COURT FILE NUMBER	**1801-09188**	CLERK OF THE COURT FILED JUL 2 3 2019 JUDICIAL CENTRE OF CALGARY
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	**BENCH BRIEF OF THE RECEIVER**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Robyn Gurofsky/Jack R. Maslen Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 Facsimile: (403) 266-1395 Email: rgurofsky@blg.com File No. 413255.63	

TABLE OF CONTENTS

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Ernst & Young Inc., in its capacity as the court-appointed receiver and manager (the "**Receiver**") of Ranch Energy Corporation ("**Ranch**"), OpsMobil Inc., 1734163 Alberta Inc., 1859821 Alberta Inc., OpsMobil Group Inc., OpsMobil Construction Inc., OpsMobil Energy Services, Air Dallaire Ltd., and K.L. Capital Corp., (collectively, the "**Debtors**"),[1] in support of its application (the "**Application**") for approval of the sale and vesting of an asset sale transaction in respect of Ranch's property (the "**Transaction**").

2. The Transaction is commercially reasonable and fair,[2] satisfies the *Soundair* principles,[3] and should be approved by this Honourable Court.

3. To facilitate the Transaction, the Receiver requests that this Court grant an order varying a trust in respect of certain permits issued by the British Columbia Oil and Gas Commission (the "**BCOGC**") which correspond with sites which are the subject of the Transaction (the "**PSA Permits**"). Specifically, the Receiver is the sole beneficiary of the PSA Permits, which are legally held by Predator Oil BC Ltd. ("**Predator BC**"), and which are necessary to operate the relevant Ranch assets. To complete the Transaction, the Receiver must convey both the beneficial and legal ownership of the PSA Permits to the purchaser, Trinitaine Energy Inc. (the "**Purchaser**"), a wholly-owned subsidiary of Third Eye Capital Corporation ("**TEC**"). Likewise, the Receiver must have authority to initiate the permit transfer process with the BCOGC.

4. Pursuant to Section 42 of the *Trustee Act*, RSA 2000, c T-8 (the "***Trustee Act***"),[4] this Court has the discretion to vary a trust, including to convey legal ownership to a sole beneficiary.[5] The Court may do so where the variation is of a "justifiable character" in all the circumstances.[6] This Court also has discretion to approve or not approve a sale by a receiver.[7]

5. Here, this Court should allow the trust to be varied, since, among other things:

   (a) the variation is in the best interests of the receivership estate and stakeholders as a whole;

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[1] *See*, Receivership Order pronounced by Justice B.E.C. Romaine on July 19, 2018, as amended on August 7, 2018 ("**Receivership Order**") [**TAB A**].

[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), Section 247 [**TAB 1**].

[3] *Sydco Energy Inc (Re)*, 2018 ABQB 75 ("***Sydco***") at para. 50 [**TAB 2**], citing *Royal Bank v Soundair Corp*, [1991] OJ No 1137 ("***Soundair***") [**TAB 13**].

[4] *Trustee Act*, RSA 2000, c T-8, Section 42 ("***Trustee Act***") [**TAB 3**].

[5] *See*, *Re Taylor Estate*, 1998 ABQB 893 (Surrogate Crt) ("***Taylor***"), paras. 7-8 [**TAB 4**]; *see also*, *DRS Estate*, 2010 ABQB 428 ("***DRS Estate***"), para. 24 [**TAB 9**].

[6] *Trustee Act*, Section 42(7) [**TAB 3**]; *see e.g.*, *Salt v Alberta*, 1986 CanLII 1695 (QB) ("***Salt***"), para. 28 [**TAB 5**].

[7] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 ("***Snowdon***"), para. 20 [**TAB 6**].

(b) the variation is sought by the Receiver, being the sole beneficiary;

(c) the variation will enable the Receiver to discharge its duty to maximize the value of the Debtors' estate; and

(d) the variation is necessary for the proposed Transaction to be completed, which meets the *Soundair* principles.

6. This Bench Brief sets out the Receiver's submissions in respect of the proposed variation to the trust. The Receiver intends to make additional submissions regarding the *Soundair* principles and a sealing order at the hearing of this Application, and in that regard the Receiver adopts the legal principles set out in its Bench Brief filed on April 5, 2019.[8]

II. FACTUAL BACKGROUND

7. The facts in support of the Receiver's Application are detailed in the Tenth Report of the Receiver filed on July 22, 2019 (the "**Tenth Report**"), and in earlier reports, which the Receiver adopts as if the same were reproduced herein. Unless otherwise indicated, capitalised terms used herein shall have the meanings ascribed to them in the Tenth Report or earlier reports, as applicable.

8. The relevant facts include the following:

(a) By way of an Asset Purchase and Sale Agreement, dated May 8, 2017 (the "**Predator PSA**"), Predator BC sold certain oil and gas assets to Ranch (the "**Ranch PNG Assets**"). The Ranch PNG Assets are regulated by the BCOGC, and certain permits (the "**Permits**") are required from the BCOGC to operate the Ranch PNG Assets.[9]

(b) At the time of the Predator PSA, however, Ranch was not qualified under the applicable regulations to hold the Permits. Consequently, Ranch and Predator BC agreed, pursuant to the Predator PSA, that Predator BC would hold the Permits in trust for Ranch as beneficiary (the "**Trust**").[10]

(c) Ranch and Predator BC also entered a Trust Agreement dated effective June 16, 2017, which they amended and restated by way of an Amended and Restated Trust Agreement dated effective July 10, 2017 (collectively, the "**Trust Agreement**").[11]

(d) Eventually, Ranch, along with the other Debtors, became insolvent and the within receivership proceedings were commenced on July 19, 2018.

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[8] *See,* Bench Brief of the Receiver, re: Application for Approval of Sale and Vesting Order, filed on April 5, 2019, paras. 7-14 and 23.

[9] Tenth Report of the Receiver filed on July 22, 2019 (the "**Tenth Report**"), paras. 10-11.

[10] *See,* Appendix "C" to the Tenth Report, Transcript of Proceedings from the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary, Alberta dated November 7, 2018 (the "**Horner Transcript**"), p 59 (lines 33-40).

[11] Tenth Report, para. 11.

(e) In order to realize on Ranch's property, the Receiver undertook a SISP process for the Ranch PNG Assets, as approved by the Court on October 2, 2018.[12]

(f) On October 2, 2018, the Receiver also gave formal notice to Predator BC that it was disclaiming the Trust Agreement, as it determined that the terms of the Trust Agreement were not commercially reasonable. On October 19, 2018, the Receiver gave further notice to Predator BC that it had disclaimed the Trust Agreement, including any and all amendments or restatements thereto (collectively, the "**Disclaimer**").[13]

(g) Predator BC then applied (the "**Predator BC Application**") to challenge the Disclaimer, as well as the Receiver's authority to operate the Ranch PNG Assets.[14] The Predator BC Application was heard on November 7, 2018, and the Honourable Madam Justice K. Horner dismissed the Predator BC Application.[15]

(h) The Receiver has now completed the SISP process in respect of the Ranch PNG Assets, which resulted in only one Qualified Phase 2 Bid for the Ranch PNG Assets, namely a credit bid by TEC.[16] The Receiver considers TEC's credit bid to be commercially reasonable and value maximizing in the circumstances, and is working to finalize and execute an Asset Purchase Agreement with TEC's subsidiary, the Purchaser (the "**Ranch PSA**").[17]

(i) Specifically, the Transaction, contemplated by the Ranch PSA, will constitute a sale of a portion of the Ranch PNG Assets, including the PSA Permits. The Purchaser is qualified under the BCOGC regulations to hold legal title to the PSA Permits subject to posting security with the BCOGC in the amount of $4.8 million, and the Transaction contemplates that the Purchaser will do so.[18] Moreover, the BCOGC has participated at length in negotiating the terms of the Ranch PSA, in order for the Purchaser to be the holder of the PSA Permits upon the closing of the Ranch PSA ("**Closing**").[19]

(j) Finally, although the Ranch PSA is a credit bid, the Purchaser will assume certain liabilities to various creditors in respect of priority payables and operational expenses. The payments that will be made in respect of such liabilities, by the Purchaser, include property taxes, surface lease payments and mineral lease rentals.[20]

9. This Court's approval of the variation of the trust is necessary to allow the Receiver to initiate the PSA Permit transfer application and to give effect to the Transaction.

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[12] *See*, Order Approving Sale and Investment Process pronounced by the Honourable Mr. Justice A.D. Macleod on October 2, 2018 (filed on October 2, 2018) ("**SISP Order**"); Tenth Report, para. 16.

[13] Tenth Report, para. 12.

[14] *See*, Amended Application of Predator Oil BC Ltd. filed on November 2, 2018; Tenth Report, para. 13.

[15] *See*, Order pronounced by the Honourable Madam Justice K. Horner on November 7, 2018 (filed December 5, 2018).

[16] Tenth Report, para. 20.

[17] *Ibid*, para. 23.

[18] *Ibid*, para. 26(e).

[19] *Ibid*, para. 22.

[20] *Ibid*, paras. 25(b) and 30(e).

III. LAW & ARGUMENT

A. The Court has Discretion to Vary a Trust

10. At common law, the sole beneficiary of a trust may vary or terminate a trust without the assistance of the Court.[21] This is known as the rule in *Saunders v Vautier*. According to Justice Deschamps (writing for a majority of the Supreme Court of Canada):

> 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.[22]

11. Justice Marceau of this Court has similarly explained that "*Saunders v Vautier* [is] ... the well-known trust law rule that allows a sole beneficiary, or multiple beneficiaries if they are all in agreement, to obtain legal title to the trust property".[23] The rule in *Saunders v Vautier* can be explained on the basis that the beneficiary's right to enjoy the property "overrides the trustees' right as legal owners".[24]

12. In Alberta, however, the rule in *Saunders v Vautier* has been modified by the *Trustee Act* such that a beneficiary may not vary or terminate a trust without approval of the Court.[25] Specifically, Subsections 42(2) and 42(4) of the *Trustee Act* state (in relevant part):

> (2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, <u>a trust arising before or after the commencement of this section</u>, whatever the nature of the property involved and whether arising by will, deed or other disposition, <u>shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, **except with the approval of the Court of Queen's Bench**</u>. ...
>
> (4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving
>
> (a) the variation or revocation of the whole or any part of the trust or trusts,
>
> (b) the resettling of any interest under a trust, or
>
> (c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.[26] (underlining and bold added)

13. Subsections 42(6) and 42(7) of the *Trustee Act* further provide that:

[21] DWM Waters, et al, *Waters' Law of Trusts in Canada*, 4th ed retrieved electronically on Westlaw ("**Waters**"), S 27.I [**TAB 7a**].

[22] *Buschau v Rogers Communications Inc*, 2006 SCC 28 ("***Buschau***") para. 21 [**TAB 8**].

[23] *DRS Estate, supra* at para. 14 [**TAB 9**].

[24] Waters, S 27.I [**TAB 7a**].

[25] Waters, S 27.IV-A [**TAB 7b**].

[26] *Trustee Act*, s 42 [**TAB 3**].

> (6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.
>
> (7) The Court shall not approve an arrangement [to vary the trust] unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent...<u>and that in **all the circumstances** at the time of the application to the Court the arrangement appears otherwise to be of a **justifiable character**</u>.[27] (underlining and bold added)

14. Thus, pursuant to Section 42 of the *Trustee Act*, this Court has discretion to allow or not allow a variation, provided it is satisfied that (i) the proposed variation is for the benefit of any incapacitated beneficiaries (i.e. those persons for "whom the Court may consent"), and (ii) the variation is of "justifiable character" in "all the circumstances".[28] The latter determination is <u>entirely</u> a matter of judicial discretion.[29]

15. In exercising this broad discretion, the purpose of the variation,[30] the interests or wishes of the beneficiaries,[31] the views of the trustee,[32] and the intentions of the settlor (as expressed by the trust documentation),[33] are relevant factors to be weighed by the Court, at least in the context of a testamentary, estate or family trust. However, the settlor's intentions may be disregarded if no intention is "apparent from the [trust] instrument" or circumstances have changed such that the settlor's intentions have "ceased to have relevance".[34]

16. In the context of a proposed sale by a court-appointed receiver, this Court's discretion to vary a trust should also be informed by all the circumstances of the receivership, including:

    (a) the overarching duty of a court-appoint receiver to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner;[35]

    (b) the purpose of the receiver to maximize returns for the benefit of all creditors;[36]

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[27] *Ibid.*

[28] *See e.g. Salt, supra* at para. 23 [**TAB 5**].

[29] *Samoil v Samoil*, 1999 ABQB 766 ("***Samoil***") para. 40 [**TAB 10**]; Waters, S 27.IV-E-2-(a) [**TAB 7b**].

[30] *Samoil, supra* para. 41 [**TAB 10**].

[31] *Taylor, supra* [**TAB 4**], where Justice Donald Lee granted a variation since "both the beneficiary and the Executrix have consented, and there are no other beneficiaries interested in the Estate" (para. 7); *see also* Waters, S 23.IV [**TAB 7c**].

[32] *Samoil, supra* para. 41 [**TAB 10**].

[33] *Berry Estate Re*, 2016 ABQB 58 ("***CD***") [**TAB 11**], where Justice Veit held "The terms of the will, as expressing the wishes of the testatrix, are indeed the most important factor in the court's decision. ... the weight of the case law appears to remain that the wishes of the testator/settlor are to be taken into account" (para. 16).

[34] Waters, S 23.IV [**TAB 7c**].

[35] *BIA, supra* Section 247 [**TAB 1**].

[36] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 ("***Reid-Built***"), para. 23 [**TAB 12**].

(c) the recognition that a receiver owes duties "to all parties interested in the debtor's assets";[37]

(d) the discretion given to the Court to approve a sale transaction,[38] having regard for the *Soundair* principles; and

(e) the Court's deference to the "commercial judgment of the receiver",[39] particularly in respect of a sale approval application.

17. This Court has also previously approved the variation of a trust in a receivership.[40]

B. The Legal Ownership of the Permits Should be Transferred

18. It is common ground that Predator BC holds the legal title to the PSA Permits, as trustee, for the exclusive benefit of Ranch (whose estate is in receivership). This is an express trust, which arose pursuant to the Predator PSA.[41] While the Trust Agreement also created an express trust in favour of the Receiver, the Receiver disclaimed any and all interest of the Debtors in the Trust Agreement on October 2, 2019 and again on October 19, 2018.[42] Hence, the relevant (and only) trust for this Application is that created by the Predator PSA. These were the findings of Justice Horner at the hearing of the Predator BC Application on November 7, 2018:

> Simply put, I find that ... the permits are held in trust for Ranch by Predator pursuant to and under the terms of the APSA [Asset Purchase and Sale Agreement – i.e. the Predator PSA]. ... The ATA [Amended Trust Agreement], in my view, does nothing more than mirror the trust provisions of the APSA. It does provide additional unsecured financial obligations of Ranch, but that is all.[43] (underlining added)

19. Her Ladyship further held that the Receiver's Disclaimer was made properly, and within a reasonable time, and on appropriate, commercially sound considerations.[44] Justice Horner's decision of November 7, 2018 was not appealed, and the appeal period has now expired.

20. In all the circumstances of this Application, this Court should exercise its discretion to vary the Trust, so that legal title of the PSA Permits is transferred to Ranch whose Receiver can then initiate the

[37] *Jaycap, supra* at para 28 [**TAB 6**].

[38] *Ibid*, para. 20.

[39] *Soundair, supra* para. 46 [**TAB 13**].

[40] *See*, *Ernst & Young Inc v Central Guaranty Trust Co*, 2006 ABCA 337 [**TAB 14**], in which the Court of Appeal noted that in an earlier application in the receivership proceedings the Court had ordered a trust to be varied (para. 12).

[41] Tenth Report, para. 11.

[42] *Ibid*, para. 12.

[43] Horner Transcript, p 59 (lines 31-41).

[44] *Ibid*, p 60 (lines 7-22).

transfer applications to the Purchaser pursuant to the BCOGC's regulatory process and in furtherance of the Transaction.

21. An order varying the Trust would be of a "justifiable character" within the meaning of Subsection 42(7) for several reasons. This is the only consideration before the Court, as the Receiver is the sole beneficiary under the Trust, hence there are no beneficiaries for "whom the Court may consent".

22. First, the Trust should be varied since the purpose of the variation—namely to unify the beneficial and legal ownership of the PSA Permits so that both can be sold to the Purchaser—is in the best interests of stakeholders of the receivership as a whole.

23. As indicated above, the credit bid submitted by TEC was the only Qualified Phase 2 Bid received by the Receiver pursuant to the Court-approved SISP. The Transaction is therefore the only way the Receiver will realize value from Ranch's PNG Assets in a commercially reasonable manner.[45] The Transaction has the support and consent of TEC, who is the fulcrum creditor, which is a significant factor.

24. Similarly, the Transaction, if completed on its proposed terms, will result in other stakeholders being paid, as the Ranch PSA requires the Purchaser to satisfy priority payables and assume certain valid and enforceable operational expenses. If the Transaction does not proceed, the Receiver will be unable to meet certain of these obligations.[46]

25. Furthermore, the proposed variation of the Trust and proposed Transaction is supported by the BCOGC, who is the regulator and issuer of the Permits (including the PSA Permits). The BCOGC has also participated in negotiating the terms of the Transaction and is supportive of the Transaction, subject to reviewing the final version of the Ranch PSA and the schedules appended thereto.[47] By unifying the legal and beneficial ownership of the PSA Permits, thereby facilitating the conveyance of such permits to the Purchaser, the PSA Permits will be held by an operator who will post cash or letters of credit with the BCOGC in or around Closing.[48] The Transaction will also benefit other stakeholders, as detailed in the Tenth Report.[49]

26. Second, the variation of the Trust is sought by the Receiver of Ranch, and Ranch is the sole beneficiary under the Trust. Specifically, the Trust is a bare trust that arose from a complex commercial transaction. It is *not* a testamentary, estate or family trust. In this context, the wishes

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[45] Tenth Report, para. 30.

[46] *Ibid*, para. 30(e).

[47] *Ibid*, para. 22.

[48] *Ibid*, para. 26(e).

[49] *Ibid*, para. 30.

and interests of Ranch/the Receiver should be determinative, and the intentions or wishes of Predator BC (as trustee or as settlor) should be irrelevant or at most, secondary. Likewise, Ranch's insolvency, and the within receivership, have rendered any intention of Predator BC as settlor, at the time of the Predator PSA, irrelevant.[50] Accordingly, it is fair and just for the interests and wishes of the Receiver to be given effect and for the Trust to be varied.

27. Third, the Transaction, as a whole, meets the *Soundair* principles and should be approved by this Court. Among other things, the Transaction is the result of a Court-approved SISP, reflects the only Qualified Phase 2 Bid received by the Receiver despite significant marketing efforts, is in the interests of stakeholders, and is fair and reasonable.[51] As such, this Court should vary the Trust, so the Transaction may be consummated. The Receiver's reasonable commercial judgment in recommending the variation of the Trust and Transaction should also be afforded deference.

28. Furthermore, there is commercial urgency for the Transaction to be completed, in the manner contemplated by the Ranch PSA. As detailed in Briefs and Reports of the Receiver in these proceedings, the Debtors' estate has been operating a net loss and TEC has already advanced over $7 million in Receiver's borrowings. As explained in the Tenth Report, if the Trust is not varied, and the Ranch PSA does not close, the Receiver would be unable to conduct any other sales process and would most likely seek a discharge. Thus, if the Trust is not varied, and the Transaction fails to close, the *entirety* of the Ranch PSA Property would likely be designated as orphans.[52]

29. Fourth, any obligations on the part of Ranch to pay Predator BC for fees or costs, pursuant to the Trust Agreement, are no impediment for the Trust to be varied and for the Transaction to be approved. Again, the Receiver has disclaimed the Trust Agreement, the Disclaimer was ratified by this Court,[53] and any claims by Predator BC under or relating to the Trust Agreement constitute unsecured claims in these proceedings.[54]

30. Finally, there is no question that the Receiver has standing to make this Application for the Trust to be varied. By filing its Application and Tenth Report, the Receiver, as sole beneficiary, has met the writing requirement of Subsection 42(6) of the *Trustee Act*. Similarly, the following sections of the Receivership Order entitle the Receiver to bring this application:

(a) Section 4(c) permits the Receiver to manage, operate and carry on Ranch's business;

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[50] Waters, S 23.IV [**TAB 7c**].

[51] *See generally*, para. 30.

[52] *Ibid*, para. 30(j).

[53] Horner Transcript, p 60 (lines 7-14).

[54] *Ibid*, p 59 (line 40) to p 60 (line 5).

(b) Section 4(h) permits the Receiver to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the name of the Receiver or in the name and on behalf of the Debtors, for any purpose;

(c) Section 4(j) permits the Receiver to initiate any and all proceedings in respect of the Debtors, the Property or the Receiver;

(d) Section 4(m) allows the Receiver to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser;

(e) Section 4(s) permits the Receiver to take any steps reasonably incidental to the exercise of its powers; and

(f) Section 33 of the Receivership Order entitles the Receiver to apply to this Court for advice and directions.[55]

IV. CONCLUSION

31. For all of the reasons above, the Receiver respectfully requests that this Honourable Court vary the Trust pursuant to Section 42 of the *Trustee Act*, RSA 2000, C T-8, such that legal title to the PSA Permits be, without anything further, conveyed to Ranch to facilitate the transfer by the Receiver to the Purchaser of the PSA Permits pursuant to the BCOGC's regulatory process.

32. The Receiver also respectfully requests orders approving the Transaction and sealing the Confidential Supplement to the Tenth Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF JULY 2019

BORDEN LADNER GERVAIS LLP

for:
Per: Robyn Gurofsky
Solicitors for the Receiver

[55] *See*, Receivership Order [**TAB A**].

TABLE OF AUTHORITIES

TAB A

I hereby certify this to be a true copy of
the original Order
dated this 7 day of Aug 20 18
for Clerk of the Court

Clerk's stamp

CLERK OF THE COURT
FILED
AUG 07 2018
JUDICIAL CENTRE OF CALGARY

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

DATE ON WHICH ORDER WAS PRONOUNCED: August 7, 2018

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

LOCATION OF HEARING: Calgary, Alberta

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

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

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

LIFTING OF STAY

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

APPOINTMENT

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

RECEIVER'S POWERS

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

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

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include, without limiting the foregoing, any right the Receiver may have, including pursuant to section 14.06(4) of the BIA, to abandon, dispose of or otherwise release any interest in any of the Debtors' real property, or any right in any immoveable, in compliance with applicable laws;

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

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

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

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

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

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

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

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

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

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

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

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

    (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 59(10) of the *Personal Property Security Act*, RSBC 1996, c 359, subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c P-7, or any other similar legislation in any other province or territory shall not be required;

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

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

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

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

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

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

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

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

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

6. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access

to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 6 or in paragraph 7 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

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

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or

the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph 8; and (ii) affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or Proceeding that is taken in respect of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OR REMEDIES

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

NO INTERFERENCE WITH THE RECEIVER

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

CONTINUATION OF SERVICES

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

RECEIVER TO HOLD FUNDS

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net

of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

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

EMPLOYEES

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

PERSONAL INFORMATION

16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled

to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

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

(i) before the Receiver's appointment; or

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

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

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

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

A. complies with the order, or

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

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

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

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

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

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

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

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

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

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

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

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

FUNDING OF THE RECEIVERSHIP

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

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

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

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

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

ALLOCATION

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

CONTINUATION OF CHARGES AND PRIORITY OF CHARGES

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

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

First – the Receivers' Borrowing Charge;

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

Third – the Receiver's Charge;

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

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

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

GENERAL

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

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

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

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

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

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

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

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

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

FILING

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

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

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

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

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

   (a) serving the same on:

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

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

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

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

and service on any other person is hereby dispensed with.

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

Justice of the Court of Queen's Bench of Alberta

CONSENTED TO THIS ____ DAY OF JULY, 2018

Josef G.A. Kruger, Q.C
Borden Ladner Gervais LLP
for the Receiver, Ernst & Young Inc.

CONSENTED TO THIS 1st DAY OF ~~JULY~~ August, 2018

Christa Nicholson
JSS Barristers
for the British Columbia Oil and Gas Commission

CONSENTED TO THIS 31st DAY OF JULY, 2018

Joseph Reynaud
Stikeman Elliott LLP
for Third Eye Capital Corporation.

ANNEX "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. ____________________

AMOUNT $ ____________________

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

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

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

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

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

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

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

DATED the _______ day of ______________, 2018.

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

Per: ________________________________
Name:
Title:

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to June 6, 2019

Last amended on May 23, 2018

À jour au 6 juin 2019

Dernière modification le 23 mai 2018

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Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248 (1) 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,

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

TAB 2

Court of Queen's Bench of Alberta

Citation: Sydco Energy Inc (Re), 2018 ABQB 75

Date: 20180131
Docket: 1701 02520
Registry: Calgary

In the matter of the Receivership of Sydco Energy Inc

MNP Ltd, in its capacity as the Court-Appointed Receiver and Manager of Sydco Energy Inc

Applicant

Memorandum of Decision of the Honourable Madam Justice B.E. Romaine

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I. Introduction

[1] In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER lending up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

[48] The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

[49] It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision)* specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormwood Transaction

[50] The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank of Canada v Soundair Corp,* (1991) 4 OR (3d) 1 (CA) at 6, and endorsed in *River Rentals Group Ltd v Hutterian Brethren Church of Codesa,* 2010 ABCA 16 at para 12, are as follows:

a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

b) the interests of all parties;

c) the efficacy and integrity of the process by which offers are obtained; and

d) whether there has been unfairness in the working out of the process.

[51] The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

[52] Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face,

TAB 3

Province of Alberta

TRUSTEE ACT

Revised Statutes of Alberta 2000
Chapter T-8

Current as of December 17, 2014

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

TAB 4

Re Taylor (Estate), 1998 ABQB 893

Date: 19981102

COURT FILE NUMBER:	106055
COURT:	Surrogate Court of Alberta
JUDICIAL DISTRICT:	Edmonton
ESTATE NAME:	Phyllis Leon Taylor

REASONS FOR DECISION
OF
THE HONOURABLE MR. JUSTICE DONALD LEE

FACTS

[1] On September 10, 1998, Mildred Corinne Taylor, Executrix of the Estate of the late Phyllis Leon Taylor, made the following Application in an Affidavit stating the following: -

3. That pursuant to my late sister's Will, the lands subject of the Estate were sold for the sum of $45,000.00;

4. That these lands were the only asset of the Estate;

5. That paragraph 3(c) of the Will provides as follows:

   "TO UTILIZE the rest and residue of my estate, including the net proceeds from the sale of my said quarter section of farm land to purchase an annuity which shall be repayable in principal and interest over a term of ten (10) years from the date of purchase and which shall be payable to my grandson, COREY GENE SWEEZEY, over the said term and TO GIVE AND TRANSFER the said annuity unto my said grandson, Corey Gene Sweezey, for his use and benefit absolutely";

6. That the only beneficiary of the Estate of Phyllis Leon Taylor is Corey Gene Sweezey. He is twenty three (23) years of age. He is a truck driver employed by Gerry Robinson Trucking Ltd. in Edson, Alberta;

7. That Corey Gene Sweezey has advised me that he does not wish the annuity purchased for him. He wishes to utilize the funds remaining to purchase a home in Edson. Attached hereto and marked as Exhibit "B" to this my Affidavit is the Consent of Corey Gene Sweezey to this change;

9. That I am advised by Corey Gene Sweezey and do verily believe that as a result of his position of employment, this additional income would be of little benefit to him in that his income would increase and that a significant portion would be ultimately payable to Revenue Canada;

10. That I am also advised by Corey Gene Sweezey that he is planning to be married in the not far distant future.

[2] This Affidavit is in support of an Application for an Order:

(a) to vary the trust created in paragraph 3(c) of my late sister's Will to enable me to pay the balance of the funds in the Estate to Corey Gene Sweezey for his own use absolutely;

(b) costs of this Application on a solicitor/client basis.

[3] This Court granted an Order of Probate in this matter on June 2, 1997. This Application is governed by the provisions of the *Trustee Act*, R.S.A. 1980, Chapter T-10.

[4] In *Re Sabo Estate*, [1995] 164 A.R. 15 [A.C.Q.B.], this Court held that s.42 of the *Trustee Act* prohibited any variation or termination of a trust without Court approval unless the trust reserved a power to someone to revoke or vary the trust. The issue on this Application by the Public Trustee was whether s.42 prevailed over the right of an executor to effectively terminate a spousal trust by advancing the entire interest to the spouse under the clause in the Will permitting him to make such advances.

[5] Section 42 of the *Trustee Act* prevails over the provisions of the Will and an executor cannot extinguish the trust without Court approval.

[6] Section 42(1) to (7) of the *Trustee Act* reads as follows: -

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust whereunder the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly, or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who is a missing person (as defined in the *Public Trustee Act*) or who is unborn, or

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting thereto.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

[7] In this particular case, both the beneficiary and the Executrix have consented, and there are no other beneficiaries interested in the Estate.

[8] The Court approves the arrangement advancing the entire interest and the trust to the beneficiary, terminating the trust. This situation is also within the rule of *Saunders v. Vautier*, (1841), 4 Beav. 115, 49 E.R. 282 (Ch.).

DATED at Edmonton, Alberta
this 2nd day of November, 1998.

J.C.Q.B.A.

APPEARANCES:

Philippe C. Lefebvre (Shtabsky & Tussman)
for the Executrix

TAB 5

Alberta Court of Queen's Bench
Salt v. Alberta (Public Trustee)
Date: 1986-06-18

C. M. Jones, for applicants.

D. M. Hunter, for Public Trustee of Alberta.

(Calgary No. 8601-08172)

June 18, 1986.

[1] HUTCHINSON J.:— The applicants, Rita Florence Salt, Viola Edna Salt, Nina Sharon Jackson, Ronald Ernest Salt and Susan Vanay Heilman, applied by originating notice for an order consenting to a proposed arrangement on behalf of certain minor contingent beneficiaries and unborn contingent beneficiaries who may have an interest in a trust hereinafter described, and approving the variation of trust interests effected by the proposed arrangement on behalf of the minor contingent beneficiaries and unborn contingent beneficiaries.

[2] Rita Florence Salt is the widow of the late Shirley Salt (also known as Louis Shirley Salt), who died on the 24th day of January 1977 in Calgary. Viola Edna Salt is the ex-wife of the deceased. Ronald Ernest Salt and Nina Sharon Jackson and Susan Vanay Heilman are the son and daughters of the deceased. They are all sui juris.

[3] Each of the deceased's daughters is married and they each have two children, who are minors. The son is unmarried and has no children.

[4] The deceased, Shirley Salt, left a holograph will, which was admitted to probate on the 16th day of August 1977. The executors named were the widow of the deceased, Rita Florence Salt, the brother of the deceased, George William Salt, now deceased, and George Ralph Salt, a nephew of the deceased.

[5] The will made provision for the wife, the ex-wife and the children of the deceased in the following terms:

> 1. That our home be sold within 3 years and the proceeds invested in Government Bonds.

2. That other properties be maintained only as long as they are producing a reasonable income or not too hard to manage and then be sold with said money returned to Government Bonds.

3. To my dear wife Rita I give $700.00 per month until her death or until she remarrys.

4. To my ex wife Viola I give $500.00 per month until her death or until she remarrys.

5. I direct that any income "left over" at the end of the year be divided equally among my three children (Sharon, Ronald and Susan). However if during the life of this estate if any one of my children become permanently sick or hurt (to require extra care) then I direct that he or she receive $^{2}/_{3}$ of the income "left over" and the others receive ⅓ of remaining income.

6. That upon the death of both Rita and Viola I direct the estate then be divided equal among my three children.

7. In the event that my son has died without a child of his blood I direct that his share be divided equally among his sisters (Sharon and Susan). However if Sharon or Susan die before the estate is settled I direct that their natural offspring receive equal shares (of their mother's share). If my son has natural heirs, then they would receive their deceased father's share.

[6] By order of the Supreme Court of Alberta, dated 11th May 1979, made pursuant to the provisions of the Family Relief Act, one-half of the proceeds from the sale of the house property or $75,000, whichever was the greater, was ordered to be paid to the wife of the deceased together with $700 per month adjusted to the consumer price index annually, with such payments not to exceed $1,000 per month, together with such contents of household use or ornament situated in the house as she may choose. The executors of the will of Shirley Salt were further directed to pay to Viola Edna Salt, the ex-wife of the deceased, the sum of $500 per month, likewise adjusted annually with reference to the consumer price index, not to exceed $1,000 per month in lieu of the $5,000 per year required to be paid to her pursuant to a decree nisi and decree absolute for divorce and the $500 per month directed to be paid to her pursuant to the will of the deceased.

[7] The estate of the deceased has a present value of approximately $500,000 and produces an annual income of approximately $40,000. The payments to the wife of the deceased have now reached the maximum of $1,000 per month and the payments

to the ex-wife are now approaching that amount and are expected to reach $1,000 per month in 1987.

[8] The applicants have executed a proposed arrangement pursuant to which they propose to vary the terms of the testamentary trust by distributing the capital of the trust to the adult beneficiaries as well as to the present four infant beneficiaries in accordance with the present value of their interest or contingent interest in the trust. The present value of the interest of the adult beneficiaries and the minor contingent beneficiaries has been calculated by the actuarial company, Mercer, Hickling and Johnston of Calgary, as follows:

Rita Salt	22.4 per cent
Viola Salt	22.3
Ronald Salt	17.2
Sharon Jackson	18.0
Susan Heilman	18.5
Kristi Jackson	.2
Lori Jackson	.2
Shawn Heilman	.1
Keith Heilman	.1
	100 per cent

[9] The following assumptions were made by the actuarial consultants:

1. Viola's monthly income was assumed to increase to $995 in 1986 and $1,000 in 1987.

2. The possibility of either Rita or Viola remarrying was ignored. (Population tables indicate the rate of remarriage for females in their early 60's is less than one-third of one per cent yearly.)

3. The clause providing extra income to Ronald, Sharon or Susan in the event of disability was ignored. (Their chances of benefitting under that clause are small, and roughly equal from one to another.)

4. The possibility that Ronald would die before the survivor of Rita and Viola and that he would then have a living child was ignored.

5. The two pairs of children were treated as twins, since within each family they are of the same sex and just a year apart in age.

6. It was assumed that at least one of the Jackson and Heilman family will be living when the survivor of Rita and Viola dies.

[10] At issue is whether the expressed wishes of the testator, Shirley Salt, concerning the distribution of his estate are to be followed or whether the adult beneficiaries can, with the required approval of the court, acting on behalf of the infants and unborn grandchildren, accelerate the distribution of the capital of the estate and take the immediate enjoyment of it.

[11] For the reasons expressed below, I have concluded that this is not an appropriate instance in which the testamentary trust should be distributed by permitting an immediate distribution of the capital and the resultant winding-up of the estate.

[12] The relevant provisions of the Trustee Act dealing with variation of trusts is found in s. 42 and in particular subs. (7), quoted as follows:

> (7) The Court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

[13] It is argued, on behalf of the applicants, that there will be an obvious benefit to the infant beneficiaries in that the immediate transfer of capital funds to their parents will enable their parents to more adequately provide for such children. It is stressed that the parents' greatest need is to receive the money now, while their children are in their formative years. In answer to the possibility of unborn children, it is suggested that the testator's daughters, being 43 years and 36 years old, will likely have no further children and do not intend to do so, and that the son, who is now 42 years old, is unmarried and is not likely to have any children. The widow is 64 years old and the ex-wife is 67 years old and both are capable of managing their own assets.

[14] The public trustee takes the position that he cannot consent to the application and, in any event, the actuarial calculations concerning the infant children's interest in the estate result in a relatively small amount of money being set aside for such children.

[15] I think that it is fair to say that just because the adult beneficiaries may want to receive the immediate enjoyment of the capital of the estate, this does not represent a justifiable reason for such a distribution. Unless there has been a demonstrable change in the circumstances of the beneficiaries, it would appear that, at least in the present instance, the testator's attempt to balance the interests of those persons whom he wished to benefit should be followed.

[16] The intervention of the widow under the Family Relief Act in May of 1979 served to bring the 1975 will up to date having regard to the cost of living provision and the sharing in the proceeds from the sale of the matrimonial home. But it should be remembered that this was a second marriage and it is not unusual to find a reluctance on the part of the testators, in similar circumstances, towards leaving substantial capital assets to a second wife for eventual disposition outside of the testator's own natural family. The testator's responsibility to maintain his wife must be recognized and this has been done through a monthly income. As far as the ex-wife is concerned, such a responsibility also exists and the testator has again discharged this responsibility. In the case before the court, the testator made thoughtful provision for his children and, indeed, they are presently in receipt of an annual income of approximately $5,500 each.

Moreover, if any one of them becomes disabled, they would be entitled to receive two-thirds of such income or, approximately, $11,000 per year. The testator's wishes also covered the possibility that any of his children might die before the time of distribution, in which event their children would be entitled to take their deceased parent's share. Thus, all of the adult beneficiaries are receiving some immediate benefit from the testator's estate with the capital of the estate being preserved for his children or his grandchildren, as the case may be. It seems highly unlikely that the testator intended to make a distribution of his capital assets to his ex-wife or to his second wife, notwithstanding that his children may agree to such a distribution, in order that they might seize the immediate enjoyment of a portion of such capital assets.

[17] Counsel have referred to the British Columbia Supreme Court case *Re Tweedie,* [1976] 3 W.W.R. 1, 64 D.L.R. (3d) 569, a decision of MacKinnon L.J.S.C. Here the court was required to find a benefit accruing to infant beneficiaries within the meaning of s. 2(2) of the Variation of Trusts Act. The court referred to certain English and Ontario cases where the word "benefit" was liberally interpreted and not confined to financial benefit. Included in such references was the Ontario decision *Re Zekelman,* [1971] 3 O.R. 156, 19 D.L.R. (3d) 652 (H.C.), where Osier J. at p. 654 found as one of three benefits:

> . . . the almost undoubted fact that a very fruitful source of dissension among the members of the family will be eliminated . . .

This was also argued in the present case, where there is an involvement between the executor wife and the ex-wife in the same estate.

[18] In *Re Tweedie,* MacKinnon L.J.S.C. states at p. 6:

> One principle that seems to emerge is that a court should approve if the benefit and detriment balance so that a reasonable adult would approve.
>
> Paramount in the consideration is the possibility of the unborn realizing a financial benefit. Where the likelihood is small, then I consider it proper to give a very liberal interpretation to the term "benefit".

And later on the same page:

On the evidence before me, I find a real psychological, emotional and family benefit of lifting a financial burden from a family member. The most probable heirs consent. I am asked to approve on behalf of classes who realistically are losing nothing.

[19] In that case the applicant wished to receive the trust fund in full and to use the amount to discharge a bank debt. The applicant's daughter and sister and the sister's two children consented to the application.

[20] *Re Tweedie* was quoted with approval by Stevenson J. in *Univ. of Alta. Gov. v. R.* (1979), 11 Alta. L.R. (2d) 26 (Q.B.), where the main object of a scheme of arrangement which was the subject of an application to vary certain trusts was to provide pooling so as to achieve a maximum return on investments, with the secondary objective of preserving the identity of individual capital funds. There the court was asked to approve the proposed arrangement on behalf of the persons set out in s. 42(5), being those persons who, by reason of infancy or other capacity, are incapable of consenting. Stevenson J. said at p. 29:

In exercising this power what is the court to do? There is now some body of authority discussing the tests to be applied on behalf of private, but unascertained or incapacitated beneficiaries. The test is not that they must necessarily be "better off" but that the arrangement is a reasonable one which an ascertained beneficiary of capacity would be prepared to make. I adopt the appropriate test from the decision in *Re Tweedie,* [1976] 3 W.W.R. 1, 64 D.L.R. (3d) 569 at 573 (B.C.), and the authorities there cited. I ask myself the question whether or not a prudent and well-advised beneficiary would consent.

[21] The case of *Re Ridalls,* a decision of Maher J. of the Court of Queen's Bench for Saskatchewan [(1983), 14 E.T.R. 157, 24 Sask. R. 16], was also cited. There the principal reason for the decision to wind up the trust was the potential liability of the estate under the provisions of the Income Tax Act for payment of capital gains in an amount estimated to be in the neighbourhood of $250,000. The proposed distribution of the residue, as planned, qualified as a spousal trust whereby the potential tax liability would be avoided. At p. 9 of his judgment, Maher J. quoted from *Re Irving* (1976), 11 O.R. (2d) 443, 66 D.L.R. (3d) 387 (H.C.), where Pennell J. of the Ontario Court reviewed the authorities and concluded that approval to a variation of a trust is to be measured, inter alia, by reference to the following considerations [p. 164 E.T.R.]:

> “First, does [the proposal] keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?”

[22] In the case of *Re Irving,* Pennell J. attempted to find the intention of the founder of the trust and then to decide whether the proposed arrangement remained within the ambit of the intention. He said at p. 448:

> The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the *Variation of Trusts Act.*

Pennell J. then attempted to balance intention with a change in circumstances which may have affected the trust. Quoting from pp. 448-49:

> Conjointly with an appraisal of intention, the Court is directed to look steadfastly to the benefit to be gained by the parties, being those very persons whom the testator intended to benefit in the first instance. The economy is largely an uncharted sea. Changes may often work to the detriment or frustration of the testator’s intention at a time when he is no longer able to modify the methods for the carrying out of his intention. The hope behind the Act is to provide protection against these problems. In my view this is the framework within which the Court must approach the question of what is of benefit to the parties for whom the Court is charged to exercise its jurisdiction.

[23] The two tests which must be satisfied before the court can approve an arrangement are those set out in s. 42(7). Firstly, the arrangement must appear to be for the benefit of each person on behalf of whom the court may consent: in this case, the four infants and possible unborn children. Secondly, that in all of the circumstances the arrangement appears otherwise to be of a justifiable character.

[24] In weighing the benefits, I am mindful of the arguments that the parents of the infant children will gain access to capital funds which are not now otherwise available to them and that such funds might enable them, if they are of a mind to do so, to enhance the quality of life for their children. There is no guarantee that they will do so or that the

funds will be used for such purpose. Such parents are already in receipt of an annual income from the estate. As to the other argument that the immediate distribution of the capital will enable the estate to be wound up and therefore avoid any further friction between the beneficiaries, this could easily be resolved by placing substitute trustees in charge of the administration of the estate and avoiding any further contact between the beneficiaries.

[25] Whereas the potential interest of the infants and unborn beneficiaries is very likely remote, it is nonetheless real, and deserves some protection. The actuarially calculated value of the infants' share of the trust estate is insignificant having regard to the present total value of the estate and totally ignores the potential interest of unborn children, where such possibility exists as with the son.

[26] Is the arrangement otherwise of a justifiable character? What is the meaning or purpose of those words? In his article, "The Rule in Saunders v. Vautier and Its Proposed Repeal", Estates and Trusts Quarterly, vol. 7, March 1986, William S. Bernstein is quoted at p. 277 as follows where he discusses the reasons that the arrangement must appear "otherwise to be of justifiable character":

> It would seem that the additional requirement beyond satisfying the court that the arrangement is for the benefit of the incapacitated beneficiaries should be justified on the basis of allowing the court to balance the intentions of the settlor with the wishes of the beneficiaries. Once the court concludes that the arrangement does benefit those incapacitated beneficiaries whom it has an obligation to protect, it seems that the only further concern of the court would be to take into account the settlor's intentions. This would seem to follow from the fact that the Alberta Report indicates that the reason for the legislation is to allow for a compromise between the wishes of the beneficiaries and the intentions of the settlor. This policy justification for the legislation does not seem to require the court to second guess what is in the best interests of the adult beneficiaries.
>
> In considering the Alberta legislation, the policy debate would seem to be as to whether or not it is appropriate to provide a compromise whereby the court can balance the intentions of the settlor with the wishes of the beneficiaries.

[27] In fairness to Mr. Bernstein I should add that he does not agree that the rule in *Saunders v. Vautier* should be repealed as it has been in Alberta. At pp. 287-88 he says:

> While there may be the occasional situation where the rule in *Saunders v. Vautier* may lead to inappropriate results, I am unable to conclude that there is sufficient reason to justify requiring court approval of all variations and early terminations of trusts. The enactment of repealing legislation would represent a distinct departure from the trend favouring the wishes of the beneficiaries. There does not seem to be sufficient justification to warrant such a significant departure from the current state of the law.

[28] In the case of *Kinnee v. Alta. Pub. Trustee* (1977), 3 Alta. L.R. (2d) 59, 6 A.R. 102 (T.D.), Hope J. held that *Saunders v. Vautier* has been qualified in Alberta by s. 37 (now s. 42) of the Trustee Act, so as to permit the court to withhold its approval to an application which would otherwise fall within that case. In the present case the beneficiaries not only cannot invoke the rule in *Saunders v. Vautier,* but the rule has been abrogated by s. 42 and the court is obliged to satisfy itself that the proposed arrangement is not only for the benefit of the infants but that the arrangement appears otherwise to be of a justifiable character. I believe that the applicants must present more cogent reasons for the variation of the testamentary trust before the intentions of the testator can be defeated.

[29] In the present case the intentions of the testator, as taken from the wording of the will, appear to me to be clear. He intended to give his wife and ex-wife an income until their death or remarriage, with any income left over to be distributed equally among his three children unless in the event of any one of them becoming incapacitated, such person was to receive a larger share. On the death of the wife and ex-wife, the capital was to be divided equally among the three children or their children if such child was then dead. There does not appear to have been any exceptional change in circumstance of any of the beneficiaries and there does not appear to be any compelling administrative or tax reasons for the proposed arrangement.

[30] I can find no persuasive reason for interfering with the terms of the trust established by the testator and accordingly, I dismiss the application with costs to be spoken to if required.

Application dismissed.

TAB 6

In the Court of Appeal of Alberta

Citation: Jaycap Financial Ltd v Snowdon Block Inc, 2019 ABCA 47

Date: 20190204
Docket: 1701-0314-AC
Registry: Calgary

Between:

Jaycap Financial Ltd.

Respondent
(Plaintiff)

- and -

Snowdon Block Inc., Neil John Richardson,
Hugh Daryl Richardson and Heritage Property Corporation

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice B.E.C. Romaine
Dated the 2nd day of November, 2017
Filed on the 2nd day of November, 2017
(Docket: 1601-01658)

requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

[15] The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 83 DLR (4th) 76. She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

[16] The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

[17] Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

[18] Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

[19] The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 23, [2002] 2 SCR 235. Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

[20] The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came

to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125.

Analysis

There was no mutual mistake

[21] We agree with the guarantors that the evidence does not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test was met. The evidence establishes that on August 2, 2017, the day the first asset purchase agreement was signed, the parties may have had *different* understandings about the purchase price and the Receiver's understanding of the purchase price was incorporated into the agreement. A different understanding is not a common misapprehension as to the facts: *Beazer v Tollestrup Estate*, 2017 ABCA 429 at para 28, [2018] 4 WWR 513.

[22] This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the $1.3 million difference was comprised of. As the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference cried out for an explanation before this Court and the court below.

[23] While the guarantors are successful on this ground of appeal, this does not end the matter as mutual mistake was an alternative argument. The appeal cannot succeed unless the guarantors establish a reviewable error in the chambers judge's *Soundair* analysis.

Lack of fairness and integrity of the process

[24] The guarantors raise two issues supporting their allegation that the integrity of the process was compromised. First, the Receiver failed to disclose relevant and material documents about what transpired after August 2, 2017. Second, the Receiver did not appear to be acting independently of Jaycap.

[25] We agree that the Receiver's evidence about what transpired after August 2, 2017 is not satisfactory, even considering the evidence contained in the confidential supplement to the third report. Legal counsel's conclusion that there was a common mistake does not provide the evidentiary foundation to establish mutual mistake. That is for the court to decide.

[26] A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase

price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

[27] Further, the Receiver provided little information about the critical August 2, 2017 email and why no further clarification was sought from Jaycap about what it meant before the court order approving the first transaction was obtained. There was enough information in that email to put the Receiver on notice that there was a misunderstanding. Had the Receiver been more diligent, this whole situation may well have been avoided.

[28] While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, these considerations do not relieve the Receiver from its basic obligations to the parties and the court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. As summarized by the court in *Ravelston Corporation Limited (Re)*, 2007 CanLII 2663, 29 CBR (5th) 1 (ON SC):

> [60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, 1912 CanLII 365 (UK JCPC), [1913] A.C. 160 at 167 (J.C.P.C.).
>
> [61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 1978 CanLII 1934 (BC SC), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.
>
> [62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1973 CanLII 467 (ON SC), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].
>
> [63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

[29] The Receiver's materials on their own do not provide the evidentiary basis to support the relief it was seeking. It was only several weeks later, when faced with serious opposition from Mr.

Richardson, that Jaycap filed an affidavit with more, although still incomplete, information about what transpired.

[30] The lack of information about what happened and the way the Receiver and Jaycap skirted around the issue in its application materials certainly did not help the perception of the Receiver's independence. The optics of the situation likely contributed to the guarantors' suspicion that what transpired merited further inquiries and that the Receiver was following Jaycap's instructions to conceal from the guarantors the true state of affairs. Jaycap and the Receiver were jointly represented before this Court, which was also unusual and unhelpful particularly when counsel for Jaycap could not answer questions the Receiver would be expected to know. During the hearing, the panel found that the guarantors' submissions were persuasive.

[31] The termination of the first asset purchase agreement was also left unexplained by the Receiver. Jaycap's evidence is that the Receiver failed to deliver closing documents, which allowed Jaycap to terminate. Jaycap signed a unilateral termination notice and the parties executed a mutual termination notice several weeks after the second asset purchase agreement was signed, and after Mr. Richardson launched his opposition. The chambers judge found that the first asset purchase agreement was terminated, but she did not explain in her reasons which termination was valid or why. Termination in these circumstances is not merely a matter between the parties as suggested by Jaycap. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed as this remained a court-supervised sales process where the Receiver owed fiduciary duties to the parties to act fairly.

[32] The Receiver provided no evidence about termination nor did it explain why it failed to deliver the final closing documents, giving rise to termination, when the first asset purchase agreement reflected its understanding of the purchase price. Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with the assistance of their legal counsel, will be held to their bargain. Had the Receiver sought to compel Jaycap to close the first asset purchase agreement, instead of abandoning it, its application may well have been successful.

[33] What is missing here is transparency. The process should be transparent. It should enable the court and interested parties to make an informed decision as to whether the sale can be considered fair and reasonable in the circumstances: *Toronto Dominion Bank v Canadian Starter Drives Inc*, 2011 ONSC 8004 at para 5, 2011 CarswellOnt 15140. Given the significant questions left unanswered by the Receiver, we have serious concerns about the efficacy, fairness and integrity of the process the Receiver followed between August 2, 2017 and the hearing of the application to approve the second asset purchase agreement. As a result, we disagree with the chambers judge that the Receiver met the requirements of *Soundair*.

Conclusion

[34] As an aside, and as a further indication of the parties' approach to procedure was the parties' approach to the sealing orders. The court record demonstrates that the parties failed to file

TAB 7

TAB A

WatersTrusts 27.I

Waters' Law of Trusts in Canada, 4th Ed.

27 — Variation of Trusts
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

27.I — The Background to the Variation of Trusts Legislation

27.I — The Background to the Variation of Trusts Legislation

It is the first duty of the trustees to preserve the trust property and to carry out the trust terms. Unless the settlor chooses to give them such a power, they have no authority to vary the terms of the trust, any more than they can neglect their duty to preserve the trust property. Nor does it matter whether the term which the trustees would like to vary is concerned with the beneficial interests created by the trust or the powers of themselves as trustees. It follows that, even if the trustees honestly and reasonably believe that it would be for the benefit of the beneficiaries were the trustees to depart in any way from any term of the trust, nevertheless they would be in breach of trust were they to do so.

As we saw when examining the termination of a trust,[1] the only persons who can set aside the terms of a trust are the beneficiaries.[2] If the sole beneficiary is of age, mentally competent, and entitled to the whole beneficial interest in the trust property, he can call for the trust property from the trustees, and thus wind up the trust whatever the trustees may wish. His sole right to enjoyment of the property overrides the trustees' right as legal owners of the trust property to carry out the terms of the trust. From this it followed, as we saw, that, if there are two or more beneficiaries, including persons who may take on the occurrence of some contingency, they can get together, being all adult and mentally competent, and wind up the trust, even if it is over the objection of the trustees. In the same way, it is possible for such beneficiaries effectively to vary an existing trust by terminating the old one and creating a new one with terms that suit them.[3]

However, if the sole beneficiary, or one or more beneficiaries, is not an adult, or, being of age, is not mentally competent, he has no legal capacity to terminate the trust or to agree to its termination. And, of course, most trusts include children among the beneficiaries. After all, as a family provision device it is to be expected that children, both alive and yet to be born, will be found among the trust beneficiaries, together swith persons who are not mentally competent. Prior to 1945 it did not much matter that such trusts could not be terminated under the rule in *Saunders v. Vautier* .[4] It might be irritating to the trustees as well as to the beneficiaries that the terms of the trust were not as they would have drawn them, and occasionally it might even cause some hardship, but seldom could it be said that disaster of some sort would ensue unless a variation of the terms of the trust was made. Indeed, if disaster did threaten, it normally took the form either that some part of the trust property, usually a building, was fast deteriorating and the trustees had no power whereby to see to repair and reinstatement, or that a beneficiary entitled, actually or possibly, to income or capital in the future was in need today. In both these cases the courts were able and willing to assist the trustees under the inherent jurisdiction.

There could be argument, it is true, as to whether the inherent jurisdiction extended to giving relief in a particular case, and in the latter half of the nineteenth century trust property would very often constitute stocks and shares rather than land to which the courts had been accustomed and to which their precedents were attuned. How far should the court lend its hand to enable the trustees to take part in a company reorganization plan? For one thing company stocks were outside the authorized investment list, and thought to be in large part speculative. The trustees may have been authorized by the instrument of the settlor to retain stocks in the company in question, and were no doubt anxious to be permitted to acquire valuable stocks in the new company. However, the courts were concerned whether they should assist in such dealings as these when the settlor or testator, who had authorized retention of the shares, had not provided for the situation, but in other matters there was no hesitation. The maintenance of young persons awaiting the vesting of their interests is a case in point. Since the nineteenth century the courts had gone so far under the inherent jurisdiction as not only to invade the terms of the trust by accelerating the right to income of those who had vested interests, but also to authorize income payments to needy persons whose beneficial interests were mere possibilities, that is, contingent on some future possible occurrence.[5]

Nor had the legislatures been idle, as we have seen in connection with the administrative powers of trustees.[6] Gradually in the years prior to 1939 the inherent jurisdiction was being reduced to a clear statutory form, and the legislatures were not only clarifying that jurisdiction but consciously extending it. Already in the mid-nineteenth century the courts were authorized to grant to trustees of settled land powers which practically allowed the trustees to treat the land as just another form of investment.[7] In the twentieth century trustees with company stocks were given the power to take part in company reorganizations of all kinds,[8] and trustees could be appointed and removed as the court thought fit if genuine difficulties arose.[9] Nor could it be said that the legislatures were unprepared to authorize trustees to act without the assistance of the court in those circumstances where the instrument might well have given a particular power to the trustees, but had not done so. The power to postpone a sale and conversion is a case in point.[10] The instrument may impose an obligation to sell the assets coming into the trust and invest the proceeds of sale, but the trustees have to obtain the best prices they can get, and they may well be caught in a quandary when the market for the assets in question is poor and may take two or three years to recover. A power to postpone relieves the trustees from pressure, and allows them to balance the needs and legitimate demands of their beneficiaries with the delays for which market conditions may call.

Canadian jurisdictions may have been somewhat slower in implementing the same changes, but prior to 1939 those changes were gradually finding their way on to the statute books. Everything changed in 1945. From that time inflation eroded fixed-interest trustee investments, so that real capital value declined, and high taxation substantially depleted the trust capital every time a beneficiary died and the person entitled to the successive beneficial interest came into possession. Had governments in England not consistently imposed significant estate duties upon the trust capital every time the beneficial enjoyment of property passed from a deceased life tenant to another, and had there been a uniform taxation of wealth acquisition by the individual, whether it came in the guise of "income" or "capital", there might never have been the *Variation of Trusts Act, 1958*. It was this Act which directly inspired legislation along similar lines through the Canadian common law jurisdictions. Not until 1962 in England was there a capital gains tax, so that prior to this time income alone was subjected to the revenue authorities' attention.[11] And a more direct effect upon the trust was produced by the fact that England did not have a gift tax, that is to say, a levy on transfers of property interests between living donors and donees. On the other hand, estate duty was one of the steepest progressive scales in the world, commencing with estates of a very small capital value.

This curious taxation policy meant that for tax avoidance purposes the individual should receive as much as possible of his income from "capital" acquisitions, and ensure that he donated in his middle life to his chosen beneficiaries as much as possible of his capital.[12] The key to success was the individual's possession of free capital. This, of course, is what nearly all trusts, whether or not they involve successive interests, do not allow. Their terms are designed either to withhold free capital from a beneficiary, or to straddle the benefits of the trust capital over a number of beneficiaries, which means in effect that no one person can deal with capital.

An economy exhausted by war, its currency devalued, was a breeding ground for the inflation which badly hurt fixed-income recipients. Moreover in the 1950s in England, as inflation continued, "equities" recovered dramatically and prospered while fixed-interest securities continued to decline. The traditional successive interests trust was therefore hit from two sides: it probably possessed a power restricting the trustees to authorized investments, and its capital was unavoidably delivered up for estate duties to be deducted every time a life dropped and there was a consequent "passing". A "passing" sometimes resulted in the greater part of the trust capital being taken for duty, and, before statutory relief was granted, rapid succession was ruinous for more than one large family trust.

In this almost incredible combination of circumstances those who could terminate their trusts did. Meanwhile, trust drafting completely changed. For instance, the one-time trust with an expected duration of forty or fifty years gave way to the trust designed for seven years as a maximum. Trustees were often given powers by trust instruments which made them appear in all but name to be absolute owners; a power to terminate the trust at any time and distribute the trust capital, should the trustees in their discretion think it wise, was common practice. When circumstances called for it, the termination of the existing trust could be followed by the beneficiaries setting up a new trust, but the new trust would be of the modern variety. Had it not been for the rule in *Saunders v. Vautier* , a rule which, it will be recalled, has not been followed in almost all the United States jurisdictions,[13] some other solution to the plight of older trusts might have been devised. However, as it was,

those who could exercise that rule were able to free themselves of the trust, acquire capital shares, and thus with free capital invest in the "equities" which provided a hedge against inflation. They could also donate their wealth in their lifetime. Those adult beneficiaries whose trusts gave interests, vested or contingent, to infants, to the unborn, or to the mentally incompetent, could not. The beneficiaries might include the unascertained, like future spouses, or persons whose whereabouts were unknown.[14] The result was the same; the rule in *Saunders v. Vautier* could not be invoked.
The result was almost inevitable. The inequity was glaring, and, as the situation had merely come about, there was no persuasive justification for allowing it to continue. A committee recommendation was made[15] that the court be empowered to consent on behalf of all the beneficiaries incapable of giving a personal consent, so that with the court's consent similar major variations of trust terms or the revocation of trusts could be carried through as if the rule in *Saunders v. Vautier* were available. The tide could not be stopped now. A private member's Bill brought the recommendations before Parliament, and no government could reasonably oppose the equity behind them, whatever reservations it might have as to the possible effects on the Exchequer of such a change. The ensuing debates which ultimately resulted in the *Variation of Trusts Act of 1958* were merely concerned with the extent of the power to be conferred upon the courts and appropriate statutory wording.[16]

The Canadian jurisdictions until this time—no doubt as the result of having a significantly smaller volume of family provision trusts—had been inclined to a greater conservativeness than was evident in the grant of statutory powers in England and Wales. It is one of the ironies of history that now the situation proved markedly different. Tax planning considerations proved to be an incentive for change such as before had been unknown in Canadian trust law. Hardly was the ink dry on the English Act of 1958 before, in 1959, it was adopted in largely identical terms in Ontario and New Brunswick. In the same year and in 1960 the British Columbia Commissioners raised the matter at the annual meeting of the Uniformity Commissioners.[17] In the main they were concerned that the existing statutory powers of the courts in British Columbia to grant relief to trusts were even more restricted than were those of the English courts prior to 1958. They also observed that this was true of all the Canadian common law jurisdictions, except for Ontario and New Brunswick which had adopted the new legislation. The decision of the House of Lords in *Chapman v. Chapman* ,[18] which held that the inherent jurisdiction did not extend to the variation of beneficial interests, was a shock in view of what had previously been thought to be the case. The significance of that decision was more considerable in Canada, said the commissioners, because the Canadian jurisdictions were more reliant upon the inherent jurisdiction. On the basis of these arguments the Uniformity Commissioners therefore adopted in 1961 a model *Variation of Trusts Act.*[19] The model kept closely to the English legislation because the commissioners were anxious to have the advantage of English case law on the subject, and it adopted the changes of the Ontario and New Brunswick legislation so that the benefit of the case law originating in those provinces might be enjoyed across common law Canada. By 1969 ten out of the eleven common law jurisdictions had enacted variations of trusts provisions, Newfoundland alone being excepted. The *Uniform Act* was adopted in each case, either as a distinct Act or as an added section to the *Trustee Act.*[20] Newfoundland and Labrador remains the only common law jurisdiction lacking any version of this legislation.

The new legislation has been described in England as "revolutionary",[21] and so indeed it is. As we shall see, the scope of the "arrangements," varying or revoking trusts, to which the courts have power to give their consent, is for almost all practical purposes without limit. The essential basis of the court's consent is the benefit of the beneficiaries on behalf of whom the court gives its consent. Only as a matter of practice, not as a requirement of the legislation, is the intention of the settlor or testator taken into account. The contrast of such legislation with the traditional attitude, which requires the upholding of the settlor's intent, is striking, and the difference of approach in the American state jurisdictions, where such variation of trusts legislation has nowhere been adopted, is equally dramatic. Had the circumstances which prevailed in England between 1945 and 1958 also prevailed in jurisdictions like New York State, it would have been intriguing to witness the outcome. As it was, the situation never arose; statutory adoption of the prudent man rule in the majority of American jurisdictions had given adequate investment powers to all trustees, and a more consistent and logical pattern of taxes sent estate planning off in different directions.

Footnotes

1 *Supra*, chapter 23.

2 Subject to any power the settlor or testator has conferred authorizing termination.

3 Two points should be made. First, this may attract unwelcome fiscal consequences. Second, the existing trustees cannot be forced to hold on the new trusts because no one can be made an express trustee without his consent. If the existing trustees are unwilling to hold on the new trusts, the beneficiaries would have to find new trustees. See *Re Brockbank,* [1948] Ch. 206 (Eng. Ch. Div.); and *Stephenson (Inspector of Taxes) v. Barclays Bank Trust Co. Ltd.,* [1975] 1 W.L.R. 882, [1975] 1 All E.R. 625; *supra*, chapter 23, note 23.

4 *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.).

5 See, *supra*, chapter 21, Part II A. *Cf.* capital payments, chapter 21, Part III A.

6 *Supra*, chapter 20.

7 *Settled Estates Acts*.

8 See, e.g., *Trustee Act*, R.S.B.C. 1996, c. 464, s. 23; C.C.S.M., c. T160, s. 74(1); R.S.N.S. 1989, c. 479, s. 12.

9 See, e.g., *Trustee Act*, R.S.O. 1990, c. T.23, ss. 5, 37(1).

10 E.g., C.C.S.M., c. T160, s. 33.

11 The Conservative Government introduced a short-term capital gains tax (acquisition and disposal within twelve months) in the *Finance Act, 1962*, and the following Labour Government introduced a long-term capital gains tax in the *Finance Act, 1965*. See C.N. Beattie, *Elements of the Law of Income and Capital Gains Taxations*, 9th ed. (1970) at 2, and chapter 17.

12 Estate duty on an individual's death was retroactive in that duty was imposed on any *inter vivos* alienation of the individual's alienable assets within seven years before his death.

13 *Supra*, chapter 23, Part III.

14 Where it was only a case of future possible spouses or untraceable adult beneficiaries, the trustees were often willing to agree to a winding-up of the trust, and to insure at the cost of the trust fund against such a beneficiary materializing or reappearing.

15 Law Reform Committee, Sixth Report (Court's Power to Sanction Variation of Trusts), Cmnd. 310, November 1957. Something similar had been adopted in New Zealand by way of an extension of the power of the court to enlarge administrative powers of trustees; see *New Zealand Trustee Act, 1956*, s. 64(2); this was repealed in 1960; see now s. 64A which follows the English legislation, with some differences.

16 For the position in England today, see Emily Campbell, *Changing the Terms of Trusts* (London: Butterworths Lexis Nevis, 2002).

17 Report of the Uniformity Commissioners (1959) at 24; Report, *ibid.* (1960) at 30, 116-19. The Commission is now entitled the Uniform Law Conference of Canada.

18 *Chapman v. Chapman,* [1954] A.C. 429, [1954] 1 All E.R. 798 (U.K. H.L.).

19 Report of the Uniformity Commissioners (1961) at 24, 140-42.

20 Ontario and New Brunswick had already legislated in the same terms in 1959, but obviously they did not adopt the model Act of the Uniformity Commissioners as such. For the current provisions, see *Variation of Trusts Act*, R.S.O. 1990, c. V.1; *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 26; *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463; *Trustee Act, 2009*, S.S. 2009, c. T-23.01, ss. 49-51; R.S.P.E.I. 1988, c. V-1; R.S.N.S. 1989, c. 486; R.S.N.W.T. 1988, c. V-1 (applicable in Nunavut by *Nunavut Act*, S.C. 1993, c. 28, s. 29); R.S.Y. 2002, c. 224; and *Trustee Act*, R.S.A. 2000, c. T-8, s. 42; C.C.S.M. c. T160, s. 59.

21 *Re Steed,* [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.) at 421 [Ch.] *per* Evershed M.R.

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TAB B

WatersTrusts 27.IV

Waters' Law of Trusts in Canada, 4th Ed.

27 — Variation of Trusts
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27.IV — Variation of Trusts Legislation

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A. — Introduction

The legislative language adopted in Ontario and New Brunswick in 1959 followed closely the language of the 1958 Act in England. The model Act recommended by the Uniformity Commissioners[1] and adopted in all the remaining Canadian common law jurisdictions, except Newfoundland and Labrador, followed the 1959 Canadian legislation with hardly a word of change. Originally there was no difference of substance between the different Canadian enactments, but there was some distinction between those enactments and the English Act. Since then, several jurisdictions have made greater or lesser changes.[2] Wewill begin by noticing the distinctions between the Canadian model Act and the English Act, since they are important even though not extensive.[3] The jurisdictions which still follow the model Act are Ontario, New Brunswick, Saskatchewan, Nova Scotia, Prince Edward Island, and all three territories.[4]

(1) Where property, real or personal, is held on trusts arising before or after the coming into force of this Act under any will, settlement, or other disposition, the Supreme Court may, if it thinks fit, by order approve, on behalf of

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or

(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, [the English Act continues "so however that this paragraph shall not include any person who would be of that description, or a member of that class as the case may be if the said date had fallen or the said event had happened at the date of the application to the court"], or

(c) any person unborn; or

(d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined, [the English Act is differently worded, "any person in respect of any discretionary interest of his under protective trusts where the interest to the principal beneficiary has not failed or determined"]

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees ofmanaging or administering any of the property subject to the trusts.

(2) The Court shall not approve an arrangement on behalf of any person coming within paragraph (a), (b), or (c) of subsection (1) unless the carrying out thereof appears to be for the benefit of that person.

In the ordinary course of events, the kinds of trust in respect of which the legislation is invoked will be those with multiple beneficiaries. However, where that beneficiary lacks full legal capacity, it can apply to allow variation of a trust with a single beneficiary.[5]

Paragraph (d) was worded differently in Canada because no Canadian jurisdiction has adopted s. 33 of the *Trustee Act, 1925*, which in England introduced a statutory protective trust, so that if an interest is left to A "on protective trusts" the section thereupon applies, and the instrument need say no more. This kind of trust is suited to a case where the settlor does not trust the judgment of the principal beneficiary; it is specifically designed to prevent the principal beneficiary from alienating his interest under it (e.g., by selling it for a capital sum). Any attempt by the principal beneficiary to alienate his non-discretionary interest terminates that interest, and substitutes a discretionary trust in favour of the principal beneficiary and other named persons (including his immediate family). The trust exists primarily for the benefit of the principal beneficiary, and the other interests exist as part of a system which dissuades alienation; this appears to be why, exceptionally, the court is empowered to consent on behalf of fully capacitated persons, where the primary interest has not yet determined.[6]

As to paragraph (b), there is no reason that is apparent for the deletion in Canada of the exception that exists in the English legislation. It was omitted from the Ontario and New Brunswick legislation, and the Uniformity Commissioners simply made the same omission in the model Act. While the wording of the English exception is nearly opaque, it was intended to have an important effect, which is discussed below.[7]

The two provinces whose legislation differs most strikingly from the English model are Alberta and Manitoba because the rule in *Saunders v. Vautier* has been abrogated. In each case, the legislation provides that the trust "shall not be varied or terminated" except with the approval of the court under the section.[8] This is not the only difference. The legislation also gives a non-exhaustive list of arrangements which require court approval.[9] Both provinces also specify that before a proposed arrangement is submitted to the Court for approval, it must have the consent in writing of those who can consent. The Alberta provision stipulates that

> Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.[10]

In other words, the approval of the court is *necessary*, certainly (as in all provinces) to supply the absence of valid consent from those who cannot give it, and also (in these two provinces) even where all beneficiaries are capacitated. However, in all Canadian jurisdictions it is not *sufficient*. Since the dissent of a single beneficiary cannot be provided by the court, this means that the application may not be presented to the court. The Manitoba legislator appears to have erred. Under the basic model, set out above, there are some *fully capacitated and ascertained* persons on behalf of whom the court can give consent, against the persons' will. These are described in paragraph (1)(d). An example would be the wife of the principal beneficiary; she would be one beneficiary of a discretionary trust that would arise if the interest of the principal beneficiary determined. The Alberta provision requires written consent from "other persons"; that is, anyone on whose behalf the court may *not* consent. The Manitoba provision stipulates

> Before a proposed arrangement is approved by the court, it must have the consent in writing of *all* persons who are beneficially interested under the trust and who are capable of consenting thereto.[11] [emphasis added]

The Manitoba provision, like the basic model, also allows the court to give consent on behalf of some fully capacitated persons.[12] So one provision, s. 59(6), seems to require written consent from the person described in paragraph (1)(d), if fully capacitated;[13] while another provision, s. 59(5)(e), allows the court to give consent on that fully capacitated person's behalf.

The substantive requirements for approval are also different in these two provinces. Under the basic model, it is necessary (but perhaps not sufficient) that the variation appears to be for the benefit of those described in paragraphs (1)(a), (b), and (c).[14] In Alberta and Manitoba, not only must the arrangement be for the benefit of those on whose behalf the court is asked to consent,[15] it must also appear to the court "otherwise to be of a justifiable character."[16] Presumably this provides some guidance in a case in which the court is not called upon to consent for anyone, but merely to approve a termination. In other provinces, such a termination could take place extrajudicially under *Saunders v. Vautier* .

There are some further innovations in the Manitoba statute which do not appear in that of Alberta. First, there is some guidance as to the meaning of "benefit", which will be discussed below.[17] There is also a much longer list of persons on whose behalf the court can give consent. In addition to the four cases given in the basic scheme set out above, the Manitoba legislation adds a number of others, which will be mentioned below.[18]

The British Columbia Act also shows variations from the basic scheme. One difference is highlighted by the name of the act: the *Trust and Settlement Variation Act*.[19] By its s. 4, the Act applies to land "the ownership of which is the subject of a legal life interest"; the legal settlement is deemed to be a trust, and the life tenant and everyone else with an interest in the land are deemed to be incapable beneficiaries.[20] Although the legislative technique is somewhat drastic, since it allows variation against the wishes of fully capacitated persons, it is true that situations like this cry out for the possibility of judicial intervention.[21] The British Columbia Act also requires that written notice of the application be given to the Public Guardian and Trustee where consent is sought on behalf of unborn, minor, or incapacitated beneficiaries; and it gives standing to that official in the hearing of the application. In Saskatchewan, notice must be given to this official in all cases.[22] In this way, the sanction of primary legislation is given to what is, in any event, a rule of practice in every jurisdiction where there is such an official.

Because of these differences, and the considerable importance of the discretionary jurisdiction conferred upon the courts, it will remain important that the published reports carry as many of these decisions as possible. Often these decisions are entirely factual, constituting a discussion only of the particular circumstances in hand, but each nevertheless reveals that type of problem and the forms of variation which the courts are prepared to entertain.[23]

B. — Persons Who May Apply Under this Legislation

Applications to the court, whether under the trustee statutes or other legislation enabling the court to grant authority for specified activity, are normally made by the trustees. The object of such legislation is to support the administrative machinery of the trust, and it is therefore natural that the duty of application should be upon the trustee, unless there is no person appointed as trustee, or it is a beneficiary who is seeking the removal by the court of a trustee.

The variation of trusts legislation, however, is little more than an authority to the court to act on behalf of those beneficiaries who cannot consent for themselves in a *Saunders v. Vautier* type of operation.[24] Consequently, though the legislation enables anyone to put forward a proposed "arrangement", it should be the beneficiaries, not the trustees, who make the proposal.[25] The adult and capacitated beneficiaries have given their consent to the bargain which the arrangement represents,[26] and they are now asking the court to complete the required consents on behalf of the other beneficiaries.[27] The trustees for their part should remain objective, and concerned merely to ensure that during the pre-hearing bargaining stage the interests of the incapacitated and unborn are adequately put forward. In British Columbia and Saskatchewan, as previously noted, the Act requires that notice of an impending application be given to the Public Guardian and Trustee, who will enter an appearance on behalf of infants and the unborn.[28] Where there is no conflict between the adult and capacitated beneficiaries as to the form of the bargain—and that will be in the great majority of instances—it is usual to appoint the Public Guardian to act on behalf of the infants and unborn, and he will normally be brought in at the bargaining stage so that preferably his consent is forthcoming before the application is brought to court.[29]

In England the absence of such an official has meant that the courts have put particular stress upon the desirability of the trustees being concerned with the interests of the infants and the unborn rather than making application themselves. The courts have made it clear several times that they wish to see the persons on behalf of whom the court has to consent separately represented by counsel.[30] It follows that wherever there is an official to perform this role of representing infants and the unborn, it would not be essential that the application be put forward by someone other than the trustees. Nevertheless, though they should be represented and their views presented on the fairness of the arrangement, it is not a proper role for trustees, we would suggest; only if an application should be made, and there is no beneficiary able or willing to apply, are the trustees properly entitled to assume the task.

In the case of an *inter vivos* trust, the settlor may choose to put forward the application himself. He may be a beneficiary, such as a life tenant, who wishes, for instance, to acquire a capital sum from the trust fund. If he is not a beneficiary, he may nevertheless desire to revoke the trust or enable the trustees to exercise a power which the trust instrument does not give them. Where the beneficiaries are all children and unborn, it would be logical for him to make the application if he is the one who desires the modification or revocation.[31] Because of the tax connotations, it is unlikely that the settlor will have reserved to himself in the instrument powers of revocation or even of modification.

C. — Persons on Whose Behalf the Court Can Approve an Arrangement

1. — Introduction

The idea of the legislation is that those who are adult and mentally competent have the right and the consequent obligation to look after their own interests,[32] subject to the court being satisfied that the proposed arrangement is, overall, one which it should support. The court's role is to consent where it is satisfied that the arrangement is to the benefit of those who cannot consent because, as is usually the case, they are infants, mentally incompetent, or unborn. The difficulty in drafting variation of trusts legislation is in deciding what to do with those persons who are adult and mentally competent, but are untraceable, or are members of a class which is to be determined in the future. For instance, Henry has a remainder interest in the capital of the trust fund after the death of his mother, who is the life tenant. The other remaindermen agree with the widow on a proposed division of the capital in the trust fund, but no one knows where Henry is. He went to South America years ago, and sends Christmas cards whose postmarks suggest he is travelling around. Henry is untraceable.[33] The members of a class, to take the second situation, may be those children of the testator who are living at the death of the presently surviving life tenant, the testator's widow. Another example is the next-of-kin of a living beneficiary on failure of that beneficiary to exercise a testamentary power of appointment. A less difficult question arises in connection with as yet unascertained persons, such as the possible spouse of a beneficiary who is at present unmarried.

2. — Infants and Mentally Incompetent Persons

Paragraph (a) of the section in question includes infants and mentally incompetent persons. It could also include persons who, though not mentally incompetent, are unable to understand what is being put to them. The sections say, "incapable of assenting", and it is important that the court's consent be sought if there is any question as to the capacity of an adult beneficiary.

Consent under this paragraph must be given for any such beneficiary whose interest is vested or contingent, and direct or indirect. It has been suggested that an indirect interest is one which arises under a sub-trust.[34] This may be so, though one would have thought that a sub-trust was independent of the head trust and would be separately brought before the court for variation or revocation. It seems the better view that the section is merely seeking to make it clear that any kind of interest whatsoever, be it in the realms of remote possibility only, is included.

3. — Persons Whose Interest is Uncertain

Paragraph (b) enables the court to consent on behalf of persons "who may become entitled" to the kind of interest already mentioned on the occurrence of a future date or event. At that time the person in question may be of a specified description ("to A and *his then wife*, if any, a joint life interest commencing ten years after my death") or a member of a specified class ("remainder to the statutory next of kin of A"). The words "who may become entitled" have been interpreted in England in *Knocker v. Youle* [35] as not applicable to vested and contingent interests, so that the only persons within paragraph (b) are those who have a mere hope of having an interest, for instance, the objects of a mere power of appointment.[36] The holder of a contingent interest *is* presently entitled, albeit contingently. Assume that a trust includes a life interest to A, with remainder to A's statutory next of kin, as if A had died unmarried and intestate. A currently has a son, B, who is fully capacitated. A also has four cousins, who are also fully capacitated, and who would be A's next of kin if B predeceased A.[37] A and B wish to vary the trust. It appears from the *Knocker* decision that the court cannot consent on behalf of B, who has a contingent interest in the trust. However, the court can consent under paragraph (b) on behalf of the cousins.[38]

The English Act then excepts from this paragraph those persons who would fit the description or be members of the class, had the future date or event taken place before the application was made. Apparently the aim of this was to allow the court to give consent on behalf of unascertained persons who are "nowhere in sight," such as the future spouse of a currently unmarried person. It seems that the court is not to consent on behalf of persons who, at the time of the application, are presumptively within the class or description, such as statutory next of kin of a person who then has a brother and a sister.[39] It is not clear that the language is well chosen for this goal. The best interpretation of the English Act is that it allows consent to be given only in the case of persons who may fit a description but will do so only if two distinct contingencies are fulfilled.[40]

Using the example just given, this means that the court could still consent under paragraph (b) on behalf of the cousins. They would fit the description of statutory next of kin only if (i) B died before A, and (ii) A died before each particular cousin. The language of the English exception excludes B, who will fit the description on the occurrence of only one contingent event, that is, the death of A before B. If it is correct, however, that persons with (singly) contingent interests are not within paragraph (b) at all, then the English exception becomes almost otiose, and the difference between the Canadian and English legislation is much reduced, as the example shows.

The position, however, is not clear. *Knocker v. Youle* has been criticized on the basis that it leaves paragraph (b) almost without any field of operation.[41] This is especially so since the language does not seem apt to include the classic holder of a spes, that is, the object of a power of appointment.[42] It might be understood to include those whose interests are contingent on more than one contingency, but this introduces the difficult distinction between degrees of contingency.[43]

4. — Can the Court Consent on Behalf of Fully Capacitated Beneficiaries?

The omission of the excepting words in paragraph (b)[44] is potentially farreaching. The effect of these words in the English Act, given paragraphs (a) and (c), is to circumscribe the court's power under paragraph (b) to consent on behalf of some persons who are adult and capacitated. Attention has earlier been drawn to the fact that no Canadian legislation includes these excepting words.

The effect of the omission has come to a head in some recent cases. In *Bentall Corp. v. Canada Trust Co.* ,[45] it was held (without reference to *Knocker*) that the court can, under this paragraph, give consent on behalf of, and against the wishes of, a capacitated beneficiary who holds a contingent interest.[46] *In Re Johnson* went further;[47] it was held that the court *must* give its consent on behalf of such a person. The testatrix established a simple will trust for her son; he could have the property only upon reaching the age of sixty, and if he did not, it was to be divided among two grandchildren. The son, now fifty-one, applied for the property, supported by a deed in which the two grandchildren renounced their interests. This should have been a simple application of *Saunders v. Vautier* , but the judge read paragraph (b) as covering the son's interest; and since the statute says that the court "shall not" approve the arrangement unless it is for the benefit of those covered by paragraph (b), he understood the legislation to displace entirely the rule in *Saunders v. Vautier* .[48] The application was denied, on the basis that no benefit to the son had been established by the evidence; just as in *Re Steed* [49] the court was concerned to preserve the protective intentions of the testatrix.

If the court can (certainly if it must) consent on behalf of the ascertained holder of a contingent interest, then the absence of the English exception makes a great deal of difference. However, the arguably better view is that capacitated persons with contingent interests should be able to give or withhold their own consent because such an approach upholds the principle of the autonomy of beneficiaries.[50] The case of the "difficult" adult and capacitated beneficiary, withholding consent to an arrangement that is both reasonable in itself and agreeable to the remainder of the beneficiaries, will probably remain rare. It is true, nevertheless, that cases like *Bentall Corp. v. Canada Trust Co.* [51] may become increasingly common. This case concerned an application to vary a pension trust in order to deal with a six million dollar surplus. Some of the money would be applied to the benefit of the employer, but two million dollars would be used to enhance benefits. The plan being a "defined benefit" plan, the chances that an employee beneficiary would otherwise obtain some of the surplus were extremely small.[52] Seven out of two hundred and seventy-nine members withheld consent, but the judge allowed the variation despite this.[53] However, this opens the door to a very difficult exercise in line-drawing: *Bentall* was followed in *Continental Lime Ltd. v. Canada Trust Co.* ,[54] where one out of ninety members dissented; but not in *Re Dalhousie Staff Assn. Contingency Fund (Trustee of)* ,[55] where a bare majority approved the arrangement. As we have seen, the Court of Appeal of the province has now declined in *Buschau v. Rogers Communications Inc.* [56] to uphold these earlier rulings on the basis that they were made without benefit of argument on the point. It has taken a position to the effect that the legislation derived from the *Variation of Trusts Act, 1958*, in England does not permit a court, save by way of express exception, to consent to an arrangement on behalf of a fully capacitated and ascertained beneficiary. When the decision was appealed to the Supreme Court of Canada, this point was not directly in issue, but a minority of the judges expressed agreement with the Court of Appeal on this point.[57] More importantly for this category of case, the Supreme Court of Canada held unanimously that the rule in *Saunders v. Vautier* does not generally apply to pension plans.[58]

In the British Columbia pension cases the courts at first instance were attempting to assist in the solution of employer/employee disputes over surplus distribution on termination of corporate pension plans. However, from a trust law perspective, the overriding of the objections of capacitated adults remains contrary to principle, and it is not difficult to imagine other circumstances in which the pension plan precedents might have been invoked in the future. One approach would be to maintain the principle that an ascertained and capacitated beneficiary must give his consent. This could most effectively be achieved in Canada by amending the variation legislation to add an exception like the English exception to paragraph (b).[59] For particular problems that may arise in the context of pension plans, the Supreme Court of Canada has taken the view that it is for the legislated pension framework to address these difficulties.

Outside of that context, the general principle of requiring the consent of capacitated beneficiaries should be allowed to prevail, unless it be thought appropriate to deal expressly with the case of the "difficult" capacitated beneficiary. In this context, the British Columbia Law Institute has recommended legislative amendment.[60] The Institute recommends that the legislation state clearly that the court can give consent, even on behalf of a fully capacitated ascertained beneficiary, where a "substantial majority" of beneficiaries does approve, the variation would not be detrimental to the beneficiary in question, and it *would* be detrimental to the trust as a whole *not* to approve the variation.[61] The idea is that a small minority should not be allowed to obstruct a beneficial variation.

5. — Unborn and Untraceable Persons

Paragraph (c)—unborn persons—speaks for itself. Where a woman is past child-bearing, an application for approval to an arrangement which takes into account her future children has been held in England to be unnecessary.[62] English trustees have been advised that, if they particularly wish to have an approval before carrying out an arrangement, they should proceed under the normal administrative jurisdiction for leave to carry out the trust on the basis that no children will be born. It is a moot point how this would translate in Canada, where the statutory jurisdiction is not uniform from jurisdiction to jurisdiction, so that the limited inherent jurisdiction might have to be invoked. As an administrative matter the court might be prepared to entertain the application under the statutory power of the court to give advice and direction,[63] but it would seem to be wiser for trustees in Canada to continue to apply under the variation of trusts legislation. Where there are other beneficiaries, on behalf of whom the court's consent is already required, an application under that legislation will, in any event, be necessary.[64]
At this point, however, Alberta and Manitoba have made additional provision for the situation of the untraceable beneficiary, to whom reference was made above.[65] Both provinces provide that the court may consent on behalf of a "missing" person.[66] Such a person is defined in the Alberta legislation as one who comes within the meaning of that term in the provincial *Public Trustee Act*[67] but Manitoba leaves the word to be construed, adding, no doubt to aid in this process, "and whose whereabouts are unknown to the trustee, to the other persons beneficially interested and to the settlor, if the settlor is alive and available."[68] In other jurisdictions, it might be possible for the court to approve a variation on behalf of a missing beneficiary, but legislative clarification would be welcome.[69]

6. — Objects of a Discretion

Paragraph (d) is differently worded in Canada, as we have seen. How far does this exclude the guidance value of English decisions? English courts have held that the English paragraph (d) only applies where the discretionary trust would be brought into effect by the forfeiture of the preceding life interest. It would not apply where the discretionary trust is to arise in the future but not on a forfeiture of a life interest, or not only on such a forfeiture. Nor will it apply where there is an immediate discretionary trust. In these instances the court has the jurisdiction to consent on behalf of beneficiaries who are infants, "incapable of assenting", or are unborn.[70] The Canadian paragraph (d), in attempting to obtain somewhat the same effect but in the absence of a statutory protective trust, is apparently much wider, and this is important for two reasons.
First, paragraph (d) allows the court to give consent on behalf of an ascertained and fully capacitated person. Second, in most provinces, approvals under paragraph (d) are unique in that it is not necessary for the court to conclude that the arrangement is for the benefit of the "discretionary power" beneficiaries. The paragraph assumes an "existing interest"; this in practice will normally be a life interest. This paragraph does not authorize consent on behalf of the holder of that interest, but rather it applies to any discretionary trust or power that would arise on the termination of that existing interest, whether that interest terminates on forfeiture, death, or in any other manner. It would not therefore apply to an immediate discretionary trust,[71] but it would appear to apply to a *discretionary trust* which follows some preceding interest, to a *power* to anyone to appoint among a class which follows a preceding interest, and to a *trust* to maintain during the infancy of any member of a class who remains an infant on the termination of the existing interest.[72]

A power of advancement exercisable in a similar manner, and any other dispositive power exercisable among a class of persons on a discretionary basis, would come within paragraph (d) of the Canadian legislation, so long as it arises after some prior "existing interest". Moreover, the "existing interest", though normally in practice a life interest, could be a life interest terminating on remarriage, or an interest for a specified period of years.

The object of the English paragraph (d) was to emphasize that the essence of a protective trust is to protect the life tenant from his own bankruptcy. It is more incidental that a discretionary trust comes into effect on that forfeiture occurring, and in any event many protected life tenants have not forfeited their interests when they are well into middle age, and, being unmarried, are unlikely to marry thereafter. The need to ensure that an arrangement benefited existing and future spouses and children therefore seemed unnecessary, though the court had to have jurisdiction to consent on their behalf if any arrangement was to be carried through. Whether the English paragraph (d) is commendable is open to doubt, but the Canadian counterpart has a much wider scope.[73]

7. — Purpose Trusts

The legislation in Alberta and Manitoba uses a definition section to bring in purpose trusts, which seems intended to allow the court to give consent to variation or termination of such trusts.[74] The Saskatchewan statute clearly authorizes the court to vary such trusts.[75] This would take effect as an addition to, or perhaps a substitute for, the normal *cy-près* scheme-making power which allows the court, as a matter of inherent jurisdiction, to vary charitable trusts.[76] Manitoba[77] also enables its courts to consent on behalf of (1) a corporation or association, where there is no person able or empowered to give this consent; (2) persons, ascertained or not, who will or might benefit from a trust under which property is held for a specified purpose, where there is no person able or empowered to consent on their behalf, and (3) the beneficiaries of a trust, whose assets constitute benefits arising from another trust, when there is no person able or empowered to consent on behalf of those beneficiaries.

An example of (1) might be, "to my wife, W, for life, remainder to the HW Family Foundation," and some difficulty has arisen with the internal governance of the foundation such that no one can speak on its behalf. An example of (2) might be, "to my sister, S, for life, remainder to provide sports facilities for the ABC School." The language here seems intended to cover the kind of case which may be difficult to classify as a trust for persons or a trust for purposes.[78] It is perhaps unfortunate that the careful use of the words "purpose" and "persons" within this section of the Act is found together with the word "person" expressly meaning both charitable and non-charitable purposes.[79] An example of (3) might arise when the trust to be varied or revoked provides for transfers to the trustees of one or more other trusts, such trusts being in favour of infants. This provision, however, seems already in hand, since all of the trusts are presumably subject to variation.[80]

D. — Proposals (Arrangements) Within the Court's Jurisdiction

An "arrangement" within the legislation does not require that two or more persons have agreed to the terms, and put it forward as an arrangement of their interests.[81] An adult life tenant can put forward an arrangement drawn up by himself, in which he has provided for infant remaindermen. And, except as we have noted,[82] it is possible that the proposed arrangement be put to the court before consents have been obtained from other adult and capacitated beneficiaries. The legislation releases the court from any concern with absence of consent, though in the circumstances of a particular case the court may decide to withhold its overall consent, a matter within its discretion, and as a matter of practice an applicant will not seek court consent unless a bargain has been struck and agreed to between the adult and capacitated parties.

The court may approve an arrangement "varying or revoking" the trust or trusts in question. It is sometimes not realized how considerable is the scope of this power. It means that revocation on any terms is possible and that variation of any degree is also possible.[83] The standard revocation arrangement allocates a share of trust capital to each beneficiary who has an interest, or would or might have acquired an interest. In *Re Spencer* ,[84] for instance, the trust fund was to be paid to A in the amount of $1000 half-yearly instalments until the fund was exhausted. Should A die before that time, the remainder was to be divided equally among his surviving children, and if at A's premature death any such child was an infant, his share was to be held on trust until he attained twenty-one years of age. In the meantime the trustees should pay out of the infant's share such sums as were required for maintenance and education, the balance remaining to be paid to the child at twenty-one. A proposed an arrangement whereby he took a capital sum in return for his interest, the remaining capital was divided equally between his two children, and life insurance was taken out on the children surviving their father and against further children being born to A.[85] A bond was also provided for the latter event.

"Varying" the trust may take any form, although it is often said that it cannot amount to a revocation and a resettling on terms which bear no comparison with the revoked trust.[86] The reason for this limitation is not that the courts are anxious to restrict what they regard as the beneficent purpose of the legislation, but because there is no power in the court to consent to a resettlement.[87] However, the courts in England have leaned over backwards to find that what is a revocation and resettlement is also a variation of the original trust. As long as the "substratum" of the original trust remains in the new trust which the arrangement proposes, it does not matter that the same purpose is to be achieved by wholly different means and in a completely changed form.[88] Moreover, the recent trend suggesting that the settlor's intention is not relevant in applying the legislation means that this traditional approach, that the court cannot approve a variation that amounts to a resettlement, may be doubtful.[89] It was in order to remove any question of a technical limitation upon a beneficent jurisdiction, and to allow judicial attention to concentrate solely upon the best alternative arrangement of the dispositive provision, that Alberta, Manitoba, and Saskatchewan have widened the jurisdiction expressly to permit resettlements.[90] The legislation in Alberta and Manitoba also allows the court to *create* a trust in a will that benefits an infant or incapacitated person, though the will itself in conferring benefit on the infant or other person does so otherwise than by use of a trust.[91]

The following are examples of what has been done:

Example 1:

Trust terms—A for life, remainder for her children equally who shall attain twenty-one, and, if more than one, in equal shares.

Arrangement—A to surrender her life interest in half the fund; the income of the surrendered half to be accumulated with deferred vesting in the children until they attained the age of 30 years.
Form—Revocation and establishment of new trusts. These took into account the new perpetuity legislation.[92]

Example 2:

Trust terms—To A for life, remainder as A shall appoint by will to two named sons, or the wife of any such son, or to his children or grandchildren whether by adoption or otherwise. Not more than one half of the fund to be appointed to each family. In default of appointment an equal share to each son, and a gift stirpitally[93] to the issue of any son then deceased.

Arrangement—Rescission of all beneficial and administrative terms of the trust. Division of the fund into two parts, each part settled on a son for life, remainder equally between his children who were alive or born on a given date. Insurance against any later lives who might have taken under the former trust in default of appointment.
Form—Revocation and establishment of new trusts. All that remained of the old trust was a half share for each son and his issue, and defined interests for those beneficiaries in place of, and in default of, the exercise of the power of appointment.[94]

Example 3:

Trust terms—To A for life, remainder as A shall appoint by will, and in default of appointment equally *per stirpes* among her issue who survive her, each such person to take the income of his share until he attains the age of thirty-five years, when the capital of that share is to be paid to that person. Gift over to the issue of any child of A who dies before attaining thirty-five. [A has appointed to her two children, both adults.]

Arrangement—A to have the capitalised value of her interest, and the remaining capital to be divided between A's two children, except for a capital sum to be set aside on trust for the children of A's two children, and another smaller capital sum for A's next-of-kin (who would have taken on there being no surviving children of A, and a failure to appoint). Insurance of the contingently interested grandchildren's interests (should either child or both children of A fail to attain thirty-five) suggested for the resumed court hearing.
Form—Termination and the creation of two new trusts. The old trust would disappear.[95]

It is important that the point be reiterated that, though *form* has been expressed as it is in these examples, the courts see the "variation" as continuing the scheme of disposition of the settlor or testator. They interpret the "trusts", with which they are concerned, in the correct sense of the dispositions (some prefer to say, distributions) made by the settlor or testator, which he obligates his "trustees" to carry out. The courts "vary" an instrument when they consent to a rearrangement of the mode of disposition; on the traditional approach, they will not depart from the scheme or pattern of disposition which the settlor or testator chose, and therefore they will not consent to what is in effect a new scheme of disposition or of distribution, which choice they believe is preferable.

Pennell J. was at pains to stress in *Re Irving* [96] that,

> The search in all [the cases cited to him] was to find the intention of the founder of the trust and then to decide whether the proposed arrangement remains within the ambit of the intention. The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily.

Finch C.J., however, took the opposite position with regard to the relevance of the settlor's intention.[97]

Obviously it is a matter of judgment in each case, and each case is likely to differ in some respect from others,[98] as to when a change in the mode of disposition becomes a change also in the scheme of disposition.
The legislation also enables the court to enlarge the powers of management or administration of the trust property. In effect this legislation therefore duplicates the existing free-standing statutory enlargement power in those Canadian jurisdictions which have adopted that power,[99] but in the context of the variation of trusts legislation it seems clear that the courts need feel no compunction exercising the new power, being part of the variation jurisdiction, in such a restricted manner as they have interpreted the older, free-standing enlargement power. The enlargement, which principally appears to have been sought, is of the power of investment permitted by the instrument in question. Between 1958 and 1961, when the *Trustee Investments Act* was passed in England, the English courts took the view that they should permit wide powers where it was at all wise to grant them,[100] but after 1961 they felt that Parliament had spoken, and only in special circumstances should a wider power be permitted than that granted by the 1961 Act.[101]

Osler J. took a "special circumstances" view in *Re Mitchell* ,[102] and, finding none in that case, refused his consent. Later in British Columbia Macdonald J. adopted the same view in *Re Burns* ,[103] but found special circumstances in that it was the settlor who was seeking approval of the arrangement, so there could be no dispute about his intention; also, the trust fund took the form of unauthorized investments, the instrument was tied to the statutory power, and the settlor wished to provide the trustees with a power adequate to the period both before and after his own death, and to all the eventualities that might arise. The latter included the possibility of the winding up of the company, in whose stock the trust funds were invested. In *Re Kiely* ,[104] however, Osler J. took a more relaxed view of when the power of approval should be exercised. In view of changes to the Ontario trustee investment power, he considered that the only consideration should be the circumstances of the case in hand, and the benefit of those on behalf of whom the court consents. The legislature had shown its approval of wider investment powers.[105] In this case the trust seemed likely to last ninety years, and he therefore approved of a power which enabled the trustees to make any investment they thought fit, provided that investments made and retained under this wider power were restricted to sixty-five per cent of the market value at any time of the trust estate.
In England a power of advancement has been inserted into a trust,[106] a power to provide a residence for an income beneficiary,[107] and a power authorizing trustees to retain the remuneration they received as directors.[108]
In Canada powers to permit pooling the funds of twenty-two separate trusts, to establish an income reserve, to postpone or withhold income with the object of restoring capital, to distribute income at discretion and to capitalise unexpended income have been granted to a university holding assets as a trustee.[109] And where the trustee was unable to carry out development of trust property, the court was prepared to confer suitable powers of management and administration.[110] A power of sale has also been added.[111]

In a jurisdiction as wide as this Act creates for the courts, some degree of overlap with the already existing *Trustee Act* was inevitable. The variation legislation is capable not only of dealing with problems that cause an application to the court under the enlargement power,[112] but indeed anything, it would seem, that falls within management or administration.[113] The limits to the enlargement power of the courts could hardly exist in this instance, given the generality of the language employed in the variation legislation. A reported application[114] has even been made seeking the court's approval of a variation whereby the five children of the deceased creator of the trust would become additional trustees as each attained the age of twenty-five, and thereby acquired a vested interest under the trust terms. The children in this way joined their mother, the existing trustee and widow of the creator of the trust. The trial judge gave his approval; all the children were of age, and were well-educated and keenly interested to share in the estate management, as by participation in decision-making they already had. But, of most importance, they would have a particular interest in the interests of the unborn, who would be their own children. As the judge mentioned, however, the estate was now fully administered, and therefore *trust* administration was the sole concern; application could have been made under the *Trustee Act*, for the appointment of trustees.

E. — Criteria to be Satisfied by the Arrangement

Two elements exist. First, the court must be satisfied that the arrangement is for the benefit of each of the beneficiaries on behalf of whom it is asked to consent, or who fall within paragraphs (a), (b), and (c).[115] It will be noticed that, except in Alberta and Manitoba,[116] persons within paragraph (d) are to be omitted from this consideration. Second, the court is required to give its consent only if the arrangement overall is one which the court thinks it ought to approve.

1. — Benefit

(a) — Introduction

The legislation was introduced to meet the type of problem which arose in the *Chapman v. Chapman* case, and the object of the arrangement which was ultimately approved there was to avoid the liability of the trust funds to estate duty on the deaths of Sir Robert or Lady Chapman.[117] It is well known that most applications under the legislation are for the saving of estate or succession duty, gift or income tax. Today in Canada the principal concern seems to be capital gains tax. Is tax avoidance a benefit? There is no doubt that it is a benefit for a person to acquire a financial advantage, and, if tax is avoided, then such an advantage is acquired. However, the financial gain must be adequate to the bargaining position of the beneficiaries who cannot consent for themselves, and on whose behalf the court approves.[118] The beneficiaries in question must not only gain something more than the trust under consideration gives them; the arrangement must reflect such a bargain as an adult and capacitated beneficiary would have consented to in view of the interest he was giving up. At the same time financial advantage does not necessarily take the form of free capital in the pocket today as opposed to tomorrow. In *Re T.'s Settlement Trusts* ,[119] the young woman in question was about to attain her majority when she would take possession of a considerable amount of money. Her mother considered she was immature and unable to hold on to money, and, having demonstrated this to the court's satisfaction, she secured approval of an arrangement whereby the young woman's capital interest was converted into a protected life interest which was to come to a close after a certain time when it was considered that she would have matured. There is no doubt that in the long run this scheme was much to the young person's benefit; it is doubtful, for instance, what advantage or benefit would be derived by a spendthrift where the protective trust is prematurely terminated and free capital released to him.

A benefit of some sort must be derived by each beneficiary on behalf of whom the court is to approve.[120] It is not enough to find a benefit to a whole class, if it is clear that there is no benefit for some of the people on whose behalf the court is asked to approve.[121] It is often a question of balancing the advantages and the disadvantages to each of these persons,[122] and the courts will take risks that the benefits planned will materialize to the same extent that a well-advised adult beneficiary would take risks for himself.[123]

(b) — Non-Financial Benefit

In the same vein of thought the courts have concluded that benefit is not exclusively financial. Educational and social disadvantages may outweigh the financial advantages, and then the court should not approve the arrangement. To dispatch children to a small island community from a capital city because the island is a tax haven may not necessarily spell benefit.[124] The view has also been expressed in England that, in terms of their moral and social benefit, young children should be reasonably settled in life and in a career before they are in receipt of an income which relieves them of the necessity to work.[125] Conversely, a non-financial benefit may be more important than financial considerations. An English court[126] agreed to the deletion of a term in a trust which would have enriched one group of the testator's grandchildren at the expense of the other should the other practise Roman Catholicism. Pennycuick J. thought such a term could be a source of family dissension, and prejudice children who later wished to marry Roman Catholics. Benefit of any kind is within the legislation, thought Pennycuick J., and, though the arrangement defeated the settlor's intention, "that [was] a serious, but by no means conclusive, consideration."[127] This decision was approved by Osler J. in *Re Zekelman* [128] where the settlor regretted his earlier trust in favour of his then only child because he now had other children and was anxious not to be inequitable in his treatment of them. He wanted to bring them all within the trust. There were two financial advantages in the arrangement that was approved, an acceleration of the oldest child's interest and an estate duty saving, but Osler J. drew attention to the benefit to be derived from the elimination of "a very fruitful source of dissension among the members of the family."[129] Similar is *Re Goldstein Insurance Trust* ,[130] in which the beneficiaries were the two children of parents who had been killed in a car accident. They had been adopted by their uncle and aunt, who had two children of their own, and who successfully applied for the trust to be varied so that the income they received could be used for all four children. And in *Re Charlesworth Estate* ,[131] a will trust was varied to admit as a beneficiary a child born after the testatrix's death, who was brother and cousin to the other beneficiaries. In these cases there is no financial benefit to the existing beneficiaries at all.

In order perhaps to put it beyond question that financial benefit is not the sole or essential concern which the legislature has in mind in conferring this variation jurisdiction upon the courts, Manitoba has amended its original legislation to spell out what "benefit" can be taken to include.[132] It includes an arrangement which "would enhance the financial, social, moral or family well-being of that person" on behalf of whom the court is asked to consent.[133] This accords with and reflects the interpretation expressly put upon the word by the courts, but it cannot solve the relative weighting problem. At the end of the day in every case these issues have to be left to the values and sensitivities of the court, wearing the mantle of the sage, intelligent adult assessing, no doubt with his own sensitivity, where, if his own concerns were in question, his best interests lie.

(c) — Summary

The criteria the courts have traditionally employed in assessing proposed arrangements were summarised in *Re Irving* ,[134] which has been frequently cited in subsequent decisions. (1) Does the proposal keep alive the basic intention of the creator of the trust?[135] (2) Does it benefit all those, including of course the infants and unborn, who are or may be interested under the trust?[136] (3) For the purposes of judging "benefit", would a prudent adult, motivated by intelligent self-interest, and sustained consideration of the expectancies and risks, be likely to accept the proposal? The third question can be singularly difficult to answer. If a beneficiary is to suffer a financial loss in order that equality shall prevail within the family, of which class of beneficiaries he is a member, is he adequately compensated? Only when the loss is insignificant, and social gains must obviously occur, are the courts normally prepared to answer, yes. Loss can be insignificant either because the dollar amount is small,[137] or because the interest of the beneficiary, being contingent and remote,[138] is very unlikely to result in his acquiring any gain from the trust fund. Even if all the adult beneficiaries are willing to forego financial advantage for themselves in order that the particular beneficiary or beneficiaries shall gain from the proposal, the court must still judge objectively whether the infants or the unborn, or any person or purpose on behalf of whom or which it must consent, could realistically, as the prudent adult, be expected to do the same.[139] And then there is the question of whether parents of infants or the unborn should receive more than the trust confers upon them, and the infants and unborn lose their interests, when the parents have an independent common law or statutory duty to support their children. The proposal may result in the parents being able to provide an education for children, or even to improve substantially the lifestyle of the whole family, including their children;[140] but the court must judge in the circumstances whether this parental opportunity is a realistic gain for the children, or whether, in the old phrase, a bird in the hand is worth two in the bush.[141]

In many circumstances a substantial tax saving to the family members may make all the difference.[142] An allocation of a definite financial gain to the infants and unborn, and even next-of-kin, is a provision which courts in all jurisdictions would expect to see in the proposal,[143] but it may be equally or more appropriate that other compensating measures are employed. It really all depends so often on how remote contingent interests are judged to be. Insurance against the possibility that contingent interests may yet result in tangible gain from the trust might be enough to satisfy the prudent adult test, but not always has it been felt by the court that insurance in the circumstances is enough.[144] Some courts, however, have suggested that insurance is required.[145]

It is important to remember, however, that (except in Alberta and Manitoba) the court is not concerned with the benefit of the persons described in paragraph (d) of the statutory language, and that it is not concerned with whether the arrangement is fair and equitable in the financial benefit which it gives to adult beneficiaries. That is their concern, and, even though the court is of the view that that provision is unfair, nevertheless if the arrangement is fair as far as the infants and unborn, and such persons, are concerned, then the court will give its approval.[146]

2. — Overall Satisfactory Character of the Arrangement

(a) — Generally

Though the court does not have to consider the benefit of the arrangement to the adult and capacitated, and is prepared to give its consent on behalf of those who cannot consent for themselves, it may still withhold its approval if it considers that it should do so. The jurisdiction cannot be described more narrowly than that because it is entirely a matter of judicial discretion.[147] Except in Alberta and Manitoba, the courts are not required to find that the arrangement is for the benefit of persons who are beneficiaries of a discretionary trust or power, and whose interest arises after a preceding interest, but, if a compensation fund is provided for them, it must be fair.[148] In Alberta and Manitoba the court must be satisfied, so far as it affects every beneficiary, that the arrangement is "of a justifiable character,"[149] a provision which has particular significance when applications are brought for variation and revocation which in other Canadian common law jurisdictions would be the subject of *Saunders v. Vautier* terminations.[150]

It is obvious that if the benefit stemming from the arrangement, or the arrangement itself, is contrary to public policy, no approval could possibly be given.[151]

An example of the exercise of the judicial discretion will bring out the kind of consideration the court may have in mind. This is where the court can consider the settlor's intention in creating the trust. In *Re Steed* ,[152] an elderly unmarried woman had a protected life interest settled upon her by her former employer, to whom she had acted as housekeeper. The lady also had a brother whose practice it was to persuade his sister to give him items of her property, which over the years she had done regularly. Approval was refused when she applied to have the protected life interest set aside, and the court was asked to approve on behalf of the unlikely future husband who would be a beneficiary of the discretionary trust that would arise on her forfeiture. The future husband was "shadowy" enough to warrant approval being given, but the court agreed with the unwillingness of the trustees to approve of the arrangement. As soon as the trust was revoked and the capital was in the lady's hands, there was every reason to suppose the brother would arrive on the scene, which was evidently the very reason for the now deceased employer having settled the property upon her the way he had. The Court of Appeal therefore saw no reason for disturbing the testator's trust.

(b) — Intention of Settlor or Testator

As a general comment, it is safe to say the courts in England have wanted to know what purpose the settlor had in mind. When the trust is *inter vivos*, and the settlor appears before the court, the court finds its inquiry and its decision easier than when the trust is testamentary and it has to rely upon the instrument and affidavit evidence.[153] Purpose is particularly relevant when the beneficial interest is protected against bankruptcy or alienation.[154] Why did the settlor make such a provision? Should it be upheld? Recently, however, there has been a qualification to this attitude. In *Goulding v. James* ,[155] the two adult beneficiaries, the daughter and grandson of the testatrix, proposed an arrangement which would give them access to ninety per cent of the trust capital; the judge refused the application, holding that it was the "complete opposite" of what the testatrix had intended. There was evidence to the effect that she did not want her daughter to have any access to capital, and so had given her only a life interest; and that she did not want the grandson to have access to capital until he was forty. In giving ninety per cent of the capital to these two, the proposed arrangement put aside the remaining ten per cent for great-grandchildren of the testatrix; this was a considerably more beneficial arrangement for the greatgrandchildren, according to the actuarial evidence, since otherwise they would have an interest only if the thirty-two-year-old grandson died before reaching the age of forty or died before his mother. The Court of Appeal overruled the trial judge, reasoning that the court was only asked to approve the arrangement on behalf of unborn great-grandchildren, and the arrangement was clearly beneficial to them. The evidence as to the testatrix's wishes related only to the *sui juris* beneficiaries, and the court did not need to do anything in that respect; those beneficiaries were entitled to consent to the arrangement themselves. Indeed the court suggested that this evidence should never have been led, as it was liable to raise inflammatory collateral issues.

Even more forthright in terms of the relevance of the trust creator's intent is the position set out by the British Columbia Court of Appeal in *Russ v. British Columbia (Public Trustee)* :[156]

> The language of s. 1, which authorizes the Court to vary or revoke any trust, is inconsistent with the suggestion that the settlor's intention is a consideration at all, much less a consideration of first importance. The Act says nothing concerning the settlor's intention, or of any obligation upon the Court to weigh that intention along with other factors in deciding whether to approve a proposed variation.
>
> In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The

> Court is not charged under the Act with protecting the interests of the settlor. If the [contrary position] were correct, the Court would not be able to approve any arrangement that was not such as to keep alive the basic intention of the settlor, in spite of great benefits that might be created for infants and unborn persons.
>
> Many variations to a trust are at odds with the intention of the settlor. If, as argued by the appellant, the wishes of the settlor may not be thwarted, notwithstanding benefits to the infants and unborn, then the powers afforded by the Act would be meaningless.

This reasoning is based on the idea that the statutory jurisdiction is an extension of the rule in *Saunders v. Vautier* , which is itself no respecter of the settlor's intentions. There is some evidence that this attitude is gaining ground in Canadian courts.[157]

(c) — Exercise or Release of a Power to Benefit Oneself

A question which has not been canvassed at all in reported Canadian cases is the position of a person with a power of appointment who releases it or exercises it in a certain manner for the purpose of the scheme set out in the proposed arrangement.[158] Such a person is likely to derive a benefit from the arrangement—indeed, in the great majority of cases that is why he has agreed to it—but, if such a benefit is acquired, can it be said that the appointor has acted in fraud of the power? In other words, has he used his power to appoint among others as a bargaining counter in an agreement with those others which also brings him benefit? It is fraud on a power for the donee of the power to exercise it in such a way that benefit ensues to himself or other non-objects.[159] The problem has typically occurred in practice when a life tenant with a power of appointment in favour of children either appoints to other persons, or, which is more likely, appoints to or among the children but with conditions attached that confer benefit upon others. Personal benefit would result if he appointed by deed in his lifetime attaching a condition benefiting himself.

The English courts seem to have been somewhat embarrassed with this problem. It is not that they have shied away from saying that an appointment which directly or indirectly benefits the donee of the power is invalid, and from therefore refusing to approve the arrangement. Rather the difficulty appears to have been where to draw the line between what can and what cannot be done. It has been said that in order for the exercise to be invalid, the intention to exercise the power must be *for the purpose* of benefiting the appointor.[160] Presumably, if the appointment is only part of a proposed course of action which will benefit several persons, including the objects of the power, that link between exercise and intended personal gain is more tenuous. Fraud is entirely a question of the intention of the alleged perpetrator, and it seems as if this issue of fraud on a power as part of a scheme of arrangement is going to be handled very much as a question of fact. The question would be: is the link between exercise and benefit obtained from the proposed arrangement so dominant as to reveal a fraudulent intent?[161]

Footnotes

1 Report of the Annual Meeting (1961) at 142.

2 For complete references, see *supra*, note 20.

3 In paragraph (b), following, the added language in the English Act is here inserted in square brackets, and the alternative language of paragraph (d) as it appears in the English Act is similarly emphasized.

4 In Saskatchewan, there is a unique provision, following the abolition in that province of the rules against accumulations and perpetuities by S.S. 2009, c. T-23.01, ss. 58-60. In s. 51, the court is empowered to vary a trust, not being a pension trust, that creates an interest in property that might be void if those rules were still in force. This provision gives the court a wider power than the ordinary variation legislation in ss. 49-50. It requires neither the consent of capacitated beneficiaries, nor a finding of benefit to those on whose behalf the court consents; it is required only that the court consider that the variation be appropriate. This provision seems aimed at ensuring that the court can intervene (on the application of an interested party) in cases involving trusts of potentially enormous duration.

5 *D (A Child) v. O,* [2004] 3 All E.R. 780, 7 I.T.E.L.R. 63. However, there must be a trust in existence whose terms are to be varied.

In *Re Davies* (1967), 1967 CarswellOnt 205, [1968] 1 O.R. 349, 66 D.L.R. (2d) 412 (Ont. H.C.), legacies were left to infants; there was a proposed arrangement that they remain with the trust company administrator on trust with a broad investment power for the infants. This was refused, quite aside from the desirability of the arrangement, because there was no jurisdiction to approve the arrangement. See also *Allen v. Distillers Co. (Biochemicals) Ltd. (Payment of Money in Court),* [1974] Q.B. 384. A power to create a trust for an infant or incapacitated person now exists in the Alberta and Manitoba legislation: *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(9); C.C.S.M., c. T160, s. 59(10).

6 These protective trusts were the drafters' response to the long-standing rule that an interest under a common law trust could not be made inalienable. The next best thing was to make a limited interest determinable on alienation or bankruptcy, creating a discretionary trust for the protected beneficiary and his family (see *supra*, chapter 21, Part VI). Note that U.S. law took a different path and allows "spendthrift trusts" with inalienable beneficial interests, whether those interests are absolute or limited: *ibid.* Note also that these "protective trusts" have nothing in common with what the Canada Revenue Agency has later called a "protective trust": see *Income Tax Technical News*, No. 7, 21 February 1996. See further, *supra*, chapter 2, Part IX.

7 *Infra*, Part IV C 3. J.W. Harris, *Variation of Trusts* (1975) at 34, notes that "[p]aragraph (b) is the least well drafted part of the [English] Act."

8 For a discussion of trust termination in these provinces, see *supra*, chapter 23, Part IV.

9 *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(3); C.C.S.M., c. T160, s. 59(3).

10 *Trustee Act*, *ibid.*, s. 42(6).

11 *Trustee Act*, (Manitoba), *supra*, note 85, s. 59(6).

12 *Supra*, note 85, s. 59(5)(e).

13 The same problem arguably arises in relation to s. 59(5)(d), which (uniquely to Manitoba) gives the court the power to consent on behalf of a beneficiary whose whereabouts are unknown; if the person is fully capacitated, then s. 59(6) seems to require his written consent.

14 Benefit is not required for approval on behalf of a beneficiary covered by paragraph (d), which may include fully capacitated beneficiaries. As explained above, these are trusts which are designed to benefit some primary beneficiary; the alternate discretionary interests which can arise are really only there to dissuade the principal beneficiary from trying to alienate his interest.

15 This means that benefit is required even for those covered by paragraph (d) of the basic model, which is not the case in other jurisdictions.

16 *Trustee Act* (Alberta), *supra*, note 85, s. 42(7); (Manitoba) *supra*, note 85, s. 59(7).

17 *Trustee Act*, (Manitoba) supra, note 85, s. 59(8), discussued infra, Part IVE 1 b.

18 *Trustee Act*, (Manitoba) supra, note 85, s. 59(5), discussued infra, Part IV C 7.

19 R.S.B.C. 1996, c. 463.

20 In line with the recommendations of the British Columbia Law Reform Commission (*Report on the Land (Settled Estate) Act*, Report No. 99, 1988) this change was made in 1989 as part of the repeal of the *Land (Settled Estate) Act*. In the case of settlements which included only legal interests, that repeal would otherwise have left the court without any jurisdiction to vary a settlement.

21 In *Getty v. Crow* (1985), 52 O.R. (2d) 689, 21 E.T.R. 286 (Ont. Dist. Ct.), the life tenant was seventy-seven years old. The remainder was to "such of his children" who should be alive at his death. At the time of this application, he had three children, the youngest of whom was forty-three. The life tenant had agreed, with the consent of all his children, to make a conveyance of the fee simple to a purchaser. The purchaser now argued that a good title could not be conveyed since there might be further children. The court, noting evidence that the life tenant would not be allowed to adopt children should he apply to do so, held that it was "morally certain" that the class of remaindermen was closed, and therefore the purchaser was required to take the conveyance. The reversionary interest of the next of kin of the grantor (in the unlikely case that all of the life tenant's children predeceased him) was not noted. See also *Chupryk v. Haykowski* (1980), 3 Man. R. (2d) 216, 110 D.L.R. (3d) 108 (Man. C.A.); leave to appeal to S.C.C. refused (1980), 6 Man. R. (2d) 269n (S.C.C.): absent legislation, the court has no jurisdiction to authorize the holder of a legal life interest to encumber the property to raise money for repairs. Unjust enrichment may be of assistance in some cases: *Buhr Estate v. Buhr* (1993), *(sub nom. Re Buhr Estate)*, 90 Man. R. (2d) 118 (Man. Q.B.).

22 S.S. 2009, c. T-23.01, s. 49(3).

23 When the Act was being debated in England, concern was expressed that there might not be adequate reporting of decisions, many of which would not be made in open court. See Donovan W.M. Waters, "The Variation of Trusts" (1960) 13 Current Legal Problems 36 at 58-59. The fears there expressed have been put to rest by the volume of subsequently reported decisions. A similar concern for the position in Canada remains. Canadian trust drafting differs somewhat in character, and taxation considerations are certainly different. For the income tax consequences of a variation in Canada, see the references *infra*, note 241.

24 See for example *Holmden's Settlement Trusts v. Holmden*, [1968] A.C. 685, [1968] 1 All E.R. 148, at 701, 710-11, 713 [A.C.]; *Sandwell & Co. v. Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 at 342 (B.C. C.A.); *Goulding v. James*, [1997] 2 All E.R. 239 (Eng. C.A.); and *McGavin v. National Trust Co.* (1998), 49 B.C.L.R. (3d) 253, 158 D.L.R. (4th) 364¶ 31-35 (B.C. C.A.). See, however, the discussion *supra*, chapter 23, Part II B.

25 *Re Druce's Settlement Trusts*, [1962] 1 W.L.R. 363, [1962] 1 All E.R. 563 (Eng. Ch. Div.).

26 As noted above, there is one type of adult capacitated beneficiary who need not consent, namely one within paragraph (1)(d) of the basic scheme set out above. In Manitoba the same is true of a beneficiary whose whereabouts are unknown: C.C.S.M., c. T160, s. 59(5)(d). Some courts have held that the same is true in relation to paragraph (1)(b); this is discussed *infra*, Part IV C 4.

27 As noted *supra*, text accompanying note 86, only in Alberta (R.S.A. 2000, c. T-8, s. 42(6)) and Manitoba (C.C.S.M., c. T160, s. 59(6)) is this written consent expressly required before the arrangement can be approved by the court. However, in practice, this consent will always be obtained. Unusually, in some cases there are no adult capacitated beneficiaries: *Re Goldstein Insurance Trust* (1988), 56 Man. R. (2d) 73 (Man. Q.B.); *Re Charlesworth Estate*, 108 Man. R. (2d) 228, [1996] 5 W.W.R. 578 (Man. Q.B.); additional reasons at (1996), 1996 CarswellMan 371 (Man. Q.B.); *D (A Child) v. O*, [2004] 3 All E.R. 780, 7 I.T.E.L.R. 63.

28 *Supra*, text following note 97. *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, s. 3; S.S. 2009, c. T-23.01, s. 49(3). In other provinces the rules of court may provide for the court to name a representative of any unborn or unascertained persons: e.g., Ontario Rule 10; for persons lacking full capacity, see Rule 7, especially (for minors) Rule 7.03(2). For the official views of the

Ontario Official Guardian (now Public Guardian and Trustee), see W.A. McTavish and R.R. Anger, "Variation of Trusts: The Official Guardian's View" (1989) 9 E.T.J. 132. This article contains perspectives on both procedural and substantive issues; for a response on some of the substantive points, see S. Heighington, "Variations of Trusts and Tax Avoidance" (1990) 10 E. & T.J. 30.

29 *Sheard, Hull and Fitzpatrick*, at 274. See also D.G. Fuller, "Modification and Termination of Trusts," *Law Society of Upper Canada, Special Lectures, 1980* at 137. The conduct of this official will, however, be scrutinized by the court. In *British Columbia (Public Trustee) v. Brown* (1993), 91 B.C.L.R. (2d) 340, 108 D.L.R. (4th) 620 (B.C. C.A.); additional reasons at [1994] 9 W.W.R. 206 (B.C. C.A.), the Public Trustee was involved in discussions leading up to the application, and it neither supported nor opposed it. After the application was granted, the Public Trustee appealed. The appeal was quashed as an abuse of process. In *Russ v. British Columbia (Public Trustee)* (1994), 89 B.C.L.R. (2d) 35, 3 E.T.R. (2d) 170 (B.C. C.A.); leave to appeal to S.C.C. dismissed (1994), 5 E.T.R. (2d) 147n (S.C.C.), a variation was approved at trial and the Public Trustee appealed unsuccessfully. It sought its costs from the trust property, but the court held that it had not raised any new issue, and costs were awarded against it.

30 *Whigham's Settlement Trusts v. Johnston,* [1971] 1 W.L.R. 831, [1971] 2 All E R. 568.

31 *Re Spencer* (1969), 1 N.S.R. (2d) 282, 9 D.L.R. (3d) 74 (N.S. T.D.).

32 See *Re Berry's Settlement,* [1966] 1 W.L.R. 1515, [1966] 3 All E.R. 431.

33 The Manitoba and Alberta legislation deals directly with this point. For further discussion, see *infra*, Part IV C 5.

34 *Lewin* at 1869.

35 *Knocker v. Youl* (1985), [1986] 1 W.L.R. 934, [1986] 2 All E.R. 914 (Eng. Ch. Div.). Now accepted as correct, and applied, by the British Columbia Court of Appeal in *Buschau v. Rogers Communications Inc.* (2004), 236 D.L.R. (4th) 18, 6 E.T.R. (3d) 236 (B.C. C.A.); additional reasons at (2004), 239 D.L.R. (4th) 610, 9 E.T.R. (3d) 221 (B.C. C.A.); additional reasons at (2004), 241 D.L.R. (4th) 766 (B.C. C.A.); appeal allowed on different reasoning 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.).

36 The reasoning of the minority of the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.,* 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.), makes no explicit reference to this difficulty or to the statutory language, but seems implicitly to adopt a similar interpretation. Those judges noted (at para. 98) that the court could not give its consent on behalf of the *sui juris* holders of a contingent interest; however, they implied (at para. 99) that the court *could* (though on the facts, probably would not) give consent on behalf of "future unascertainable spouses and common law partners".

37 This is a modification of the facts of *Re Moncrieff's Settlement Trusts,* [1962] 1 W.L.R. 1344 (Eng. Ch. Div.).

38 This holding in *Re Moncrieff's Settlement Trusts* , *ibid.* was taken to be correct in *Knocker v. Youle* (*supra*, note 111). However, it is certainly arguable that even the cousins have a contingent interest in the trust fund (although only a *spes* in the estate of A): J.G. Riddall, [1987] Conveyancer 144 at 146. Hence one criticism of *Knocker* is that it requires distinctions between degrees of contingent interests. This will be discussed further below. In *Moncrieff*, Buckley J. thought that B was also within paragraph (b), but (unlike the cousins) he was then excluded by the English exception.

39 J.W. Harris, *Variation of Trusts* (1975) at 34-36.

40 *Ibid.*, at 36-41.

41 J.G. Riddall in [1987] Conveyancer 144. Riddall arguably takes this point too far, with the example of a remainder to "such members of the X Gliding Club as shall be living at my death." Current members would seem to have a contingent interest and, under *Knocker* (*supra*, note 111), are excluded from paragraph (b) and must give their own consent (although even if they were in paragraph (b), they would be within the English exception to it). Riddall argues that under *Knocker*, the court could not give its consent on behalf of those unascertained persons who might join the club between the time of application and the time of A's death because they have a contingent interest. Although the gift might be described as contingent, it is hard to understand how an unascertained person can be described as currently having a contingent interest. Under *Knocker* it seems that the court could consent on behalf of such persons under paragraph (b).

42 On this point see J.W. Harris, *Variation of Trusts* (1975) at 37-38. The cases seem to have assumed that powers can be ignored in variation applications; see Harris, *loc. cit.*, and *Lewin* at 1874-75. The Canadian legislation seems to cover this in a different way, under paragraph (d), at least where the power is not yet exercisable: see *infra*, Part IV C 4.

43 For example, the cousins in *Re Moncrieff's Settlement Trusts* , *supra*, note 113, and the text accompanying the note. The English Act can be understood as requiring two distinct contingencies (see *supra*, text at note 116), but this is because of its proviso, which is absent in the Canadian legislation.

44 See *supra*, text accompanying note 79.

45 *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181, [1997] 4 W.W.R. 414 (B.C. S.C.), followed in *Continental Lime Ltd. v. Canada Trust Co.*, 1998 CarswellBC 2757, 25 E.T.R. (2d) 128 (B.C. S.C.).

46 This was in accord with the conclusion in the second edition (1984) of the present book (text and note 67 at p. 1071), to the effect that paragraph (b), as it appears in Canadian legislation, allows the court to consent on behalf of an adult and capacitated beneficiary with a contingent interest.

47 *In Re JohnsoN*, 35 Sask. R. 35, [1984] 5 W.W.R. 649 (Sask. Q.B.).

48 *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch.). The judge's approach to paragraph (b) was actually similar to that of the English court in *Knocker* (*supra*, note 111), since he understood it to cover "those who may become beneficiaries in the future." However, as has been said, a contingent interest is a present interest, and the holder of it is an existing trust beneficiary; this is the basis of *Knocker*. As to *Re Johnson* (*ibid.*) the usual view would be that in that case the son held a vested, not a contingent interest, albeit one which was postponed in enjoyment and was defeasible. In any event, the son was a beneficiary as soon as the trust was constituted.

49 *Re Steed*, [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.); the facts are discussed *infra*, Part IV E 2 a.

50 *Re Johnson* was not mentioned in the more recent case of *Concentra Financial Services Assn. v. Blashill*, 2005 CarswellSask 666, *(sub nom. Re Empey Estate)*, 271 Sask. R. 65 (Sask. Q.B.), where it was held (at para. 8) that the statute "makes no provision for the court to act on behalf of adult and capacitated beneficiaries."

51 *Supra*, note 121. The trial judge in *Buschau v. Rogers Communications Inc.* (2003), 13 B.C.L.R. (4th) 385 (B.C. S.C.), expressly rejected *Knocker* and followed *Bentall Corp.* but was reversed in the Court of Appeal (*supra*, note 111) on the ground that, following *Knocker v. Youle* , *supra*, note 111, the "missing" plan members (approximately 25 individuals) were persons with

interests that did not fall within s. 1(b), and the court had no power to consent on their behalf. As we have seen (*supra*, note 112), a minority in the Supreme Court of Canada seemed to agree with this interpretation.

52 What would need to occur would be all of the following:

(a) termination of the plan,

(b) with a surplus still existing,

(c) with the employee still being a member, and

(d) that on a contested construction of the terms of the plan, there would be a holding that the employees were entitled to the surplus.

53 He was following *Sandwell & Co. v. Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 (B.C. C.A.), in which all known members of the pension plan consented, and the court consented on behalf of unknown and unascertained contingent beneficiaries; and *Versatile Pacific Shipyards v. Royal Trust Corp. of Canada* (1991), 84 D.L.R. (4th) 761 (B.C. S.C.), in which a variation to release a surplus was approved when ninety per cent of the members consented. It does not appear that in either case there was actual opposition to the variation from any known beneficiary; rather, the beneficiaries could not all be found. If the court can consent on behalf of unknown beneficiaries under paragraph (c) (on which see *infra*, note 145 and the accompanying text), then it would seem that the judge in *Bentall Corp.* (*supra*, note 121) went beyond the earlier cases on which he relied.

54 *Continental Lime Ltd. v. Canada Trust Co.* (1998), 25 E.T.R. (2d) 128 (B.C. S.C.).

55 *Re Dalhousie Staff Assn. Contingency Fund (Trustee of)* (1999), *(sub nom. Re Dalhousie Staff Association Contingency Fund),* 175 N.S.R. (2d) 102, 27 E.T.R. (2d) 310 (N.S. S.C.).

56 *Supra*, notes 111 and 127.

57 *Buschau v. Rogers Communications Inc.,* 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1¶ 98 (S.C.C.).

58 See the discussion in chapter 23, Part II A.

59 Although one could reasonably hope that it would be more clearly drafted. In the absence of amendments, a similar result would be achieved if Canadian courts followed *Knocker v. Youle* , *supra*, note 111. That is exactly what the judgment in *Buschau v. Rogers Communications Inc.* in the Court of Appeal achieves (*supra*, notes 111 and 127); in order for the court to consent on behalf of a beneficiary the "double contingency" test has to be satisfied which, as we have seen, confines the court's power to an extremely narrow range of persons. A minority of judges in the Supreme Court of Canada seemed to agree with this interpretation: *supra*, note 112.

60 Report No. 25, *Variation and Termination of Trusts* (2003).

61 See Recommendation 4 and s. 5 of the draft proposed legislation. See also, British Columbia Law Institute, "A Modern *Trustee Act* for British Columbia", Report No. 33, October 2004 (s. 55 of the draft Act).

62 *Re Pettifor's Will Trust,* [1966] 1 Ch. 257, [1966] 1 All E.R. 913 (Eng. Ch. Div.). See also *Re Westminster Bank Ltd.'s Declaration of Trust,* [1963] 1 W.L.R. 820, [1963] 2 All E.R. 400 (Eng. Ch. Div.).

63 *Supra*, chapter 20, Part II N.

64 *Re Westminster Bank Ltd.'s Declaration of Trust* , *supra*, note 138.

65 *Supra*, Part IV C 1, note 109.

66 *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(5)(c); C.C.S.M., T160, s. 59(5)(d) (although unfortunately the Manitoba Act also arguably requires this person's written consent: s. 59(6)).

67 R.S.A. 2000, c. P-44, s. 1(e): "a person who, after reasonable inquiry, cannot be found and whose present place of abode is unascertainable."

68 *Supra*, note 142.

69 The court has jurisdiction to make an order protecting trustees in distributing trust assets without regard to the claim of a person who is missing and presumed dead (*Re Benjamin,* [1902] 1 Ch. 723 (Eng. Ch. Div.)), and it has been suggested that the same principle would allow the court to consent on behalf of a missing beneficiary, without statutory authority: P. Luxton, "An Unascertainable Problem in the Variation of Trusts" (1986) 136 New L.J. 1057; *Hanbury and Martin* at 672, n. 77. The B.C.L.I. Report, and the draft Act report, *supra*, note 136, recommend a new draft s. 3(b) that would expressly include the missing person.

70 *Re Clitheroe's Settlement Trusts,* [1959] 1 W.L.R. 1159, [1959] 3 All E.R. 789 (Eng. Ch. Div.); *Re Bristol's Settled Estates* (1964), [1965] 1 W.L.R. 469, [1964] 3 All E.R. 939; and *Re Wallace's Settlements,* [1968] 1 W.L.R. 71, [1968] 2 All E.R. 209.

71 That is, a discretionary trust not preceded by any prior interest. See *Re Clitheroe's Settlement Trusts, ibid* .

72 Infancy is the usual characteristic attracting such maintenance provisions, but the settlor or testator may extend the trust or power beyond majority. If he does so, there will again be adults on behalf of whom the court is able to consent.

73 It is a persuasive contention that the wisest and simplest correction would be to repeal it. Professor McClean is also critical of this paragraph: "Variation of Trusts in England and Canada" (1965) 43 Can. Bar Rev. 181, at 250-52. It is not difficult for an arrangement to make the degree of benefit proportionate to the likelihood of the interest arising. Alternatively, if some of these interests are thought to be sufficiently remote that the court can consent on behalf of their holders even when they are fully capacitated, it should at least be required that the arrangement be for their benefit, as with the other paragraphs. This is the situation in Alberta and Manitoba. *Trustee Act*, (Alberta), *supra*, note 142, s. 42(7); (Manitoba), *supra*, note 142, s. 59(7)(a). The B.C.L.I. Report, and Report No. 33, a new draft *Trustee Act* (s. 55(3)(d)), *supra*, note 136, recommend a new draft allowing the court to consent on behalf of "any person in respect of an interest of the person that may arise by reason of an immediate or postponed discretionary power, or as a result of a mere power of appointment."

74 *Trustee Act*, (Alberta), *supra*, note 142, s. 42(1) (charitable trusts only); (Manitoba), *supra*, note 142, s. 59(1) (charitable and non-charitable trusts). The B.C.L.I. Report, *supra*, note 136, recommends the inclusion of charities (draft s. 3(e)). See also, *supra*, note 136, the new draft *Trustee Act*, s. 55(3)(e).

75 *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 50 (charitable and non-charitable).

76 *Supra*, chapter 14, Part VI B. In *Re Forsythe Estate,* 2001 CarswellNS 98, 192 N.S.R. (2d) 283 (N.S. S.C.), the court considered (and refused) the variation of a charitable trust under the variation legislation, even though in that province the legislation makes no reference to charitable trusts. The variation or termination of a charitable trust is distinct from the question of when a trust can be terminated *in favour of* a charity which, as a corporation or through its trustees, is itself the beneficiary of that trust: *supra*, chapter 23, Part II F. The first case involves the charitable trustees having the terms of their trust varied; the second case involves the charitable trustees obtaining property from some other trustees.

77 *Trustee Act*, (Manitoba), *supra*, note 142, ss. 59(5)(f), (g), (h). The Saskatchewan statute (*supra*, note 151, s. 49(1)) defines "person" to include an association of persons, but does not speak to the case of incapacity stemming from the association's structural rules.

78 For example, the facts of *Re Denley's Trust Deed* (1968), [1969] 1 Ch. 373, [1968] 3 All E.R. 65 (Eng. Ch. Div.), discussed *supra*, chapter 14, Part II D.

79 *Trustee Act*, (Manitoba), *supra*, note 142, s. 59(1).

80 And if it is not in hand because, for example, the trust is out of the jurisdiction, this provision does not seem apt to cure that difficulty.

81 *Re Steed* , *supra*, note 125, where the protected life tenant had drawn up and put forward the proposed arrangement.

82 *Supra*, text at note 86.

83 Note however that in *Schipper v. Guaranty Trust Co. of Canada* (1989), 69 O.R. (2d) 386, 33 E.T.R. 149 (Ont. C.A.), the Ontario Court of Appeal held that the legislation was not appropriately invoked in seeking an order that a trustee exercise an existing discretion in a particular way. Presumably this was because no variation was sought.

84 *Re Spencer* (1969), 1 N.S.R. (2d) 282, 9 D.L.R. (3d) 74 (N.S. T.D.).

85 One was of age, the other a year under majority.

86 *Re Purves,* 1984 CarswellBC 868, 14 D.L.R. (4th) 738 (B.C. S.C.); *Fischel v. Budovitch Estate* (1990), 108 N.B.R. (2d) 187 (N.B. Q.B.) (where, however, the application under the statute appears to have been misconceived; the applicant was fully capacitated, and so did not need court approval of her consent, and there were other capacitated beneficiaries whose consent had not been secured); *Re Hessian,* 1996 CarswellNS 357, 14 E.T.R. (2d) 188 (N.S. S.C.) (which seems similarly misconceived, as both beneficiaries were capacitated. In any event the "trust" to be varied was a contract of annuity set up under a court order, which is not a trust. The annuity payor has free use of the capital paid for the annuity); *Re Forsythe Estate,* 2001 CarswellNS 98, 192 N.S.R. (2d) 283 (N.S. S.C.) (charitable trust).

87 *Re T.'s Settlement Trusts* (1963), [1964] Ch. 158, [1963] 3 All E.R. 759 (Eng. Ch. Div.); *Re Holt's Settlement* (1967), [1969] 1 Ch. 100, [1968] 1 All E.R. 470 (Eng. Ch. Div.); and *Re Ball's Settlement,* [1968] 1 W.L.R. 899, [1968] 2 All E.R. 438 (Eng. Ch. Div.). The British Columbia Law Institute, Report No. 33, *supra*, note 136, recommends the court be empowered to approve a "resettlement" (see s. 55(1) of the draft *Trustee Act*).

88 *Re Ball's Settlement* , *ibid.*, per Megarry J.

89 This is discussed below, Part IV E 2 b. It is to be noted that the approvals were granted in *Re Ball's Settlement* , *ibid.*, and in *Re Holt's Settlement* , *supra*, note 163, with the court merely insisting on the terminology of variation rather than resettlement; see also *Lafortune v. Lafortune Estate,* 1990 CarswellOnt 507, 40 E.T.R. 299 (Ont. H.C.). Moreover, in both *Re T's Settlement Trusts* , *supra*, note 163, and *Re Purves* , *supra*, note 162, where variations were refused, the courts noted that they did not think that the proposed arrangements were for the benefit of those on whose behalf their consent was sought. *Query* whether in Canada there is room for argument over whether "resettlement" is outside the statutory jurisdiction.

90 *Trustee Act*, (Alberta), *supra*, note 142, s. 42(4)(b); (Manitoba), *supra*, note 142, s. 59(4)(b); (Saskatchewan), *supra*, note 151, s. 50(1)(d). For the same reasons the British Columbia Law Institute has recommended an abolition of the distinction between a "variation" and a "resettlement": Report No. 25, *Variation and Termination of Trusts* (2003), draft s. 1: an "arrangement" would mean "a variation, resettlement or revocation". See also the Institute's final draft *Trustee Act*, *supra*, notes 136 and 163 (s. 55(1) of the draft Act).

91 *Trustee Act*, (Alberta), *supra*, note 142, s. 42(9); (Manitoba), *supra*, note 142, s. 59(10).

92 *Re Holt's Settlement* , *supra*, note 163.

93 Children, and children of children. For a discussion of the expression "per stirpes", see C.S. Thériault, (1998) 18 E.T.J. 127.

94 *Re Ball's Settlement* , *supra*, note 163.

95 *Re Irving* (1975), 11 O.R. (2d) 443, 66 D.L.R. (3d) 387 (Ont. H.C.). See also *Russ v. British Columbia (Public Trustee)* (1994), 89 B.C.L.R. (2d) 35 (B.C. C.A.); leave to appeal refused (1994), 5 E.T.R. (2d) 147n (S.C.C.), in which the arrangement involved not only the termination of the old trust and the creation of a new one, but also a corporate rearrangement.

96 *Ibid.*, at 448. This passage was cited with approval in *Leir v. British Columbia (Public Trustee)* (1983), 48 B.C.L.R. 92, 1 D.L.R. (4th) 556 (B.C. S.C.), in which a variation was allowed to take care of a gap in the beneficial interest.

97 *Russ v. British Columbia (Public Trustee)* , *supra*, note 171, discussed on this point *infra*, Part IV E 2 b. In *Smith v. Smith Estate,* 2003 BCSC 1606, 2003 CarswellBC 2611 (Macaulay J.) (B.C. S.C. [In Chambers]), following the approach in *Russ*, approved a variation which added a new beneficiary to the trust.

98 Compare *Re Tweedie* (1975), [1976] 3 W.W.R. 1, 64 D.L.R. (3d) 569 (B.C. S.C.); and *Re Harris,* [1974] 6 W.W.R. 97, 47 D.L.R. (3d) 142 (B.C. S.C.).

99 *Supra*, Part III A.

100 E.g., *Re Byng's Will Trusts,* [1959] 1 W.L.R. 375, [1959] 2 All E.R. 47n, 54. For a comment on those early days, see Donovan W.M. Waters, "The Variation of Trusts" (1960) Current Legal Problems 36 at 54-56.

101 On the other hand, with the passage of time, the courts were increasingly likely to find that circumstances were special: *Trustees of the British Museum v. Attorney General,* [1984] 1 W.L.R. 418, [1984] 1 All E.R. 337 (Eng. Ch. Div.). With the passage of the *Trustee Act, 2000* (Eng.), investment powers in default of the instrument providing a power are statutorily much wider.

102 *Re Mitchell,* [1969] 2 O.R. 272, 5 D.L.R. (3d) 123 (Ont. H.C.), where the English authorities are discussed.

103 *Re Burns* (1970), 74 W.W.R. 321, 11 D.L.R. (3d) 378 (B.C. S.C.).

104 *Re Kiely,* [1972] 1 O.R. 845, 24 D.L.R. (3d) 389 (Ont. H.C.). The court was referring to the *Trustee Amendment Act*, S.O. 1968-69, c. 134, which widened the list of securities in which "legal list" trustees might invest.

105 This taking of the legislation to justify a yet wider power seems to be the opposite view from that taken in England following the enactment of trustee investment legislation. See, *supra*, notes 176 and 177, and accompanying text.

106 *Re Lister's Will Trusts,* [1962] 1 W.L.R. 1441, [1962] 3 All E.R. 737.

107 *Re Burney's Settlement Trusts,* [1961] 1 W.L.R. 545, [1961] 1 All E.R. 856.

108 *Re Cooper's Settlement* (1961), [1962] Ch. 826, [1961] 3 All E.R. 636.

109 *University of Alberta v. R.* (1979), 11 Alta. L.R. (2d) 26 (Alta. Q.B.). The *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(1) gives the court power to vary or revoke charitable purpose trusts. See *supra*, note 150.

110 *Tanner v. Tanner* (1980), 20 B.C.L.R. 185 (B.C. S.C.). See further, D.G. Fuller, "Modification and Termination of Trusts," *Law Society of Upper Canada, Special Lectures, 1980* at 137, and especially at 146.

111 *Re Leier* (1985), 41 Sask. R. 192, 24 E.T.R. 35. Although the free-standing enlargement power can permit this, that power is absent in Saskatchewan. Note also that it was held in Western Australia that where the trust terms positively require an asset to be retained, a power to sell cannot be derived from the enlargement power; however, it can be approved under the variation of trusts legislation: *Palmer v. McAllister* (1991), 4 W.A.R. 206; not followed in *Perpetual Trustees W.A. Ltd. v. Attorney-General for W.A.* (1992), 8 W.A.R. 441. The opposite suggestion can be found in *Re O'Brien* (1958), 15 D.L.R. (2d) 484 (N.S. S.C.). See, *supra*, note 60 and text to that note.

112 *Supra*, Part III A.

113 In *Falkenberg v. Falkenberg Estate,* 39 Alta. L.R. (3d) 268, [1996] 7 W.W.R. 285 (Alta. Surr. Ct.), the judge refused an application to postpone the sale of condominiums, but he allowed a variation to the effect that the fees of the professional trustee should be borne as to two thirds out of capital, not entirely out of income as the will provided. The judge noted that the income from the trust was the applicant's sole income, that interest rates were now much lower than when the testator made his will, and that it was usual for such expenses to be divided between capital and income. At the same time, it is very difficult to see how this variation gave a benefit to those on whose behalf the court was consenting.

114 *Re Heintzman* (1981), 31 O.R. (2d) 724, 120 D.L.R. (3d) 295 (Ont. H.C.).

115 The minority of the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.,* 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.) at para. 99, suggests that the question is whether the arrangement is in the "best interests" of those on whose behalf the court is to consent. Aside from the fact that the legislation itself speaks only of "benefit" accruing, the legislation is enabling and supportive. "Best interests" may set the measuring standard too high.

116 In these jurisdictions, the court must find that the proposed arrangement appears to be for the benefit of every person on whose behalf the court consents: *Trustee Act*, *supra*, note 185, s. 42(7); C.C.S.M., c. T160, s. 59(7)(a).

117 *Re Chapman's Settlement Trusts (No. 2),* [1959] 1 W.L.R. 372, [1959] 2 All E.R. 47n at 48-49.

118 *Bagger v. Dean,* [1964] 1 W.L.R. 449, [1964] 1 All E.R. 843 (Eng. Ch. Div.).

119 *Re T.'s Settlement Trusts* (1963), [1964] Ch. 158, [1963] 3 All E.R. 759 (Eng. Ch. Div.).

120 *Belhumeur v. Becker Estate,* 2003 CarswellSask 348, 235 Sask. R. 161 (Sask. Q.B.); *Donald Estate v. Donald (Litigation Guardian of),* 2005 CarswellSask 516, *(sub nom. Re Donald Estate),* 268 Sask. R. 290 (Sask. Q.B.) at para. 21: "It is not enough, however, for the proposed variation to not harm him. I must be satisfied that it appears to be for his benefit."

121 *Re Cohen's Settlement Trusts,* [1965] 1 W.L.R. 1229, [1965] 3 All E.R. 139; *Saskatchewan (Public Trustee) v. Packet Estate,* 50 Sask. R. 263, [1986] 6 W.W.R. 285 (Sask. C.A.); *Finnell v. Schumacher Estate* (1990), 74 O.R. (2d) 583, 37 E.T.R. 170 (Ont. C.A.); *Re Hoffos Estate* (1992), 106 Sask. R. 96, [1993] 2 W.W.R. 429 (Sask. Q.B.). Some decisions have suggested that less attention needs to be paid to interests which are particularly remote: *Re Tweedie* , *supra*, note 174; and *Versatile Pacific Shipyards v. Royal Trust Corp. of Canada* (1991), 84 D.L.R. (4th) 761 (B.C. S.C.). *Re Tweedie* is controversial on this point: *Re Dent* (1984), 37 Sask. R. 7, 18 E.T.R. 252 (Sask. Surr. Ct.); W.A. McTavish and R.R. Anger, "Variation of Trusts: The Official Guardian's View" (1989) 9 E.T.J. 132 at 160-62.

122 *Re Lister's Will Trusts* , *supra*, note 182; and *Re Clitheroe's Settlement Trusts,* [1959] 1 W.L.R. 1159, [1959] 3 All E.R. 789 (Eng. Ch. Div.). In *Re Strother* (November 21, 1981), Toronto Weekly Ct. 2642-81 (unreported), Labrosse J. permitted a higher stipend to be paid to the nurse/housekeeper/ companion to a class of grandchildren, thereby consenting on behalf of the great-grandchildren who would take *per stirpes* on a gift over. The court was of the view that by looking after the grandchildren for many years, she had benefited the future generation.

123 *Re Cohen,* [1959] 1 W.L.R. 865, [1959] 3 All E.R. 523. A well-drafted proposal may involve the purchase of insurance. For a discussion of risk-taking by the court, see *Re Brook's Settlement,* [1968] 1 W.L.R. 1661, [1968] 3 All E.R. 416 (Eng. Ch. Div.).

124 *Re Weston's Settlements* (1968), [1969] 1 Ch. 223, [1968] 3 All E.R. 338 at 234 (Eng. C.A.): *per* Lord Denning M.R.:

> [T]he court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worth-while than money. One of these things is to be brought up in this our England, which is still "the envy of less happier lands" [Shakespeare, *Richard II*, Act II, Scene I]. I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax. ...

The avoidance of tax may be lawful, but it is not yet a virtue.

125 *Re Holt's Settlement* (1967), [1969] 1 Ch. 100, [1968] 1 All E.R. 470 (Eng. Ch. Div.).

126 *Hooper v. Wenhaston,* [1970] 1 Ch. 560, [1970] 2 All E.R. 554 (Eng. Ch. Div.).

127 *Ibid.*, at 567 [Ch.].

128 *Re Zekelman,* [1971] 3 O.R. 156, 19 D.L.R. (3d) 652 (Ont. H.C.). See also *Duchess of Westminster v. Royal Trust Co.* (1972), 32 D.L.R. (3d) 631 (N.S. T.D.).

129 *Ibid.*, at 158. The enhancement of family harmony was also mentioned in *Smith v. Smith Estate,* 2003 BCSC 1606, 2003 CarswellBC 2611 (B.C. S.C. [In Chambers]), and *Drescher (Attorney of) v. Drescher Estate,* 2007 CarswellNS 572, *(sub nom. Re Drescher Estate),* 260 N.S.R. (2d) 328 (N.S. S.C.), though in this instance there were also financial benefits.

130 *Re Goldstein Insurance Trust* (1988), 56 Man. R. (2d) 73 (Man. Q.B.).

131 *Re Charlesworth Estate,* 108 Man. R. (2d) 228, [1996] 5 W.W.R. 578 (Man. Q.B.); additional reasons at (1996), 1996 CarswellMan 371 (Man. Q.B.). See also *Weir Trust (Trustees of) v. Weir* (2003), 50 E.T.R. (2d) 314 (Ont. S.C.J.).

132 *Trustee Act*, *supra*, note 192, s. 61(8). "Benefit", however, is not actually defined inasmuch as the guidance does not limit the generality of that word.

133 Section 61(8)(a). Complementing its provision that the court can consent on behalf of a corporation, an association, or a specified trust purpose (see *supra*, note 153), the Act also provides (see ss. 61(8)(b) and (c)) that "benefit" includes that which will "advance or further the purposes of the corporation or association," or which will "advance or further [the specified] purpose."

134 *Re Irving* (1975), 11 O.R. (2d) 443, 66 D.L.R. (3d) 387 (Ont. H.C.).

135 This first question, which is controversial and is not directly concerned with the question of benefit, is discussed *infra*, Part IV E 2 b. A number of courts have now taken the view that this element is irrelevant.

136 In *Sandwell & Co. v. Royal Trust Corp. of Canada,* 1985 CarswellBC 683, 17 D.L.R. (4th) 337 (B.C. C.A.), confirmed on this point in *Russ v. British Columbia (Public Trustee),* 1994 CarswellBC 131, 89 B.C.L.R. (2d) 35, 3 E.T.R. (2d) 170 (B.C. C.A.); leave to appeal refused (1994), 5 E.T.R. (2d) 147n (S.C.C.), it was held that this element is also irrelevant, and only the third point from *Re Irving* is important.

137 *Re Harris,* [1974] 6 W.W.R. 97, 47 D.L.R. (3d) 142 (B.C. S.C.): in this case the loss was significant, and the court felt impelled to refuse its consent.

138 *Re Tweedie* (1975), [1976] 3 W.W.R. 1, 64 D.L.R. (3d) 569 (B.C. S.C.). Although this decision is controversial on the question of remote interests (see *supra*, note 199), it has been frequently cited with approval to the effect that the inquiry as to benefit often involves balancing the loss of a contingent interest against the gains of the proposed arrangement.

139 *Ibid.*

140 The court recognized a benefit to children in the form of increased wealth in their parents' hands in *Ridalls v. Co-operative Trust Co. of Canada* (1983), 24 Sask. R. 16, 14 E.T.R. 157 (Sask. Q.B.); *Re Kovish* (1985), 18 E.T.R. 133 (B.C. S.C.); *Re Henderson Estate* (1991), 77 Man. R. (2d) 91 (Man. Q.B.); and *May v. May* (1994), *(sub nom. May v. May Estate),* 96 Man. R. (2d) 268, [1995] 1 W.W.R. 70 (Man. Q.B.) (although in the last case there was also significant life insurance).

141 Cases in which the court has denied approval due to the absence of a more tangible benefit for the next generation include *Kunater v. Royal Trust Corp. of Canada* (1980), 23 B.C.L.R. 287 (B.C. S.C.); *Re Nathanson* (1981), 45 N.S.R. (2d) 151, 9 E.T.R. 256 (N.S. T.D.); *Salt v. Alberta (Public Trustee)* (1986), 45 Alta. L.R. (2d) 331, 23 E.T.R. 225 (Alta. Q.B.); and *Samoil v. Buob Estate* (1999), 86 Alta. L.R. (3d) 250, [2001] 2 W.W.R. 280 (Alta. Q.B.) (even though the Public Trustee did not oppose). In *Canada Permanent Trust Co. v. Assie* (1985), *(sub nom. Re Assie),* 42 Sask. R. 262, 24 E.T.R. 278 (Sask. Q.B.), the judge rejected the application as failing to show any tangible benefit for the contingent beneficiaries, expressing a concern that applications should not be granted as of course. The application was modified and renewed (1985), 45 Sask. R. 142, but it was refused again.

142 *Re Irving* , *supra*, note 210: succession duty; *Ridalls v. Co-operative Trust Co. of Canada* , *supra*, note 216; *Re Henderson Estate* , *supra*, note 216: capital gains tax; *Finnell v. Schumacher Estate* , *supra*, note 197: income tax. In the last case, Carthy J.A. said (at 182 [E.T.R.]) that saving tax "makes good business sense and should be encouraged," although the variation was not approved because benefit for some beneficiaries was not clear.

143 *Re Irving* , *supra*, note 210.

144 *Farrington v. Rogers* (1980), 6 E.T.R. 156 (B.C. S.C.).

145 Noticing the insurance which had been obtained in *Duchess of Westminster v. Royal Trust Co.* , *supra*, note 204, Cowan C.J.T.D., in *Re Nathanson* , *supra*, note 217, would not accept an undertaking from adult beneficiaries to pay money in certain contingencies; counsel had advised the judge that the appropriate kind of insurance could not be obtained. Walker J., in refusing a second application in *Re Assie Estate* (1985), 45 Sask. R. 124 (Sask. Q.B.), noted the absence of insurance. Insurance seemed to play a decisive role in the granting of the application in *May v. May* , *supra*, note 216. W.A. McTavish and R.A. Anger, in "Variation of Trusts: The Official Guardian's View" (1989) 9 E. & T.J. 132, argue that because insurance policies can lapse and their beneficiaries be changed, what is required is customized whole life insurance, fully prepaid, with an irrevocable beneficiary designation and the insurer's waiver of any argument based on material non-disclosure. Their arguments were noticed with approval by Lee J. in *Samoil v. Buob Estate* , *supra*, note 217.

146 *Re Irving* , *supra*, note 210.

147 *Lafortune v. Lafortune Estate* (1990), 40 E.T.R. 299 (Ont. H.C.); *Belhumeur v. Becker Estate,* 2003 CarswellSask 348, 235 Sask. R. 161 (Sask. Q.B.); *Donald Estate v. Donald (Litigation Guardian of),* 2005 CarswellSask 516, *(sub nom. Re Donald Estate),* 268 Sask. R. 290 (Sask. Q.B.). The jurisdiction is derived from the words at the beginning of the legislation, "the Supreme Court may, if it thinks fit, approve." The benefit requirement is independent, and is to be found in subsection (2). *Supra*, Part IV A.

148 *Re Poole's Settlements' Trusts,* [1959] 1 W.L.R. 651, [1959] 2 All E.R. 340.

149 *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(7); C.C.S.M., c. T160, s. 59(7)(b).

150 *Supra*, chapter 23, Part II.

151 In *Silver Estate v. Silver* (2000), 35 E.T.R. (2d) 287 (Ont. S.C.J.), Cullity J. held that an arrangement could be approved even though the will under which the trust arose had not been probated, and even though it was admitted that the reason for this was to avoid probate fees. In *Re Michelham's Will Trusts* (1963), [1964] Ch. 550, [1963] 2 All E.R. 188, two bachelor beneficiaries, each a life tenant of a trust which gave a life interest over to any widow, and a power of appointment among children, proposed an arrangement under which insurance would be taken out against their marrying. The agreement was that the bachelors would indemnify the insurers if this event occurred with either of them, and the question was whether the agreement as part of the arrangement was in restraint of marriage. Approval was granted.

152 *Re Steed,* [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.). See also *Re Baker's Settlement,* [1964] 1 W.L.R. 336n, [1964] 1 All E.R. 482n.

153 *Re Burns* (1970), 74 W.W.R. 321, 11 D.L.R. (3d) 378 (B.C. S.C.).

154 As in *Re Steed* , *supra*, note 228.

155 *Goulding v. James,* [1997] 2 All E.R. 239 (Eng. C.A.). See P. Luxton, "Variation of Trusts: Settlor's Intentions and the Consent Principle in *Saunders v. Vautier"* (1997), 60 M.L.R. 719.

156 *Russ v. British Columbia (Public Trustee)* (1994), 89 B.C.L.R. (2d) 35, 3 E.T.R. (2d) 170 (B.C. C.A.); leave to appeal to S.C.C. dismissed (1994), 5 E.T.R. (2d) 147n (S.C.C.); see also *Buschau v. Rogers Communications Inc.* (2004), 236 D.L.R. (4th) 18, 6 E.T.R. (3d) 326¶ 46 (B.C. C.A.); additional reasons at (2004), 239 D.L.R. (4th) 610, 9 E.T.R. (3d) 221; additional reasons at (2004), 241 D.L.R. (4th) 766 (B.C. C.A.); appeal allowed on different reasoning 2006 CarswellBC 1530, 2006 CarswellBC 1531, [2006] 1 S.C.R. 973, 269 D.L.R. (4th) 1 (S.C.C.).

157 In Ontario, in *Finnell v. Schumacher Estate* (1990), 74 O.R. (2d) 583, 37 E.T.R. 170 (Ont. C.A.), Carthy J.A. said that the holding of Pennell J. in *Re Irving* , *supra*, note 210 that the basic intention of the settlor should be kept alive "may be open for argument in another case." See also *Lafortune v. Lafortune Estate,* 1990 CarswellOnt 507, 40 E.T.R. 299 (Ont. H.C.). The Manitoba Court of Appeal has downplayed the importance of the settlor's intentions in *Brown v. National Victoria & Grey Trust Co.* (November 12, 1985), (Man. C.A.), unreported; *Knox United Church v. Royal Trust Corp. of Canada* (1996), 110 Man. R. (2d) 81, 12 E.T.R. (2d) 40 (Man. C.A.); and *Teichman v. Teichman Estate* (1996), *(sub nom. Re Teichman Estate),* 110 Man. R. (2d) 114, 134 D.L.R. (4th) 155 (Man. C.A.). See the analysis of K.B. Farquhar, "Recent Themes in the Variation of Trusts" (2001) 20 E.T.P.J. 181 at 186-91. See also *Re Greenwood,* [1988] 1 N.Z.L.R. 197, in which Tipping J. held that inconsistency between the proposed arrangement and the settlor's intentions can be relevant to the merits of the application, but does not affect the court's jurisdiction to approve the arrangement, and *Drescher (Attorney of) v. Drescher Estate,* 2007 CarswellNS 572, *(sub nom. Re Drescher Estate),* 260 N.S.R. (2d) 328 (N.S. S.C.). *Russ* was followed in *Smith v. Smith Estate,* 2003 BCSC 1606, 2003 CarswellBC 2611 (B.C. S.C. [In Chambers]), although of course it was binding on that court.

158 In one of the trusts under consideration in *Re Irving* , *supra*, note 210, the life tenant had a special power of appointment which at the time of the application to court, she had exercised, but there is no evidence at all that this was done as part of an attempt to secure variation.

159 Fraud on a power cannot be committed by the appointor releasing the power, whatever his intentions: *Re Brook's Settlement,* [1968] 1 W.L.R. 1661, [1968] 3 All E.R. 416 (Eng. Ch. Div.); G. Thomas, *Powers* (1998) at 487-89. Releasing a power often occurs as a result of a bargain struck between the interested parties, from which a benefit undoubtedly arises. The doctrine of fraud on a power grew in the days when this kind of bargaining was unheard of; it is questionable whether fraud should not now include both exercise and release, if the doctrine is to have significance at all in this area.

160 *Re Robertson's Will Trusts,* [1960] 1 W.L.R. 1050, [1960] 3 All E.R. 146n.

161 *Cf.* G. Thomas, *supra*, note 235, at 474-77.

TAB C

WatersTrusts 23.IV

Waters' Law of Trusts in Canada, 4th Ed.

23 — Termination of the Trust
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

23.IV — Trust Termination in Alberta and Manitoba

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In view of the marked difference of philosophy between American and Commonwealth common law jurisdictions, it is of particular interest that Alberta and Manitoba have legislatively departed from the rule in *Saunders v. Vautier* .[1] There were three positions which these provinces could have taken if greater significance was to be given to the settlor's intent: the first was to adopt the American material purpose doctrine, the second was to prohibit the termination of trusts in those factual circumstances which have excited judicial criticism of *Saunders v. Vautier* , and the third was to make all trust termination subject to judicial consent under the terms of the variation of trusts legislation.

The last of these is a compromise between the prohibition of the American position which heavily favours the settlor's intent, and the *Saunders v. Vautier* rule which as heavily favours the beneficiaries' contrary wishes. At the same time it avoids the "tinkering" with the problem that is implicit in merely prohibiting *Saunders v. Vautier* termination in certain circumstances. Moreover, it follows the principle already established in the variation of trusts legislation that the court will give its consent to an arrangement varying or revoking a trust where in its discretion the court "thinks fit" to do so.

Alberta in 1973[2] and Manitoba in 1983[3] adopted this third position. The object of the legislation may best be seen in the words accompanying the Alberta bill:

> This amendment will replace the rule to the extent of giving the court power to decide whether to permit termination or variation of the trust so that cognizance may be taken of the donor's intent, ignored in the application of the rule, and also of the interest of the donee.

The existing variation of trusts legislation is incorporated in the new legislation, so that the court continues to be concerned that any proposed arrangement is for the benefit of infants and unascertained, unborn or missing persons. But the legislation goes on to say that the court may consent only if

> in all the circumstances at the time of the application to the court the arrangement appears otherwise to be of a justifiable character.[4]

This means that the court may refuse its consent where, though all the beneficiaries are ascertained, capacitated, and have consented to the proposed arrangement, the alteration of the settlor's terms does not seem to be warranted.[5] It also means that the court may withhold its consent where in its view the best interests of the adult beneficiary are not reflected in the proposed arrangement. In *Kinnee v. Alberta (Public Trustee)* ,[6] for instance, the court refused consent to a young man, just of age, selling his half-interest in the family home to his father at something less than its value, and under the influence of his father. The young man's deceased mother had by will left a half-interest each to her husband and son, and in this document was clearly apprehensive of the father's influence over the young man. The court considered it preferable that the young man return to the court in a year or so, when the matter could be examined again.[7] And in a case like *Re Steed* ,[8] the court may exercise its beneficent influence even where no unascertained beneficiaries are involved. It may enquire why a young man of eighteen wants to have capital that the testator thought it would be best for him to receive at a later age, and it can ensure that intended instalment payments of capital are not avoided, whatever the justification, simply because the draftsman overlooked the rule in *Saunders v. Vautier* .

But even in these jurisdictions, the settlor's intention is not entirely determinative. In *Re Johnston* ,[9] the testator sought to create endowments for two charities while making an outright gift to a third, all three gifts to take effect after the death of the widow, who held an income interest. Fifteen years after the testator's death, all four sought approval of an arrangement which paid a lump sum to the widow and divided the rest of the estate equally among the three charities. Approval was granted, the court holding that the concerns which led the testator to desire to keep the capital out of the hands of two charities were no longer valid. Monnin J. said:

> I accept that in matters of this nature I am to be guided by the principle laid down by Upjohn J. in *Re Steed* , *supra,* and in granting the variation requested, respect, is in fact being given to the testator's views. … I find that although the variation requested does change the testator's will, it does not do so with a flagrant disregard for his ultimate wishes.

And in *Knox United Church v. Royal Trust Corp. of Canada* ,[10] the testatrix created a trust to accumulate income for 20 years and then pay the capital to a church. The church applied to convert this to a perpetual income interest, with payments starting immediately.[11] The application was initially rejected on the basis that it was contrary to the intentions of the testatrix. The Court of Appeal allowed the appeal, holding that "the learned motions judge placed undue emphasis on the intentions of the testatrix which will inevitably be overcome in every successful application to vary, and by so doing he did not exercise his discretion on a sound basis in determining what constitutes a justifiable character."[12] Interestingly, the Court of Appeal, referring to one of its own judgments, also held that despite the new legislation, the rule in *Saunders v. Vautier* "still makes considerable sense".[13]

In short, the court assumes the role of the testator or the settlor, and it gives its consent, as a reasonable and prudent person would do, where the proposed arrangement for any variation or revocation of the trust terms is demonstrably in the best interests of the beneficiaries. The court will also have in mind what it was that the testator or settlor wanted to achieve.

The operative words of the legislation in both cases say that the trust "shall not be varied or terminated before the expiry of the period of its natural duration as determined by the terms of the trust except with the approval of the court."[14] The requirement of court approval is "subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts."[15] This seems clearly to mean that approval is not required in any case in which the termination of the trust takes place according to the terms of trust. When the life tenant dies, the trustee need not go to court in order to pay the capital to the remainderman. In that case, the trust is ending at the expiry of its natural duration as determined by the terms of the trust. The same reasoning would seem to apply to the case of dispositive powers. If the trustee has a power of appointment over the whole capital, and uses it in such a way that the whole capital is appointed, it is hard to see how approval under the legislation is required (although, of course, the trustee's act could be challenged under normal principles). Assuming that the power was otherwise validly exercised, that would be a termination in accordance with the terms of the trust. And yet in *Sabo Estate v. Sabo Estate* ,[16] it was held that court approval was required in just such a case. Marshall J. reasoned that the effect of the legislation was that the only case in which court approval was not required was the case where the terms of the trust created a power of revocation or variation. The paying out of the entire capital, albeit futher to a power to advance any amount of capital, was neither revocation nor variation.He did not refer to the other words in the statute,[17] excluding the requirement of approval where the trust ends according to its terms.
It is sometimes said that if the beneficiaries are all adult, capacitated and agree on a trust termination, and the trustees take no objection, the court's denial of a winding-up of the trust would be unreasonable. However, this may be the value judgment produced by centuries of *Saunders v. Vautier* thinking. To hear evidence of the settlor's "material purpose", as we have seen, is the contrary approach in almost all U.S. states. The courts in Alberta and Manitoba are invited by the provincial legislation, it would seem, to consider each set of facts from the standpoint, not only of the beneficiaries, and anything the trustees may have to say, but from the standpoint also of the settlor's purpose as it appears in the trust terms, and to assess the continued relevance or significance of that purpose. If no purpose is apparent from the instrument and other admissible evidence, or it has ceased to have relevance, then the court can disregard that consideration. This was presumably the state of the evidence in *Re Taylor Estate* .[18]
The legislation appears to be presupposing that if testators or settlors have clear purposes in the instructions they give, the drafting will incorporate those purposes into the instrument. This would give the court the material it needs.[19]

Footnotes

1 Implementing the recommendations of the Institute of Law Research and Reform, University of Alberta, in its Report No. 9 (The Rule in *Saunders v. Vautier*), February, 1972, and of the Manitoba Law Reform Commission in its Report No. 18 (The Rule in *Saunders v. Vautier*), January 1975, and its Report No. 49 (The Rules against Accumulations and Perpetuities), Appendix C, February 1982.

2 S.A. 1973, c. 13, s. 12; now *Trustee Act*, R.S.A. 2000, c. T-8, s. 42.

3 S.M. 1982-83-84, c. 38, s. 4, now *Trustee Act*, C.C.S.M., c. T160, s. 59.

4 *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(7); *Trustee Act*, C.C.S.M., c. T160, s. 59(7)(b).

5 The legislation in each of the two provinces applies to all trusts, arising before or after the amendments. Without limiting the generality of that, the legislation then sets out the precise circumstances in which application to the court must be made (*Trustee Act*, R.S.A. 2000, c. T-8, s. 42(3); C.C.S.M., c. T160, s. 59(3)). The enumeration is intended to provide for all the circumstances in which, or the methods by which, premature termination could be obtained under *Saunders v. Vautier* . By a definitional technique, the legislation also applies to purpose trusts: R.S.A. 2000, c. T-8, s. 42(1) (charitable trusts only); C.C.S.M., c. T160, s. 59(1) (charitable and non-charitable trusts). This makes the legislation applicable to the variation and termination of charitable trusts themselves, which is quite different from the discussion above (*supra*, Part II F) on the termination of trusts of which a charity is the beneficiary.

6 *Kinnee v. Alberta (Public Trustee)* (1977), 3 Alta. L.R. (2d) 59, 6 A.R. 102 (Alta. T.D.).

7 To opposite effect is *Re Taylor Estate* (1998), 231 A.R. 324 (Alta. Surr. Ct.), in which the will directed the trustee to use the residue to purchase an annuity payable to the beneficiary over ten years. No one else was interested in the residue. On the trustee's application, with the support of the beneficiary who wanted the capital to purchase a house, the court granted permission for the capital to be paid out.

8 *Re Steed,* [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.). See further, chapter 27, note 228.

9 (1985), *(sub nom. Brown v. National Victoria & Grey Co.),* 35 Man. R. (2d) 300, 20 E.T.R. 209 (Man. Q.B.).

10 *Knox United Church v. Royal Trust Corp. of Canada* (1996), 110 Man. R. (2d) 81, 12 E.T.R. (2d) 40 (Man. C.A.).

11 The application was therefore to vary, not to terminate. But in other jurisdictions, the church would have had the power to terminate the trust under *Saunders v. Vautier* and would not have needed to apply to the court to make a resettlement, so long as the trustees were agreeable.

12 Para. 7.

13 Referring to *Brown v. National Victoria & Grey Trust Co.* (November 12, 1985), (Man. C.A.), unreported; this *dictum* was applied again later in *Teichman v. Teichman Estate* (1996), *(sub nom. Re Teichman Estate),* 110 Man. R. (2d) 114, 134 D.L.R. (4th) 155 (Man. C.A.), when the court again overruled a trial judge who had disallowed an application on the basis that it was contrary to the testator's intention.

14 *Trustee Act*, R.S.A. 2000, c. T-8, s. 42(2); C.C.S.M., c. T160, s. 59(2).

15 *Ibid.*

16 *Sabo Estate v. Sabo Estate* (1995), 26 Alta. L.R. (3d) 377, *(sub nom. Re Sabo Estate),* 164 A.R. 151 (Alta. Q.B.).

17 *Supra*, text accompanying note 131.

18 *Supra*, note 124.

19 *Cf.* the nature and effect of the "material purpose" doctrine in the U.S., *supra*, Part III.

End of Document

TAB 8

Buschau v. Rogers Communications Inc., [2006] 1 SCR 973, 2006 SCC 28 (CanLII)

Date:	2006-06-22
File number:	30462
Other citations:	269 DLR (4th) 1 — 349 NR 324 — [2006] 8 WWR 583 — 54 BCLR (4th) 1 — 226 BCAC 25 — 26 ETR (3d) 1 — EYB 2006-106843 — JE 2006-1309 — [2006] SCJ No 28 (QL) — 148 ACWS (3d) 483
Citation:	Buschau v. Rogers Communications Inc., [2006] 1 SCR 973, 2006 SCC 28 (CanLII), <http://canlii.ca/t/1nn6m>, retrieved on 2019-07-02

SUPREME COURT OF CANADA

CITATION: Buschau *v.* Rogers Communications Inc., [2006] 1 S.C.R. 973, 2006 SCC 28

DATE: 20060622
DOCKET: 30462

BETWEEN:

Rogers Communications Incorporated
Appellant
and
Sandra Buschau et al.
Respondents
and
National Trust Company
Respondent

AND BETWEEN:

National Trust Company
Appellant
and
Sandra Buschau et al.
Respondents
and
Rogers Communications Incorporated
Respondent

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

REASONS FOR JUDGMENT: (paras. 1 to 59) Deschamps J. (LeBel, Fish and Abella JJ. concurring)
CONCURRING REASONS: (paras. 60 to 104) Bastarache J. (McLachlin C.J. and Charron J. concurring)

Buschau *v.* Rogers Communications Inc., [2006] 1 S.C.R. 973, 2006 SCC 28

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*

and

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*

Indexed as: Buschau *v.* Rogers Communications Inc.

Neutral citation: 2006 SCC 28.

16 Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products Canada Ltd.*, 1994 CanLII 104 (SCC), [1994] 2 S.C.R. 611, 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 p. 639) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54 (CanLII), 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 *PBSA*, 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 *PBSA*, 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 Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the *PBSA* (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 *PBSA* (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 Relating to 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 the 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

TAB 9

Court of Queen's Bench of Alberta

Citation: D.R.S. Estate, 2010 ABQB 428

Date: 20100624
Docket: SES12 32659
Registry: Wetaskiwin

Court File Number	SES12 32659
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Wetaskiwin
Estate Name	D.R.S.
Applicant (Plaintiff)	D.M.H.S.
Respondent (Defendant)	G.S., R.S., Office of the Public Trustee of Alberta

Corrected judgment: A corrigendum was issued on September 2, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Mr. Justice R.P. Marceau

Introduction

[1] This is an application for maintenance and support pursuant to the *Dependants Relief Act*, R.S.A. 2000, c. D-10.5. The Applicant, D.M.H.S. applies for maintenance for herself and the minor A.R.S. from the estate of her father, D.R.S.

[2] This application came on before me in Wetaskiwin on May 18, 2010.

[3] The proposed order in Paragraph 4 states:

> 4. G.S. and R.S., personal representatives of the Estate of D.R.S., shall provide a final accounting of their administration of the said Estate to the Public Trustee and shall pay and transfer 40% of the net residue held in

> the Estate after the Residence has been transferred to the applicant, D.S., to the Public Trustee in trust for and for investment on behalf of A.R.S. until he attains the age of 25 years. Upon A.R.S. attaining the age of 18 years, the Public Trustee shall account to him for one half (½) of the funds held in trust, and upon him attaining the age of 25 years, the Public Trustee shall account to him for the balance of funds held in trust.

[4] I questioned whether there was any precedent for expanding a trust for a minor beneficiary beyond the age of 18. I believe I was informed that an order had been made by Justice Sulyma which extended the trust past the age of 18. I requested a further memorandum from counsel for the Applicant. They submitted their argument to me. The order of Justice Sulyma was granted on January 24, 2007 in the Estate of D.W.A. I have also had one of our students prepare a memorandum. I will grant the order for the following reasons:

1. Relevant Statutory Law

[5] The *Family Relief Act*, R.S.A. 2000, c. F-2 was renamed the *Dependants Relief Act* by the *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, s. 35(2). The relevant sections remained identical.

[6] Section 1(d)(iii) of the *Dependants Relief Act*:

> 1. In this Act,
>
> ...
>
> (d) "dependant" means
>
> ...
>
> (iii) a child of the deceased who is under the age of 18 years <u>at the time of the deceased's death</u> [emphasis added]

[7] Section 5(1) of the *Dependants Relief Act*:

> 5(1) The judge in any order making provision for maintenance and support of a dependant may impose any conditions and restrictions the judge sees fit.

[8] Section 8 of the *Dependants Relief Act*:

> 8. A judge at any time
>
> (a) may fix a periodic payment or lump sum to be paid by a legatee, devisee or beneficiary under an intestacy to represent, or in commutation

of, the proportion of the sum ordered to be paid that falls on the portion of the estate in which the legatee, devisee or beneficiary is interested,

...

(c) may direct

(i) in what manner the periodic payment is to be secured, or
(ii) to whom the lump sum is to be paid and in what manner it is to be dealt with for the benefit of the person to whom the commuted payment is payable.

[9] Section 42(2) of the *Trustee Act*, R.S.A. 2000, c. T-8:

> Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, <u>shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.</u> [emphasis added]

2. Relevant Case Law

<u>5.1 *Dependants Relief Act*</u>

Dupere (Next Friend of) v. Spinelli Estate (1998), 229 A.R. 137, 84 A.C.W.S. (3d) 610 (Alta. Surr. Ct.)

[10] This case dealt with an application under the *Family Relief Act*, R.S.A. 1980, c. F-2, which is the predecessor legislation to the current *Dependants Relief Act*. As noted above, the relevant sections remained identical. The applicant sought an order that would create a trust for the minor child beyond the age of 18. The Court granted the application, ordering that a $50,000 trust be held for the benefit of the child, with one half of the capital to be distributed at the age of 21 and the other half distributed at the age of 25. Additionally, a separate sum of $25,000 would be held in trust until the child reached the age of 25, at which point it would also be distributed.

[11] Beginning at para. 15, Johnstone J. went through a lengthy analysis of the policy and rationale for providing support orders for minor children that extend beyond the age of majority. At para. 23, the Court states that:

> Where evidence is led as to the reasonable needs of the child for adequate maintenance beyond that age ... the fact that the Legislature has arbitrarily placed an age cap on those eligible to apply should not affect the judge's wide discretion

> in determining what constitutes appropriate maintenance for a child who is eligible to apply.

[12] At para. 20, the Court contrasts the *Family Relief Act* with "other legislation regarding maintenance of children, such as the *Parentage and Maintenance Act*, S.A. 1990 c. P-0.7". In the *Parentage and Maintenance Act*, "the Legislature has used express language to limit the duration of child maintenance to 18 years of age." The absence of such an express age limitation in the *Family Relief Act* is evidence that the Legislature intended to give courts discretion when making orders under the *Family Relief Act*. Additionally, at para. 24, the Court notes that the age of 18 years is a legitimate reference point in many cases, despite being somewhat arbitrary. At para. 28, after concluding that the Court had jurisdiction to extend the trust beyond the age of majority, Johnstone J. set out a lengthy list of factors that the Court considered before granting the order sought by the applicant.

C.D.T. (Next Friend of) v. T. Estate, 2003 ABQB 769

[13] Similarly to the facts in ***Dupere***, this case arises from an application made by a child of the deceased, pursuant to the *Family Relief Act*. As in ***Dupere***, Power J. granted the dependant child's application. The applicant child in this case was awarded $60,000, to be held by the Public Trustee for his maintenance and released to him once he reached the age of majority. Additionally, another $40,000 was to be held in trust by the Public Trustee and released at the time he reached the age of 25. In his brief discussion, Power J. did not address the basis of the Court's authority to extend the trust beyond the applicant reaching the age of majority.

[14] I am therefore of the opinion that there is clear precedent for making an order extending the time for the Public Trustee to pay the trust funds until D.R.S. reaches the age of 25 years. At the hearing, I also expressed the concern that even if I made such an order in ***Saunders v. Vautier*** (1841), 4 Beav. 115, 49 E.R. 282 would give rise to the well-known trust law rule that allows a sole beneficiary, or multiple beneficiaries if they are all in agreement, to obtain legal title to the trust property. In other words the dependent after attaining the age of 18 could well apply to collapse the trust. In this context the following cases are of some relevance:

Buschau v. Rogers Communications Inc., 2006 ACC 28, [2006] 1 S.C.R. 973

[15] In this case, the Court considered the application of the rule in ***Saunders v. Vautier*** in the context of complex litigation over a large pension plan. This is the most recent characterization of the rule in ***Saunders v. Vautier*** by the Supreme Court of Canada. Deschamps J., for the majority, succinctly described the Rule at para. 21:

> ... 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.

[16] Ultimately, both the majority and dissenting judgments held that the rule was inapplicable in the context of a pension trust. At paras. 28-31, the majority sets out several reasons why the rule did not apply.

Re S.D., 2007 NSSC 288, 36 E.T.R. (3d) 43

[17] In this case, the applicants requested a trust variation pursuant to the Nova Scotia *Variation of Trusts Act*, R.S.N.S. 1989, c. 486. The Court held that the rule in ***Saunders v. Vautier*** did not bar the Court from granting the requested variation and extending the trust beyond the point at which the beneficiary would reach the age of majority. However, the Court noted that nothing in its decision prevented the future application of the rule.

[18] The two minor children, A.J. and N.S., were beneficiaries of separate trusts created by the Will of their late uncle. Each trust was valued at over $1,000,000. Under the original terms of the testamentary trust, the beneficiaries would become entitled to the capital of the trust once they reached the age of majority. The beneficiaries' mother and great-aunt, who were the trustees of both trusts, were concerned about the children coming into such a large inheritance at such a young age. The trustees applied to vary the trust so that the distribution of capital would be delayed beyond the date at which each beneficiary attained the age of majority. The proposed variation delayed the capital distribution of each trust until the respective beneficiary attained the age of 35, unless the trustees, in their discretion, made an early determination that the respective child was capable of managing the trust funds personally.

[19] At para. 36, the Court considered whether the rule in ***Saunders v. Vautier*** blocked the Court from extending the trust beyond the age of majority. The Court found that nothing in the rule prevented the Court from granting such an order. Conversely, however, nothing in the Court's decision would prevent the rule from operating once the beneficiary reached the age of majority. The effect of this decision is that the trustees will "not be obliged to <u>automatically</u> distribute the capital ... once each child attains the age of majority." [emphasis in original]

Grieg v. National Trust Co. (1998), 47 B.C.L.R. (3d) 42, 20 E.T.R. (2d) 309 (B.C. S.C.)

[20] In this brief decision, the Court considered whether a structured settlement was subject to the rule in ***Saunders v. Vautier***. The Court allowed the applicant to invoke the rule. The Court terminated the trust and ordered the distribution of assets to the applicant, who was an adult capacitated beneficiary. The Court found that the mere fact that the trust was "set up by court order" gave it "no special quality" that would bar the application of the rule.

Hubbard v. Hubbard, [2005] O.T.C. 488, 140 A.C.W.S. (3d) 216 (On. Sup. Ct. J.)

[21] Similarly to ***Grieg***, this case dealt with the ability of an adult beneficiary to invoke the rule in ***Saunders v. Vautier*** and terminate a trust established by a structured settlement. In this

case, the central issue was whether the applicant had the capacity to consent to the termination of the trust. The Court found that the applicant was sufficiently capacitated to manage his own financial affairs, and thus ordered the termination of the trust. As in ***Grieg***, the origins of the trust did not bar the application of the rule in ***Saunders v. Vautier***.

Re Campeau Family Trust (1984), 44 O.R. (2d) 549, 4 D.L.R. (4th) 667 (Ont. H. Ct.), aff'd (1984), 50 O.R. (2d) 296 (Ont. C. A.)

[22] This case concerned the application of the rule in ***Saunders v. Vautier*** to the adult capacitated beneficiaries of a family trust. The intention of the settlor was to allow the trustees to manage the trust for the benefit of the four adult beneficiaries until they attained the age of 35, at which point they would have their share of the capital transferred to them. The applicant beneficiary, who was at the time 30 years old, asked the Court for clarification on whether the rule in ***Saunders v. Vautier*** would allow him to obtain his share of the trust in advance of attaining the required age. The Court found that the rule did not apply, and the applicant beneficiary was unable to have his share of the trust property transferred in advance of his 35th birthday. The trust instrument contained the following section:

> 5(a) The Trustee shall keep invested the share of each child and shall pay so much of the income arising therefrom or the capital thereof as he shall, in his sole and uncontrolled discretion deem advisable until such child attains the age of thirty-five years whereupon his or her share, or the amount remaining shall be paid or transferred to him or her, any income not so paid or applied in any year to be added to the capital and dealt with as part thereof;
>
> 5(b) In the event that any child shall become entitled to a share of the Trust Estate in accordance with the provisions of this Article and shall die before attaining the age of thirty-five years, then and in that event his or her share shall form part of his or her estate and shall be dealt with as part thereof.

[23] Paragraph 5(b) created a "gift over" to the estate of each beneficiary in the event that the beneficiary died before reaching 35. The Court held that the rule in ***Saunders v. Vautier*** must be narrowly applied, and is only applicable in cases where the beneficiaries hold an absolute indefeasible beneficial interest. While the applicant's beneficial interest in the trust had vested, the presence of a "gift over" to the estate of the beneficiary meant that his interest was defeasible. Since he did not hold an indefeasible interest, the ***Saunders v. Vautier*** did not apply. The Ontario Court of Appeal, giving only brief reasons, endorsed the decision of the lower court.

[24] I conclude the rule in ***Saunders v. Vautier*** may apply to the order I have made but there is some discretion vested in the Court into whether it will collapse the trust, and of course the application must be made to the Court.

Parens Patriae

[25] I have also considered ***Re Eve***, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1; ***Re Seaman*** (1998), 151 D.L.R. (4th) 337, [1998] 1W.W.R. 353 (Alta. Surr. Ct.); ***R.R. v. Alberta (Child Welfare Appeal Panel)***, 2000 ABQB 1018, 80 Alta. L.R. (3d) 338. Basically the *parens patriae* jurisdiction is founded on necessity and can only be exercised in protecting those who cannot protect themselves. In this case there is no gap in the legislation and in my view the legislation provides the necessary authority to make the order which I have made and there is no necessity to invoke the *parens patriae* jurisdiction of the Court.

[26] Order accordingly.

Heard on the 18th day of May, 2010.
Dated at the City of Edmonton, Alberta this 24th day of June, 2010.

R.P. Marceau
J.C.Q.B.A.

Appearances:

Jacklynn Pivovar
for the Applicant

Craig W. Paterson
for the Estate of D.R.S.

Beverly McNally/Kim Villella
for the Public Trustee

Corrigendum of the
of
The Honourable Mr. Justice R.P. Marceau

In the style of cause, the words "Dependent Adult" have been changed to "Estate".

TAB 10

Samoil v. Samoil, 1999 ABQB 766

Date: 19991018
Action No. 9903 08790

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

BETWEEN:

IRMGARD SAMOIL

Applicant

\- and -

DEANNE NICOLE SAMOIL, DAVID MICHAEL SAMOIL,
ERIK EDWARD SAMOIL, NORMAN LEWIS WITTEN
EXECUTOR OF THE ESTATE OF EUGENE BUOB, DECEASED,
AND THE PUBLIC TRUSTEE FOR THE PROVINCE OF ALBERTA

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE LEE

A) FACTS

[1] The facts of this case are set out in detail in my written Reasons of June 30, 1999, wherein I returned an issue fundamental to the Court's jurisdiction to the Applicant for further documentation, that now has been satisfactorily provided.

[2] The essential facts are the following. The testator, Eugene Buob, signed a will in 1980. He died in 1984. His will provided, *inter alia*, that 70% of the residue of his estate be held in trust, and the net income paid to his daughter, Irmgard Samoil during her lifetime, with a gift over on her death to Eugene Buob's grandchildren alive at the date of Ms. Samoil's death in equal shares, any deceased grandchild's share to go in equal shares to that granchild's children alive at the time of their parent's death. There was a further gift over in the absence of such

beneficiaries, to the children of his friend, Joseph Schille, in equal shares. All adult beneficiaries consented to the application, as did the Public Trustee. Ms. Samoil has three children, all in their child-bearing years, and one granchild.

[3] The Applicant, Irmgard Samoil, has requested the Court's approval of a proposal which would vary the trust. Although the language of the Applicant's brief seems to contemplate a continuation or resettling of the trust (the interest in which is eventually assigned to Ms. Samoil), the Proposed Arrangement itself clearly contemplates termination of the trust, and not resettling (except for a relatively small amount which would be held in trust by the Public Trustee).

B) EVIDENCE

[4] The Affidavit of Irmgard Samoil, filed May 11, 1999 shows the "Assets on Hand" as decreasing from $682,136.19 as at July 31, 1992 to $622,826.22 as at July 31, 1998, with the most significant decrease occurring between 1994 and 1998. Ms. Samoil deposes that she is concerned that if the capital of the trust continues to shrink, the diminished capital amount will not provide adequate financial support for her during her lifetime and will not provide the financial support to her children and grandchildren upon her death as she believed was the intention of her father. She deposes that investments have been restricted to GICs which she believes limit the capital growth. She states that she believes that the trustee fees and expenses paid with every passing of account are diminishing the capital of the testamentary trust, and that the manner of investment undertaken by the Trustee is not keeping up with inflation. She states that one reason why her father prepared his will with a trust for her life was so that her spouse at that time would not be able to obtain any of the capital from an inheritance.

[5] The only evidence before the Court containing projections is the report of Ron Graham, financial advisor (which is Exhibit "A" to Ms. Samoil's Affidavit). Paragraph 22 of Ms. Samoil's Affidavit is an incomplete summary of Ron Graham's conclusions, as set out in his attached report. Ms. Samoil states in paragraph 22: -

> Ron Graham analysed the income that could be earned for my retirement and concluded as follows:
>
> 22.1 If the trust was not terminated and the trust continued with trustee's fees and expenses in a similar manner as is now being managed, ***my retirement income will remain level by age 90 and the capital will shrink to approximately $60,000 by age 90.***
>
> 22.2 If the trust was terminated and I managed the money myself using the same kinds of investments as the Trustee, and did not incur the trustee's fees and expenses, my retirement income would increase slightly by age 90 and the capital would grow to approximately $775,000 by age 90.

22.3 If the trust was terminated and I managed the money myself by following the investment strategies recommend (sic) by the financial planner, and did not incur the trustee's fees and expenses, my retirement income would more than double by age 90 and the capital would grow to approximately $1,400,000 by age 90. [*Emphasis Mine]*

[6] This account is not complete in my respectful opinion. On page 12 (unnumbered) of Ron Graham's report, he states:

> As you can see, to be able to spend a modest amount during retirement, you will have to draw down on your investment capital. If you live to age 90, your own investments would decline to about $60,000. ***Your trust fund would still hold its value of $600,000.*** If you needed to spend more than $25,000, your own funds would be drawn down to $0.
>
> If you spend less than $25,000, your funds would maintain their value or grow.
>
> Capital remaining at end of planning period $60,161.
>
> [*Emphasis Mine]*

[7] He describes the second scenario on page 18:

> As you can see, reducing the fees associated with the Trust Fund has a substantial long term impact on your ability to meet your retirement goal of spending $25,000 annually. Even though the rate of return on your funds is 4% rather than 5% on the Trust Fund in the first scenario, you come out ahead because of the substantially lower fees.
>
> If you wanted to spend more than $25,000, you could draw down some of your capital to do so. If you spent $30,000 annually, your funds would decline by about $250,000 to $531,000.
>
> If, as you got older, you spent less than $25,000 your capital would grow and your children would inherit a larger estate than if you maintained the Trust Fund.
>
> Capital remaining at end of planning period $775,816.

[8] And the third scenario is set out on page 24:

> If you manage your investments for a higher return, there is a much larger estate left for your children and grandchildren than if you maintain your current investment mix and Trust Fund. You could also spend more while you are alive. This could include giving money away to your children prior to your death.
>
> Capital remaining at end of planning period $1,405,387.

[9] Thus Ron Graham's report contains three scenarios: 1. Maintaining the *status quo;* 2. Terminating the trust and maintaining the *status quo* on the type of investments, thus saving trustee fees and associated expenses; 3. Terminating the trust and taking a more aggressive investment approach.

[10] In the first scenario, the trust would not be terminated, and therefore in addition to the $60,000 representing Ms. Samoil's own assets at 90 years of age, the trust fund would hold its value of $600,000 to that time. In the second scenario, Ms. Samoil would save trustee fees. The capital of her estate (including funds previously held in trust) would grow to $775,816 by her 90th year, using investment strategies similar to those employed by the present trustee. In the third scenario, Ms. Samoil would manage the investments more aggressively. Ron Graham's third scenario figures are obviously premised on the assumption that she would obtain better returns by investing more aggressively. He projects growth of her estate capital to $1,405,387 by the age of 90. In all three scenarios, Ms. Samoil would maintain annual living expenditures of $25,000. Obviously, in the latter two scenarios, she might draw on capital to varying extents to supplement her income if she so desired, without depleting the original projected trust fund amount.

[11] Ron Graham's report shows trust expenses of $11,000 per year for accounting, legal and executor fees. The trust must earn 2% per annum to cover those expenses out of revenue. At 6% per annum, assuming the expenses were paid from trust revenue, Ms. Samoil would receive $24,000 net income from the trust, which is very close to the $25,000 used as a benchmark income for Ms. Samoil in Ron Graham's report. Ron Graham projects 5% earnings if the Trust Fund remains as it is. Further, as is obvious from the report, Ms. Samoil will not depend entirely on income from the trust for her own support over the period of time considered in the report.

[12] Ron Graham states in his report that Ms. Samoil has done a very good job of accumulating and retaining her personal investment capital, and that she has been very conservative in her investments. According to the information contained in Ron Graham's report and the Cohabitation Agreement referred to below, Ms. Samoil is far from impecunious at the time of this application.

[13] The Affidavit of Norm Witten, executor, filed May 21, 1999, states that the estate has been, at times, complicated and time-consuming. He deposes that the testator wanted to look after his daughter's needs but felt that her husband was not trustworthy, and that Ms. Samoil was not strong in her financial management skills. Norm Witten followed a conservative investment strategy, comparing rates and discussing investment choices with Ms. Samoil. He deposes that the reduction in the capital of the trust is in large part due to Ms. Samoil's desire to have the expenses of the Trustee paid out of capital rather than her income, which has been an issue on passing of accounts since 1990. He disagrees with the Applicant, in that the manner of investment undertaken by him does keep up with inflation, and the Trust continues to make reasonable returns. Although investment returns have declined, the investments are more than adequate to meet expenses. Finally, he indicates that one GIC in the sum of $286,768.71 does

not mature until February 1, 2000, and has an interest rate of 9.375%, and that it may be impractical to either cash that GIC or change ownership at this time.

[14] Under the Proposed Arrangement, the trust would be terminated, the trust capital would vest in the three children pursuant to the terms of the will, the three children's interests would be assigned to Ms. Samoil, and Ms. Samoil would pay $50,000 to the Public Trustee on trust for her grandchildren for her lifetime, the remainder of the funds to be divided equally amongst her grandchildren upon her death. She would also maintain a life insurance policy in the amount of $70,000 with an irrevocable designation of her children as beneficiaries, with a gift over to her grandchildren in the event a child predeceases Ms. Samoil.

[15] All adult beneficiaries, including those with contingent interests, have consented in writing to the Proposed Arrangement, as has the Public Trustee.

[16] There is a Cohabitation Agreement before the Court signed by Ms. Samoil and her common law spouse, wherein the said spouse disclaims any interest in the trust fund monies.

[17] There is no information before the Court as to what tax ramifications, if any, would flow from a termination of the trust and transfer and assignment of the monies in the manner suggested. Nor is there any evidence as to the terms of the insurance policy which is part of the Proposed Arrangement, nor any actuarial evidence as to the value of the contingent interests of Ms. Samoil's grandchild and any unborn grandchildren.

C) ANALYSIS

[18] Subsection 42(5) of the ***Trustee Act*, R.S.A. 1980, c.T-10** sets out the various persons on behalf of whom the Court may consent to an arrangement. Subsection 42(7) requires that the Court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

a) Is the Arrangement for the benefit of each person on behalf of whom the Court may consent?

[19] D.W.M. Waters, in ***Law of Trusts in Canada***, 2d ed. (Toronto: Carswell, 1984) at p.1069 states that the idea of variation of trusts legislation (such as the provisions regarding variation of trusts in the ***Trustee Act***) is that those who are adult and mentally competent have the right and the consequent obligation to look after their own interests. The Court's role is to consent where it is satisfied that the arrangement is to the benefit of those who cannot consent. Some general benefit or good to most concerned is not sufficient: ***Re Assie Estate* (1985), 45 Sask.R. 124 (Q.B.)** at p.128. Thus, the first step in this case is to determine whether the Proposed

Arrangement is to the benefit of the grandchild, and any unborn grandchildren, and whether that benefit is sufficient.

[20] Stevenson J. in ***University of Alberta* v. *Alberta* (1979), 11 Alta. L.R. (2d) 26 (Q.B.)** adopted the formulation of the appropriate test from the decision in ***Re Tweedie* (1975), 64 D.L.R. (3d) 569** (B.C.S.C.) at p.573 as being whether or not a prudent and well-advised beneficiary would consent. Likewise, ***Waters, supra***, states (at p.1079) that the beneficiaries on whose behalf the Court approves must not only gain something more than the trust under consideration gives them; the arrangement must reflect such a bargain as an adult and capacitated beneficiary would have consented to in view of the interest he was giving up.

[21] It is noteworthy that incapacitated beneficiaries in these situations are in strong bargaining positions (since the capacitated beneficiaries who most likely obtain substantial benefits for themselves under the variation cannot obtain these benefits unless the assent of the incapacitated beneficiaries is obtained), and that the Courts will consider this leverage in relation to the other participants in the bargaining in considering the benefit to the incapacitated beneficiaries: ***Re Irving* (1976), 11 O.R. (2d) 443 (H.C.J.)**, W.A. McTavish, R.R. Anger, ***"Variation of Trusts: The Official Guardian's View"* (1963), 45 Can. Bar Rev. 181** at 132, p.152.

[22] "Benefit" as used in the ***Act*** is not limited to financial benefit. However, ***McTavish, supra,*** (p.157) states:.

> Providing wealth to that person's ancestors and similar matters of non-financial benefit may be placed in the balance by the Court, but...such non-financial benefits cannot outweigh the financial detriment to the incapacitated beneficiary. It must be more than compensated for by a financial benefit. And such non-financial considerations cannot stand alone as the only "benefit".

[23] Although the foregoing passage reflects the state of the law in Ontario, it is observed that the Ontario legislation and test used by the Courts with respect to the requirement of a "benefit" are substantially the same as those in Alberta. The same writers note that the cases suggest that actuarial evidence is simply one factor to be considered by the Courts, and that the Courts have required between five and ten thousand times the actuarial value of an interest in order to be satisfied of a benefit (p.152).

[24] Despite the limited weight of actuarial evidence, in its absence it is very difficult to ascertain the value of the interest the grandchildren, alive and unborn, are asked to give up. Ms. Samoil is presently 62 years of age. Her three children are in their early thirties. It is not out of the question that one of the children would predecease Ms. Samoil. However, given the facts as stated, I am prepared to accept that such a possibility is remote. The fact that it is remote does not alleviate the Court's duty to ensure that the beneficiaries on whose behalf it consents gain something more through the Proposed Arrangement than under the trust. However, the potential loss to the beneficiaries is obviously less significant where the interest is contingent and remote.

[25] According to the first projection outlined in Ron Graham's report, on Ms. Samoil's death and assuming all three children are alive at the time or have died leaving children, each child (or his or her offspring) would be entitled to $200,000 (or $220,000 if Ms. Samoil bequeaths her remaining estate to her children in equal shares with gifts over). Under the Proposed Arrangement, each child (or his or her offspring) would be entitled to $23,000, being one third of the insurance proceeds, plus whatever Ms. Samoil bequeathed to them from her personal estate.

[26] In addition, any grandchildren would share the remainder of a $50,000 trust. Thus, if no further grandchildren are born, the existing grandchild would receive approximately $73,000 (assuming the $50,000 trust does not increase or decrease greatly in size) plus an unascertained share of Ms. Samoil's estate. If more grandchildren are born, obviously the potential benefit would decrease. It is clear that this is just one fact scenario, and the possible permutations are seemingly endless. However, it is not the task of this Court to engage in any actuarial analysis of its own, and the foregoing appears to be one of the most likely scenarios on the evidence.

[27] What the Court must consider is whether the grandchildren (alive and unborn) gain something more through the Proposed Arrangement than a remote, contingent interest in their parent's share. Aside from the valuation problem already mentioned, the answer to that question depends largely on two unknowns: 1) how well the funds presently in the trust do under Ms. Samoil's management, and 2) how Ms. Samoil eventually disposes of her personal estate. It may be safe to assume that Ms. Samoil will provide generously in her will for her grandchildren, and the consent of the adult beneficiaries to this Arrangement satisfies me that those closest to her repose their trust in Ms. Samoil that the Arrangement will eventually result in a benefit at least to them.

[28] ***McTavish, supra*** summarizes the reasoning with respect to this issue (pp.158, 159):

> There can be a benefit to an incapacitated living beneficiary by providing wealth to that beneficiary's ancestors which would allow, say, a parent to provide his children with a better upbringing, better living accommodation, better education, etc., because the parent has received money while still young and most in need of it to raise a family. Pennell J. carefully considered such an argument in ***Re Irving***, inquiring into the ages and financial resources of the parents and the ages and prospects of their children, and concluded that a "benefit" to the parents' children "may be inferred from the proposed arrangement. Yet I hesitate to lay emphasis upon this form of 'benefit'". Russell J., in ***Re Tinker's Settlement***, [[1960] 3 All E.R. 85 at p.87]was even more definite:
>
> > In a broad sense, so the argument runs, it would be beneficial to the sister's children as members of the family viewed as a whole that something which was reasonable and fair should be done. I cannot apply the jurisdiction under the Variation of Trusts Act, 1958, in that broad way. Although it may very well be that one can throw that kind of consideration into the scale beside a financial

> benefit which has already been established, yet one cannot regard that sort of consideration as a benefit in itself.

His Lordship concluded that, although he himself would be only too pleased if he were able to approve the proposed variation, he simply did not have the jurisdiction to do so under the language of the Act.

Ruttan J., in ***Kunatar, Kunater and Kunater* v. *Royal Turst Corp. of Canada*** [(1980), 23 B.C.L.R. 287 (S.C.) At p.291] has put his finger on the logical flaw in this argument that it benefits children to make their parents richer sooner on the ground that the parents will be able to use the funds to benefit their children. In that case it was argued that the trust fund could be exhausted by exercise of a power of encroachment to the sons before their unborn issue could have any opportunity to take. The Court rejected that argument as Courts have generally rejected such "exhaustion" arguments. The other argument was that the sons would be able to use the money conferred upon them by the variation to benefit, not only themselves, but any children they might subsequently have. In refusing approval, Ruttan J. said:

> But this suggested "benefit" is no more than an obligation which exists on the sons as on any parent, by common and statute law. To discharge these parental obligations, by using the trust fund vested in the issue, can hardly be said to be a benefit to the issue.

[29] Courts occasionally have nevertheless been willing to infer a benefit to grandchildren where the parents receive a benefit, although in some of those cases consideration has been given to representations by parents and grandparents that they will make appropriate provisions in their Wills: see, for example, ***Re Riddalls* (1983), 24 Sask. R. 16 (Q.B.).** In at least one case, however, the Court did not accept a covenant or undertaking to make payments in the absence of insurance, even by a prominent and wealthy person: ***Re Nathanson* (1981), 9 E.TR. 256 at 271 (N.S.S.C.).** As was stated in ***Re Assie Estate, supra*** (p.128):

> As well as the nature of the benefit being clear, it should be somewhat certain that it will in fact accrue to the beneficiaries on behalf of whom consent is sought. This is not to demand absolute certainty. Risk of some kind is inherent in every application under the Act. On the other hand, the Court cannot be altruistic at the expense of beneficiaries for whom it is asked to consent. The Court does not have unlimited licence in dealing with the rights of infants and unborn persons.

[30] Here, no representations have been made with respect to the eventual disposition by Ms. Samoil or her children of their estates.

[31] As to how the funds presently in the trust would do under Ms. Samoil's management, Ron Graham's report indicates that Ms. Samoil has achieved a degree of success, using very

conservative investment strategies, in managing her personal estate. His second scenario contemplates growth as a result of reduced fees and expenses relating to the trust. Given Ms. Samoil's successful conservative investments in the past, such growth is very possible. However, the increased overall benefit is not significant, increasing the three equal shares on her death to $260,000 each, nor is it without risk.

[32] The third scenario contemplates a more aggressive approach to investment. There is nothing before the Court to indicate that Ms. Samoil would be successful in managing investments more aggressively, nor that she could do so with less expense than the present trustee, and therefore the Court can only speculate as to whether the funds would increase or diminish under such management. Thus, while it is entirely conceivable that simply reducing fees and expenses would result in an increased benefit to the grandchildren, there is much greater risk in terminating the trust if Ms. Samoil takes a more aggressive approach to investment.

[33] The Court is cognizant of the fact that under the Arrangement the grandchildren would share in the remainder of the $50,000 trust upon Ms. Samoil's death, regardless of whether their parent has predeceased. Furthermore, the grandchildren may be entitled to funds for their maintenance, education, benefit or advancement from the trust prior to Ms. Samoil's death. These are real and certain benefits not available under the present trust.

[34] As in ***Assie Estate v. Assie* (1985), 42 Sask. R. 262 (Q.B.),** there are two courses the Court could take:

> a) Deny approval with the grandchildren and unborn retaining their contingent interest in the estate. If their parent does not survive Ms. Samoil, they will share in the estate *per stirpes.* If their parent survives Ms. Samoil, they have no interest in the estate and will only benefit, if at all, through their parent.
>
> b) Grant the approval with the grandchildren losing a good portion of their interest in the assets and benefitting, if at all, through their parents.

[35] The Court in ***Assie Estate* v. *Assie, supra*** compared the facts in the case before it to those in ***Re Riddalls,*** noting *inter alia*, that the Riddalls trust tax saving was $250,000, whereas in ***Assie*** it might be only an annual saving of $12,500. The Riddalls trust tax saving was reasonably certain whereas in ***Assie*** it was speculative. In ***Riddalls,*** a real psychological, emotional and family benefit would result from the lifting of a financial burden from a member of the family, whereas in ***Assie*** there was no hint of a like problem or result. In ***Riddalls*** both the widow and the son and daughter had indicated their intention to protect the interests of the grandchildren and had arranged to include in their present wills terms protecting the grandchildren, whereas in ***Assie,*** there was an affidavit of the widow bearing on her estate and will but no word from others. The application was dismissed, but without prejudice to renew with additional material.

[36] Considering the same factors, the following observations may be made in the present case. The trust is at no great risk of decimation, according to Graham's report. A small benefit is

reasonably certain, but a larger benefit is speculative, and entails a greater risk. There is no suggestion of a non-financial benefit flowing to the grandchildren from the Proposed Arrangement other than the immediate increase in Ms. Samoil's personal estate. There is no assurance from Ms. Samoil, nor her children that the grandchildren will inherit a portion of what are presently the trust funds.

[37] An additional factor in the present case is the face value and nature of the insurance policy in this case. ***McTavish, supra*** (pp.153-155) suggests that insurance funding in such cases should be by way of a single premium policy, containing an irrevocable designation, with no provision permitting conversion, cancellation or any optional settlement other than payment of cash on the death of the life insured, non-assignable, unamendable, and containing a statement by the insurer that it has accepted proof of age, sex and status as a non-smoker and that it will not rely upon any such conditions. Further, the Court should not allow any disposition of property or any other acts under the variation to occur which could prejudice the incapacitated beneficiaries until the operative period of the suicide clause has elapsed. Payment of the single premium and any other administrative expense related to the insurance policy should be paid by a capacitated beneficiary or taken out of a share in the trust in which only capacitated beneficiaries are interested. This Court has before it the Irrevocable Beneficiary Designation, but not the terms of the insurance policy, thus it is difficult at this juncture to receive sufficient comfort from the Irrevocable Designation itself, as to the various issues raised above.

[38] The amount of the insurance also merits consideration. In ***May* v. *May* (1994), 96 Man.R. (2d) 268 (Q.B.),** Beard J. compared proposed insurance proceeds to a maximum bequest under the will in assessing benefit to those with contingent interests. In that case, the insurance proceeds exceeded the amount of a maximum bequest under the will, which was a factor taken into account by the Court in allowing the proposal. Here, the insurance proceeds along with the $50,000 trust do not come close to the amount of a maximum share of the trust. Nor does the Court have before it actuarial information which would facilitate a comparison on that basis.

[39] Taking into account the bargaining position of the grandchildren, and all of the foregoing factors, it would be unreasonable to conclude that the Arrangement is one to which a prudent and well-advised beneficiary would, at this time, consent. Some of the weaknesses in the Applicant's case with respect to this first requirement might very well be remedied by additional evidence. (Perhaps the Public Trustee was persuaded to consent to this application by information which is not before the Court.) Even if that were the case, however, I have serious reservations with respect to the second requirement of the ***Act.***

b) Is the Arrangement, in all the circumstances otherwise of a justifiable character?

[40] The second step in the analysis under s.42 of the ***Trustee Act*** is whether the Arrangement is of a justifiable character. ***Waters, supra***, at pp. 1081, 1082 states:

> Though the Court does not have to consider the benefit of the arrangement to the

> adult and capacitated, and is prepared to give its consent on behalf of those who cannot consent for themselves, it may still withhold its approval if it considers that it should do so. The jurisdiction cannot be described more narrowly than that, because it is entirely a matter of judicial discretion.

[41] The factors to be considered by the Court with respect to the requirement of "fitness" (or "justifiability" in Alberta) include: the purpose of the variation, the views of the trustees and the intention of the founder of the trust: D.G. Fuller, ***"Modification and Termination of Trusts", Law Society of Upper Canada Special Lectures 1980***, at p.137.

[42] The intentions of the testator are to be determined in light of the circumstances existing at the time of execution of the will. It is safe to assume that the intention of the founder of the trust was to provide for his daughter, Ms. Samoil, during her lifetime, with the residue eventually going to his grandchildren, or their children in the event they predecease Ms. Samoil. Ms. Samoil has stated that she was married to a man whom her father considered untrustworthy in 1980 at the time of execution of the will, and that her husband was incarcerated at the time of their divorce in 1982. However, the testator did not die until 1984, and took no steps to change the will in the intervening time after the divorce. Therefore it is conceivable that he had other concerns in his mind.

[43] It is also relevant that the testator in this case was an experienced businessman, who had undoubtedly experienced the normal fluctuations in the economy, and who would have understood that trustee fees and associated expenses would be payable in relation to the trust, and understood the difficulties associated with managing a large estate in an effective manner.

[44] Norm Witten, the present trustee, is an experienced lawyer who provided legal services to the testator for many years. He deposed to the fact that the trust fund has been producing reasonable returns, that the trust has at times been complicated and difficult, that he has consulted Ms. Samoil with respect to investments, and that Ms. Samoil has taken issue with the fees and expenses being deducted from the income. He attributes the reduction in the trust capital to a large extent to Ms. Samoil's insistence that the fees be paid from the capital.

[45] While Norm Witten's experience and qualifications are not questioned, his lack of defence of the trust in his role as trustee in this case is somewhat unusual. Other than stating the obvious, that it is the duty of a trustee to maintain or propound the trust and defending aspersions cast on his management of the trust, the position taken by the Trustee has hardly been neutral.

[46] The Trustee may be motivated by the circumstances described in my Reasons in The Matter of the Estate of Buob issued concurrently with these Reasons which deals with the Application by the Trustee to pass accounts, or perhaps by the Trustee's express stated desire to be relieved of his trusteeship responsibilities irrespective of the outcome of this Application for variation/termination.

[47] In any event, the Court finds itself in the rather difficult position of having no

submissions from any party opposite in interest, as the Trustee and the Public Trustee essentially are very supportive of the Applicant's position. The Court therefore has a general and specific duty in this case not to abdicate its responsibilities.

[48] Ms. Samoil, in her Affidavit, expressed concern over the future of the trust. She expressed concern that if the capital continues to shrink, the diminished capital amount will not provide adequate financial support for her during her lifetime, nor to her children and grandchildren upon her death. However, the report she produced as Exhibit "A" of her Affidavit (Ron Graham's report) projects a sustained value for the trust until Ms. Samoil reaches the age of 90. Ron Graham's report shows that if the trust remains in place, Ms. Samoil can survive to 90 with some limited assets to spare, assuming annual living expenses by her of $25,000 per year. The trust in that scenario would maintain a value of $600,000.

[49] Thus, on Ms. Samoil's own evidence, there is no pending threat to the trust. Further, there is no significant evidence that the trust has not been properly managed as discussed in my Reasons in Re Buob Estate. However, inherent in the Applicant's submissions is the assumption that Ms. Samoil could obtain better returns at less expense than the present trustee. In response, I find the following excerpt from ***Re Assie Estate, supra*** (pp.127,128) to be apt:

> The public trustee says, quite simply, if there is a management problem change the management. Let the trustee applicant resign and Albert Assie or someone else continue. It is not necessary, it is said, to terminate the trust to deal with a management problem. It is not necessary, it is said, to extinguish contingent rights to deal with a management problem. There is merit in this new argument of the public trustee. It is an important consideration.

[50] Ms. Samoil's concerns relate to the trustee fees and the conservative approach to investment taken by the trustee, despite his consultation with Ms. Samoil. There is no indication that the trust structure itself is the problem.

[51] There is insufficient evidence to persuade the Court that Ms. Samoil could obtain better returns than the present trustee has obtained. There is no evidence as to her real experience with investments, other than Ron Graham's general comments. Ms. Samoil has pushed to have trustee fees taken out of capital. She is not impecunious. With respect, this may not necessarily bode well for her preservation of the capital of the original fund should she be managing the entire amount without restriction.

[52] Ms. Samoil can realistically expect to save fees and expenses relating to administration of the trust through the Proposed Arrangement. While this is a significant saving, representing $11,000 per year, I have found no example in the case law of an application which extinguishes contingent interests succeeding on the grounds that the applicant wishes to avoid trustee fees.

[53] These fees and expenses where reasonable are a normal, expected part of the trust which the testator established and intended. Certainly this testator, with his extensive business

experience, was aware of the financial ramifications of establishing a trust. If the Courts on such applications were to terminate every trust which is subject to market fluctuations and trustee fees, there would be no point in testators establishing trusts in the first place.

[54] Also, any significant increase in trust fund capital as outlined in Ron Graham's report would result from more aggressive investing. Such an approach might result in an increased capital, or it might result in a depletion of capital. This Court can only speculate as to whether the fund would increase under Ms. Samoil's management.

[55] There are other concerns which come to mind. The potential for strife in this family could greatly increase under the proposed arrangement. For example, there would likely be negative repercussions if the fund does poorly. Further, Ms. Samoil may be subject to pressure from one or more children to encroach on capital.

[56] Also, no information has been provided with respect to tax implications of terminating this trust in this manner.

[57] The Cohabitation Agreement between Ms. Samoil and her common law spouse is of limited comfort, as it may be superseded by subsequent agreements. As well, Ms. Samoil may wish to benefit her common law spouse and his family through her will.

[58] This case cannot be likened to those cases where the trusts were subject to certain significant tax liabilities, such as in ***Re Riddalls, supra,*** or ***Hasick* v. *Henderson Estate* (1991), 77 Man.R. (2d) 91 (Q.B.)**. The Court in ***Re Assie Estate, supra*** (p.128) found:

> There is no immediate danger [of depletion through a tax problem]. There is here no hint of a family problem or dissension to be dealt with. It is true that there is a theoretical or remote possibility of increased benefit to grandchildren and the unborn through tax saving and management efficiency, but it does not balance let alone exceed the detriment arising from the direct and final loss of existing contingent interests.

[59] Similarly, in ***Salt* v. *Salt Estate* (1986), 71 A.R. 161 (Q.B.)** the Court held (p.168):

> There does not appear to have been any exceptional change in circumstance of any of the beneficiaries and there does not appear to be any compelling administrative or tax reason for the proposed arrangement. I can find no persuasive reason for interfering with the terms of the trust established by the testator and accordingly, I dismiss the application.

[60] To conclude the foregoing analysis, it is the respectful opinion of this Court that the evidence before it at this time does not adequately demonstrate that the Proposed Arrangement is to the benefit of the contingent beneficiaries, nor that it is "justifiable". There are less draconian

means available to change the management powers of the trustee. The Application is accordingly dismissed, without prejudice however to the Applicant to renew the same, using materials filed in this application and additional materials.

DATED at Edmonton, Alberta this 18th day of October, 1999.

J.C.Q.B.A.

APPEARANCES:

Philip J. Renaud; Duncan & Craig
Solicitor for the Applicant

Marta E. Burns & Audrey A. Wakeling; Witten Binder
Solicitors for the Executor/Trustee

Jack Hoffman; Office of the Public Trustee
Guardians of the estates of any minor beneficiaries and unborn beneficiaries of the Estate of Eugene Buob, deceased

TAB 11

Court of Queen's Bench of Alberta

Citation: Berry Estate (Re), 2016 ABQB 58

Date: 20160126
Docket: ES03 133313
Registry: Edmonton

Court File Number	ES03 133313
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial Centre	Edmonton
Estate Name	A.B.
Applicant	C.D.
Respondents (Personal Representatives)	E.F. G.H.

Restriction on Publication

Pursuant to the provisions of section 126.2(1) of the *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, the names of the parties have been anonymized to prevent the identification of a child who has received intervention services.

Endorsement
of the
Honourable Madam Justice J.B. Veit

[1] In morning chambers, invoking the provisions of s. 42 of the *Trustee Act*, the adult life tenant beneficiary of a will asks the court to terminate the trust provisions relating to her share in her late mother's will.

[2] The application is allowed.

[3] The publication ban, which was issued in 2013, was presumably authorized, at least in part, because of the reference to the remainderwoman's status as a ward of the state.

[4] The will appoints the applicant as executrix of her late mother's will and as trustee of the trusts created under the will. After making specific bequests to her children and grandchildren, the testatrix's will goes on to state that the residue of her estate shall be dealt with as follows:

> I direct the residue of my estate be divided into three (3) equal shares and to pay or transfer one (1) such share to each of my children, subject to the following trusts:
>
> . . .
>
> To invest and keep invested the share of my daughter, C.D., subject to the following trusts:
>
> (a) Income Distribution
>
> My daughter, C.D.., is to receive the income from her share, <u>subject to encroachments</u>, on a yearly basis until her death, at which time <u>the remaining capital</u> of her share, and any income earned thereon, shall be distributed as follows:
>
> 1. To divide the remaining capital of her share, and any income earned thereon into equal shares and to pay or transfer one (1) such share to each of her children (my grandchildren), subject to trusts established in Paragraph 1 below.
>
> . . .
>
> [Emphasis added]

[5] The shares of the residue to be given to each of the testatrix's other two adult children were also subject to trusts pursuant to which those adult children were also to receive the income from their shares, "subject to encroachments", in each of their cases until the happening of specified events. Each of those trusts has been vacated or terminated for public policy reasons; in the result, the applicant's siblings have each received the capital of the trusts created for them by the testatrix.

[6] In 2013, the applicant was replaced as the personal representatives of her late mother's estate by her two siblings; this change also makes the applicant's siblings the trustees of the life trust which has been set up for the applicant. This change was made at a time when the applicant was suffering florid mental health difficulties.

[7] There is now, and has been over the past years, considerable friction between the applicant and her two siblings. As personal representatives, the siblings state that they do not want to take an adversarial position, but do outline their concerns about granting the application.

[8] The amount in the trust which is held for the applicant is approximately $300,000.00. In 2015, the applicant received approximately $2,300.00 as the income from the trust, after expenses of approximately $3,000.00 were paid out from the trust. There might be small increases in the income of the trust in future years; the expenses of the trust are expected to remain approximately the same in the foreseeable future. Since the siblings have been trustees, no encroachments were made on the capital for the benefit of their sister and no encroachments were requested by the applicant.

[9] The applicant is employed and earns approximately $2,000.00 in net monthly income; she lives within her income, but describes her situation as living "from month to month". She would use any distribution from the trust to pay off her secured and unsecured lines of credit, to make improvements to the home in which she resides, and to purchase a vehicle.

[10] The applicant, who is 52 years old, and divorced, only has the one child, the remainderwoman on this application. The applicant has had significant mental health difficulties, which difficulties would have been known to her mother. By letter dated in mid-August 2015, the applicant's psychiatrist has provided the following information to the court:

> The above named is a patient under my care at the . . .Department of Psychiatry since April of 2005. Originally when I met . . . her appointments were much more infrequent but certainly in the last two years her appointments have been every two weeks and she is very diligent in coming for them. I understand that there is a question as to her ability to manage money in a trust that has been rightfully hers. I have no question as to . . .'s mental stability. She has worked diligently for over a year and a half, remodeled her house and lived very successfully since her daughter was taken out of her home. . . . has worked extremely hard to recover herself, being completely compliant with medications and with therapy. It has certainly paid off as there have been no signs of depression whatsoever. . . . has also been very appropriate in my estimation of the money that she earns and how she spends it. It is understandable that at her stage in life she would need the trust money particularly because of paying of her mortgage.

[11] The applicant's daughter, a 16 year old minor who apparently voluntarily left her mother's residence and became a ward of the state, is represented on this application by the Public Trustee. There is no information on this application about whether the state has requested child support from each of the child's mother, the applicant herein, and the child's father. In addition to being the remainderwoman in relation to the trust set up for her mother/the applicant, that grandchild of the testatrix is also the beneficiary of another testamentary trust into which the testatrix deposited the house and property in which the testatrix lived and, in addition, $10,000.00 earmarked for the maintenance of that house and property. That house is assumed to be worth approximately $300,000.00.According to the terms of the will, the testatrix's grandchild, the applicant's daughter, is to receive the trust when she attains the age of 30. On this application, nothing is known about the 16 year old's father, his financial circumstances, and the likelihood that he will be making provision for his daughter in his will.

[12] In addition to the applicant's daughter, the testatrix had three other grandchildren, each of whom received a testamentary bequest of $10,000.00. Those grandchildren would also

conceivably benefit from the trust created by the testatrix if the applicant's daughter did not herself apply to terminate "her" trust once she reaches the age of majority and did not reach the age of 30.

[13] Alberta's *Trustee Act* includes the following provisions:

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

. . .

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the

application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

[14] On behalf of the remainderwoman, and of one of the other grandchildren who would have an interest if the applicant's daughter did not obtain the benefit of the trust, the Public Trustee opposes the application because it is not in the interests of the remainderwoman.

[15] There is no doubt that the application is not in the interests of the remainderwoman: there is no guarantee either that the applicant will have an estate upon her death or that she will make her only child the beneficiary of her estate. I agree, as well, that a trustee must be even handed as between a life tenant and a remainderwoman. Nonetheless, even that duty is subject to the terms of the will.

[16] The terms of the will, as expressing the wishes of the testatrix, are indeed the most important factor in the court's decision. Although there has been some comment in Canadian case law to the effect that the intention of the settlor is not even relevant, much less material, to the determination of whether a trust should be terminated – see, for example, ***Russ v British Columbia (Public Trustee)*** (1994) 89 B.C.L.R. 92d) 35, the weight of the case law appears to remain that the wishes of the testator/settlor are to be taken into account – see, for example, ***Montreal Trust Co. v Krisman*** (1960) 24 D.L.R. (2d) 220.

[17] Here, as the applicant emphasizes, she was not only the beneficiary of the trust in question, but she was also the trustee of that trust. The personal representatives note that the will does not explicitly give to the trustee the power to encroach. However, in assessing the wording of the trust provision in its entirety, and, in particular relying on the phrase "remaining capital" in relation to the encroachments, I conclude that the testatrix did indeed intend to give to the applicant the unrestricted right to encroach upon the capital of the trust to make payments to herself. In this context, I refer to decisions such as ***Holgate v Sheehan Estate*** 2015 ONSC 259 for comment where the power of encroachment was limited in some way, for example, as to "proper support and maintenance"; in the situation here, there is no restriction whatever on the power of encroachment. In the same overall context, when the testatrix died in 2010, the applicant's daughter was living with the applicant. The testatrix would have had no concern about any special needs for her granddaughter; indeed, even as of the date of this application, the granddaughter in question does not appear to have any special needs. In any event, the granddaughter in question has been well provided for in this will by her grandmother. In the result, in the situation here, the testatrix intended to give to the applicant the right to fully encroach on the capital of the trust for whatever reason the applicant chose. This means, in effect, that, in perfect compliance with the will, the applicant might have left no remainder for her daughter. Indeed, given the very small returns available to the applicant from the income

alone, (the Bank of Canada overnight rate in September 2010 being one percent) it must certainly have been within the testatrix's assessment that substantial encroachments on capital would be made.

[18] The personal representatives observe that the testatrix obviously preferred the applicant's daughter to her other grandchildren; indeed, they state that the applicant manipulated their mother to advance the interests of her own daughter. In any event, as is pertinent to the effect on the granddaughter of terminating the trust, the court observes that, in the remainderwoman portion of the trust, the testatrix did not even specifically mention the granddaughter, or mention solely the granddaughter, even though the daughter who was the trustee under the will was divorced and was of an age where it was unlikely that she would bear other children. In other words, the provisions of the will specifically creating a life interest in the applicant do not appear to have taken special account of the granddaughter.

[19] As to whether the application is premature, given the fact that no application for encroachment has been made, given the animosity between the applicant and her siblings, it is probable that any such application by her would lead to further litigation.

[20] The personal representatives express some concern about the applicant's ability to manage money. Although the applicant's psychiatrist has obviously misunderstood some aspects of the current situation – it is not correct, for example, for the psychiatrist to assume that the money in the trust is "rightfully" that of her patient – the psychiatrist's opinion suggests that the applicant would deal with the trust funds normally, i.e. she would presumably make the kind of good and bad decisions which adults typically make in relation to money which is under their control.

[21] In all of these circumstances, the court allows the application and approves the arrangement proposed by the applicant. That arrangement is of a justifiable character given the provisions of the will itself.

[22] The applicant asks the personal representatives for an accounting of the trust; I expect there will be no difficulty in providing that accounting, but if there is, the parties are at liberty to re-address the court on that issue.

[23] The costs of all of the parties will be paid from the estate.

Heard on the 15th day of September, 2015.
Dated at the City of Edmonton, Alberta this 25th day of January, 2016.

J.B. Veit
J.C.Q.B.A.

Appearances:

Helen R. Ward, Duncan & Craig LLP
for the Applicant

Christopher R. Head
for the Personal representatives

Stacy K. Hennings
for the Office of the Public Trustee

TAB 12

In the Court of Appeal of Alberta

Citation: Edmonton (City) v Alvarez & Marsal Canada Inc, 2019 ABCA 109

Date: 20190325
Docket: 1803-0050-AC
Registry: Edmonton

Between:

City of Edmonton

Respondent
(Applicant)

- and -

Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp.

Appellants
(Defendants)

- and –

Royal Bank of Canada

Not a Party to the Appeal
(Plaintiff)

- and -

Reid-Built Homes Ltd and Emilie Reid

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice R.A. Graesser
Dated the 21st day of February, 2018
Filed the 11th day of April, 2018
(2018 ABQB 124, Docket: 1703 21274)

[21] There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

[22] We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

[23] The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in *Royal Bank v Delta Logistics*, 2017 ONSC 368 at para 26:

> The whole point of a court-appointed receivership is that one person ... is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

[24] With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

[25] This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of

individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

[26] Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Appeal heard on February 7, 2019

Memorandum filed at Edmonton, Alberta
this 25th day of March, 2019

Authorized to sign for: Paperny J.A.

Greckol J.A.

Authorized to sign for: Khullar J.A.

Appearances:

H.A. Gorman, Q.C./A.M. Badami
for the Appellants

A. Turcza-Karhut/C.N. Androschuk
for the Respondent

TAB 13

Royal Bank v. Soundair Corp.
1991 CarswellOnt 205 | Ontario Court of Appeal | Ontario | July 3, 1991 (Approx. 21 pages)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

(3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

***Galligan J.A.* :**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

> (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
>
> (2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until

> the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re*

Beauty Counsellors , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids; evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement

dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or

that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from

its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFI was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to

indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

TAB 14

In the Court of Appeal of Alberta

Citation: Ernst & Young Inc. v. Central Guaranty Trust Company, 2006 ABCA 337

Date: 20061115
Docket: 0503-0014-AC
Registry: Edmonton

Between:

Ernst & Young Inc.

Appellant
(Plaintiff)

- and -

Central Guaranty Trust Company

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Adelle Fruman
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment/Orders by
The Honourable Mr. Justice W.E. Wilson
Dated the 8th day of February, 2001; Dated the 31st day of May, 2004
Filed on the 17th day of July, 2002; Filed on the 5th day of January, 2005
(Docket: 9203-20725)

Memorandum of Judgment

The Court:

I. Introduction

[1] In the mid 1980s, International Warranty Company Limited ("IW") sold extended warranties to automobile purchasers pursuant to agreements it had with several automobile importers (the "Importers"). Those warranties covered items not covered by the Importers' warranties for up to five years.

[2] At first, IW insured its warranty obligations. Later, it put some of the warranty monies it received into trust. IW deposited some of its warranty monies with Central Guaranty Trust Company ("Central Guaranty") pursuant to various trust agreements.

[3] The trust agreements contemplated that IW would draw down the trust funds to reimburse itself for the cost of repairs as it did warranty work. They also contemplated that, at the end of the warranty period, any trust surpluses would belong to IW.

[4] At some point, IW began withdrawing actuarially projected surpluses from the trusts. It also refrained on occasion from depositing warranty monies with Central Guaranty.

[5] IW stopped carrying on business in December 1987, leaving some warranty holders at risk. A receiver was appointed to determine the extent of IW's warranty obligations and make a recommendation to the Court regarding the most appropriate way to deal with the warranty holders (the "Receiver").

[6] Miller A.C.J. case managed the receivership. The Receiver filed a report and a series of orders were issued. As a result of the receivership proceedings, the Importers assumed most of IW's warranty obligations, the trust funds held by Central Guaranty were paid to the Receiver, the Receiver paid a substantial portion of the funds it received to the Importers, and the Receiver was authorized to bring an action against Central Guaranty to determine whether it had breached its obligations as trustee. Central Guaranty was involved in the receivership proceedings from the outset.

[7] In 1992, pursuant to Miller A.C.J.'s order, the Receiver commenced this action alleging breaches of the trust agreements by Central Guaranty. On the eve of trial, in May 2000, Central Guaranty amended its statement of defence to allege, for the first time, that the trusts were invalid for uncertainty. The Receiver replied that many orders had been made on the assumption that the trusts were valid and it was too late for Central Guaranty to raise a trust invalidity defence. The trial judge found the issue of the validity of the trusts was not settled by principles of *res judicata*, collateral attack or abuse of process. He also found the trusts invalid and determined no other form

of relief was called for. The Receiver appeals.

[8] Many grounds of appeal were raised. It is unnecessary for us to consider most of them because we conclude that Central Guaranty is precluded from attacking the validity of the trusts in this litigation.

II. The Receivership Proceedings

[9] In the report it prepared in March 1988, the Receiver made a number of recommendations. Those recommendations were based upon certain explicit assumptions, including an assumption that the trusts were valid. The Receiver's report estimated that IW owed its creditors (excluding the warranty holders) between $5.85 and $10.85 million, and that IW's unsecured creditors would recover nothing from IW because they had no access to the funds in trust for the warranty holders. Central Guaranty was given an opportunity to review and comment upon the Receiver's report before it was filed.

[10] In April 1988, Central Guaranty was made aware by its lawyers of the existence of a possible defence that the trusts were invalid. It did not, however, raise such a defence at that time.

[11] In June 1988, Miller A.C.J. directed that the following issues be tried: whether certain payments Central Guaranty made out of the trust funds were improper; whether Central Guaranty was required to repay any amounts it improperly paid out of the trust funds; and, who would be the beneficiaries of any monies Central Guaranty was required to repay (the "June 1988 Order").

[12] In July 1988, Miller A.C.J. made an order that accomplished a number of things (the "July 1988 Order"). The July 1988 Order approved an agreement which provided that the Importers would assume most of IW's warranty obligations in exchange for trust funds held by Central Guaranty. It also directed Central Guaranty to pay virtually all the trust funds it held to the Receiver, and the Receiver to pay most of those funds to the Importers. In addition, it varied the trusts so that: the rights vested in Central Guaranty as trustee were vested in the Receiver for the benefit of the Importers; the Importers replaced the warranty holders as beneficiaries of the trusts; and, upon the trusts' termination, any remaining trust funds would be paid to the Importers.

[13] Both Central Guaranty and Lloyds Bank, one of IW's main secured creditors, commenced appeals from the July 1988 Order. Those appeals were later abandoned as part of a settlement agreement reached between the Importers, the Receiver, Lloyds Bank and Central Guaranty.

[14] The trust funds were distributed pursuant to the July 1988 Order.

[15] In January 1992, Miller A.C.J. authorized the Receiver to bring an action against Central Guaranty on behalf of the warranty holders and their heirs, successors and assigns. The Receiver commenced that action in October 1992 alleging that, in breach of the trust agreements, Central

Guaranty made several improper payments to IW from the trust funds and consented, agreed or acquiesced to IW's failure to pay certain warranty monies into the trusts.

[16] In December 1992, Central Guaranty filed a statement of defence in which it admitted the validity of the trusts.

[17] In March 1995, Miller A.C.J. released Central Guaranty as trustee of the trusts and ordered the Receiver to act as trustee.

[18] Central Guaranty retained new counsel a month before the trial of the Receiver's action was scheduled to commence. Consequentially, the trial was delayed by three weeks. In May 2000, just before the trial commenced, Central Guaranty amended its statement of defence to allege, for the first time, that the trusts were not validly constituted because they lacked certainty of subject matter and objects. The Receiver replied that the issue of the validity of the trusts was *res judicata*, and that Central Guaranty's trust invalidity defence was a collateral attack on Miller A.C.J.'s orders and an abuse of process. It also asserted the trusts were valid and, in the alternative, claimed relief for breach of fiduciary duty and negligence.

III. Decisions Below

[19] The trial took place in two phases. The parties made submissions on liability in the first phase and submissions on remedies in the second phase.

[20] In the first phase decision, reported at 283 A.R. 325, 2001 ABQB 92 [Phase I], the trial judge concluded that the issue of the validity of the trusts was not settled by principles of *res judicata*, collateral attack or abuse of process. He also concluded that all but one of the trusts failed for lack of certainty of subject matter and objects, and that grounds were not made out for breach of fiduciary duty or negligence.

[21] In the second phase decision, reported at 365 A.R. 302, 2004 ABQB 389 [Phase II], the trial judge concluded that the one trust he had deemed valid in the first phase was an invalid purpose trust. Because he concluded all the trusts were invalid, the trial judge declined to consider most of the issues relating to whether the trusts had been breached by Central Guaranty and, if they had, what the appropriate remedies were.

[22] The trial judge accepted Central Guaranty's argument that the July 1988 Order was interlocutory, rather than final, and was made without an adjudication of the validity of the trusts. He concluded the issue of trust validity was not central to the receivership proceedings and was left, by Miller A.C.J., to be determined in other proceedings. In his view, once the June 1988 Order was issued any trust invalidity defence most properly belonged to the separate trial contemplated by that Order, rather than the receivership proceedings. Accordingly, the trial judge concluded the doctrine of *res judicata* was inapplicable: Phase I at paras. 17-18.

[23] The trial judge also concluded that, even if the doctrine of *res judicata* was applicable, there were special circumstances that made it necessary not to apply the doctrine. Among the special circumstances he found was the fact the court might be called upon to administer uncertain trusts if the doctrine of *res judicata* was applied: Phase I at paras. 19-21.

[24] The trial judge found Central Guaranty was not attempting to vary or nullify the July 1988 Order by raising a trust invalidity defence. In his view, because Central Guaranty was not seeking to undo the arrangements and distributions which flowed from the July 1988 Order, its trust invalidity defence was not a collateral attack: Phase I at para. 22.

[25] The trial judge also concluded it was not an abuse of process for Central Guaranty to raise a trust invalidity defence: Phase I at paras. 4 and 11.

IV. Standard of Review

[26] The applicability of the doctrine of *res judicata* is a question of law reviewable on the correctness standard: *Saggers v. Calgary (City)* (2000), 271 A.R. 352, 2000 ABCA 259 at para. 19.

[27] Whether special circumstances exist which warrant the suspension of the principles of *res judicata* is a question of mixed fact and law reviewable on the standard of palpable and overriding error. However, where the alleged error is an extricable error of law, the applicable standard of review is correctness.

[28] The applicability of the rule against collateral attack and the applicability of the doctrine of abuse of process are questions of law reviewable on the correctness standard.

V. Analysis

A. *Res Judicata*

[29] The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which was adjudged in a previous court proceeding: Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2d ed. (Ontario: LexisNexis Canada Inc., 2004) at 1 [*Res Judicata*]. We need not consider the applicability of cause of action estoppel because issue estoppel precludes Central Guaranty from attacking the validity of the trusts in this litigation.

(i) Issue Estoppel

[30] For issue estoppel to be successfully invoked, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies: *Toronto (City) v. Canadian Union of Public*