental Protection and Management Guideline (EPMG) provides specific guidance for permit holders in meeting the requirements of the Environmental Protection and Management Regulation.

Applicants and permit holders must plan oil and gas activities to avoid and/or minimize impacts to environmental values, mitigate impact where no realistic opportunity exists to avoid, and/or restore the impacted area to its pre-development state. General protection and management approaches must continue during the operational stages so adequate management controls are in place and operations should be monitored to identify further opportunities to reduce environmental impacts.

Area-based Analysis

The Commission's Area-based Analysis (ABA) approach helps to minimize cumulative impacts on the landscape, reduce the footprint of activities, and shorten restoration / reclamation timeframes on specific resource values. Projects should minimize disturbance where possible. Guidance is available in the Commission's Supplementary Information for Area-based Analysis document and on the Area-based Analysis section of the Commission's website. Permit holders should continue to refer to and follow the guidance in these resources and keep apprised of updates by following the Commission's website.

Environmental Protection and Management Requirements

Part 3 of the EPMR prescribes operational requirements with respect to the items listed below:

- Water quality (for operating areas and adjacent areas).
- Aquifers.
- Crossings of streams, wetlands and lakes.
- Deleterious materials into streams, wetlands or lakes (oil and gas activities must not result in any deleterious material deposited).
- Operations within wetlands.
- Natural range barriers.
- Invasive plants.
- Forest health.
- Soil conservation.
- Seismic lines.
- Restoration of operating areas.

Permit Conditions

Permits may contain additional requirements permit holders must comply with during all phases of operation. It is prudent of permit holders to also have current knowledge and understanding of both the legal requirements and best practices to ensure stewardship of environmental values and features in the course of carrying out oil and gas activities

Water Use

There are different ways permit holders may access water in British Columbia and seek permission. Refer to the Commission's Oil and Gas Activity Application Manual for water use permission and reporting requirements and the Commission's Water Licence Application Manual for water licence application details.

The Commission may restrict water usage, especially during times of drought in the case of water shortages or droughts. Water withdrawals from rivers and lakes can and will be suspended if necessary. Permit holders are responsible for keeping apprised of Commission updates by following the website for directives, bulletins, safety advisories and news releases.

3.3 Emergency Planning and Response Programs

The prevention of oil or gas emergencies requires operators to prepare, understand and minimize risks and adhere to legislative regulation, guidelines, industry standards, engineering codes and standards. Many of the regulations and standards are designed specifically to safeguard operations, but permit holders are required to check equipment, train employees and report to the Commission at various stages.

A permit holder is required to prepare and maintain an emergency management program and a emergency response plan for each of its oil and gas activities prior to carrying out those activities, as prescribed in the Emergency Management Regulation (EMR) and the Commission's Emergency Management Manual.

Incident Prevention

The Commission's Emergency Response and Safety web page provides guidelines, forms and information on emergencies, incident reporting and notification and annual exercise requirements. The Commission maintains a web page for Provincial emergency updates focussed on natural disasters which may affect oil and gas operating areas in B.C. The site includes direct links to up-to-date fire and other incident mapping, as well as training and preparation resources. Permit holders are encouraged to keep staff informed of evolving hazards and the procedures for reporting incidents by reviewing the documents on both pages.

3.4 Flaring and Venting

The Commission's Flaring and Venting Reduction Guideline provides guidance for flaring, incinerating and venting in British Columbia, as well as procedural information for flare approval requests, dispersion modelling and the measuring and reporting of flared, incinerated and vented gas.

Review the Flaring and Venting Reduction Guideline to understand flaring volume thresholds and time limits, public notification, guidance for flare stacks and incinerators and documentation. Specific sections of the wells and facility operations further discuss flaring and venting.

3.5 Archaeological Assessments

Permit holders must fulfill archaeological requirements pursuant to the Heritage Conservation Act and the Commission's archaeology guidelines as outlined in the Commission's Oil and Gas Activity Application Manual.

3.6 Roads Maintained by a Road Permit Holder

Section 21 of the Oil and Gas Road Regulation (OGRR) establishes requirements related to use, notification and contribution to maintenance costs associated with using an oil and gas road maintained by a road permit holder:

- Providing Notice of Use to the road permit holder at least 14 days before the intended use will begin.

Upon receiving a notice of intended road use the road permit holder must provide to the permit holder providing the notice, an estimate of costs along with supporting data and records in relation to maintenance or any modifications necessary to accommodate the intended use of the permit holder, or to repair any damage caused by the user.

3.7 Noise Management

Section 40 of the Drilling & Production Regulation states:

- A permit holder must ensure operations at a well or facility for which the permit holder is responsible does not cause excessive noise.

Review Section 40 of the DPR and the Commission's British Columbia Noise Control Best Practices Guideline for an understanding of noise levels, guidelines and suggested best practice standards. In addition, work with area residents to minimize noise impacts when undertaking construction, drilling, completions, and operations activities near populated areas.

3.8 First Nations Engagement

Permit holders are encouraged to work with First Nations and consider any environmental, heritage and/or community concerns impacted by oil and gas activity by initiating and building relationships with First Nations communities during the project planning phase and continue the relationship throughout the project life cycle.

While not required prior to application, engagement with the public and First Nations within a pre-determined Emergency Planning Zone for Emergency Response Contingency Plans is encouraged since emergency plans must be in place for well, facility and pipeline permit holders prior to operation.

3.9 Land Owner and Rights Holder Engagement

Once a permit is approved, the Commission provides notice to the land owner(s) stating an oil and gas permit has been issued over the land.

Permit holders are encouraged to work proactively and collaboratively with those affected by oil and gas activity. The formalized public engagement process of consulting and engaging with land owners and/or rights holders are discussed in the Oil and Gas Activity Application Manual.

3.10 Restoration and Reclamation

Planning, construction and the oil and gas activity should take into consideration the entire life cycle of the project and the environmental and social impact of the proposed project. It is the intent of the Commission that oil and gas sites are temporary; therefore, careful planning beforehand is required to ensure a successful project end.

Regulatory and legal requirements cover the restoration of oil and gas sites no longer operating. Planning to reclaim a project starts early. For example, companies must minimize the disturbance to nearby land before and during a drilling operation. This decreases the amount of work necessary to return the area to its original state after the well is no longer producing.

Construction corridors are used to avoid or prevent disturbance to sensitive ecosystems and wherever practical, locate oil and gas activity within the corridor.

During construction and ongoing operation of oil and gas activities, permit holders should take into account the eventual requirements for restoration and reclamation of land disturbed to facilitate the activity. When construction and/or operations are complete, restoration and reclamation should return the site to a similar state existing prior to disturbance.

Restoration and reclamation requirements are identified in Section 19 of the Environmental Protection and Management Regulation under OGAA. Guidance for planning and carrying out restoration and reclamation activities are in the following documents:

- Environmental Protection and Management guideline.
- Certificate of Restoration Application manual.
- Restoration Verification Audit Program Procedure manual.

Reclamation on ALR Land

The preliminary reclamation plan for activity falling within the Agricultural Land Reserve provides a brief description of how the site will be restored once it is no longer required for the oil and gas activity. This plan forms part of an ALR Schedule A report submitted with an application for the oil and gas activity (detailed in the Oil and Gas Activity Application Manual). The preliminary reclamation plan must include:

- Post oil and gas activity land-use objective.
- Soil handling.
- Re-vegetation.

In some cases, the submission of an ALR Schedule A report is not required until after the Commission has granted an oil and gas activity permit. In these cases, the ALR Schedule A report must be submitted via email to postpermitrequests@bcogc.ca for Commission review. The permit holder must receive a letter verifying that the report is to the satisfaction of the Commission prior to beginning construction activities.

Specific reclamation criteria for lands within the Agricultural Land Reserve are found in the site reclamation requirements as part of the Schedule B section in the Delegation Agreement, as well as on the Commission's website.

Schedule B Reports for pipeline right of ways must be submitted to the Commission within 24 months of Leave to Open submission for the pipeline. Schedule B Reports for wells must be submitted with the COR Part 2 application. For all other surface leases described in Schedule B of the Delegation Agreement, Schedule B Reports must be submitted in a timely manner after cessation of activity on the site, allowing for practicability of reclamation activities.

Schedule B Reports can be submitted in paper copy to the Commission's Fort St. John office, or via email to OGCwaste.management@bcogc.ca.

3.11 Compliance and Enforcement

Applicants have a legal obligation to meet all legislated requirements. The Commission expects applicants and permit holders to use formal practices in day-to-day operations and comply with the Oil and Gas Activities Act, the Commission's specified enactments, and all related regulations.

The Compliance and Enforcement Manual provides further information about the Commission's compliance processes. It is the permit holder's responsibility to know and uphold any legal responsibilities inside and outside of the Commission's legislative authority. The Commission audits and inspects permit holder activities and investigates incidents of alleged non-compliance.

3.12 Freedom of Information & Protection of Privacy

Throughout the course of application preparation and planning, the information collected from a person or other entity may contain personal information as defined by the Personal Information Protection Act (PIPA). Private sector organizations collecting personal information in British Columbia are subject to the PIPA, which sets out the rules for how personal information may be collected, used or disclosed.

Applicants and permit holders should comply with PIPA when collecting information from persons or entities and can contact the Office of the Information and Privacy Commissioner for British Columbia for more information.

As a public body, the Commission is subject to the Freedom of Information and Protection of Privacy Act (FOIPPA). Any personal information contained in plans or applications submitted to the Commission are subject to the protection and security requirements identified in FOIPPA.

Confidentiality of Well Information

The Commission may make all or any portion of information included in well reports and well data publically available on expiry of statutory confidentiality status of the well.

TAB 5

Most Recently Cited in: ARC Resources Ltd. and British Columbia (Oil and Gas Commission), Re , 2018 CarswellBC 1708 | (B.C. Oil & Gas App. Trib., Jun 26, 2018)

S.B.C. 2008, c. 36, s. 26

s 26. Actions by commission respecting permit

Currency

26.Actions by commission respecting permit

26(0.1) In this section, **"associate"**, in relation to a permit holder or applicant, means any of the following, as applicable:

(a) an agent of the applicant or permit holder;

(b) a director, officer or shareholder of the applicant or permit holder;

(c) a person who, in the opinion of the commission,

(i) may have influence over the applicant or permit holder, or

(ii) may be able to affect the activities permitted by the permit.

26(1) The commission may

(a) refuse to issue a permit,

(b) suspend a permit or a permission specified in a permit,

(c) cancel a permit or a permission specified in a permit, or

(d) amend a permit.

26(2) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) if the applicant or permit holder, or an associate of the applicant or permit holder, does any of the following:

(a) contravenes or has contravened

(i) this Act, the regulations, a permit, an authorization or an order issued under this Act, or

(ii) the *Petroleum and Natural Gas Act* or regulations made under that Act;

(b) fails to meet or no longer meets any of the conditions of section 24(4);

(c) fails to meet or no longer meets the requirements prescribed for the purposes of section 25(1), if any;

(d) begins an oil and gas activity permitted by a permit but then fails to carry out or continue that oil and gas activity;

(e) engages in or has engaged in a pattern of conduct that shows, in the commissioner's opinion, that the person is unfit to have a permit;

(f) is or has been convicted of an offence under

(i) this Act or any other enactment, or

(ii) a law enacted by the government of Canada, another province of Canada or a foreign jurisdiction

for conduct that shows, in the commissioner's opinion, that the person is unfit to have a permit.

26(3) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) with respect to an applicant or permit holder if the applicant or permit holder is an employer, employee, officer, director or agent of a

(a) permit holder against whom the commission has made a decision under subsection (1), or

(b) permit holder that has an employee, officer, director or agent against whom the commission has made a decision under subsection (1).

26(4) Without limiting the authority of the commission under subsection (1), the commission may make a decision under subsection (1) with respect to a permit holder who holds more than one permit for any contravention by the permit holder of

(a) any of the permit holder's permits, or

(b) any order issued to the permit holder with respect to oil and gas activities permitted under any of the permit holder's permits.

26(5) If the commission suspends or cancels a permit or a permission under subsection (1)(b) or (c), the commission may also suspend or cancel an authorization issued to the permit holder for a related activity of an oil and gas activity permitted by the permit, whether or not a specified enactment prohibits the suspension or cancellation of the authorization or requires the commission to make a finding other than the suspension or cancellation of a permit before suspending or cancelling an authorization.

26(6) The commission must give a permit holder an opportunity to be heard before making a decision under subsection (1)(b), (c) or (d) or (5) and must notify the permit holder of its decision under any of those provisions.

26(7) If the commission refuses under subsection (1) to issue a permit, the commission must provide notice, in accordance with subsection (8), to the land owner of the land notified by the applicant under section 22(2).

26(8) A notice under subsection (7) must advise the land owner

(a) that the commission has refused to issue a permit,

(b) that the applicant for the permit may, in relation to the refusal, request a review under section 70 or appeal under section 72, and

(c) that the land owner may, on request, be a party to an appeal referred to in paragraph (b).

Amendment History
2014, c. 10, s. 5; 2018, c. 15, s. 3

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

Most Recently Cited in: Mitchell and British Columbia (Oil and Gas Commission), Re , 2017 CarswellBC 3701 | (B.C. Oil & Gas App. Trib., Sep 20, 2017)

S.B.C. 2008, c. 36, s. 35

s 35. Obligations in carrying out oil and gas activities

Currency

35.Obligations in carrying out oil and gas activities
35(1) In carrying out oil and gas activities and related activities, a permit holder, an authorization holder or a person entering land under section 23 must minimize

(a) damage and disturbance to the sites of those activities, and

(b) waste.

35(2) A pipeline permit holder must make reasonable efforts to ensure that its oil and gas activities do not prevent access to or use of a highway, road, railway or public place.

35(3) A pipeline permit holder, as soon as reasonably possible after constructing a pipeline, must restore, in accordance with the regulations, if any, the land and surface disturbed by the construction.

Amendment History
2015, c. 40, s. 13

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

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Most Recently Cited in: Canada Energy Partners Inc. and British Columbia (Oil and Gas Commission), Re , 2017 CarswellBC 3698 | (B.C. Oil & Gas App. Trib., Aug 21, 2017)

S.B.C. 2008, c. 36, s. 49

s 49. Order issued by official

Currency

49.Order issued by official
49(1) An official may issue an order to

(a) a person carrying out an oil and gas activity or a related activity, with respect to those activities or any of the person's obligations under the Act or the regulations,

(b) a permit holder, former permit holder, authorization holder or former authorization holder, with respect to any of the person's obligations under the Act or the regulations or the person's permit or authorization, if any, or

(c) a person who may enter on land under section 23, with respect to that entry,

if, in the opinion of the official,

(d) the person fails to comply with the Act, the regulations, a previous order made under the Act, or the person's permit or authorization, or

(e) the order is necessary

(i) to mitigate a risk to public safety,

(ii) to protect the environment, or

(iii) to promote the conservation of petroleum and natural gas resources.

49(2) An official may issue an order to a person under subsection (1) with respect to an act or omission by the person whether or not the commission has made a finding under section 62 with respect to that act or omission.

49(3) An order under subsection (1) must be in writing and must

(a) name the person to whom the order is addressed,

(b) specify the action to be taken, stopped or modified,

(c) state the date by which the person must comply with the order,

(d) state the reasons for the order,

(e) state that the person may request a review of the order under section 70 or appeal the decision under section 72, and include an address to which a request for a review or an appeal may be sent,

(f) be dated the day the order is made, and

(g) be served on the person to whom it is addressed.

(h) [Repealed 2010, c. 9, s. 31(a).]

49(3.1) If an order under subsection (1) is addressed to an employee, agent or contractor of a permit holder, the official who served the order must serve a copy of the order on the permit holder.

49(4) Without limiting subsection (3)(b), an order under subsection (1) may specify any of the following requirements:

(a) that a person must apply to obtain or amend a permit or an authorization in accordance with the Act and the regulations;

(b) that a person remedy a failure referred to in subsection (1)(d);

(c) that a person repair damage to the environment;

(d) that a person suspend or resume an oil and gas activity or any aspect of an oil and gas activity;

(e) that a person use a specified method to carry out an oil and gas activity;

(f) that a person conduct tests, take samples, conduct analyses and submit records and information to the commission;

(g) that a person control or prevent the escape of petroleum, natural gas, water, waste or other substances from a well, pipeline or facility;

(h) that a person repressure, recycle or carry out pressure maintenance of any pool or portion of it, or use any other enhanced recovery technique, including the introduction or injection of natural gas, water or other substances into any pool or part of it;

(i) with respect to water produced in relation to the production of petroleum or natural gas, that a person dispose of the water into an underground formation or as otherwise specified;

(j) that a person deepen a well beyond the formation from which production is being taken or has been taken;

(k) that a person recomplete a well;

(l) that a person restrict or cease production of petroleum, natural gas or water;

(m) that natural gas be gathered, and processed if necessary, and that the natural gas or liquid hydrocarbons extracted be marketed or injected into an underground reservoir for storage or for any other purpose;

(n) that a pipeline permit holder alter or divert its pipeline;

(o) that a permit holder prepare and implement, in a form and manner satisfactory to the official, a program of measures to contain and eliminate spillage;

(p) that a permit holder arrange for an independent audit of the permit holder's operations and activities and have the auditor's report submitted to the official.

49(5) Despite subsection (3), if the official referred to in subsection (1) is of the opinion that a person's actions or omissions are of such nature that they are causing, or may imminently cause, serious damage to the environment or that they are a risk to public safety, the order under subsection (1) may be issued orally.

49(6) If, under subsection (5), an official issues an order orally, an official, within 48 hours, must confirm the order in writing as required under subsection (3) or the order ceases to be effective.

49(7) An official may amend an order issued under subsection (1), and subsection (3) applies to the amendment.

49(8) If satisfied that the circumstances that gave rise to an order under subsection (1) are no longer present or have been affected by other circumstances, an official may terminate the order by providing the person to whom the order was addressed with written notice of the termination.

49(9) An order under subsection (1) may specify a requirement that is different from a requirement in a provision of a regulation under this Act, if the regulation expressly states that the provision is subject to this section.

49(10) Subject to subsection (9), if a regulation is made concerning a matter with respect to which an order has been made under this section, the order, if it has not been terminated under subsection (8), is no longer valid to the extent of any inconsistency between the order and the regulation.

Amendment History
2010, c. 9, s. 31; 2018, c. 15, s. 14

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

End of Document

S.B.C. 2008, c. 36, s. 86

s 86. Offences

Currency

86.Offences

86(1) A person who contravenes section 21, 35(1), 36(1), 37(1) or (2), 39(3), 40, 61 or 81, or in relation to an order issued under section 49, section 82, commits an offence and is liable on conviction to a fine not exceeding $1 500 000 or to imprisonment for not more than 3 years, or to both.

86(2) A person who contravenes section 35(3) commits an offence and is liable on conviction to a fine not exceeding $1 000 000 or to imprisonment for not more than 2 years, or to both.

86(3) A person who contravenes section 34, 38(1) or 39(1), or in relation to an order issued under section 53(2)(a), section 82, commits an offence and is liable on conviction to a fine not exceeding $500 000 or to imprisonment for not more than one year, or to both.

86(4) A person who contravenes section 35(2) or 76(1), or in relation to an order issued under a section not referred to in subsections (1) to (3) of this section, section 82, commits an offence and is liable on conviction to a fine not exceeding $100 000.

86(5) A person who contravenes section 37(3) or 60(1) or (2) commits an offence and is liable on conviction to a fine not exceeding $25 000.

86(6) The Lieutenant Governor in Council may provide by regulation that

(a) a contravention of a regulation is an offence, and

(b) a person convicted of an offence for a contravention of a regulation is liable to a fine not exceeding a maximum amount, or to imprisonment not exceeding a maximum length, or to both.

86(7) If the maximum fine or imprisonment provided by a regulation under subsection (6)(b) is less than that provided by a provision of this Act, the regulation prevails.

86(8) If a contravention continues for more than one day, the offender is liable to a separate penalty, without notice and without a separate count being laid, for each day that the contravention occurs.

86(9) In a prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by the defendant's contractor, employee or agent.

86(10) Subsection (9) applies even if the contractor, employee or agent has not been identified or prosecuted for the offence.

86(11) If a corporation commits an offence under this Act, a director or officer of the corporation who authorized, permitted or acquiesced in the offence also commits the offence.

86(12) If a person commits an offence under this Act, any other person who

(a) is directly or indirectly responsible for the act or omission that constitutes the offence, and

(b) is a contractor, employee or agent of the person or of an other person described in paragraph (a)

also commits the offence.

86(13) Due diligence, mistake of fact and officially induced error are defences to a prosecution under this Act.

86(14) If

(a) a corporation referred to in subsection (11), or

(b) a person referred to in subsection (12),

has not committed an offence under this Act as a result of subsection (13), the other persons referred to in subsections (11) and (12) may be found guilty of an offence, subject to subsection (13).

86(15) Section 5 of the *Offence Act* does not apply to this Act or the regulations.

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

S.B.C. 2008, c. 36, s. 62

s 62. Contraventions

Currency

62.Contraventions

62(1) After giving an opportunity to be heard to a person who is alleged to have contravened a provision of the Act, the regulations, a permit, an authorization or an order, the commission may find that the person has contravened the provision.

62(2) If a corporation contravenes a provision referred to in subsection (1), a director, agent or officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

62(3) If an employee, contractor or agent of a permit holder contravenes a provision referred to in subsection (1) in the course of carrying out the employment, contract or agency, the permit holder also contravenes the provision.

62(4) If a person contravenes a provision referred to in subsection (1), any other person who

(a) is directly or indirectly responsible for the act or omission that constitutes the contravention, and

(b) is a contractor, employee or agent of the person or of an other person described in paragraph (a)

also contravenes the provision.

62(5) The commission may not find that a person has contravened a provision referred to in subsection (1) if the person demonstrates to the satisfaction of the commission that

(a) the person exercised due diligence to prevent the contravention, or

(b) [Repealed 2012, c. 27, s. 10(a).]

(c) the person's actions relevant to the provision were the result of an officially induced error.

62(6) If

(a) a corporation referred to in subsection (2),

(b) an employee, contractor or agent referred to in subsection (3), or

(c) a person referred to in subsection (4)

has not contravened a provision referred to in subsection (1) as a result of demonstrating to the satisfaction of the commission anything referred to in subsection (5)(a) and (c), the commission may find that any of the other persons referred to in subsections (2) to (4) has contravened the provision, unless the other person demonstrates to the satisfaction of the commission anything referred to in subsection (5)(a) and (c).

62(7) Nothing in subsection (5) prevents

(a) an official from issuing an order under section 49(1) to a person with respect to an act or omission by the person, or

(b) the commission from doing anything referred to in section 50.

62(8) A person does not contravene a provision referred to in subsection (1) by doing or omitting to do something if that act or omission is reasonably necessary to conform with the requirements of the *Workers Compensation Act* or any regulations under that Act.

Amendment History
2012, c. 27, s. 10

Currency
British Columbia Current to B.C. Reg. 160/2018 (July 17, 2018)

TAB 6

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
OCT 02 2018
CLERK OF THE COURT

COURT FILE NUMBER	1801-09188
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	THIRD EYE CAPITAL CORPORATION
RESPONDENTS	RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., and K.L. CAPITAL CORP.
DOCUMENT	**ORDER APPROVING SALE AND INVESTMENT SOLICITATION PROCESS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Josef G.A. Kruger, Q.C./ Robyn Gurofsky Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 / (403) 232-9774 Facsimile: (403) 266-1395 Email: JKruger@blg.com/ RGurofsky@blg.com File No. 413255.63

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

Dated this 2 day of Oct 2018

for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: October 2, 2018

NAME OF JUSTICE WHO MADE THE ORDER: The Honourable Mr. Justice A.D. Macleod

LOCATION OF HEARING: Calgary, Alberta

UPON the application of Ernst & Young Inc. ("**EY**"), in its capacity as the court-appointed receiver and manager (the "**Receiver**") of Ranch Energy Corporation, OpsMobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc., Air Dallaire Ltd., and K.L. Capital Corp. (collectively, the "**Debtors**"), and not in its personal capacity; **AND UPON** having read the First Report of the Receiver dated August 8, 2018 (the "**Receiver's First Report**"), the Second Report of the Receiver dated September 24, 2018 (the "**Receiver's Second Report**"), the pleadings, affidavits and other documents filed in these proceedings, including the receivership order granted on July 19, 2018 (the "**Receivership Date**"), as amended on August 7, 2018 (the "**Receivership Order**"); **AND UPON** hearing from counsel for the Receiver and counsel for any other interested parties appearing at the hearing of this application:

IT IS HEREBY ORDERED AND DECLARED THAT:

Approval of Sales and Investment Solicitation Process

1. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the sale and investment solicitation process attached hereto as Appendix "A" ("**SISP**").

2. The SISP is hereby approved, and the Receiver is hereby authorized and directed to implement the SISP and do all things as are reasonably necessary to conduct and give full effect to the SISP and carry out its obligations thereunder, including seeking approval of this Court as soon as reasonably practicable following the selection of a Successful Bidder under the SISP.

3. Neither the Receiver nor the Selling Agent shall have any liability whatsoever to any person or party for any act or omission related to the SISP, except to the extent such act or omission is the result of gross negligence or wilful misconduct of the Receiver or the Selling Agent.

Increase to Receiver's Borrowings Charge

4. Paragraph 24 of the Receivership Order is hereby amended such that the Receiver shall be authorized to borrow, by way of revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, up to the principal of $7,000,000 (or such greater amount as this Honourable Court may by further Order authorize).

5. The Receiver's Borrowings Charge, as contemplated by, and defined in paragraph 24 of the Receivership Order, is hereby increased from $6,000,000 to $7,000,000.

Miscellaneous Matters

6. The Receiver's activities as set out in the Receiver's First Report and the Receiver's Second Report are hereby ratified and approved.

7. This Order and the SISP shall be without prejudice to any contractual rights that run with or are related to the Property which Canadian Natural Resources Limited or Canadian Natural Resources, a general partnership by its managing partner, Canadian Natural Resources Limited, may have and assert in these proceedings.

8. The time for service of this Application together with all supporting materials is hereby declared to be good and sufficient and no other person is required to have been served with such documents,

and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

9. Service of this Order shall be deemed good and sufficient by serving the same on:

   a) the persons listed on the service list (attached as **Schedule "A"** to the Application); and

   b) by posting a copy of this Order on the Receiver's website at: www.ey.com/ca/OpsMobil.

10. No other persons are entitle to be served with a copy of this Order.

" Justice Macleod "

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A" TO
ORDER DATED OCTOBER 2, 2018

SALE AND INVESTMENT SOLICITATION PROCESS

INTRODUCTION

On July 19, 2018, the Alberta Court of Queen's Bench (the "**Court**") made an order which was amended on August 7, 2018 (the "**Receivership Order**") appointing Ernst & Young Inc. ("**EYI**") as Receiver and Manager (the "**Receiver**") over the current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceedings therefrom (the "**Property**") of Ranch Energy Corporation ("**Ranch**"), OpsMobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services Inc., Air Dallaire Ltd. and K.L. Capital Corp. (collectively, the "**Corporations**").

The Receiver intends to conduct a sale and investment solicitation process (the "**SISP**") as set out below to market and sell the Business (as defined below) and Property of Ranch. The SISP will be conducted with the approval of the Court, and under the SISP, all qualified interested parties will be provided with an opportunity to participate in the SISP. The SISP is intended to solicit interest in an acquisition or investment in the Business or a sale of the assets and/or the Business of Ranch.

The Receiver has engaged Animus Capital Partners Inc. as Selling Agent (in such capacity, the "**Selling Agent**") to administer and carry out the marketing steps contemplated by the SISP.

TEC Capital Corporation ("**TEC**") is the senior secured lender to Ranch, and in that capacity, will have certain consultation rights in the SISP, as provided for below.

This document (the "**SISP Procedure**") outlines the SISP, which is comprised principally of three stages: pre-marketing, marketing, and offering and evaluation.

OPPORTUNITY AND SISP SUMMARY

1. The SISP is intended to solicit interest in, and opportunities for a sale of, or investment in, all or part of the Ranch's business or Property (the "**Opportunity**"), which primarily consist of wells, pipelines, facilities and other oil and gas production assets located in British Columbia.

2. In order to maximize the number of participants that may have an interest in the Opportunity, the SISP will provide for the solicitation of interest for:

   (a) the sale of Ranch's interest in the Property. In particular, interested parties may submit proposals to acquire all, substantially all or a portion of the Property (a "**Sale Proposal**"); and

   (b) the investment in the business operations, as a going concern (the "**Business**") of Ranch. Such proposals for the Business may take the form of an investment in the Business (an "**Investment Proposal**").

3. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any Sale Proposal or any Investment Proposal will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Receiver, the Selling Agent or Ranch, or any of their respective affiliates, agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of Ranch in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

4. Solicitation of interest for Sale Proposals and Investment Proposals will be on an unpriced basis whereby no set asking price will be stipulated.

5. As described more fully in this SISP, the major stages in the SISP Procedure will be comprised of the following:

    (a) Pre-Marketing: preparation of all marketing material, assembly of all relevant due diligence material, establishment of an electronic data room and preparation of potential buyer/investor lists;

    (b) Marketing: advertising, contacting potential buyers/investors, responding to requests for information and disseminating marketing material to potential buyers and investors; and

    (c) Offer Submission and Evaluation: solicitation, receipt of, evaluation and negotiation of offers from potential buyers and investors, as described below.

6. The offer submission and evaluation stage of the SISP will be comprised of a two phase offering process: "**Phase 1**" being the submission of letters of intent ("**LOIs**") from qualified bidders, and "**Phase 2**" being the submission of formal binding offers from those parties that submitted LOIs and that have been invited by the Selling Agent and the Receiver to participate in Phase 2 (defined below as Phase 1 Qualified Bidders).

PROPERTY & REGULATOR

7. Ranch is the operator or has a working interest in the Property comprised of approximately 1,600 oil and gas wells in northeast British Columbia, and a gas processing plant in the Wildboy district of British Columbia that is owned and operated by Ranch.

8. All of the Property was acquired from Predator Oil BC Ltd. ("**Predator BC**") on July 10, 2017.

9. The British Columbia Oil and Gas Commission ("**BCOGC**") regulates oil and gas and related activities in British Columbia, including wells, facilities, oil refineries, natural gas processing plants, pipelines and oil and gas roads, through permits, authorizations, orders and regulations.

10. The permits associated with the Property continue to be held by Predator BC pursuant to a trust agreement as Ranch was not qualified to hold the permits under applicable BCOGC regulations.

11. The BCOGC has the regulatory authority to transfer the permits and has advised the Receiver that it will exercise such authority provided a Bidder meets its regulatory requirements. Bidders will be required to be licensees in good standing with the BCOGC, or to be otherwise eligible to obtain or hold BCOGC licenses, permits or approvals with respect to the Property.

TIMELINE

12. The following table sets out the key milestones under the SISP:

Milestone	Deadline
Phase 1 Non-Binding LOI Deadline	October 25, 2018
Phase 2 Binding Bid Deadline	November 15, 2018
Closing Dates	November 30, 2018

PRE-MARKETING STAGE

13. As soon as reasonably practicable, but in any event by no later than October 2, 2018 (the "**Commencement Date**"):

(a) the Selling Agent will prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; (ii) a non-disclosure agreement (an "**NDA**"); and (iii) a confidential Information Memorandum ("**CIM**"). The Teaser Letter, NDA and CIM shall be in form and substance satisfactory to the Receiver, in consultation with TEC. The CIM will specifically stipulate that the Selling Agent, the Receiver and their respective advisors make no representation or warranty as to the accuracy or completeness of the information contained in the CIM, the Data Room (as defined below), or made available pursuant to the SISP or otherwise, except to the extent expressly contemplated in any definitive sale or investment agreement with a Successful Bidder (as defined below) ultimately executed and delivered by the Receiver;

(b) the Selling Agent, with the assistance of the Receiver, will gather and review all required due diligence material to be provided to interested parties and shall establish a secure, electronic data room (the "**Data Room**"), which will be maintained and administered by the Selling Agent during the SISP;

(c) the Selling Agent will develop a draft form of LOI (the "**LOI Form**") and a purchase and sale agreement or investment agreement for use during the SISP (the "**Draft Purchase/Investment Agreement**"), which agreement or agreements shall be in form and substance satisfactory to the Receiver, in consultation with TEC; and

(d) the Selling Agent, in consultation with the Receiver and TEC, will prepare a list of potential bidders, including: (i) parties that have approached one or more of the Selling Agent, Ranch or the Receiver indicating an interest in the Opportunity; and (ii) local, national and international strategic and financial parties who the Selling Agent and the Receiver believe may be interested in purchasing all or part of the Business and Property or investing in Ranch pursuant to the SISP (collectively, "**Known Potential Bidders**").

MARKETING STAGE

14. As soon as reasonably possible after the Commencement Date, the Selling Agent shall:

(a) arrange for a notice of the SISP (and such other relevant information as the Selling Agent, in consultation with the Receiver, considers appropriate) (the "**Notice**") to be published in The Globe and Mail (National Edition) and the Oil and Gas Bulletin, and any other newspaper or journals as the Selling Agent, in consultation with the Receiver, considers appropriate, if any; and

(b) send the Teaser Letter and NDA to all Known Potential Bidders and to any other party who responds to the Notice as soon as reasonably practicable after such identification or request, as applicable.

15. The Selling Agent will send the CIM and grant access to the Data Room to those parties who have executed and delivered the NDA to the Selling Agent as soon as reasonably practicable after such execution and delivery.

16. Requests for information and access to the Data Room will be directed to the Selling Agent, to the attention of the persons listed in **Schedule "A"** hereto. All printed information shall remain the property of the Receiver and, if requested by the Selling Agent or the Receiver, shall be returned without further copies being made and/or destroyed with an acknowledgement that all such material has either been returned and/or destroyed and no electronic information has been retained.

17. Any party who expresses a wish to participate in the SISP (a "**Potential Bidder**") must, prior to being given any additional information such as the CIM and access to the Data Room, provide to the Selling Agent:

(a) an NDA executed by it, and which shall inure to the benefit of any ultimate Successful Bidder; and

(b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

18. If a Potential Bidder has delivered the NDA and the letter contemplated in paragraph 17(b) with disclosure that is satisfactory to the Receiver, acting reasonably, then such Potential Bidder will be deemed to be a "**Phase 1 Qualified Bidder**". TEC will automatically be deemed to be a Phase 1 Qualified Bidder, without having to satisfy the criteria listed in paragraph 17 (a) and (b). No Potential Bidder shall be deemed not to be a Phase 1 Qualified Bidder without the approval of the Receiver.

OFFER SUBMISSION AND EVALUATION STAGE

Phase 1

Due Diligence

19. The Selling Agent in consultation with the Receiver, subject to competitive and other business considerations, will afford each Phase 1 Qualified Bidder such access to due diligence materials through the Data Room and information relating to the Property and Business as it deems appropriate. Due diligence access may further include management presentations, on-site inspections, and other matters which a Phase 1 Qualified Bidder may reasonably request and to which the Selling Agent, with the approval of the Receiver, in its reasonable business judgment, may agree. The Selling Agent will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 1 Qualified Bidders and the manner in which such requests must be communicated. Neither the Selling Agent nor the Receiver will be obligated to furnish any information relating to the Property or Business to any person other than to Phase 1 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 1 Qualified Bidders if the Receiver, in consultation with the Selling Agent, determines such information to represent proprietary or sensitive competitive information.

LOI Submission

20. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with the Receiver on behalf of Ranch.

21. Phase 1 Qualified Bidders who advise the Selling Agent that they wish to submit an offer will be provided with a copy of the LOI Form.

22. A Phase 1 Qualified Bidder who wishes to pursue the Opportunity further must deliver an executed LOI, identifying each specific Property or Business the Phase 1 Qualified Bidder is interested in, to the Selling Agent at the addresses specified in Schedule "A" hereto (including by email or fax transmission), so as to be received by them not later than 12:00 PM (Calgary time) on or before October 25, 2018 (the "**Phase 1 Bid Deadline**").

23. An LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

(a) it is submitted on or before the relevant Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;

(b) it contains an indication of whether the Phase 1 Qualified Bidder is making a:

(i) Sale Proposal; or

(ii) an Investment Proposal;

(c) in the case of a Sale Proposal, it identifies or contains the following:

(i) the purchase price, in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation. If a Phase 1 Qualified Bidder wishes to acquire more than one Property, a price for each Property must be stipulated;

(ii) a description of each Property that is expected to be subject to the transaction and any of the Property or obligations for each Property expected to be excluded;

(iii) a specific indication of the financial capability, together with evidence of such capability, of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction;

(iv) a description of the conditions and approvals required for a final and binding offer; and

(v) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(d) in the case of an Investment Proposal, it identifies the following:

(i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment in the Business or Businesses;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business or in Ranch in Canadian dollars;

(iii) the underlying assumptions regarding the *pro forma* capital structure;

(iv) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction;

(v) a description of the conditions and approvals required for a final and binding offer;

(vi) all conditions to closing that the Phase 1 Qualified Bidder may wish to impose; and

(vii) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;

(e) in the case of either a Sale Proposal or an Investment Proposal it contains a statement that the Phase 1 Qualified Bidder is a licensee in good standing with the BCOGC, or is eligible to obtain or hold BCOGC licenses, permits or approvals with respect to the Property, and its current Liability Management Rating is 1.0 or greater; and

(f) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Selling Agent or Receiver from time to time.

24. The Receiver, in consultation with the Selling Agent, will consider any bid on behalf of a creditor of Ranch, including but not limited to TEC, under which all or a portion of the consideration being offered under the bid includes the compromise of all or a portion of indebtedness owing from Ranch to the creditor (a "**Credit Bid**", and a person submitting a Credit Bid, a "**Credit Bid Party**"). For further clarity, a Credit Bid will not prohibit a Potential Bidder from becoming a Qualified Phase 1 Bidder, Qualified Phase II Bidder or the Successful Bidder, provided that such Credit Bid is in accordance with these SISP Procedures.

25. Notwithstanding any consultation rights specifically afforded to TEC in this SISP, should any creditor, including TEC, submit a bid including a component of a Credit Bid to acquire the Business or Property, such bidder shall be barred from receiving any confidential data regarding the bids received prior to the Phase 1 Bid Deadline or the Phase 2 Bid Deadline, as may be applicable and will not be consulted by the Receiver in the selection of the Phase 2 Bidders or the Successful Bidder.

26. An LOI shall not be a Qualified LOI if the Sale Proposal or Investment Proposal contemplated thereby is conditional on further due diligence or financing.

27. The Receiver may waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Preliminary Assessment of Phase 1 Bids and Subsequent Process

28. Following the Phase 1 Bid Deadline, the Receiver will assess the Qualified LOIs with respect to the Property or Business in consultation with the Selling Agent and TEC (unless TEC has submitted a Credit Bid). If it is determined by the Receiver that a Phase 1 Qualified Bidder that has submitted a Qualified LOI (i) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**", provided that the Receiver may, in its reasonable business judgment, in

consultation with TEC (unless TEC has submitted a Credit Bid), limit the number of Phase 2 Qualified Bidders (and thereby eliminate some Phase 1 Qualified Bidders from the process). Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

29. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, the Receiver in consultation with the Selling Agent and TEC (unless TEC has submitted a Credit Bid), shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received; (ii) the extent to which the Qualified LOIs relate to the same Property or Business or involve Investment Proposals predicated on certain Property or Business; (iii) the scope of the Property or Business to which any Qualified LOIs may relate; and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Property.

30. In the event that no Qualified LOIs are submitted by the Phase 1 Bid Deadline, then the Receiver may terminate the SISP.

31. Upon the determination by the Receiver of the manner in which to proceed to Phase 2 of the SISP, the Receiver will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), which will include a Draft Purchase/Investment Agreement which will be made available in the Data Room, and the Bid Process Letter will be sent to all Phase 2 Qualified Bidders who are invited to participate in Phase 2.

Phase 2: Formal Offers and Selection of Successful Bidder

32. Paragraphs 33 to 44 below and the conduct of Phase 2 bidding are subject to paragraphs 28 to 31, above, and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

Formal Binding Offers

33. Phase 2 Qualified Bidders that wish to make a formal Sale Proposal or an Investment Proposal shall submit to the Selling Agent a sealed binding offer that complies with all of the following requirements at the addresses specified in Schedule "A" hereto (including by email or fax transmission), so as to be received by the Selling Agent not later than 12:00 PM (Calgary time) on November 15, 2018 or such other date and time as may be modified in the Bid Process Letter (the "**Phase 2 Bid Deadline**"):

    (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs;

    (b) cash is the preferred form of consideration, but if the bid utilizes other consideration, a description of the material terms of the consideration shall be provided;

(c) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Property or Business on terms and conditions reasonably acceptable to the Receiver;

(d) unless otherwise agreed, the bid shall take the form of the Draft Purchase/Investment Agreement and shall include a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with such Successful Bidder;

(e) the bid includes duly authorized and executed transaction agreements as listed in the Draft Purchase/Investment Agreement; including, but not limited to, the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto, the name or names of the ultimate beneficial owner(s) of the Phase 2 Qualified Bidder including their respective percentage interests;

(f) to the extent that a bid is conditional upon new or amended agreements being entered into with other parties, the interested parties shall provide the proposed terms of such amended or new agreements and identify how such agreements may differ from existing agreements to which Ranch may be a party. A Phase 2 Qualified Bidder's willingness to proceed without such conditions and, where such conditions are included in the bid, the likelihood of satisfying such conditions shall be an important factor in evaluating the bid;

(g) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction that will allow the Receiver to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;

(h) the bid should not be conditioned on the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder;

(i) each Phase 2 Qualified Bidder must provide with its bid details regarding its ability to obtain and method of financing the transaction, the timetable for obtaining financing and, if appropriate, the amount of senior debt, subordinated debt, equity and any other source of financing contemplated in the pro forma capital structure;

(j) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing, or that is participating or benefiting from such bid;

(k) for a Sale Proposal, the bid, except in the case of a Credit Bid, includes a commitment by the Phase 2 Qualified Bidder to provide a refundable deposit in the amount of not less than 10% of the purchase price offered upon the Phase 2 Qualified Bidder being selected as the Successful Bidder, which shall be paid to

"Ernst & Young Inc. in trust" (the "**Deposit**"). One half of the Deposit shall be paid to "Ernst & Young Inc. in trust" upon the submission of the Phase 2 Qualified Bidder's Phase 2 Bid. The second half of the Deposit shall be submitted upon the Phase 2 Qualified Bidder being selected as the Successful Bidder. The Successful Bidder's Deposit shall be applied as against the Purchase Price and all other Deposits submitted by Phase 2 Qualified Bidders who are not selected as the Successful Bidder shall be returned within one week of obtaining court approval for the Successful Bid;

(l) for an Investment Proposal, the bid, except in the case of a Credit Bid, includes a commitment by the Phase 2 Qualified Bidder to provide a refundable deposit in the amount of not less than 10% of the total new investment contemplated in the bid upon the Phase 2 Qualified Bidder being selected as the Successful Bidder, which shall be paid to "Ernst & Young Inc. in trust". One half of the Deposit shall be paid to "Ernst & Young Inc. in trust" upon the submission of the Phase 2 Qualified Bidder's Phase 2 Bid. The second half of the Deposit shall be submitted upon the Phase 2 Qualified Bidder being selected as the Successful Bidder. The Successful Bidder's Deposit shall be applied as against the Purchase Price and all other Deposits submitted by Phase 2 Qualified Bidders who are not selected as the Successful Bidder shall be returned within one week of obtaining court approval for the Successful Bid;

(m) in the case of a Credit Bid, it is accompanied by a Deposit in the form of a wire transfer (to a bank account specified by the Receiver), or such other form acceptable to the Receiver, payable to the order of the Receiver, in trust, in an amount equal to 10% of that total consideration set out in its Phase 2 Bid, less the value of the consideration allocated to the credit portion of the Credit Bid;

(n) the bid includes acknowledgments and representations of the Phase 2 Qualified Bidder that: (i) it has had an opportunity to conduct any and all due diligence regarding the Property, Business and Ranch or any of them prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid; and (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever made by the Selling Agent, Ranch or the Receiver, whether express, implied, statutory or otherwise, regarding the Business, Property or Ranch, or the accuracy or completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Receiver on behalf of Ranch;

(o) all required corporate approvals of the Phase 2 Qualified Bidder will have been obtained prior to the submission of the bid;

(p) the bid shall identify any material conditions in favour of the purchaser to be resolved prior to closing the transaction;

(q) the bid is received by the relevant Phase 2 Bid Deadline;

(r) the bid contemplates court approval; and

(s) the bid contemplates a schedule for closing the transaction set out therein which is on or before November 30, 2018 (the "**Closing Date**").

34. Following the Phase 2 Bid Deadline, the Receiver, in consultation with TEC (unless TEC has submitted a Credit Bid), will assess the Phase 2 bids received with respect to the Property or Business. The Receiver will designate the most competitive bids that comply with the foregoing requirements to be "**Phase 2 Qualified Bids**". No Phase 2 bids received shall be deemed to be Phase 2 Qualified Bids without the approval of the Receiver in consultation with the BCOGC and TEC (unless TEC has submitted a Credit Bid). Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

35. The Receiver may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Phase 2 Qualified Bid.

36. The Selling Agent, upon receiving instructions from the Receiver, shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Phase 2 Qualified Bid within ten (10) business days of the Phase 2 Bid Deadline, or at such later time as the Receiver deem appropriate.

37. If the Receiver is not satisfied with the number or terms of the Phase 2 Qualified Bids, the Receiver, in consultation with the Selling Agent and TEC (unless TEC has submitted a Credit Bid), may extend the Phase 2 Bid Deadline without Court approval, or the Receiver may seek Court approval for an amendment to the SISP.

38. The Receiver may terminate, in consultation with TEC (unless TEC has submitted a Credit Bid), further participation in the Phase 2 Bid Process by any interested party, or modify dates or procedures in this SISP as deemed appropriate or necessary, or terminate the process altogether.

39. The Receiver may aggregate separate bids from unaffiliated Phase 2 Qualified Bidders to create one or more "**Phase 2 Qualified Bid**".

40. In the event that no Phase 2 Qualified Bids are submitted by the Phase 2 Bid Deadline, then the Receiver may terminate the SISP.

Evaluation of Competing Bids

41. A Phase 2 Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value and form of consideration to be paid provided by such bid, the identity, circumstances and ability of the Phase 2

Qualified Bidder to successfully complete such transactions, including any conditions attached to the bid and the expected feasibility of such conditions, the proposed transaction documents, factors affecting the speed, certainty and value of the transaction, the assets included or excluded from the bid, any related restructuring costs, compliance with BCOGC requirements, the likelihood and timing of consummating such transactions, and the ability of the bidder to finance and ultimately consummate the proposed transaction within the timeline established by the Receiver.

Selection of Successful Bid

42. The Receiver, in consultation with TEC (unless TEC has submitted a Credit Bid): (a) will review and evaluate each Phase 2 Qualified Bid with the applicable Phase 2 Qualified Bidder, and such Phase 2 Qualified Bid may be amended, modified or varied as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "**Successful Bid**"), and the Phase 2 Qualified Bidder making such Successful Bid (the "**Successful Bidder**") for any particular Property or the Business in whole or part. The determination of any Successful Bid by the Receiver shall be subject to approval by the Court.

43. The Receiver shall have no obligation to enter into a Successful Bid, and the Receiver reserves the right to reject any or all Phase 2 Qualified Bids.

Sale Approval Hearing

44. At the hearing of the application to approve any transaction with a Successful Bidder (the "**Sale Approval Application**"), the Receiver shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by the Receiver on and as of the date of approval of the Successful Bid by the Court.

Confidentiality and Access to Information

45. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the Receiver and such other bidders or Potential Bidders in connection with the SISP. The Receiver may however, with the consent of the applicable participants, disclose such information to other bidders for the purpose of seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.

Supervision of the SISP

46. The Receiver will participate in the SISP in the manner set out in this SISP Procedure and the SISP Order and is entitled to receive all information in relation to the SISP.

47. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between Ranch, the Selling Agent or the Receiver and any Phase 1 Qualified

Bidder, any Phase 2 Qualified Bidder or any other party, other than as specifically set forth in a definitive agreement that may be signed with the Receiver on behalf of Ranch and approved by the Court.

48. Without limiting the preceding paragraph, neither the Receiver nor the Selling Agent shall have any liability whatsoever to any person or party, including without limitation any Potential Bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, the Successful Bidder, or any other creditor or other stakeholder of Ranch, for any act or omission related to the process contemplated by this SISP Procedure, except to the extent such act or omission is the result of gross negligence or willful misconduct of the Receiver or Selling Agent. By submitting a bid, each Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, or Successful Bidder shall be deemed to have agreed that it has no claim against the Receiver or Selling Agent for any reason whatsoever, except to the extent such claim is the result of gross negligence or willful misconduct of the Receiver or Selling Agent.

49. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

50. The Receiver shall have the right, in consultation with the Selling Agent and TEC (unless TEC has submitted a Credit Bid), to modify the SISP and the deadlines set out herein (including, without limitation, pursuant to the Bid Process Letter) if, in its reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP.

SCHEDULE "A"

Selling Agent

Animus Capital Partners Inc.
3800, 855-2nd Street SW
Calgary, Alberta
T2P 4J8

Attention: **Mathew August, Executive Managing Director**

Receiver

Ernst & Young Inc.
2200, 215-2nd Street SW
Calgary, Alberta
T2P 1M4

Attention: **Neil Narfason, Senior Vice President/Duncan MacRae, Manager**

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Grafikom Ltd. Partnership | 2009 CarswellOnt 6162, [2009] O.J. No. 4262, 59 C.B.R. (5th) 90, 181 A.C.W.S. (3d) 925 | (Ont. S.C.J., Oct 14, 2009)

2009 BCSC 17
British Columbia Supreme Court

Pope & Talbot Ltd., Re

2009 CarswellBC 88, 2009 BCSC 17, [2009] B.C.W.L.D. 1794, 174 A.C.W.S. (3d) 1067, 50 C.B.R. (5th) 99

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 POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

AND AN APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

D. Brenner C.J.S.C.

Heard: November 19, 2008
Judgment: January 22, 2009
Docket: Vancouver S077839

Counsel: K. Jackson for Pope & Talbot
V. Tickle for PriceWaterhouseCoopers
F. Dearlove for Westcoast Energy Inc.
P. Rubin for Ableco

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy and insolvency --- Interim receiver — Powers, duties and liabilities
PT Ltd. used services of W Ltd. under agreement for natural gas services — Under contract, fixed monthly charge was payable in respect of available capacity and variable charge was payable on basis of gas actually delivered — PW was appointed receiver of PT Ltd. and took over possession of PT, though it never operated PT, until assets were sold to third party purchasers — Natural gas continued to be available to PT Ltd. from time PW took over until PT Ltd. was sold — W Ltd. asked for confirmation that PW would honour W Ltd.'s invoices and PW did not reply or pay — W Ltd. filed proof of claim seeking payment for unpaid services pre-receivership and contingent claim for term of contract — Pre-receivership claim was allowed while contingent claim was disallowed — W Ltd. brought application seeking payment — Application dismissed — No good were actually being supplied and PW did not come under obligation to affirm or disclaim contract until required to do so — It would have been simple procedure for W Ltd. to apply to court for order requiring PW to make its election — PW never gave any indication that it wanted supply and it was open to W Ltd. to cease providing services, but they never did.

Table of Authorities

Cases considered by *D. Brenner C.J.S.C.*:

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 154, 2005 CarswellBC 578, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.*) 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.*) 348 W.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*) 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

APPLICATION by gas supply company for payment by receiver.

***D. Brenner C.J.S.C.*:**

1 The issue on this application is whether PricewaterhouseCoopers ("PWC"), the court-appointed receiver of Pope & Talbot Ltd ("P & T") is required to pay contractual standby charges to Westcoast Energy Inc. ("Westcoast") in respect of natural gas supply that continued to be available at two of the P & T mills from the date the receiver took possession until the mills were sold to third party purchasers.

2 P & T used the firm transportation services of Westcoast under the Firm Service Agreement ("FSA") to supply natural gas to its mills at Mackenzie and Fort St. James. Firm transportation service entitled P & T to a specified maximum daily capacity in the relevant zone of Westcoast's pipeline system. A fixed monthly charge known as the "Demand Toll" was payable in respect of this available capacity and a variable charge (the "Commodity Toll") calculated on the basis of gas actually delivered was also payable.

3 On May 10, 2008 the Receiver was appointed by the court as receiver of the assets and undertakings of P & T, but by the terms of the order was prohibited from taking possession of the two mills and from operating the business formerly carried on by P & T at the mills. On June 16, 2008 the court expanded the receivership to include the mills, but the receiver continued to be barred from operating the mills.

4 The Fort St. James mill sale completed August 22, 2008; the Mackenzie mill sale closed September 22, 2008. At no time from May 10 to September 22, 2008 did the receiver ever operate either mill.

5 Under the terms of the receivership order all suppliers including Westcoast were obliged to continue their contractual obligations to supply goods and/or services to Pope & Talbot as "may be required by the receiver". However since it never operated either mill, PWC never used natural gas from Westcoast.

6 On June 23, 2008 Westcoast's counsel wrote to the receiver. After noting the provision of the receivership order requiring Westcoast to continue providing the "firm service", its counsel asked for confirmation that the receiver would honour Westcoast's invoices. PWC never replied; periodic billings from Westcoast were never paid.

7 The amount outstanding from May 10 to September 30 is $147,190.01.

8 On June 30, 2008 as part of P & T's post filing creditors claim process, Westcoast filed a proof of claim seeking $44,855.78 for services for the month of April and May 1 to 9, 2008 in respect of unpaid firm service charges for the pre-receivership *CCAA* period. It also filed a contingent claim for $548,249.75 for the period May 10, 2008 to October 31, 2009 (the end of the term of the FSA) in the event the receiver sought to terminate the FSA.

9 On July 24, 2008 the receiver issued a notice of disallowance in respect of the contingent claim; it allowed the pre-receivership claim.

10 On August 18, 2008 the receiver advised Westcoast of the status of its efforts to sell both mills. It raised the possibility that if sold, the purchasers might want to take an assignment of the supply contracts with Westcoast. Sales of both have now closed; neither purchaser has requested an assignment.

11 The receiver denies liability to pay on the basis that no natural gas was ever supplied during the billing period and that it never affirmed the contract. It contends that since no natural gas was being supplied, it was not obliged to make an election to affirm or disclaim the contract until called upon to do so by Westcoast. No such demand was ever made.

12 Westcoast's response is that it was entitled to treat the contract as on foot until such time as the receiver made an election. Since the receiver never disclaimed the contract Westcoast says it was entitled to treat the contract as in good standing and that it is entitled to be paid the firm service charges. Westcoast billed periodically under the terms of the contract, but its accounts were never paid by the receiver.

13 The issue is this: on these facts, which party had a positive duty to act? Did the receiver have the obligation to assess this contract and make a decision whether to affirm or disclaim and notify Westcoast, or did Westcoast have a duty to call on the receiver to make the election and, in the absence of a response, apply to the court to force the receiver to make an election? Here neither party took such a step during the billing period. The question is: which party should bear the loss for its failure to act?

14 It is well settled law that, in the absence of an affirmation, a court appointed receiver is not bound by existing contracts made by the debtor. See *New Skeena Forest Products Inc., Re*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

15 In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication. Here there was clearly no express affirmation.

16 The question is whether, on the particular facts of this case, the receiver's silence or its August 18 letter constituted an implied affirmation.

17 Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

18 In this case, no goods were actually being supplied. While the contract did require the payment of a standby charge known as the Demand Toll, the mills were never operated and hence no natural gas ever flowed. By sending its invoices and the June 23 letter, Westcoast gave clear notice to the receiver that it expected to be paid for its standby charges. But it received no response to its letter and no payment of its invoices.

19 In the August 18 letter, PWC did not agree to pay the Demand Tolls. What it did was to advise Westcoast that sales for the two mills were pending. PWC raised the possibility that the outstanding amounts might be paid, in whole or part, by such purchasers.

20 In these circumstances can it be said that the receiver's conduct constituted affirmation of the contract?

21 In my view, on the rather unusual facts of this case where no actual goods or services were being supplied, the receiver did not come under an obligation to affirm or disclaim the contract until required to do so. In a receivership of this nature a receiver is in the position of having to assess many contracts and to decide whether to continue or terminate them.

22 If goods or services are being supplied, the receiver will be forced to complete this assessment and make its decisions within a reasonable time. But where no actual services or goods are being supplied, it is my view that the onus of taking a step rests with the other contracting party. It would have been a simple procedure for Westcoast to apply to the court for an order requiring the receiver to make its election. Other parties in this case did just that.

23 Here the receiver never gave any indication of ever wanting supply from Westcoast. It never made any payments nor indicated any intention of doing so. At best it raised the possibility that either or both of the mill purchasers might make the payment indicated to Westcoast. It was open to Westcoast to cease providing the firm transportation services under the FSA and to terminate the contract (or if in doubt to seek an order from the court permitting it to do so). It never did this and accordingly its application will be dismissed.

24 It is also clear that the receiver never had any intention of affirming this contract. That being the case it is apparent that this contract came to an end at a date prior to the date of this application. I will invite submissions from the parties as to when that effective date should be declared by this court.

Schedule A

Pope & Talbot, Inc.

MacKenzie Pulp Land Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

Application dismissed.

End of Document

TAB 8

HMANALY F§48
Houlden & Morawetz Analysis F§48

Houlden and Morawetz Bankruptcy and Insolvency Analysis
THE BANKRUPTCY AND INSOLVENCY ACT
Part IV (ss. 67-68.1)
L.W. Houlden and Geoffrey B. Morawetz

F§48 — Licences

F§48 — Licences

See ss. 67, 68, 68.1

The Supreme Court of Canada held that a commercial fishing licence constituted property within the meaning of the *BIA* and it was covered by the definition of intangibles within the meaning of the *PPSA.* The substance of the matter was a licence to participate in the fishery coupled with a proprietary interest in the fish caught according to the terms of the licence and subject to the Minister's regulation: *Saulnier (Receiver of) v. Saulnier* (2008), 2008 CarswellNS 569, 2008 CarswellNS 570 (S.C.C.). For a discussion of this case, see F§63 "*Personal Property Security Act* — (40) Licences".

This judgment clarifies earlier decisions of the Nova Scotia lower courts, which were split on the issue of whether a fishing licence constituted property: *Re Bennett* (1988), 1988 CarswellBC 515, [1988] B.C.J. No. 402, 67 C.B.R. (N.S.) 314, 24 B.C.L.R. (2d) 346 (B.C. S.C.); *Re Jenkins* (1997), 32 C.B.R. (4th) 262, 1997 CarswellNS 578 (N.S. S.C.); *Re Townsend* (2002), 32 C.B.R. (4th) 318, 2002 CarswellNS 47 (N.S.S.C.).

There is no express or regulatory prohibition against a transfer of the beneficial interest in a fishing licence issued under the *Fisheries Act,* R.S.C. 1985, c. F-14, and numerous cases have accepted the propriety of trust agreements respecting such fishing licences. It was a reasonable inference from the caselaw that the Department of Fisheries and Oceans was aware of the widespread prevalence of trust agreements relating to fishing licences and the enforceability of such agreements. In the circumstances, the chambers judge erred in declining to enforce the trust agreement: *Loder v. Citifinancial Canada Inc.* (2007), 2007 CarswellNfld 382, 38 C.B.R. (5th) 234 (N.L. C.A.)

In *Caisse populaire de Shippagan Ltée c. Ward* (2000), 21 C.B.R. (4th) 211, 2000 CarswellNB 375, 229 N.B.R. (2d) 121 592 A.P.R. 121 (Q.B.), it was held that a non-transferable fishing licence valid for only one year and which had to be renewed each year because there was no right of renewal was not property of the bankrupt. The court found that the licence only granted a privilege to the bankrupt and was non-seizable.

In *Waryk v. Bank of Montreal* (1990), 80 C.B.R. (N.S.) 44, 1990 CarswellBC 424 (B.C. S.C.), affirmed (1991), 1991 CarswellBC 453, 12 C.B.R. (3d) 233, 85 D.L.R. (4th) 514, (*sub nom. Noel & Lewis Holdings Ltd. v. Bank of Montreal*) 6 B.C.A.C. 81, 13 W.A.C. 81 (B.C. C.A.), leave to appeal to S.C.C. refused 12 C.B.R. (3d) 233n, 89 D.L.R. (4th) vii (note), 139 N.R. 160 (note), [1992] 1 S.C.R. xii (S.C.C.), a commercial fishing licence issued for a fishing vessel but not issued to a company or individual, was held not to constitute a property interest.

In *Re Dugas Estate* (2003), 43 C.B.R. (4th) 123, 2003 CarswellNB 249, 2003 NBQB 220 (N.B. Q.B.) (stay by virtue of bankrupt's appeal cancelled and motion by trustee for security for costs dismissed 43 C.B.R. (4th) 127), the court held that a licence to fish crab was property of the bankrupt and that all revenues earned by the bankrupt from his fishing activities should be paid to the trustee from which the trustee would pay all expenses of *bona fide* arm's length transactions arising out of ordinary course fishing activities of the bankrupt. The trustee was directed to prepare a report of all revenues and expenses and then to proceed according to the provisions of s. 68 of the *Act.*

If, prior to bankruptcy, the bankrupt has granted a licence to market a film that it was producing, and the trustee completes the film, the trustee will be subject to the terms of the licence and must comply with it in marketing the film: *Re Erin Features No. 1 Ltd.* (1991), 8 C.B.R. (3d) 205, 1991 CarswellBC 498 (B.C. S.C.). See articles "Licenses and the Effects of Bankruptcy and Insolvency Law on the Licensee" by Mario J. Forte and Amanda C. Chester, 13 Comm. Insol. R. 25; "The Fate of a Technology License When the Licensor Becomes Insolvent" by Elyse Rosen, 20 Nat. Insol. Rev. 32.

A waste management licence owned by the bankrupt that is transferable and has value constitutes property of the bankrupt: *Re Celtic Extraction Ltd.,* [2000] 2 W.L.R. 991 (C.A.).

In *Re Rogers* (2001), 42 C.B.R. (4th) 310, 2001 CarswellAlta 1887, 2001 ABQB 551 (Alta. Q.B.), the City of Edmonton retained ownership of taxi cab licences but permitted taxi cab owners (identified by licence) to operate taxis. The permission to operate a taxi could only be transferred with the permission of the municipality. A transferee would pay a substantial amount of money for a permitted transfer. In *Rogers,* the bankrupt had permission to operate a taxi. It was held that the right to operate a taxi was an asset of the bankrupt, subject to any exemption to which the bankrupt might be entitled.

If a licence owned by the bankrupt can only be terminated in a particular mode, that mode must be followed for a valid termination of the licence: *Re Kinlin* (2000), 21 C.B.R. (4th) 287, 2000 CarswellOnt 4713 (Ont. Gen. Div.).

The Ontario Superior Court of Justice held that a contractual licence confers no interest or property in the thing and thus the presence of an exclusive licence did not preclude the receiver from selling the underlying property. Morawetz J. held that the process by which the property was transferred was conducted in accordance with the provisions of s. 47(1) of the *BIA* and s. 101 of the *Courts of Justice Act* and at best, the applicant had an exclusive licence to use the technology. However, even if established, a licence agreement only creates a contractual agreement as between the parties, and even if the grant to market and sell were construed as a traditional licence, it did not acquire a property interest in such a right. The remedy, if any, was contractual in nature and the exercise of that remedy had been impacted by the approval and vesting order, which was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. The objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions. Here, the applicant took no steps after becoming aware of the approval and vesting order to set aside or vary the order and did not appeal the order: *Royal Bank v. Body Blue Inc.* (2008), 2008 CarswellOnt 2445, 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

Where a bankrupt did not list a commercial fishing licence as an asset, a creditor that had loaned the bankrupt money to buy the licence sought leave under s. 38 to take proceedings on the debt and ultimately to force the sale of the fishing licence. The trustee took the position that the creditor had not filed a proof of claim and thus was not a creditor within the meaning of the *BIA* for the purpose of making an application under s. 38. Handrigan J. of the Newfoundland and Labrador Supreme Court found that there was evidence to establish that the trustee had ample notice of the claim even though the creditor did not file a formal proof of claim. The court held that it has discretion to allow creditors to prove claims at any time during the administration and to share in assets still to be distributed, regardless of the delay, subject to the imposition of conditions where appropriate and provided no injustice is done to other creditors. The fact that the bankrupt and trustee had been discharged did not prevent the court from exercising its discretion under s. 38. Justice Handrigan was satisfied that applicant was a creditor for the purposes of s. 38, that it had requested the trustee to take the proceedings, and that commercial fishing licences confer "property rights" that a trustee can take control of and sell for the benefit of the estate. The court observed that the Department of Fisheries will issue new licences if it receives the appropriate documentation relinquishing and requesting reissuance of fishing licences and the designated licence holder meets its criteria. Here, the secured creditor consented to the creditor's s. 38 procedure. The court granted an order authorizing the creditor to take the proceeding against the bankrupt as it considered appropriate, whether in contract, in debt, or otherwise for the money it claims he owed: *Re Beothic Fish Processors Ltd.* (2009), 2009 CarswellNfld 29, 50 C.B.R. (5th) 299, 2009 NLTD 19 (N.L. T.D.).

The Ontario Superior Court of Justice granted leave to the Crown to initiate the process of cancelling a sustainable forest licence ("SFL") held by the debtor in receivership. The court noted that to the extent that the security purported to cover the SFL, s. 35(1) of the *Crown Forest Sustainability Act* (*CFSA*) provides that a charge or other disposition of a forest resource licence was not valid without the written consent of the Minister. In this case, the consent of the Minister was not obtained. The court granted leave to the Crown to initiate the process of cancelling the SFL on the basis that the Ministry had the authority and basis to terminate the licence and the receiver acknowledged that it did not have the authority to transfer the licence. Further, the SFL had no real value in the absence of a wood supply: *G.E. Canada Equipment Financing G.P. v. Atikokan Forest Products Ltd.* (2011), 2011 CarswellOnt 5826, 79 C.B.R. (5th) 278 , 2011 ONSC 2992 (Ont. S.C.J.).

See Sean Collins and Jeffrey Carhart, "E-Commerce in Transition: Some Insolvency Issues", by 13 Comm. Insol. R. 68; Michael Geist,"When Dot-Coms Die. The E-Commerce Challenge to Canada's Bankruptcy Laws", 37 C.B.L.J. 34; Jacob Ziegel, "The Supreme Court of Canada and Security Interests in Regulated Licences: Still No Closure" (2009), 55 C.B.R. (5th) 159.

The Nova Scotia Court of Appeal allowed the appeal from the decision of the motions judge. At issue was whether a "fishing licence" includes a quota and whether a reference to a "fishing licence" in a financing statement was sufficient to capture the licence and the quota. The Court of Appeal held that the appellants had a valid security interest against the licence which included the quota: *Nova Scotia (Minister of Economic and Rural Development and Tourism) v. D'Eon Fisheries Ltd. Estate (Trustee of)*, 2016 CarswellNS 316, 35 C.B.R. (6th) 223, 2016 NSCA 30 (N.S. C.A.). For a discussion of this judgment, see F§63(56) "Errors in Description of Chattels in Financing Statement".

The Saskatchewan Court of Queen's Bench held that a receiver was entitled to sell the assets of the debtor free and clear of any claim of the licensor pursuant to its licence with the debtor. The claim of the licensor, if any, was against the sale proceeds: *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.*, 2016 CarswellSask 607, 2016 SKQB 306 (Sask. Q.B.).

TAB 9

2007 NLCA 78
Newfoundland and Labrador Court of Appeal

Loder v. Citifinancial Canada Inc.

2007 CarswellNfld 382, 2007 NLCA 78, 163 A.C.W.S. (3d) 408, 272 Nfld. & P.E.I.R. 323, 290 D.L.R. (4th) 155, 37 E.T.R. (3d) 35, 38 C.B.R. (5th) 234, 830 A.P.R. 323

Paul Loder (Appellant) and Citifinancial Canada Inc. (First Respondent) and Business Investment Corp. (Second Respondent) and N.E. Parrott Surveys Ltd. (Third Respondent) and Rex Mangrove & Loretta Mangrove (Fourth Respondents) and David W. Jones in his capacity as High Sheriff of Newfoundland & Labrador (Fifth Respondent)

B.G. Welsh, M. Rowe, K.J. Mercer JJ.A.

Heard: September 21, 2007
Judgment: December 14, 2007 *
Docket: 06/09

Proceedings: reversing *Loder v. Citifinancial Canada Inc.* (2005), 2005 CarswellNfld 361, 2006 NLTD 8, 773 A.P.R. 262, 256 Nfld. & P.E.I.R. 262 (N.L. T.D.)

Counsel: Wayne White for Appellant
No one for Respondents

Subject: Natural Resources; Public; Corporate and Commercial; Insolvency; Estates and Trusts
Related Abridgment Classifications
Natural resources
I Fish and wildlife
I.4 Licences
I.4.c Miscellaneous
Headnote
Natural resources --- Fish and wildlife — Licences — Miscellaneous
In 2005 appellant L entered into agreement of purchase and sale to purchase fishing licence from G, a resident of Labrador — Department of Fisheries and Oceans ("DFO") rules provided that registered licence holder be core fisherman who could hold only one licence in his or her name at one time — Also, rules required that licence holder be resident of Labrador for minimum of three years — L was not resident of Labrador and already had fishing licence in his name — M, who was core fisherman and resident of Labrador, agreed to hold licence as trustee for L, and M specifically acknowledged that he had no beneficial interest in licence — Licence was transferred on DFO records from G to M and L filed registration regarding licence at PPS registry listing M as debtor and L as secured party — General collateral was described as M's fishing enterprise including licence and proceeds of all fish and seafood derived therefrom — Licence included shrimp quota which was fished collectively with other quotas by company and funds attributable to L's licence were forwarded by company to High Sheriff due to judgments registered against M by some of respondents — L objected to proposed disbursement of funds to respondents and applied for order to determine entitlement to funds — Chambers judge determined that trust was effected solely to circumvent regulations and refused to recognize it so that L was not entitled to order that sheriff release funds to him — L appealed — Appeal allowed — There is no express statutory or regulatory prohibition against transfer of beneficial interest in fishing licence — Registered holder of DFO fishing licence can bind himself contractually respecting not only disposition of licence but ongoing benefits therefrom — Cases supported reasonable inference that DFO was aware of widespread prevalence of trust agreements relating to fishing

licences and enforceability of such agreements — In circumstances, chambers judge erred in declining to enforce trust agreement between L and M and those claiming under M — Accordingly, L was entitled to funds held by high sheriff.

In 2005 appellant L entered into an agreement of purchase and sale to purchase a fishing licence from G, a resident of Labrador. The Department of Fisheries and Oceans ("DFO") rules provided that a registered licence holder be a core fisherman and could hold only one licence in his or her name at one time. Also, the rules required that at the time of the purchase a licence holder be a resident of Labrador for a minimum of three years.

L was not a resident of Labrador and already had a fishing licence in his name. M, who was a core fisherman and a resident of Labrador, agreed to hold the licence as trustee for L, and M specifically acknowledged that he had no beneficial interest in the licence. The licence was transferred on DFO records from G to M and L filed a registration regarding the licence at the PPS registry listing M as debtor and L as the secured party. The general collateral was described as M's fishing enterprise including the licence and the proceeds of all fish and seafood derived therefrom.

The licence included a shrimp quota which was fished collectively with other quotas by a company and the funds attributable to L's licence were forwarded to the high sheriff due to judgments registered against M by some of the respondents.

L objected to the proposed disbursement of funds to the respondents and applied for an order to determine entitlement to the funds. The chambers judge determined that the trust was effected solely to circumvent the regulations and refused to recognize it so that L was not entitled to an order that the sheriff release the funds to him. L appealed

Held: The appeal was allowed.

Per K.J. Mercer J.A. (B.G. Welsh, J.A. concurring): There is no express statutory or regulatory prohibition against a transfer of the beneficial interest in a fishing licence. A registered holder of a DFO fishing licence can bind himself contractually respecting not only the disposition of the licence but the ongoing benefits therefrom. Case law supports a reasonable inference that the DFO was aware of the widespread prevalence of trust agreements relating to fishing licences and the enforceability of such agreements. In the circumstances, the chambers judge erred in declining to enforce the trust agreement between L and M and those claiming under M. Accordingly, L was entitled to the funds held by the high sheriff.

Per Rowe J.A. (concurring in the result): Trust agreements like the one given effect to in this case evade and thereby undermine fisheries policies such as fleet separation and adjacency, and create significant anomalies in the economic regulation of the fishery. At some point those anomalies may be so great that the courts should apply the general rule against giving effect to those agreements that are contrary to public policy.

Table of Authorities

Cases considered by *K.J. Mercer J.A.*:

Baines v. Deluney (2002), 211 Nfld. & P.E.I.R. 344, 633 A.P.R. 344, 2002 CarswellNfld 45 (Nfld. T.D.) — considered

British Columbia Packers Ltd. v. Sparrow (1989), 35 B.C.L.R. (2d) 334, [1989] 4 C.N.L.R. 63, 1989 CarswellBC 46 (B.C. C.A.) — considered

Cabot v. Hicks (1999), 1999 CarswellNfld 62, 176 Nfld. & P.E.I.R. 48, 540 A.P.R. 48 (Nfld. T.D.) — considered

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans) (1997), 142 D.L.R. (4th) 193, 43 Admin. L.R. (2d) 1, 1997 CarswellNat 10, 1997 CarswellNat 11, 206 N.R. 363, 31 C.C.L.T. (2d) 236, [1997] 1 S.C.R. 12 (S.C.C.) — referred to

Doucette v. Jones (2005), 291 N.B.R. (2d) 38, 758 A.P.R. 38, 15 E.T.R. (3d) 98, 2005 NBQB 144, 2005 CarswellNB 196 (N.B. Q.B.) — referred to

Goulden v. Smith (2003), 2003 NSSC 215, 2003 CarswellNS 393 (N.S. S.C.) — referred to

Green v. Harnum (2006), 19 B.L.R. (4th) 236, 2006 NLCA 46, 2006 CarswellNfld 246, 781 A.P.R. 141, 259 Nfld. & P.E.I.R. 141 (N.L. C.A.) — considered

Green v. Harnum (2007), 269 Nfld. & P.E.I.R. 97, 817 A.P.R. 97, 2007 CarswellNfld 275, 2007 NLCA 57, 34 B.L.R. (4th) 1, 285 D.L.R. (4th) 340 (N.L. C.A.) — considered

R. Baker Fisheries Ltd. v. Widrig (1998), 1998 CarswellNS 158, [1998] 11 C.C.L. 9361 (N.S. S.C.) — referred to

Theriault v. Corkum (1993), 121 N.S.R. (2d) 99, 335 A.P.R. 99, 1993 CarswellNS 485 (N.S. C.A.) — considered

Statutes considered:

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

Judgment Enforcement Act, S.N. 1996, c. J-1.1

Generally — referred to

Regulations considered:

Fisheries Act, R.S.C. 1985, c. F-14

Fishery (General) Regulations, SOR/93-53

Generally — referred to

APPEAL by purchaser of fishing licence from judgment reported at *Loder v. Citifinancial Canada Inc.* (2005), 2005 CarswellNfld 361, 2006 NLTD 8, 773 A.P.R. 262, 256 Nfld. & P.E.I.R. 262 (N.L. T.D.), refusing to recognize trust under which licence was held.

***K.J. Mercer J.A.*:**

1 This appeal concerns the enforceability of a trust agreement respecting a fishing license issued by the Department of Fisheries and Oceans (DFO) under the *Fisheries Act*, R.S.C. 1985, c.F-14. The dispute arose over the distribution of funds derived from the fishing license as between execution creditors of the trustee and the beneficiary of the trust agreement.

Facts

2 In February, 2005 the appellant (Loder) entered into an agreement of purchase and sale to purchase a fishing license (License) from Reginald Green, a resident of Labrador. The License was restricted to NAFO fishing area 2J, an area off Labrador.

3 DFO rules and regulations governing the License provided, among other things, that a registered license holder be a core fisherman and that a fisherman could hold only one license in his or her name. As the License was for area 2J, DFO further required that the license holder be a resident of Labrador for a minimum of three years. At the time of the above transaction Loder already had a fishing license registered in his name and was not a resident of Labrador.

4 The Fourth Respondent, Rex Mangrove (Mangrove), was a core fisherman who met the Labrador residency requirement. He agreed to hold the License as trustee for Loder under a trust agreement of March 24, 2005. Mangrove's spouse, Loretta, the other Fourth Respondent, also party to the trust agreement, specifically acknowledged that her husband had no beneficial interest in the License.

5 The only benefit to Mangrove stated on the face of the trust agreement was the nominal consideration of $1.00 per year. Appended to the trust agreement was a letter signed by Mangrove addressed to DFO advising of the trust and of an irrevocable enduring power of attorney in favour of Loder covering, among other things, any transfer of the License.

6 Following execution of the trust agreement, the License was transferred on the DFO records from Reginald Green to Mangrove on May 26, 2005.

7 Shortly thereafter, on May 30, 2005, Loder filed a registration regarding the License at the Personal Property Security Registry. The verification statement filed listed Mangrove as the debtor, Loder as the secured party, and described the general collateral as comprising Mangrove's fishing enterprise including the License and the proceeds of all fish and seafood derived therefrom.

8 The License included a northern shrimp quota for 2005 which was fished collectively with other such quotas by the Labrador Fisherman's Shrimp Union Co. Ltd. That company was obligated to pay each license holder his or her proper proportion of the proceeds from sale of the shrimp. Pursuant to that obligation, that company, in August 2005, had funds attributable to the License's shrimp quota. These funds were forwarded to the Fifth Respondent (High Sheriff), because of judgments registered against Mangrove. The First, Second and Third Respondents, each held a Judgment Enforcement registration against Mangrove.

9 Loder objected to the proposed disbursement of the funds by the High Sheriff to the First, Second and Third Respondents. In accordance with the *Judgment Enforcement Act*, SNL 1996, c. J. 1-1 Loder applied to the Supreme Court, Trial Division for an order determining entitlement to the funds paid by the Labrador Fisherman's Shrimp Union Co. Ltd. to the High Sheriff.

Proceedings before the Chambers Judge

10 On the application the High Sheriff's position was:

> That while, on the face of the record and the information presented by the solicitor for the Applicant, it is apparent that Paul Loder has a legal and a beneficial interest in the fishing license issued in Rex Mangrove's name and the subject fishing operation, no satisfactory explanation, in my opinion, has been offered: as to the reason why Rex Mangrove and his wife, Loretta Mangrove entered into the agreement and signed the documents referred to in the Exhibit 3 to this my Affidavit; and as to Rex Mangrove's economic and business relationship with Paul Loder; so as to assuage my concern that Rex Mangrove has no interest in the money held at my Office in connection with this matter.

The First, Second and Third Respondents chose not to be represented on the application. I note that their judgments against Mangrove were relatively minor being $230.81, $1,348.25 and $692.65 respectively.

11 DFO was not a party to the application and there was no evidence before the Chambers Judge whether it had received the letter from Mangrove, referenced in para. 5 above, advising of the trust agreement.

Decision of Chambers Judge

12 In his decision — *Loder v. Citifinancial Canada Inc.* (2005), 2006 NLTD 8 (N.L. T.D.) — the Chambers Judge summarized his conclusion as follows:

> The court found that the trust was effected solely to circumvent the regulations and accordingly refused to recognize it. Loder was not entitled to an order that the Sheriff release the funds to him.

13 The Chambers Judge accepted that trust agreements respecting fishing licenses have been enforced by the courts. In his opinion however the enforceability of such trust agreements had been upheld simply for the transfer of fishing licenses:

> [18] ... These authorities indicate that trust agreements have been respected by the courts and have been considered as enforceable when it comes to the transfer of fishing licenses. These trust arrangements were necessitated by DFO policy which says that licenses are issued in the discretion of the minister and thus an entitlement to a license cannot be transferred as of right. Be that as it may, DFO, I think, has clearly accepted this sort of private arrangement between fishermen when it comes to dealing with transfers of the licenses.
>
> . . . . .
>
> [25] The cases in which the authorities have upheld these trust arrangements as being enforceable have recognized the trust as being used simply to effect transfers of fishing enterprises and really not to get around regulations; they are simply to accommodate the fact that licenses are issued as a matter of discretion and not as of right. The use of the trust also recognizes that some time may lapse between the transfer of the enterprise and the re-issuance of the license. ...

14 The Chambers Judge considered that the situation in this case was not of that nature as the purpose of the trust agreement between Loder and Mangrove "is not to facilitate a transfer but rather to enable Mr. Loder to get the continuing economic benefit of the license". (para. 20) He noted that Loder could not hold the License (for the reasons stated in para. 3 above) and found that the whole reason for the trust agreement was to "deliberately and continuously circumvent the license holding requirements of DFO". (para. 23) Acknowledging that Loder had acted upon legal advice and had not attempted to conceal his purpose the Chambers Judge concluded:

> [25] ... given the purposes for which the trust was set up, I do not think it would be appropriate for the court, for the purposes of this proceeding and between these parties, to respect or give effect to the trust. Simply put, the court should not lend its aid to an arrangement with no other purpose than to facilitate a result which is clearly contrary to the spirit and intent of the law. ...

Accordingly Loder's application was dismissed and the High Sheriff was authorized to disburse the funds to the First, Second and Third Respondents. Loder appeals the decision of the Chambers Judge.

Analysis

15 The Chambers Judge stated that the authorities limited the enforceability of trust agreements respecting fishing licenses to cases where the trust was created only to effect a transfer of the fishing license. On that basis he declined to enforce the trust agreement in this case as he considered it to have been designed solely to circumvent licensing requirements or regulations.

16 With respect, the authorities do not support the restrictive view stated by the Chambers Judge. In numerous cases courts across Canada, including those in this province, have accepted the propriety of trust agreements respecting fishing licenses issued by DFO. In *British Columbia Packers Ltd. v. Sparrow* (1989), 35 B.C.L.R. (2d) 334 (B.C. C.A.) the agreement in question concerned a fishing license intended for use by an Indian only. The object of the agreement was to enable use of the license by a non-Indian. The Court held that, in the absence of express statutory or regulatory prohibition, the transfer of the beneficial interest in the fishing license was enforceable:

> [15] ... The object of the agreement was the transfer of all beneficial interest in the herring license to the respondent, Sparrow, who was to remain a bare trustee holding the legal title. It would be an unprofitable elaboration to do more than say that one can search the statute and regulations and find no prohibition of transfer of beneficial interest in a herring license. The restrictions apply only to dealing with the legal title.
>
> p. 340

17 In *Theriault v. Corkum* (1993), 121 N.S.R. (2d) 99 (N.S. C.A.) a registered license holder agreed to sell his fishing vessel and to hold the DFO fishing license in trust pending the transfer of the vessel. The particular regulations cited in that dispute were held not to prohibit temporary trust agreements that are necessary to facilitate the transfer of fishing vessels. Though it may be argued that the ratio of that case can be restricted, other points of the decision are noteworthy. The license was fished by the beneficial owner for an extended period. Complications arose and the registered holder sought to have the agreement declared illegal. Hallett J.A. for the Court dismissed the appeal of the registered license holder stating:

> 20 The decision of the British Columbia Court of Appeal in *B.C. Packers Ltd. v. Sparrow* (1989), 35 B.C.L.R. (2d) 334 (B.C.C.A.) would have indicated to counsel who prepared the agreements respecting the sale of Sea Track that under similar regulations on the West Coast the trust agreements, whereby the beneficial interest in a licence is held by the vendor in trust for another, are not illegal and that in the absence of an expressed statutory prohibition the beneficial interest in a license is transferable. The policy of the Department recognizes that licenses are in effect transferable (Policy No. 17). The learned arbitrator appears to have accepted the evidence before him that trust arrangements are widespread in the fishing industry and that the principal concern of the Department is to ensure compliance with regulatory requirements by the registered license holder. It would seem that business efficacy necessitates there be some trust arrangement with respect to the holding of licences until they can be transferred if sales of fishing boats are to be facilitated.
>
> 21 Having participated as a party to the contract respecting the sale and transfer of the boat and the license associated with it, and after being paid $400,000 the appellant, Theriault, two and a half years later took the position that the contract should be declared illegal. The learned arbitrator did not accept his arguments; the appellant then applied

> to the court to review and set aside the award of the arbitrator. That application was refused which resulted in this appeal.
>
> 22 The learned arbitrator was correct in finding that the contract entered into between the parties was not illegal. Clearly the policy of the Department permits the reissuance of a license to a new license holder. The Department is well aware of the trust agreements used in the fishery to facilitate the ownership and transfer of boats between fishermen and the evidence of Mr. Kimber was that officials pay no attention to the private agreements between fishermen.

18 In *Cabot v. Hicks* (1999), 176 Nfld. & P.E.I.R. 48 (Nfld. T.D.) the trial judge found that the litigants had entered into a partnership agreement for a fishing venture. The DFO fishing license underlying that venture was registered in the name of one of the partners in order to comply with the requirement that such licenses be held by an individual. The trial judge found that: "In fact the license was held on behalf of and in trust for the partnership". (para. 42) Citing *Theriault* and *British Columbia Packers* the trial judge held that such private agreements respecting fishing licenses are enforceable by the courts.

> [47] I have been told of no expressed or implied statutory prohibitions in the regulations which would prevent the present ground-fish licence and its supplementary crab licence being held as described by Mr. Cabot. Furthermore despite the defendant's contention that such fishing licences are purely personal and renewable yearly at the discretion of the Minister, I am of the view that private agreements respecting such licences are enforceable by the courts. It is an accepted fact that because new licences are not being issued and have not been issued for some years, existing licences have very considerable value and can be transferred, i.e. bought and sold, as was the case when the present licence was bought from Mr. Hudson.

As the registered license holder had died the license had to be sold. The trial judge determined that:

> [48] The beneficial interest in the license having been purchased on behalf of an equal partnership, it follows that the proceeds of the sale of the license should be divided equally after the payment of debts.

It was further ordered that the partner who was not the registered licensee was entitled to an equal share of the net proceeds from fishing activities under the license. In reaching the foregoing conclusion the trial judge explicitly applied the concepts of constructive trust and unjust enrichment.

19 Likewise in *Baines v. Deluney* (2002), 211 Nfld. & P.E.I.R. 344 (Nfld. T.D.) trust principles were enforced. A DFO fishing license was held to have been leased, not sold, to the registered license holder. The trial judge, citing *Cabot v. Hicks*, concluded:

> [44] ... The law is clear that in relation to these kinds of licenses, where a lease is involved, there is created a constructive trust. Mr. Deluney may have the legal title to the impugned license in accordance with the federal fishery regulations, however, the beneficial title is determined by the contractual relationship existing between the parties. ...
>
> [45] In relation to the license, the Defendant was a trustee holding it in trust for the Plaintiff ...

Though control of the transfer of the fishing license was a central feature of the contract in *Baines v. Deluney*, that contract further required an accounting and division of the proceeds of fishing the license and the trial judge so ordered.

20 In *Green v. Harnum*, 2006 NLCA 46 (N.L. C.A.) this Court upheld a trial judge's finding that a DFO fishing license, registered in the name of one party, was an asset of a fishing enterprise partnership. In a subsequent related decision — 2007 NLCA 57 (N.L. C.A.) — this Court, approving *Cabot v. Hicks*, upheld the equal division of the proceeds of sale of the fishing license and required the registered holder of the fishing license to account for the proceeds derived from the fishing carried out under the license.

21 Clearly the foregoing decisions, including those of this Court in *Green v. Harnum*, confirm that the registered holder of a DFO fishing license can bind himself or herself contractually respecting not only disposition of the license but the ongoing economic benefits therefrom, and that conversely non-license holders can enforce agreements with license holders in that regard. As noted in *British Columbia Packers* there is no express statutory or regulatory prohibition against the transfer of a beneficial interest in a fishing license.

22 It should be noted that DFO was not a party to this proceeding and accordingly there were no representations on its behalf respecting any policy concerns over trust agreements respecting fishing licenses. I note that comments in various cases support the reasonable inference that DFO is aware of the widespread prevalence of trust agreements relating to fishing licenses and of the enforceability of such agreements. See *Baines v. Deluney* at para. 29; *Doucette v. Jones* (2005), 291 N.B.R. (2d) 38 (N.B. Q.B.) at paras. 10-13; *Theriault v. Corkum* at para. 12; *Goulden v. Smith*, 2003 NSSC 215 (N.S. S.C.) at para. 8; and *R. Baker Fisheries Ltd. v. Widrig*, [1998] N.S.J. No. 158 (N.S. S.C.) at para. 9. The broad discretionary authority of DFO and its Minister pursuant to the *Fisheries Act* and the regulations thereunder is well recognized — *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.). The circumvention of statutory policy objectives through trust agreements is a matter best left to DFO which can address any problems in a comprehensive manner.

23 In this case there is no express statutory or regulatory prohibition against the creation of beneficial interests in fishing licenses; trust agreements respecting fishing licenses are widespread; DFO is aware of their prevalence, and the record did not include any representations from DFO. In these circumstances the Chambers Judge erred in declining to enforce the trust agreement as between Loder and Mangrove and those claiming under Mangrove.

24 I would accordingly allow the appeal and order that Loder is entitled to the funds held by the High Sheriff.

***B.G. Welsh J.A.*:**

I concur.

***M. Rowe J.A.*:**

25 I am in accord with the general line of reasoning and the result reached by my brother Mercer. I share his view (in para. 22) that, "The circumvention of statutory policy objectives through trust agreements is a matter best left to DFO which can address any problems in a comprehensive manner." However I would go further.

26 Trust agreements, like that given effect in this case, evade and thereby undermine fisheries policies such as fleet separation and adjacency. That is their purpose. Ordinarily, the courts do not give effect to agreements that are contrary to public policy. However, repeatedly in argument we were told that to fail to give effect to such arrangements would cause chaos in the industry. Fisheries & Oceans was not present to confirm or deny this. Thus far, the courts have given effect to arrangements that have created significant anomalies in economic regulation of the fishery. At some point those anomalies may be so great that the courts should apply the general rule against giving effect to the agreements that are contrary to public policy.

Appeal allowed.

Footnotes

* A corrigendum issued by the court on March 11, 2008 as been incorporated herein.

TAB 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: Burke v. Hudson's Bay Co. | 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, 268 O.A.C. 1, 84 C.C.P.B. 1, 60 E.T.R. (3d) 1, 406 N.R. 109, 193 A.C.W.S. (3d) 1332, J.E. 2010-1818, D.T.E. 2010T-674, [2010] 2 S.C.R. 273, [2010] S.J. No. 34, 324 D.L.R. (4th) 498, 2010 C.E.B. & P.G.R. 8408 (headnote only) | (S.C.C., Oct 7, 2010)

2006 SCC 28
Supreme Court of Canada

Buschau v. Rogers Communications Inc.

2006 CarswellBC 1530, 2006 CarswellBC 1531, 2006 SCC 28, [2004] S.C.C.A. No. 350, [2006] 1 S.C.R. 973, [2006] 8 W.W.R. 583, [2006] B.C.W.L.D. 4053, [2006] B.C.W.L.D. 4123, [2006] B.C.W.L.D. 4124, [2006] B.C.W.L.D. 4201, [2006] B.C.W.L.D. 4202, [2006] B.C.W.L.D. 4203, [2006] S.C.J. No. 28, 226 B.C.A.C. 25, 269 D.L.R. (4th) 1, 26 E.T.R. (3d) 1, 349 N.R. 324, 373 W.A.C. 25, 52 C.C.P.B. 161, 54 B.C.L.R. (4th) 1, J.E. 2006-1309

Rogers Communications Incorporated (Appellant) v. Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and National Trust Company (Respondents)

National Trust Company (Appellant) v. Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and Rogers Communications Incorporated (Respondents)

McLachlin C.J.C., Bastarache, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: November 15, 2005
Judgment: June 22, 2006 *
Docket: 30462

Proceedings: reversing *Buschau v. Rogers Communications Inc.* (2004), 24 B.C.L.R. (4th) 85, 6 E.T.R. (3d) 236, [2004] 5 W.W.R. 10, 39 C.C.P.B. 247, 193 B.C.A.C. 258, 316 W.A.C. 258, 2004 BCCA 80, 2004 CarswellBC 325, 236 D.L.R. (4th) 18, C.E.B. & P.G.R. 8090 (B.C. C.A.); additional reasons at *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279, 9 E.T.R. (3d) 221, 27 B.C.L.R. (4th) 17, [2004] 7 W.W.R. 218, 239 D.L.R. (4th) 610, 40 C.C.P.B. 199, 197 B.C.A.C. 279, 2004 BCCA 282, 2004 CarswellBC 1095, C.E.B. & P.G.R. 8101 (B.C. C.A.); further additional reasons at *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279 at 287, [2005] 2 W.W.R. 67, 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, 40 C.C.P.B. 209, 197 B.C.A.C. 279 at 287, 2004 BCCA 369, 2004 CarswellBC 1450 (B.C. C.A.); reversing *Buschau v. Rogers Communications Inc.* (2003), 2003 BCSC 683, 2003 CarswellBC 1042, 35 C.C.P.B. 199, [2003] 7 W.W.R. 341, C.E.B. & P.G.R. 8499 (note), 13 B.C.L.R. (4th) 385 (B.C. S.C.); and reversing *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279, 9 E.T.R. (3d) 221, 27 B.C.L.R. (4th) 17, [2004] 7 W.W.R. 218, 239 D.L.R. (4th) 610, 40 C.C.P.B. 199, 197 B.C.A.C. 279, 2004 BCCA 282, 2004 CarswellBC 1095, C.E.B. & P.G.R. 8101 (B.C. C.A.); and affirming *Buschau v. Rogers Communications Inc.* (2004), 323 W.A.C. 279 at 287, [2005] 2 W.W.R. 67, 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, 40 C.C.P.B. 209, 197 B.C.A.C. 279 at 287, 2004 BCCA 369, 2004 CarswellBC 1450 (B.C. C.A.)

Counsel: Irwin G. Nathanson, Q.C., Stephen R. Schachter, Q.C. for Appellant/Respondent, Rogers Communications Inc.
Jennifer J. Lynch, Joanne Lysyk for Appellant/Respondent, National Trust Co.
John N. Laxton, Q.C., Robert D. Gibbens for Respondents, Sandra Buschau et al.

Subject: Estates and Trusts; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.b Successful party deprived of costs
XXIV.6.b.ii Grounds
XXIV.6.b.ii.B Nominal success
Estates and trusts

II Trusts
II.2 Express trust
II.2.g Termination
II.2.g.i General principles
Estates and trusts
II Trusts
II.2 Express trust
II.2.g Termination
II.2.g.ii Rule in Saunders v. Vautier
Pensions
I Private pension plans
I.1 Administration of pension plans
I.1.j Designation of beneficiaries
I.1.j.i General principles
Pensions
I Private pension plans
I.5 Practice in pension actions
I.5.a Jurisdiction
Pensions
I Private pension plans
I.5 Practice in pension actions
I.5.d Costs

Headnote

Estates and trusts --- Trusts — Express trust — Termination — Rule in Saunders v. Vautier

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier — Pension trust was not stand-alone instrument — Termination of plan in accordance with prevailing PBSA was condition precedent to distribution — Superintendent's power under s. 29(2)(a) of PBSA becomes almost duty when employees ask him to act — Superintendent could review all circumstances and decide whether facts warranted winding-up of part of merged plan that related to pension plan, which would have effect of terminating trust.

Estates and trusts --- Trusts — Express trust — Termination — General principles

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier — Pension trust was not stand-alone instrument — Termination of plan in accordance with prevailing PBSA was condition precedent to distribution — Superintendent's power under s. 29(2)(a) of PBSA becomes almost duty when employees ask him to act — Superintendent could review all circumstances and decide whether facts warranted winding-up of part of merged plan that related to pension plan, which would have effect of terminating trust.

Pensions --- Administration of pension plans — Designation of beneficiaries — General principles

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier.

Pensions --- Practice in pension actions — Jurisdiction

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Termination was dealt with explicitly in Pension Benefits Standards Act, 1985 (PBSA) — Pension plans were heavily regulated — To extent that it provides means to reach distribution stage, PBSA prevailed over traditional rule in Saunders v. Vautier.

Pensions --- Practice in pension actions — Costs

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Members were not required to pay R Inc.'s costs — R Inc. was ordered to pay trustee's costs — Order of Court of Appeal was set aside with exception of order as to costs.

Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Nominal success

Pension plan was established in 1974 for employees of P Ltd. — P Ltd. was acquired by R Inc. in 1980 — Pension plan was closed to future employees in July 1984 — Pension plan was amended to merge it retroactively with four other pension plans — Pension plan members initiated litigation against R Inc. — Trial judge dismissed claim on most issues — Members appealed — Court of Appeal concluded that merger of plans was valid but did not affect existence of trust as separate trust — Members were at liberty to institute proceedings to terminate trust based on rule in Saunders v. Vautier or on Trust and Settlement Variation Act to extent that either might be applicable — Plan members applied in 2001 for order terminating plan — Termination was ordered — Court of Appeal found that rule in Saunders v. Vautier could operate to terminate trust — R Inc. and trustee appealed — Appeal allowed — Rule in Saunders v. Vautier did not apply — Members were not required to pay R Inc.'s costs — R Inc. was ordered to pay trustee's costs — Order of Court of Appeal was set aside with exception of order as to costs.

Successions et fiducies --- Fiducies — Fiducie explicite — Cessation — Règle de Saunders v. Vautier

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier — Fiducie de retraite n'était pas un instrument distinct — Cessation du régime conformément à la LNPP était une condition préalable à la répartition — Pouvoir conféré au Surintendant par l'art. 29(2)a) LNPP devient presque une obligation lorsque les employés lui demandent d'agir — Surintendant peut examiner les circonstances et décider si les faits justifiaient la liquidation d'une partie du régime fusionné concernant le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Successions et fiducies --- Fiducies — Fiducie explicite — Cessation — Principes généraux

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier — Fiducie de retraite n'était pas un instrument distinct — Cessation du régime conformément à la LNPP était une condition préalable à la répartition — Pouvoir conféré au Surintendant par l'art. 29(2)a) LNPP devient presque une obligation lorsque les employés lui demandent d'agir — Surintendant peut examiner les circonstances et décider si les faits justifiaient la liquidation d'une partie du régime fusionné concernant le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Régimes de retraite --- Administration des régimes de retraite — Désignation des bénéficiaires — Principes généraux

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier.

Régimes de retraite --- Procédure dans le cadre d'actions relatives à des régimes de retraite — Compétence

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Loi de 1985 sur les normes de prestation de pension (LNPP) traitait expressément de la cessation du régime — Régimes de retraite étaient fortement réglementés — Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la LNPP l'emportait sur la règle traditionnelle de Saunders v. Vautier.

Régimes de retraite --- Procédure dans le cadre d'actions relatives à des régimes de retraite — Frais

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Participants n'avaient pas à payer les dépens de R inc. — R inc. s'est vue ordonner de payer les dépens du fiduciaire — Ordonnance de la Cour d'appel a été annulée, sauf en ce qui concernait les dépens.

Procédure civile --- Frais — Effet de la réussite des procédures — Partie gagnante privée des frais — Motifs — Réussite symbolique

Régime de retraite a été établi en 1974 pour les employés de P ltée — R inc. a acquis P ltée en 1980 — En 1984, le régime de retraite a été fermé aux employés — Régime de retraite a été modifié pour le fusionner rétroactivement avec quatre autres régimes de retraite — Participants au régime ont entamé des procédures judiciaires contre R inc. — Premier juge a rejeté leur demande à presque tous les égards — Participants ont interjeté appel — Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait aucun effet sur la fiducie qui continuait d'exister comme une entité distincte — Il était loisible aux participants d'entamer des procédures judiciaires pour mettre fin au régime en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre pouvait s'appliquer — En 2001, les participants au régime ont demandé une ordonnance mettant fin au régime — Cessation a été ordonnée — Cour d'appel a conclu que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie — R inc. et le fiduciaire ont interjeté appel — Pourvoi accueilli — Règle de Saunders v. Vautier ne s'appliquait pas — Participants n'avaient pas à payer les dépens de R inc. — R inc. s'est vue ordonner de payer les dépens du fiduciaire — Ordonnance de la Cour d'appel a été annulée, sauf en ce qui concernait les dépens.

The pension plan was established in 1974 for the employees of P Ltd. The pension plan provided for defined benefits and was funded by the employer only. The pension plan stated that the company expected to continue the plan indefinitely but that in the event of termination, the surplus remaining in the trust fund was to be distributed among the remaining members. In 1980, P Ltd. was acquired by R Inc. The pension plan was closed to future employees in July 1984. In 1985, trustee refunded $968,285 to R Inc. upon request by R Inc. By the end of 1986, R Inc. had taken contribution holidays evaluated at $842,000. In 1992, R Inc. amended the pension plan to merge it retroactively with four other pension plans. Pension plan members initiated litigation against R Inc., requesting the return of the trust funds and a declaration that the funds belonged to them. The trial judge dismissed the claim on most issues and the members appealed. The Court of Appeal concluded that the merger of the plans was valid but did not affect the existence of the trust as a separate trust. The members were at liberty to institute proceedings to terminate the trust based on the rule in Saunders v. Vautier or on the Trust and Settlement Variation Act to the extent that either might be applicable. R Inc.'s withdrawal of substantial funds from the surplus had been properly repaid.

The plan members applied in 2001 for an order terminating the plan. Termination was ordered on the basis that the rule in Saunders v. Vautier was applicable and that s. 1(b) of the Trust and Settlement Variation Act provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were sui juris. By 2002 the trust had a surplus evaluated at $11 million. On appeal by R Inc., the part of the decision based on the Trust and Settlement Variation Act was set aside. The members were provided with an opportunity to show that all required consents had been obtained. The Court of Appeal found that the rule in Saunders v. Vautier could operate to terminate the trust. R Inc. and the trustee appealed.

Held: The appeal was allowed.

Per Deschamps J. (LeBel, Fish, Abella JJ. concurring): Neither the trust agreement nor the pension plan provided for the termination of the trust by the employees. The members consequently relied upon the rule in Saunders v. Vautier. That rule did not apply. First, pension plans are heavily regulated. To the extent that it provides a means to reach the distribution stage, the Pension Benefits Standards Act, 1985 (PBSA) prevailed over the traditional rule in Saunders v. Vautier. Second, a family or testamentary trust was generally a stand-alone instrument. The trust agreement was expressly made a part of the plan and the plan was attached to that agreement. The trust could not be collapsed without regard to the plan itself. The two instruments were indissociable. Termination of the plan in accordance with the prevailing PBSA was a condition precedent to distribution. Third, employers establish plans because it is in their interest to do so and under normal circumstances they have the right not to have their management decisions disturbed. A blanket statement that the employer had no interest conflicted with the usual expectation of parties to a pension plan. Fourth, gift or legacy trusts were gratuitous and accelerating the date of the beneficiaries' entitlement had no broad social consequences. The capital of the pension trust fund could not be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

The impediments to applying the rule in Saunders v. Vautier were numerous. Termination was dealt with explicitly in the PBSA. The members could have asked the Superintendent to step in. The members could ask the Superintendent to partially terminate the merged plan insofar as it related to the pension plan. The Superintendent was in the best position to monitor the orderly termination of the part of the merged plan that related to the members. Most of the facts presented by the members to the courts could have been submitted to the Superintendent. The Superintendent's power under s. 29(2)(a) of the PBSA becomes almost a duty when employees ask him to act. The Superintendent's power must be exercised in conformity with the remedial purpose of the provisions of the PBSA. The Superintendent could review all the circumstances and decide whether the facts warranted a winding-up of the part of the merged plan that related to the pension plan, which would have the effect of terminating the trust.

R Inc.'s arguments had not prevailed. The members were not required to pay R Inc.'s costs. R Inc. was ordered to pay the trustee's costs. The order of the Court of Appeal was set aside with the exception of the order as to costs.

Per Bastarache J. (McLachlin C.J.C., Charron J. concurring): The PBSA is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the workforce. Section 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets. The Superintendent is given power to terminate pension plans in certain specified situations. There was no provision in the PBSA for plan beneficiaries to terminate a pension plan. There was no provision in the PBSA for any party to terminate the trust under which the pension fund contributions were held as security for the payment of the plan benefits prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2) but the Superintendent's power to terminate the plan is available only where the stipulated pre-conditions are met. None of the statutory grounds for termination of a pension plan were present. The pension plan was fully funded and there was no threat to the solvency of the plan or the security of the pension benefits. There was no issue that the merged plan was being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

In view of its very terms, there was no entitlement to an actuarial surplus while the plan was ongoing. The trust agreement and the plan formed an integrated whole. It was an error to infer that the rule in Saunders v. Vautier could in effect create a manner of realizing on the actuarial surplus in violation of the terms of the plan. Absolute entitlement to the surplus would only occur once the surplus had become real. The rule in Saunders v. Vautier could not be invoked since the rule required that the beneficiaries seeking early termination possess the sum total of vested interests in the trust corpus. The pension plan clearly stated that it was the employer who might amend and terminate the plan and that it was the employer's expectation that the plan and trust would continue indefinitely. There could be no reasonable expectation on the part of R Inc. or the members that the trust could be terminated by the members, over R Inc.'s objections, in order that the members might obtain the surplus. The application of the rule in Saunders v. Vautier would contradict the reasonable contractual expectations of the parties. The terms of the contract at the root of the trust could not be circumvented and the legislative framework could not be made irrelevant by applying the rule in Saunders v. Vautier. The introduction of the Saunders v. Vautier principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan.

The rule in Saunders v. Vautier requires the consent of all parties who have an interest, or who own rights of enjoyment, in trust property. Section 22 of the PBSA requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on that date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 per cent of the joint benefit. The inclusion of survivor benefits was a policy choice that must be honoured. These statutory rights could not be overwritten by the consent of the present plan members and other beneficiaries or by the courts. The current spouses and common law partners who have present contingent interest were sui juris. While the current spouses and common law partners of the plan members were able to consent to termination, future spouses and common law partners who were currently unascertainable could not give consent and a court would be reluctant to give consent on their behalf.

The conclusion of the Court of Appeal on the issue of good faith was premised on its earlier decision that the amendment would deprive the beneficiaries of the trust of their right to terminate under the rule in Saunders v. Vautier. R Inc.'s powers of amendment were not forfeited or estopped because of the closure of the plan. Any termination of the plan and amendments to it had to be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the PBSA. What was permitted and what was abusive would have to be determined in future proceedings according to the standard set in s. 8(10)(b) of the PBSA.

En 1974, un régime de retraite a été établi au bénéfice des employés de P ltée. Il était à prestations déterminées et n'était financé que par l'employeur. Il énonçait que la compagnie s'attendait à ce qu'il subsiste indéfiniment mais, en cas de cessation, l'actif restant dans la fiducie serait partagé entre les participants restants. En 1980, R inc. a acquis P ltée. En 1984, le régime de retraite a été fermé aux employés futurs. En 1985, le fiduciaire a remboursé 968 285 $ à R inc. à la demande de celle-ci. Vers la fin de 1986, R inc. s'était accordée des congés de contribution évalués à 842 000 $. En 1992, R inc. a modifié le régime de retraite afin de le fusionner rétroactivement avec quatre autres régimes de retraite. Les participants au régime de retraite ont entamé des procédures judiciaires contre R inc., demandant le remboursement des fonds et qu'il soit déclaré que les fonds leur appartenaient. Le premier juge a rejeté la demande à presque tous les égards; les participants ont interjeté appel. La Cour d'appel a conclu que la fusion des régimes était valide, mais qu'elle n'avait pas d'effet sur l'existence de la fiducie comme entité distincte. Il était loisible aux participants d'entamer des procédures judiciaires pour qu'il soit mis fin à la fiducie, en se fondant soit sur la règle de Saunders v. Vautier, soit sur la Trust and Settlement Variation Act, dans la mesure où l'une ou l'autre était applicable. R inc. avait remboursé à juste titre les fonds considérables qu'elle avait retirés de l'actif restant.

En 2001, les participants au régime ont demandé une ordonnance mettant au régime. La cessation a été ordonnée au motif que la règle de Saunders v. Vautier s'appliquait et que l'art. 1(b) de la Trust and Settlement Variation Act donnait compétence à la cour de consentir au nom des bénéficiaires juridiquement autonomes mais manquants. En 2002, l'excédent d'actifs de la fiducie était évalué à 11 millions de dollars. R inc. a interjeté appel, et la portion du jugement se fondant sur la Trust and Settlement Variation Act a été annulée. Les participants avaient eu l'opportunité de démontrer que tous les consentements nécessaires avaient été obtenus. La Cour d'appel a estimé que la règle de Saunders v. Vautier pouvait s'appliquer pour mettre fin à la fiducie. R inc. et le fiduciaire ont interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (LeBel, Fish, Abella, JJ., souscrivant à son opinion): Ni la convention de fiducie ni le régime de retraite ne prévoyaient que les employés pouvaient mettre fin à la fiducie. Les participants se sont donc fondés sur la règle de Saunders v. Vautier. Cependant, cette règle ne s'appliquait pas. Premièrement, les régimes de retraite sont fortement réglementés. Dans la mesure où elle prévoyait un moyen de parvenir à l'étape de la répartition, la Loi de 1985 sur les normes de prestation de pension (LNPP) l'emportait sur la règle traditionnelle de Saunders v. Vautier. Deuxièmement, une fiducie familiale ou testamentaire constituait généralement un instrument distinct. La convention de fiducie a été expressément intégrée au régime et ce dernier était joint à cette convention. On ne pouvait mettre fin à la fiducie sans tenir compte du régime lui-même. Ces deux instruments étaient indissociables. La cessation du régime conformément à la LPNN prédominante était une condition préalable à la répartition. Troisièmement, les employeurs établissent des régimes de retraite parce qu'il est dans leur intérêt de le faire; dans des circonstances normales, ils ont droit à ce que leurs décisions administratives soient respectées. Une déclaration générale selon laquelle l'employeur n'avait aucun intérêt allait à l'encontre des attentes normales des parties à un régime de retraite. Quatrièmement, les donations ou les legs en fiducie sont des libéralités, et le fait de rapprocher la date à laquelle les bénéficiaires peuvent exercer leur droit n'a aucune conséquence sociale générale. Le capital de la fidudie de retraite ne pouvait être réparti sans contrecarrer l'objectif social consistant à assurer la sécurité financière des employés retraités en leur permettant de recevoir des versements périodiques jusqu'à la fin de leurs jours.

Plusieurs motifs empêchaient l'application de la règle de Saunders v. Vautier. La LPNN traitait explicitement de la cessation. Les participants auraient pu demander au Surintendant d'agir. Ils auraient pu lui demander de mettre fin au régime fusionné dans la mesure où il avait trait au régime. Le Surintendant était le mieux placé pour assurer la cessation ordonnée de la partie du régime fusionné relative aux participants. La plupart des faits mis en preuve par les participants devant les tribunaux auraient pu être soumis au Surintendant. Le pouvoir conféré à ce dernier par l'art. 29(2)a) LPNN devient presque une obligation lorsque les employés lui demandent d'agir. Le Surintendant doit exercer ce pouvoir conformément à l'objet réparateur des dispositions de la LPNN. Il peut examiner l'ensemble des circonstances et décider si les faits justifiaient de mettre fin à la partie du régime fusionné qui concernait le régime de retraite, ce qui aurait pour effet de mettre fin à la fiducie.

Les arguments de R inc. n'ont pas été retenus. Les participants n'étaient pas tenus de payer les dépens de R inc. Cette dernière s'est vue ordonner de payer les dépens du fiduciaire. L'ordonnance de la Cour d'appel était annulée, sauf en ce qui concernait les dépens.

Bastarache, J. (McLachlin, J.C.C., Charron, J., souscrivant à son opinion): La LPNN constitue un régime législatif complet, conçu pour favoriser la réalisation de l'objectif de politique générale d'amélioration de la sécurité financière des travailleurs au moment où ils quittent les rangs de la population active. L'article 29 et le règlement qui s'y rapporte contiennent des dispositions détaillées qui régissent la cessation des régimes de retraite et la répartition de leurs actifs. Le Surintendant se voit conférer le pouvoir de mettre fin aux régimes de retraite dans certains cas précis. La LPNN ne contient aucune disposition permettant aux participants au régime de mettre fin à ce dernier. Elle ne contient aucune disposition permettant à quiconque de mettre fin à la fiducie en vertu de laquelle les cotisations à la caisse de retraite sont détenues à titre de garantie du versement des prestations du régime, avant la cessation du régime et indépendamment de celle-ci. Les bénéficiaires ne peuvent demander au Surintendant d'exercer ses pouvoirs discrétionnaires pour mettre fin au régime que lorsque les conditions préalables stipulées sont remplies. Aucun des motifs prévus par la loi pour mettre fin au régime n'existait en l'espèce. Le régime de retraite était entièrement capitalisé et la solvabilité du régime et la sécurité des prestations de retraite ne sont pas compromises. Personne ne contestait que le régime fusionné était géré d'une manière contraire aux bonnes pratiques du commerce ou non conforme aux exigences de la mesure législative.

Compte tenu des modalités mêmes du régime, il n'y avait aucun droit à un surplus actuariel pendant que le régime était en vigueur. La convention de fiducie et le régime constituait un tout. Il était erroné d'inférer que la règle de Saunders v. Vautier pouvait, dans les faits, créer une façon de réaliser le surplus actuariel contrairement aux modalités du régime.

Un droit absolu au surplus ne pourrait exister qu'une fois le surplus devenu réel. On ne pouvait invoquer la règle de Saunders v. Vautier, puisque celle-ci exigeait que les bénéficiaires sollicitant la cessation anticipée possèdent tous les intérêts dévolus dans le capital de la fiducie. Le régime de retraite énonçait clairement que c'était l'employeur qui pouvait modifier le régime et y mettre fin et que c'était l'employeur qui s'attendait à ce que le régime subsiste indéfiniment. Ni R inc. ni les participants ne pouvaient raisonnablement s'attendre à ce que, en dépit des objections de R inc., les participants puissent mettre fin à la fiducie afin de pouvoir toucher les surplus. L'application de la règle de Saunders v. Vautier irait à l'encontre des attentes contractuelles raisonnables des parties. On ne pouvait se soustraire aux termes du contrat à l'origine de la fiducie et on ne pouvait appliquer la règle de Saunders v. Vautier afin de faire perdre au cadre législatif toute sa pertinence. L'introduction du principe de Saunders v. Vautier dans le système de régimes de retraite privés, sans réserve ou restriction, constituerait une atteinte importante au droit de l'employeur de décider de son propre gré d'offrir ou de maintenir un régime de retraite.

La règle de Saunders v. Vautier requiert le consentement de toutes les parties qui ont un intérêt dans les biens en fiducie ou qui possèdent des droits de jouissance sur ceux-ci. L'article 22 LPNN exige que, en l'absence d'une renonciation écrite dans la forme prescrite, toute prestation de retraite versée après le 1er janvier 1987 à un participant actuel ou ancien, qui avait un époux ou un conjoint de fait à la date du premier versement, doit être une prestation réversible, ce qui permet à l'époux ou au conjoint survivant de recevoir une prestation équivalant à au moins 60 pour 100 de la prestation réversible. Il fallait respecter ce choix de politique générale que constituait l'inclusion des prestations de survivant. Ces droits prévus par la loi ne pouvaient être écartés avec le consentement des participants actuels au régime et des autres participants ou par les tribunaux. Les époux et conjoints de fait actuel qui avaient un intérêt éventuel étaient juridiquement autonomes. Même si les époux et conjoints de fait actuels des participants au régime pouvaient consentir à la cessation du régime, les futurs époux et conjoints de fait, qui étaient actuellement indéterminés, ne pouvaient donner leur consentement et un tribunal serait hésitant à consentir en leur nom.

La conclusion de la Cour d'appel relativement à la question de la bonne foi reposait sur sa décision antérieure selon laquelle une modification au régime retirerait aux bénéficiaires de la fiducie leur droit de mettre fin au régime en appliquant la règle de Saunders v. Vautier. R inc. n'a pas été déchue de ses pouvoirs de modification ni empêchée de les exercer en raison de la fermeture du régime. La cessation et la modification du régime devaient être examinées en fonction de ses modalités et des dispositions applicables de la LNPP. La question de savoir ce qui était permis et ce qui était abusif devrait donc être tranchée, dans toute instance future, en fonction de la norme énoncée à l'al. 8(10)b) LNPP.

Annotation

This decision can perhaps best be characterized as a "good news, not so good news" development in the pension law area. The good news is that the Court held unanimously that the ancient trust law rule in *Saunders v. Vautier* should not apply to permit the members of a trusteed pension plan to terminate that plan. The Court noted that its previous decision in *Schmidt v. Air Products of Canada Ltd.* did not make pension plans subject to ALL trust law principles, but only to APPLICABLE trust law principles, and held that where Parliament had legislated rules in regard to the operation of pension plans, the legislation could be taken to have occupied the field to the exclusion of the common law. This development is to be welcomed, and represents, one hopes, the beginnings of a judicial retreat from the rote application in the pension area of trust rules that were designed for the most part to apply to arrangements very different from modern-day pension plans.

The not so good news is that the majority opinion contains a number of curious passages which could spell trouble down the line. For one, Mme Justice Deschamps advanced the hypothesis that the rule in *Saunders v. Vautier* could still be applied in the case of certain corporate executive pension plans, although her statement on this point is almost certainly obiter. For another, and more ominously, she mused about the possibility that in some cases contribution holidays could be disguised plan terminations, although she does not elaborate. Again, this passage is probably best characterized as obiter. Finally, in holding that jurisdiction in this case lies with the Superintendent of Financial Institutions (i.e. OSFI), she did not draw any distinction between regulatory power to terminate a pension plan and regulatory power to wind up a pension plan. It must be admitted in this latter regard that even for most pension practitioners that distinction is a subtle one, at best; it remains to be seen how OSFI will define the scope of its own powers in this area.

Overall, and with respect, Mr. Justice Bastarache's concurring opinion seems somewhat more cohesive and more consistent with established understandings on many points as compared to the majority opinion. Only time will tell whether the law will develop more in the direction of the majority opinion or the direction of the concurring opinion in the coming years.

One other observation about the *Buschau* decision might also be worth making. That is, this is the third pension decision from the Supreme Court in the past year, after the decisions in *Boucher c. Stelco Inc.*, 48 C.C.P.B. 167, 2005 CarswellQue 9790/9791 and *Bisaillon c. Concordia University*, 51 C.C.P.B. 163, 2006 CarswellQue 3689/3690, which has focused as much on jurisdictional issues as on substantive issues. The hope is that the Supreme Court has now provided sufficient guidance that henceforth, parties will be more likely to commence their proceedings in the proper forum right from the start.

Gary Nachshen

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***Deschamps J.*:**

1 The 112 respondents are pension plan members who have been litigating for over 10 years to gain access to their pension trust fund. This case is about whether and how the fund can be distributed to them.

2 By 2002, the plan for which the trust was created, the Premier pension plan ("Plan"), had a surplus evaluated at $11 million. The Supreme Court and the Court of Appeal for British Columbia accepted the members' arguments and found that the trust used to fund the Plan ("Trust" or "Premier Trust") could be collapsed under the common law rule in *Saunders v. Vautier* (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.). According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. For the reasons that follow, I am of the view that the common law rule does not apply to the Trust in the case at bar. The context and the purpose of pension plans do not generally lend themselves well to the common law rule. Moreover, a pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan. It cannot be terminated without taking

into account the Plan for which it was created and the specific legislation governing the Plan. Any recourse available to the members here is subject to the provisions of a federal statute, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."). In my view, the Superintendent of Financial Institutions ("Superintendent"), who is responsible for the application of the P.B.S.A., is in a position to resolve the impasse that the members would face if the interpretation suggested by my colleague Bastarache J. were adopted.

3 In order to explain the particular context in which the termination of the Trust is sought, a few facts will have to be elicited to situate the dispute between the members and their former employer. Then, to explain why the common law rule does not apply, it will be useful to briefly review pension plans in general and the Plan itself. Finally, I will comment on the relevant provisions of the P.B.S.A. that would allow the members to make a proper request to the Superintendent.

I. Facts

4 The Plan was established in 1974 for the employees of Premier Communication Ltd. It provides for defined benefits and is funded by the employer only. It states that the company expects to continue the Plan indefinitely, but that in the event of termination, the surplus remaining in the trust fund is to be distributed amongst the remaining members:

> **General Rule Seven — Amendment or Termination of Plan**
>
> . . . . .
>
> 2. While the Company expects to continue the Plan indefinitely, it must and does reserve the right to terminate the Plan, if, at any time in the future, conditions should arise that indicate the necessity of such action.
>
> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

5 In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used for improvements to improve benefits for members. On April 12, 1984, the actuary actually recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:

> It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).

6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:

> You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc).

> We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.

7 The members initiated the litigation against Rogers in 1995. They requested the return of the trust funds paid to Rogers in 1985 and a declaration that the funds belonged to them. The trial judge dismissed the claim on most of the issues (*Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125 (B.C. S.C.)). The members appealed. The Court of Appeal [2001 CarswellBC 40 (B.C. C.A.)] found that trust law imports its own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent and in view of Rogers' concession that the merger was not complete as regards the Plan, members of the Plan retained rights that were distinct from those of members of the other plans that had been merged with it in the RCI Plan. The Court of Appeal concluded that the merger of the Plan with the RCI Plan was valid but did not affect the existence of the Trust as a separate trust. The members were also at liberty to institute proceedings to terminate the Trust based on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent that either may be applicable. The Court of Appeal held that the employer's withdrawal of substantial funds from the surplus in 1985, which was admitted to have been in breach of trust, had been properly repaid to the trustee. Thus, the Plan's members retained the right to distribution of the surplus upon termination (*Buschau v. Rogers Cablesystems Inc.*, 83 B.C.L.R. (3d) 261 (B.C. C.A.) ("*Buschau* #1"), at paras. 63 to 68). This Court denied leave to appeal that decision, [2001] 2 S.C.R. vii (note) (S.C.C.).

8 In 2001, the members applied to the Supreme Court of British Columbia for an order terminating the Plan. Loo J. ordered termination on the basis that the rule in *Saunders v. Vautier* was applicable and that s. 1(*b*) of the *Trust and Settlement Variation Act* provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were *sui juris* (*Buschau v. Rogers Communications Inc.*, 100 B.C.L.R. (3d) 327, 2002 BCSC 624 (B.C. S.C.)). Rogers appealed.

9 The Court of Appeal found that the members were at liberty to invoke the rule in *Saunders v. Vautier* provided that the consents of all members and beneficiaries had been obtained. It set aside a part of the chambers judge's decision based on the *Trust and Settlement Variation Act*, finding that a court did not have the power to consent on behalf of contingent *sui juris* beneficiaries. However, it provided the members with an opportunity to show that all the required consents had been obtained (*Buschau v. Rogers Communications Inc.*, 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (B.C. C.A.) ("*Buschau* #2")). After receiving additional evidence and representation, the Court of Appeal found that the rule in *Saunders v. Vautier* could operate to terminate the trust. It recognized that questions could arise concerning the "mechanics" of the termination, but it was of the opinion that the trustee would have to satisfy itself that "[all] the conditions have been met and that all statutory requirements — including the payment of applicable taxes ëdash; have been complied with" before distributing the trust assets (*Buschau v. Rogers Communications Inc.*, 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (B.C. C.A.) ("*Buschau* #3"), at para. 17). Rogers and the trustee appealed to this Court.

10 Rogers submits that the rule in *Saunders v. Vautier* does not apply. National Trust does not take issue with the Court of Appeal's order inasmuch as it determines the rights of Rogers or of the members. However, the trustee claims that the order places it in an untenable position by devolving upon it the authority and legal responsibility to give effect to and administer the termination of the Premier Trust, although this authority is not provided for by the terms of the Trust or by statute. The members maintain that the rule in *Saunders v. Vautier* applies but argue, in the alternative, that Rogers should terminate the Plan pursuant to its fiduciary duty under the P.B.S.A. At the end of the hearing before this Court, the parties were asked to provide their views on the application of the P.B.S.A. to the termination of a plan by the Superintendent. Rogers takes the position that the Superintendent does not have the right to terminate the Plan because his role is limited to solvency issues. The members submit that the Superintendent has a discretionary power and that, as a result, they do not have a clear recourse. In their view, the rule in *Saunders v. Vautier* is not ousted by the P.B.S.A.

11 It is clear from the history of the litigation that some of the issues are now *res judicata*. One of them is that the merger of the Plan with the RCI Plan did not affect the Trust. As the Court of Appeal noted at the time, this peculiar situation may present some conceptual difficulties (*Buschau* #1, at para. 66). Nonetheless, these facts must be interpreted with the

help of the general principles of pension law. For this reason, it will be useful to review some background information concerning pension plans in general and the Plan in particular.

II. Pension Plans in General

12 Pension plans have a complex history and constitute a response to a multitude of needs. As R. L. Deaton puts it:

> ...[employee] benefits [initially] served multiple purposes, including attracting a labour supply and reducing turnover, serving as an investment in human capital by improving morale, increasing productivity and efficiency by rationalizing the human element in the work process, promoting loyalty to the firm, preventing or forestalling unionization, preventing government intervention with respect to compulsory social insurance, maximizing the tax position of certain benefits by increasing non-taxable compensation to employees, minimizing the cost per unit of benefit through group arrangements, thereby compensating for imperfect individual knowledge of insurance markets, and creating a favourable corporate public relations image.
>
> (*The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at pp. 119-20)

He adds that in recent years many sophisticated employers have adopted a compensation approach based on the "total value of labour remuneration, wages and fringes having become interchangeable costs" (p. 122). Thus, what some may still view as a gratuitous reward for employees remains a powerful long-term human resources management tool as well as an undeniable benefit for aging employees. Employees rightly see their pension benefits as part of their overall compensation. How important pension benefits are to employees, and how sensitive employees are about such benefits, is even clearer in the present context of corporate mergers and acquisitions.

13 Pension benefits also serve broader social goals, which were recognized by the Court of Appeal (*Buschau* #2, at para. 47), citing approvingly E. E. Gillese (now a justice of the Ontario Court of Appeal), "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 232-34. Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support. In recognition of the social value of such an investment, pension contributions receive special tax treatment. The social component of private pension plans plays a crucial role in an era in which public pension programs have not yet been reformed to ensure adequate funding (see Deaton, at pp. 136-37, for an outline of the increase in contributions that would be required to conform to international standards). Courts do not make social policy, but the social role of pension plans might prove relevant when it comes time to decide whether the rule in *Saunders v. Vautier* can be employed to terminate a pension trust.

14 In Canada, defined benefit plans are usually funded in one of two ways: the funds are either held by an insurance company or held in trust (D. Rienzo, "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14; G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *Meredith Memorial Lectures 1988, New Developments in Employment Law* (1989), 59, at p. 64). In an insured plan, the insurance company receives an agreed payment and, bearing the risk of a shortfall, undertakes to pay the pension benefits to the members. When a plan is funded through a trust, the employer contracts with a trust company. The trust company holds and invests the pension contributions, subject to instructions under the trust agreement. The contributions are generally adjusted following an evaluation by an actuary who determines the level of funding needed to meet the solvency requirement under the applicable legislation. Here, the Plan is and always has been funded through a trust, so the discussion can be limited to trust-related issues.

15 A defined benefit plan can fall into deficit or accumulate a surplus. Pension underfunding is a cause for concern. Almost 70 percent of major corporate pension plans were in deficit positions in the late 1970s. In the early 1980s, however, the situation reversed. Surpluses were generated by high levels of investment earnings coupled with lower wage increases and widespread layoffs, while employer contributions were left in the funds as employees forfeited their future pension rights: Deaton, at pp. 133-34, and Nachshen, at pp. 66-67. The situation reverted to one of deficits in the late 1990s. The magnitude of the underfunding problem has only recently started to emerge in legal commentaries ("Pension

Underfunding Still Widespread, Yet...", *Business and Legal Reports*, October 1, 2003 (online)). However, a surplus or deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as an ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding while preventing the unnecessary accumulation of surpluses. Although the existence of deficits or surpluses is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations.

16 Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), the Court, dealing with issues relating to the distribution of a surplus, held that "when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust" (p. 639). The Court also stated that "[w]hen a pension fund is impressed with a trust, that trust is subject to all *applicable* trust law principles" (p. 643 (emphasis added)). It is thus necessary to determine which trust law principles *are applicable* before considering how they apply.

17 Before termination of a plan, a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at para. 48) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 39).

18 Pension plans are heavily regulated. At this juncture, it is worth looking at the legislative scheme applicable to the issue.

III. *The Pension Benefits Standards Act, 1985*

19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the economic and social importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the P.B.S.A., was initially enacted in 1986 (S.C. 1986, c. 40). Under it, an important role of control and supervision is assigned to the Superintendent (see A. N. Kaplan, *Pension Law* (2006) for analysis on the analogous role of the Superintendent under the Ontario legislation). The Superintendent administers the P.B.S.A., collects information and conducts studies concerning pension plans and their operation (s. 5). Strict investment and solvency standards are imposed on plan administrators (s. 9(1) and *Pension Benefits and Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the P.B.S.A. (ss. 7.4 and 12). A plan administrator also acts as a trustee for the employer, the members of the plan, and any persons entitled to pension benefits. The Superintendent can issue a direction of compliance if he is of the view that an administrator or an employer is pursuing a course of conduct that is contrary to sound financial practices, or that a pension plan is not being administered in accordance with the P.B.S.A. (s. 11(1) and (2)). If the Superintendent's direction is not complied with, the pension plan's registration may be revoked (s. 11.1). The Superintendent also plays a key role at the termination and distribution stage (ss. 9.2 and 29, and rr. 16 and 24). For example, his consent must be obtained before a surplus can be distributed (r. 16(2)(*d*)). Guidelines and instruction guides are published by the Superintendent to assist in the administration and termination of plans and trusts. Specific attention is paid to the rights of beneficiaries upon a request for distribution of a surplus. The *Guidelines to Administrators for Plan Terminations* make it clear that a delay in winding up will not be accepted simply because the administrator prefers to manage the funds.

20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a

pension fund. The Superintendent has unique duties and responsibilities vis-à-vis beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

IV. The Rule in *Saunders v. Vautier*

21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

According to D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

22 The members argue that this rule allows them to terminate the Trust fund even though the employer, upon agreeing to the Trust, stated that only he could terminate it. The terms of the Plan and its Trust fund are the key to the analysis. I will now turn to them.

V. The Plan and its Trust Fund

23 The Plan, as stated in 1974, provided for the assets to be held in accordance with the terms of a Trust agreement. A committee known as the Retirement Committee was appointed by the company to administer the Plan. All employees hired after January 1, 1974 were required to become members of the Plan, while the other employees were eligible to join it under certain conditions (General Rule Two). The benefits were not to exceed the maximum permitted under the prevailing legislation and were payable upon retirement (the normal retirement age was 65 years). Although entitled to make additional contributions, employees were not required to contribute to the regular funding of the Plan (Special Rule Four (1)). The employer's contribution was calculated by the actuary appointed under the Plan (General Rule Four (2)). Benefits were to be paid to the member for the remainder of his or her life and then to the member's beneficiary for any remaining portion of a "guaranteed period". A lump sum could be paid, but only to a member, if the benefit was less than $10 per month, and even so this was at the Retirement Committee's discretion. The committee could decide all matters in respect to the operation, administration and interpretation of the provisions of the Plan (General Rule Six (12)). The company had the right to amend the Plan provided that the amendment did not affect rights acquired or benefits earned as at the date of the amendment. Upon termination, benefits were to be paid as provided for in the Plan, and the balance of assets remaining in the trust fund, after all liabilities had been satisfied, were to be distributed by the Committee among the remaining members on the basis of s. 12 of the former *Pension Benefits Standards Act* (General Rule Seven).

24 The Trust agreement was entered into for the specific purpose of creating a Trust fund for the Plan. The fund was to be held and administered for the benefit of employees and of beneficiaries under the Plan. The trustee was to follow directions given by the company. The company also had the right to terminate the Trust agreement (art. V(2)).

25 Rogers purported to amend the Plan to give itself the right to the surplus in 1992, but the Court of Appeal found (*Buschau* #1, at para. 59) that the amendments had not affected the members' rights; its judgment in that case is now binding on the parties.

26 Thus, neither the Trust agreement nor the Plan provides for termination of the Trust by employees. The members consequently rely on the rule in *Saunders v. Vautier*. Does it apply? Like my colleague Bastarache J., I conclude that it does not. My reasons are slightly different, however.

VI. Non-Application of the Rule in *Saunders v. Vautier*

27 There are many reasons why the rule is not easily incorporated into the context of employment pension plans.

28 First, pension plans are heavily regulated. The P.B.S.A. regulates the termination of a plan and the distribution of the fund and the trust assets. I accept the following comment of the Court of Appeal (*Buschau* #2, at para. 47):

> It must be acknowledged that the application of the rule in *Saunders v. Vautier* to pension trusts does involve different and more complicated factors, financial and legal, than an ordinary legacy or gift in trust. As already noted, pension trusts are part of the complex of rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

However, the Court of Appeal's order (*Buschau* #3) defies the application of the P.B.S.A. because it allows for the operation of the rule in *Saunders v. Vautier* without regard to the obligations to report to the Superintendent and to provide for the payment of pension benefits before distribution of the trust fund. The P.B.S.A. deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that it provides a means to reach the distribution stage, the P.B.S.A. prevails over the traditional rule in *Saunders v. Vautier*.

29 Second, a family or testamentary trust is generally a stand-alone instrument. It does not usually depend on any other instrument for its operation. No indirect effect results from the application of the rule in *Saunders v. Vautier* in such cases. In contrast, a pension trust serves only as a vehicle for holding and managing the funds required by the pension plan. In the instant case, the Trust agreement is expressly "made a part of the Plan" (art. I(1)) and the Plan is attached to that agreement (preamble to the Trust agreement). The Trust agreement is therefore dependent on the Plan for which it was created. The Premier Trust cannot be collapsed without regard to the Plan itself. The two instruments are therefore indissociable. This particular situation was not dealt with in *Schmidt*, which focussed on the distribution of trust assets, not the termination of a trust agreement that had been expressly made part of a Plan. In the case at bar, despite the link between the Plan and the Trust agreement, the judgment of the Court of Appeal purports to authorize the members to resort to the rule in *Saunders v. Vautier*, but does not provide for termination of the Plan. And yet, termination of the Plan in accordance with the prevailing P.B.S.A. is a condition precedent to distribution. This awkward juridical status illustrates why the common law rule is not an easy fit in the pension law context.

30 Third, employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.

31 Fourth, gift or legacy trusts are gratuitous, and accelerating the date of the beneficiaries' entitlement has no broad social consequences. Pension trusts funds, however, are no longer generally viewed as being gratuitous: either employees contribute directly or their entitlement is regarded as remuneration deferred until the date of their retirement. The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

32 Thus, this case amply demonstrates the difficulties associated with applying the rule in *Saunders v. Vautier* to a pension trust. The Court of Appeal issued an order stating that the members were at liberty to invoke the rule in *Saunders v. Vautier*. All the reporting and approval mechanisms that must precede termination by virtue of the P.B.S.A. were

disregarded. They were treated as issues relating merely to "mechanics" (*Buschau* #3, at para. 17). According to the Court of Appeal, the Premier Trust may be collapsed without regard to its purpose of providing a means to defer income. No order was made to provide for annuities as required by the P.B.S.A. Moreover, while the Court of Appeal held that the Premier Trust may be terminated pursuant to the rule in *Saunders v. Vautier*, no corresponding provision was made for terminating the trustee's obligations to the members under the merged RCI Plan.

33 I therefore conclude that the impediments to applying the rule in *Saunders v. Vautier* are numerous. The rule is not easily applicable to pension trusts and not even the length of time elapsed since the beginning of the proceedings can allow the members to bend the rule to fit it to their case. I do not exclude the possibility that the common law rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general the fit is wrong. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the P.B.S.A. provides mechanisms that protect members from inappropriate conduct by plan administrators. Since my colleague Bastarache J. does not share my opinion on this point, I feel that I should elaborate on it.

VII. Members' Recourse

34 I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers' right to terminate is still common. A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. However, they are not left without recourse should the employer infringe the P.B.S.A. or their plan. They can alert the Superintendent and trigger action if and when required.

35 The P.B.S.A. is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the P.B.S.A. When asked to submit representations on the remedies afforded by the P.B.S.A., the members took the position that the remedy afforded by the statute could not cover all their claims. They also stated that the Superintendent could have intervened on his own.

36 This answer is not satisfactory. The members wanted the Trust fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*. As mentioned above, however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum. Moreover, the members' position is not compatible with the P.B.S.A. and it puts them at risk of attracting undesirable tax consequences (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11) and (13); *Income Tax Regulations*, C.R.C. 1978, c. 945, ss. 8501(1) and 8502). Also, the Superintendent can hardly be expected to be familiar with details of the management of a particular pension plan. The members could have asked him to step in.

37 A clear illustration of the Superintendent's potential role can be found in the facts that gave rise to the members' original action. In 1985, the trustee, at Rogers' request, transferred close to $1 million to Rogers out of the Plan's Trust fund. Rogers eventually acknowledged that the transfer was improper and reimbursed the amount in the course of that initial proceeding. However, the members could have asked the Superintendent to exercise his powers under the P.B.S.A.

38 Under s. 8(3) of the P.B.S.A., plan members can object to an administrator'`s conduct if it is in breach of its fiduciary duty to them. Also, under s. 8(10), an employer who is an administrator is forbidden to put itself in a material

conflict of interest. The Superintendent could have directed Rogers to return the money to the Trust (s. 29(11) and s. 11(1) of the P.B.S.A.).

39 Here, the members claim to be entitled to distribution of the surplus. For them to be entitled to distribution, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the Superintendent could order a distribution if he were faced with circumstances falling within the parameters of the P.B.S.A.

40 Is that the case? I mentioned earlier that clauses allowing employers to control terminations are common. However, the traditional pension plan analysis does not apply in the instant case. Rogers conceded that the 1992 amendments entitling it to any surplus on termination were "invalid as against the [members]" (*Buschau* #1, at para. 38). The Court of Appeal found (*Buschau* #1, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau* #1 is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau* #1 limit Rogers' rights to use it.

41 One circumstance that could justify delaying the termination of the Plan (as incompletely merged with the RCI Plan) and the incidental distribution of the Premier Trust fund would be if Rogers had a right to amend the Plan to open it to new members. However, the possibility of reopening the Plan is problematic and has been commented on by the courts below.

42 In the second action, the chambers judge interpreted the Court of Appeal's conclusion in *Buschau* #1 concerning the distinct right of the Plan members to the surplus as preventing Rogers from using its power to amend the Plan to reopen it to new members. Dealing with Rogers' argument that the rule in *Saunders v. Vautier* could not apply because it had the right to amend, the chambers judge found, in her 2002 reasons, that Rogers could not use its amending power to do what it could not do through a merger (at para. 29):

> The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to re-opening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

43 The Court of Appeal left this finding undisturbed (*Buschau* #2, at para. 61):

> The particular circumstances of this case make it impossible in my view that RCI could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time RCI gave any thought to re-opening ... was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other RCI employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by RCI some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust - the purported "merger" of the Plan with other plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the employer would be required to account to the existing Members as if the Plan had not been re-opened.

44 If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau* #1, the matter is best left to the Superintendent.

45 The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members.

46 If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the P.B.S.A.

47 The Superintendent could consider the Plan terminated because all contributions ceased in 1984. He could find that this cessation is, in the circumstances, a *termination* as that word is defined in the P.B.S.A.:

> **2**. (1) In this Act,
>
> . . . . .
>
> "termination", in relation to a pension plan, means the <u>cessation</u> of crediting of benefits to plan members generally; and includes the situations described in subsections 29(1) and (2);

According to the guidelines issued by the Office of the Superintendent, winding up must not be delayed without the Superintendent's consent, and the administrator wanting to manage the fund is not an acceptable reason for delay. Moreover, the trust Fund, according to its terms, must be administered for the benefit of the employees and the beneficiaries, not the employer.

48 It is up to the Superintendent to decide whether the circumstances surrounding the cessation of the contribution make the definition of "termination" mentioned above applicable and whether the delay in winding up is justified (s. 11.1).

49 If the cessation is a termination and if the delay is not justified, the Superintendent can direct that the plan be wound up in part in accordance with s. 29(11), which reads as follows:

> **29**. ...
>
> (11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

50 It is also possible that the Superintendent could exercise his power of termination. Section 29(2) provides as follows:

> **29**. ...
>
> (2) The Superintendent may declare the whole or part of a pension plan terminated where
>
> (*a*) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

51 Obviously, not every cessation of contributions will result in a direction by the Superintendent. Such a direction is not, however, restricted to cases in which the trust fund no longer meets the solvency requirements. The Superintendent's power in relation to solvency issues is governed by s. 29(2)(*c*), which reads as follows:

> the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1) [proper funding].

Since s. 29(2)(*c*) deals with solvency requirements, s. 29(2)(*a*) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.

52 Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power.

53 Most of the facts that the members presented to the courts in their quest to have the rule in *Saunders v. Vautier* applied could have been submitted to the Superintendent. I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward-looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. The provisions of the P.B.S.A. and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.

54 Rogers argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(*a*), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(*c*), a provision that deals solely with solvency issues.

55 The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (Ont. C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P-8 (s. 69(1)(a)), similar to s. 29(2)(*a*) of the P.B.S.A., that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Court of Appeal for Ontario affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, ftn. 5):

> I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the [*Pension Benefits Act*] envisions a wind-up process initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

56 I agree with the Court of Appeal for Ontario, and it is my view that the Superintendent's power under s. 29(2)(*a*) of the P.B.S.A. becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the P.B.S.A.

57 In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties.

58 Although the appeal is allowed, Rogers' arguments have not prevailed. As a result, the members should not be required to pay Rogers' costs. In addition, Rogers should bear the trustee's costs. The Court of Appeal's order as to costs should however be left undisturbed.

59 For these reasons, I would allow the appeal, order Rogers to pay National Trust's costs in this Court and set aside the order of the Court of Appeal with the exception of the order as to costs, which I would affirm.

***Bastarache J.*:**

1. Introduction

60 This appeal concerns a decision of the British Columbia Court of Appeal holding that the respondents Sandra Buschau et al. ("respondents") are entitled to terminate an ongoing employee pension trust by invoking the rule in *Saunders v. Vautier* (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.), a 19th century doctrine that arose in connection with the postponement of gifts in private trusts. The rule was considered by this Court in *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196 (S.C.C.), where, at p. 215, in concurring reasons (for himself and Rinfret J.), Crocket J. addressed the origins and rationale of the rule in these terms:

> It is true that in *Saunders v. Vautier; Gosling v. Gosling; Wharton v. Masterman*, and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime....
>
> Various reasons have been ascribed for its [the rule's] establishment. Lindley, L.J., in *Harbin v. Masterman*, which went to the House of Lords on appeal under the name of *Wharton v. Masterman*, above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:
>
>> Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded....
>
> Herschell, L.C. said:
>
>> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
>
> Lord Davey said:
>
>> The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. [Footnotes omitted.]

61 The Court of Appeal relied on the judgment of this Court in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), as holding that the rule in *Saunders v. Vautier* was applicable to pension trusts, based on the finding in *Schmidt v. Air Products of Canada Ltd.* that pension trusts are "classic" trusts which are subject to "all applicable trust law principles" (*Buschau v. Rogers Communications Inc.*, 24 B.C.L.R. (4th) 85, 2004 BCCA 80 (B.C. C.A.) ("*Buschau #2*"), at para. 52). The appellant employer, Rogers Communications Inc. ("RCI"), now appeals that decision of the Court of Appeal, arguing that the respondents cannot invoke the rule in *Saunders v. Vautier* to terminate the pension trust. The respondents' purpose in seeking to terminate the pension trust was to crystallize and obtain the actuarial surplus, to which they would not otherwise be entitled unless the pension plan was terminated in some other way, such as by the

employer pursuant to the terms of the plan. A previous decision of the Court of Appeal had determined that despite the amendments to the trust made by RCI, the respondents retained the right to any actual surplus upon termination (see *Buschau v. Rogers Cablesystems Inc.*, 83 B.C.L.R. (3d) 261 (B.C. C.A.) ("*Buschau #1*"). It should also be noted that the pension plan itself provided that any surplus remaining upon termination after payment of the defined benefits would be distributed among the plan members.

62 The decision of the Court of Appeal also raises questions regarding the nature and content of an employer's obligation of good faith in a pension plan setting. In particular, it asks to what extent an employer is entitled to act in its own interests in the administration of a pension plan, consistent with its obligation to act in good faith. In *Buschau #2*, the Court of Appeal held that RCI's good faith obligation would preclude an amendment to re-open the Rogers Communications Inc. pension plan ("RCI Plan"), which was closed to new members in 1984.

63 National Trust Co., trustee of the pension trust under consideration in the main case (the "Trust"), also appeals the Court of Appeal's decision. It asks this Court to overturn the order made in the supplementary reasons of the Court of Appeal issued on May 18, 2004, wherein that court ordered National Trust to "turn ... over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners" (*Buschau v. Rogers Communications Inc.*, 27 B.C.L.R. (4th) 17, 2004 BCCA 282 (B.C. C.A.) ("*Buschau #3*"), at para. 16). National Trust argues that the effect of the decision of the Court of Appeal is to devolve upon it the authority and legal responsibility to give effect to and administer the termination of the Trust, an authority it says it does not possess under the terms of the RCI Plan or any applicable statute. National Trust argues that it is in no position to reconcile the decision of the court with the various legislative standards and requirements applicable to the termination of the Plan and Trust. It asks this Court to reverse the decision to impose on it duties and responsibilities it is not authorized to undertake pursuant to the Trust agreement, such duties and responsibilities belonging to the employer RCI or the Superintendent of Financial Institutions ("Superintendent"), pursuant to the applicable legislation and/or the terms of the Plan.

2. Background

64 RCI and respondents both provided a description of the events leading to the present appeal to establish the factual background for dealing with this case. I reproduce here the essence of their descriptions. It must be noted however that there is some disagreement concerning, in particular, the actual number of members in the Plan and the role played by the trustee National Trust, also an appellant.

65 The corporate predecessor of RCI established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

66 Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

67 Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

68 The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: *Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125 (B.C. S.C.). On January 11, 2001, the Court of Appeal [2001 CarswellBC 40 (B.C. C.A.)] upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see *Buschau #1*). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal, I would note at the outset that the court's finding in *Buschau #1* that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, *inter alia*, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the plan "so they can obtain the necessary consents to terminate the Plan" (100 B.C.L.R. (3d) 327, 2002 BCSC 624 (B.C. S.C.), at paras. 12 and 33).

71 On January 7, 2003 the respondents came to court with consents executed by the 144 members of the plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act*.

72 In reasons issued on May 1, 2003 (*Buschau v. Rogers Communications Inc.*, 13 B.C.L.R. (4th) 385, 2003 BCSC 683 (B.C. S.C.)), Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

73 Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, 2004. She held, at paras. 11 and 22 of *Buschau #2*, that:

> (a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;
>
> (b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;
>
> (c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;
>
> (d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances of this case, be taken in good faith by this employer *vis-à-vis* the existing beneficiaries".

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in *Buschau #3*, the court held that the appeal should be allowed but made, *inter alia*, the following orders:

> THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;
>
> THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;
>
> THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;
>
> . . . . .
>
> THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members (RCI's factum, at para. 24).

77 The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (*Buschau #3*).

78 At the hearing of this appeal on November 15, 2005, this Court requested that the parties provide further written submissions regarding the interface between the rule in *Saunders v. Vautier* and the P.B.S.A. This decision followed a discussion between various members of the Court and counsel concerning possible conflicts between the rule in *Saunders v. Vautier* and the P.B.S.A. I might also add that the same concerns had been raised by National Trust in its factum.

3. Analysis

79 The P.B.S.A. is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The P.B.S.A., together with the *Pension Benefits Standards Regulations, 1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.

80 Within this comprehensive scheme, s. 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets.

81 Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, as expressed in most plan documents, including the Plan at issue here. This right is recognized in s. 29(5) of the P.B.S.A., which refers to the intention of a plan administrator (who in most cases will be the employer) to terminate a pension plan. But the Superintendent is also given power to terminate pension plans in other certain specified situations. He has the power to revoke a pension plan's registration for failure to comply with directions (s. 11.1). Directions of

compliance can be issued where the Superintendent is of the opinion that an administrator or employer is acting in a manner "contrary to safe and sound financial or business practices" (s. 11(1)), or that a pension plan, or the administration of a pension plan, is not compliant with the P.B.S.A. or regulations (s. 11(2)). If registration is revoked, a plan is deemed to have been terminated (s. 29(1)).

82 In addition to deemed termination in consequence of the revocation of a plan's registration, s. 29(2) stipulates three other situations in which the Superintendent has power to directly order the termination of a plan. The Superintendent may exercise this power when there has been: a) cessation or suspension of employer contributions; b) discontinuance of the employer's business operations; or c) the employer's failure to fund the plan in accordance with prescribed standards of solvency. In each case, the power is directed to circumstances in which the security of the promised pension benefits is threatened.

83 This is consistent with the statute governing the Office of the Superintendent which states that the objects of the Office, in respect of pension plans, are: a) to supervise pension plans in order to determine if they meet minimum funding requirements or are complying with the other requirements of the legislation; b) if not, to advise the administrator and take, or advise the administrator to take, necessary corrective measures; and c) to promote the adoption by administrators of policies and procedures designed to control and manage risk (see the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I). It is apparent from the statutory objects of the Office that the supervisory focus of the Superintendent is primarily on matters affecting the solvency or financial condition of pension plans. It is worth noting here that National Trust invokes the P.B.S.A. in its appeal, arguing at para. 70 of its factum that "[t]he judgment of the British Columbia Court of Appeal turns this statutory scheme on its head and places the Trustee in the role that by statute has been assigned to the administrator and to the Superintendent".

84 There is no provision in the P.B.S.A. for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the P.B.S.A. for any party (employer, administrator, trustee, Superintendent, plan members or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.

85 "[T]ermination" in relation to a pension plan is defined in the P.B.S.A. as the cessation of the crediting of benefits to plan members generally (s. 2(1)). Termination of a pension plan is distinguished from "winding-up" which refers to the distribution of the assets of a terminated pension plan. The P.B.S.A. provides that the pension fund assets are only to be distributed after the Superintendent approves a report filed by the plan administrator on the termination of a plan. The report must set out the nature of the benefits to be provided under the plan and describe the methods of allocating and distributing those benefits (s. 29(9) and (10)).

86 A major issue in this appeal is whether termination of the Plan must logically precede the termination of the Trust. According to RCI, the judgment of the British Columbia Court of Appeal reverses the legislative scheme by permitting the beneficiaries of the Premier Plan to terminate the Trust and distribute the Trust assets, which were being held as security for the pension benefits accruing under the Plan, outside the legislative scheme and prior to the termination of the pension Plan itself. It argues at para. 18 of its supplemental factum that:

> In enacting the *PBSA, 1985*, Parliament intended to devise a comprehensive scheme for dealing with issues of pension plan regulation, including the circumstances of their termination and the winding up and distribution of assets held in pension funds. If it had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.

87 It would appear that none of the statutory grounds for termination of a pension plan are present in this case. The Premier Plan is fully funded and there is no threat to the solvency of the plan or the security of the pension benefits.

There is no issue that the RCI Plan is being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

88 RCI has suspended contributions to the Plan. However, these contribution holidays are authorized by the terms of the Plan and have been approved by the courts. The reference to "suspension or cessation of employer contributions" in s. 29(2)(*a*) of the P.B.S.A. must be construed as referring to situations where an employer does not make required contributions. It does not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan.

3.1 The Applicability of the Rule in Saunders v. Vautier

89 RCI recognizes that there may be circumstances in which it is appropriate to apply common law trust principles to resolve issues regarding pension plans which have not been directly addressed in the legislation. I agree. This was the approach taken in *Schmidt* with respect to the question of ownership of surplus on termination of a pension plan. In that case, it was acknowledged that there was a gap in the legislation and the provisions of the statute did not provide guidance on this issue. However, RCI argues that, in the present case, s. 29 contains detailed provisions regarding the circumstances and manner in which pension plans may be terminated. RCI concludes that the legislation has "occupied the field" on this issue and there is no room for the operation of a common law rule.

90 Pension trusts are not the same as traditional trusts, as stated by the Court of Appeal at paras. 1-2 in *Buschau #1*. In employment pension trusts, there is a legal relationship between the parties apart from the trust and continuing obligations on the part of the administrator. In the present case, in view of its very terms (see General Rule 7.2), there is no entitlement to an actuarial surplus while the Plan is ongoing. As stated by the Court of Appeal, the Trust Agreement and the Plan form an "integrated whole" (*Buschau #2*, at para. 13). Moreover, this is a defined benefit plan, i.e., a plan that is entirely funded by the employer, where members have an equitable interest in the trust assets, a right *in personam* against the trustee to require proper administration of the trust assets, and a contingent interest to the trust assets existing on plan termination if they are alive and members at the date of termination. The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract clearly contemplated a continuing Plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan; in the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus, which does not vest until the Plan is terminated. This is reinforced by the statement in *Schmidt*, at p. 655: "When the plan is terminated, the actuarial surplus becomes an actual surplus and *vests* in the employee beneficiaries" (emphasis added) (see also p. 654). As a result, the rule in *Saunders v. Vautier* cannot be invoked here, since the rule requires that the beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust *corpus*: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178. The question then is whether termination of this Plan can occur outside the boundaries of the P.B.S.A. The Court of Appeal reasoned that *Schmidt* had implicitly accepted that the rule in *Saunders v. Vautier* could apply independently of the P.B.S.A. and of any contract. The real question is whether trust law can in effect prevail over the contract and governing legislation in the present case (*Buschau #2*).

91 It is important to take note of the terms of the Plan and Trust documents. As I have previously stated, these are not distinct. The terms of the Plan are very specific and somewhat atypical of plans adopted in later years. In particular, art. V of the Trust Agreement reserves to the employer

> ...the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the Plan (including [the Trust] Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the [Trust] to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan....

General Rule Five permitted, but did not oblige, the employer to allocate additional pensions or pension entitlements to Plan members, retired or otherwise, if the Plan had an actuarial surplus. General Rule Six permitted members to designate a beneficiary, and to alter or revoke that designation within the bounds of the law. General Rule Seven gave the employer the right to amend, modify or change the Plan, provided that the changes did not affect certain of the members' rights or benefits. It also gave the employer the right to terminate the Plan if necessary. It went on to say:

> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of the assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

92 The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of RCI or the members that the Trust could be terminated by the members, over RCI's objections, in order that the members might obtain the surplus. The application of the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties because beneficiaries who can collapse a trust under *Saunders v. Vautier* can, with the consent of the trustees, collectively agree to vary its terms. The rule would permit members of a pension plan to unilaterally vary its terms without the employer's consent.

93 It is also very important to consider the legislative context in which modern pension plans operate. It would appear that, in her 2003 decision, Loo J. disregarded the provisions of the P.B.S.A. regarding termination, but applied the *Trust and Settlement Variation Act* where it was necessary to circumvent the difficulty in obtaining all consents necessary under the rule in *Saunders v. Vautier*. In *Buschau #3*, the Court of Appeal noted that the rule in *Saunders v. Vautier* could result in the termination of the Plan if all of the preconditions of the rule were met, without regard for the legislative scheme and in particular s. 29(9) which provides that on termination of a plan, the administrator must file a report with the Superintendent

> ...setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

94 This means that the rule in *Saunders v. Vautier* would permit the termination of the pension Plan and Trust without the involvement of the employer as Plan administrator and without the approval of the Superintendent. The only logical explanation for this conclusion is that the Court of Appeal had accepted that the Trust was independent of the Plan and could be dealt with solely by reference to the Trust itself, notwithstanding, in particular, that the P.B.S.A. (and the terms of the Plan, at art. 9.3) provided special protections for spouses and common law partners. The terms of the Plan could be totally disregarded. At para. 54 of its reasons in *Buschau #2*, the Court of Appeal seems to accept that the Trust and the Plan constitute an "integrated whole", but nevertheless concludes that this whole is subject to trust law principles and to the resulting "disappearance" of the employer's rights and powers on the sole initiative of the Plan members. This is very different from the decision to apply the rule only where there is no conflict with the legislative scheme as in *Schmidt*. In my view, the unique role of the employer in respect of the pension Plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier*.

95 In the context of the appeal brought by National Trust, particular regard must be given to s. 8(3) of the P.B.S.A., which states:

> 8. ...
>
> (3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

It is clear that a court has no authority to assign to National Trust the responsibilities of the administrator and of the Superintendent contrary to the legislative scheme which has determined a process to terminate a pension plan. But here I believe the Court of Appeal was defining a role for National Trust in light of the distinction it had made between the termination of the Plan and the termination of the Trust, only the former being subject to the terms of the Plan and provisions of the P.B.S.A.

96 The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security. This is not consistent with the operation of the rule in *Saunders v. Vautier*, as applied by the Court of Appeal in this case, which is based on an entirely different policy objective.

97 The introduction of the *Saunders v. Vautier* principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests. In these circumstances, the "fair and delicate balance between the employer and employee interests" (*Monsanto Canada*, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans.

98 The rule in *Saunders v. Vautier* requires the consent of all parties who have an interest, or who own rights of enjoyment, in the trust property. The Court of Appeal held that the rule could be applied with the consent of all members (by which they surely meant to include former members) of the Premier Plan and those persons who are now designated beneficiaries (*Buschau #2*). But s. 22 of the P.B.S.A. requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on the date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 percent of the joint benefit. This requirement is reflected in the terms of the Premier Plan (art. 9.3). The inclusion of survivor benefits was a policy choice of the Legislature that must be honoured. These statutory rights cannot be overridden by the consent of present Plan members and other beneficiaries or by the courts. Nor can s. l(b) of the *Trust and Settlement Variation Act* assist. The current spouses and common law partners who have a present contingent interest are *sui juris*. As such, they could give their consent to termination of the Plan, and the court does not have the power to consent on their behalf unless they are legally incapacitated.

99 As for the interests of future possible spouses and common law partners, whose consent would also be required for termination pursuant to *Saunders v. Vautier*, those interests are more problematic in that their direct consent cannot be obtained, and asking a court to consent on their behalf would raise serious questions. RCI notes at para. 37 of its supplementary factum that, "the court may only consent on behalf of a beneficiary if the proposed trust variation is in the interests of that party. It is difficult to conceive of a circumstance in which termination of a pension trust would be in

the interests of future spouses or common law partners". Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners would presumably not be in their best interests. If Plan members who are not currently married or in a common law relationship were allowed to terminate the Plan and obtain the surplus, but were then to enter into a marriage or common law relationship in the future, their future spouses or common law partners would not enjoy their statutory right to the joint and survivor benefit to which they would have been entitled had the Plan been ongoing and not terminated. Thus, even if this was sufficient, valid consents to termination of the Plan in order to satisfy the pre-conditions of the *Saunders v. Vautier* rule have not been and cannot be obtained from all possible beneficiaries here; more importantly, while the current spouses and common law partners of Plan members are able to consent to termination, future spouses and common law partners who are currently unascertainable cannot give such consent, and a court would likely be reluctant to give its consent on their behalf.

100 For these reasons, I would conclude that the rule in *Saunders v. Vautier* does not apply in the circumstances of this case and that any application regarding the termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the P.B.S.A. The respondents' suggestion that the absence of a procedure in the P.B.S.A. permitting a unilateral termination of the Plan by the members justifies the action under the rule of *Saunders v. Vautier* cannot be accepted. The rule simply does not apply. Members' rights are determined by the Plan itself and the P.B.S.A.; as indicated above, neither the terms of the Plan itself nor the provisions of the P.B.S.A. grant the members a right to terminate the Plan. The unilateral right of members to terminate the Plan simply does not exist in this case.

3.2 The Issue of Good Faith

101 The Court of Appeal decided, at para. 61 of its reasons in *Buschau #2*, that the obligation of good faith of the employer precluded RCI from adopting any amendments to the Plan and Trust opening it to new members following its closure in 1984; it related this to what it termed the "stratagem" adopted by RCI years earlier to benefit from the actuarial surplus by merging different pension plans. The Court of Appeal then continued with a discussion of the employer's "interest" in the Plan and Trust.

102 It is quite obvious that the whole discussion concerning good faith had to do with fair conduct as administrator of the Plan. RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plans's terms. RCI says there is no stratagem, only the exercise of a power to amend in the context — and this is fundamental — of a defined benefit plan. RCI says that "the analysis of good faith in respect of the exercise of a discretionary power in a contractual context begins with a careful consideration of the parties' reasonable contractual expectations" (factum, at para. 75). It is a prohibition against acting in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" unless the employer has "reasonable and proper cause" (para. 80, quoting *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* (1990), [1991] 2 All E.R. 597 (Eng. Ch. Div.), at p. 606). The respondents reject the contractual perspective and say that nothing done by the employer should affect or dilute their entitlements under the Plan; equitable principles should apply. I do not consider it necessary to arbitrate this debate. Section 8(10) of the P.B.S.A. provides sufficient guidance. The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees' pension benefits, not in a way that would reduce, threaten or eliminate them (see *Imperial Group*).

103 It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier*. I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier*. But of course the parties could not ignore the Court of Appeal's decision in *Buschau #1*. As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could

be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning is however driven by the idea that the Plan members were promised more than their pensions under the Plan, i.e., the right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the P.B.S.A. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(*b*) of the P.B.S.A. which states that "where the employer is the administrator pursuant to paragraph 7(1)(*c*), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer ... (*b*) shall act in the best interests of the members of the pension plan".

4. Disposition

104 The appeal is allowed and the order of the Court of Appeal is set aside with costs in all courts to RCI and in this Court to National Trust.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on June 26, 2006 has been incorporated herein.

TAB 11

FORM 49
[RULE 13.19]

CLERK'S STAMP

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*, R.S.C. 1985, c. C-36, as amended
	AND IN THE MATTER OF THE 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.
DOCUMENT	**AFFIDAVIT OF RYAN TOBBER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** 1600 – 421 7th Avenue SW Calgary, Alberta T2P 4K9 Attention: Tom Cumming / Anthony Mersich Telephone No.: 403-298-1938 / 403-298-1831 Fax No.: 403-695-3538 Email: tom.cumming@gowlingwlg.com / anthony.mersich@gowlingwlg.com File No.: V41817

Sworn on July 3, 2018

I, Ryan Tobber, of Calgary, Alberta, SWEAR AND SAY THAT:

I. INTRODUCTION

1. I am the President and Chief Executive Officer of Ranch Energy Corporation ("**Ranch**"), OpsMobil Inc. ("**OpsMobil**"), 1734163 Alberta Inc. ("**1734**"), 1859821 Alberta Inc. ("**1859**"),

GROUP INC, OPSMOBIL CONSTRUCTION INC, OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.

DOCUMENT	**SECOND AFFIDAVIT OF RYAN TOBBER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** 1600 – 421 7th Avenue SW Calgary, Alberta T2P 4K9 Attention: Tom Cumming / Anthony Mersich Telephone No.: 403-298-1938 / 403-298-1831 Fax No.: 403-695-3538 Email: tom.cumming@gowlingwlg.com / anthony.mersich@gowlingwlg.com File No.: V41817

Sworn on July 8, 2018

I, Ryan Tobber, of Calgary, Alberta, SWEAR AND SAY THAT:

I. INTRODUCTION

1. I am the President and Chief Executive Officer of Ranch Energy Corporation ("**Ranch**"), OpsMobil Inc. ("**OpsMobil**"), 1734163 Alberta Inc. ("**1734**"), 1859821 Alberta Inc. ("**1859**"), OpsMobil Group Inc. ("**Ops Group**"), OpsMobil Construction Inc. ("**Ops Construction**"), OpsMobil Energy Services Inc. ("**Ops Services**") and K.L. Capital Corp. ("**KLCC**"). (Ranch, OpsMobil, 1734, 1859, Ops Group, Ops Construction, Ops Services are hereinafter referred to as the "**Applicants**", and each individually, an "**Applicant**"). As such I have personal knowledge of the matters hereinafter deposed to, save where stated to be based on information and belief, in which case I verily believe the same to be true.

2. I am authorized to swear this Affidavit as the corporate representative of the Applicants.

3. This Affidavit is made to supplement my Affidavit sworn July 3, 2018 (the "**July 3 Affidavit**") in support of an Application by the Applicants for an Order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "***CCAA***"), and for an Order adjourning *sine die* the application of Third Eye Capital Corporation ("**Third Eye**") for an order appointing Ernst & Young Inc. ("**E&Y**") as receiver of the assets, undertakings and properties of the Applicants (the "**Receivership Application**", and the proposed receiver, the "**Receiver**").

4. All references to dollar amounts contained herein are to Canadian Dollars unless otherwise stated.

5. All capitalized terms herein have the same meaning as in the July 3 Affidavit unless otherwise defined.

II. REASON FOR CREATING 211 ALBERTA TO PURCHASE THE SHARES OF PREDATOR

6. At paragraphs 50 and 51 of the July 3 Affidavit, I discussed 211 Alberta's acquisition of all of the shares in the capital of Predator. The following paragraphs provide additional information as to my reasoning for causing 211 Alberta to acquire all the shares of Predator.

7. In early June 2018, I was informed by Predator's principal at the time, Greg MacDonald, that Predator had been approached by a third party in early 2018 offering to purchase all the outstanding shares in Predator, and that the shareholders of Predator were considering proceeding with the third party. Had the third party successfully completed the purchase of Predator's shares, I believe that Ranch would have lost the opportunity to acquire the Permits to the PNG Assets. Attached hereto as **Exhibit "A"** is a copy of the email and attached letter from a third party to Predator setting out the terms under which the third party proposed to purchase the shares of Predator.

8. As a result of insufficient cash flow, Ranch had been unable to comply with the following obligations under the Trust Agreement:

   (a) Under section 4.1, Ranch was required to pay a monthly administrative fee to Predator, which increased in time intervals of 3 to 5 months, from $40,250 to $275,000, plus any reasonable costs incurred by Predator as a result of holding the assets. As of May 31, 2018, $960,654.44 was owing on account of these fees and expenses;

   (b) On April 20, 2018, Predator received from the British Columbia Oil and Gas Commission (the "**OGC**") an order to pay a security deposit of $656,883, which Ranch was obligated to pay under section 4.1, and is obligated to indemnify Predator for under section 5.1. On June 18, 2018, I caused Predator, as sole its shareholder, to make this payment to the OGC on behalf of Ranch.

(c) On June 28, 2018, Predator received from the OGC an order to pay an additional security deposit of $2,752,849, which Ranch is obligated to pay under section 4.1 and is obligated to indemnify Predator for under section 5.1.

(d) Under section 4.3(a), for 12 months following June 16, 2017, Ranch was required to pay 25% of its monthly net cash flow into a trust account to be allocated to abandonment, reclamation or other environmental liabilities, and thereafter, until the Permits were transferred to Ranch, pay into trust 25% of Ranch's net monthly cash flow plus an additional 25% of Ranch's net monthly cash flow as security for any security deposit required to be paid by the OGC. As of July 7, 2018, Ranch had failed to pay any funds into trust.

9. Further, in order to be entitled to obtain a transfer of the Permits, Ranch had to be compliant with the OGC's regulatory framework, including being qualified to hold the Permits. At the very least, Ranch would have to replace the current security deposit of $15,656,868, provide the additional security deposit of $3,710,412, and perform the regulatory obligations described in paragraphs 42 - 44 of this Affidavit, which would cost approximately $3,101,000.

10. Further, the OGC has indicated that it would review Ranch's LMR monthly, and expected that an additional security deposit upwards $15,000,000 could be required over the next 12 months. Attached hereto as **Exhibit "B"** is a true copy of an email originating from Mike Janzen, Director of Liability Management at OGC, dated July 3, 2018, setting out the OGC's position with respect to Ranch's LMR obligations.

11. It is my belief that if a third party gained control of the permits they would have pursued Ranch for the full all amounts owing under the Trust Agreement and possibly the PSA.

12. Because the Permits are integral to protecting the value of the PNG Assets for all stakeholders of Ranch, including Third Eye, I believed purchasing the shares of Predator and amalgamating Predator with Ranch was the most capital efficient approach to securing the Permits. As stated at paragraph 50 of the July 3 Affidavit, I discussed the option of purchasing Predator's shares with Horrox prior to causing 211 Alberta to do the same, but the idea was rejected by Third Eye. Subsequently, on June 30, 2018, Third Eye indicated to me that Ranch and Predator should be amalgamated.

III. INDEBTEDNESS OF RANCH

13. Ranch is indebted to Third Eye pursuant to a promissory note issued by Ranch to Third Eye on July 10, 2017 (the "**Original Note**") in the original principal amount of $8,500,000, of which:

(a) $7,000,000 was advanced by Third Eye to Ranch;

(b) $1,000,000 was retained by Third Eye to be advanced to Ranch at a later date, when such amounts would be lent to OpsMobil Inc. to make certain payments as approved by Third Eye; and

(c) $500,000 represented the fully earned and non-refundable closing fee payable by Ranch to Third Eye.

14. The Original Note has since been amended and restated seven times. Under each amendment, Third Eye advanced additional funds to Ranch for specified purposes, which are as follows:

(a) Under the first amended and restated promissory note, dated October 19, 2017, a further (i) $1,210,000 was advanced to secure a letter of credit with ATB Financial, (ii) $240,000 was advanced to pay outstanding invoices due to OpsMobil Inc., and (iii) $50,000 represented the fully-earned and non-refundable closing fee owing to Third Eye;

(b) Under the second amended and restated promissory note, dated November 24, 2017, a further (i) $2,950,000 was advanced to permit Ranch to pay amounts approved by Third Eye from time to time owing to third parties, and (ii) $50,000 represented the fully-earned and non-refundable closing fee owing to Third Eye;

(c) Under the third amended and restated promissory note, dated February 15, 2018, a further (i) $132,798.55 was advanced to pay outstanding interest owing to Third Eye, (ii) $727,201.45 was advanced for working capital purposes, and (iii) $100,000 represented the fully-earned and non-refundable closing fee owing to Third Eye;

(d) Under the fourth amended and restated promissory note, dated March 9, 2018, a further $330,000 was advanced for working capital purposes;

(e) Under a fifth amended and restated promissory note, dated March 16, 2018, a further (i) $651,000 was advanced on the date thereof for working capital purposes, and (ii) $31,000 represented the fully-earned and non-refundable closing fee paid by Ranch to Third Eye;

(f) Under a sixth amended and restated promissory note, dated April 5, 2018, a further $69,000 was advanced for working capital purposes;

(g) Under a seventh amended and restated promissory note, dated April 13, 2018, a further $750,000 was advanced for working capital purposes,

(the Original Note, collectively with the foregoing amended and restated promissory notes, being the "**Ranch P-Note**").

15. In total $15,760,000 was advanced by Third Eye to Ranch under the Ranch P-Note, of which $5,477,201.45 was allocated to address Ranch's working capital shortfall caused by depressed commodity prices and constrained due to production transmission curtailment and shut-in wells. The working capital advances were not used on operations that enhanced the value of the PNG Assets. $731,000 represented Third Eye's fees.

16. Under the Promissory Note, interest was 12% compounded monthly in arrears (the "**Interest Rate**"), payable on the outstanding principal amount of the Promissory Note in arrears for the preceding calendar month on the first business day of each calendar month commencing August 1, 2017. If an event of default occurred, interest increased to the Interest Rate plus 10% per annum, for a total of 22% (the "**Default Rate**"). Under the Original Note, the principal amount and accrued interest was to be paid no later than September 30, 2017; however, from the third amended and restated promissory note onwards, Ranch was required to apply 25% of each receivable collected, net of transportation costs, to repay the principal owing under the Promissory Note. This obligation was without prejudice to Third Eye's absolute and sole discretion to demand repayment of the entire principal amount owing under the Promissory Note at any time.

17. Under the Promissory Note, interest payments were due on the first day of each month. The following interest payments were due under the Promissory Note.

(a) September 1, 2017 in the amount of $86,630.12, which was paid by Ranch on September 5, 2017;

(b) October 1, 2017 in the amount of $86,630.12, which was paid by Ranch on October 5, 2017;

(c) November 1, 2017 in the amount of $93,123.87, which was paid by Ranch on November 24, 2017;

(d) December 1, 2017 in the amount of $106,238.46, which was paid by Ranch on December 8, 2017;

(e) January 1, 2018 in the amount of $132,737.58, which was paid by Ranch on January 8, 2018;

(f) February 1, 2018 in the amount of $132,798.55, which was paid by Ranch on February 15, 2017;

(g) April 1, 2018 in the amount of $ 123,497.49, which was not paid by Ranch;

(h) May 1, 2018 in the amount of $281,617.34, which was not paid by Ranch; and

(i) June 1, 2018, in the amount of $302,044.16, which was not paid by Ranch.

18. All interest payments were subject to the Interest Rate, until March 26, 2018, after which date all interest payments were subject to the Default Rate.

19. As of June 30, 2018, Ranch has paid $635,478.10 in interest to Third Eye under the Ranch P-Note, and has an additional $707,158.99 owing in outstanding interest under the Ranch P-Note. A summary of fees and charges under the Ranch P-Note, and a copy of the Ranch P-Note account statement for May 2018, are attached hereto as **Exhibits "C"** and **"D"**, respectively.

IV. INDEBTEDNESS OF OPSMOBIL

20. OpsMobil is indebted to Third Eye pursuant to a credit agreement dated December 23, 2015 among OpsMobil Inc., as borrower, and 1734163 Alberta Inc., 1859821 Alberta Inc., 810807 Alberta Ltd., Air Dallaire Ltd., OpsMobil Group Inc. (formerly Gemini Helicopters Inc.), Lynn's Helicopter Leasing Ltd., OpsMobil Construction Inc. OpsMobil Energy Services Inc., K.L.

Capital Corp., Ranch Energy Corporation, Roch Dallaire and Ryan Tobber, as guarantors, the lenders from time to time party thereto, and Third Eye as administrative agent to the lenders. Such credit agreement was amended pursuant to (i) a forbearance agreement dated April 8, 2016, (ii) an amendment and extension to forbearance agreement dated July 6, 2016, (iii) a second amendment and extension to forbearance agreement dated September 30, 2016, and (iv) a third amendment and extension to forbearance agreement dated December 31, 2016 (such credit agreement as amended, restated, supplemented and modified, the "**Credit Agreement**" or the "**OpsMobil Loan Agreement**").

21. Under the Credit Agreement, Third Eye agreed to provide to OpsMobil (i) a revolver facility of $3,000,000 (the "**Revolver Facility**"), and (ii) a term credit facility of $7,000,000 (the "**Term Facility**"). The Closing Date under the Credit Agreement was December 23, 2015.

22. On June 1, 2016, OpsMobil Group Inc., 810807 Alberta Ltd. and Lynn's Helicopter Leasing Ltd. amalgamated to form Ops Group.

23. In consideration of Third Eye arranging the financing under the Credit Agreement, OpsMobil was required to pay to Third Eye i) a closing fee of $200,000.00, ii) a placement fee of $100,000, iii) a fee equal to 2% per annum multiplied by the difference between the average daily advances outstanding under the Revolver Facility and the maximum amount available under the Revolver Facility, calculated on the first business day of each month, and iv) a monthly monitoring fee of $10,000 per month.

24. The advance under the Term Facility was made on the Closing Date. Advances under the Revolver Facility were conditional on, among other things, there being no default or event of default under the Credit Agreement, no material adverse change had occurred in the business, operations and assets of OpsMobil, the delivery of a borrowing base certificate to Third Eye and the lending limit under the Revolver Facility not being exceeded.

25. Interest accrued under (i) the Revolver Facility bore interest at the greater of 12% per annum and the prime rate of the Royal Bank of Canada from time to time, compounded monthly not in advance, and (ii) the Term Facility at 14% per annum calculated monthly not in advance. If an event of default occurs, additional interest of 10% per annum was imposed, for a total 22% under the Revolver Facility and 24% under the Term Facility.

26. Under the Credit Agreement, OpsMobil is required to repay the principal under the Term Facility by monthly payments of $87,500 on the first day of each month following the first anniversary of the Closing Date and the balance of all outstanding amounts under the Term Facility on the date that is 36 months after the Closing Date, or such later date as may be determined under the Credit Agreement (the "**Maturity Date**"). OpsMobil shall repay all advances made under the Revolver Facility and the Term Facility on the Maturity Date.

27. As of April 30, 2018, Third Eye has advanced $21,363,119.37to OpsMobil under the Credit Agreement. OpsMobil has paid $2,275,283 in interest and $143,150 in fees under the Credit Agreement. OpsMobil has been charged a further $10,330,098 in interest and fees under the Credit Agreement that it has not yet paid to Third Eye. A summary of fees and charges under the Credit Agreement, and a copy of the Credit Agreement account statement for May 2018, are attached hereto as **Exhibits "E"** and **"F"**, respectively.

V. CONTROL OF THE APPLICANTS' CASH FLOW

28. ATB Financial (formerly Alberta Treasury Branches, and referred to as "**ATB**"), Ranch and Third Eye entered into a blocked account agreement dated as of July 10, 2017 (the "**Ranch Blocked Account Agreement**"), which provides that ATB will maintain certain accounts of Ranch with ATB, being account no. 00791264100 and account no. 00791445800 (the "**Ranch Accounts**"), to which all deposits, revenues and other sums payable to Ranch shall be deposited, and, under the Blocked Account Agreement, a security interest is granted to Third Eye by Ranch of the deposits and other monies of Ranch in the Accounts. Attached hereto as **Exhibit "G"** is a true copy of the Ranch Blocked Account Agreement.

29. ATB, OpsMobil and Third Eye also entered into a blocked account agreement (the "**OpsMobil Blocked Account Agreement**") in December of 2015, with respect to OpsMobil's accounts having account nos. 0047-5733-500, 0047-5636-300, 760-00541523300, and 760-0541262500 (the "**OpsMobil Accounts**", and collectively with the Ranch Accounts, the "**Accounts**"). The terms of the OpsMobil Blocked Account Agreement are identical to those of the Ranch Blocked Account Agreement. Attached hereto as **Exhibit "H"** is a true copy of the OpsMobil Blocked Account Agreement.

30. The Ranch Blocked Account Agreement and the OpsMobil Blocked Account Agreement (collectively, the "**Blocked Account Agreements**") stipulate that until there is a default under

the Ranch P-Note or the Credit Agreement, ATB will comply only with the transfer, withdrawal and disbursement instructions of Ranch or OpsMobil Inc, as applicable. Once Third Eye gives ATB notice of default under the Ranch P-Note and/or Credit Agreement, the Accounts are under the dominion and control of Third Eye, and Ranch and/or OpsMobil Inc. cease to be entitled to withdraw, draw upon or otherwise exercise authority with respect to the Accounts.

31. Starting July 2016 and continuing at various intervals until June 15 2017, Third Eye swept cash daily from the OpsMobil Accounts and applied these funds to their loan balances and fees. This forced repayment ranged for $10,000 per day to $40,000 per day and was paid in advance of all other required payments including: Canada Revenue Agency, payroll, subcontractors, and critical vendors and suppliers.

32. Ranch has never had free access to the funds made available to it under the Ranch P-Note. Since July 10, 2017, Ranch has been required to obtain approval from Third Eye for the use of funds under the Ranch P-Note, notwithstanding that Ranch had not defaulted under the Ranch P-Note until late-March of 2018.

33. On March 26, 2018, Ranch defaulted under the Ranch P-Note. Shortly thereafter Third Eye issued a notice to ATB blocking the Ranch Account.

34. Since March 18, 2016 and July 10, 2017, respectively, OpsMobil and Ranch, have had to submit requests to Third Eye any time they required access funds from the Accounts to pay vendors and other service providers. Each payment was individually approved.

35. Upon approval of any payment request, Third Eye would forward the requested funds to Ranch or OpsMobil, as applicable, for the approved purposes.

36. Since invoices need to be paid frequently, and these requests were made nearly on a daily basis. Attached hereto as **Exhibit "I"** is a list of each payment request made by OpsMobil and Ranch from March 18, 2016 to April 27, 2018.

37. Each payment request was reviewed by Third Eye, and either approved or rejected at Third Eye's sole discretion. Third Eye rejected payment requests for, *inter alia*, the following expenses:

(a) Administration payroll;

(b) Field payroll; and

(c) Subcontractor payments.

38. Since OpsMobil and Ranch were required to deposit all revenues and other sums in the Accounts, and Third Eye had exclusive power and authority over the Accounts, OpsMobil and Ranch were not able to pay any invoices without Third Eye's approval. Since March 18, 2016, Third Eye has reviewed and approved every single expenditure made by OpsMobil and Ranch, as applicable.

39. Since the last advance provided by Third Eye on April 13, 2018, OpsMobil and Ranch have struggled to operate within their current cash flows, due in part to depressed gas prices experienced during scheduled maintenance of gas transmission pipelines in the area in which Ranch and OpsMobil operate. During this period Third Eye has approved payments for a narrow scope of purposes, such as mineral lease payments owing to the Crown. Conversely, Third Eye has not approved the payment of amounts owing to Ranch's and OpsMobil's trade creditors. As a result, the unsecured trade debt owing by Ranch and OpsMobil to its service providers and vendors has increased dramatically since mid-April of this year. Attached hereto as **Exhibit "J"** and **"K"** are statements summarizing the accounts payable of Ranch and OpsMobil as of June 25, 2018 and July 2, 2018, respectively

40. Only July 3, 2018, I received a correspondence from Pam Gabris of Enbridge (the "**Gabris Letter**"), wherein she demanded payment from Ranch for amounts owing to Enbridge under invoices due on June 27, 2018 relating to transportation fees (the "**Enbridge Fees**"). Failure to pay the Enbridge Fees would give rise to a default under the transportation agreement between Enbridge and Ranch (the "**Transportation Agreement**"). Pursuant to the Transportation Agreement, Enbridge is permitted to terminate transportation of Ranch's natural gas if a default is not cured within five days of being served with notice. Such termination would have a material and detrimental impact on Ranch's ability to generate revenue.

41. Upon receiving the Gabris Letter, Thompson contacted Shinya to request how to proceed with the demand from Enbridge, since such payment would have to be approved by Third Eye in advance. Horrox responded to Thompson on behalf of Third Eye, wherein he did not approve the payment to Enbridge, but rather, advised that OpsMobil "discuss with [its] management

team." Attached hereto as **Exhibit "L"** are true copies of the Gabris Letter with attachments and subsequent email correspondence between Third Eye and OpsMobil.

VI. REGULATORY COMPLIANCE

42. As stated at paragraph 35 of the July 3 Affidavit, the PNG Assets consist of approximately 1600 wells. Of those wells, approximately 800 are non-producing wells.

43. Upon the transfer of the PNG Assets from Penn West to Predator, the OGC identified various deficiencies (the "**OGC Deficiencies**") with the PNG Assets. The OGC also issued a number of compliance orders to in respect of the PNG Assets (the "**OGC Orders**"). As indicated in paragraph 8 above, Ranch was required to indemnify Predator for any liabilities incurred or suffered by Predator as a result of holding the PNG Assets in trust, which would include the OGC Deficiencies and OGC Orders.

44. Currently, Ranch estimates the costs associated with remediating the OGC Deficiencies at approximately $211,000, and the cost of complying with the OGC Orders at approximately $2,890,000. Attached hereto as **Exhibit "M"** is are lists setting out the details of the OGC Deficiencies and OGC Orders.

VII. THE APPLICANTS' PROPOSED *CCAA* PLAN

45. The first critical plank of any plan under the *CCAA* is securing the Permits without significant expenditure up-front. The former shareholders of Predator (the "**Former Shareholders**"), who are at arm's length to Ranch and OpsMobil, are owed $7,000,000 on account of the purchase price, which unpaid purchase price is secured by a security interest over all of the assets of 2118469 Alberta Ltd. ("**211 Alberta**"), including the shares in Predator. Predator also has paid a security deposit to the OGC equal to $15,656,868, which the OGC is required to return to Predator on approving the transfer of the Permits. Since the Former Shareholders would likely object to a transfer or transaction that does not protect the actual value of their interest in Predator, part of the plan would have to protect that interest on terms acceptable to them. Since I have guaranteed the Indebtedness owing to Third Eye, any amounts in excess of the real economic interest of the Former Shareholders would have to go back into Ranch.

46. The Applicants have suggested amalgamating Ranch and Predator as a means of unifying the PNG Assets with the Permits. Under such an amalgamation, the amalgamated entity would also

acquire all of Predator's liabilities. As the sole shareholder Predator, I am aware that, as at April 30, 2018, Predator has liabilities in the amount of $1,151,484, as well as a potential liability in the amount of $2,042,001.56, mostly relating to accounts payable in respect of the PNG Assets. I believe under a CCAA proceeding, and with an amalgamation between Ranch and Predator, the claim by CNRL against Predator can be resolved amicably. Attached hereto as **Exhibit "N"** is a true copy of a correspondence from CNRL to Predator, dated June 8, 2018.

47. Prior to the *CCAA* application, Third Eye and Ranch had agreed to the concept of selling part or all of the working interest in the Wildboy gas plant to a Midstream company. We would propose to continue this approach, as it is a common and viable form of raising capital and I believe this process would result in a transaction that would completely payout the Ranch debts own and make substantial payment to the OpsMobil debts. Alvarez & Marsal Securities Canada ULC ("**A&M Securities**") had recently prepared the marketing materials for this purpose and we are in discussions with a number of interested parties.

48. If the *CCAA* application is granted and Alvarez & Marsal Canada Inc. ("**A&M**") is appointed as monitor, OpsMobil and Ranch would apply for an Order, in a form acceptable to Third Eye and other stakeholders:

(a) Creating a sale and investment solicitation process (the "**SISP**"), administered by A&M, with full disclosure to and consultation with Third Eye, its financial advisor and other stakeholders, except to the extent that they are proposing to purchase assets of Ranch or OpsMobil, in which event disclosure and consultation would be limited to the extent A&M believes necessary to control the integrity of the process. . I envision that the SISP would created by court order, and would set out detailed procedures and key milestones that would be established by the Monitor, in consultation and agreement with the Applicants and Third Eye. Ensuring that key milestones and procedures are established and agreed upon will reduce the costs of administration of the CCAA proceeding;

(b) A&M would be given such enhanced powers under court order with respect to the Applicants, in order to assure Third Eye and other stakeholders that their concerns with respect to the management of the Applicants have been addressed; and

(c) A&M would utilize the services of A&M Securities to carry out the marketing and sale activities under the SISP, on terms approved by this Court, to ensure that economies are achieved in carrying out the SISP.

49. As an independent court officer, A&M would ensure that transparency is achieved with the stakeholders of OpsMobil and Ranch. OpsMobil and Ranch are committed to giving A&M their complete cooperation and are prepared to work with Third Eye in a cooperative manner throughout this process.

50. A&M Securities has a good understanding of the assets and operations of Ranch and OpsMobil from its previous marketing work on such assets, and has already created certain marketing materials from such marketing. I believe that results from the prior marketing process conducted by A&M Securities are not representative of what could be achieved from a SISP in these proceedings. I believe that the current market conditions have changed since the previous marketing process was conducted, approximately nine months ago. Further, I believe that having a pre-approved SISP in place will provide comfort to parties interested in bidding that any or all bids or offers will be seriously considered, and that a transaction will take place.

51. If the *CCAA* Order is granted, there are a number of transactions which A&M could pursue:

(a) Airborne Energy Solutions ("**AES**") had agreed to purchase certain aviation assets of OpsMobil, and has been in possession of and operating the various assets subject to that agreement. If A&M and the Court are satisfied that the purchase price represents fair value to the estate, the transaction could be completed immediately, which would realize approximately $1,500,000;

(b) A&M would market the remaining aviation assets of OpsMobil, which could have a value in the range of $2,000,000 to $3,000,000. AES has expressed an interest in these assets;

(c) The remaining value in OpsMobil is the goodwill associated with the asset management business. I approached ClearStream Energy Services Inc. ("**ClearStream**"), a publicly traded service company, to discuss a business combination pursuant to which ClearStream would create an asset management division to operate the asset management business and would add new projects. Currently, OpsMobil is in advanced negotiations with ClearStream about such combination. OpsMobil would receive 50% of the divisional profits for 5 years. Based on the current contract and opportunities backlog we believe the expected earnings to the benefit of OpsMobil would be $17,360,350 by the end of the third year. I do not believe a receiver could realize any value from the OpsMobil goodwill; and

(d) A&M would market the PNG Assets of Ranch, including approaching parties who had previously indicated an interest in purchasing them.

(e) A&M would engage a specialized marine broker to market the catamaran sail boat owned by 1859. Expected proceeds would be $500,000 - $600,000.

52. These steps would form the building blocks of a plan that would at least bring the Permits within Ranch and possibly form the basis for a restructured Ranch and OpsMobil.

VIII. FILED 13-WEEK CASH FLOW FORECAST

53. As previously reported and reflected in the filed 13-Week Cash Flow Forecast (and as commented in the Proposed Monitor's report dated July 3, 2018), Ranch and Ops originally required approximately $3.7 million over the 13-week period.

54. As agreed to with Third Eye in the Interim Stay Order, Third Eye advanced the majority of the $856,000, of which $300,000 was an pre-paid account receivable and $355,275.38 was Ranch's cash on hand held by Third eye, to cover critical operating costs as reported in the 13-Week cash flow (and additional expenses relating to transportation costs that Third Eye wished to pay with cash as opposed to not allowing the transportation to be "stayed" from paying these amounts or having these companies rely on letters of credit that had been previously posted). These transportation costs, of approximately $518,000 were not reflected in the 13-week cash flow as it was assumed that these amounts would have been stayed or that there was adequate security to pay these amounts in the letters of credit (which relate to pre-*CCAA* amounts outstanding). Going-forward in a CCAA proceeding, and as reflected in the 13-week cash flow forecast, transportation costs are forecasted to be paid on monthly basis. Ranch did receive a $300,000 early payment by Middleton Energy Management Ltd. with respect to June production revenues. This payment was reflected in the filed 13-week cash flow and, in accordance with the Interim Stay Order, these funds were swept by Third Eye.

55. Since the Week 1 receipts and expenses as included in the filed 13-Week cash flow forecasts have largely been collected and paid from the Interim Financing provided by Third Eye, respectively (except the forecast CCAA professional fees), OpsMobil and Ranch will now require approximately $3.4 million (starting from Week 2 to Week 13). To address the next immediate cash flow concerns, Predator continues to be prepared (as originally contemplated) to advance an immediate $500,000 as interim financing which will allow the Applicants to operate over the next two weeks. This, along with the immediate closing of the AES agreement will provide $2,000,000 into the estate that will provide adequate cash flows until the first week of August 2018 (one additional month), or Week 6 of Ranch's 13-Week cash flow. The Company would then be required to obtain an additional $1.5 million to address the remaining cash flow needs over the 13-Week cash flow period.

56. My management team and I have been actively pursuing additional interim financing. I expect, imminently, to receive a number of term sheets to provide interim financing for up to $5 million. I understand that once an additional interim lender is selected, closing will likely take no more than two weeks, subject to court approval. I am confident that I will be able to obtain additional interim financing before we return to Court, but have instructed my counsel to seek a stay that expires before the cash resources, including the amounts advanced by Predator, are exhausted.

57. I have been in discussions with the following parties in respect of obtaining additional interim financing:

(a) Maynbridge Capital;

(b) Bullmoose Capital;

(c) Stream Capital;

(d) Callidus Capital;

(e) Pillar Capital;

(f) AES;

(g) Angelo Gordon; and

(h) Invinco Capital.

58. I expect to have term sheets in respect of offers for interim financing from some of the above-noted parties within a matter of days of the date of this Affidavit. Interim financing and the SISP would permit a plan to restructure Ranch and OpsMobil, or at least enable the amalgamation of Ranch and Predator.

59. Further, if this court were to provide relief under the CCAA, and Third Eye wish to provide the interim financing, then subject to agreeing upon reasonable terms, the Applicants would be amenable to obtaining financing from them.

60. Therefore, from a cash flow perspective, the cash flow requirements identified in the 13-Week cash flows that I signed, are achievable if (i) this court allows the interim financing of $500,000 that Predator is prepared to advance, (ii) closing of the sale to AES occurs forthwith (which I am advised AES supports) and (iii) further interim financing is obtained. Without the interim financing, the Applicants would be unable to cause the amalgamation of Ranch and Predator, and to pursue a SISP, and develop a plan of compromise and arrangement to preserve their core business.

61. I swear this my Affidavit in support of an Application for the relief set out in the proposed form of Order attached to the Application filed by the Applicants on July 3, 2018, and for no other or improper purpose.

SWORN BEFORE ME at Calgary, Alberta, this 8th day of July, 2018 A Commissioner for Oaths in and for the Province of Alberta	)))))))	**RYAN TOBBER**

Anthony Mersich
Barrister and Solicitor

CAL_LAW\ 3052764\11

TAB 12

COURT FILE NUMBER	1801-09188
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE RECEIVERSHIP OF OPSMOBIL, 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*, RSA 1985, c B-3, as amended.
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	Transcript of Oral Questioning of MARK TRISTAN GEORGE HORROX (on affidavits sworn June 26, 2018; July 6, 2018; July 24, 2018; August 8, 2018; September 28, 2018)
HELD AT	Burnet, Duckworth & Palmer LLP, Calgary, Alberta
DATE	October 4, 2018

For the Applicant

Joseph Reynaud
Stikeman Elliott
1155 boul. René-Lévesque O.
41 étage
Montreal, Quebec H3B 3V2
514-397-3019

For Airborne Energy Solutions Inc.

David LeGeyt
Burnet, Duckworth & Palmer LLP
2400, 525 - 8 Avenue SW
Calgary, Alberta T2P 1G1
403-260-0210

For Ernst & Young

John R. Maslen
Borden Ladner Gervais LLP
1900, 520 - 3 Avenue SW
Calgary, Alberta T2P 0R3
403-232-9790

Court Reporter

Claire Forster, CSR(A)
Amicus Reporting Group
403-266-1744

(Proceedings commenced at 10:16 a.m.)

MARK TRISTAN GEORGE HORROX, affirmed, questioned by Mr. LeGeyt:

Q. Good morning, Mr. Horrox. You have just taken an oath to tell the truth; is that correct?
A. Correct.
Q. And is that oath binding on your conscience so that you will tell the truth today?
A. Yes.
Q. And you have sworn five affidavits in Alberta Court of

Queen's Bench Action No. 1801-09188; is that correct?
A. Correct.
Q. And those affidavits are filed on behalf of the plaintiff in that proceeding, who is Third Eye Capital Corporation?
A. Correct.
Q. And I will refer to that plaintiff today as "Third Eye" or perhaps "TEC." You will understand that?
A. Yes.
Q. And as I know you are aware, I represent Airborne Energy Solutions Inc., and I will refer to that entity as "AES" today.
A. Okay.
Q. And as I believe you're aware, AES is party to an agreement or a number of agreements with some of the defendants in the proceedings, being OpsMobil Group Inc., OpsMobil Inc., and OpsMobil Energy Services Inc. I will refer to that group of defendants collectively as either "OpsMobil" or "Ops." Is that okay?
A. That's fine.
Q. And there's a couple other entities affiliated with my client. Rilpa Enterprises Ltd., I will refer to that entity as "Rilpa."
A. Okay.
Q. And Classic Helicopters Ltd., when I refer to them, I will refer to "Classic"?
A. Okay.

Q. Can you tell me about your post-secondary education, please, sir.
A. Sure. I have a MBA from London Business School.
Q. Okay. And have you ever had any flying lessons?
A. I have been -- I have flown a plane, but I have not done it in any lesson capacity.
Q. Okay. So you are not a pilot?
A. I am not a pilot.
Q. Okay. And tell me about your work experience, in particular after you got your MBA.
A. Yeah. I spent just over a year working for Credit Suisse in their leverage finance group. I then segued into BlueCrest Capital as an analyst in their special situations group. That ended up me running about half of the special situations group for BlueCrest Capital. Very diverse set of -- set of assets: energy assets, infrastructure assets, all manner of different businesses across the world, some mining assets, there was timber. There's all sorts of vary -- varying and interesting investments.
Q. Okay.
A. After about three years, I came over to Canada and I worked in The Catalyst Capital Group, which is a leading restructuring private equity firm. And I did that for just over two years and before coming across to Third Eye Capital. And I have been with Third Eye for nearly four years.

Q. Okay. So you have never worked for a Canadian aviation business?
A. Correct.
Q. And have you reviewed all five of your affidavits before coming here today?
A. Oh, I wrote them so I should have done.
Q. Okay. And in your affidavits I believe you mention, in separate cases, that you have read all three of the affidavits put forward by the AES witness, and that's Mr. Mizera?
A. Correct.
Q. Okay. Is there anything in any of your affidavits that you want to correct or clarify today?
A. We corrected everything we needed to in the most-recent affidavit, the fifth affidavit.
Q. Okay. Do you have copies of all your affidavits here today?
MR. REYNAUD: We have copies of the third, the fourth, and the fifth.
MR. LEGEYT: Okay.
MR. REYNAUD: I don't have copies of the first two. I didn't think they were particularly germane to this application. If you have questions on them, maybe you can show a copy to the witness.
MR. LEGEYT: I will, okay.
Q. TEC is a secured lender to OpsMobil; correct?
A. Correct.

Q. And OpsMobil has been in default of its obligations to TEC since about April of 2016; is that correct?
A. Correct.
Q. And since April of 2016, there has been a -- from time to time there have been forbearance agreements in place between OpsMobil and Third Eye?
A. Correct.
Q. And Third Eye was in a position to enforce its security against OpsMobil since about April of 2016?
A. Correct.
Q. And in fact, since that time, Third Eye has enforced some of its rights pursuant to what we call "the blocked account agreements"; is that correct?
A. The blocked account went down in April 2016 and has been down for the entirety of time. There has not been any breaks in the blocks being operational since April 2016.
Q. Sir, what do you mean by the blocked accounts "went down"?
A. So the blocked account agreement is a tri-party agreement, meaning it's between OpsMobil as borrower, their bank, and Third Eye Capital. And what it says is if the company goes into default -- if the borrower goes into default, we have the rights to trigger the block --
Q. Hmm-hmm.
A. -- with the bank, and then the bank will send all the

money that is incoming into that account to Third Eye Capital, then it's for Third Eye Capital to decide what to do.

In this case we have -- we have instigated a daily system where Ops would put forward a list of payables they wanted to pay. We would approve that and we would send their money back to them. From time to time there was a cash sweep of varying amounts. That is no longer the case, and hasn't been the case for some time.

Q. Okay. Do you recall when was the last time that Third Eye swept funds out of the OpsMobil accounts, as you have just described?

A. What do you mean by "swept"?

Q. Well, the mechanism that you just described under the block --

A. The daily -- the daily sweeping?

Q. Yes.

A. That happens every day.

Q. Okay.

A. Any day that there is money received by the company, that money is swept to Third Eye Capital automatically.

Q. Okay. Thank you.

A. I mean, it should also be added that -- that is followed quickly by a request for that money back by the company, which is approved on a daily basis. That money is returned to the company daily.

Q. Okay. We'll get to that in a moment.

I'm going to refer you to your second affidavit, for the record, sworn July 6th of 2018.
A. To which I do not have a copy in front of me.
Q. I do. We can share.
I'm going to refer you to paragraph 16. Because we're going to share, I'm going to paraphrase it first and then slide it across to you. Paragraph 16 talks about forbearance agreement between Third Eye and Ops?
A. Hmm-hmm.
Q. You are looking at paragraph 16 of your affidavit?
A. Yes, I am.
Q. And you will see the reference there to the first forbearance agreement and some critical forbearance covenants?
A. Correct.
Q. And in subparagraph (b), one of these critical forbearance covenants was for Ops to enter into a joint venture transaction with Rilpa. Do you see that?
A. Correct.
Q. And TEC was obviously in agreement with Ops pursuing this transaction with Rilpa; is that correct?
A. That's correct.
Q. In fact, it was TEC's expectation for OpsMobil to complete this transaction with Rilpa?
A. Correct.
Q. Then a little further down, paragraph 18 of the same affidavit, looking at the second sentence: (as read)

The borrowers missed the following business objectives and milestones...
And then it carries on.
Subparagraph (a) refers to a sale of 100 percent of the aviation and related assets of OpsMobil to Classic Helicopters. Do you see that?
A. Correct.
Q. Now, these are not defined as the critical forbearance covenants, so do you know if this transaction, or potential transaction described in 18(a), was that part of a forbearance arrangement?
A. Yes. I mean, the critical forbearance covenants was for -- was for the company to enter into a deal with -- with Rilpa. I mean we use Rilpa and Classic somewhat interchangeably potentially. The -- the idea was to follow the IOI that was put in place.
Q. Sorry, what's an IOI?
A. The indicative offer in -- IOI was the indicative offer -- indication of interest I think it stands for.
Kim had entered into conversations with Ryan Tobber to form a joint venture where both parties would contribute assets and form an aviation business not dissimilar to the business now carried out by AES.
Q. Okay. And Third Eye was aware of those conversations at the time?
A. Indeed. In fact, we were asked to sponsor --
Q. Right.

A. -- the transaction.
Q. Right. Okay. And Third Eye, in a general sense, was in agreement with OpsMobil pursuing this transaction; correct?
A. We saw it as a necessary way forward for -- for -- for OpsMobil. The business -- the business of OpsMobil was under great strain and needed improved management, which Kim would bring to the table with his group. He was also willing to transact on what was called the "Classic Helicopter package," which was a package of A-star helicopters at an advantageous value that would provide a -- provide the joint venture split.
Q. And at this time the -- sorry, OpsMobil was in great financial distress; correct?
A. It was already in default --
Q. Yeah.
A. -- under our agreements and was in increasing distress.
Q. Okay. And so in a general sense, Third Eye supported these efforts because they were designed to alleviate that financial distress?
A. Yeah. It was a restructuring.
Q. Yeah.
A. It was an attempt to restructure the aviation side of the OpsMobil business and put it on to a sound financial footing.
Q. Would this have been something that Third Eye directed Ops to do or pursue?

A. It's -- it's something that Ryan Tobber came up with and which we supported.
Q. Okay. And do you recall -- sticking in 18(a), do you recall the timing of when those discussions started?
A. We have an exhibit to one of the affidavits over here that has the IOI.
Yeah, December 2016 the IOI was -- was entered into by both Ryan Tobber and Mr. Mizera.
Q. Okay. And do you recall when the pursuit of that potential transaction ceased? Essentially when that deal --
A. It's not clear exactly when.
Q. Okay.
A. We were told by Mr. Tobber that conversations were ongoing for some time. It became apparent to us that Kim was not going to -- to complete the transaction and had, for non-specific reasons, failed due diligence on the joint venture, and he walked away.
Q. Okay. And you just can't recall when you heard that message?
A. I don't recall.
Q. Okay. When you say "Mr. Tobber" or "Ryan Tobber," that is the officer of Ops; correct?
A. Correct.
Q. And Mr. Mizera is the representative of AES?
A. Correct.
Q. Sometimes referred to as "Kim"?

A. Yeah. And I -- I missed -- I -- Mr. Mizera is also the -- as I -- as far as I know, the -- the controlling hand of both Classic and Rilpa.
Q. Okay. Returning to paragraph 18 of your second affidavit, subparagraph (c) talks about the sale of aviation hangar?
A. Hmm-hmm.
Q. Assets consisting of Whitecourt, High Level, and Rainbow Lake. Do you see that?
A. Yeah.
Q. And TEC was aware of these OpsMobil efforts to sell those assets?
A. That's right.
Q. And supported those efforts?
A. We certainly did.
Q. And was that a formal requirement within the forbearance arrangement or less formal?
A. It was part of a subsequent forbearance. The company entered into multiple forbearance agreements with us.
Q. Okay.
A. This -- paragraph 18 here is not -- does not relate to just one of the forbearance. It relates to all of the different forbearance agreements the company entered into.
Q. Okay.
A. The sale of the hangar assets was -- was something that was put on the table by the management team as a way to

pay down debt after the IOI had fallen apart.
Q. Right. And that's a good point.
A. Was --
Q. I should have asked that one of the reasons, presumably, Third Eye supported these efforts was it would generate cash to repay some debt?
A. Correct.
Q. So getting back to the hangar transactions or attempted sale of the hangars, do you know when Ops started those efforts?
A. I don't specifically recall.
Q. Okay.
A. I do know that we have -- we do have an email from Ryan telling us when he put it on the market so...
Q. Okay.
A. Can provide that if we need to.
Q. Would you undertake to provide me with that email you have referred to?
A. Sure.
MR. REYNAUD: Can you just describe it, please, the date or with -- description of email, it's an email from who?
A. Tobber to us stating that he had confirmed that he had put the asset on the -- on the market.
MR. LEGEYT: The assets described in paragraph 18(c) of the second Horrox affidavit. Thank you.

UNDERTAKING NO. 1 - To provide the

email from Mr. Tobber stating that he had confirmed that he had put the assets on the market (described in paragraph 18(c) of the second Horrox affidavit)

Q. MR. LEGEYT: And do you recall today whether those -- whether Ops formally ceased attempting to sell those assets at any point in time?
A. They continued to -- they put them on the market with a -- I believe it was Colliers. They -- they never formally ceased to put them on the market, but it became apparent over time that they were not supporting the sale and not -- and not seeking to -- to actually sell those assets.
Q. So they were listed; correct? As far as you know?
A. As far as I know.
Q. Okay. I'm looking a little further down at subparagraph (g) of paragraph 18. You will see reference there to a potential purchase by Roch Dallaire of certain helicopters?
A. Hmm-hmm.
Q. Again, I take it TEC knew that Ops was pursuing this deal?
A. Ops attempted to. It became very apparent that Roch Dallaire did not have the financial wherewithal to continue that transaction. That was a short-lived effort.

Q. Okay, but you were aware of the effort.
And notwithstanding the result, you supported it at the time?
A. We would have done. It's not something that was ever approved by us because it never -- the documentation was never finalized between the parties.
Q. Okay. And do you know when the pursuit of this potential transaction started?
A. I don't specifically recall.
Q. Okay. And I take it from your earlier comment that it --
A. Would have been towards the back of 2016.
Q. Okay. I take it it wasn't alive for a very long time?
A. Didn't last very long, no.
Q. Couple of months, couple of weeks?
A. I mean, may have been -- it may have been a month. I -- I don't specifically recall.
Q. Okay.
A. The point is that it was very clear very quickly that Roch did not have the financial wherewithal to -- to meet his ambition to purchase these aircraft.
Q. Hmm-hmm, okay. But TEC was supporting these efforts we've discussed, and the others described here, again, in an effort to find a restructuring-type transaction and get some repayment for that?
A. We were -- we were willing to entertain any asset sales that were done at or around fair market value that

would lead to a deleveraging of the OpsMobil Group, all of which would be subject to our approval once final documentation was -- was presented to us.
Q. Yeah. And as I understand it, partly because of the blocked account arrangement you discussed -- discussed earlier, the sweeping of cash, there were very regular, if not daily, communications between Third Eye and Ops?
A. Every day.
Q. Every day, okay.
A. Well, perhaps not every day, but near as, damn it.
Q. Understood. And I take it, just to sort of close the loop, none of these efforts described in paragraph 18 were successful?
A. That's correct, unfortunately.
Q. And therefore, no improvement to the Ops' financial situation?
A. Correct.
Q. And as I understand it, then, with these efforts not bearing any fruit, in mid-2017 Third Eye requested Ops to prepare a more formal restructuring proposal. Do you recall that?
A. Ryan Tobber presented a document that was -- that he had put together in an effort to convince Third Eye that he was working on a formal restructuring. It's not something that we had specifically asked him to put together. We did ask -- we had continued to ask him to find ways to improve his financial situation.

It's unfortunate that he would promise to do a lot of different things and never seems to follow through on those things.
Q. Okay. For the record, I believe the document you are referring to is in Mr. Mizera's third affidavit at Exhibit 16. If you turn to that, please.
A. Yeah. Sure.
Q. You are looking at that exhibit now?
A. Yeah.
Q. And is this what you just described as being prepared by Mr. Tobber and sent to yourself?
A. That's right.
Q. Okay. And do you recall approximately when this would have been sent or received?
A. Around June 2017.
Q. Okay.
A. The point here is that Mr. Tobber was finding it increasingly difficult to maintain his credibility with Third Eye. He needed a solution, and the only solution on the table was a completely different transaction.
Q. Sir, what do you mean by that?
A. Well, he was further -- trying to further -- further his -- his business by -- through acquisition. And if he could get more capital, he could buy more assets.
Q. Okay.
A. And collateralize those to the loan, and he could present that to Third Eye as -- as a safe investment.

Q. Okay. And so Mr. Tobber prepared this document, and it sets out a number of restructuring options for refinancings to joint ventures to sales. I take it there may have been other efforts going on at this time?
A. Hmm-hmm.
Q. Would it be fair to say there was continually efforts by OpsMobil to find transactions to deal with its financial situation?
A. Yes.
Q. Okay. And that included asset sales? Attempted sales?
A. Third Eye Capital was open to all forms of transaction that would improve the financial situation of the company.
Q. Okay. And when you received Exhibit 16, the OpsMobil Group 2017 restructuring plan, you reviewed it, I take it?
A. Okay.
Q. Did you review it? Do you remember reviewing this document?
A. I don't specifically remember reviewing it. Yeah, I'm sure I did.
Q. Okay. Do you remember having a specific reaction to it?
A. I -- it was a -- yet another piece of paper that Ryan hopes to put in the file to -- to show that he was doing what -- what we wanted him to -- to achieve;

namely, an improvement to his financial situation.

Q. Okay.

A. This was a document that was meant to convince us that he was in control and working to -- to improve his future.

Q. Okay. Do you recall responding to him about this document?

A. Not specifically.

Q. So you don't recall objecting to anything it said or anything like that?

A. I don't believe that this document was given particular credibility. You only need to look at the financial forecast within the document to know that it was a marketing piece principally.

MR. REYNAUD: What are you referring to?

A. Well, if you look at the financial deleveraging on page 14 of the document as an example, it's highly complicated and unlikely to -- to actually come off.

Q. MR. LEGEYT: Okay, thank you. Please refer to your fifth affidavit.

A. Yes, sir.

Q. Turn to paragraph 10, please. I'll paraphrase the beginning of that. But you are more or less saying that Third Eye has seen no evidence, nor was it ever informed, that Big Rock Helicopters was provided with an opportunity to acquire the OpsMobil business.

Do you see that there?

A. I do.
Q. Now I'm going to show you an exhibit to Mr. Mizera's second affidavit. This is Exhibit No. 2. Do you have that there? It's an email dated November 9th of 2017 addressed to yourself and sent by Ryan Tobber?
A. Yeah.
Q. You are looking at that now?
A. Yeah.
Q. So does that refresh your memory that in fact TEC was informed by Ops that --
A. Again --
Q. -- Big Rock was an option that was explored?
A. This email was an email that Ryan put together in exactly the same way as the restructuring plan that you just showed me. Was intended to show -- and to be passed onto the committee of Third Eye Capital to show that Ryan was trying to do the things that he needed to do to improve the financial situation of the company. What it didn't do necessarily was reflect actual facts.
So Big Rock is a very good example of what I'm talking about because Big Rock hasn't got any money, as far as I know. So to say that Big Rock had the opportunity to buy the assets is disingenuous because Big Rock has no financial wherewithal to enter into a transaction with -- with OpsMobil.
Q. Okay.
A. And should a transaction have actually been put

forward, I'm absolutely certain there would have been a follow-on request for financing from Third Eye Capital to make it happen.

Q. Okay.

A. Which is certainly something we wouldn't have supported.

Q. Do you know whether the company explored its -- that is OpsMobil explored its options with Big Rock?

A. Again, if they did, I'm sure it was short-lived. Third Eye Capital certainly didn't take it seriously. And without any evidence -- unless there was evidence to be brought forward that we hadn't seen that Big Rock had more money than we knew, we're not aware of Mr. Roch Dallaire, who is the principal there, of having any -- any great net worth or any --

Q. No.

A. -- access to actual financing to be to be able to do this deal.

Q. He might have had --

A. We didn't take --

Q. -- access to financing. You don't know?

A. If he does, great. If he does, absolutely great, he can come forward and put -- put an actual term sheet on the table.

But we didn't see a term sheet from Mr. Dallaire. We were told that there was conversation. We didn't take it any -- seriously. I don't think it's credible.

And it's not something that we thought was -- was in fact done. I think it was included on emails such as this to try and convince us that he was doing things. But Big Rock, as I said, has, as far as I know, no capital.

Q. Okay. My understanding is that the business, which is the subject matter of the purchase and sale agreement, is somewhat specialized, and there's a relatively small number of potential purchasers for that business. Do you agree?

A. I don't disagree or agree.

Q. Okay. You just don't know?

A. Well, no -- no formal SISP has ever been entered into around the business, so it's hard to tell.

MR. REYNAUD: For the record, SISP?

A. Sale investment solicitation process.

Q. MR. LEGEYT: I understand.

Would you agree that Great Slave Helicopters is a potential buyer for this business?

A. No, I would not.

Q. Okay. Would you agree that Big Rock is a potential buyer for this business?

A. No, I would not.

Q. And why is that?

A. Because Big Rock doesn't have any money.

Q. If they had the money, would they be a potential buyer for the business?

A. They could be a potential buyer for this business, sure.
Q. And I shouldn't say -- in November of 2017, would you agree with me that Great Slave may have been a potential buyer for this business?
A. As I understand it, Great Slave wasn't given the opportunity to buy the business. As I understand it, Great Slave was given the opportunity to buy all of the assets of OpsMobil except the business.
Q. Okay.
A. And therefore any offer being -- to be put forward by Great Slave would be done so not in competition to the Rilpa/AES/Classic offer.
Q. And how do you come to that understanding?
A. We have exhibits to the fifth affidavit which we will draw you to. If you look at Exhibit B of the fifth -- of the Horrox fifth affidavit, you will see an email forwarded by -- sorry, not Exhibit B. Apologies. Exhibit A.
Mr. Bertrand Perron forwarded an email Thursday, November 22nd, 2017, to Ryan Tobber, and I will quote. This is an email from Alasdair Martin, who at the time was president of Great Slave Helicopters. And will quote: (as read)
We have reviewed the information supplied and discussed options as a group, following our meeting, have come

to the conclusion that we are not in a
position to make an offer on any of the
remaining parts of OpsMobil which you
have outlined are for sale.

The key word being "remaining."

Q. Thank you. And other than that email, you don't know what discussions Ops may have had with Great Slave?

A. Correct.

Q. And similarly, you don't know what discussions Ops may have had with Big Rock?

A. I do know that Great Slave Helicopters did not hold OpsMobil in great regard. Third Eye Capital had entered into conversations over a year prior to -- prior to these with -- or actually, not over a year. At the start of the 2017 with the owners of Great Slave Helicopters for a potential purchase.

Q. Hmm-hmm. That wasn't my question. My question was: You are not aware --

A. No, I'm just -- to let you know that they did not -- they did not feel they wanted to enter into conversations with OpsMobil at that time, and I don't believe any great process was undertaken between Great Slave and OpsMobil --

Q. That --

A. -- in November.

Q. That wasn't my question. My question was about Big Rock.

A. Oh, I'm sorry.
Q. You don't know what discussions OpsMobil may have had with Big Rock at this time?
A. I didn't see any documentation, term sheets, or anything similar between either Big Rock or OpsMobil that led me to suggest that a transaction was seriously considered.
Q. But you don't know what discussions they might have had?
A. Roch Dallaire was a min- -- is and was a minority owner of OpsMobil and is a personal guarantor under the -- under the debt transaction with Third Eye Capital so he's intimately aware of OpsMobil, and as a partner of Ryan, I'm sure speaks to him regularly.
Q. Right. And did you ever follow up with him about what discussions might have been had on this topic?
A. We didn't ever see Big Rock as a credible buyer of the OpsMobil assets because, again, as far as we know, it does not have the financial wherewithal to undertake a transaction.
Q. Okay. Did you ever talk to Great Slave about whether they had discussions with Ops in November of 2017?
A. We did not. We -- but we did have the email that showed that they had no interest in the remaining parts of the business.
Q. At the beginning of this email, Mr. Tobber says: (as read)

I need to move --

A. Sorry, which email is that?

Q. The November 9, 2017, email attached to Mr. Mizera's affidavit as Exhibit 2. That is Mr. Mizera's second affidavit.

A. Oh, okay.

Q. Mr. Tobber starts by saying: (as read)

I need to move forward with the deal proposed by Kim this morning.

A. Hmm-hmm.

Q. And you understand that to be the deal which was subsequently embodied in a letter of intent and then a purchase and sale agreement?

A. Correct.

Q. Do you recall responding to Mr. Tobber about that deal with AES after receiving this email?

A. This email was an email from Ryan trying to convince us that this was the best path forward for these assets. Again, it was somewhat of a marketing piece designed to put forward to the credit committee at Third Eye. I, of course, would have responded to -- to that email.

Q. Okay. And ultimately, Third Eye did approve of the deal in the sense that it acknowledged the term sheet, correct, supporting the deal?

A. What is the date of the acknowledgement of that term sheet?

MR. REYNAUD: Can you refer the witness to -- I think you are referring to the term sheets. It's the one from November 21st, 2017?

A. Yes. Yes. Sorry. So we did not -- we did not agree at that date to the terms, and it was for that reason.

Ryan presented the terms on or around November 9th as the best he could do, and if I didn't like it or if Third Eye Capital didn't like it, then we should enter into negotiations directly with Kim to see if we could do better.

Ryan at the time was fatigued. He was running out of interest in supporting OpsMobil, and at the time didn't see OpsMobil as the future of his group. Preferring to spend his energies on furthering his business on the Ranch Energy side. And effectively washed his hands of any negotiations with Mr. Mizera from November 9th onwards, which is why at that point I had to call Mr. Mizera, with Ryan's permission, to see if I could improve the offer for those assets.

Q. MR. LEGEYT: Okay. And you did come to terms with Mr. Mizera?

A. But not until around -- on or around November 21st.

Q. Sure. And that's the date of the IOI, I take it?

A. Yeah, we acknowledged that IOI as -- as an under -- as understanding what was in that term sheet.

Q. Okay. And your affidavits go into great detail about the time frame between November of 2017 and May 10th of 2018. I don't want to dig into those details now, but would it be fair to say that that TEC's support of the AES transaction continued from November of 2017 up to at least May 10th of 2018?

A. Is it fair? The deal fundamentally changed multiple times between November and May. Our support for the deal also fundamentally changed between November and May. And to the point where I felt in May that I had to -- had to find a way to -- to get Mr. Tobber to improve the transaction that was then on the table.

The company was running out of liquidity. There were monthly requests for additional liquidity, additional loans from Third Eye Capital to maintain liquidity of the business. The business was in a seasonally -- seasonal low months.

OpsMobil had never intended for the deal to continue past -- or the transition period to continue past December. Did not have the working capital to support the business during its low months. And the deal continued to change between November and May.

Q. And --

A. We were not supportive necessarily of all of the different variations of transaction that were brought forward during that time.

Q. But during the time frame I'm talking about, so November of 2017 to May of 2018, Third Eye had never took steps to terminate the deal, did it?

A. The company -- OpsMobil needed liquidity. OpsMobil

needed capital, and Ryan Tobber presented the deal in November and continued to present it through that time as the only source of liquidity available to OpsMobil other than new loans from Third Eye Capital.
Q. Okay. Did you accept those statements from Mr. Tobber as being accurate?
A. He was not bringing forward alternative liquidity opportunities.
Q. Okay. And you didn't answer my recent question. At any time between November of 2017 and May of 2018, did you express to Ops or AES that Third Eye no longer supported this deal?
A. Yeah. We would -- we absolutely would not have closed the deal, including the holdbacks that were put forward by Mr. Mizera and his team, on or around April, for example.
Q. Okay.
A. We made that very clear. And in fact, that's -- that was what -- what resulted in me having to call Mr. Mizera, because Mr. Tobber would not bring forward and negotiate with Ms. Mizera adequately.
Q. So you communicated your objection to Ops; correct?
A. Yes.
Q. Did you communicate that objection to AES?
A. It wasn't our place to do that.
Q. So you didn't?
A. I don't believe we did that directly. I know that

counsel has been talking. It's very clear -- it was very clear to us that the deal was -- was morphing, changing for alleged good reason, but at the same time the business was being -- the transition period was being elongated way beyond what was in our -- in our view reasonable.
Q. Yeah.
A. And we -- we weren't happy with that. We weren't happy with in April the -- the proposal by AES to yet further reduce the purchase price for reasons that we didn't feel were -- were justifiable.
Q. Okay.
A. You know, there was still in April, and indeed in May, all the way through to the end of May, key documents in the deal that was still in draft form and not in signed-off format. The deal wasn't ever presented on a finalized basis to Third Eye to -- to get our approval.
Q. Okay. But it was alive during this time frame?
A. It was ongoing as the only form of -- of liquidity that was on the table other than from us. We had to -- we had to see if there was a deal that was doable and -- and to entertain it.
Q. Okay. And as you have indicated, on May 10th of 2018, you talked to Mr. Mizera on the telephone; correct?
A. That's right.
Q. And you discussed with him new mechanisms to close the deal; is that correct?

A. Yeah. I called him up. I was hugely frustrated with the time that was being taking to close the transaction. The company desperately needed to close it. Mr. Mizera was well aware Rilpa and his related entities were not being paid, which he did -- the genesis of the transaction is we know the whole reason for -- for the original deal was so that Mr. Mizera could be paid his -- his accounts payable.

The deal took a long time. Much, much longer than Third Eye's expectation for any of the documentation to be put together. I called Mr. Mizera on May the 10th to let him know that I was frustrated with the length of time that it was taking to close this transaction, but we needed to find a way to break the logjam and to get the deal finalized so that we could approve -- put it forward to Third Eye's credit committee for approval.

And we -- we went through the various holdbacks that -- that AES had proposed and was able to -- to -- to agree on a way forward. It was unfortunate. That that was May 10th. We didn't hear from them again until May 28th, which was, you know, another two and a half weeks of delay or two weeks of delay. And all the time, as AES was well aware, OpsMobil financial situation was deteriorating.

Q. And do you recall that -- I don't have an exact reference, but I recall from your affidavits that in

either late May or early June, Third Eye made an institutional decision to proceed with demand and section 244 notices on OpsMobil?
A. Correct.
Q. After May 10th, 2018, did Third Eye ever communicate to AES that in Third Eye's view the transaction was off or couldn't go forward?
A. I called Kim and let him know that we had -- that we had commenced proceedings under -- sorry, issued 244 notices and let him know that, unfortunately, they wouldn't be able to close.
Q. And do you recall when that was?
A. It would have been after we had served notice. We couldn't -- we obviously couldn't put the cart before the horse.
Q. Earlier today we talked about the blocked accounts agreements that --
A. Hmm-hmm.
Q. -- Third Eye has and the sweeping of cash.
A. Sure.
Q. And I believe it was -- all of the cash was swept, and that was done daily?
A. All the cash every day, yeah.
Q. Okay. And the cash would be swept into initially an account controlled by Third Eye?
A. Correct.
Q. And then there were discussions with Ops about the list

of payables?

A. Ops would -- Ops's controller, Mrs. Karen Thompson, would send a list of payables. It would -- the schedule was the same every day in terms of its formats. There will be an amount of cash that they -- that they had, which would be in trust -- held in trust by us. There would be the list of payables that they sought to pay that day, and then a net -- a net balance at the end of the day.

So they would ask for -- if the hundred thousand dollars had come in that day, hundred thousand dollars would be swept by the bank to Third Eye. Karen would then send an email to us asking for up to a hundred thousand dollars of payables to be paid. We would then approve that, that -- and that money would then be sent back to them the same day, and then to allow them to make the payments that same day.

Because of the ongoing financial distress OpsMobil had, it was very important that that was streamlined. And the reason that we had the blocked account in place was it allowed us to keep a track of what was actually being paid and to -- and for us to reconcile on a daily basis the cash that was running through the accounts. The accounts receivable are a first -- first-liened collateral of Third Eye who supports the loans, so it was therefore very important that -- that we kept track of the cash and understood that the cash was being used for legitimate business reasons and not, for example, being sidelined into -- into a Ryan Tobber entertainment account, for example.

And it's a -- the blocked account agreement itself is a -- is a standard feature of all of the loans that Third Eye makes.

Q. Okay. And at this time, OpsMobil didn't have any other credit available to it from Third Eye?

A. It had exhausted its -- its loans from us.

Q. It was fully drawn?

A. And in actual -- actuality on a regular basis they asked for additional loans. Some of the time we would grant those loans and some of the time we would not.

Q. Okay. And so my understanding is the only access to cash that Ops had was from this cash flow you are talking about that went back and forth?

A. Not always because sometimes -- sometimes they would -- they would be able to put a proposal to us that made sense to us and we were able to support that proposal by providing an additional loan.

So sometimes -- and so, you know, the original $10 million deal has ended in a balance that is now as -- I don't have the exact balance on my hand, but north of $20 million.

Q. But other than those unusual circumstances where Third Eye did advance more credit, it was the cash flow --

A. Correct.

Q. -- for the company?

A. Correct.

Q. And I take it, from your earlier comments, that sometimes there were things on this list of payables that Third Eye didn't agree should be paid?

A. No. We -- we -- I don't think we ever told them they couldn't pay something that they wanted to pay that they put forward as part of their daily cash flow allocation.

Q. And you know Mr. Tobber's evidence on that point is very different?

A. I'm aware. I have -- I have all the -- we have the daily sweeps. We can -- if somebody -- if somebody wants to do a full reconciliation of the account, they could.

Q. Well, we may get there, sir.

But Third Eye didn't always return a hundred percent of the cash to Ops? Sometimes you would take some money to --

A. There were periods when we were -- when we were very deeply concerned about the financial distress of the company and sought to try and instil some form of discipline on the management team, particularly Mr. Tobber, to live within his means.

During the forbearance period, for example, there was a period of time where we would sweep on a daily basis $20,000 and apply that to the loan. That represented the fact that we were providing over-advances above the value of the collateral that was posted, and we were deeply concerned about the -- the financial situation of the company. Yeah.

Q. Okay. And you were personally involved in reviewing the list sometimes, list of payables?

A. The list would come in. The daily process was Karen Tobber -- Karen Thompson, apologies. Karen Thompson would put the list of payables together, presumably in conjunction with the management team and Mr. Tobber. There would be X dollars of money that they would receive from their accounts receivable, and therefore they then put a list together of what needed to be paid that day.

They would send that over to us. In conjunction, the automatic sweep would have occurred. We would review the list. We would approve the list and we would send it back. Send that cash back.

Q. And were you involved in reviewing the list sometimes?

A. I would see it every day.

Q. Yeah.

A. It would be approved by Third Eye, yeah.

Q. Okay. And did Third Eye audit, for lack of a better word, how Ops used the cash? Did you ensure they paid what they said they were going to pay?

A. We have no -- there were multiple days where they would say they were going to pay something and then they would end up paying something else once they got the cash back in their account. And it's very difficult to -- to stop that from occurring, frankly.

We did our best to -- to ensure that what they said they were going to pay were the things that they paid. What we -- what we didn't do was dictate which payment was being put forward.

Q. Sure. So I take it, then, the answer to my question is yes, you did review not -- not only did you approve the list, you then looked at it --
A. Yeah.
Q. -- after --
A. It would be crazy not to.
Q. -- payment to see if they complied or not?
A. Would be crazy not to, right.
Q. Okay. And you would have seen a lot of evidence in Mr. Mizera's affidavit or affidavits about the payment of Matrix. Do you know what I am talking about?
A. Yes, I do.
Q. Matrix, for the record, is a company that was doing some environmental work for Ops; correct?
A. Correct. They had a broader relationship than just that.
Q. No, I understand that. They were doing environmental work and other work for Ops and --
A. Correct.

Q. -- Ranch?
A. Correct.
Q. Do you recall if in April of 2017, Ops was requesting TEC's permission on the payables list to pay Matrix?
A. I do recall.
Q. Was Ops making that request of Third Eye?
A. They asked for a new loan to make that -- to make that payment. They did not at any -- at any point in time ask to make the payment from their own cash flow.
Q. And so I understand how that would work mechanically, then. There were note payable lists that showed Matrix?
A. Well, if -- we need to bifurcate between a general accounts payable listing, which dramatically exceeded the cash they had on any given day to make those payments.
Q. Sure.
A. And so they had to prioritize the payments they made. They never brought forward Matrix as a payment that was required that day from the -- from their internal cash flow.
Q. Okay. And I just want to make sure I'm understanding. Going back to your earlier evidence, Third Eye would sweep the cash and on the same day get a list of requested payables?
A. Correct.
Q. From Ops?

A. Correct.
Q. In April of 2017 -- sorry, let's go back.
And on that list of payables are the vendors or creditors identified --
A. Yes.
Q. -- by name?
A. Yes.
Q. So you know who Ops is proposing to pay on their list?
A. Correct.
Q. Was Matrix's name on that list?
A. No.
Q. At any point in April of 2017?
A. It -- so there were four payments -- I believe four payments made between December 17 and May 18 to Matrix, but I believe for other payments, not the one you are referring to.
Q. Okay.
A. So every time the Matrix name was brought forward on that listing, the money that was associated with that payment was sent to Ops and was -- and as I understand it, Ops then made that payment to Matrix.
Q. Okay.
A. But I --
Q. Sorry?
A. -- I also believe those four -- those four payments do not relate to the payment that you are referring to.
Q. Right. So I understand it, you are saying there were

requests from Ops to pay Matrix but not in respect of the environmental work in Whitecourt?
A. Correct. There was a subsequent request by Mr. Tobber for a new loan with which he would pay Matrix.
Q. Okay.
A. That loan request was turned down.
Q. Okay. Was that loan request made in writing or by email?
A. He sent a listing of -- of payables that he wanted to pay with a new loan from Third Eye Capital.
Q. Yeah.
A. And there's emails, I think, attached to your affidavit that refers to the list provided last week. That is a new money request by Ryan.
Q. Okay.
A. And that new money request was turned down.
Q. So --
MR. REYNAUD: Can we just identify which emails you are referring to.
A. Yeah, we should.
MR. REYNAUD: For the record.
Q. MR. LEGEYT: Well, let me -- yes, just give me one moment here.
I'm going to ask you to undertake to produce to me the email that you have just described wherein Mr. Tobber -- and these are my words, not yours -- requests new financing to pay Matrix and perhaps other

creditors.

A. Be happy to.

Q. Okay, thank you.

UNDERTAKING NO. 2 - To produce the email wherein Mr. Tobber requests new financing to pay Matrix and perhaps other creditors, referred to in Mr. Horrox's third affidavit (see text)

MR. REYNAUD: So which email?

MR. LEGEYT: Well, I'm --

A. Well, a specific -- there is a specific email that you have referred to in your third affidavit. Third affidavit.

Q. MR. LEGEYT: Just before we get there. I will let you get there in just a moment.

I'm going to ask for another undertaking, and that that is that you produce the daily --

A. Yeah, that one.

Q. -- payables -- I'm going to ask that you produce the daily payables list sent by Ops to Third Eye for payment from the swept cash in the months of April and May.

A. Yeah. That's fine.

UNDERTAKING NO. 3 - To produce the daily payables list sent by Ops to Third Eye for payment from the swept cash in the months of April and May

2018

Q. MR. LEGEYT: Now, sorry, you can complete --

MR. REYNAUD: Sorry, April and May 2018?

MR. LEGEYT: 2018.

Q. Can you tell me now which exhibit you are looking at?

A. Yeah. We're looking at Exhibit 29 of the affidavit sworn 3rd August 2018.

Q. Okay. Give me a moment. And so -- I mean, you can continue your answer if you would like, but I think the point you were making is that this request follows a request for new financing?

A. Correct.

Q. And it is not a -- when he refers to "the list," it's not the daily payables list?

A. Correct. So this is -- this is money that he's requesting in addition to the loans already provided to him.

Q. And what did Third Eye do with this request for new financing?

A. We turned it down. The company was in deep financial distress.

Q. Would that have been communicated to Mr. Tobber in writing or by email?

A. Probably more verbal.

Q. Okay. I'm going to ask for another undertaking, and that is you provide us with copies of the communications from April of 2018 whereby Third Eye

approved the payable lists that Ops had submitted.
A. The approval is internal and not to Ops. Ops would get a verbal back, I think, and that would allow the money to -- I mean, de facto we approved it because the money would go back, right. Go back to the company.
The approval internally was between the team internally, wasn't back to the company. The company would be let -- Miss Shinya, who is our collateral analyst, would let Karen Thompson know that the money was coming once the wire was released.
Q. And what if Third Eye did not approve a certain payment?
A. I don't believe there was a single instance where we didn't approve a payment.
Q. Okay.
MR. REYNAUD: So what do we do with the undertaking request, colleague?
MR. LEGEYT: I think he's answered it.
MR. REYNAUD: Thank you.
Q. MR. LEGEYT: Are you telling me there is no written --
A. I don't believe so.
Q. -- approval?
A. I mean, there may an email between Nicole and Karen. I'm not sure. It's not something I would have seen.
Q. Well, then, I will ask that you review --
A. Okay.

Q. -- the email between those people.
A. Actually, and I'll let you know. If there is one, I will provide it to you.
Q. Thank you.
MR. REYNAUD: So to restate the undertaking, it's copies of the approvals sent by Third Eye Capital to Ops in respect of the daily payables lists for the months of April and May 2018. Is that --
MR. LEGEYT: Sure.
MR. REYNAUD: Is that it?
MR. LEGEYT: Sure.
A. Yeah.
MR. REYNAUD: If it exists.

UNDERTAKING NO. 4 - To provide copies of the approvals sent by Third Eye Capital to Ops in respect of the daily payables lists for the months of April and May 2018

Q. MR. LEGEYT: Please get a hold of your fifth affidavit.
A. My fifth affidavit. Yeah.
Q. Paragraph 23, please.
A. Yeah.
Q. And in particular take a read of that, and then we will look at the documents under Exhibit C.
A. Okay.
Q. So Exhibit C contains three purchase orders, I believe,

from Imperial Oil?
A. Hmm-hmm.
Q. Does that sound correct?
A. Hmm-hmm.
Q. And all three of those are dated August 15, 2018; is that correct?
A. Sure.
Q. Okay.
A. Yeah.
Q. And on the first page of each purchase order, in the middle of the page to the right side, there's a delivery date. Do you see that, December 31st, 2018?
A. I see that.
Q. Okay. Now, of course, you're well aware that Ops was placed into receivership on July 19th of 2018?
A. Yeah.
Q. And within a few days the receiver fired a number of Ops employees, including the chief pilot?
A. Yeah.
Q. And as a result of that, OpsMobil has lost its aircraft operator's certificate, is that --
A. Amongst other reasons, yes.
Q. Right. Point being with the loss of that certificate, OpsMobil can no longer fly aircraft. Is that your understanding?
A. As I understand it, yeah.
Q. And so OpsMobil has not been doing any work for

customers since mid-July 2018?
A. As it relates to aviation, sure.
Q. Correct, okay. And in fact, it would be impossible for OpsMobil to do the type of work described in the Imperial purchase orders?
A. Sure.
Q. Please open your third affidavit to paragraph 22. You will see reference there to something you call an "accounts payable offset"?
A. Yes.
Q. You're aware that under the purchase and sale agreement between AES and Ops, AES actually assumes liability for the payment of the amounts owing to Rilpa and Classic?
A. I think that's semantics.
Q. Well, that's what the document says.
A. Can you show me the document?
MR. REYNAUD: Is that Exhibit 1 to the August 3rd Mizera affidavit?
MR. LEGEYT: Yeah. That's -- that's what I'm looking at here.
MR. REYNAUD: This.
Q. MR. LEGEYT: Take your time to review it, but I'm looking at recital B.
A. Okay.
Q. So do you agree that AES is assuming liability for payment of the amounts owing to Rilpa and Classic?
A. That's what -- that's what recital B says.

Q. Okay. Thank you. And the amount referred to is $1,748,652.23; correct?
A. That is the amount.
Q. And my understanding of the purchase and sale agreement is that there is no payment of these amounts by Ops to either Classic or Rilpa. Is that your understanding?
A. I'm not following you. It was a de facto payment through the accounts payable offset. It's a reduction in the purchase price on an absolute basis which, by definition, means that the company no longer is paying that accounts payable.
Q. Ops is not paying, though? And I agree with you. I mean, we're talking about the characterization of the document?
A. Well, the offset is a payable; right? The accounts payable offset reduces the purchase price.
Q. Right.
A. The effect is that OpsMobil is paying that accounts payable through the provision of the assets. The value of that -- of that asset assumed is a payment for the Op -- for the accounts payable. That is -- that is the de facto realty here.
Q. Well, I disagree and --
MR. REYNAUD: Colleague, with all due respect, I think -- the characterization of this matter I think is a legal question.
MR. LEGEYT: No, fair enough.

MR. REYNAUD: My -- I'm happy to have the witness answer facts, you know. There's -- the fact is is written in the documents here. It says off --

MR. LEGEYT: Yes, I understand.

MR. REYNAUD: It's -- you know, you are welcome to ask him questions about facts, but this is a legal question.

OBJECTION TAKEN to answering the question: Well, I disagree and --

Q. MR. LEGEYT: Sorry, I'm bouncing around a little bit here because of -- you recall speaking with Mr. Mizera on May 10th of this year?

A. I do.

Q. I understand you were in Calgary about a week earlier, on May 3rd, to meet with Mr. Tobber; is that correct?

A. I don't recall.

Q. You don't recall?

A. It's -- it's possible.

Q. Sir, you don't recall the date or you don't recall meeting with him in Calgary?

A. I have met him many times over many different --

Q. Okay.

A. -- over many different time periods.

Q. No, fair enough. My --

A. Is there a -- is there a point in that affidavit that you are pointing to on that -- to make that point?

Q. No. No. But my understanding is that at the May 3rd

meeting between yourself and Mr. Tobber it was actually Mr. Tobber suggested that you and Mr. Mizera should talk to each other about closing -- or advancing the transaction. Does that -- do you recall that?
A. I'm not necessarily recalling the exact meeting.
Q. Okay. Do you recall Mr. Tobber saying something like that to you?
A. Mr. Tobber was fatigued and wasn't able to represent his best -- his company's best interest, frankly. He was allowing himself to agree to deal -- dynamics that weren't in the company's best interest. But more importantly, Third Eye felt his collateral was being eroded through his -- through his activity. We weren't supporting the deal at that time. The holdbacks were, frankly, egregious.
Third Eye Capital can't release security and allow collateral to be sold at significantly below fair market value when it backs the loan. We're talking about -- the deal itself is -- is for the sale of collateral that is significant to -- to the -- to the loan.
Q. Sure.
A. We can't sell a hundred dollars of assets for a dollar. It doesn't make any -- doesn't make economic sense.
Q. Well --
A. We weren't supportive of the deal in that time period.
Q. Okay. And hence the conversation on May 10th, which --

A. Yeah. Mr. Tobber asked me at some point -- it may well have been at a meeting on May 3rd. I don't recall specifically. But he did ask me -- he said I can't -- I can't do better than I'm doing.
Q. Okay.
A. And if you don't support the deal, you should call Mr. Mizera and see if you can break the logjam.
Q. Okay. Do you recall being in Calgary in early May?
A. I'd need to check my calendar, sir.
Q. Okay.
A. I'm a busy guy and I go to a lot of different places lots of different times.
Q. Do you recall meeting with Ernst & Young in Calgary in early May to talk about a receivership of OpsMobil?
A. I do not.
Q. Okay. When did Third Eye first meet with Ernst & Young to discuss a receivership role?
A. The decision was made, I believe, in late May.
Q. And is -- that's when Ernst & Young was contacted?
A. I'd need to check my calendar and my emails.
Q. Okay. I'll ask for a couple of undertakings. Could you undertake to review your calendar and emails and advise whether you had a meeting in Calgary in early May with Mr. Tobber?
A. Okay.

UNDERTAKING NO. 5 - To review your calendar and emails and advise whether

you had a meeting in Calgary in early May with Mr. Tobber

Q. MR. LEGEYT: And would you also review your calendar and emails and advise whether you had a meeting with Ernst & Young in early May?

A. In Calgary? Sure.

Q. Or -- or elsewhere.

A. Well, be specific, counsel.

MR. REYNAUD: I'm sorry, but my client has many different files.

MR. LEGEYT: Sure.

MR. REYNAUD: Others that may involve receiverships involving Ernst & Young, which is a -- major market players.

MR. LEGEYT: Of course.

MR. REYNAUD: Perhaps if you can be a bit more specific in --

MR. LEGEYT: So the undertakings relate only to the OpsMobil receivership and not any other dealings that Third Eye may have had with Ernst & Young.

Q. So I will rephrase the second undertaking request. If you could review your emails and calendars and advise when Third Eye first communicated with Ernst & Young about a potential receivership role for OpsMobil?

A. Happy to.

Q. Thank you.

UNDERTAKING NO. 6 - To review your

emails and calendars and advise when Third Eye first communicated with Ernst & Young about a potential receivership role for OpsMobil

Q. MR. LEGEYT: Turning back to your third affidavit.
A. Sure.
Q. Paragraph 11. No, I'm sorry, got the wrong paragraph reference there.
I apologize, fourth affidavit of yourself, please.
MR. REYNAUD: Too many affidavits in this file.
MR. LEGEYT: There are.
A. Way too many.
Q. Paragraph 11 you will see the reference to the direction to pay?
A. Yeah.
Q. Relating to a payment for some work done for an outfit that I'll call "Alberta Forestry"?
A. Okay.
Q. Are you aware that Alberta Forestry in fact made the payment to OpsMobil notwithstanding the direction to pay?
A. I am.
Q. Okay. And are you aware that initially those funds were not paid into the segregated trust account which is subject to the preservation order?
A. I am.

Q. And are you aware that the funds have relatively recently been transferred by the receiver into the segregated trust account?
A. I am not aware of the timing of transfers by the receiver. I'm not -- I'm not reconciling the receiver's actions in that regard.
Q. Fair enough. Are you aware that the funds have been transferred into the segregated trust account by the receiver?
A. I would need to check.
Q. Now, in the application which Third Eye has filed part of the relief which is sought is a return of the business so that the receiver can sell it as a going concern?
A. Correct.
Q. And as you testified to earlier, you are aware that OpsMobil has not flown aircraft since July 19th or 20th of this year; correct?
A. Correct.
Q. And in effect, they cannot until they re-establish their aircraft operator's certificate?
A. Yeah.
Q. So OpsMobil has not been providing any services to customers who need at least aerial surveillance work from -- since that time?
A. It's part of the business that Mr. Mizera was buying, so, yeah, correct.

Q. Correct. And would you agree with me that the purchase and sale agreement between AES and Ops has not closed?
A. It absolutely has not closed.
Q. And as a result, the customer contracts of OpsMobil have not yet been assigned to AES?
A. They should not have been assigned to AES. We are unclear as to what has happened, and that is still an area of contention.
Q. Okay. So if those contracts have not been assigned, they will still be contracts in the name of OpsMobil?
A. They should -- again, should be in the name of OpsMobil.
Q. Hmm-hmm.
A. They should be subject to the actual transition services agreement.
Q. Okay.
A. Which is very clear on this matter.
Q. But OpsMobil itself hasn't been doing any work for those customers since --
A. No. Under the transition services agreement it was clear who was to do the work.
Q. Okay. And at the moment OpsMobil cannot do that work itself?
A. Well, again, under the transition services agreement we wouldn't be doing the work anyway.
Q. Right. But if the business came back, OpsMobil couldn't do it because it can't fly?

A. Yeah. But if the business came back, we would undertake to -- to have an AOC in place. In the same way Mr. Mizera didn't have an AOC for his business when he first entered into the -- into the agreement with Ops.
Q. And has that happened?
A. The receiver is currently working on -- on -- on that.
Q. But you would know if it had happened?
A. I would be aware if it had been finalized, yes.
Q. Okay.
A. Which, of course, it has not been. I believe the receiver has asked for an interim transfer period in which to make that happen.
MR. LEGEYT: Okay. Let's go off the record.
(ADJOURNMENT)
MR. LEGEYT: Subject to anything arising from the undertakings that have been given, those are my questions. Thank you.
A. Thank you.

(Proceedings ended at 11:53 a.m.)

Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 to 55 are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this 10th day of October, 2018.

"C. M. Forster, CSR(A)"

C. M. Forster, CSR(A)
Official Court Reporter

- I N D E X -

MARK TRISTAN GEORGE HORROX

October 4, 2018

The following is a listing of undertakings and objections as interpreted by the Court Reporter.

The transcript is the official record, and the index is provided as a courtesy only. It is recommended that the reader refer to the appropriate transcript pages to ensure completeness and accuracy.

UNDERTAKINGS REQUESTED

UNDERTAKING NO. 4 - To provide copies of the approvals sent by Third Eye Capital to Ops in respect of the daily payables lists for the months of April and May 2018 44

UNDERTAKING NO. 5 - To review your calendar and emails and advise whether you had a meeting in Calgary in early May with Mr. Tobber 50

UNDERTAKING NO. 6 - To review your emails and calendars and advise when Third Eye first communicated with Ernst & Young about a potential receivership role for OpsMobil 51

OBJECTIONS

OBJECTION TAKEN to answering the question: Well, I disagree and -- 48

TAB 13

Most Negative Treatment: Check subsequent history and related treatments.

1991 ABCA 181
Alberta Court of Appeal

Panamericana de Bienesy Servicios SA v. Northern Badger Oil & Gas Ltd.

1991 CarswellAlta 315, 1991 ABCA 181, [1991] 5 W.W.R. 577, [1991] A.W.L.D. 525, [1991] A.J. No. 575, 117 A.R. 44, 27 A.C.W.S. (3d) 563, 2 W.A.C. 44, 7 C.E.L.R. (N.S.) 66, 81 D.L.R. (4th) 280, 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31

PANAMERICANA DE BIENES Y SERVICIOS, S.A. v. NORTHERN BADGER OIL & GAS LIMITED; ENERGY RESOURCES CONSERVATION BOARD v. VENNARD JOHANNESEN INSOLVENCY INC. (Receiver and Manager of NORTHERN BADGER OIL AND GAS LIMITED); ATTORNEY GENERAL OF ALBERTA (Intervenor)

Laycraft C.J.A., Foisy and Irving JJ.A.

Judgment: June 12, 1991 *

Judgment: December 20, 1991 **

Docket: Docs. Calgary Appeal 11698, Calgary Appeal 11713

Counsel: *Stanley H. Rutwind*, for appellant (intervenor) Attorney General of Alberta.
W.J. Major, Q.C., and *M.J. Major*, for appellant Energy Resources Conservation Board.
R.C. Wigham, for respondent Panamericana de Bienes y Servicios, S.A.
T.L. Czechowskyj, for respondent Vennard Johannesen Insolvency Inc.
J.D. McDonald, for Collins Barrow Limited, trustee in bankruptcy.

Subject: Corporate and Commercial; Insolvency; Environmental; Estates and Trusts; Constitutional; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
  I.1 Constitutional jurisdiction of Federal government and provinces
    I.1.b Provincial jurisdiction
      I.1.b.i General principles
Bankruptcy and insolvency
X Priorities of claims
  X.1 Secured claims
    X.1.d Dealings with security after bankruptcy
      X.1.d.i By secured creditor
        X.1.d.i.A Realization of security
Bankruptcy and insolvency
XIV Administration of estate
  XIV.2 Trustees
    XIV.2.l Discharge of trustee
Bankruptcy and insolvency
XIV Administration of estate
  XIV.2 Trustees
    XIV.2.m Miscellaneous

Bankruptcy and insolvency
XIV Administration of estate
XIV.13 Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.a General principles
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.a Commercial regulation
VII.4.a.ii Licensing
VII.4.a.ii.C Oil and gas

Headnote

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Dominion and provinces — Provincial jurisdiction — General

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Bankruptcy --- Administration of estate — Trustees

Bankruptcy --- Administration of estate

Constitutional Law --- Distribution of legislative powers — Areas of legislation — Commercial regulation — Licensing — Oil and gas

Practice --- Costs — Effect of success of proceedings — General

Receivers — Court-appointed receiver-manager producing oil and gas from wells of bankrupt oil company — Only licensee of well legally permitted to produce oil and gas — Bankruptcy of oil company not permitting receiver-manager to ignore order of Energy Resources Conservation Board to abandon wells.

Constitutional law — Constitution Act, 1867 — Distribution of legislative powers — Bankruptcy Act not overriding provincial legislation permitting Energy Resources Conservation Board to order abandonment of oil and gas wells — Doctrine of paramountcy not applying — Constitutional Act, 1867 (U.K.), 30 & 31 Vict., c. 3 — Bankruptcy Act, R.S.C. 1985, c. B-1.

Practice and procedure — Costs — Receiver of oil company denying obligation to comply with order of Energy Resources Conservation Board requiring proper abandonment of wells — Trustee in bankruptcy brought into litigation by court order — Trustee supporting receiver's position — Board losing at first instance and successful on appeal — Board entitled to one set of costs from oil company and receiver only — Trustee's argument not adding significantly to burden of litigation — Trustee choosing to take sides not entitled to costs of unsuccessful argument.

An oil company, which was licensed to operate oil and gas wells in Alberta, granted floating charge debenture security over certain assets, including the wells, to the creditor. When the company defaulted under the debenture, the creditor applied for and obtained a court order appointing a receiver-manager. A receiving order was subsequently made, placing the company in bankruptcy.

The Energy Resources Conservation Board wrote to the company prior to the receiving order, demanding an undertaking that the wells would continue to be operated in accordance with the regulations and the conditions of the well licences, and in particular that the wells could be abandoned when production was complete. The board asked the receiver-manager to confirm that no permits, licences or approvals would remain before they applied to be discharged as receiver-manager, or at least that the board would be notified of any application for discharge.

The receiver-manager agreed to sell the company's remaining assets to S, which would become the licensee of the remaining wells. The agreement allowed S to back out of the sale of any assets that were worth less than the cost of their abandonment. The receiver-manager informed the board that all of the company's assets had been sold, but S had already invoked the back-out clause and passed seven wells back to the receiver-manager.

When the receiver-manager applied for an order approving its administration of the company's affairs and for a discharge from its responsibilities, the board discovered that the seven wells were still licensed to the company; only then was it made aware of the back-out clause and its results. The board ordered the abandonment of the seven remaining wells, having obtained an order in council authorizing it to do so. When the receiver-manager failed to comply, the board applied for an order requiring the receiver-manager to obey the board's order and abandon the wells. The application was dismissed. The board and the intervenor Attorney General appealed.

Held:

The appeal was allowed.

The board did not have a claim against the company that was provable in bankruptcy so as to rank as an ordinary creditor and behind the creditor claiming under the debenture. The company had an inchoate liability for the ultimate abandonment of the wells, which liability passed to the receiver-manager. The receiver-manager could not function as a licensee without assuming a licensee's obligations, including the obligation to abandon the wells properly.

Although the expense of abandoning the wells meant less money for distribution in the bankruptcy, the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the *Bankruptcy Act*; the doctrine of paramountcy did not apply and the receiver-manager was required to comply with the provincial requirements.

As the board was successful, it was entitled to its costs, to be payable by the oil company and receiver-manager. The trustee's argument had not added significantly to the burden of the board's litigation costs. However, having chosen to support an unsuccessful argument, the trustee was not entitled to costs.

Table of Authorities

Cases considered:

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 61 C.B.R. (N.S.) 238, 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) [affirmed (1986), 61 C.B.R. (N.S.) 254, 47 Alta. L.R. (2d) 94 (C.A.)] — *considered*

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110 — *applied*

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, [1989] 5 W.W.R. 577, 83 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 97 N.R. 61 — *distinguished*

Canada Trust Co. v. Bulora Corp. (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), affirmed (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) — *applied*

Canadian Commercial Bank v. Simmons Drilling Ltd. (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87 (C.A.) — *considered*

Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish), [1989] A.C. 367 (P.C.) — *considered*

Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 — *distinguished*

Federal Business Development Bank v. Quebec (Comm. de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 — *considered*

Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.) — *considered*

Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City), 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986) [rehearing denied (sub nom. *O'Neil v. New York (City); O'Neill v. New Jersey Department of Environmental Protection*) 475 U.S. 1091, 89 L. Ed. 736, 106 S. Ct. 1482 (1986)] — *considered*

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 — *referred to*

Ohio v. Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985) — *considered*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

Penn Terra Ltd. v. Department of Environmental Resources, 733 F. 2d 267 (C.A. 3rd Circ., 1984) — *considered*

Plisson v. Duncan (1905), 36 S.C.R. 647 — *referred to*

Quebec (Deputy Minister of Revenue) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Deputy Minister of Revenue Quebec v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgaul's Estate v. Deputy Minister of Revenue of Quebec)* 30 N.R. 24 — *distinguished*

Royal Bank v. Nova Scotia (Workmen's Compensation Board), [1936] S.C.R. 560, [1936] 4 D.L.R. 9 — *considered*

United States v. Whizco Inc., 841 F. 2d 147 (C.A. 6th Circ., 1988) — *considered*

Statutes considered:

Bank Act, R.S.C. 1927, c. 12.

Bank Act, R.S.C. 1985, c. B-1.

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 2 "creditor"

s. 121(1)

Business Corporations Act, S.A. 1981, c. B-15 —

s. 92

s. 93

s. 94

s. 95

Energy Resources Conservation Act, R.S.A. 1980, c. E-1 —

s. 2

Limitation of Civil Rights Act, R.S.S. 1978, c. L-16.

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

s. 4(b) [am. 1983, c. O-5.5, s. 30]

s. 4(f) [am. 1983, c. O-5.5, s. 30]

s. 7

s. 9

ss. 11-20

s. 11(1)(b)

s. 92(1)

s. 92(2) [re-en. 1988, c. 37, s. 12]

s. 95

Workers' Compensation Act, The, S.A. 1973, c. 87.

Regulations considered:

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

Oil and Gas Regulations,

Alta. Reg. 151/71,

s. 3.030(3)

Words and phrases considered:

ABANDONMENT

"Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface.

CREDITOR

. . . a public officer ordering a citizen to obey the general law [does not thereby become] a creditor [as meant in s. 2 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3] for any amount the citizen may ultimately be required to spend in complying.

Appeal from decision of MacPherson J., (1989), 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 (Q.B.), additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.), ordering receiver-manager not to comply with order of Energy Resources Conservation Board.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The issue on this appeal [from 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.)] is whether the *Bankruptcy Act*, R.S.C. 1985, c. B-3, prevents the court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the province of Alberta. The order required the receiver-manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In Court of Queen's Bench, Mr. Justice MacPherson held [at p. 191 Alta. L.R.] that the order requiring "the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement" under the *Bankruptcy Act* and is "beyond the province's constitutional powers." He directed the receiver-manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the board.

2 "Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface. The cost may vary from a few hundred dollars to tens of thousands of dollars depending on the circumstances.

I Facts

3 Prior to May 1987, Northern Badger Oil and Gas Limited ("Northern Badger") carried on business in the exploration for, and the production of, oil and gas in Alberta and Saskatchewan. It was licensed to operate 31 oil and gas wells in Alberta of which 11 were producing wells. The remainder were suspended or standing in a non-producing condition. Northern Badger owned varying interests approximating 10 per cent in each well and was the operator of them on behalf of itself and other working interest owners.

4 On November 1, 1985, Northern Badger granted floating charge debenture security over certain oil and gas assets, including its interest in the 31 Alberta wells, to the respondent Panamericana. It defaulted under the debenture, and in May 1987 Panamericana applied for and obtained a court order appointing Vennard Johannesen Insolvency Inc. (the "receiver"):

> Receiver and Manager of all of the undertaking, property, and assets of the Defendant, Northern Badger Oil and Gas Limited with authority to manage, operate, and carry on the business and undertaking of the Defendant ....

5 On August 7, 1987, a receiving order, effective retroactively to July 7, 1987, placed Northern Badger in bankruptcy. Collins Barrow Limited was appointed trustee in bankruptcy.

6 On July 20, 1987, the Energy Resources Conservation Board wrote to Northern Badger referring to the insolvency and:

> requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licences. Also it is essential that the licensee be capable of responding to any problems which may occur and properly abandoning the well once production is complete.

7 The board further suggested that "the solution to the problem" would be to transfer the wells to a party "who is prepared to take on the responsibilities of the licensee." The receiver responded to this letter on August 14, 1987. It reported that 21 of the wells had been transferred to other parties, but that 12 wells had not. It then said:

> The Receivership Manager is presently involved in negotiations to sell *all of the assets and liabilities* to a number of interested parties. Vennard Johannesen is therefore striving to pass on the obligations to the prospective purchaser.

[Emphasis added.]

8 The board wrote again to the receiver on December 11, 1987, pointing out that their records still showed Northern Badger to be the licensee of the wells. The letter asked the receiver to confirm that no permits, licences or approvals would be remaining before they applied for discharge "or alternatively that you give the Board notice of any application to be discharged."

9 During the interval between these two letters, the receiver had attempted to sell the Northern Badger properties to various prospective purchasers, including Senex Corporation. On November 13 Senex made an offer to purchase the remaining Northern Badger assets held by the receiver for $1,850,000 plus a carried interest of 17.5 per cent on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

> The purchaser may elect to exclude any interest of the Vendor in any lands which has a value less than the costs of abandonment as agreed by the parties, or, failing agreement by Sproule Associates Limited, on or before the closing date.

10 The receiver applied to the court for approval of the sale; the affidavit material filed in support of the application made no express reference to the "back out" clause. The receiver did not give notice to the board of the application. The court approved the transaction on December 18, 1987, and the closing date of the sale was set for January 15, 1988.

11 Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000 each.

12 The court order of December 18, 1987, set aside five different funds to meet the claims of named claimants against Northern Badger for sums held in trust for them, or where claimants had rights of set-off, or to meet lien claims against the properties themselves. None of these funds made allowance for the abandonment of the wells. The remainder of the moneys were held by the receiver awaiting the outcome of litigation to determine whether Panamericana was entitled to priority over other creditors.

13 On January 27, 1988, the receiver advised the board that:

> [E]ffective January 15, 1988 Vennard Johannesen Insolvency Inc. in its capacity as Receiver and Manager of Northern Badger Oil and Gas Limited *has sold all of the assets of the company* to Senex corporation.
>
> Please cancel our account with you effective January 15, 1988. We will not be responsible for any charges or fees incurred after January 15, 1988 ...

[Emphasis added.]

14 After a six-day trial in May 1988 Panamericana obtained judgment against Northern Badger for $1,304,112, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the debenture. Thereupon, on May 29, 1988, the receiver applied to Court of Queen's Bench for an order approving its administration of the receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

15 At the time of this application, the receiver had approximately $226,000 on hand which it sought to pay to Panamericana after deducting its fees and disbursements. It wished to deliver to Collins Barrow, as trustee in bankruptcy, what were termed "minor, unrealized receivables," including the interest of Northern Badger in the seven wells and the well licences relating to them. The affidavit did not refer specifically to the liability arising from the obligation to abandon the seven wells. An apparent indirect reference to these seven wells is contained in para. 18 of the supporting affidavit:

> The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court.

16 The record before this court makes only brief reference to events during the next year. However, the application by the receiver to be discharged remained in abeyance. In December 1988 the board wrote to the receiver pointing out that a number of wells were still licensed to Northern Badger. The receiver did not respond until May 3, 1989. It advised the board that five of the seven wells which now require to be abandoned had been deleted from the Senex sale.

17 The board's reaction to this information was, apparently, immediate. On June 1, 1989, an order in council of the Lieutenant Governor in Council purporting to be issued under s. 7 of the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, approved the issuance by the board of an order respecting the abandonment of those five wells and the two others.

18 The board order authorized by the order in council was issued on June 6, 1989. It required the receiver to submit abandonment programs for the seven wells by June 15, 1989, and to abandon them in accordance with an approved program on or before February 28, 1990. On June 13, 1989, the board moved in Court of Queen's Bench for an order requiring the receiver to comply with the board's order, and this litigation resulted.

19 While the board's motion was pending an effort was made to obtain contribution toward the cost of abandonment from other working interest owners. Upon the application of the board, on November 23, 1989, Mr. Justice MacPherson directed the receiver to take steps to collect from other working interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330. Nothing in the record before the court discloses whether, or the extent to which, this effort succeeded.

20 On this appeal, the respondents objected that a portion of the evidence presented on behalf of the board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, Chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a professional engineer and chairman of the board. He testified,

on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of them. He expressed opinions as to the danger of cross-flows of liquids and gases, and as to hazards to the environment and to "public health and safety." The information was, apparently, derived from the records of the wells filed with the board; the expressions of opinion were his own.

21 In my opinion, it is not necessary to determine whether this information was admissible in this form or to consider the need for a new trial if it was not. Even if the information and expressions of opinion in this affidavit are ignored, there is ample evidence on the record in other affidavits, including those filed on behalf of the receiver, to establish the probable cost of abandonment of the wells and the need for that process. As will be discussed later in these reasons, the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens.

II The reasons for judgment

22 The learned chambers judge delivered extensive reasons for judgment. He held that the board order sanctioned by the order in council was within the board's jurisdiction under the general powers contained in ss. 4(*b*), 4(*f*) and 7 of the *Oil and Gas Conservation Act*. He held [at p. 189 Alta. L.R.], however, that the board:

> is a creditor seeking to have its claim to have the seven wells abandoned preferred to the claim of the secured creditor, and to the scheme of distribution set forth in s. 136 of the Bankruptcy Act.

He cited *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Deputy Minister of Revenue of Quebec v. Rainville*) 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Deputy Minister of Revenue of Quebec*) 30 N.R. 24, and *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 97 N.R. 61, and said [at pp. 190-192 Alta. L.R.]:

> The E.R.C.B. orders in council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> . . . . .
>
> Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act: 'All debts and liabilities, present or future, to which the bankrupt is subject', is surely wide enough to cover this liability.
>
> The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in *F.B.D.B. v. Que. (Comm. de la santé & de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209 at 217 and following, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308, a similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.
>
> The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.
>
> While I am aware that the Supreme Court of the United States of America split five to four in deciding a similar issue in the matter of *Midlantic Nat. Bank v. New Jersey Dept. of Env. Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), I am of the view that the law of Canada accords

with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also *Lloyd's Bank Can. v. Int. Warranty Co.*, a decision of the Alberta Court of Appeal (1989) [now reported 68 Alta. L.R. (2d) 356, [1990] 1 W.W.R. 749, 76 C.B.R. (N.S.) 54, 60 D.L.R. (4th) 272, 97 A.R. 113, leave to appeal to S.C.C. refused 70 Alta. L.R. (2d) liii, 102 A.R. 240, 104 N.R. 320] as to the need for clear legislative statements before destroying property rights.

Accordingly, I must instruct the receiver-manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the moneys held for the secured creditors.

III The Regulatory Regime for Alberta Oil and Gas Wells

23 The regulatory scheme for oil and gas operations in Alberta is contained in the *Oil and Gas Conservation Act*, in the *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11, and in the regulations under those acts. Each statute contains a statement of its purposes. Section 4 of the *Oil and Gas Conservation Act* provides:

4 The purposes of this Act are

. . . . .

(*b*) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in operations for oil and gas;

. . . . .

(*f*) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

24 The board is given wide specific powers under the Act in the regulation of operations in the exploration for, and production of, oil and gas. Where a specific power is not given to the board to be exercised on its own volition, it has a wide general power to be exercised with the authorization of the Lieutenant Governor in Council. Section 7 provides:

7 The Board, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

25 Section 9 provides that a board order shall override the terms of any contract. Sections 11 to 20 provide for the licensing of oil and gas drilling and producing operations. Section 11 provides that no person shall continue any producing operations unless:

11(1) ...

(*b*) he is the licensee or is acting under the instructions of the licensee.

26 Section 13 provides that if it is established that a licensee does not have the right to produce oil or gas from land, the licence becomes "void for all purposes except as to the liability of the holder of the licence to complete or abandon the well ..." Section 3.030(3) of the regulations also provides, in some circumstances, for the board to direct a licensee to abandon a well. Section 18 provides that a well licence shall not be transferred without the consent of the board. Section 19 outlines circumstances in which the board may cancel a licence.

27 By s. 92(1) and (2) the board is empowered to enter a well site and to perform, itself, work needed for "control, completion, suspension or abandonment of the well." The cost of this work then becomes a "debt payable by the licensee of the well to the Board." Section 95 empowers the board to enforce any order by taking over the production, management and control of the well.

28 The *Energy Resources Conservation Act*, which establishes the board, has a similar statement of its purposes in s. 2. Among these purposes are:

> 2 ...
>
> (*c*) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;
>
> (*d*) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;
>
> (*e*) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta ...

29 It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells." Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

IV Did the Board have a Provable Claim in the Bankruptcy?

30 A basic premise of the respondents' position in Court of Queen's Bench, and in this court, is that the board has a provable claim as a creditor in the bankruptcy of Northern Badger. From this it is contended that, in enforcing the requirement for the proper abandonment of oil and gas wells, the board simply ranks as a creditor. Then, it is said, the scheme of distribution of the *Bankruptcy Act* gives priority to the secured creditors so that the trustee is unable to obey the law requiring abandonment of oil and gas wells. That is so, it is urged, because the requirement of the provincial legislation cannot subvert the scheme of distribution specified by the *Bankruptcy Act*. The respondents point to the definition of "creditor" in s. 2 of the *Bankruptcy Act* and to the elements of a "provable claim" set forth in s. 121.

31 Mr. Justice MacPherson agreed with these contentions, saying that the words in ss. 2 and 121 of the *Bankruptcy Act* were "surely wide enough to cover" Northern Badger's liability to abandon the wells. These sections provide:

> 2. In this Act,
>
> "creditor" means a person having a claim preferred, secured or unsecured, provable as a claim under this Act.
>
> . . . . .
>
> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

32 There are two aspects to the question whether the board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the board so that it is the board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.

33 The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty

by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

34 It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above), do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta.

35 Counsel for Panamericana cited three authorities in support of its argument that the board is a creditor of Northern Badger: *Quebec (Deputy Minister of Revenue) v. Rainville*, supra; *Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81; and *British Columbia v. Henfrey Samson Belair Ltd.*, supra. But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In *Rainville*, Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in *Deloitte, Haskins & Sells*, the sum in dispute was a levy of $3,646.68 made under *The Workers' Compensation Act*, S.A. 1973, c. 87; in *Henfrey Samson Belair Ltd.* the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

36 In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

V The Duties of the Receiver

37 Vennard Johannesen Insolvency Inc. assumed its duties as receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the *Business Corporations Act*, S.A. 1981, c. B-15. Sections 92 and 93 require the receiver to act in accordance with the directions of the court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> 94 A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (*a*) act honestly and in good faith, and
>
> (*b*) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (*a*) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (*b*) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (*c*) an order fixing the remuneration of the receiver or receiver-manager;
>
> (*d*) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(*d*.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;

(*e*) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

38 A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with *Plisson v. Duncan* (1905), 36 S.C.R. 647. The decision of Viscount Haldane in *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.), which has been fre quently quoted, emphasizes the independence of the receiver from those who procured the appointment.

39 It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in *Federal Business Development Bank v. Quebec (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. At p. 315 [N.R.] he said:

> [T]he immoveable in the case at bar is property of the bankrupt within the meaning of the *Bankruptcy Act*. Even if the trustee takes possession of the immoveable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immoveable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in *Laliberté v. Larue*, [1931] S.C.R. 7 and *Trust général du Canada v. Roland Chalifoux Ltée*, [1962] S.C.R. 456.

40 A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alberta Treasury Branches v. Invictus Financial Corp.* (1986), 61 C.B.R. (N.S.) 238, 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.), Stratton J. (as he then was) said that the receiver's obligations "reach further than merely acting honestly." He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.*, [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.), at p. 54 [W.W.R.]:

> [T]he receiver is an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.

41 The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87. In that case the receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the receiver had been appointed. The court affirmed the duty of a receiver to ascertain his obligations within a reasonable time and noted that the receiver's actions in the discharge of those obligations

are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at p. 249 [C.B.R.]:

> The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

[Emphasis added.]

42 In the present case it is clear that almost from the commencement of the receivership, the receiver was aware of the obligation, in law, of Northern Badger to see the oil and gas wells properly aban doned. The correspondence from the board detailed the obligation for the proper operation of the wells and the ultimate abandonment of them.

43 As one reviews the sequence of events leading to the sale of the assets to Senex, it is difficult to escape the conclusion that the "back out" clause was deliberately negotiated to achieve the very result for which the respondents now contend. The "back out" clause contemplates the situation that the costs of abandonment of some wells may exceed the revenue to be gained from them. Of course, no matter what wealth a well has produced in the past, there comes a time, in the last days of its life, when little oil remains and the well must be abandoned. At that point it is a liability with the cost of abandonment exceeding the revenue that could be obtained. In this case, the parties even provided for an arbitrator to determine, if need be, whether that moment had arrived. All wells with some value were to be sold; the remainder were to be left in the bankrupt estate when the receiver obtained a discharge from its duties.

44 Moreover, whether by accident or design, the board was not made aware of the developing situation. Despite the correspondence, the board was not aware that Senex was able to exercise a "back out" clause in the sale agreement. The board was first told of the effort "to sell *all the assets and liabilities*." It was then told that "*all the assets* have been sold." Only the most alert reader would detect the subtle difference in the two quoted portions of the receiver's letters. On the material filed, it is also difficult to escape the conclusion that the court approved the sale to Senex without being aware of the prospect that some wells were to be left as "orphans."

VI Conclusion

45 In my opinion the board had the power, when authorized by the Lieutenant Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general

law enacted by the provincial legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

46 The parties referred the court to some cases in the United States and to one in Canada where a debtor's legal duties on environmental matters conflicted with the potential distribution of the estate on insol vency. In each case, however, the response of the court was to some degree determined by statutory provisions. The cases are not easy to reconcile.

47 In *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

48 In *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F. 2d 267 (1984), the Third Circuit Court of Appeals was required to decide whether an exemption clause in the bankruptcy legislation should be construed to exempt from discharge an order requiring the debtor to complete restoration of the sites after coal operations. The court observed that the judgment obtained was not in the form of a traditional money judgment as for a tort or other claim. It then held that the debtor was not discharged and was required to perform the restoration.

49 In *Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), a corporation filed for bankruptcy after it was discovered to have stored oil contaminated with a carcinogen at a site in New Jersey and another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, state environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandonment might be barred in emergency conditions, which did not yet exist in the case.

50 A similar problem arose again after both the above cases had been decided in *United States v. Whizco Inc.*, 841 F. 2d 147 (C.A. 6th Circ., 1988). The United States sought an injunction to force obedience to a statutory obligation to abandon a worked out coal mine. The Sixth Circuit Court of Appeals held, following the *Kovacs* case, that the operator's discharge under the *Bankruptcy Act* discharged the operator's liability to the extent that it would require the expenditure of money.

51 One similar case has arisen in Canada. In *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), the receiver, as in the present case, had been appointed to receive *and manage* the company. The fire marshall ordered the receiver to demolish certain housing units which were in a "serious and hazardous" condition. It was urged that, despite the appointment of the receiver, the company continued to exist and to hold title to its assets. Thus, it was said, the proper recipient of the demolition order was the company, itself, and not the receiver. Cory J., then a judge of the High Court of Ontario, summarized the argument in these terms at p. 151:

> It was contended that the nature of the position of the receiver, although it might paralyze the power of the company for which it was appointed, did not extinguish the legal existence of that company. Thus Bulora continued to exist and continued as the entity responsible for the required demolition. It was said that, as the Fire Marshal had every right to recover from the municipality, the receiver should not and could not be required to undertake the demolition, which would have the effect of reducing the amount recovered by Canada Trust, the secured creditor.

52 Cory J. then summarized the powers of the receiver under the order appointing it, which gave it very wide powers of management and control similar to those given the receiver in this case. He then said at p. 152:

> There remains the major problem of determining who should bear the costs of the demolition. The order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide

> and sweeping powers in the management of the company, surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by the recovery of assets. In my view, there is a social duty to comply with an order such as this which deals with the safety of individuals affected by an asset the receiver is managing.
>
> The direction then will be that the receiver is to comply with the order of the Fire Marshal and proceed with the demolition of the specified units.

53 The Court of Appeal affirmed the judgment of Cory J. ((1981), 39 C.B.R. (N.S.) 152). The endorsement on the record was as follows:

> There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory J. referred to a "social duty" to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order. The appeal is dismissed with costs.

54 As in *Canada Trust Co. v. Bulora Corp.*, supra, it is urged in this case that Northern Badger is the licensee of the wells; the receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the receiver. In my opinion, that contention is not valid.

55 The receiver has had complete control of the wells and has operated them since May 1987, when it was appointed receiver and manager of them. It has carried out for more than three years activities with respect to the wells which only a licensee is authorized to do under the provisions of the *Oil and Gas Conservation Act*. In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.

56 While the receiver was in control of the wells, there was no other entity with whom the board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

57 I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not, and, indeed, is forbidden, to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells.

58 Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110.

59 Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no") — as Dickson J. (as he then was) expressed it in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181, the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

60 That the two statutes affect the same subject matter does not necessarily mean that one or the other of them is invalid. An early case of this type was *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish)*, [1899] A.C. 367. In that case the Privy Council held that since Parliament has the exclusive right to prescribe regulations for the construction, repair and alteration of a railway, a provincial legislature could not regulate the structure of a ditch forming part of the works. But it held intra vires a municipal code which prescribed the cleaning of the ditch and the removal of obstructions to prevent flooding.

61 Similarly, in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560, [1936] 4 D.L.R. 9, the Supreme Court of Canada held valid a levy for worker's compensation which adversely affected security granted under the *Bank Act* [R.S.C. 1927, c. 12]. La Forest J., giving the judgment of the court in *Bank of Montreal v. Hall*, supra, quoted the judgment of Davis J. in the Nova Scotia case (at pp. 568-69 [S.C.R.]) as follows (at p. 148 [S.C.R.]):

> I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia
>
> > used in or in connection with or produced by the industry with respect to which the employer (was) assessed though not owned by an employer
>
> and became subject to the lien of the provincial statute the same as the goods of other owners ... *It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at the impairment of bank securities though its operations may incidentally in certain cases have that effect*.

[Emphasis added by La Forest J.]

62 In *Bank of Montreal v. Hall* the provincial legislation in conflict with valid federal legislation was forced to give way. The bank sought to enforce security granted to it under the *Bank Act*, R.S.C. 1985, c. B-1, and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16. After a review of the case law and of the two enactments La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

63 In my view, there is no such direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means that less money will be available for distribution.

64 I respectfully agree with the decision in *Canada Trust Co. v. Bulora Corp.*, supra. In my opinion, the receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

65 I would not attempt to define the limits of provincial regulatory authority in relation to the federal powers respecting insolvency and bankruptcy. The various levels of government regulate business in a myriad of ways. The extent to which these levels of government may, in the exercise of their powers, affect in an incidental way the distribution of insolvent estates must depend, to a considerable extent, on the facts of the particular case.

66 I would allow the appeal and direct the receiver to comply with the board order. The parties may speak to costs.

. . . . .

Memorandum of judgment (supplemental reasons on costs):

67 The issue decided in this memorandum of judgment is the question of costs between the parties, Panamericana de Bienes y Servicios, S.A. and its receiver, Vennard Johannesen Insolvency Inc., the Energy Resources Conservation Board ("E.R.C.B.") and Collins Barrow Limited, Trustee in Bankruptcy of Northern Badger Oil and Gas Limited.

68 In Court of Queen's Bench, Mr. Justice MacPherson held that the receiver was not obliged to comply with an E.R.C.B. order of June 6, 1989 respecting the abandonment of seven oil wells. Subsequently he directed the board to pay to Panamericana costs of $15,000 plus proper disbursements and to the trustee in bankruptcy costs of $1,500 plus proper disbursements. On June 12, 1991 the court issued its judgment in this case allowing the appeal of the E.R.C.B. and directing the receiver to comply with the board's order. Subsequently, the parties made written submissions as to costs.

69 The receiver took possession of the seven wells when it obtained a receiving order of the assets of Northern Badger in May 1987. It had operated the wells for a considerable time and still had control of them at the time of the board's order on June 6, 1989. The issue in this litigation was the contest between Panamericana and its receiver on the one hand, and the board on the other as to whether the receiver was bound to obey the order.

70 The trustee in bankruptcy was brought into the litigation by the direction of Mr. Justice MacPherson presumably to protect the estate in bankruptcy. There was, however, very little if any estate in the bankruptcy which was not already subject to the receiving order obtained by the receiver. Nevertheless, once it was involved in the litigation the trustee in bankruptcy actively supported the position of the receiver that it was not bound to comply with the board order.

71 These positions were essentially unchanged in the argument before this court. The principal issue continued to be the contest between Panamericana and its receiver-manager on the one hand and the board on the other. The trustee in bankruptcy continued to support the position of Panamericana and its receiver. Nevertheless, there was one significant difference. The receiver, while continuing to argue that it was not bound to comply with the board's order, in this court suggested that the obligation to abandon the wells passed to the trustee in bankruptcy. The trustee vehemently resisted this contention.

72 The receiver and Panamericana now contend that each party should bear its own costs urging that the litigation involved a novel issue of great public significance. For its part the trustee in bankruptcy argues that it should be entitled to costs throughout on a solicitor-and-client basis to be paid by the receiver from the moneys remaining under its administration in the receivership. The board seeks its costs from the opposing parties.

73 We are all of the view that the board should be entitled to one set of costs in this litigation. Those costs should be paid by Panamericana and its receiver from the assets under administration. The argument made by the trustee in bankruptcy did not, in our view, add significantly to the burden of the litigation. On the other hand the trustee in bankruptcy chose to take sides in the argument between the receiver and the Board and should not be entitled to the costs of this unsuccessful argument.

74 Accordingly we direct that the Energy Resources Conservation Board will have its costs from Panamericana and the receiver in the lump sum of $15,000 plus proper disbursements for the proceedings in Court of Queen's Bench and its party-and-party costs to be taxed under Column 5 of the *Rules of Court* for the appeal. The trustee in bankruptcy should neither pay nor receive costs of the litigation either in Court of Queen's Bench or in this court.

Appeal allowed.

Order accordingly.

Footnotes

* On November 5, 1991, the court issued an amendment to the judgment, which has been incorporated herein.

** Leave to appeal to S.C.C. refused (January 16, 1992), Doc. 22655, Lamer C.J.C., Sopinka, McLachlin JJ. (S.C.C.).

TAB 14

Ranch Energy, OpsMobil, et al.

Cash Flow Forecast Variance - Receiver Report 2 vs Report 4

Cash flow forecast for the period of September 14, 2018 to November 30, 2018
$000's, CAD

Week ended	Notes	14-Sep-18	21-Sep-18	28-Sep-18	05-Oct-18	12-Oct-18	19-Oct-18	R2 26-Oct-18	R4 26-Oct-18		R2 02-Nov-18	R4 02-Nov-18		R2 09-Nov-18	R4 09-Nov-18		R2 16-Nov-18	R4 16-Nov-18		R2 23-Nov-18	R4 23-Nov-18		R2 30-Nov-18	R4 30-Nov-18		R2 Total	R4 Total	
Oil and gas receipts	A			911				1,237	759	-39%			-										1232	980	-20%	2469	1,739	-30%
Liquids receipts				50				50	50	0%			-										50	50	0%	100	100	0%
Joint interest billings				25				25	25	0%			-										25	25	0%	50	50	0%
Insurance proceeds				56				-																				
Total receipts				1,042				1,312	834	-36%													1307	1055	-19%	2619	1,889	-28%
Field operating costs	B	(465) -		(43)	(116)	(135)		(43)	(309)	619%	(116)	(366)	216%	(135)	(135)	0%				(43)	(43)	0%	(116)	(141)	22%	(453)	(994)	119%
Professional fees	C	(186)	(306)	(80)	(75)	(80)		(80)	(80)	0%	(75)	(75)	0%	(80)	(80)	0%				(80)	(80)	0%	(75)	(75)	0%	(390)	(390)	0%
Salaries, wages and source deductions		(155)	(81)	(114)		(114)		(114)	(114)	0%			-	(114)	(114)	0%				(114)	(114)	0%				(342)	(342)	0%
Transportation costs				(252)				(253)	(617)	144%			-			-							(253)	(402)	59%	(506)	(1,019)	101%
Carbon taxes		(60)		(201)				(201)	(201)	0%			-			-							(201)	(201)	0%	(402)	(402)	0%
Mineral leases (Crown)		(310)	(90)	(11)						-	(81)	(81)	0%			-							(157)	(157)	0%	(238)	(238)	0%
Road use fees		(80)								-	(240)	(240)	0%			-										(240)	(240)	0%
Maintenance and regulatory		(254)		(20)				(20)		-100%			-			-							(20)	(20)	0%	(40)	(20)	-50%
Contingency			(100)				(100)		(100)	-			-			-				(100)	(100)	0%				(100)	(200)	100%
Royalties (Crown and freehold)		(64)		(45)				(45)	(45)	0%			-			-							(45)	(45)	0%	(90)	(90)	0%
General and administrative expenses			(16)		(60)					-	(60)	(60)	0%			-							(56)	(56)	0%	(116)	(116)	0%
Surface leases (Crown)		(14)	(5)	(23)						-	(30)	(30)	0%			-							(98)	(98)	0%	(128)	(128)	0%
Insurance		(43)		(10)			(43)			-	(10)	(10)	0%			-				(43)	(43)	0%	(10)	(10)	0%	(63)	(63)	0%
Surface leases (freehold)		(17)	(3)	(58)						-	(38)	(38)	0%			-							(18)	(18)	0%	(56)	(56)	0%
Field service truck leases			(51)				(25)		N/A	-		N/A	-		N/A	-	(25)	(25)	0%		N/A			N/A	-	(25)	N/A	-
Joint interest billings		(28)	(10)	(20)				(20)	N/A	-		N/A	-		N/A	-					N/A		(20)	N/A	-	(40)	N/A	-
Fuel expense				(25)				(25)	N/A	-		N/A	-		N/A	-					N/A		(25)	N/A	-	(50)	N/A	-
Safety & ERP					(15)				N/A		(15)	N/A	-		N/A	-					N/A			N/A	-	(15)	N/A	-
Total disbursements		(1,677)	(662)	(900)	(267)	(329)	(168)	(800)	(1,466)	83%	(665)	(900)	35%	(329)	(329)	0%	(25)	(25)	0%	(379)	(380)	0%	(1,093)	(1,223)	12%	(3,291)	(4,323)	31%
Total net change in cash		(1,677)	(662)	142	(267)	(329)	(168)	513	(651)	-227%	(665)	(900)	35%	(329)	(329)	0%	(25)	(25)	0%	(379)	(379)	0%	214	(167)	-178%	(671)	(2,451)	265%
Opening cash balance		2,053	976	1,414	1,556	1,289	1,260	1,192	1,521	28%	1,705	2,070	21%	2	1,171	75939%	1,510	1,141	-24%	1,485	1,116	-25%	1,429	1,295	-9%	1,192	1,521	28%
Additional Receiver's borrowings		600	1,100			300	100		1,200	-	500	-	-	300	300	-			-	323	558	-			-	1,123	2,058	83%
Ending cash balance		976	1,414	1,556	1,289	1,260	1,192	1,705	2,070	21%	1,540	1,171	-24%	1,510	1,141	-24%	1,485	1,116	-25%	1,429	1,295	-9%	1,643	1,128	-31%	1,643	1,128	-31%
Regulatory reserve	D	(410)	(821)	(410)	(410)	(410)	(410)	(410)	(410)	0%	(410)	(410)	0%	(410)	(410)	0%	(410)	(410)	0%	(410)	(410)	0%	(410)	(410)	0%	(410)	(410)	0%
Unpaid disbursement reserve	E	(377)	(406)	(669)	(669)	(669)	(669)	(931)	(566)	-39%	(951)	(586)	-38%	(951)	(586)	-38%	(951)	(586)	-38%	(951)	(586)	-38%	(1,233)	(718)	-42%	(1,233)	(718)	-42%
Ending available cash balance		189	188	476	210	181	113	363	1,094	201%	178	174	-2%	149	145	-3%	124	14	-89%	67	299	346%	-	-	-	-	-	

A Anticipated oil and gas receipts based on forecast pricing and production volume estimates.
B Cost estimates based on historical lease operating costs.
C Estimated fees for the Receiver and the Receiver's counsel.
D The Receiver has maintained a regulatory reserve for 8COGC compliance requirements.
E The Receiver has accrued funds incurred but not yet paid.