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APPLICANTS	**BANK OF MONTREAL**
RESPONDENTS	**BUMPER DEVELOPMENT CORPORATION LTD. and BUMPER DEVELOPMENT CORPORATION**

DOCUMENT

BRIEF OF LAW OF BANK OF MONTREAL

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. This Brief is submitted on behalf of the Bank of Montreal ("**BMO**"), in response to an application made by Canstone Energy Ltd. ("**Canstone**") for a declaration that the sum of $121,401 (the "**Disputed Funds**") held by Alvarez and Marsal Canada Inc. (the "**Receiver**") is imposed with a trust and that the Disputed Funds should therefore be remitted to Canstone. Further, Canstone asserts that through either the delivery of a "no interest letter" or estoppel, BMO released its security interest in the Disputed Funds.

2. There is no basis, contractual or equitable, upon which the Disputed Funds should be impressed with a trust in favour of Canstone. Canstone merely has an unsecured claim against the debtor, Bumper Development Corporation Ltd. ("**Bumper**"), respecting the Disputed Funds. Imposing the Disputed Funds with a trust has the effect of converting Canstone's unsecured claim to a trust claim, in essence elevating its priority to the detriment of BMO, which is anticipated to be Bumper's fulcrum creditor in the receivership proceedings.

3. Further, for the reasons set forth below, Canstone's interpretation of the No Interest Letter is untenable and BMO should not be estopped from asserting its security interest: the No Interest Letter was delivered only with respect to the Assets; BMO made no representations to Canstone with regards to Bumper's financial position, and had no obligation to make any such disclosure to Canstone. In fact, disclosure of Bumper's financial position to Canstone would have placed BMO in breach of its duty of confidentiality to Bumper as its customer.

4. It is respectfully submitted that there is nothing inequitable or patently unfair about the present situation. It would be inequitable, unfair, and contrary to the law, to elevate Canstone's unsecured claim to a trust claim in priority to BMO, without any legal justification to do so.

FACTS

5. BMO extended a series of credit facilities to Bumper, pursuant to which Bumper was indebted to BMO in the approximate amount of CAD$48.7 million and USD$241,600, as of May 2015. In the summer of 2015, Bumper defaulted under the terms of its credit facilities with BMO. Beginning as early as June 2015, BMO worked with Bumper to alleviate Bumper's financial distress and negotiated a series of, what would ultimately be, fifteen forbearance agreements spanning a period of 9 months, from June 2015 to February 2016.

Affidavit of Kinsley McWhinnie, sworn on February 11, 2016, at paras 10, 12 [*McWhinnie Affidavit*]

6. Unfortunately, in February 2016, despite their best efforts and history of cooperation, Bumper was unable to provide BMO with a viable plan or course of action with respect to satisfying the outstanding indebtedness owed to BMO, which at that time totaled $11,352,237.87. BMO was left with no choice but to apply to appoint the Receiver in order to protect its security.

McWhinnie Affidavit, *supra* at paras 16-20

7. BMO is owed in excess of $10 million after receiving a distribution approved by the Court in these proceedings pursuant to an order dated May 13, 2016. In addition, Bumper owes Encana Corporation, another secured creditor, approximately $1.4 million. Based on realizations to date and discussions with the Receiver, it appears that BMO is the fulcrum creditor.

First Report of the Receiver, dated May 3, 2016 at paras 22-23
Order of Justice Jones, dated May 13, 2016

8. Through the course of BMO and Bumper's forbearance arrangements, Bumper completed several asset transactions in order to pay down the BMO indebtedness. One such asset transaction has given rise to the within dispute.

9. On August 26, 2015 Bumper and Canstone entered into a purchase and sale agreement (the "**PSA**") whereby Canstone purchased certain oil and gas assets from Bumper. The PSA is attached as Exhibit "A" to the Affidavit of Phil Peterson, filed on June 17, 2016, on behalf of Canstone (the "**Peterson Affidavit**").

10. The PSA incorporated the provisions of the 2000 CAPL Property Transfer Procedure (the "**CAPL Procedure**"). The CAPL Procedure provided that Bumper and Canstone would apportion the benefits and obligations pertaining to the "**Assets**" (as defined in the PSA and CAPL Procedure), including the proceeds from the sale of production from the Assets, on an accrual basis as of the effective date of June 1, 2015. The CAPL Procedure is attached as Exhibit "C" to the Peterson Affidavit.

11. In order to facilitate the transaction, BMO provided Bumper and Canstone with a no interest letter on September 30, 2015 (the "**No Interest Letter**"), whereby BMO released and discharged the Assets from its security. Nowhere in the No Interest Letter did BMO release or discharge its security as regards proceeds received by Bumper.

12. The present dispute relates to payment by Bumper of the final statement of adjustments which Canstone calculates in the amount of the Disputed Funds. BMO now understands from

Canstone's court materials and the Receiver that the final statement of adjustments was due on January 31, 2016 but ultimately settled by Bumper and Canstone on February 16, 2016, the date on which Bumper was placed into receivership.

13. Canstone asserts that the Disputed Funds received by Bumper were impressed with a trust and therefore do not form part of the within Receivership proceedings. Further, Canstone asserts that BMO is estopped from claiming a security interest in the Disputed Funds as a result of the No Interest Letter or, alternatively, on the basis of the equitable doctrine of estoppel.

ISSUES

14. Whether Canstone has a trust claim with respect to the Disputed Funds; and

15. Whether BMO has lost its security interest in the Disputed Funds as a result of the No Interest Letter, or through estoppel.

LAW

Trust General Principles

16. There are two types of trusts which appear to be alleged by Canstone as existing over the Disputed Funds resulting in those funds being exempt from the receivership estate: an express trust or a constructive trust.

17. An express trust may arise by operation of law or by intention, in word or deed of the settlor. In order for a court to declare that an express trust exists there must be present a settlor, a trustee, a beneficiary, and trust property. Additionally there must be certainty of intention, certainty of subject matter and certainty of objects. Where trust funds have been commingled with non-trust funds, in order to maintain certainty of subject-matter, the trust property must be traceable.

DMW Waters, Law of Trusts in Canada, 4th ed. (Toronto: Carswell, 2012) at p 140 [*Waters*] **[TAB 1]**
Re Graphicshoppe Ltd (2005), 78 OR (3d) 401 at para 32 (CA) **[TAB 2]**

18. Constructive trusts can be imposed by operation of law regardless of the original intentions of the parties; however, constructive trusts are remedial in nature, being appropriate remedies where there has been a wrongful act such as fraud or a breach of loyalty, or where there has been unjust enrichment.

Ambrozic v Burcevski, 2008 ABCA 194 at para 48 [*Ambrozic*] **[TAB 3]**

19. In the case at hand, neither an express trust nor a constructive trust is present. None of the terms of the PSA or the CAPL Procedure create or imply any express trust with respect to the Disputed Funds. Further, any certainty of subject matter has been destroyed by the commingling of the Disputed Funds with non-trust funds and it is impossible to trace those funds. Lastly, there are no circumstances giving rise to a wrongful act which warrant the imposition of a constructive trust.

Lack of Express Trust

20. In order for an express trust to arise there must be certainty of intention. Certainty of intention requires the language of the alleged trust instrument to create for the trustee a specific obligation to hold property for the benefit of another. The language in the trust instrument must be imperative and must clearly demonstrate an intention that property should be held in trust.

Waters, *supra* at p 140
Luscar Ltd v Pembina Resources, 1994 ABCA 356 at para 110-111 [*Luscar*]**[TAB 4]**

21. In this case, one must look at the language of the PSA and the CAPL Procedure to determine whether an intention exists to hold post-closing adjustments in trust.

22. The PSA entered into between Canstone and Bumper does not contain any language whatsoever that would create an express trust in relation to the Disputed Funds. Similarly, the CAPL Procedure does not contain any language demonstrating any intention that amounts owing as a result of post-closing adjustments should be held in trust.

23. While the CAPL Procedure does require Bumper to remit all proceeds and other benefits received by Bumper respecting the Assets (less the corresponding expenses and obligations incurred), there is no language which suggests the parties intended to create a trust relationship or that indicates post-closing amounts were to be held in trust. Rather, such amounts are treated as a debt owing by Bumper to Canstone as a result of Canstone purchasing the Assets from Bumper.

CAPL Procedure at 4.01, 4.02 and 5.03 **[TAB 5]**

24. While certainty of intention can be ascertained through an examination of the surrounding circumstances and conduct of the parties (which is rarely likely to reveal the necessary intention), the surrounding circumstances in the present case and the conduct of Bumper and Canstone demonstrate there was no intention to create a trust relationship.

Re BA Energy Inc, 2009 ABQB 647 at paras 17 and 20 **[TAB 6]**

Waters, *supra* at p 142

25. The parties did turn their minds to a trust relationship in relation to other obligations under the PSA and CAPL Procedure, but clearly no such intention existed with respect to the post-closing adjustments giving rise to the Disputed Funds. For example, clause 2.02 of the CAPL Procedure expressly states that the "Deposit" is to be held in trust by Bumper on behalf of Canstone. The parties chose not to use such language in respect of the post-closing adjustments. A plain reading of the PSA and CAPL Procedure indicates that their use of express trust language in relation to some portions of the agreement and not others was deliberate and that only certain obligations were meant to be trust obligations. The Alberta Court of Appeal applied similar reasoning in *Luscar*.

26. In *Luscar* the court found that while the words "in trust" or "on trust" are not iron-clad requirements to finding the existence of a trust, the fact that they were employed elsewhere in the agreement and omitted from the operative clause is telling of the fact that the parties did not intend to create an onerous trust obligation.

Luscar, *supra* at para 112

27. Here, like in *Luscar*, the parties are sophisticated, were aware of the onerous duties of a trustee and chose to invoke a trust relationship for some aspects of the agreement but not others. It is clear from the omission of trust language in the sections relating to the post-closing adjustments that Bumper and Canstone did not intend to create a trust relationship in respect of those funds.

28. What is even more telling is the statements contained in the Affidavit of Phil Peterson, that should Canstone have been aware of Bumper's defaults to BMO, Canstone:

> ...would have taken steps to protect itself with respect to payments arising from the 4 month adjustment period for production revenue arising from the Twining Assets (the "Adjustment Period"). For example, it could have made arrangements for funds to be held back, **or put in trust**, to cover off the payments arising from the lengthy Adjustment period.

Affidavit of Phil Peterson, sworn on June 17, 2016, at para 14 [*Peterson Affidavit*]

29. Clearly, if there already was a trust relationship between Bumper and Canstone pursuant to the PSA and CAPL Procedure, there would have been no reason to make further trust arrangements. The fact is, there was no trust relationship.

30. The relevant sections of the CAPL Procedure do suggest that Bumper may have been acting as an agent of Canstone; however, a trust relationship is quite distinguishable from an agency relationship and the intention, to create an agency relationship is fundamentally different than an intention to create a trust relationship. Agency relationships are fashioned by the common law courts and based on a contract which can be modified by the parties. An express trust is a mode of conveyance of property and the trustee is not an agent of the settlor or the beneficiary. The rights of agents stem from contract whereas rights of trustees stem from their status as holders of title; the two concepts are fundamentally different. The incorporation of agency language should therefore not be extrapolated to establish a trust relationship.

Waters, *supra* at pp 56-59

Loss of Certainty of Subject Matter through Commingling

31. Even if this Court finds that Canstone had a trust over the Disputed Funds, which BMO submits is not demonstrated by the evidence, any such trust would have been destroyed by the commingling of the Disputed Funds by Bumper, resulting in the loss of certainty of subject-matter. In order to maintain the certainty of subject-matter, it must be possible to trace the trust property into identifiable assets. Tracing into bank accounts is possible and governed by the rule known as the "lowest intermediary balance": a trustee is presumed to have spent his funds first, with any remaining funds in the account being trust funds. Once an account is fully depleted, the ability to trace is gone.

Waters, *supra* at pp 1347-1352
Re Kel-Greg Homes Inc, 2015 NSSC 274 at paras 33, 48, 54, and 72 [**TAB 7**]

32. In the present circumstance, it is not possible to trace any trust to the Disputed Funds. The Disputed Funds were not received by Bumper all at once; they were received over the course of a four month period from production revenues. BMO now understands through discussions with the Receiver that as the production revenues were received by Bumper, they were commingled with non-trust funds in Bumper's general account. From this general account, Bumper would then pay its employees and operating expenses associated with running an oil and gas exploration and production company. The revolving door of receipt of production revenue and disbursements of expenses destroys the ability to trace any trust back to the Disputed Funds.

33. Even if tracing is possible, it is irrelevant here as no trust was created.

Lack of Constructive Trust

i) No Fraud or Breach of Loyalty

34. The imposition of a constructive trust is sometimes applied as a means of recognizing a claimant's legal or equitable entitlement to property and is often characterized as a corrective measure applied where a party has been unjustly enriched to the prejudice of another party.

35. Alberta courts have recognized that imposing a remedial constructive trust is appropriate when there has been a wrongful act, such as fraud or a breached duty of loyalty, or when one party has been unjustly enriched and another party has suffered a corresponding deprivation. It is respectfully submitted that neither circumstance is present in the case at hand.

Ambrozic supra

36. There are no allegations that Bumper acted in bad faith and nothing to suggest that the Disputed Funds were obtained as a result of fraud or wrongdoing. The Disputed Funds were obtained as a result of the continued operation of the Assets throughout the closing of the transaction.

37. Similarly, there is nothing to suggest that Bumper owed, or breached, a duty of loyalty to Canstone. Canstone had an opportunity to conduct due diligence pursuant to the PSA, which they did in fact do. Canstone was aware that Bumper had granted a security interest in all of its assets to BMO. It was Canstone's responsibility to discover what they considered to be relevant facts in respect of the transaction, including Bumper's current financial position. Regardless, no allegation brought forward by Canstone amounts to fraud or breach of loyalty on the part of Bumper.

Peterson Affidavit, supra at para 6

38. The argument made by Canstone that BMO somehow owed Canstone a duty to disclose Bumper's financial position is untenable given the existing relationships between all three parties. There was, and is, no relationship between Canstone and BMO. As such, BMO owed Canstone no duty to advise Canstone of Bumper's financial position, or otherwise. BMO's relationship and attendant duties were with Bumper, not with Canstone. As there was no relationship between BMO and Canstone, there can be no breach of loyalty. None of Canstone's allegations amount to fraud on the part of BMO.

39. Furthermore, advising Canstone of Bumper's financial position would have placed BMO in breach of its obligations to Bumper, by divulging its customer's confidential financial information. There is an implied term of the relationship between a bank and its customer that a bank not disclose information regarding its customer's dealings or financial status.

40. A bank's duty of confidentiality to its customer is subject to certain exceptions: i) where disclosure is required by compulsion of law; ii) where there is a duty to the public to disclose; iii) where the interests of the bank require disclosure; and iv) where the disclosure is made by the express or implied consent of the customer.

Canadian Imperial Bank of Commerce v Sayani (1992), 83 BCLR (2d) 167 (CA) at paras 20-21 [*Sayani*] **[TAB 8]**

41. None of the exceptions are relevant to the current circumstance. It is difficult to understand Canstone's argument in respect of this issue, however, if the argument is that the public disclosure exception, often referred to as the fraud or misrepresentation exception, applies, that exception is inapplicable to the present case. Canstone has made no allegations of fraudulent conduct. It has alleged that certain representations made by Bumper in the PSA were misrepresentations, that BMO was aware of such misrepresentations, and that BMO had a duty to advise Canstone of these misrepresentations. The purported offending provisions of the PSA were Bumper's representations to the effect that:

> ...there were no lawsuits or claims "in existence, contemplated or threatened with respect to the Assets or its interests therein" and to its knowledge "no particular circumstance exists that it reasonably believes will give rise to such a claim, proceeding, action or lawsuits that would have a material adverse effect on the aggregate value of the Assets."
>
> *Peterson Affidavit*, supra at para 13

42. BMO cannot speak to Bumper's understanding of its position. While BMO had made demands for repayment of its indebtedness and held a consent receivership order with respect to Bumper, the parties had negotiated a forbearance arrangement, including several forbearance extensions, to allow Bumper to undertake an asset disposition process, which process was specifically recognized and incorporated into the various forbearance agreements and amendments. At the time the Canstone PSA was negotiated and closed, Bumper was positively pursuing its assets dispositions and at that time, it was not contemplated that BMO would enter the consent receivership order.

43. Alternatively, even if this did constitute a misrepresentation, it was done by Bumper, not by BMO. BMO was not involved in negotiating or drafting the PSA. Even if BMO had been aware of the representation given by Bumper at the time, which is not clear, it is not sufficiently egregious to have warranted an exception to BMO's duty of confidentially owed to Bumper. This is not a case where a bank customer was delivering materially misleading financial information to third parties, as was the case in *Sayani*; this is a boilerplate representation contained in a purchase and sale agreement.

Sayani, *supra* at para 28

ii) No Unjust Enrichment

44. With respect to the imposition of a constructive trust as a vehicle for compensating for unjust enrichment, Canstone needs to establish that Bumper has been enriched, Canstone has suffered a corresponding deprivation, and there is no juristic reason for such deprivation. Additionally, Canstone must establish a direct link between their contribution and the Disputed Funds.

Canada (Revenue Agency) v TNG Acquisitions Inc (Trustee of) (2011), 79 CBR 315 at paras 21 and 23 (Ont SCJ) **[TAB 9]**

45. The dispute between Canstone and Bumper is governed by the PSA and the ancillary documents thereto. Alberta courts have found that where one party gains due to breach of contract, as is the case here, that party is not truly enriched because the breaching party's gain is subject to its liability for breach of contract.

Luscar, *supra* at para 129

46. Although Bumper has retained the Disputed Funds, Bumper has not truly been enriched. The PSA requires Bumper to pay certain post-closing amounts to Canstone and Bumper's failure to do so amounts to a breach of contract. As such, any gain Bumper has experienced in respect of the Disputed Funds is subject to Bumper's liability for breach of contract. In any event, it is difficult to see how Bumper is enriched by non-payment of the Disputed Funds, when it was placed into receivership by its secured creditor who is expected to incur a loss on the total outstanding indebtedness owed. In the result, Bumper has not been unjustly enriched and imposing a constructive trust in the case at hand is unwarranted and inappropriate.

47. Moreover, it is not appropriate to impose a constructive trust in order to elevate an unsecured debt claim. Bumper owes $121,401 to Canstone pursuant to the PSA. The Disputed Funds represent an

unsecured debt. BMO, as Bumper's first secured creditor, applied for the appointment of a receiver with respect to Bumper, its assets and undertakings and now Canstone is trying to reduce its exposure as an unsecured creditor and recover its losses by elevating its claim with no legal justification to do so. Imposing the Disputed Funds with a constructive trust would be unfairly detrimental to Bumper's creditors who took actions to mitigate their risk by securing their loans and who are seeking recovery within the Receivership process. Courts have frowned on behaviour similar to Canstone's and have held that:

> While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

Barnabe v Touhey (1995), 37 CBR (3d) 73 (Ont CA) **[TAB 10]**

48. The relationship between Canstone and Bumper is governed by the PSA and ancillary documents thereto. It is respectfully submitted that Canstone has alleged the existence of a constructive trust for the purpose of receiving funds that otherwise would have become part of the receivership estate and divisible among Bumper's creditors. Imposing such a trust is unfair to all other creditors and directly contravenes *Barnabe*. The case at hand does not warrant such action.

BMO Did Not Lose its Security Over the Disputed Funds

49. Canstone asserts that the No Interest Letter results in BMO's loss of its security against the Disputed Funds. This is simply not the case. The No Interest Letter releases BMO's security as regards the Assets, as that term is defined in the PSA, on closing, in order to transfer the Assets to Canstone free of BMO's security.

50. The definition of "Assets" within the PSA, incorporates the definition of "Assets" under the CAPL Procedure, which includes the Petroleum and Natural Gas Rights, the Tangibles, and the Miscellaneous Interests. Generally speaking, these defined terms pertain to interests in property, the land schedule, and the facilities and processes used to recover the oil and gas from those purchased lands; it does not include the proceeds of production.

CAPL Procedure, *supra* 1.01 (D), (T), (W) and (II)

51. In fact, in explaining the adjustments under the CAPL Procedure, the procedure states that "the Parties will apportion all benefits and obligations of every kind and nature relating to the Assets, including...proceeds from the sale of production". Thus, the proceeds from the sale of production, while related to the Assets, are actually treated by the CAPL Procedure as being separate and distinct from the Assets themselves.

CAPL Procedure, *supra* 4.01

52. This is not an instance where BMO delivered a no interest letter respecting certain present and after-acquired purchased assets, and then following closing, attempted to reassert a security interest in those very same purchased assets, as occurred in *Re Yukon Zinc*, argued by Canstone as support for their position. In the present case, BMO delivered the No Interest Letter with respect to the Assets *only*. The intention of the parties in the delivery of the No Interest Letter was the release of the Assets from BMO's security in order to facilitate the sale of those Assets to Canstone. The argument now advanced by Canstone, that through the No Interest Letter BMO released its security as regards revenue received by Bumper from the proceeds of production, defies commercial logic. The Disputed Funds represent revenue received by Bumper, and were, and are, subject to BMO's security.

Re Yukon Zinc, 2015 BCSC 836 at paras 187-194 **[TAB 11]**

53. Lastly, BMO is not estopped from asserting its security interest as regards the Disputed Funds. As noted by Canstone in its own brief, estoppel by representation at a minimum requires a positive representation made by a party whom it is sought to bind. BMO made no representations to Canstone, outside of the release and discharge of its security contained in the No Interest Letter. Therefore, estoppel by representation has not been shown.

Bank of Montreal v Ross, 2013 NSCA 70 at paras 30 and 31, as cited in Canstone's Brief at para 25

54. Canstone also complains that BMO should be estopped on the basis of its silence, as BMO failed to disclose Bumper's financial position and the existence of the forbearance agreements to Canstone. Again, on Canstone's own authority, estoppel by silence or inaction is also absent. In order to establish estoppel by silence there must be a legal duty owed by the representor (BMO) to the representee (Canstone) to make disclosure. No such legal duty was owed by BMO to Canstone in the present circumstance. BMO's relationship in the present case was with Bumper, not Canstone. Furthermore, as previously noted, any disclosure of Bumper's financial position or

existence of the forbearance agreements would have in fact breached BMO's duty of confidentially it owed to Bumper.

CONCLUSION

55. Neither the PSA nor the CAPL Procedure evidence an intention by the parties to create a trust with respect to the post-closing adjustments. In fact, the parties turned their minds to a trust relationship with respect to other matters contained in the CAPL Procedure, but not with respect to the post-closing adjustments. Canstone has also stated it could have made arrangements to put the Disputed Funds in trust, implying that no trust relationship exists under the current agreements.

56. Furthermore, there is no basis for the imposition of a constructive trust in the circumstances. There was no unjust enrichment and no allegations of fraudulent behaviour or a breach of a duty of loyalty. Imposing a constructive trust in the circumstances is not only unwarranted, it would be inappropriate as it would elevate Canstone's unsecured debt claim against Bumper to the prejudice of Bumper's other creditors.

57. The Disputed Funds are still subject to BMO's security, as neither the No Interest Letter nor the equitable doctrine of estoppel, release BMO's security interest in them.

RELIEF SOUGHT

58. In the result, the Bank of Montreal respectfully requests that:

(a) Canstone's application be denied;

(b) That an order be granted declaring that the sum of $121,401 is not imposed with a trust but rather forms part of Bumper's Receivership Estate, and is therefore subject to the Bank of Montreal's security; and

(c) Costs of this Application on a solicitor-and-his-own-client, full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF JUNE, 2016.

BORDEN LADNER GERVAIS LLP

Per: _____

Robyn Gurofsky / Jessica L. Cameron
Solicitors for the Bank of Montreal

LIST OF AUTHORITIES

1. DMW Waters, Law of Trusts in Canada 4th ed (Toronto: Carswell, 2012)
2. *Re Graphicshoppe Ltd* (2005), 78 OR (3d) 401 (CA)
3. *Ambrozic v Burcevski*, 2008 ABCA 194
4. *Luscar Ltd v Pembina Resources*, 1994 ABCA 356
5. CAPL Transfer Procedure
6. *Re BA Energy Inc*, 2009 ABQB 647
7. *Re Kel-Greg Homes Inc*, 2015 NSSC 274
8. *Canadian Imperial Bank of Commerce v Sayani* (1992), 83 BCLR (2d) 167 (CA)
9. *Canada (Revenue Agency) v TNG Acquisitions Inc (Trustee of)* (2011), 79 CBR 315 (Ont SCJ)
10. *Barnabe v Touhey* (1995), 37 CBR (3d) 73 (Ont CA)
11. *Re Yukon Zinc*, 2015 BCSC 836

TAB

1

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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singly when conveying freehold interests,[56] and since 1925 when disposing of leasehold interests,[57] there appears to be no such restriction in the Canadian common law provinces.

Statute in Canada may well have brought closely together the legal positions of the personal representative and the trustee, but the differences that may still exist are not inconsequential, and the subject is in need of statutory clarification.

However, if one turns from analysis of the present law to the question of what form that statutory clarification should take, the similarity of the two offices is striking. Indeed, they are so similar that the question of the distinction is always framed in terms of where they differ. If this is so, the practical issue is whether the distinctions that exist or may still exist should be perpetuated. Need there remain the pitfalls of distinction? There is certainly a powerful argument in favour of requiring all personal representatives, should there be more than one, to be party to an act which binds the estate, if only because this is the rule already applicable to trustees and there is no justification for maintaining an anomaly which cannot justify itself. But it may be possible to go further, and say that the powers as well as the duties of personal representatives and trustees ought to be the same, save where statute expressly withholds a power.[58] After all, a power enables something to be done; it does not compel, and an express statutory withholding of a particular power, where that is thought necessary, permits the suggested statutory change to be made without any distortion resulting in the nature of the office of personal representative.[59]

III. TRUST AND AGENCY

Agency arises when one person, called the agent, has express or implied authority to act on behalf of another, called the principal, and consents so to act. It is the task of the trustee to administer property on behalf of beneficiaries. In this broad sense, agent and trustee have it in common that each is acting to advance the interests of others.

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[56] *Land Transfer Act, 1897* (Eng.), s. 2(2). See Charles Harpum, Malcolm Grant & Stuart Bridge, *Megarry and Wade: The Law of Real Property*, 6th ed. (London: Sweet & Maxwell, 2000) at 637.

[57] *Administration of Estates Act, 1925* (Eng.), ss. 2(2), 3(1), replacing the provisions of the *Land Transfer Act, 1897* (60 Vict., c. 65).

[58] E.g., *Trustee Act*, R.S.O. 1990, c. T.23, s. 2(2).

[59] If the two offices were totally equated, so that a personal representative is always a trustee, the *Livingston* case (*Commissioner of Stamp Duties (Queensland) v. Livingston* (1964), [1965] A.C. 694, [1964] 3 All E.R. 692 (Australia P.C.)), would no longer be good authority. See further, *supra*, note 17. Would this be a loss? Does it suggest that the personal representative cannot be a trustee for all purposes during the period of administration?

A. Agency and Express Trusts

1. Agent Acts on Instructions; Trustee Acts According to Terms of Instrument

Agency, however, is a relationship fashioned by the common law courts, the trust by the courts of Equity. From that fact stem the present differences between the concepts. The express trust is a mode of conveyance of property while agency need not involve a conveyance of property. The agent acts within the scope of the principal's grant of authority, and when dealing with third parties the agent is effectively a conduit whereby his principal and the third party are put in direct relations. The express trustee, on the other hand, is not an agent of the settlor nor of the beneficiary. He is performing an office which would otherwise devolve upon the court itself;[60] indeed, it is for this reason that statute confers upon him the right to seek the advice and direction of the court, a right which he has a duty to exercise whenever he is in genuine doubt as to how he should interpret the trust document or act in a particular situation.

2. Trustee Vested with Title and Contracts Directly with Third Parties

The trustee is not only vested with title in the trust property, he contracts with third parties as if he also had the beneficial enjoyment of that title, being personally liable on those contracts. His right of recovery from the trust property for the outgoings from his own pocket is of no concern or interest to the third party, nor whether the trust property is sufficient to meet any action for damages the third party might have. The trustee is also liable personally to third parties for torts committed by himself or his agents, whether or not he or his agents were acting within the scope of their duties.[61]

3. Principal/Beneficiary Action is Personal but Trust is a Mode of Conveyance of Property

A similarity between agency and the express trust is that the enforcement of the agent's duties is the concern of his principal, and the enforcement of the trustee's duties is the concern of the beneficiaries on whose behalf he is acting. The principal has only personal rights against his agent, and beneficiaries, too, have only personal

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[60] I.e., the administration of the trust. See *Underhill and Hayton*, at 1106-09. The general supervisory jurisdiction of the courts over trust administration is reflected, e.g., in the salvage and emergency jurisdiction, and the scheme-making power with regard to charitable trusts.

[61] If the trustee wishes to limit his liability in any breach of contract action, thus ensuring that he will be liable only to the extent of the trust property, he must have a term to that effect in his contract with the third party. To meet the possibility of his tortious liability, e.g., as an occupier of premises, he will insure, and set off the premiums against the trust income or capital as a proper disbursement.

rights against the trustee. However, these likenesses have significance jurisprudentially only if they stem from similar processes of reasoning. In fact, they do not. As we have seen, the trust is a mode of conveyance of property for the purpose of separate management and enjoyment. Because the trustee is title holder of the property or legal owner – as title holding is popularly known – the beneficiary can only enforce the duties of the trustee through personal action. Nevertheless, it is precisely because a trust is a conveyance of property, and the prime concern of the beneficiary is with that property, that common lawyers are not in agreement as to whether the beneficiary's interest is only a personal, or *in personam*, right.[62]

4. The Method of Varying the Arrangement is Different

Agency can be modified at any time by agreement of the principal and agent. The trust, however, once it is created is beyond later intervention by the settlor, unless he has reserved a power permitting him to intervene for some express purpose, and the beneficiary for his part has no power to instruct the trustee in what manner he is to employ his administrative or dispositive powers. This last point was underlined in *Re Brockbank*,[63] where the court made it clear that no beneficiary may interfere with a trustee properly exercising his powers and discretions. There is one exceptional case where the beneficiaries can, so to speak, intervene. If they are all ascertained, adult and capacitated, they can agree to wind up the trust and recover the title to the trust property from the trustees. But this is not really an intervention. Beneficiaries have no power to interfere with the trustees while the trust survives,[64] but they may be able to bring the whole trust to a premature close even if the trustees object. This is a reflection of the fact that in essence the right of enjoyment of property is predominant over the rights of management and disposition.

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[62] See further, *supra*, chapter 1, note 29.

[63] [1948] Ch. 206, [1948] 1 All E.R. 287 (Eng. Ch. Div.). The beneficiary may only instruct the trustee to the extent expressly provided for in the trust instrument – see, e.g., *Ingram v. Inland Revenue Commissioners*, [1997] 4 All E.R. 395 (Eng. C.A.), *per* Millet L.J. dissenting, and at [2000] 1 A.C. 293 (Eng. H.L.) at 350D-H and 310G adopting the views of Millet L.J. See also *Mordo v. Nitting*, 2006 CarswellBC 2934, [2006] B.C.J. 3081 (B.C. S.C.), at paras. 373-376.

[64] However, in *Butt v. Kelson* (1951), [1952] 1 Ch. 197, [1952] 1 All E.R. 167 (Eng. C.A.), it was held that, if all the beneficiaries are adult and capacitated, and the trust property includes shares in a private company, they may direct the trustee directors to exercise the voting rights as the beneficiaries choose. In *Re Whichelow* (1953), [1954] 1 W.L.R. 5, [1953] 2 All E.R. 1558 (Eng. Ch. Div.), Upjohn J. pointed out that this decision is not compatible with *Re Brockbank*, *ibid.*, note 63, which represents the traditionally accepted view. It may be that there is a difference between a trustee power (whether of administration or disposition) and an attribute (i.e., a voting right) attaching to a trust asset as part of that asset. For another interpretation of *Butt v. Kelson*, see *Re Martin Estate*, 2009 BCSC 1407. In *Kordyban v. Kordyban* (2003), 50 E.T.R. (2d) 116 (B.C. C.A.) at 131, additional reasons at (2003), 19 B.C.L.R. (4th) 19 (B.C. C.A.), the court suggests approval of *Butt v. Kelson* but on another point.

5. Agent Free from Constraint According to Terms of Grant of Authority; Trustee Freedom from Constraint by Virtue of Status as Title Holder

The agent, too, is entitled to act within the scope of the authority granted to him by the principal without intervention from the principal other than in a manner reserved in the grant of authority. In this sense, there is again similarity. But the result stems from the nature of the grant of authority, while the trustee's right to freedom from intervention stems from his status of title holder.

6. Death of Agent Terminates Agency; Death of Settlor, Trustee or Beneficiary does not End Trust

Another aspect of the personal nature of the relationship between a principal and an agent is that the death of either party normally brings the agency to a close. This is not true of the trust. The settlor's death is irrelevant. Also no trust fails for want of a trustee, as the maxim runs, and the beneficiary's death will only bring the beneficiary's interest to a close.[65]

7. Agency Born of Consent; Trustee and Beneficiary Need not Know of Trust

The personal nature of agency is further brought out by the fact that while agency, as we have said, is born of a consent, neither trustee nor beneficiary need know of a trust for it to be valid and enforceable. If A declares himself an immediate trustee of property that he owns, and the required evidence exists for proof of the declaration, the beneficiaries can claim the property to be held on trust as of the date of that declaration whenever the existence of the trust comes to light.[66]

B. Agency and Trusts by Operation of Law

When we turn from express trusts to trusts created by operation of law, however, agency rules do coincide with those of trusts. Every agent who holds office, to which

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[65] I.e., it will not affect other beneficiaries who survive.

[66] In tax law there is a marked tendency for the courts to see the purported trust as a mere conduit for the transfer of assets from third parties to the beneficiaries, and the trustee in this connection has been described as an agent for the beneficiaries. However, these "heresies" are restricted almost exclusively to the tax decisions, and in a real sense are a response to the attempts of settlors and testators to use the trust as an instrument of tax avoidance, i.e., enriching persons but without appearing to do so because legal title to the assets in question is held in trust. For tax purposes the courts have said on many occasions that they are concerned with the "substance", not the theory, of the situation the trust produces. See further Donovan W.M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can. Bar Rev. 219.

I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

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1 (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.) at para. 82, reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.); *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.).

4 The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III D.

A trust may be construed from conduct alone,[9] but it is unlikely that such evidence will conclusively reveal the necessary intention. Words do show that intention, and they must either appear in a document which the maker regarded as final or be orally communicated to another.[10] Evidence extrinsic to words in a

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Armstrong v. Clarke, 2008 CarswellBC 667, 39 E.T.R. (3d) 1, 79 B.C.L.R. (4th) 121 (B.C. C.A.), however, a person's oral statement that he would leave a house to two named persons in his will was not considered sufficient to establish an intent to create a trust. In *Saugestad v. Saugestad* (B.C. C.A.), *supra*, note 3, the conduct of an alleged secret trustee in an e-mail to his solicitor in which he acknowledged he held property in trust, together with the fact that he had transferred one-half of the estate to his nephews, was held to be sufficient evidence of the intention of the secret trustee's mother to create a trust.

[9] Conduct in the form of a sequence of transactions or circumstances may be enough: *Northguard Financial Group v. Wah*, [1977] 3 W.W.R. 3 (B.C. S.C.). See also *Kattler v. Kattler* (1995), 132 Sask. R. 92 (Sask. Q.B.), additional reasons at (June 22, 1995), Doc. Regina Q.B. 015726/ 94 (Sask. Q.B.) (which mentions *Northguard* with respect to a trust potentially arising from conduct alone but then holds that a trust arose on the facts partly on conduct and partly on other evidence); *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 O.R. (3d) 666, 18 E.T.R. (2d) 288 (Ont. Bktcy.); *Randall v. Nicklin* (1984), 58 N.B.R. (2d) 414 (N.B. C.A.), reversing (1984), 54 N.B.R. (2d) 95 (N.B. Q.B.); and *Thomas v. Whitwell* (1991), 45 E.T.R. 75 (Alta. Q.B.). A court may also consider the circumstances surrounding a transaction alleged to give rise to an express trust. See, e.g., *Winisky v. Krivuzoff* (2003), 237 Sask. R. 213, 3 E.T.R. (3d) 147 (Sask. Q.B.). In *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 44 E.T.R. (2d) 155, 22 B.L.R. (3d) 182 (Ont. S.C.J.), additional reasons at (2002), 44 E.T.R. (2d) 175 (Ont. S.C.J.), affirmed (2002), 2002 CarswellOnt 4537 (Ont. C.A.), the court considered whether the incorporation of a foundation (to which the hospital transferred funds) with clauses limiting its objects could itself amount to the creation of a trust. Although there were other circumstances which led the court to conclude that there was no trust, the court also suggested that, particularly without the application of the doctrine of ultra vires to the foundation objects, the incorporation of the foundation alone could not amount to the creation of trust. In *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 3, poker players at a casino made deposits towards a jackpot with set rules for payments out of the jackpot to specified winning poker hands. Brooker J. found that "even though there is no trust document or oral communication establishing the trust, the intention can be inferred from the players' conduct in the circumstances of this game. It seems clear from the nature of the game itself that the players, upon depositing their dollar, expected that the jackpot would go to whomever had the necessary hand. The players did not expect that the jackpot would go into the general coffers of either the casino operator or the charity. The players gave the money for a particular purpose and expected the casino operator to use it for that purpose... Under these circumstances, therefore, I am satisfied that I can infer that it was the players' intention to create an express trust with respect to the funds which they wagered and lost on the jackpot." See also *McMillan v. Hughes*, *supra*, note 3, where the circumstances and the defendant's own statements, corroborated by other witnesses, established the intention to create a trust.

[10] Trust documentation which reveals the intention to create a trust by those documents will exclude the argument that they were mere evidence of an earlier oral trust in the same terms: *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, *supra*, note 6. And an agreement to create a trust will only create a trust there and then if the agreement (a contract) is specifically enforceable: *ibid.*; *North Vancouver (Municipality) v. Macdonald* (1977), 5 B.C.L.R. 89 (B.C. S.C.). The document as a whole must be considered in addition to the specific words of bequest: *LeBlanc Estate v. Belliveau* (1986), 68 N.B.R. (2d) 145, 175 A.P.R. 145 (N.B. Q.B.); *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.); *Canada Permanent Trust Co. v. Lasby*, 42 Sask. R. 73, [1985] 6 W.W.R. 665 (Sask. Q.B.). As to what may constitute evidence of the intent, see *Re Kayford Ltd.* (1974), [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Eng. Ch. Div.); *Re Japan Leasing (Europe) plc v. Shoa Leasing (Singapore) Pte Ltd.* (July 30, 1999), (Eng. Ch. Div.); and *Re Lewis's of Leicester Ltd. v. Kordengate*

III. THE PRINCIPLES OF TRACING

The paradigm case of traceable proceeds is a clean substitution. With $10,000 of trust money, the trustee buys an estate in land. The land is the traceable proceeds of the trust property. There is a factual inquiry into what was actually done with the original property. The traceable proceeds are the exchange products. There is no limit to the number of exchanges through which one might trace. In general, intention is not relevant. Whether the trustee wanted the estate in land to be held in trust or held by himself is beside the point. Because it was acquired in exchange for trust property, it is itself trust property, if the beneficiaries so elect.

A. Mixtures of Value

The process becomes difficult when value is mixed. The process of tracing, however, is governed by a relatively small number of principles which are easy to state. The principles are shared by the common law and equity, and they apply not only to notional mixtures such as bank accounts, but to genuine physical mixtures of indistinguishable things, like sawlogs or grain.[64] Indeed, the most fundamental principle applies in many cases which have nothing to do with mixtures. That is the principle that an evidentiary difficulty which has been created by an unlawful act is resolved against the person who created it.[65]

1. The Interests of a Wrongdoer are Subordinated

When a mixture of value has been created, if one contributor is a wrongdoer *vis-à-vis* another, then in determining what is the traceable product of a contribution, the interests of the wrongdoer are subordinated.[66] This principle is evident, for example, in the rules that allow an innocent victim to choose between a proportionate share or a charge. Recall the example in which a trustee misappropriates $10,000 of trust property, combines it with his own $10,000 and invests the $20,000 in land. He has wrongfully created a mixture of value. The beneficiary can claim a 50 per

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[64] *Smith* at 70-104.

[65] *Ibid.*, at 77-78.

[66] One difficulty that can arise is, what is the mixture? Usually the concern is with a bank account. But, if a trustee has multiple accounts, are they to be consolidated and treated as one? In some cases this has been done, either by agreement or perhaps for purely pragmatic reasons: see for example *Law Society of Upper Canada v. Mazzucco*, 2009 CarswellOnt 200 (Ont. S.C.J.), at para. 57. Other cases have held that, at least absent agreement among the parties, it is not permissible to treat separate accounts as one, which will usually have the effect of changing the outcome for the parties: *Ontario (Securities Commission) v. Xantrex Management Corp.*, 1977 CarswellOnt 114, 25 C.B.R. (N.S.) 272 (Ont. S.C.); *Connecticut General Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612 (1st Cir., 1988) at 619-20; *Shalson v. Russo*, *supra*, note 62, at paras. 137-9. Cf. *Re Fonds Norbourg placements équilibrés*, 2007 CarswellQue 7235, [2007] R.J.Q. 1890 (Que. C.A.), where the Quebec Court of Appeal refused to combine separate investment trusts, applying Ontario law. The whole question is discussed, with further authorities, in *Smith*, at 227-34.

cent beneficial interest in the land, and if the land has risen in value this is the logical claim to make. If, however, the land has now dropped to a market value of $14,000, the beneficiary would instead assert a personal claim for recovery of the $10,000, and to secure that claim by asserting an equitable lien or charge over the whole of land.[67] The beneficiary is permitted to choose between asserting that he contributed half of the price (so generating a proportionate share), or asserting that he contributed an amount, namely $10,000, and requiring that amount be returned to him out of the proceeds (so generating an equitable charge). The second option shows that the interests of the wrongdoing contributor can be subordinated.

Where money is mixed in a bank account, there are both inputs to and outputs from the mixture. Take a simple case in which $1,000 of trust money is misappropriated and put into a personal bank account of the trustee, raising its balance to $2,000. Later, $1,000 is dissipated, and finally the trustee is made bankrupt at a time when the remaining balance is back to $1,000. Whose money remains in the account? It could be the trustee's, or the beneficiaries, or we could say half comes from each. Of course this is more than an evidentiary difficulty; it is an evidentiary impossibility, since no facts that can be proved will answer the question. Again, it is resolved against the wrongdoer. The beneficiary is allowed to decide what happened to his contribution, and here he will clearly wish to say that it was the trustee's money which was dissipated and his which remains.[68] This cannot be explained by saying that the trustee is "presumed" to spend his own money first, as a slight variation will show. Assume instead that after the initial deposit, there is a withdrawal of $1,000 to buy shares, and then the final $1,000 is dissipated. Whose money was used to buy the shares? Again, the beneficiary is allowed to say that it was his money that was so used.[69] Taking both together, the principle is clear, that the wrongdoer's interest is subordinated.

So where the mixture was wrongfully created, the innocent contributor can choose whether his contribution stayed in the mixture or was withdrawn, and this choice can be made with the benefit of full knowledge of what has become of the mixture and what has become of any withdrawals. It is important to bear in mind that if the mixture of value is transferred to a third party, even one who is innocent, this ability to choose the best outcome survives.[70] This is why, in the many cases of trustee bankruptcy, trust claimants have the benefit of the subordination of the trustee's interest, even though the competition is no longer against the trustee, but rather against his unsecured creditors.[71]

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[67] *Foskett v. McKeown* (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97 (U.K. H.L.).

[68] *Re Hallett's Estate*, *supra*, note 45.

[69] *Re Oatway*, (sub nom. *Hertslet v. Oatway*) [1903] 2 Ch. 356 (Eng. Ch. Div.); *Re Saskatchewan General Trusts Corp.*, [1938] 2 W.W.R. 375, [1938] 3 D.L.R. 544 (Sask. C.A.).

[70] *El Ajou v. Dollar Land Holdings plc*, *supra*, note 50, at 735-36 (Ch. Div.); *Law Society of Upper Canada v. Mazzucco*, 2009 CarswellOnt 200 (Ont. S.C.J.), at paras. 52-4.

[71] Notably *Frith v. Cartland* (1865), 2 H. & M. 417, 71 E.R. 525, and *Re Hallett's Estate*, *supra*, note 45.

2. The Subordination of the Wrongdoer's Interest Must be Consistent with the Evidence

There is an important limitation to the rule about resolving evidentiary difficulties against the wrongdoer who created them. This is that it only goes as far as the resolution of the difficulty. It does not allow findings contrary to evidence. Assume again that $1,000 of trust money is misappropriated and put into a personal bank account of the trustee, raising its balance to $2,000, but now all $2,000 is dissipated before the trustee's bankruptcy. The beneficiary cannot simply find some other asset of the trustee and say that this is the traceable product of his money.[72] The facts show that his money was dissipated. Any other result would go beyond the resolution of the evidentiary difficulty and would turn into a kind of forfeiture, which could not be justified against the other creditors of the trustee.[73] The beneficiary has a personal claim for breach of trust, but this will be an unsecured claim.

It is this limitation which underlies the rule of the "lowest intermediate balance". Assume again that $1,000 of trust money is misappropriated and put into the trustee's personal bank account, raising its balance to $2,000. Later, $1,600 is dissipated so that the balance is $400. Later still, $700 of the trustee's own money is deposited to the account, so that at the time of his bankruptcy the balance is $1,100. The beneficiary can say that $400 of this amount (the lowest intermediate balance) is the traceable product of the trust property; but no more than that. For the rest, the beneficiary has an unsecured claim for breach of trust. To say that there was $1,000 of trust property in the final $1,100 would be to make a finding contrary to the evidence, treating money as proceeds of trust property when the facts show that it is impossible. The lowest intermediate balance rule essentially says that a person cannot take more out of a mixture than he put into it. On those facts, it is clear that $400 is the upper limit of the contribution made by the trust beneficiary to the final $1,100. The rule has been accepted by the Supreme Court of Canada.[74]

There are other ways in which the beneficiary might establish that more than $400 is held in trust for him. Contrary to the facts assumed above, he might be able to trace in respect of some of the withdrawals. He might show that some surviving asset was purchased with a withdrawal, and lay his claim to that asset.[75] That tracing process might even show that the final deposit of $700 included traceable proceeds of the trust money, and in this case more than $400 of the final $1,100 could be

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[72] *British Canadian Securities Ltd. v. Martin*, 27 Man. R. 423, [1917] 1 W.W.R. 1313 (Man. K.B.).

[73] See *Indian Oil Corp. v. Greenstone Shipping SA (Panama)* (1987), [1988] Q.B. 345, [1987] 3 W.L.R. 869, in the context of a mixture of crude oil.

[74] *Ontario (Securities Commission) v. Greymac Credit Corp.*, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.)*) [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767 (S.C.C.), in which the court adopted in whole the judgment of the Ontario Court of Appeal, (1986), 55 O.R. (2d) 673, 30 D.L.R. (4th) 1 (Ont. C.A.), additional reasons at (October 20, 1986), Doc. CA 306/85 (Ont. C.A.); the Court of Appeal accepted the lowest intermediate balance rule at (1986), 55 O.R. (2d) 673 (Ont. C.A.) at 688. For English law, see *James Roscoe (Bolton) Ltd. v. Winder* (1914), [1915] 1 Ch. 62 (Eng. Ch. Div.); and *Bishopsgate Investment Management Ltd. v. Homan*, [1995] Ch. 211, [1995] 1 W.L.R. 31 (Eng. C.A.).

[75] As in *Re Oatway*, *supra*, note 69.

shown to be held in trust. That is not an exception to the rule, but a case in which it has nothing to say. So, too, if it could be shown that the final deposit was an attempt by the trustee to reimburse the trust. Again, that would not be any exception to the rule, but would merely be a case in which there was a declaration of trust regarding new property.[76]

3. Innocent Contributors to a Mixture are Treated Equally

The contributors to a mixture of value may be innocent *vis-à-vis* one another. This may happen because a trustee transfers property to an innocent recipient, who combines it with his own.[77] It may also occur where a trustee holds property on trust for multiple beneficiaries of multiple trusts, and, wrongfully or lawfully, mixes the funds together.[78] Even if the mixing was wrongful, the point now is that the *contributors* are innocent. This means that none of them can raise against the others the principle that a wrongdoing contributor's interest is subordinated. Instead, they must be treated equally.

One outcome of this situation is that the claims available are different. Assume that a trustee misappropriates $10,000 of trust property from each of two trusts, and invests the $20,000 in land. The different beneficiaries would be equal co-owners in equity of the land. If it had fallen in value to $14,000, the result is the same. There is no warrant to allow one of them to have a charge over the land to secure repayment of the loss, as would be the case if the claim was against the trustee himself, because there is no basis for shifting loss from one innocent victim to the other.[79]

The same effect occurs with the tracing process. Assume that a trustee misappropriates $1,000 from each of two trusts, and puts it into his personal bank account, raising the balance to $5,000, and then dissipates all but $500. The wrongdoing trustee's contribution is subordinated, so all of the remaining $500 is trust property; but as between the two innocent contributors, there is no reason to favour one over the other, and they share it in proportion to their contributions; in this case, equally.[80]

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[76] This would however raise a difficult question whether such a reimbursement was a voidable preference, and much would depend on the terms of the governing statute. See *Re Carson*, 55 O.L.R. 649, [1924] 4 D.L.R. 492 (Ont. C.A.); *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.); *Blackhawk Downs Inc. v. Arnold* (1972), [1973] 3 O.R. 729, 38 D.L.R. (3d) 75 (Ont. H.C.); and *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 95.

[77] *Diplock v. Wintle*, *supra*, note 60.

[78] *Ontario (Securities Commission) v. Greymac Credit Corp.*, *supra*, note 74.

[79] Alternatively, a better analysis might be that both are entitled to the charge, the legal title being in the trustee, but the charges would have identical priority, and so the result would simply be the equal sharing of the property as before.

[80] *Ontario (Securities Commission) v. Greymac Credit Corp.*, *supra*, note 74. Until this decision, there was some authority for resolving a dispute over a bank account between innocent contributors by using the rule in *Clayton's Case* (1816), 1 Mer. 529, 35 E.R. 767, which is based on the order of deposits and withdrawals (first in, first out). This is a rule governing the banker-customer relationship and it should never have been imported into tracing. Most other common law jurisdictions have also accepted this: see *Smith* at 185-94. The New Zealand Court of Appeal did so in *Re Registered Securities Ltd.*, [1991] 1 N.Z.L.R. 545, as did the New South Wales Court of Appeal in *Keefe v. Law Society N.S.W.* (1998), 44 N.S.W.L.R. 45. The position in England is still unclear, with *Clayton's*

There is a difficult question which arises regarding the interaction of the principles governing multiple innocent claimants, and the idea of the lowest intermediate balance. Recall that the lowest intermediate balance rule really only says that a person cannot get more out of a mixture than he put into it. Assume that a trustee takes $1,000 from Trust A and puts it in a new bank account. Later, he dissipates $500 so that $500 remains. Then he takes $1,000 from Trust B and puts into the new account; finally his bankruptcy occurs with the account balance at $1,500. The beneficiaries of Trust A will say that they should be treated equally with those of Trust B, and the remaining funds should be seen as traceable equally from the two sources so that each gets $750, with an unsecured claim for the shortfall. However, the beneficiaries of Trust B will say that the evidence shows that Trust A contributed only $500 to the final balance, while Trust B contributed $1,000, and so the remaining funds should be distributed in that way. Trust A would establish a trust claim to only $500 and would have an unsecured claim for the rest, while Trust B would be made whole. This seems to be the correct outcome of the established principles. In *Law Society of Upper Canada v. Toronto Dominion Bank*,[81] however, the Ontario Court of Appeal favoured the argument of Trust A and held that in such a case, whatever remains should be allocated proportionately according to the amounts contributed, without regard to intervening losses. The judgment seems somewhat weakened by an apparent assumption that the lowest intermediate balance rule is somehow part and parcel of the rule in *Clayton's Case*, which is now discredited as relevant to tracing. In fact, although both rules take notice of the order of transactions, they are entirely different ideas.[82] Although there is clearly a certain fairness in proportionate sharing, this approach shifts earlier losses onto later contributors, whose money could not possibly have been implicated in those losses.[83] More recently, in *Re Graphicshoppe*,[84] the Ontario Court of Appeal has indicated that the logic of the

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Case seen as a default rule which is rather easily displaced: *Barlow Clowes International Ltd. v. Vaughan* (1991), [1992] 4 All E.R. 22 (Eng. C.A.), especially Leggatt L.J. at 44; *Russell-Cooke Trust Co. v. Prentis (No.1)* (2002), [2003] 2 All E.R. 478, 5 I.T.E.L.R. 532; and *Commerzbank v. Aktiengesellschaft JMB Morgan, plc*, [2004] EWHC 2771.

[81] (1998), 42 O.R. (3d) 257, 169 D.L.R. (4th) 353 (Ont. C.A.), leave to appeal refused (1999), 250 N.R. 194 (note) (S.C.C.). See also *Winsor v. Bajaj* (1990), 75 D.L.R. (4th) 198 (Ont. Gen. Div.).

[82] Blair J., who gave the court's judgment, also concluded that there was no binding authority requiring the application of the lowest intermediate balance rule, but it was accepted in *Greymac*, *supra*, note 74, to say nothing of *Re Norman* (1951), [1951] O.R. 752, [1952] 4 D.L.R. 174 (Ont. C.A.). He noted also the acceptance of the rule in *British Columbia v. National Bank of Canada*, *supra*, note 55. For a more detailed analysis of the judgment, see the note by L. Smith, (2000) 33 C.B.L.J. 75.

[83] Blair J. based his reasoning partly on the fact that the mixing in the case was lawful, being a solicitor's trust account, which is a device of administrative convenience for multiple trusts. But it is not clear that a client who entrusts money to his solicitor thereby takes the risk that he will be forced to contribute to a loss suffered by another client, whose money had earlier been taken by the solicitor. Also, if this part of the judgment is followed, the approach in the case would not govern in instances which do not involve, like a solicitor's trust account, a lawfully created common trust fund.

[84] 2005 CarswellOnt 7008, 78 O.R. (3d) 401, 260 D.L.R. (4th) 713 (Ont. C.A.). The majority indicated (at para. 127) that the reasoning of *Law Society of Upper Canada v. Toronto Dominion Bank* could perhaps be upheld if it were confined to situations where the mixture is a single trust account, such as a lawyer's trust account. See further *Boughner v. Greyhawk Equity Partners Ltd. Partnership (Millenium)*, 2012 ONSC 3185 (Ont. S.C.J. [Commercial List]).

lowest intermediate balance rule stands apart from *Clayton's Case*, and must be applied even in mixed fund situations.[85]

It is clear that the interaction of the lowest intermediate balance rule with multiple innocent claimants can become very complex if the number of transactions is large.[86] A sharing of what remains according to the amounts contributed is much easier.[87] Some courts have suggested that in complicated tracing situations, there is a jurisdiction to override the strict rights of the parties where the costs of determining those rights would be excessive.[88] The attraction of this is clear, although there is also an argument that it for the parties to agree whether to compromise their rights in the interests of a simpler resolution of the dispute.

B. The End of Tracing

When is the trust property gone, actually and notionally, so that ascertainment is no longer possible? Money can be dissipated in many ways. If it is spent on living expenses, including rent for a period now expired, then it is consumed and there are no proceeds.[89]

1. Improvements

In *Diplock v. Wintle*,[90] the English Court of Appeal concluded that where an innocent defendant used money to improve immovable property, the tracing exercise was at an end. These conclusions have been controversial ever since, and there is no doubt the court permitted the competing equities of the claimant and the defendant to influence its conclusions on the limits of notional ascertainability. In such a case, has the traced fund "gone" or is it merely inequitable to impose a charge or mortgage upon the real estate of an innocent person? It is clear that this is the limit of the claimant's hitherto superior equity; it is not the limit of the ascertainability of the trust property. One might understand it better as an example of the defence of change of position.

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[85] See also the discussion of the point in *Shalson v. Russo* (2003), [2005] Ch. 281 (Eng. Ch. Div.), at paras. 149-50, where the Ontario cases were not cited, but Rimer J. agreed with the approach in *Re Graphicshoppe*.

[86] See *Smith* at 265-70.

[87] In *Barlow Clowes International Ltd. v. Vaughan*, *supra*, note 80, all of the judges accepted that the fairest and most logical approach was one which took notice of the balance from time to time and the timing of contributions; but it was agreed by counsel that this would be too complicated to apply.

[88] See *Greymac*, *supra*, note 74, at 690 [55 O.R.]; *Re Registered Securities Ltd.*, *supra*, note 80, at 555; and *Chering Metals Club Inc. (Trustee of) v. Non-Discretionary Cash Account Trust Claimants* (1991), 7 C.B.R. (3d) 105 (Ont. Bktcy.).

[89] In *Simpson-Sears Ltd. v. Fraser* (1974), 7 O.R. (2d) 61, 54 D.L.R. (3d) 225 (Ont. H.C.), some of the money had been spent "in higher living than my position dictates" (at 63 [O.R.]). It was therefore dissipated and gone. A further part of the money had been spent in the purchase of real estate, which was then conveyed to a company which took with notice of the trust; tracing permitted against the company's equity of redemption over the land.

[90] *Supra*, note 60.

TAB

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2005 CarswellOnt 7008
Ontario Court of Appeal

Graphicshoppe Ltd., Re

2005 CarswellOnt 7008, 2005 C.E.B. & P.G.R. 8178 (headnote only), [2005] O.J. No. 5184, 144 A.C.W.S. (3d) 355, 15 C.B.R. (5th) 207, 205 O.A.C. 113, 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, 49 C.C.P.B. 63, 78 O.R. (3d) 401

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF THE BANKRUPTCY OF THE GRAPHICSHOPPE LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Moldaver, Armstrong, Juriansz JJ.A.

Heard: June 16, 17, 2005
Judgment: December 5, 2005 *
Docket: CA C42864, M32603

Proceedings: reversing *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.)

Counsel: Harvey Chaiton, George Benchetrit for Appellant
Andrew Hatnay, Clio Godkewitsch for Respondents

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

Headnote

Pensions --- Administration of pension plans — General principles

Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employee' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Estates and trusts — Trusts — General principles — Nature of trust

Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employees' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

The pension plan that G Ltd. provided for its employees was a defined contribution plan administered by insurer L. The employees contributed four per cent of their wages and G Ltd. contributed an amount equal to one per cent. G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to the plan administrator within thirty days of the month end. In the months preceding bankruptcy, G Ltd. failed to do so: between February 2003 and the date of bankruptcy, November 20, 2003, G Ltd. failed to remit $92,889.45 of the moneys that it had deducted from its 102 employees' pay. G Ltd. had one bank account that it used for all purposes. The employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account. As G Ltd. continued to carry on business, the bank account balance fluctuated and, at one point, became negative. On the date of bankruptcy, however, there was $145,667.51 in the account. The closing balance resulted from transfers from T Ltd., which was factoring G Ltd.'s receivables. The employees filed a proof of claim for $92,889.45 with the trustee in bankruptcy. They relied on s. 67(1)(a) of the Bankruptcy and Insolvency Act ("BIA"), which provides that the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person. The trustee disallowed the employees' claim on the basis that the employees must be able to trace their money into property in the possession of the bankrupt on the date of bankruptcy. Because G Ltd. had converted the trust moneys to other property or spent it on running its business, the trust was destroyed and the money in the account on the date of bankruptcy was not trust money. The employees successfully appealed to Registrar in Bankruptcy. The trustee's appeal of the registrar's decision to the Superior Court of Justice was dismissed. The trustee appealed to the Court of Appeal.

Held: The appeal was allowed.

Per Moldaver J.A. (Armstrong J.A. concurring): The trustee in bankruptcy correctly determined that the employee contributions did not constitute trust funds under s. 67(1)(a) BIA. G Ltd. held its employees' pension contributions in trust when it deducted them from their pay. At that moment, the trust property was identifiable and the trust met the requirements for a trust under established principles of trust law. Shortly thereafter, however, the trust property ceased to be identifiable. The employee contributions were commingled with G Ltd.'s funds and, prior to the date of bankruptcy, they were converted into other property and were no longer traceable. As of the date of bankruptcy,

none of the employee contributions that had been deposited into G Ltd.'s bank account remained intact. Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Per Juriansz J.A. (dissenting): Under traditional principles of trust law, commingling the trust property with other assets does not destroy the trust. It simply affects whether proprietary as opposed to personal relief is available. In this case, there was no doubt that the pension contributions were the employees' money, and it was conceded that G Ltd. held that money in trust upon deducting it from the employees' pay. The commingling of the employees' money with its own in one bank account did not destroy the trust. It was open for the Superior Court of Justice to not apply the lowest intermediate balance rule and to find that the employees were entitled to reclaim their contributions in the amount of $92,899.45.

Annotation

In a result which even the majority conceded to be "harsh", the Ontario Court of Appeal has overturned the decision below which had applied the "deemed trust" rules in the Ontario *Pension Benefits Act* to extricate unremitted employee pension plan contributions from the bankrupt employer's estate. Many commercial insolvency lawyers had considered the earlier decision to be simply wrong in law, and indeed the majority's reasons for judgment at the Court of Appeal are much more consistent with well-established precedents like the Supreme Court of Canada's *Henfrey Samson* decision. That being said, the fact that this case involved EMPLOYEE contributions as opposed to EMPLOYER contributions makes this result all but impossible to justify to the man on the street. Recent amendments to the *Bankruptcy and Insolvency Act*, which will give special priority to employee pension plan contributions, will likely go a long way to limiting the effect of this decision on future insolvencies.

Gary Nachshen

Table of Authorities

Cases considered by *Juriansz J.A.*:

Anderson & Co., Re (1923), 4 C.B.R. 288, 25 O.W.N. 257, 1923 CarswellOnt 74 (Ont. S.C.) — referred to

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — referred to

Bethlehem Steel Corp. v. Tidwell (1986), 66 B.R. 932 (U.S. Dist. Ct.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — considered

Bryant Isard & Co., Re (1923), 4 C.B.R. 41, 24 O.W.N. 597, 1923 CarswellOnt 35 (Ont. S.C.) — considered

Bryant Isard & Co., Re (1925), 5 C.B.R. 393, [1925] 1 D.L.R. 847, 1925 CarswellOnt 3 (Ont. S.C.) — considered

Capra v. Grobstein (1929), 49 B.R. 495, 11 C.B.R. 250, 1929 CarswellQue 19 (C.A. Que.) — referred to

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — considered

Conrad, Re (1963), 6 C.B.R. (N.S.) 275, 1963 CarswellQue 58 (C.S. Que.) — referred to

Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustee of) v. Caisse populaire de Black-Lake (1986), 64 C.B.R. (N.S.) 156, 1986 CarswellQue 37 (C.S. Que.) — referred to

Cynar Dry Co., Re (2005), 2005 CarswellOnt 63, 8 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Diplock v. Wintle (1948), (sub nom. *Diplock, Re)* [1948] 2 All E.R. 318, [1948] 1 Ch. 465 (Eng. C.A.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360 (Ont. C.A.) — considered

H. O. Kirkham & Co., Re (1938), 20 C.B.R. 223, [1939] 1 W.W.R. 425, 53 B.C.R. 278, 1938 CarswellBC 3 (B.C. S.C.) — referred to

Hallett's Estate, Re (1880), 13 Ch. D. 696, [1874-1880] All E.R. Rep. 793 (Eng. C.A.) — considered

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — considered

Lupton v. White (1808), 33 E.R. 817, 15 Ves. Jun. 432 — considered

Murdoch v. Murdoch (1973), [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423, 1973 CarswellAlta 156, 1973 CarswellAlta 119 (S.C.C.) — referred to

Nierenberg, Re (1979), 30 C.B.R. (N.S.) 267, 1979 CarswellOnt 211 (Ont. Bktcy.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.))* [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Owen, Re (1985), (sub nom. *Burlingham v. First City Trust Co.)* 38 Sask. R. 104, 55 C.B.R. (N.S.) 161, 1985 CarswellSask 54 (Sask. Q.B.) — referred to

Plourde, Re (1979), 31 C.B.R. (N.S.) 308, 1979 CarswellQue 73 (C.A. Que.) — referred to

Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd. (1999), 1999 CarswellSask 435, 11 C.B.R. (4th) 107, (sub nom. *Pratchler Agro Services Inc. (Bankrupt) v. Cargill Ltd.)* 183 Sask. R. 157 (Sask. Q.B.) — referred to

Rathwell v. Rathwell (1978), [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — referred to

Reed v. Franco (1980), [1980] C.S. 391, 35 C.B.R. (N.S.) 149, 1980 CarswellQue 54 (C.S. Que.) — referred to

Reed v. Franco (1983), 49 C.B.R. (N.S.) 21, 1983 CarswellQue 41 (C.A. Que.) — referred to

Soucier, Re (1939), 20 C.B.R. 298, 1939 CarswellNB 1 (N.B. S.C.) — referred to

Tlustie, Re (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — considered

Ward-Price v. Mariners Haven Inc. (2001), 2001 CarswellOnt 1514, 199 D.L.R. (4th) 68, 42 R.P.R. (3d) 39, 57 O.R. (3d) 410, 159 O.A.C. 117 (Ont. C.A.) — considered

Cases considered by *Moldaver J.A.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — followed

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.)*) [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Statutes considered by *Juriansz J.A.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 30 — referred to

s. 30(1)(d) — referred to

s. 67 — referred to

s. 67(1)(a) — considered

s. 136 — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Social Service Tax Act, R.S.B.C. 1979, c. 388
s. 18(1) — referred to

s. 18(2) — referred to

Statutes considered by *Moldaver J.A.*:

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

s. 67(1)(a) — considered

APPEAL by trustee in bankruptcy from judgment reported at *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.) with respect to application of s. 67(1)(a) of *Bankruptcy and Insolvency Act*.

***Juriansz J.A.* (dissenting):**

1 This is an appeal by the Trustee in Bankruptcy ("Trustee") of Graphicshoppe Limited ("Graphicshoppe") from the judgment of Lax J. dated December 23, 2004. The question raised is whether former Graphicshoppe employees can recover their pension contributions that Graphicshoppe commingled with its own funds in a single bank account prior to its bankruptcy. The Trustee concedes that Graphicshoppe held the pension contributions as trustee when it deducted the pension contributions from the employees' pay. Lax J. dismissed the Trustee's appeal from the decision of the Registrar in Bankruptcy and allowed the employees to recover their pension contributions.

2 I would dismiss the appeal. I conclude that the employees are able to trace their pension contributions to the account and, in the circumstances, this provided a basis for Lax J. to allow the employees to assert a trust interest.

I. Background

(a) Facts

3 The pension plan that Graphicshoppe provided for its employees was a defined contribution plan administered by London Life. The employees contributed 4% of their wages and Graphicshoppe contributed an amount equal to 1%. Graphicshoppe deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to the plan administrator within thirty days of the month end. In the months preceding bankruptcy, Graphicshoppe failed to do so: between February 2003 and the date of bankruptcy, November 20, 2003, Graphicshoppe failed to remit $92,889.45 of the moneys that it had deducted from its 102 employees' pay.

4 Graphicshoppe had one bank account that it used for all purposes. The employees' money deducted from their pay was commingled with Graphicshoppe's own funds in that account. As Graphicshoppe continued to carry on business the bank account balance fluctuated and, at one point, became negative. On the date of bankruptcy, however, there was $145,667.51 in the account. The closing balance resulted from transfers from Textron Financial Canada, which was factoring the company's receivables.

5 The employees filed a proof of claim for $92,889.45 with the Trustee. They relied on s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which provides:

> The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

6 Section 67(1)(a) does not stipulate priorities between trust beneficiaries and creditors. Rather, it provides that certain property held by a bankrupt shall not be available for distribution among creditors.

7 The employees were careful to claim a trust interest in the bank account only to the extent of their own pension contributions. They made no claim in respect of contributions the employer was supposed to have made to the pension plan on their behalf.

(b) Underlying Decisions

8 The Trustee disallowed the employees' claim on the basis that the employees must be able to trace their money into property in the possession of the bankrupt on the date of bankruptcy. Because Graphicshoppe had converted the trust

moneys to other property or spent it on running its business, the trust was destroyed and the money in the account on the date of bankruptcy was not trust money.

9 The employees appealed to the Registrar in Bankruptcy. On appeal, the Trustee did not dispute that Graphicshoppe initially held the employees' contributions as trustee. Rather, the Trustee's position was that, once Graphicshoppe spent the money on operating its business, the subject matter of the trust was no longer certain because it could no longer be identified.

10 The Registrar concluded that there was a "common law" trust because the "three certainties" were established, namely: (1) certainty of intention; (2) certainty of subject matter; and (3) certainty of object. She found that the identical funds did not have to be in the bankrupt's bank account at the date of bankruptcy. She concluded that there was no tracing requirement and, provided that the employees' money was calculable or ascertainable, the "identifiable" aspect of the certainty of subject matter test was met.

11 The Trustee appealed the Registrar's decision to the Superior Court of Justice. Lax J. dismissed the Trustee's appeal. She agreed with the Registrar that there was certainty of subject matter under trust principles, because the collective agreement specified a defined percentage to be deducted from each employee and held on trust. She rejected the Trustee's argument that the trust was destroyed by the fact that Graphicshoppe had commingled the pension contributions with its own funds.

12 Lax J. then responded to the Trustee's argument that the lowest intermediate balance rule (sometimes referred to as the "LIBR") should be applied. She summarized the rule and its effect in the following terms:

> The Lowest Intermediate Balance Rule ("LIBR") has historically stood for the principle that where trust money has been mingled in a bank account and spent by a breaching trustee and new money originating from a different source is subsequently deposited into the mixed account, an injured beneficiary can only claim a proprietary interest over the lowest intermediate balance. It was assumed that the "new money" was not technically part of the injured beneficiary's trust and the application of LIBR prevented the beneficiary from recovering the full value of the trust.

13 If the LIBR were applied in this case, the employees would be entitled to nothing, because Graphicshoppe's account had a negative balance after their funds were deposited into the account.

14 Relying on this court's reasoning in *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (Ont. C.A.) ("*LSUC*"), Lax J. found she was not obliged to apply the lowest intermediate balance rule. Instead, she concluded:

> I am bound to search for the method of allocating the loss which is the more just, convenient and equitable in the circumstances. The contest here is between wronged trust beneficiaries, whose property was taken, and creditors of the bankrupt. In my view, it would be unjust and inequitable to apply the LIBR rule in these circumstances to deprive the employees of their own property and correspondingly benefit the creditors of the bankrupt's estate at their expense.

She therefore held that the employees could assert a proprietary interest over the mixed fund, dismissed the Trustee's appeal, and directed him to allow the employees' proof of claim and pay the amount of $92,899.45.

(c) Positions of the Parties and Issues

15 The appellant submits, first, that there was no trust for purposes of s. 67(1)(a) of the BIA. While the *Pension Benefits Act*, R.S.O. 1990, c. P.8, creates a provincial statutory deemed trust, s. 67(1)(a) applies only to a valid trust under the general principles of the law of equity. In this case, the appellant submits that there was no longer such a trust in existence on the date of bankruptcy.

16 While the appellant concedes that Graphicshoppe held its employees' pension contributions in trust when it deducted them from their pay, it submits that the trust was destroyed when Graphicshoppe commingled them with its own funds. For this proposition, it relies on the Supreme Court of Canada's decision in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) ("*Henfrey Samson*") and this court's decision in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.) ("*GMAC*").

17 The appellant's second argument is that there was no trust property remaining at the date of bankruptcy. The funds in the account were no longer traceable to or in any way attributable to the employees' pension contributions because Graphicshoppe had spent the employees' money. The money in the account was other money from a different source that had been later deposited. This was evident because the account had been in an overdraft position shortly before bankruptcy. The appellant submits that the money subsequently deposited into the account was not impressed with a trust under general principles of law.

18 Finally, if the employees did have a valid trust over the money in the account on the date of bankruptcy, the appellant submits that Lax J. erred by failing to take into account a payment of $77,812.87 paid to the employees as wages for the period prior to bankruptcy.

19 The respondents submit that the appeal should be quashed or stayed because the appellant filed and proceeded with the appeal without the inspectors' permission as required by s. 30 of the BIA.

20 In regard to the merits of the appeal, the respondents submit that commingling trust assets with other assets does not, in and of itself, destroy a trust. In this case, the trust continued to exist after the funds were commingled, because the trust property was sufficiently identifiable even though the trustee withdrew and spent money from the account. They contend that the appellant effectively relies upon the LIBR, which was, they submit, rejected by this court's decision in *LSUC*.

21 The respondents also submit that Graphicshoppe intended to replenish the trust funds that it improperly withdrew from the account. More specifically, they say that Graphicshoppe took the money to keep the company afloat when it was in financial difficulty but that, as new money came in, it replenished or restored the trust funds.

22 As I will later explain, I agree with the respondents that the effect of the appellant's second argument is that the lowest intermediate balance rule should be applied. Therefore, the positions of the parties raise the following five issues:

> (1) Should the appeal be quashed or stayed because the appellant proceeded without the permission of the inspectors?
>
> (2) Did commingling the pension contributions with the employer's funds in one bank account destroy the trust?
>
> (3) Was the judge bound to apply the lowest intermediate balance rule?
>
> (4) Was the trust replenished?
>
> (5) Did the judge err by failing to take into account the payment of $77,812.87 to the employees?

II. Analysis

(1) Issue One: Should the appeal be quashed or stayed because the appellant proceeded without the permission of the inspectors?

23 Section 30(1) of the BIA provides:

> 30.(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> . . . . .

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

24 It is not disputed that the appellant filed and proceeded with this appeal without seeking the permission of the inspectors. Nevertheless, the permission of inspectors is not required for a trustee to have capacity to bring legal proceedings. Rather, obtaining the permission of the inspectors simply protects the estate from becoming liable for costs. A long line of jurisprudence makes it clear that trustees have the capacity to undertake litigation without the authorization of the inspectors, but if they do so they will be personally liable for costs if unsuccessful: *Anderson & Co., Re* (1923), 4 C.B.R. 288 (Ont. S.C.); *Capra v. Grobstein* (1929), 11 C.B.R. 250 (C.A. Que.); *Soucier, Re* (1939), 20 C.B.R. 298 (N.B. S.C.); *H. O. Kirkham & Co., Re* (1938), [1939] 1 W.W.R. 425 (B.C. S.C.); *Conrad, Re* (1963), 6 C.B.R. (N.S.) 275 (C.S. Que.); *Plourde, Re* (1979), 31 C.B.R. (N.S.) 308 (C.A. Que.); *Reed v. Franco* (1980), 35 C.B.R. (N.S.) 149 (C.S. Que.), aff'd (1983), 49 C.B.R. (N.S.) 21 (C.A. Que.); *Owen, Re* (1985), 55 C.B.R. (N.S.) 161 (Sask. Q.B.); *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustee of) v. Caisse populaire de Black-Lake* (1986), 64 C.B.R. (N.S.) 156 (C.S. Que.); and *Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd.* (1999), 11 C.B.R. (4th) 107 (Sask. Q.B.).

25 The cases cited by the respondents do not refute this established principle: *Bryant Isard & Co., Re* (1923), 4 C.B.R. 41 (Ont. S.C.); *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Bryant Isard & Co., Re*, [1925] 1 D.L.R. 847 (Ont. S.C.); and *Nierenberg, Re* (1979), 30 C.B.R. (N.S.) 267 (Ont. Bktcy.). These cases all deal with the requirement of inspector authorization when employing solicitors or accountants. The cases confirm that unauthorized costs must be borne by the trustee personally.

26 In *Cynar Dry Co., Re* (2005), 8 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), the Court set aside a release that a trustee had executed without first convening a meeting of inspectors to discuss the matter. However, the case is distinguishable from the jurisprudence set out above, because it dealt with the discontinuation of litigation rather than the commencement of litigation. While a trustee who initiates litigation without the inspectors' permission can reimburse the estate for any costs, there would be enormous difficulties encountered in requiring a trustee to compensate the estate for the consequences of the discontinuation of litigation. In my view, this distinction explains the result in *Cynar Dry Co., Re*.

27 Therefore, the respondents have not established that the appeal should be quashed or stayed.

(2) Issue Two: Did commingling the pension contributions with the employer's funds in one bank account destroy the trust?

28 As noted above, the appellant does not dispute that Graphicshoppe held the employees' contributions as trustee at the time it deducted the money from their pay. At that point, the three certainties required to establish a trust were satisfied.

29 The appellant's first argument is that the trust was destroyed, because its subject matter became uncertain when the pension contributions were commingled with the employer's funds in one bank account.

30 The appellant relies on the Supreme Court of Canada's decision in *Henfrey Samson* and, in particular, McLachlin J.'s statement at p. 34:

> The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law.

31 The appellant also relies on this court's decision in *GMAC*, which was released after Lax J.'s decision. Feldman J.A., writing for the unanimous court, said at para. 20:

> In my view, the facts in this case regarding how the funds were held and accounted for are not distinguishable from the *Henfrey Samson Belair* case, and consequently, the legal result must also be the same. The funds relating to

> the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds when they were not segregated and were co-mingled with other TCT funds.

32 As I will discuss below, I do not regard *Henfrey Samson* and *GMAC* as changing the settled principles of trust law that: a trust is not destroyed when a trustee wrongfully mixes trust property with his or her own property; and the beneficiary may still be able to claim proprietary remedies in such a situation. Therefore, the more pertinent question is whether, on the facts of this case, the employees can claim a proprietary remedy despite the commingling of their funds with Graphicshoppe's. This question is addressed in the next section.

33 Before discussing *Henfrey Samson* and *GMAC*, I will briefly review what was considered to be the state of trust law prior to these decisions.

(a) Settled principles

34 As mentioned above, a fundamental concept of trust law is that, for a trust to come into existence, it must have three essential certainties: (1) certainty of the intention to create a trust; (2) certainty of the subject matter or trust property; and (3) certainty of the objects of the trust. If any one of these does not exist, the trust fails to come into existence: D.W.M. Waters *et al.*, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 132.

35 It is useful to bear in mind the distinction between the certainty of subject matter required to create a trust initially and the identification of property into which a claimant can subsequently "trace" trust property after it has been converted to other forms. The property that is the subject of the trust must be identified clearly in order for the trust to be validly created in the first place. That is certainty of subject matter.

36 It has long been a principle of trust law that a trust is not destroyed when a trustee wrongfully mixes trust property with his or her own. In *Lupton v. White* (1808), 33 E.R. 817, where the trustee had mixed the trust's lead ore with his own, the Lord Chancellor said at p. 819:

> If the result is, that the Master cannot take the account, it is clearly not for him, without a farther direction, to apply the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture upon his part.

37 It would be odd indeed if a trustee could, by its own wrongful acts in commingling trust property with its own, destroy the trust, cause its obligations to expire and make the trust property its own. As Lax J. noted, if that were the case, a wronged beneficiary could never assert even a personal remedy against a breaching trustee.

38 "Tracing" comes into play after the trust has been created and there has been a wrongful disposition of trust property and the beneficiary claims what has been substituted for the original trust property. At this stage, the claimant must be able to identify property as the substitute for the trust property in order to claim proprietary relief. If tracing is no longer possible — where, for instance, the plaintiff's money is spent on a dinner or squandered at the racetrack — the claimant may still seek personal relief, but will no longer have an effective proprietary remedy.

39 The right to trace into a mingled fund has long been part of the law of equity. One of the leading cases establishing the right to trace into a mingled fund is *Hallett's Estate, Re*, which dates back 125 years: (1880), [1874-1880] All E.R. Rep. 793 (Eng. C.A.). In A.W. Scott & W.F. Fratcher, *The Law of Trusts*, 4 th ed. (Boston: Little Brown and Co., 1989) at para. 515, the authors state that this case is commonly cited for the principle that, "where a fiduciary, even though he is not a trustee of an express trust, wrongfully mingles money of his principal with money of his own, his principal is entitled to a charge on the mingled fund."

40 In the leading English text of *Underhill and Hayton Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995) at 869, David J. Hayton writes:

> Once a wrongdoing fiduciary has mixed trust funds with his own in a bank account an equitable lien or charge will automatically attach to that account and therefore to moneys paid out of that account, whether into other accounts (so purchasing a chose in action) or to purchase a painting or Whizzo shares ...

41 Canadian textbooks published since the Supreme Court's decision in *Henfrey Samson* continue to regard it as a settled principle that the equitable right to trace is available, even when the trustee has mixed trust property with his or her own property.

42 For example, Eileen E. Gillese and Martha Milczynski in *The Law of Trusts*, 2d ed. (Toronto: Irwin Law, 2005) at 173, state that:

> Even if the trust property has changed in form, equity still follows the property so long as it can be ascertained to be the product of the original property. That is, the property must remain identifiable in order to be traced. To be identifiable, it must be the original property, or the product or sale of the original property. *Equity permits the claimant to follow property into a mixed fund*, or through such a fund into property purchased with monies from that fund, because the claim is against the traced asset itself and is not dependent on establishing some claim to the entirety of the converted asset
>
> [emphasis added].

43 In the 2005 edition of *Waters' Law of Trusts in Canada*, the authors carefully review the principles that apply to the remedies of a beneficiary for recovering trust property when trust property has been mixed with other property. They say, at p. 1279, that these principles "apply not only to notional mixtures such as bank accounts, but to genuine physical mixtures of indistinguishable things, like sawlogs or grain."

44 In summary, certainty of subject matter is one of three certainties that must be established to create a trust. Where a trustee subsequently mingles trust moneys with other moneys in a mixed account, the beneficiary will be able to claim a proprietary remedy if the beneficiary's money can still be identified or traced. In other words, under traditional principles of trust law, commingling the trust property with other assets does not destroy the trust. Rather, it simply affects whether proprietary as opposed to personal relief is available.

45 I now turn to the question of whether the Supreme Court of Canada in its decision in *Henfrey Samson* or this court in *GMAC* intended to interfere with these settled principles.

(b) Henfrey Samson

46 *Henfrey Samson* was a constitutional case. The Supreme Court decided that s. 67 of the BIA, which excludes trust property held by the bankrupt from the bankrupt's estate, applies only to trusts arising under general principles of the law of equity and not to provincially created statutory "deemed trusts" that lack the attributes of such trusts. This is because the provinces lack constitutional competence to reorder the priorities stipulated by the BIA.

47 The specific issue in *Henfrey Samson* was whether a trust created pursuant to s. 18(1) of the *Social Services Tax Act*, R.S.B.C. 1979, c. 388, was a trust for purposes of s. 67(1)(a) of the BIA. Section 18(1) provides that a person who collects sales tax "shall be deemed to hold it in trust for Her Majesty in right of the Province".

48 The province took the position that sales tax that the bankrupt had collected, but failed to remit, was held in trust for the Crown pursuant to s. 18(1) and that, pursuant to s. 67(1)(a), the Crown was entitled to this amount out of the bankrupt's general estate before it was distributed to creditors.

49 In this context, a majority of the Supreme Court of Canada held that provincially created "deemed trusts" are subject to the rights of secured creditors and entitled to priority only as Crown claims under s. 136 of the BIA. Section 67(1)(a) will only apply if a statutory "deemed trust" meets the requirements for a trust under the general principles of trust law.

50 McLachlin J., writing for the majority, then turned her attention to whether, in the particular circumstances before the Court, the "statutory trust" constituted a trust under general principles. In concluding that there was no trust, she commented at p. 34:

> I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. *The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law*
>
> [emphasis added].

51 The bankrupt had "mingled the tax collected with its other assets" and the Province, in accordance with s. 18(2) of the *Social Services Tax Act*, claimed a trust over all of the bankrupt's assets equal to the tax not remitted. It is essential to note that the Province did not, as did the employees in this case, identify an account into which the unremitted sales tax had been deposited or any other particular asset to which the tax money could be traced. McLachlin J. continued in the same paragraph:

> In an attempt to meet this problem, s. 18(1)(b) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust.

52 Section 18(2), which provides that the amount of taxes required to be collected and remitted "forms a lien and charge on the entire assets of" the deemed trustee, was of no assistance because it was provincial legislation that could not affect priorities under the BIA.

53 In my view, McLachlin J. was simply reiterating the settled principle of trust law that a beneficiary of a trust has no proprietary remedy if property impressed with a trust cannot be identified through tracing. At p. 35, she went on to say:

> If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of [s. 67(1)]. If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under [s. 67(1)].

54 Therefore, I do not understand McLachlin J.'s comment at p. 34 as changing settled trust law that a beneficiary may still have a proprietary trust remedy, even though the trust funds have been commingled and converted to other property, provided that it is possible to trace the funds to identifiable assets. The point she was making is that, on the facts before the Court in *Henfrey Samson*, as no specific property impressed with a trust could be identified at the time of the bankruptcy, the province's claim against the bankrupt's entire assets failed.

(c) GMAC

55 Like *Henfrey Samson*, *GMAC* also involved a provincial statutory deemed trust and competing priorities on bankruptcy.

TAB

3

2008 ABCA 194
Alberta Court of Appeal

Ambrozic v. Burcevski

2008 CarswellAlta 652, 2008 ABCA 194, [2008] A.W.L.D. 2419, [2008] A.W.L.D. 2420, [2008] A.W.L.D. 2421, [2008] A.W.L.D. 2422, [2008] A.W.L.D. 2451, [2008] A.W.L.D. 2452, [2008] A.W.L.D. 2454, [2008] A.W.L.D. 2484, [2008] A.W.L.D. 2486, [2008] W.D.F.L. 3001, [2008] W.D.F.L. 3043, [2008] A.J. No. 552, 169 A.C.W.S. (3d) 817, 41 E.T.R. (3d) 1, 429 W.A.C. 25, 433 A.R. 25, 53 R.F.L. (6th) 242, 90 Alta. L.R. (4th) 247

Monyca Ambrozic (Respondent / Cross-Appellant / Plaintiff) and Dimitri Burcevski and Voodoo Enterprises Ltd. (Appellants / Cross-Respondents / Defendants) and Michael Harrison and William A. Troughton (Not Parties to the Appeal / Defendants)

C. Fraser C.J.A., C. O'Brien, P. Rowbotham JJ.A.

Heard: September 13, 2007
Judgment: May 22, 2008
Docket: Calgary Appeal 0601-0265-AC

Proceedings: reversing in part *Ambrozic v. Burcevski* (2006), 55 Alta. L.R. (4th) 323, 2006 ABQB 4, 2006 CarswellAlta 75, 22 E.T.R. (3d) 46, 394 A.R. 15 (Alta. Q.B.)

Counsel: V. May, Q.C., D.J. Reed for Appellants
D. Steele, K. Colborne for Respondent

Subject: Restitution; Civil Practice and Procedure; Estates and Trusts; Family; Property; Torts

APPEAL by husband from judgment reported at *Ambrozic v. Burcevski* (2006), 55 Alta. L.R. (4th) 323, 2006 ABQB 4, 2006 CarswellAlta 75, 22 E.T.R. (3d) 46, 394 A.R. 15 (Alta. Q.B.), holding that wife was entitled to constructive trust of certain property and to compensation for services rendered to husband's business.

***Per curiam*:**

1 Monyca Ambrozic divorced Dimitri Burcevski almost 30 years ago. She received no property and no support. The trial judge found that she was entitled to a constructive trust on certain property and to compensation for services which she rendered to Burcevski's business. Burcevski appeals. Ambrozic cross-appeals the quantum awarded for her services and the extent of the constructive trust the trial judge granted. This appeal raises issues of limitation of actions and the appropriateness of the selected remedy.

Background Facts

2 Burcevski and Ambrozic married in their home country of Macedonia in June 1970. Ambrozic spoke little English and had completed high school. She had been admitted to university but an arranged marriage intervened. In December 1970, Ambrozic moved to Calgary where Burcevski had resided for about four years prior to the marriage. They divorced in 1978.

3 At the time of the marriage, Burcevski owned several rental properties. During the marriage, he bought and sold others. Although Ambrozic did not contribute money to any of the purchases, several of the rental properties were registered in the couple's names as joint tenants or in Ambrozic's name alone. Ambrozic did not work outside the home,

but helped her husband with the rental business by keeping records of tenants and rents, paying bills, and sometimes cleaning rental properties. She was not paid for this work.

4 The trial judge found that when Burcevski and Ambrozic divorced in February 1978, she received nothing. During the marriage, certain properties had been transferred by Burcevski to Ambrozic alone or into both their names. Later, while still married, Ambrozic, upon the instruction of Burcevski or his lawyer, executed documents transferring properties registered in her name back to Burcevski or to third party purchasers. She received none of the proceeds from these transfers or sales. The *decree nisi* stated that Ambrozic waived her claim to maintenance.

5 In 1976, during the marriage, Burcevski incorporated Voodoo Enterprises Ltd. (Voodoo) to hold, buy and sell property. The trial judge found that certain properties were then transferred to Voodoo by Burcevski, the rollover for tax purposes having been completed on May 10, 1977: AB F24. Among other properties, Burcevski transferred to Voodoo three quarter-sections of land (the farmland) purchased in 1975 and 1976 prior to the divorce. The trial judge expressly found that apart from the property rolled over from Burcevski, "Voodoo did not acquire any additional interest in property prior to the divorce in February 1978": AB F24 at para. [146]. In particular, the trial judge found that while Burcevski's brother, Nik, was a director of Voodoo, Burcevski was the sole owner of 100% of the shares of Voodoo and that "Nik was not reported as a shareholder of Voodoo until the filing of an annual report on December 11, 1980 where he was seen to have 50% of the shares. However, in 1996 and again in 2001, [Burcevski] was again listed as the sole shareholder of [Voodoo]": AB F24 at para. [147].

6 Most important, for purposes of this appeal, the trial judge found at AB F24 at para. [146] that, "There is no evidence to establish that Nik had ever transferred any interest in property he may have owned direct to Voodoo prior to the divorce." However, Nik testified that he gave Burcevski $99,000.00 in 1976. Based on all the evidence, the trial judge made the following critical findings at AB F25 at para. [153]:

> 1. Nik had no registered interest in the shares of Voodoo at the time of the divorce.
>
> 2. Nik "had an undeclared, unregistered interest in some of the properties which were then in the name of [Burcevski] or Voodoo, particularly the three Montgomery properties".
>
> 3. There is "no evidence that Nik deposited funds with [Burcevski] or Voodoo specifically to assist in the purchase of any of the three parcels of farmland in which [Burcevski] had acquired his interest before August 30, 1976. That was the date he purchased the last of these three quarter sections", that is the Chestermere lands.
>
> 4. Nik did not contribute any services to the improvement of those properties.

7 By 1979, Burcevski had sold all of the rental properties, including those earlier registered in Ambrozic's name. For the most part, he used the proceeds to pay the mortgages on the farmland. In fact, the trial judge found that "the two quarters of farmland near Balzac had been largely paid off by the time of the divorce. The farmland at Chestermere would have been about one half paid": AB F26 at para. [156]. Around 1979, Voodoo held title only to the farmland and a house in Artist's View. The Artist's View house was eventually traded for a hotel, which was lost to foreclosure. Voodoo still owns the farmland. Two of the quarter sections are near Balzac and the other near Chestermere. Given their proximity to Calgary, they are now very valuable pieces of real estate.

8 Following the divorce, Ambrozic improved her English and eventually became a realtor. In 1999, encouraged by a friend, she began investigating the properties held during her marriage to Burcevski. She obtained a copy of the 1978 divorce decree and searched land titles records for properties she remembered Burcevski's owning. She discovered she was recorded as owner of a number of properties. She sought legal advice and commenced this action on February 21, 2001.

9 The action against the lawyers, at whose direction she executed documents during the marriage and who purported to represent her interest at the time of the divorce, was settled before trial.

Trial Decision

10 Ambrozic's action consisted of three claims. She sought damages for personal injury for physical and mental abuse suffered during the marriage. The trial judge found that this action was barred by the *Limitations Act*, R.S.A. 2000 c. L-12 [the *Act*]: AB F12 at para. [63].

11 Ambrozic also sought compensation for the bookkeeping and cleaning work she had performed in connection with the rental properties during the marriage. Finally, she sought proprietary remedies for the properties in respect of which she had held title and which Burcevski had converted to his use. The trial judge allowed Ambrozic's claims for equitable relief. He found that since Burcevski had fraudulently concealed certain material facts, the prescribed limitation periods had been suspended.

12 The trial judge found that Burcevski was unjustly enriched by Ambrozic's work and awarded her $5,000.00 compensation on a *quantum meruit* basis. The trial judge also concluded that Burcevski was unjustly enriched as a result of his dealings with the properties registered in Ambrozic's name. He found that Burcevski was a trustee for Ambrozic's interest in the properties, but had converted her interest in the proceeds of sale. Since Burcevski ultimately used the converted proceeds to buy the farmland, the trial judge found that Ambrozic contributed to the acquisition of the farmland. As a remedy, the trial judge declared that Voodoo held one-third of the farmland in trust for Ambrozic.

Grounds of Appeal

13 The appellants contend that Ambrozic's claims are barred by the *Act*. Specifically, they assert that the trial judge erred in failing to conclude that Ambrozic ought to have discovered her claims either when she became a member of the Calgary Real Estate Board in 1987 and a licensed realtor in 1990, or when she divorced her second husband in 1993. Burcevski also argues that the trial judge erred in finding that he had fraudulently concealed the causes of action. The appellants further say that the trial judge ought to have considered the equitable doctrine of laches and based on this, barred Ambrozic's claim.

14 Burcevski also submits that the trial judge erred in concluding that Ambrozic received nothing at the time of her divorce, and in finding that he was unjustly enriched by Ambrozic's work and by the sale of the properties registered in her name.

15 Finally, the appellants contend that a constructive trust is not an appropriate remedy in this case because of the inability to trace funds and because Nik also has an unregistered interest in the farmland. In their view, an award of damages is the appropriate remedy and they ask that the action be returned to the trial judge for an assessment.

16 Ambrozic cross-appeals. She says that the trial judge erred in awarding her only $5,000.00 for her work and that she ought to have been compensated on the basis of value-surviving rather than value-received. Further, she seeks a declaration that one-half, rather than one-third, of the farmland should be held in trust for her benefit.

Standard of Review

17 The findings regarding Ambrozic's knowledge of her claim and of fraudulent concealment are questions of mixed fact and law. Whether Burcevski was unjustly enriched is also a question of mixed fact and law. If the trial judge applied an incorrect test, the standard of review is correctness. If the only issue is the application of the test, this Court will disturb the trial judge's findings only if the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 26-36, [2002] 2 S.C.R. 235 (S.C.C.). The trial judge's finding that Ambrozic received nothing at the time of the divorce is a question of fact, reviewable only if the trial judge made a palpable and overriding error.

18 Laches, as a discretionary doctrine, will not be interfered with by an appellate court unless the trial judge erred in law or the decision was unreasonable: *Decock v. Alberta*, 2000 ABCA 122 at para. 13, 255 A.R. 234 (Alta. C.A.).

48 The remedial constructive trust is recognized as an appropriate remedy in two situations: (1) where there has been a wrongful act such as fraud or breach of duty of loyalty, and (2) where there has been unjust enrichment and corresponding deprivation: *Soulos* at para. 43. The trial judge invoked both. He found that Burcevski had been unjustly enriched *and* that there had been a wrongful act — Burcevski had converted Ambrozic's properties. Much of the appellants' argument in this Court was directed at the inappropriateness of a constructive trust as a remedy, based upon decisions such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.) [*Panara*]. However, those cases concern claims of unjust enrichment by a spouse for work performed during the relationship. They do not involve claims for conversion. Indeed, the spouses in those cases had no interest in the property.

Proprietary v. Personal Remedy

49 The appellants submit that where damages would be an adequate remedy, the court should not impose a constructive trust. They rely upon cases such as *Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.), and *Panara*, involving unjust enrichment in the family law context. They also rely on *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), which considers constructive trust as a discretionary remedy.

50 Those cases do not apply here. The trial judge found that Burcevski had converted Ambrozic's interests in real property. Accordingly, Ambrozic is entitled to proprietary relief as a matter of right, rather than of discretion. It is a basic principle that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects: Donovan W.M. Waters, Mark R. Gillen & Lionel C. Smith, eds., *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 1273 [*Waters*]. Although a beneficiary may choose other remedies, such as an equitable lien or damages, Ambrozic's pleading sought a proprietary remedy. Having so elected, the trial judge was entitled to consider the constructive trust as an appropriate remedy, as long as the proceeds could be traced.

Tracing

51 The appellants submit that there was no evidence for the trial judge to properly trace the proceeds of the wrongful transfers into the farmland. They point to the trial judge's finding at AB F26 at para. [162] that, "It is not possible for this Court to trace the proceeds of the sale of Monyca's property interests, or those of Dimitri or Nik into subsequent purchases with any certainty." However, the trial judge also found, as noted earlier, that the proceeds of disposition of Ambrozic's property interests, along with other funds belonging to Burcevski and Nik had been rolled into properties now registered in the name of Voodoo: AB F24 at para. [142]. It is evident that the trial judge made two significant findings. Reviewed in context, there is no contradiction between them.

52 First, the trial judge found that the monies Burcevski obtained from sale of the converted properties could be traced into the farmland. This is demonstrated by the trial judge's express finding that Ambrozic's contribution to the purchase of the farmland arose from "the proceeds of her property interests which were converted by [Burcevski] and used by him for other purchases which ultimately led to the purchase of the farmland: AB F26 at para. [161]. There is ample support for that finding.

53 Burcevski himself testified that he occasionally sold his rental properties in order to make a payment on the mortgage for the farmland, and that it was his practice to have all of the properties he owned listed for sale on a continuous basis. The trial judge concluded that the two pieces of farmland near Balzac had been largely paid off at the time of the divorce and that the farmland at Chestermere would have been about one-half paid at that time. It is true that the appellants submit that this finding was partly in error because on October 25, 1978, after the divorce, Burcevski obtained a mortgage of $160,000.00 on two municipal properties in order to make payments on one of the Balzac properties. However, it appears that this evidence was not accepted by the trial judge.

TAB

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1994 ABCA 356
Alberta Court of Appeal

Luscar Ltd. v. Pembina Resources Ltd.

1994 CarswellAlta 251, 1994 ABCA 356, [1994] A.W.L.D. 1005, [1994] A.J. No. 864, [1995] 2 W.W.R. 153, 162 A.R. 35, 24 Alta. L.R. (3d) 305, 51 A.C.W.S. (3d) 537, 83 W.A.C. 35

LUSCAR LTD. and NORCEN ENERGY RESOURCES LIMITED v. PEMBINA RESOURCES LIMITED

Hetherington, Conrad and Côté JJ.A.

Judgment: November 10, 1994
Docket: Doc. Calgary Appeal 13293

Counsel: *L.M. Sali, Q.C., A.G. MacWilliam, L.R. Duncan, Q.C.*, and *L. O'Donoghue*, for appellant Pembina Resources Ltd.
E.L. Bunnell, Q.C., and *A.P. Argento*, for respondent Luscar Ltd.
J.J. Marshall, Q.C., and *T.E. Valentine*, for respondent Norcen Energy Resources Limited.

Subject: Civil Practice and Procedure; Natural Resources; Restitution; Estates and Trusts

Appeal and Cross-appeal from decision of Egbert J. (1991), 85 Alta. L.R. (2d) 46, 122 A.R. 83, additional reasons (1992), 85 Alta. L.R. (2d) at 98, 122 A.R. at 130, allowing action for breach of contract, breach of fiduciary duty, breach of trust and unjust enrichment. For related proceedings, see (1992), 131 A.R. 79 (C.A.).

***Conrad J.A.* (*Côté J.A.* concurring):**

1 The main issue on appeal is whether the appellant's failure to give written notice pursuant to an area of mutual interest ("AMI") Clause in an agreement ("the operating agreement") gives rise to concurrent liability in equity and contract, thereby extending the time of commencement of an action.

2 Pembina Resources Limited ("Pembina") purchased two oil and gas properties in 1971 and 1972 and participated in a pooling agreement relating to parts of those properties in 1976. It failed to give written notice to Norcen Energy Resources Limited ("Norcen") and Luscar Ltd. ("Luscar") as required pursuant to the AMI Clause. Action was not commenced until 1986. The trial judge [85 Alta. L.R. (2d) 46] found that failure to give notice constituted a breach of contract, a breach of fiduciary duty, a breach of trust, and resulted in unjust enrichment; and that the causes of action were not discovered or discoverable by Norcen and Luscar until 1983. Relying on *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)* (1988), 61 Alta. L.R. (2d) 193 [[1988] 6 W.W.R. 427] (C.A.), the trial judge held that the contract action was barred by the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 ("*Limitations Act*"), and he imposed liability on the equitable grounds.

3 Pembina now appeals that decision. Norcen and Luscar cross-appeal.

4 The following issues arise:

5 1. Can there be concurrent causes of action available in both equity and contract?

6 2. Did the trial judge err in finding a breach of a fiduciary duty?

7 3. Did the contract create an express or implied trust?

105 The certainty of the applicable limitation period within which to commence an action is an important underlying assumption upon which parties to a commercial transaction are entitled to rely. If they intend otherwise, they should so state.

106 In the final analysis, I agree with the appellant's submission. But for the express provision of the contract requiring written notice, information, and participation to Luscar and Norcen, Pembina would have been under no obligation on the facts of this case to provide the same. As well, the clause did not create a fiduciary obligation.

Issue 3: Did the Contract Create an Express or Implied Trust?

107 The trial judge found that the AMI Clause created an express or implied trust. He stated (A.B. Vol. IV, p. 1221) [p. 76]:

> It is my view that the A.M.I. clause created an express trust or, at the very least, an implied trust, as there was certainty of words, certainty of subject matter (lands within a specified area) and certainty of the persons, in this case companies, who are intended to benefit from the trust, or such certainties can be implied.
>
> That being the case, it follows that, upon acquisition of the interests in the Crown lands, the Cabot lands, and the pooled lands, Pembina held and still holds in trust for each of Norcen and Luscar a one-third interest therein.

108 The relevant language of cl. 18 provides that upon receipt of the notice the party has a period of thirty days to elect to participate in the lands by paying a proportion of the consideration paid and "thereupon shall be entitled to receive ... good and sufficient conveyance ... vesting in it the interest to which it is entitled by virtue of this provision". The clause also provides that if the party fails to elect to acquire its share, "... such share shall be owned by the parties which acquired the same and the party not so electing shall have no further right to participate in such interest". It is submitted by the respondents that this language constitutes an express or, at a minimum, an implied trust.

109 Various arguments were raised in opposition to the imposition of a trust. The appellant argued that cl. 18 provided for a contingent interest, that there was not certainty as to the date of creation of the trust, and that being contingent, it invited perpetuity problems. I find it unnecessary to deal with that issue as, in my view, there is no certainty of intention.

110 It has long been settled that the three certainties required for a valid trust are certainty of words, certainty of subject, and certainty of object: *Knight v. Knight* (1840), 3 Beav. 148, 49 E.R. 58. In *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 [[1984] 6 W.W.R. 481] (S.C.C.), Dickson J. summed up the requirements as follows [p. 342]:

> An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation.

111 D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), at p. 107 indicated that the language must be imperative:

> For a trust to come into existence, it must have three essential characteristics ... first, the language of the alleged settlor must be imperative ... This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust.

112 In this case the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of trust. While the words "in trust" or "on trust" are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling. Their use in cl. 24(g) indicates that the parties understood the use of the trust relationship and employed trust wording when desired. There, it is stated that on the assignment of an interest, it "shall be held in trust" until the obtaining of necessary consents where required. It is anomalous that the parties did not use similar language in regard to cl. 18, if

a trust was intended. There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated.

113 D.W.M. Waters explained the essential nature of trust duties at p. 690, as follows:

> The obligation which lies at the base of trusteeship has resulted in there being three fundamental duties applicable to all trustees. First, no trustee may delegate his office to others; secondly, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; thirdly, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called "substratum" duties, to which the duties associated with the particular trust are added.

114 The statutory regime, as well as the common law, creates duties and concerns for trustees to the extent that no sophisticated party would blindly accept them. Before willingly entering into an agreement that created a trust arrangement, any potential trustee, with the legal resources of the appellant, would therefore be expected to seek to include terms limiting the trustee's liability. For instance, one would expect that the parties would have clauses expressly declaring or agreeing that they would only be accountable for such moneys as might actually come into their hands; or that they would not be answerable for involuntary losses incurred through any agent; or agreeing that in the absence of fraud, they would not be responsible for any loss, costs or damages that might result from the exercise or non-exercise of trust duties. No such limitations appear.

115 In particular, and of major concern in this action, are the provisions of ss. 40 and 41 of the *Limitations Act*, which remove time limits against a trustee in certain situations. Thus, it is critically important whether the parties expressly, or by implication, agreed to create a trust. The applicable limitation period is an important consideration for any party entering into an agreement. It is a natural inference that parties to a contract intend that the applicable limitation period for a breach of a term of the agreement will be that applicable to breach of contract. It should take clear language before finding an intention to be subject to more onerous limitation dates. Finality, and an end to obligations, are important elements of commercial life.

116 As the parties had the sophistication and forethought to clearly and completely spell out the duties of the Manager Operator (under cl. 9), clarify the rights of the Joint Operators (under cl. 10), and provide for an equitable lien on the participating equity of the Manager Operator (under cl. 14), as well as the limitation of actions against the Manager Operator (under cl. 23), it is hard to believe they would not also have carefully elucidated their rights and duties in relation to circumstances where the potential liability could be greater and last longer. In light of the Entire Agreement provision (cl. 30) which states there is to be no implied covenant, a trust should not be implied where it was not expressed.

117 On the whole of the evidence, it is apparent these parties intended merely to enter into a contract. The commercial context and jurisprudence make it doubtful the parties to such an agreement would even think about an AMI Clause carrying fiduciary duties. I stress the importance of not straining equity beyond its due and proper limits, again referring to Sopinka J.'s adoption in *LAC Minerals* of Dawson J.'s remarks in *Hospital Products Ltd.*

118 I agree that the parties by cl. 18 intended to have both the right to participate in the acquisition and a remedy that would allow them the actual property. Specific performance would have provided that remedy without implying a trust. Some authorities have analogized the relationship of a vendor-purchaser to a trustee-beneficiary, employing language of trust with respect to obligations of a vendor to purchaser in an agreement for sale. However, the exact nature of that trust is uncertain. D.W.M. Waters, at p. 425, calls it a "curious type of trustee". Keeton and Sheridan in *Law of Trusts*, 11th ed. (Chichester, England: Barry Rose Publishers, 1983), at p. 202, refer to it as "to some extent a constructive trustee". One case goes as far as to call it an "implied trust": *Irvine v. Macaulay* (1897), 24 O.A.R. 446 at 449 (C.A.). For a good discussion of this issue, see *Martin Commercial Fueling Inc. v. Virtanen* (1993), 84 B.C.L.R. (2d) 289 [[1994] 2 W.W.R. 348] (S.C.), which sets out the principle that the trustee-beneficiary relationship arises only upon completion of the contract. To quote James L.J. from *Rayner v. Preston* (1881), 18 Ch. D. 1 (C.A.), at p. 13:

> I am of the opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser.

See also Di Castri, Q.C., *The Law of Vendor and Purchaser*, Vol. 2 (Toronto, Carswell: 1989), at para. 482; *Shebley v. Mervin No. 499 (Rural Municipality)* (1922), 63 D.L.R. 632 [[1922] 1 W.W.R. 384] (Sask. C.A.), at p. 635; and *Robinson v. Moffatt* (1916), 31 D.L.R. 490 (Ont. C.A.), at p. 492.

119 Care must be taken in applying trust language to contractual relationships. While it is understandable that a true trust relationship would exist once a purchaser had performed and all that remained was the legal formality of transfer, the relationship between those parties in the interim period is not so clear. What is really being dealt with is the contractual obligation of the vendor to preserve the property to enable specific performance of its obligation. The contractual obligation and the equitable remedy are sufficient to provide the needed relief without imposition of trust obligations. Otherwise, the law of limitations would be eroded to the point of replacement by laches in equity, varying day to day under judicial discretion.

120 In any event, the case at bar involves a contingent right to participate and is distinguishable from all of the authorities dealing with an agreement for sale, because until such time as there is notice and an exercise of the right to purchase, there is no certainty as to the beneficial interest.

121 At best, the agreement can be construed as a contract to create a trust which does not provide the respondents any relief that would flow from breach of an express trust. According to Keeton and Sheridan, at p. 5:

> Trust and contract can be related to each other in the same transaction. There can be a contract to create a trust, and that is like any other contract.

122 In summary, I am of the view that the trial judge erred in construing this agreement as an express or implied trust. It was a simple contract that carried with it the right to sue for specific performance.

Issue 4: Was Unjust Enrichment Available on the Facts?

123 The principle of unjust enrichment has been adopted by the Supreme Court of Canada as the theoretical foundation of the traditional doctrines of both quasi contract and equitable remedies. It is recognized as a separate branch of recovery, independent of contract and tort: *Deglman v. Guarantee Trust Co. of Canada*, [1954] S.C.R. 725; *Becker v. Pettkus*, [1980] 2 S.C.R. 834. The rationale for the doctrine of unjust enrichment has been stated in many ways. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.), at p. 61, Lord Wright said its objective is "... to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep". In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 [[1978] 2 W.W.R. 101], Dickson J. stated at p. 455:

> As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another.

While the outer limits of the doctrine are still in the developmental stages, the doctrine appears to derive from two underlying rationales: namely, "the recovery of windfalls conferred by the plaintiff and the recovery of the profits of

wrongdoing": P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (Aurora, Ontario: Canada Law Book, 1990), at p. 33.

124 The law of quasi contract was developed to remedy those situations where agreements are otherwise unenforceable under contract law because of one of the following defects: informality, incapacity, illegality, want of authority, mistake, misunderstanding, uncertainty, frustration, misrepresentation, etc. In such circumstances where there is no valid contract between the parties, the equitable doctrine of unjust enrichment and restitution applies. The reason for this equitable intervention is simple: without a valid and enforceable contract upon which to rely, the injured party would otherwise have no recourse against the enriched party.

125 With respect to the equitable imposition of liability based on unjust enrichment, the applicable circumstances include breach of fiduciary duty, unconscionable transactions, breach of confidence, etc.

126 A claim for unjust enrichment may lie in circumstances where the plaintiff has no recourse through contract law, or where there is some other reason for equity to intervene. The Canadian test of general application to found a claim in unjust enrichment is outlined in *Rathwell*, supra, at p. 455:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

The trial judge found that all three components were met in this case. The appellant argued that the trial judge erred in his finding of unjust enrichment as none of the three factors were present. An analysis of these criteria brings us back to the basic problem that Luscar and Norcen face: Pembina breached a term of the contract, and the time limitation for commencing an action for breach of contract is statute-barred. Moreover, the gain did not arise because of some wrongful act as intentional concealment. Nor was it a benefit derived from the labours of the respon dents. The benefit resulted from Pembina's actions, its purchase and development of lands offered for public sale in which both Norcen and Luscar had an opportunity to bid. At best, the benefit and deprivation occurred as a result of Pembina's oversight to provide written notice and Luscar's and Norcen's failure to discover and act upon it

127 The failure to give written notice may have deprived the respondents of an opportunity, but this is not the same as a case of secret profit by a fiduciary. It was a contractual opportunity, the breach of which denied the respondents the benefit of their contract. There was a remedy if discovered and acted upon within six years or longer if fraudulent concealment was involved. The very existence of s. 6 in the *Limitations Act* makes it clear that ordinary oversight does not relieve one of the time limit for commencement of action in breach of contract.

128 In reasons dealt with hereafter, I conclude the parties had notice of the facts necessary to establish their cause of action. Thus, even if it could be said in some circumstances that an undiscovered breach of contract gives rise to the type of wrongdoing which justifies a claim for unjust enrichment (an issue I do not decide), the facts of this case do not justify such a finding.

129 Where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract. If the other party does not sue within the time set out in the *Limitations Act*, then, without more, there *is* a juristic reason for the gain because the breaching party is entitled to rely on the intended limitation.

130 With respect to the issue of juristic reason, *United Canso Oil & Gas Ltd. v. Washoe Northern Inc.* (1991), 121 A.R. 1 (Q.B.), was cited by the respondents as supporting the proposition that a claim for unjust enrichment can be brought notwithstanding the existence of a contract. In *United Canso*, supra, the parties were governed by a joint operating agreement which was allegedly misinterpreted by the defendant. The result was an improper accounting depriving the plaintiff of moneys properly payable to it. The defendant raised the contract as a juristic reason for the enrichment. It was argued that unless and until the contract was prematurely discharged by frustration or in reaction to a repudiatory

TAB

5

PROPERTY TRANSFER PROCEDURE

CANADIAN ASSOCIATION OF PETROLEUM LANDMEN

2000

2000 CAPL PROPERTY TRANSFER PROCEDURE

TABLE OF CONTENTS

PROPERTY TRANSFER PROCEDURE

Attached to and forming part of the Agreement dated _____, between _____
_____.

1.00 DEFINITIONS AND INTERPRETATION

1.01 Definitions

In this Property Transfer Procedure:

A. **"Abandonment and Reclamation Obligations"** means all obligations under the Title and Operating Documents and the Regulations:

(a) to abandon the Wells;

(b) to decommission and remove the Tangibles, including associated foundations and structures; and

(c) to restore, remediate and reclaim the lands to which the Surface Rights relate.

B. **"AFE"** means an authority for expenditure, mail ballot or any other authorization of expenditure under the Title and Operating Documents for the conduct of an operation or the accrual of a financial obligation.

C. **"Agreement"** means the Head Agreement and the Schedules attached to it, including this Property Transfer Procedure.

D. **"Assets"** means, subject to Clauses 1.02 and 1.05, the Petroleum and Natural Gas Rights, the Tangibles, the Miscellaneous Interests (including, without limitation, the Wells) and any sulphur comprising part of a base pad or storage block that forms part of the Assets under Paragraph 4.01(e).

E. **"Business Day"** means any day of the week other than a Saturday, Sunday or statutory holiday in Alberta.

F. **"Closing"** means the delivery of those documents and amounts described in Clause 3.03.

G. **"Closing Date"** has the meaning set forth for that term in the Head Agreement.

H. **"Deposit"** means any payment made by the Transferee under the Head Agreement prior to Closing as security for payment of the Purchase Price and, if applicable, as an estimate of liquidated damages for the purposes of Paragraph 12.01(c).

I. **"Effective Date"** has the meaning set forth for that term in the Head Agreement.

J. **"Environmental Liabilities"** means all liabilities pertaining to the Assets in respect of the environment, whether or not caused by a breach of the applicable Regulations and whether or not resulting from operations conducted with respect to the Assets, including, without limitation, liabilities related to:

(a) the transportation, storage, use or disposal of toxic or hazardous substances or hazardous, dangerous or non-dangerous oilfield substances or waste;

(b) the release, spill, escape or emission of toxic or hazardous substances;

(c) any other pollution or contamination of the surface, substrate, soil, air, ground water, surface water or marine environments;

(d) damages and losses suffered by third parties as a result of the occurrences in Paragraphs (a)-(c) of this Subclause; and

(e) any obligations imposed by the Regulations to protect the environment or to rectify environmental problems.

K. "**Facilities**" means all unit facilities under any unit agreement that applies to the Petroleum and Natural Gas Rights and all other field facilities that are not solely located on or under the surface of the Lands (or lands with which the Lands are pooled) and that are used for production, gathering, treatment, compression, transportation, injection, water disposal, measurement, processing, storage or other operations respecting the Petroleum and Natural Gas Rights or the Petroleum Substances produced therefrom, including, without limitation, any applicable battery, separator, compressor station, gathering system, pipeline, production storage facility or warehouse, which other field facilities are in each case specifically identified in a Schedule.

L. "**General Conveyance**" means a document delivered at Closing, substantially in the form of Exhibit "A" to this Property Transfer Procedure, through which the Transferor conveys the Assets to the Transferee.

M. "**GST**" means the goods and services tax provided for under the *Excise Tax Act* (Canada), as amended, and the regulations thereunder, or any successor or parallel federal or provincial legislation that imposes a tax on the recipient of goods and services.

N. "**Head Agreement**" means the agreement to which this Property Transfer Procedure is attached as a Schedule.

O. "**Interim Period**" means the period from the Effective Date to, but not including, the Closing Date.

P. "**Lands**" means the lands, formations and associated Petroleum Substances described in the Land Schedule, insofar as rights relating thereto are granted under the Leases.

Q. "**Land Schedule**" means the Schedule that describes, without limitation, the Lands, the Leases and the Petroleum and Natural Gas Rights being disposed of by the Transferor.

R. "**Leases**" means, collectively, the various leases, licences, permits, reservations, certificates of title and other documents of title set forth in the Land Schedule through which the holder may explore for, drill for, recover, remove or dispose of Petroleum Substances within, upon or under the Lands (or lands with which the Lands are pooled or unitized), and includes, if applicable, all renewals and extensions of those documents and all documents issued in substitution therefor.

S. "**Losses and Liabilities**" means all claims, liabilities, actions, proceedings, demands, losses, costs, penalties, fines, damages and expenses which may be sustained or incurred by any of a Party, its directors, officers, agents and employees, including, without limitation, reasonable legal fees and disbursements on a solicitor and client basis.

T. "**Miscellaneous Interests**" means, subject to the limitations and exclusions in this definition, the Transferor's entire assigned interest in all property and rights, other than the Petroleum and Natural Gas Rights and the Tangibles, to the extent they pertain directly to the Petroleum and Natural Gas Rights or the Tangibles, including, without limitation:

(a) the Title and Operating Documents;

(b) the Surface Rights;

(c) the wellbores and downhole casing respecting the Wells; and

(d) copies of geological, engineering, Facility and other records, files, reports, data, correspondence and documents that, in the Transferor's reasonable judgement, relate directly to the Assets.

Unless otherwise agreed in writing by the Parties, the Miscellaneous Interests exclude the Transferor's tax and financial records, as well as files, documents, reports, data, intellectual property and computer hardware or software insofar as they: (i) pertain to the Transferor's geophysical data and interpretations thereof; (ii) pertain to the Transferor's proprietary technology, evaluations or interpretations (whether geological, engineering, economic or otherwise); (iii) are legal opinions; (iv) are documents prepared on behalf of the Transferor in contemplation of litigation; (v) are owned or licenced by third parties with restrictions that prohibit their deliverability or disclosure to the Transferee; (vi) are referred to specifically as exclusions in a Schedule; or (vii) pertain to records required to be maintained under the Regulations if the retention period for those records thereunder has expired.

U. "Party" means a person, partnership or corporation that is bound by this Agreement.

V. "Permitted Encumbrances" means:

(a) the terms and conditions of the Title and Operating Documents, including, without limitation, any penalty or forfeiture that applies to the Assets subsequent to the Effective Date resulting from the Transferee's election under Subclause 5.02B not to participate in a particular operation, provided that the following items must be identified in a Schedule to qualify as Permitted Encumbrances: (i) any overriding royalties, net profits interests or other encumbrances applicable to the Petroleum and Natural Gas Rights for which the Transferee will assume the obligation for payment; (ii) any existing potential alteration of the Transferor's interest in the Assets because of a payout conversion or farmin, farmout or other such agreement; (iii) any Right of First Refusal; (iv) any penalty or forfeiture that applies to the Assets at the Effective Date because of the Transferor's election not to participate in a particular operation; and (v) any agreements described in Paragraphs 1.01KK(d), (f) and (g);

(b) easements, rights of way, servitudes or other similar rights, including, without limitation, rights of way for highways, railways, sewers, drains, gas or oil pipelines, gas or water mains, electric light, power, telephone or cable television towers, poles and wires;

(c) the Regulations and any rights reserved to or vested in any municipality or governmental, statutory or public authority to levy taxes or to control or regulate any of the Assets in any manner, including, without limitation, the right to control or regulate production rates and the conduct of operations;

(d) statutory exceptions to title and the reservations, limitations and conditions in any grants or transfers from the Crown of any of the Petroleum and Natural Gas Rights or interests therein;

(e) undetermined or inchoate liens incurred or created in the ordinary course of business as security for the Transferor's share of the costs and expenses of the development or operation of any of the Assets, which costs and expenses are not delinquent as of the Closing Date;

(f) undetermined or inchoate mechanics' liens and similar liens for which payment for services rendered or goods supplied is not delinquent as of the Closing Date;

(g) liens granted in the ordinary course of business to a public utility, municipality or governmental authority respecting operations pertaining to any of the Assets;

(h) any lien contemplated by Paragraphs (e), (f) or (g) of this Subclause that is being contested in good faith by the Transferor and for which it will retain responsibility, as identified in a Schedule; and

(i) any defects or deficiencies in title to the Assets disclosed in this Agreement and any other defects or deficiencies in title to the Assets that are waived or deemed to be waived under Article 8.00.

W. "**Petroleum and Natural Gas Rights**" means the interests of the Transferor described in the Land Schedule in respect of the Leases to the extent they apply to the Lands, including, without limitation, any existing contractual right of the Transferor to earn an interest under a farmin or similar arrangement and any overriding royalty, net profits interest or other encumbrance accruing to the Transferor.

X. "**Petroleum Substances**" means crude oil, natural gas and every other mineral or substance, the right to explore for which, or an interest in which, is granted under the Leases.

Y. "**Prime Rate**" means the per annum rate designated as the prime rate for Canadian dollar commercial loans by the main Calgary branch of the principal bank used by the Transferor, with any change to that rate being effective under this Agreement on the same day as it is made effective by that bank.

Z. "**Property Transfer Procedure**" means this Schedule, including Exhibit "A" hereto titled "General Conveyance".

AA. "**Purchase Price**" means: (i) for a sale and purchase, the amount payable by the Transferee to the Transferor for the Assets under the applicable provision of the Head Agreement; and (ii) for an asset exchange, the value attributed to the Transferor's Assets under the applicable provision of the Head Agreement, in each case with such modifications as are provided under the Agreement.

BB. "**Regulations**" means all statutes, laws, rules, orders, directives and regulations in effect from time to time and made by governments or governmental agencies having jurisdiction over the Assets or the Parties.

CC. "**Representations and Warranties Certificate**" means a certificate to be executed by an officer of a Party under Clause 10.01 respecting the truth and correctness of the representations and warranties made by that Party under Article 6.00, if the form of that certificate has been included as a Schedule.

DD. "**Right of First Refusal**" means a right of first refusal, pre-emptive right of purchase or similar contractual right under the Title and Operating Documents or otherwise whereby a third party has the right to purchase or acquire any of the Assets because of the Transferor's agreement to dispose of the Assets to the Transferee.

EE. "**Schedule**" means a schedule or exhibit to the Head Agreement.

FF. "**Security Interests**" means security interests in the Assets (or registrations evidencing same) expressly granted by the Transferor or its predecessors in title under the provisions of, without limitation, a mortgage, deed of trust, *Bank Act* (Canada) assignment, debenture, general security agreement or a land charge under personal property security legislation.

GG. "**Specific Conveyances**" means all conveyances, assignments, transfers, novations and other documents, other than the General Conveyance, that are required to effect the transfer of the Assets to the Transferee and to novate the Transferee into the Title and Operating Documents with respect to the Assets.

HH. "**Surface Rights**" means all rights to use the surface of land in connection with the Assets, including, without limitation, rights to enter upon and occupy the surface of land on which the Tangibles and the Wells are located and rights to cross or otherwise use the surface of land for access to the Assets, excluding any such rights the Transferor reasonably retains for its other operations, as identified to the Transferee in writing at least 3 Business Days prior to Closing (or at such other time as the Parties may agree), for which the Transferor will, insofar as it has the right to do so and on such terms as are reasonable in the circumstances, provide the Transferee with such rights of use as the Transferee may reasonably require for its operations respecting the Assets.

II. "**Tangibles**" means the Transferor's entire assigned interest in and to:

(a) the Facilities;

(b) all tangible depreciable property and assets, other than the Facilities, that are located on or under the surface of the Lands (or lands with which the Lands are pooled) and are used or useful solely for production, gathering, treatment, compression, transportation, injection, water disposal, measurement, processing, storage or other operations respecting the Petroleum and Natural Gas Rights, including, without limitation, the tangible equipment, if any, relating to the Wells and located at the Well site; and

(c) any additional items that are specifically indicated in a Schedule to be included as Tangibles, provided that any abandoned pipeline that has not been removed and which is not subject to a unit agreement must be identified in a Schedule to be included in the Assets.

JJ. "**Thirteenth Month Adjustment**" means the accounting procedure performed annually by an operator of particular Tangibles for the purpose of redistributing certain revenues and expenses, including, without limitation, operating expenses, processing fee revenues, excess capacity utilization fees and recoveries, royalties and gas cost allowances (or similar cost allowances).

KK. "**Title and Operating Documents**" means, to the extent directly related to the Petroleum and Natural Gas Rights and the Tangibles, or either of them:

(a) the Leases;

(b) agreements affecting the Transferor's interests in the Petroleum and Natural Gas Rights, including, without limitation, operating agreements, royalty agreements, farmout or farmin agreements, option agreements, participation agreements, pooling agreements, sale and purchase agreements and asset exchange agreements;

(c) agreements for the sale of Petroleum Substances that are terminable on 31 days' notice or less (without an early termination penalty or other cost) or that are identified in a Schedule;

(d) agreements respecting the unitization of any of the Petroleum and Natural Gas Rights;

(e) agreements pertaining to the Surface Rights;

(f) agreements for the construction, ownership and operation of gas plants, gas gathering systems and other Tangibles;

(g) service agreements for the treating, gathering, storage, transportation or processing of Petroleum Substances or other third party petroleum substances, the injection or subsurface disposal of substances, the use of wellbores or the operation of any Wells or Tangibles by a third party;

(h) any approvals, authorizations or licences required under the Regulations for the conduct of operations with respect to the Assets, including, without limitation, Well and pipeline licences; and

(i) all other agreements that relate to the ownership, operation or exploitation of the Petroleum and Natural Gas Rights or the Tangibles.

LL. "**Title Defect**" means a deficiency or discrepancy in or affecting the title of the Transferor in and to any of the Assets, sufficient to cause a reasonable buyer of the affected Assets to refuse to purchase them for fair market value (computed as if that defect did not exist), but specifically excludes, without restricting the generality of the foregoing, the Permitted Encumbrances.

MM. "**Transferee**"means the Party acquiring the Assets hereunder, as further described in the Head Agreement

and possibly referred to as the "Purchaser" therein.

NN. "Transferor" means the Party disposing of the Assets hereunder, as further described in the Head Agreement and possibly referred to as the "Vendor" therein.

OO. "Wells" means the Transferor's entire interest in all wells located on the Lands or lands pooled or unitized therewith, including, without limitation, any producing, shut-in, abandoned, suspended, capped, injection and disposal wells set forth in a Schedule, and includes the associated wellbores and casing, provided that an abandoned, injection or disposal well not subject to a unit agreement must be identified in a Schedule to be included in the Assets.

1.02 Exclusion Of Assets

If a portion of the Assets is excluded from Closing because of uncured Title Defects, the exercise of any Right of First Refusal by third parties, other provisions of this Agreement or the written agreement of the Parties:

(a) the terms "Assets", "Facilities", "Lands", "Leases", "Miscellaneous Interests", "Petroleum and Natural Gas Rights" and "Tangibles" will be deemed to be amended to reflect the exclusion of that portion of the Assets, and the Head Agreement and the Schedules will be deemed to be amended accordingly; and

(b) the Purchase Price will be reduced by the value attributed to the Assets for which Closing does not occur under Article 7.00 or 8.00, as applicable, the term "Purchase Price" will be construed to be that reduced amount, the allocations of value among the classes of Assets under the Head Agreement will be modified accordingly and adjustments under Article 4.00 and any interest accruing under Clause 2.04 will be calculated accordingly.

1.03 References And Interpretation

Unless otherwise stated:

(a) the references "hereunder", "herein" and "hereof" refer to the provisions of this Property Transfer Procedure, and references to an Article, Clause, Subclause, Paragraph or Subparagraph herein refer to the specified Article, Clause, Subclause, Paragraph or Subparagraph of this Property Transfer Procedure;

(b) the singular, masculine or neuter will be construed as the plural or feminine or corporate and vice versa, as the context requires;

(c) the headings of Articles and Clauses and any other headings or indices are for reference only, and will not be used in interpreting any provision herein;

(d) a capitalized derivative of a defined term will have a corresponding meaning;

(e) all references to "dollars" or "$" will mean lawful currency of Canada, and all billings, payments and receipts will be made and recorded in Canadian currency;

(f) any reference to time means Mountain Standard Time or Mountain Daylight Time during the respective intervals in which each is in force under the *Daylight Savings Time Act* (Alberta);

(g) any reference to days refers to calendar days unless the reference is to Business Days, and if the phrase "within", "at least" or "not later than" is used with reference to a specific number of days or Business Days, the day of receipt of the relevant notice will be excluded and the day of the relevant response or event will be included in determining the relevant time period. However, if the time for doing any act expires on a day that is not a Business Day, the time for doing that act will be extended to the next Business Day; and

(h) any reference to the "Transferor's entire assigned interest" pertains to that interest of the Transferor, as identified in a Schedule, if applicable, that is being disposed of hereunder in the applicable Assets, and does not include any portion of the interest held by the Transferor that is not being disposed of hereunder.

1.04 Optional And Alternate Provisions

Except as provided in Clauses 2.04 and 6.02, if the Parties have not made an election required under this Property Transfer Procedure respecting an optional or alternate term, that optional term or the first such alternate will apply as if they had designated that optional or alternate term.

1.05 Interpretation If Types Of Assets Limited

If the Assets to which the Agreement pertains do not include both Petroleum and Natural Gas Rights and Tangibles, the provisions of this Property Transfer Procedure will be interpreted in the context of either the Petroleum and Natural Gas Rights or Tangibles, as the case may be, and the applicable Miscellaneous Interests.

1.06 Interpretation If Closing Does Not Occur

Each provision of this Property Transfer Procedure that presumes that the Transferee has acquired the Assets hereunder will be construed as having been contingent upon Closing having occurred.

1.07 Conflicts And Enforceability

A. If there is any conflict or inconsistency between a provision of the Head Agreement and that of a Schedule (including this Property Transfer Procedure), the General Conveyance or a Specific Conveyance, the provision of the Head Agreement will prevail. If any term or condition of this Property Transfer Procedure conflicts with a term or condition of another Schedule, the General Conveyance or a Specific Conveyance, the provision of this Property Transfer Procedure will prevail. If any term or condition of the Agreement, the General Conveyance or a Specific Conveyance conflicts with a term or condition of a Lease or the Regulations, the term or condition of that Lease or the Regulations will prevail, and the Agreement, the General Conveyance or that Specific Conveyance will be deemed to be amended to the extent required to eliminate any such conflict, provided that: (i) the Parties recognize that the registered interests in the Leases may not correspond to the Transferor's interests in the lands; and (ii) the allocation of responsibility for Losses and Liabilities will continue to apply between the Parties in the event of any such conflict.

B. Insofar as any of the provisions of the Agreement are judicially determined to be unenforceable, the applicable provisions (or portions thereof) will be deemed to be severed from the Agreement and of no force and effect between the Parties. The remainder of the Agreement will remain in full force and effect between the Parties in such event.

1.08 Transferor's Knowledge

The knowledge or awareness of the Transferor herein consists of the actual knowledge or awareness of its current officers and employees who are primarily responsible for the matter in question in the course of their normal duties (other than those employees employed in the field who do not have management responsibilities), after reasonable inquiry of the Transferor's applicable files and records. For these purposes, knowledge and awareness do not include the knowledge of any third party or constructive knowledge. The Transferor does not have any obligation to make inquiry of third parties or the files and records of any third party or public authority in connection with representations and warranties that are made to its knowledge or awareness.

1.09 Modifications To 2000 CAPL Property Transfer Procedure

This Property Transfer Procedure is in the form of the 2000 CAPL Property Transfer Procedure. It has been modified only by the completion of the blanks and elections required herein and by those additional changes

specifically identified herein, in the Head Agreement or in a Schedule of elections and amendments to this Property Transfer Procedure. Insofar as there are modifications to this Property Transfer Procedure that have not been specifically identified in that manner, those modifications will be deemed to be ineffective and the applicable provisions of the 2000 CAPL Property Transfer Procedure will apply as if they had not been made.

2.00 ACQUISITION AND DISPOSITION

2.01 Application Of Head Agreement

The Head Agreement includes provisions that set forth the Purchase Price and the allocation of the Purchase Price to the Petroleum and Natural Gas Rights, Tangibles and Miscellaneous Interests, as applicable. Each Party confirms that the Transferee's assumption of responsibility for Abandonment and Reclamation Obligations and Environmental Liabilities and the Transferor's release of responsibility therefor has been used in the determination of the Purchase Price.

2.02 General Payment Obligations

A. Unless otherwise agreed, the Transferee will pay all amounts payable under the Head Agreement and this Article by certified cheque or bank draft payable to the Transferor in immediately available funds.

B. The Transferor will hold any Deposit in trust on behalf of the Transferee. If Closing occurs, the Transferor will apply the Deposit (without any adjustment for accrued interest thereon) to the Purchase Price. If Closing does not occur, the Transferor will promptly return the Deposit to the Transferee with simple interest thereon calculated at the Prime Rate from the time of its receipt by the Transferor, subject to the respective rights of the Parties under Article 12.00 in the event of default.

2.03 GST And Other Sales Taxes

A. The GST applicable to the disposition of the Assets will be handled on the basis outlined in Alternate _____ below (Specify 1 or 2). The GST Business Numbers of the Parties are _____.

Alternate 1

Subject to any application of the reverse collection mechanism, which applies to certain real property conveyances, the Transferee will remit the applicable GST to the Transferor at Closing. The Transferor will remit such GST to the applicable governmental authority in the manner and within the time constraints stipulated in Part IX of the Excise Tax Act ("ETA"), or as stipulated in successor or parallel legislation that might arise from time to time. If the reverse collection mechanism applies, the Transferee will comply with all of its obligations and entitlements under the ETA.

Alternate 2

The Transferee and Transferor will make a joint election under section 167 of the ETA so that GST will not be payable on the transfer of the Assets. The Parties will both execute the relevant GST form for Closing to effect that election. The Transferee will file that form with its GST return for the reporting period in which Closing occurs. The Transferee will provide the Transferor with such supporting documentation as the Transferor may reasonably request in order to confirm that such election has been made and properly filed. The Transferee will indemnify the Transferor for the Transferor's Losses and Liabilities pertaining to any failure of the Transferee to file that election or any failure in acceptance by applicable governmental authorities of that election.

B. At Closing, the Transferee will remit any provincial sales taxes pertaining to its acquisition of the Assets to the applicable governmental authority in the required manner, or will provide appropriate purchase exemption certificates, if applicable. The Transferee will indemnify the Transferor for the Transferor's Losses and Liabilities pertaining to any failure of the Transferee to remit those taxes as required.

C. If the amount of the GST or any provincial sales tax payable hereunder is adjusted as a result of any reassessment by the applicable governmental authority, any adjustment and any associated interest and penalties will be for the Transferee's account. However, the Parties will cooperate to ensure that all reasonable steps are taken to minimize the net impact of any such taxes and the corresponding penalties and interest.

2.04 Interest Accrual

Interest will accrue on the Purchase Price, plus or minus the net amount of the adjustments made at Closing under Paragraph 4.02A(a), on the basis provided in this Clause if Alternate 1 or 2 is selected, with any interest accrual resulting in a corresponding increase to the Purchase Price and, subject to Clause 1.05, the amount allocated to the Petroleum and Natural Gas Rights. Interest will not accrue under this Clause if neither Alternate is selected. Alternate ____/ Neither Alternate 1 nor 2____ will apply (Specify) in this Clause.

Alternate 1
Interest at Prime Rate will accrue to the Transferor on the adjusted Purchase Price during the Interim Period, except insofar as Closing is delayed for reasons solely attributable to the Transferor or it waives that interest accrual, provided that the interest accrual for the period following the Transferor's receipt of a Deposit will be based on the adjusted Purchase Price, less the Deposit. Interest will be calculated on a daily basis, but will not be compounded.

Alternate 2
If Closing is delayed, interest will accrue to the Transferor on the adjusted Purchase Price, less any Deposit, for the period between the original Closing Date and the date Closing occurs on the same basis as is provided in Clause 12.02, except insofar as that delay is solely attributable to the Transferor or it waives that interest accrual.

3.00 CLOSING

3.01 Place Of Closing

Unless otherwise agreed by the Parties, Closing will occur at the office of _____ on the Closing Date.

3.02 Effective Date Of Transfer

The transfer of the Assets from the Transferor to the Transferee and the assumption of the benefits, obligations and risks associated with the Assets by the Transferee will be effective as of the Effective Date, provided Closing occurs. As between the Parties, possession of the Assets, however, will not pass to the Transferee until Closing.

3.03 Deliveries At Closing

A. Subject to Clause 3.05, the Transferor will deliver to the Transferee on the Closing Date:

(a) a General Conveyance, which has been prepared and executed by the Transferor;

(b) all required Specific Conveyances, prepared and executed by the Transferor, except to the extent that the Head Agreement or the Transferee permits the Transferor to deliver the Specific Conveyances at a later date;

(c) copies of all waivers and exercises of Rights of First Refusal received by the Transferor respecting the disposition of the Assets to the Transferee;

(d) the Representations and Warranties Certificate, if required by the Agreement; and

(e) those other documents as may be specifically required under this Agreement or as may be reasonably requested by the Transferee upon reasonable notice to the Transferor, including, without limitation, any additional agreements required under Subclause 1.01HH for surface access to the Assets because of the Transferor's retention of surface access for its other operations.

B. Subject to Clause 3.05, the Transferee will deliver to the Transferor on the Closing Date:

(a) payment of any amount owing at Closing under the Agreement;

(b) a duly executed General Conveyance;

(c) the Representations and Warranties Certificate, if required by the Agreement;

(d) copies of Specific Conveyances that have been executed by it; and

(e) those other documents as may be specifically required under the Agreement.

3.04 Delivery Of Files

A. Unless otherwise agreed by the Parties, the Transferor will deliver to the Transferee, in an organized form, the Transferor's records, files, reports, data and documents constituting the Miscellaneous Interests within 10 Business Days following Closing. Insofar as they relate directly to other assets in which the Transferor retains an interest, the Transferor may retain the original of those materials and provide a photocopy of them to the Transferee. The Transferor may retain a photocopy of any original materials delivered to the Transferee under this Subclause.

B. The Transferor may, at its sole expense, obtain from the Transferee, for a period of ___ months following the Closing Date, copies or photocopies of the materials delivered to the Transferee under the preceding Subclause if those materials are required by the Transferor for audits or claims by third parties and those materials are still in the possession of the Transferee. If the Transferee disposes of any of the Assets during that period to a third party, the Transferee will take reasonable steps to enable the Transferor to have continued reasonable access to those materials for the remainder of that period, provided that the Transferee will not be required to retain copies of those materials following any such disposition.

3.05 Distribution Of Specific Conveyances

Alternate _____ (Specify 1 or 2) will apply in this Clause, provided that the Transferor will reimburse the Transferee for all registration fees incurred by the Transferee in registering discharges for Security Interests provided to it under Paragraph 10.02(c).

Alternate 1
Except as otherwise agreed by the Parties, the Transferor will retain the required number of original copies of the Specific Conveyances and other documents delivered under Subclause 3.03A, and will promptly distribute them to third parties or register them on behalf of the Transferee after Closing, insofar as they are normally distributed or registered. The Transferor will deliver to the Transferee proof of registration of the applicable Specific Conveyances in a timely manner. The Transferee will reimburse the Transferor for all transfer and registration fees incurred by the Transferor in registering those Specific Conveyances and other documents.

Alternate 2
Except as otherwise agreed by the Parties, the Transferee will, after Closing, promptly distribute to third parties or register the Specific Conveyances and other documents delivered under Subclause 3.03A, insofar as they are normally distributed or registered. The Transferee will deliver to the Transferor proof of

registration of the applicable Specific Conveyances in a timely manner. The Transferee will bear all costs in distributing or registering those Specific Conveyances and other documents.

4.00 ADJUSTMENTS

4.01 Benefits And Obligations To Be Apportioned

Except as otherwise provided herein, the Parties will apportion all benefits and obligations of every kind and nature relating to the Assets, including, without limitation, capital expenditures, maintenance costs, development costs, operating costs, royalties, property taxes, proceeds from the sale of production, accounts receivable, gas cost allowances (or similar cost allowances) and incentives accruing to operations under the Regulations. The Parties will make that apportionment on an accrual basis as of the Effective Date using generally accepted accounting principles. Notwithstanding the generality of the foregoing, the following principles will apply to adjustments made under this Article:

(a) all costs incurred in connection with work performed or goods and services provided in respect of the Assets will be deemed to have accrued as of the date the work was performed or the goods or services provided, regardless of the time those costs became payable;

(b) advances, cash calls and deposits by the Transferor for operations pertaining to the Assets will be adjusted under this Article, and will be transferred to, and be for the benefit of, the Transferee;

(c) surface and mineral lease rentals and any similar payments made by the Transferor to preserve any of the Leases or any Surface Rights will be apportioned on a per diem basis as of the Effective Date;

(d) all taxes, other than income taxes and any taxes based on the volume of produced Petroleum Substances, will be apportioned on a per diem basis as of the Effective Date;

(e) all Petroleum Substances produced as of the Effective Date, but not delivered to the purchaser of those Petroleum Substances, including Petroleum Substances in storage, will not comprise part of the Assets, provided that sulphur comprising part of a base pad or storage block, if any, will form part of the Assets, unless otherwise agreed in the Head Agreement. Petroleum Substances not comprising part of the Assets will remain the property of the Transferor, and the proceeds from the sale thereof will accrue to the Transferor, with sales of those Petroleum Substances deemed to occur on a "first in, first out" basis;

(f) there will be no adjustments for royalty tax credits or other similar incentives that accrue to a Party because of financial or organizational attributes specific to it, other than gas cost allowances (or similar cost allowances);

(g) a Thirteenth Month Adjustment that relates to a period that includes months prior to and after the Effective Date will be apportioned on a per diem basis to reflect expenses, revenues and throughput volumes applicable to the respective periods of the Parties' ownership of the Assets, provided that if there is a material variance between the throughput or unit operating costs during those periods, the methodology provided for in the Title and Operating Documents for the applicable facility to calculate a Thirteenth Month Adjustment will apply, *mutatis mutandis*, to any such adjustment between those periods, as if each such period is an annual period;

(h) there will be no interest payable on adjustments except to the extent provided for in Clause 2.04 and Paragraph 5.03(c); and

(i) any dispute respecting adjustments will be resolved under Article 9.00.

4.02 Adjustments To Accounts

A. Subject to Paragraph 4.01(i) and Subclauses B and C of this Clause, adjustments between the Transferor

and the Transferee under this Property Transfer Procedure will be effected as follows:

(a) unless otherwise agreed by the Parties, the Transferor will provide the Transferee with an interim statement setting forth the adjustments proposed to be made at Closing not later than 3 Business Days prior to the Closing Date, based on the Transferor's good faith estimate of the costs and expenses paid by the Transferor prior to Closing and the revenues received by the Transferor prior to Closing. The Transferor will provide reasonable assistance to the Transferee to assist it to verify the amounts set forth in that statement; and

(b) within the ____ day period following the Closing Date, the Transferor will prepare, on the basis of information available at that time and with input from the Transferee, a written final statement of all adjustments and payments to be made under this Property Transfer Procedure, with the net amount thereof to be remitted by the Party required to make payment within 30 days of receipt of that statement, without prejudice to the other rights of that Party under this Property Transfer Procedure to verify that amount.

B. Notwithstanding the preceding Subclause, each Party will have the right, within the later of 6 months following the distribution of the final statement of adjustments by the Transferor under Paragraph 4.02A(b) or 12 months following the Closing Date, to examine, copy and audit the records of the other relative to the Assets for the purposes of effecting or verifying adjustments required under this Article. The auditing Party will, upon reasonable notice, conduct that audit at its sole expense during normal business hours at the offices of the audited Party or at such other premises where those records are maintained. Any claims of discrepancies disclosed by that audit will be made in writing to the audited Party within 2 months following the completion of that audit. That Party will respond in writing to any such claims within 6 months of the receipt of notice of those claims. The Parties will resolve any outstanding claims of discrepancies under Article 9.00 if they are unresolved within 2 months of that response.

C. Notwithstanding Paragraph 4.02A(b), further adjustments on the basis indicated in this Article will be made as and when those items arise if notice requesting that adjustment, including reasonable particulars thereof, has been given by a Party to the other Party within 30 days following receipt of a Thirteenth Month Adjustment or a completed and agreed to audit or other report and the need for that adjustment arises from:

(a) a Thirteenth Month Adjustment, operator error adjustments or errors established by joint venture audits within 36 months after the Closing Date; or

(b) errors established by an audit or other review of lessor royalty payments that is conducted under the Regulations or Leases within 60 months after the Closing Date or such later time as may be prescribed by the Regulations.

D. Subject to Article 9.00 and the timing restrictions in this Article 4.00, the Parties agree that the period for seeking a remedial order under section 3(1)(a) of the *Limitations Act* (Alberta) is extended from 2 years to 4 years for all claims that may arise under this Article 4.00 respecting adjustments and audits.

4.03 **Adjustment For Income Tax - Treatment Of Interim Period Income**

Alternate _____ (Specify 1 or 2) will apply in this Clause. The GST applicable to both sales (outputs) and purchases (inputs) in respect of the production from the Assets during the Interim Period will be reported by the Party responsible for reporting income or loss for income tax purposes during that period.

Alternate 1

A. *The net production income or loss (i.e., gross revenues less operating costs, lessor royalties and other direct costs) that accrues in respect of the Assets in the Interim Period will belong to, or be a loss of, the Transferor. The net income or loss will be adjusted for income taxes at the rate of _____%. The net production income or loss, as adjusted for income taxes, as provided for in this Article will constitute a*

decrease or increase to the Purchase Price and, subject to Clause 1.05, to the amount allocated to the Petroleum and Natural Gas Rights, unless Subclause B of this Alternate applies.

B. This optional Subclause will _____/ will not _____ (Specify) apply herein.

If Closing occurs in the same calendar month as the Effective Date, the net production income or loss (i.e., gross revenues less operating costs, lessor royalties and other direct costs) that accrues in respect of the Assets in the Interim Period will belong to, or be a loss of, the Transferee. Such net production income or loss will be reported by the Transferee for income tax purposes, and the consequential resource allowance implications will be claimed by the Transferee (and not by the Transferor).

Alternate 2
The treatment of net production income or loss realized during the Interim Period will be handled in the manner that the Parties provide in the Head Agreement.

5.00 MAINTENANCE OF BUSINESS

5.01 Assets To Be Maintained In Proper Manner

The Transferor will maintain the Assets in a proper and prudent manner in accordance with good oil field practice and the Regulations during the Interim Period, with such consultation with the Transferee as is prescribed by Clause 5.02 or is otherwise reasonably appropriate in the circumstances. The Transferor will comply with all of its obligations with respect to the Assets under the Title and Operating Documents, will pay when due all expenses and other amounts payable in respect of the Assets during the Interim Period and will maintain any insurance it holds respecting the Assets until Closing. Unless otherwise specified herein or in the Head Agreement, the Transferor will not be required to obtain additional insurance respecting the Assets during the Interim Period, except to the extent such insurance is required to be maintained under the Regulations or the Title and Operating Documents. The Transferor will remain the beneficiary under all such policies of insurance, and, unless otherwise agreed by the Parties, the Transferee will not be entitled to any proceeds of settlement thereunder. The Transferor will promptly give notice, in reasonable detail, to the Transferee upon the Transferor becoming aware of any damage to the Tangibles of the type contemplated in Paragraph 10.02(a).

5.02 Material Commitments During Interim Period

A. During the Interim Period, the Transferor will forthwith provide to the Transferee copies of all AFEs, notices and mail ballots the Transferor receives respecting the Assets, and will not, without the prior written consent of the Transferee, which consent may not be unreasonably withheld or delayed:

(a) assume any new obligation or commitment respecting the Assets, if the Transferor's share of the associated expenditure is estimated to exceed $25,000.00, except: (i) for amounts that the Transferor is committed to expend or is deemed to authorize under the Title and Operating Documents without its specific authorization or approval; or (ii) to the extent that the Transferor reasonably determines that those expenditures or actions are necessary for the protection of life and property, provided that the Transferor will promptly notify the Transferee of any such expenditure or actions;

(b) sell, transfer or otherwise dispose of any of the Assets, except for: (i) sales of production of Petroleum Substances reasonably made by the Transferor in the ordinary course of business under sales arrangements permitted herein; (ii) or to the extent required to comply with any Right of First Refusal;

(c) surrender or abandon any of the Assets;

(d) amend any of the Title and Operating Documents (other than for processing of assignments by third parties in the ordinary course of business), terminate any of the Title and Operating Documents, enter into any new agreement respecting the Assets or vote on any mail ballot or other similar notice issued under the Title and Operating Documents;

(e) subject to Clause 5.01, Paragraph 5.02A(a) and Subclause 5.02B, propose or initiate the exercise of any option arising as a result of the ownership of the Assets (including, without limitation, rights under area of mutual interest provisions and any Right of First Refusal) or propose or initiate any operations with respect to the Assets that have not been commenced or committed to by the Transferor as of the Effective Date, if that exercise or option would result in an obligation of the Transferee after the Effective Date or a material adverse effect on the value of any of the Assets; or

(f) other than for Permitted Encumbrances, grant a Security Interest or any encumbrance with respect to any of the Assets.

B. If an operation or the exercise of any option respecting the Assets is proposed in circumstances which would require the written consent of the Transferee under Subclause 5.02A (the "Proposal"):

(a) the Transferor will promptly give notice of the Proposal to the Transferee, including with that notice supporting information in reasonable detail;

(b) the Transferee will advise the Transferor, by notice, not later than 2 Business Days prior to the time the Transferor is required to make its election for the Proposal, if the Transferee wishes the Transferor to exercise its rights on behalf of the Transferee, provided that this period will be reduced to 12 hours if the period within which the Transferor is required to reply, by notice to the applicable third parties, is 48 hours or less and that failure to make an election within the applicable period will be deemed to be the Transferee's election not to participate in the Proposal;

(c) the Transferor will make the election authorized by the Transferee for the Proposal within the period during which the Transferor may respond to the Proposal;

(d) an election by the Transferee not to participate in a Proposal will not result in any reduction of the Purchase Price if the Transferor's interest therein is terminated or altered as a result of that election, and that termination or alteration will not constitute a Title Defect or a breach of the Transferor's representations and warranties; and

(e) the Transferor may require the Transferee to advance or otherwise secure any costs to be incurred by the Transferor on behalf of the Transferee under this Subclause in such manner as may be reasonably appropriate in the circumstances.

C. The Transferee may not, without the written consent of the Transferor, request the Transferor to propose the conduct of any operation respecting the Assets during the Interim Period, except to the extent provided in the Head Agreement or this Article.

5.03 Post-Closing Transitional Maintenance Of Assets

Following Closing and to the extent that the Transferee must be recognized by third parties under the Title and Operating Documents or otherwise recognized as the owner of any of the Assets, the following will apply to those Assets until that recognition has been effected:

(a) the provisions of Clause 5.02 will continue to apply, *mutatis mutandis*;

(b) the Transferor will forthwith provide to the Transferee all AFEs, notices, mail ballots, specific information and other documents the Transferor receives respecting the Assets, and will respond to such AFEs, notices, mail ballots, information and other documents pursuant to the written instruction of the Transferee, if received on a timely basis, provided that the Transferor may refuse to follow instructions that it reasonably believes to be unlawful, unethical or in conflict with an applicable contract by providing notice to that effect to the Transferee in a timely manner;

(c) the Transferor will deliver to the Transferee, on a monthly basis, in a manner consistent with the Transferor's internal accounting processes, all revenues, proceeds and other benefits received by the Transferor respecting the Assets, other than those that accrue to the Transferor under Article 4.00, less the share of the applicable lessor royalties, operating costs, treating, gathering, processing and product transportation expenses and those other costs and expenses directly relating to the Assets and the production of Petroleum Substances, provided that the Transferor may not recover any administrative costs and expenses it incurs as a result of that delivery, that any net amount owing to the Transferor under this Paragraph will be paid by the Transferee within 30 days of the Transferor's invoice therefor and that any amount not paid by a Party within the prescribed period may, at the option of the other Party, accrue interest under Clause 12.02; and

(d) subject to Clause 3.05, the Transferor will, as agent of the Transferee, deliver all such agreements, notices and other documents as the Transferee may reasonably request to effect its ownership of the Assets.

5.04 **Transferor Deemed Agent Of Transferee**

A. Provided Closing occurs and insofar as the Transferor maintains the Assets and takes actions on behalf of the Transferee in compliance with the obligations under this Article, the Transferor will be deemed to have been the agent of the Transferee hereunder. The Transferee ratifies all actions taken, or refrained from being taken, by the Transferor under this Article in that capacity, with the intention that all of those actions will be deemed to be those of the Transferee, except to the extent that the Transferor's actions under this Article constitute gross negligence or wilful misconduct.

B. The Transferee will be liable to and, in addition, indemnify the Transferor and each of its directors, officers, agents and employees against all of their Losses and Liabilities as a result of maintaining the Assets or exercising other rights as the Transferee's agent under this Article, insofar as those Losses and Liabilities are not a direct result of the gross negligence or wilful misconduct of the Transferor or any of its directors, officers, agents or employees. An act or omission will not be regarded as gross negligence or wilful misconduct under this Article, however, to the extent that it was done or omitted to be done in accordance with the Transferee's written instructions or written concurrence.

6.00 **REPRESENTATIONS AND WARRANTIES OF PARTIES**

6.01 **Mutual Representations And Warranties**

Each of the Transferor and the Transferee represents and warrants to the other that:

(a) **Standing:** It is duly organized, validly subsisting, registered and authorized to carry on business in the jurisdiction(s) where the Assets are located;

(b) **Requisite Authority:** It has the requisite capacity, power and authority to execute the Agreement and all other documents to be executed by it, or on its behalf, hereunder and to perform its obligations hereunder;

(c) **No Conflict:** The execution and delivery of the Agreement and the completion of the transfer of the Assets hereunder are not and will not be in breach of, or in conflict with:

(i) any provision of the charter, by-laws, partnership agreement or other governing documents of that Party;

(ii) the Regulations or any court order or judgement applicable to that Party or the Assets; or

(iii) any agreement, instrument, permit or authority to which it is a party or by which it is bound;

(d) **Execution And Enforceability:** It has taken all actions necessary to authorize the execution and delivery

of the Agreement and all other documents to be executed by it hereunder, and, as of the Closing Date, that Party will have taken all actions necessary to authorize and complete the transfer of the Assets hereunder. The Agreement has been validly executed and delivered by that Party, and the Agreement and all other documents executed and delivered on behalf of that Party hereunder constitute binding obligations of that Party enforceable in accordance with their respective terms and conditions; and

(e) **No Finders' Fees:** It has not incurred any obligation or liability, contingent or otherwise, for brokers' or finders' fees for this transaction for which the other Party will have any responsibility.

6.02 **Transferor's Representations And Warranties**

The optional Paragraphs in this Clause will only apply herein if indicated to apply by so indicating with a "Yes" in the applicable blank in the margin.

The Transferor represents and warrants to the Transferee that:

____ (a) **Residency For Tax Purposes:** It is not a non-resident of Canada within the meaning of the *Income Tax Act* (Canada);

____ (b) **Lawsuits And Claims:** Except as identified in a Schedule, to the Transferor's knowledge, there are no unsatisfied judgements or claims, proceedings, actions or lawsuits in existence, contemplated or threatened with respect to the Assets or its interest therein, and, to the Transferor's knowledge, no particular circumstance exists that it reasonably believes will give rise to such a claim, proceeding, action or lawsuit that would have a material adverse effect on the aggregate value of the Assets;

____ (c) **No Default Notices:** Except as identified in a Schedule, the Transferor has not received any notice of default under the Regulations or the Title and Operating Documents or any notice alleging its default thereunder, which default remains outstanding or unsatisfied;

____ (d) **Compliance With Leases And Agreements:** To the Transferor's knowledge, there has been no act or omission whereby it is, or would be, in default under the Regulations or any of the Title and Operating Documents, which default would reasonably be expected to have a material adverse effect on the aggregate value of the Assets;

____ (e) **Payment Of Royalties And Taxes:** To the Transferor's knowledge, all royalties and all ad valorem, property, production, severance and similar taxes and assessments based on, or measured by, its ownership of the Assets, the production of Petroleum Substances from the Lands or the receipt of proceeds therefrom that are payable by it and that accrued prior to the Effective Date and for all prior years have been properly paid in the manner prescribed by the Leases and the Regulations, or will be so paid when due;

____ (f) **Encumbrances:** The Transferor does not warrant its title to the Assets, but does warrant that its interest in the Assets is free and clear of any and all liens, mortgages, pledges, claims, options, Rights of First Refusal, encumbrances, overriding royalties, net profits interests or other burdens for which the Transferee will be responsible that were created by, through or under the Transferor or of which the Transferor has knowledge, except for the Permitted Encumbrances;

____ (g) **No Reduction:** The Transferor's interests in the Assets are not subject to reduction, by farmout, reference to payout of a well or otherwise, through any right or interest granted by, through or under it or of which it has knowledge, except for the Permitted Encumbrances;

____ (h) **Sale Agreements:** Except as identified in a Schedule, the Petroleum and Natural Gas Rights are not subject to any agreement: (i) for the sale of Petroleum Substances that cannot be terminated, without penalty, on 31 days' notice or less; (ii) that includes "take or pay" or similar provisions; or (iii) for gas balancing;

____ (i) **Provision Of Documents:** To the Transferor's knowledge, it will have made available to the Transferee, prior to Closing, all of the Title and Operating Documents in the Transferor's possession that are relevant to the Transferor's title to the Petroleum and Natural Gas Rights and those additional Title and Operating Documents and other files, documents and materials comprising the Miscellaneous Interests that are reasonably required by the Transferee to satisfy any conditions included under Clause 10.02 or have otherwise been reasonably requested by the Transferee;

____ (j) **Authorized Expenditures:** Except as identified in a Schedule, as may be authorized under Article 5.00 or as are operating costs incurred in the ordinary course of business, there are no outstanding AFEs or other outstanding financial commitments respecting the Assets under which expenditures of greater than $25,000 are or may be required by the Transferee as a result of the acquisition of the Assets or in respect of which any amount is outstanding as of the Effective Date;

____ (k) **Environmental Matters:** Except as identified in a Schedule, the Transferor has not received and does not have knowledge of:

(i) any order or directive under the Regulations that relates to Abandonment and Reclamation Obligations, Environmental Liabilities or environmental compliance matters under the Regulations, if that order or directive has not been complied with or otherwise satisfied in all material respects by the Closing Date;

(ii) any demand or notice issued under the Regulations for the breach of any environmental, health or safety laws applicable to the Assets, including, without limitation, any Regulations respecting the release, use, storage, treatment, transportation or disposition of environmental contaminants, which demand or notice remains outstanding on the Closing Date; or

(iii) any particular existing circumstance that it reasonably believes to be material and a reportable event under the Regulations;

____ (l) **Condition Of Wells:** To the Transferor's knowledge, each Well located on the Lands whether producing, shut-in, injection, disposal or otherwise, has been drilled and, if completed, completed and operated in accordance with generally accepted oil and gas field practices and the material requirements of the Regulations as they existed at the relevant time;

____ (m) **Abandonment Of Wells:** To the Transferor's knowledge, each Well located on the Lands that has been abandoned has been plugged and abandoned, and the wellsite therefor properly restored, in accordance with generally accepted oil and gas field practices and the material requirements of the Regulations as they existed at the relevant time;

____ (n) **Condition Of Tangibles:** To the Transferor's knowledge, the Tangibles have been constructed, installed, maintained and operated in accordance with generally accepted oil and gas field practices and the material requirements of the Regulations as they existed at the relevant time;

____ (o) **Well And Tangibles Licence Transfers:** The Transferor is eligible under the Regulations to transfer the applicable licence or approval for any Well or Tangibles operated by it for which it is intended that the Transferee will become operator following Closing;

____ (p) **Regulatory Production Penalties:** Except as identified in a Schedule, to the Transferor's knowledge each Well that has been drilled for the purpose of producing Petroleum Substances has been drilled at a location for which an off-target production penalty is not applicable under the Regulations;

____ (q) **Regulatory Production Allowables:** Except as identified in a Schedule, to the Transferor's knowledge no notice has been received under the Regulations that a Well has been produced in excess of regulatory production allowables, and there is no pending change in those production allowables, other than as may

generally be applicable under the Regulations;

____ (r) **Area Of Mutual Interest:** Except as identified in the Land Schedule, none of the Title and Operating Documents includes an area of mutual interest that remains in effect as of the Effective Date;

____ (s) **No Offset Obligations:** Except as identified in the Land Schedule, the Transferor has not received any notice from, or on behalf of, the applicable lessor that a Lease is subject to an offset obligation, including an unsatisfied obligation to drill a well or surrender rights or an obligation to pay compensatory royalties;

____ (t) **Commitment To Deliver:** Except as identified in a Schedule, none of the Title and Operating Documents described in Paragraphs 1.01KK(f) and (g) includes a commitment to deliver production from any Lands to particular Tangibles;

____ (u) **Alberta Royalty Tax Credits:** The Transferor is not an "above-limit corporation", a "restricted corporation" or a member of a "restricted partnership", and none of the Assets is a "restricted resource property", as those terms are defined in the *Alberta Corporate Tax Act*;

____ (v) **Quiet Enjoyment:** Subject at all times to the Transferor's other representations and warranties made under this Article, the Permitted Encumbrances, Title Defects waived by the Transferee under Paragraph 8.02B(b) and the satisfaction of the obligations required to maintain the Leases in good standing by the applicable lessees, the Transferee may, for the remainder of the term of the Leases, take possession of and use the Assets for its own use and benefit without any interruption by the Transferor or any other person claiming by, through or under the Transferor; and

____ (w) **Additional Representations:** The Transferor makes those additional representations and warranties that are specified as such in the Head Agreement, which are deemed to be made under this Clause for all purposes hereunder.

6.03 **Transferee's Representations And Warranties**

The Transferee represents and warrants to the Transferor that:

(a) **Investment Canada Act:** The Transferee is not a "non-Canadian" for the purposes of the *Investment Canada Act* (Canada) or, if the Transferee is a "non-Canadian", the Transferee will comply with the requirements of that Act to the extent, if any, that this transaction is reviewable or subject to notification requirements thereunder;

(b) **Well And Tangibles Licence Transfers:** The Transferee is eligible under the Regulations to accept the transfer of the applicable licence or approval for any Well or Tangibles for which it is intended to replace the Transferor as operator following Closing; and

(c) **Additional Representations:** The Transferee makes those additional representations and warranties that are specified as such in the Head Agreement, which are deemed to be made under this Clause for all purposes hereunder.

6.04 **Survival Of Representations And Warranties**

Each Party acknowledges that the other may rely on the representations and warranties made by that Party under Clauses 6.01, 6.02 and 6.03. Those representations and warranties will be true on the Effective Date and on the Closing Date, and they will continue in full force and effect and survive the Closing Date for a period of ____ months, for the benefit of the Party for which they were made. In the absence of fraud, however, no claim or action may be commenced for a breach of any representation or warranty, unless, within that period, written notice specifying the breach in reasonable detail has been provided to the Party that made that representation or warranty, and each Party waives any rights it may have at law or otherwise to commence a claim or action

for a breach of a representation or warranty after that period. Nothing in this Clause, Article 13.00 or any other provision of this Agreement will preclude a Party that made such a representation or warranty from offering as a possible defence that the other Party did not, in fact, rely to its detriment on the representation or warranty alleged by it to have been breached herennder.

6.05 No Additional Representations Or Warranties By Transferor

A. The Transferor makes no representations or warranties to the Transferee except as set forth in Clauses 6.01 and 6.02. Except to the extent provided in Clause 6.02, the Transferor does not warrant title to the Assets or make representations or warranties respecting: (i) the quantity, quality or recoverability of Petroleum Substances; (ii) any estimates of the value of the Assets or the revenues applicable to future production from the Lands; (iii) any engineering, geological or other interpretations or evaluations respecting the Assets; (iv) the rates of production of Petroleum Substances; (v) the degree to which production of natural gas from the Lands corresponds to the annual contract volume under any gas sales contract identified in a Schedule; or (vi) the quality, condition or serviceability of the Assets or the suitability of their use for any purpose. Without restricting the generality of the foregoing, the Transferee acknowledges that it has made (and will, prior to Closing, continue to make) its own independent evaluation and inspection of the Assets and their condition as part of its due diligence process, and that, subject always to Clause 6.04, it has relied on that independent review for its assessment of the condition, quantum and value of the Assets.

B. Except for the representations and warranties in Clauses 6.01 and 6.02, or in the event of fraud, the Transferee forever releases and discharges the Transferor and each of its directors, officers, servants, agents and employees from any Losses and Liabilities of the Transferee and its assigns and successors, as a result of the use or reliance upon advice, information and materials pertaining to the Assets delivered or made available to the Transferee by the Transferor or any of its directors, officers, agents or employees prior to or under the Agreement, including, without limitation, any evaluations, projections, reports and interpretive or non-factual materials prepared by or for the Transferor, or otherwise in its possession.

7.00 THIRD PARTY RIGHTS AND CONSENTS

7.01 Rights Of First Refusal

A. If any portion of the Assets is subject to a Right of First Refusal, or if the disposition herein requires the consent or approval of any third party under the Title and Operating Documents, the Transferor will promptly serve all required notices following execution of this Agreement. Each such notice will include a request for a waiver of any Right of First Refusal or for the granting of any required consent.

B. The Transferee will supply to the Transferor, in good faith and on a reasonable basis, the value or allocation proposed by the Transferee for any of the Assets for which a Right of First Refusal notice is required under this Clause. The Parties will consult with respect to that value or allocation as appropriate in the circumstances. The Transferor will use the agreed upon value or allocation for the purposes of this Clause, provided that any dispute between the Parties with respect to that value or allocation will be resolved under Article 9.00.

C. Insofar as third parties elect to exercise any Right of First Refusal, the Transferor will promptly notify the Transferee of that exercise. In such event, the Transferee will proceed only with the acquisition of those interests in the Assets to which those exercised third party Rights of First Refusal do not directly pertain. The value and description of the Assets will be amended under Clause 1.02, and, subject to Subclause D of this Clause and the other provisions of the Agreement, the Parties will proceed with Closing for those unaffected Assets, with a resultant adjustment of accounts.

D. This optional Subclause will _____ / will not _____ (Specify) apply herein.

The Transferee may, by notice to the Transferor prior to the Closing Date, terminate this Agreement if the value of the Assets deleted from the Assets through the exercise of Rights of First Refusal by third parties

and because of uncured Title Defects exceeds the threshold prescribed by Paragraph 8.02B(d), if Alternate 2 of Subclause 8.02B applies.

8.00 TRANSFEREE'S REVIEW

8.01 Transferor To Provide Access

The Transferor will, subject to the Regulations, the Title and Operating Documents and Article 16.00:

(a) provide the Transferee and its nominees reasonable access to the Transferor's records, files and documents constituting the Miscellaneous Interests at the Transferor's office during normal business hours, for the purpose of the Transferee's review of the Assets and the Transferor's title thereto, including, without limitation, the Title and Operating Documents, provided that the Transferor may exclude from the Title and Operating Documents all commercial or business terms that do not affect the Assets; and

(b) provide the Transferee and its nominees with a reasonable opportunity to inspect the Assets at the Transferee's sole cost, risk and expense, insofar as the Transferor can reasonably provide that access.

8.02 Title Defects

A. The Transferee will conduct its review of the Transferor's title to the Assets with reasonable diligence. Not later than ___ Business Days prior to the Closing Date, the Transferee will give the Transferor notice of the Transferee's Title Defects. That notice will specify: (i) those Title Defects in reasonable detail; (ii) the Assets directly affected thereby ("the Affected Assets"); (iii) any material agreements or documents related to the Title Defects that appeared to be missing; and (iv) the Transferee's reasonable requirements for the curing of those Title Defects. The Transferor will diligently make reasonable efforts to cure those Title Defects not later than 3 Business Days prior to the Closing Date.

B. Alternate ____ (Specify 1 or 2) will apply in this Subclause.

Alternate 1

Insofar as the Title Defects described in the notice in the preceding Subclause have not been cured to the Transferee's reasonable satisfaction on or before the Closing Date, the Transferee may elect, by notice to the Transferor on or before the Closing Date, to do one of the following:

(a) delay the Closing Date to such later date as is agreed by the Parties, to provide the Transferor with additional time to cure the remaining Title Defects, at which point this Subclause will again apply to any then uncured Title Defects;

(b) waive the uncured Title Defects and proceed with Closing; or

(c) terminate this Agreement, in which case Clause 18.07 will apply.

Alternate 2

Insofar as the Title Defects described in the notice in the preceding Subclause have not been cured to the Transferee's reasonable satisfaction on or before the Closing Date, the Transferee will, on or before the Closing Date, give the Transferor notice of the Title Defects that the Transferee is not prepared to waive. The Transferee will include in that notice the value reasonably attributed to each affected interest by the Transferee. The Parties will proceed with Closing, without adjustment to the Purchase Price due to those uncured Title Defects, unless the total value attributed to them by the Transferee in that notice exceeds $_____. If the total value so attributed to those uncured Title Defects exceeds that amount, the Transferee may elect, by notice to the Transferor on or before the Closing Date, to do one of the following:

(a) *delay the Closing Date to such later date as is agreed by the Parties, to provide the Transferor with additional time to cure the remaining Title Defects, at which point this Subclause will again apply to any then uncured Title Defects;*

(b) *waive the uncured Title Defects and proceed with Closing;*

(c) *proceed with Closing for only those Assets not directly affected by the applicable uncured Title Defects, in which case the value and description of the Assets will be amended under Clause 1.02 and accounts adjusted accordingly, provided that the Transferor may delay Closing by 2 Business Days, by notice to the Transferee, and may at or prior to that delayed Closing Date terminate this Agreement, by notice to the Transferee, if the Transferee had attributed a value of ___% or more of the Purchase Price to the Assets affected by the applicable uncured Title Defects; or*

(d) *subject to Subclause 8.02F, terminate this Agreement if the value of the Affected Assets for which the Title Defects remain uncured and, if Subclause 7.01D has been selected to apply, the Assets excluded from Closing through the exercise of Rights of First Refusal by third parties are ___% or more of the Purchase Price.*

C. Failure of the Transferee to make an election on or before the Closing Date will be deemed to be an election under Paragraph (b) of the preceding Subclause. Upon Closing, the Transferee will be deemed to have waived permanently all Title Defects pertaining to the acquired Assets that were identified by the Transferee in the notice issued under Subclause 8.02A. However, this Subclause will not limit the Parties' respective rights with respect to other Title Defects respecting the acquired Assets that are subsequently discovered by the Transferee, insofar only as those Title Defects are a result of the breach of the Transferor's obligations under Clause 5.02 or, subject to Clauses 6.04 and 13.01, in breach of the Transferor's representations and warranties under Article 6.00.

D. If Alternate 2 has been selected to apply in Subclause 8.02B, the Transferee elects to proceed with Closing under Paragraph (c) thereof and the Transferor does not exercise its right to terminate this Agreement thereunder, the Purchase Price for Closing will exclude the value attributed to the Affected Assets by the Transferee under Subclause 8.02B or such other value as the Parties may agree. Insofar as the Parties have not agreed on the value of the Affected Assets, they will determine that value under Article 9.00, as of the Effective Date, provided that this amount will not exceed the value attributed to those Affected Assets by the Transferee. The Parties will promptly adjust accounts accordingly following a determination of the value of the Affected Assets under Article 9.00.

E. If Alternate 2 has been selected to apply in Subclause 8.02B, Closing proceeds under Paragraph (c) thereof and, within 30 days of the Closing Date, the Transferor cures or rectifies uncured Title Defects to the reasonable satisfaction of the Transferee for any of the Affected Assets for which Closing did not occur, it may, by notice to the Transferee within that period, require the Transferee to proceed with the acquisition of those Affected Assets. This Agreement will apply, *mutatis mutandis*, to that acquisition, as of the Effective Date. The Purchase Price applicable to those Affected Assets will be the amount of the reduction in the Purchase Price applicable to the exclusion of those Affected Assets from Closing, subject to the adjustments provided in Article 4.00. The Purchase Price for those Affected Assets will be payable by the Transferee at the Closing for those Affected Assets, but in no event later than 45 days following the Closing Date hereunder.

F. If Alternate 2 has been selected to apply in Subclause 8.02B, the Transferee elects to terminate this Agreement under Paragraph (d) thereof and the Transferor does not agree with the value allocated to the Affected Assets for which the Title Defects remain uncured, the Transferor may, by notice to the Transferee within 1 Business Day of the Transferee's notice to terminate this Agreement, require the applicable values to be determined under Article 9.00. If the Transferor serves that notice, the Parties will be deemed to have agreed to delay the Closing Date until 2 Business Days following that determination, at which point Subclause 8.02B will again apply.

9.00 DISPUTE RESOLUTION

9.01 Disputes Initially Referred To Mediation

The Parties will attempt to resolve any dispute arising hereunder through consultation and negotiation in good faith. If those attempts fail, a Party may, by notice to the other Party at any time during those negotiations, request the other Party to attempt to resolve that dispute through mediation, including with that notice sufficient detail to enable the other Party to understand the issues that remain in dispute. The Parties will attempt to agree on the selection of a mediator within 5 Business Days of receipt of that notice, unless a Party gives notice to the other Party within that period that it is not prepared to proceed with mediation respecting that dispute. If the Parties are proceeding with a mediation and are unable to select a mediator within that period, either Party may thereafter deliver a written request to The Canadian Foundation for Dispute Resolution to attempt to select, within 2 Business Days of the receipt of that request, a mediator, qualified by education and experience to resolve that dispute, and the Parties agree that the person so selected will be the mediator for the dispute. Unless otherwise agreed, the Parties will commence a mediation within 15 Business Days of the selection of the mediator, and the mediation process will continue until the dispute is resolved, a Party serves notice to the other Party that it wishes to terminate the mediation or the mediator makes a written determination that the dispute cannot be resolved through mediation, whichever first occurs. The Parties will each bear their own costs associated with a mediation, but will share the common costs of a mediation equally, including, without limitation, the cost of the mediator.

9.02 Arbitration Proceedings

A Party that wishes to pursue further proceedings after a failed or terminated mediation under Clause 9.01 must refer the dispute to binding arbitration for final resolution if the dispute pertains to: (i) the degree to which it is reasonable for the Transferor to exclude rights from the Surface Rights for its other operations under Subclause 1.01HH; (ii) the degree to which Closing is delayed for reasons solely attributable to the Transferor under Clause 2.04; (iii) adjustments under Article 4.00; (iv) the value or allocation to be used in a Right of First Refusal notice under Subclause 7.01B; or (v) the value of Assets for which Title Defects remain uncured under Clause 8.02. Any such arbitration, and any other arbitration the Parties may agree to conduct hereunder, will be conducted under the Commercial Arbitration Rules of The Canadian Foundation for Dispute Resolution. Except as otherwise provided in this Clause, a Party may commence a court action with respect to any other dispute after a failed or terminated mediation.

9.03 Limitation Periods And Interim Relief

All limitation periods respecting the commencement of an action will be stayed during the period that the Parties are attempting to resolve a dispute under Clause 9.01 or 9.02. A Party may, at any time it believes it necessary to protect its interest during that period, seek interim or provisional relief, in the form of a temporary restraining order, preliminary injunction or other interim equitable relief concerning a dispute under this Agreement, notwithstanding anything to the contrary in this Article.

10.00 CONDITIONS TO CLOSING

10.01 Conditions For Benefit Of Each Party

The obligation of a Party to complete the transaction herein is subject to the following conditions precedent that have been included for the mutual benefit of the Parties:

(a) **Investment Canada Act And Competition Act:** Any approvals required under the *Investment Canada Act* (Canada) and the *Competition Act* (Canada) will have been obtained;

(b) **Rights Of First Refusal:** All Rights of First Refusal will have been exercised, been waived or lapsed

by the effluxion of time at or prior to the Closing Date;

(c) **Material Compliance:** The other Party will have complied in all material respects with its obligations under this Agreement to be performed or complied with at or prior to the Closing Date;

(d) **Representations And Warranties Correct:** The representations and warranties made by the other Party under Article 6.00 will be true and correct in all material respects as of the Effective Date and the Closing Date, except for those changes thereto that necessarily arise as the result of the operation of the provisions of the Agreement, and, if required by the Agreement, the other Party will have delivered a Representations and Warranties Certificate to that effect at Closing; and

(e) **Additional Conditions:** Any additional conditions precedent for the mutual benefit of the Parties that are specified as such in the Head Agreement, which are deemed to be made under this Clause for all purposes hereunder.

10.02 **Conditions For Benefit Of Transferee**

The obligation of the Transferee to complete the acquisition hereunder is subject to the following conditions precedent that have been included for its sole benefit:

(a) **No Substantial Damage:** Except as consented to in writing by the Transferee, no substantial unrepaired damage or physical alteration of the Tangibles will have occurred between the earlier of the Effective Date or the date of the Agreement, as applicable, and the Closing Date which, in the Transferee's reasonable opinion, would materially and adversely affect the value of the Assets;

(b) **Delivery Of Conveyance Documents:** The Transferor will have delivered to the Transferee a General Conveyance and those other documents and materials described in Subclause 3.03A that are to be provided to the Transferee at Closing;

(c) **Discharge Of Security Interests:** The Transferor will have delivered to the Transferee, at no cost to the Transferee, registrable discharges of all Security Interests or a "no interest" letter that is satisfactory to the Transferee, acting reasonably, from the financial institution(s) or other third parties holding those Security Interests; and

(d) **Additional Conditions:** Any additional conditions precedent for the benefit of the Transferee that are specified as such in the Head Agreement, which are deemed to be made under this Clause for all purposes hereunder.

10.03 **Conditions For Benefit Of Transferor**

The obligation of the Transferor to complete the disposition hereunder is subject to the following conditions precedent that have been included for its sole benefit:

(a) **Required Payment:** The Transferee will have tendered to the Transferor in the prescribed manner all amounts required to be paid by the Transferee hereunder at or prior to Closing Date, as applicable;

(b) **Delivery Of Conveyance Documents:** The Transferee will have delivered to the Transferor copies of a General Conveyance and the Specific Conveyances executed by the Transferee; and

(c) **Additional Conditions:** Any additional conditions precedent for the benefit of the Transferor that are specified as such in the Head Agreement, which are deemed to be made under this Clause for all purposes hereunder.

10.04 Waiver Of Conditions Precedent

The Party for the benefit of which conditions precedent have been included may waive any of them, in whole or in part, by notice to the other Party. However, neither Party may waive the existence or operation of any Right of First Refusal or any condition that has been included respecting approvals required under the Regulations.

10.05 Failure To Satisfy Conditions

A. If any condition precedent in Clause 10.01, 10.02 or 10.03 has not been satisfied at or before the Closing Date and that condition has not been waived under Clause 10.04 by the Party for the benefit of which it was included, that Party may terminate this Agreement by notice to the other Party. However, a Party may not terminate this Agreement in this manner after Closing, and any remedies thereafter for the failure to satisfy such a condition will be limited to damages, if applicable.

B. Notwithstanding the preceding Subclause, but subject to Clause 10.04, any additional condition precedent included in the Head Agreement under Paragraph 10.01(e), 10.02(d) or 10.03(c) that is to be satisfied on or before a specified date prior to the Closing Date will be deemed to have been met or waived unless, prior to that date, the Party for the benefit of which it exists notifies the other Party that the condition has not been met.

10.06 Parties To Exercise Diligence With Respect To Conditions

Each Party will proceed in good faith and use all reasonable efforts with respect to all matters within its control to satisfy the conditions referred to in Clauses 10.01, 10.02 and 10.03. A Party that fails to comply with its obligations under this Clause with respect to a particular condition may not rely on the failure to satisfy that condition as a basis for the termination of this Agreement under Clause 10.05.

11.00 OPERATORSHIP

11.01 Operatorship And Third Parties

Nothing in this Agreement will be interpreted as an assignment of the Transferor's rights as operator of any of the Assets under the Title and Operating Documents or as any assurance by the Transferor that the Transferee will be able to serve as operator for any of the Assets thereunder at or after Closing.

11.02 Signs And Notifications

After Closing, the Transferor and Transferee will coordinate the removal of any signs that indicate the Transferor's ownership or operation of the Assets. It will be the Transferee's responsibility to erect or install any signs that may be required by the Regulations to indicate that the Transferee is the owner or operator of the Assets. The Transferee will complete any such replacement of signs within 3 months of the Closing Date, and the Transferor may proceed with the replacement of those signs at the Transferee's expense, insofar as they are not replaced by that time. It will also be the Transferee's responsibility to notify suppliers, contractors, governmental agencies, gas transporters and other affected third parties of its interest in the Assets within 60 days of the Closing Date.

12.00 DEFAULT

12.01 Remedies Of Injured Party

If a Party (the "Defaulting Party") fails to comply with an obligation under the Agreement and Closing does not occur as a result, the other Party (the "Injured Party") may, by notice to the Defaulting Party, elect:

(a) to continue to treat the Agreement as binding and enforceable;

(b) to treat the Agreement as terminated by reason of the non-fulfilment of the Defaulting Party's obligations and, if the Injured Party so decides and subject to Article 9.00, pursue a claim for damages, provided that any Deposit and interest accrued thereon under Subclause 2.02B will be: (i) returned to the Transferee if the Transferee is the Injured Party; or (ii) retained in trust by the Transferor's solicitors until the resolution of the dispute if the Transferor is the Injured Party or there is a dispute as to which Party is the Injured Party, in which case those amounts will be applied towards satisfaction of the damages or promptly returned to the Transferee, as applicable; or

(c) if there is a Deposit, to treat the Agreement as terminated by reason of the non-fulfilment of the obligations of the Defaulting Party and to limit the Injured Party's remedy for that default to the handling of the Deposit on the basis set forth in this Paragraph (c). If the Defaulting Party is the Transferee, the Deposit and the interest accrued thereon will be forfeited to the Transferor as a genuine pre-estimate of liquidated damages and not as a penalty. If the Defaulting Party is the Transferor, the Deposit and the interest accrued thereon under Subclause 2.02B will be refunded to the Transferee forthwith. If the Injured Party elects to proceed under this Paragraph, it will be deemed to have waived all other remedies that may otherwise have been available to it at law or equity for that default.

However, the Injured Party will be deemed to treat the Agreement as binding and enforceable until it elects, by notice to the Defaulting Party, to apply Paragraph (b) or, if applicable, (c) of this Clause.

12.02 Interest Accrues On Amounts Owing

Subject to Subclause 8.02D, any amount owing to a Party by the other Party hereunder after Closing and remaining unpaid will bear interest, compounded and computed monthly at the rate of 2% percent per annum above the Prime Rate, from the day that amount was due to be paid until the day it is paid, regardless of whether the Party has given the other Party prior notice of the accrual of interest hereunder.

13.00 LIABILITY AND INDEMNIFICATION

13.01 Responsibility Of Transferor

A. Alternate _____ (Specify 1 or 2) will apply in this Subclause.

Alternate 1
Subject to Clauses 5.04, 6.04, 13.03 and 13.04 and provided Closing has occurred, the Transferor will:

(a) be liable to the Transferee for its Losses and Liabilities; and, in addition

(b) indemnify and hold harmless the Transferee and each of its directors, officers, agents and employees from and against all Losses and Liabilities;

as a direct result of the Transferor's breach, on or prior to the Closing Date, of any of the representations and warranties of the Transferor under this Agreement, except any Losses and Liabilities insofar as they are caused by a breach of the Transferee's representations or warranties under Article 6.00 or by the gross negligence or wilful misconduct of the Transferee, or any of its directors, officers, agents, employees or assigns.

Alternate 2
Subject to Clauses 6.04, 13.03 and 13.04 and provided Closing has occurred, the Transferor will:

(a) be liable to the Transferee for its Losses and Liabilities; and, in addition

(b) indemnify and hold harmless Transferee and each of its directors, officers, agents and employees from and against all Losses and Liabilities;

as a direct result of any matter attributable to the Assets and occurring or accruing prior to the Effective Date, except any Losses and Liabilities insofar as they are caused by the gross negligence or wilful misconduct of the Transferee, or any of its directors, officers, agents, employees or assigns.

B. The responsibility prescribed by the preceding Subclause, however, is not a title warranty and does not provide an extension of any representation or warranty contained in Clauses 6.01 and 6.02, an additional remedy for the Transferor's breach thereof or any extension of the Transferee's rights under Clause 8.02. Subject only to Subclause 4.02C and in the absence of fraud, no claim or action may be commenced by the Transferee under this Clause, unless, within _____ months following the Closing Date, written notice describing the claim in reasonable detail has been provided to the Transferor, and the Transferee hereby waives any rights it may have at law or otherwise to commence such a claim or action after that period.

13.02 Responsibility Of Transferee

Subject to Clauses 5.04 and 6.04 and provided Closing has occurred, the Transferee will:

(a) be liable to the Transferor for its Losses and Liabilities; and, in addition

(b) indemnify and hold harmless the Transferor and each of its directors, officers, agents and employees from and against all Losses and Liabilities;

as a direct result of any matter attributable to the Assets and occurring or accruing on or subsequent to the Effective Date, except any Losses and Liabilities insofar as they are caused by a breach of the Transferor's representations or warranties under Article 6.00 or by the gross negligence or wilful misconduct of the Transferor, or any of its directors, officers, agents or employees. The responsibility prescribed by this Clause, however, does not provide an extension of any representation or warranty under Clauses 6.01 and 6.03 or an additional remedy for the Transferee's breach thereof.

13.03 Limit On Party's Responsibility

A. This optional Subclause 13.03A will _____/ will not _____ (Specify) apply herein.

The Transferor's total liabilities and indemnities under the Agreement, including, without limitation, any claims relating to its representations and warranties, will not exceed the Purchase Price, as adjusted, except in the event of fraud and as required under Clause 4.02.

B. This optional Subclause 13.03B will _____/ will not _____ (Specify) apply herein.

No claim will be made against a Party by the other Party under the Agreement unless the total Losses and Liabilities alleged by the Party making the claim exceed $_____.

13.04 Assets Acquired On "As Is" Basis

Notwithstanding the previous provisions of this Article, the Transferee acknowledges that it is acquiring the Assets on an "as is" basis, as of the Effective Date. The Transferee acknowledges that it is familiar with the condition of the Assets, including the past and present use of the Petroleum and Natural Gas Rights and the Tangibles, that the Transferor has provided the Transferee with a reasonable opportunity to inspect the Assets under Clause 8.01 and that the Transferee is not relying upon any representation or warranty of the Transferor as to the condition, environmental or otherwise, of the Assets, except as is specifically made under Clause 6.02. Provided Closing has occurred, the Transferee will:

(a) be solely liable and responsible to the Transferor for its Losses and Liabilities; and, in addition

(b) indemnify and hold harmless the Transferor and each of its directors, officers, agents and employees from and against all Losses and Liabilities;

as a direct result of any matter attributable to any Environmental Liabilities and Abandonment and Reclamation Obligations pertaining to the acquired Assets, regardless of the date from which they may have accrued. In addition, the Transferor will also retain those other rights and remedies available to it under the Regulations, under the common law or otherwise with respect to any claim it may have against the Transferee with respect to those Losses and Liabilities. The Transferee hereby releases the Transferor from any claims it may have against the Transferor with respect to all such Environmental Liabilities and Abandonment and Reclamation Obligations under the Regulations, at common law or otherwise, including, without limitation, the right to name the Transferor as a third party under any action commenced against the Transferee. Nothing in this Clause, however, will operate to limit any representation or warranty made by the Transferor under Clause 6.02 with respect to the environmental condition of the Assets or to affect the Transferee's right to make a claim against the Transferor for the breach thereof hereunder, subject to Clause 6.04.

13.05 Notice Of Claims

A. If, after Closing, a claim is asserted by a third party in circumstances that may give rise to an indemnity under this Article, the Party against which that claim is asserted must give notice thereof to the other Party as soon as is reasonably possible, including with that notice reasonable details about that claim. The Parties will consult in respect thereof and in determining if that claim and any legal proceedings relating thereto should be resisted, compromised or settled.

B. A Party must make available to the other Party all information in its possession or to which it has access that may be relevant to a claim described in the preceding Subclause, excluding any privileged communications or correspondence. The Transferee must provide the Transferor with access to the Assets to which that claim relates to the extent reasonably necessary in connection with that claim. No such claim for indemnity will apply if the claim is settled or compromised without the written consent of the indemnifying Party, which consent may not be unreasonably withheld or delayed.

13.06 Substitution And Subrogation

Insofar as is possible, each Party will have full rights of substitution and subrogation in and to all representations and warranties by others previously given or made respecting the Assets.

14.00 ASSIGNMENT

14.01 Assignments Before Closing

Prior to Closing, neither Party may assign any interest in or under this Agreement or to the Assets without the prior written consent of the other Party (which consent may be arbitrarily withheld), except as may be required by the Transferor to comply with its obligations respecting any Right of First Refusal, because of any earning or payout recovery under the Title and Operating Documents or as a result of any operation of Clause 5.02.

14.02 Assignments By Transferee After Closing

No assignment, transfer or other disposition of this Agreement or any of the Assets by the Transferee after Closing will relieve it from its obligations to the Transferor under this Agreement. The Transferor will have the option to claim payment or performance of those obligations from the Transferee or its assignee, and to bring proceedings for any default against either or all of them. However, nothing in this Agreement will entitle the Transferor to receive duplicate payment or performance of the same obligation.

15.00 NOTICES

15.01 Service Of Notice

Any notice required or permitted under the Agreement must be in writing, and may be served:

(a) by delivering the notice to a Party at its current address for service under Clause 15.02. A notice so served will be deemed to be received by the addressee when actually delivered, provided that such delivery is during normal business hours on any Business Day. If a notice is not delivered on a Business Day or is delivered after normal business hours, that notice will be deemed to have been received by that Party at the beginning of the first Business Day next following the time of the delivery; or

(b) by facsimile or other electronic medium directed to a Party at its current address for service under Clause 15.02. A notice so served will be deemed to be received by the addressee when actually received by it, if received within normal business hours on any Business Day or at the beginning of the next Business Day following transmission if that notice is not received during normal business hours.

15.02 Addresses For Service

The Parties' initial addresses for service of notices hereunder are:

A Party may change its address for service by notice to the other Party. That changed address for service thereafter will be effective for all purposes of the Agreement.

16.00 CONFIDENTIALITY

16.01 Transferee's Obligation To Maintain Information Confidential

Until Closing, information respecting the Assets obtained by the Transferee hereunder will be retained in confidence by it and used only for the purposes of this transaction. Upon Closing, the Transferee's right to use or disclose that information will be subject only to any applicable Title and Operating Documents. Any additional information obtained by the Transferee hereunder that does not relate to the Assets will continue to be treated as confidential by it, and will not be used by it without the prior written consent of the Transferor. However, these restrictions on disclosure and use of information will not apply, insofar as information:

(a) is or becomes publicly available through no act or omission of the Transferee or its consultants or advisors;

(b) is subsequently obtained lawfully from a third party, which, after reasonable inquiry, the Transferee does not reasonably believe is obligated to the Transferor to maintain that information as confidential;

(c) is already in the Transferee's possession at the time of disclosure to it hereunder, without restriction on disclosure; or

(d) is required to be disclosed under the Regulations or by the direction of any court, tribunal or other regulatory body having jurisdiction.

However, specific items of information will not be considered to be in the public domain merely because more general information respecting the Assets is in the public domain.

16.02 Consultants And Advisors Bound

If the Transferee employs consultants, advisors or agents to assist in its review of the Assets, it will ensure that they comply with the restrictions on the use and disclosure of information set forth in Clause 16.01.

16.03 Confidentiality Agreement

Notwithstanding Clause 16.01, the obligations of the Transferee under this Article are in addition to, and not in substitution for, its obligations under any confidentiality agreement made between the Transferor and the Transferee for its possible acquisition of the Assets, except as otherwise provided in that agreement.

17.00 PUBLIC ANNOUNCEMENTS

17.01 Parties To Discuss Public Announcements

The Parties will cooperate with each other in releasing to third parties information concerning this Agreement and the transaction contemplated herein. A Party will provide the other Party with a draft of all press releases and other releases of information for dissemination to the public a sufficient time prior to its release to enable the other Party to review that draft and provide any comments it may have. The proposed release is subject to the prior written approval of the other Party, which approval may not be unreasonably withheld or delayed. However, a Party may provide information about this transaction to any governmental agency, any regulatory authority or to the public, insofar only as is required by the Regulations or securities laws or stock exchange requirements applicable to the Party, and a Party may provide information about this transaction to a bank or other financial institution to obtain financing or any required consent of its bank or other financial lender. The Transferor may also disclose information pertaining to this Agreement and the identity of the Transferee, insofar as is required to enable the Transferor to fulfil its obligations pertaining to Rights of First Refusal and other third party rights under Article 7.00.

18.00 MISCELLANEOUS PROVISIONS

18.01 No Merger

The covenants, representations, warranties, liabilities and indemnities in this Agreement will survive Closing on the basis set forth in this Agreement. They will be deemed to apply to the General Conveyance, the Specific Conveyances and all other instruments conveying any of the Assets from the Transferor to the Transferee. They will not merge with those documents, notwithstanding the terms of those documents and any rule of law, equity or statute to the contrary, and all such rules are hereby waived.

18.02 Further Assurances

At the Closing Date and thereafter as may be necessary, the Parties will, on a timely basis and without further consideration, complete such other documents and take such other actions as may be reasonably necessary to fulfil their respective obligations hereunder.

18.03 Waiver Must Be In Writing

Except as otherwise provided herein, only a written waiver by a Party of any breach (whether actual or anticipated) of any of the terms, conditions, representations or warranties contained herein will be effective or binding upon that Party. Any waiver so given will extend only to the particular breach waived, and will not limit or affect any rights for any other or future breach.

18.04 Governing Law

This Agreement will be treated as a contract made in the Province of Alberta. This Agreement will be subject to and be interpreted and enforced in accordance with the laws in effect in the Province of Alberta, provided that this does not affect the obligations of the Parties to comply with the Regulations applicable to any Assets located outside the Province of Alberta. Subject to Article 9.00, each Party accepts the jurisdiction of the courts of the Province of Alberta and all courts of appeal therefrom with respect to this Agreement and any associated legal proceedings between the Parties.

18.05 Time

Time is of the essence in this Agreement.

18.06 No Amendment Except In Writing

Subject to Clauses 1.02 and 15.02, amendments to this Agreement may only be in writing, executed by the Parties.

18.07 Results Of Termination

If this Agreement is terminated prior to Closing, the Parties will be released from all obligations under this Agreement, except for those under Articles 12.00 and 16.00 and the warranties, representations or other obligations breached prior to that termination, provided that the Transferee's obligations under Article 16.00 will no longer be in effect 2 years following the date of that termination. If this Agreement is terminated prior to Closing, the Transferee will promptly return to the Transferor all materials delivered to it by the Transferor hereunder and all copies of them that may have been made by or for the Transferee, and, subject to the provisions of Article 12.00, the Transferor will promptly return to the Transferee any Deposit and the interest accrued thereon under Subclause 2.02B.

18.08 Supersedes Earlier Agreements

This Agreement supersedes all other agreements between the Parties respecting the Assets, and, except for the Title and Operating Documents and any confidentiality agreement described in Clause 16.03, expresses the entire agreement of the Parties with respect to this transaction.

18.09 Exercise Of Remedies

No failure of a Party to exercise any right or remedy will operate as a waiver thereof. A Party will not be precluded from exercising any right available to it at law, equity or by statute because of its exercise of any single or partial right, and a Party may exercise any such remedies independently or in combination.

18.10 Enurement

Subject to the provisions of Article 14.00, this Agreement will be binding upon and enure to the benefit of the Parties and their respective trustees, receivers, receiver-managers, successors and permitted assigns.

This is Exhibit "A" to the Property Transfer Procedure included as a Schedule to the Agreement dated _____ _____, between _____

GENERAL CONVEYANCE
( ) Area, (Province)

This General Conveyance made this _____day of _____, ____.

BETWEEN:

_____
(hereinafter called the "Transferor")

- and -

_____
(hereinafter called the "Transferee")

Whereas the Transferor has agreed to convey the Transferor's entire interest in the Assets to the Transferee and the Transferee has agreed to acquire the Transferor's interest in the Assets, the Parties agree as follows:

1. **Definitions**

In this General Conveyance, "Agreement" means the Agreement dated the _____ day of_____,_____ between the Transferor and the Transferee. In addition, the definitions provided for in the Head Agreement and in the Property Transfer Procedure included as a Schedule to the Agreement are adopted in this General Conveyance.

2. **Conveyance**

The Transferor, for the consideration provided for in the Agreement, the receipt and sufficiency of which is acknowledged by the Transferor, conveys the Assets to the Transferee. The Transferee acquires those interests from the Transferor, subject to the terms of the Agreement, the Permitted Encumbrances and compliance with the terms of the Title and Operating Documents.

3. **Effective Time**

This General Conveyance is effective as of the Effective Date.

4. **Subordinate Document**

This General Conveyance is executed and delivered by the Parties under the Agreement for the purposes of the provisions of the Agreement, and the terms hereof are to be read in conjunction with the terms of the Agreement. The Agreement will prevail if there is a conflict between the provisions of the Agreement and this General Conveyance.

5. **Enurement**

This General Conveyance enures to the benefit of and binds upon the Parties and their respective successors and permitted assigns.

6. Further Assurances

Each Party will, after the date of this General Conveyance, on a timely basis and without further consideration, do all further acts and execute and deliver all further documents that are reasonably required to carry out the terms of this General Conveyance.

IN WITNESS WHEREOF the Parties have duly executed this General Conveyance.

(TRANSFEROR'S NAME)	(TRANSFEREE'S NAME)
Per: _____	Per: _____
Per: _____	Per: _____

This is Exhibit "A" to the Property Transfer Procedure included as Schedule "C" to that Purchase and Sale Agreement made the 26th day of August, 2015 between Bumper Development Corporation Ltd., as Vendor, and Canstone Energy Ltd., as Purchaser

GENERAL CONVEYANCE

This General Conveyance made this ____ day of _____, 2015

BETWEEN:

BUMPER DEVELOPMENT CORPORATION LTD., a body corporate, having an office in the City of Calgary, in the Province of Alberta (hereinafter called the "Transferor");

- and -

CANSTONE ENERGY LTD., a body corporate, having an office in the City of Calgary, in the Province of Alberta (hereinafter called the "Transferee");

AND WHEREAS the Vendor has agreed to convey the Vendor's entire interest in the Assets to the Transferee and the Transferee has agreed to acquire the Vendor's interest in the Assets, the Parties agree as follows:

1. **Definitions**

In this General Conveyance, "Agreement" means the Agreement made as of the 26th day of August, 2015 between the Vendor and the Transferee. In addition, the definitions provided for in the Head Agreement and in the Property Transfer Procedure included as Schedule "C" to the Agreement are adopted in this General Conveyance.

2. **Conveyance**

The Vendor, for the consideration provided for in the Agreement, the receipt and sufficiency of which is acknowledged by the Vendor, conveys the Assets to the Transferee. The Transferee acquires those interests from the Vendor, subject to the terms of the Agreement, the Permitted Encumbrances and compliance with the terms of the Title and Operating Documents.

3. **Effective Time**

This General Conveyance is effective as of the Effective Date.

4. **Subordinate Document**

This General Conveyance is executed and delivered by the Parties under the Head Agreement for the purpose of the provisions of the Agreement, and the terms are to be read in conjunction with the terms of the Agreement. The Agreement will prevail if there is a conflict between the provisions of the Agreement and this General Conveyance.

5. **Enurement**

This General Conveyance enures to the benefit of and binds upon the Parties and their respective successors and permitted assigns.

6. **Further Assurances**

Each Party will, after the date of this General Conveyance, on a timely basis and without further consideration, do all acts and execute and deliver all further documents that are reasonably required to carry out the terms of this General Conveyance.

IN WITNESS WHEREOF the Parties have duly executed this General Conveyance.

BUMPER DEVELOPMENT CORPORATION LTD.

Per: _____

Per: _____

CANSTONE ENERGY LTD.

Per: _____

Per: _____

TAB

6

2009 ABQB 647
Alberta Court of Queen's Bench

BA Energy Inc., Re

2009 CarswellAlta 1818, 2009 ABQB 647, [2010] 2 W.W.R. 125, [2010] A.W.L.D. 71, [2010] A.W.L.D. 72, 15 Alta. L.R. (5th) 86, 182 A.C.W.S. (3d) 236, 481 A.R. 365, 63 B.L.R. (4th) 219

In the Matter of the Section 193 of the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended; And in the Matter of the Judicature Act, R.S.A. 2000, c. J-2, as amended; And In the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc; And In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of BA Energy Inc.

B.E. Romaine J.

Judgment: November 11, 2009
Docket: Calgary 0801-16292

Counsel: Jean van der Lee, Q.C. for Applicant, Jacobs Canada Inc.
Randal Van de Mosselaer for BA Energy Inc.

Subject: Estates and Trusts; Civil Practice and Procedure; Corporate and Commercial; Contracts

Headnote

Estates and trusts — Trusts — Constructive trust — General principles

Agent procured goods and services for business for its projects — Payment for goods and services arranged by agent were paid through bank accounts — Agent purchased pumps for business, which totalled $459,518.60 — Agent paid for pumps by wire transfer from own funds, and did not seek reimbursement for several months — Business entered protection under Companies' Creditors Arrangement Act — Agent wrote itself cheque on account for reimbursement, which bounced — Agent brought proceedings for declaration that funds in account were impressed with trust — No trust existed — No express trust in documents — Good conscience constructive trust did not exist — Business had no equitable duty to agent, and duty to place funds in account was merely contractual — No wrongful conduct arose that gave rise to equitable breach — Unfair to other creditors to impose constructive trust — No unjust enrichment occurred as benefit came with contractual liability — Property involved was not unique, but was merely debt.

Estates and trusts — Trusts — Resulting trust — Rebuttal of presumption of resulting trust — Miscellaneous issues

Agent procured goods and services for business for its projects — Payment for goods and services arranged by agent were paid through bank accounts — Agent purchased pumps for business, which totalled $459,518.60 — Agent paid for pumps by wire transfer from own funds, and did not seek reimbursement for several months — Business entered protection under Companies' Creditors Arrangement Act — Agent wrote itself cheque on account for reimbursement, which bounced — Agent brought proceedings for declaration that funds in account were impressed with trust — No trust existed — No express trust in documents — No implied trust as no certainty of intention or of object — Agent was in most transactions conduit through which money flowed, not beneficiary of trust regarding funds — Documentation showed that agency relationship was intention of parties, not trust relationship — Specific purpose of clearing account did not in itself create trust — Business did not lose control of funds after placed in

account — Account was in business's name — Agent did not obtain payment in timely manner — Claim was not post-filing claim.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Ambrozic v. Burcevski (2008), 90 Alta. L.R. (4th) 247, 41 E.T.R. (3d) 1, 429 W.A.C. 25, 433 A.R. 25, 2008 CarswellAlta 652, 2008 ABCA 194, 53 R.F.L. (6th) 242 (Alta. C.A.) — referred to

Bank of Nova Scotia v. Société Générale (Canada) (1988), 1988 CarswellAlta 288, 58 Alta. L.R. (2d) 193, [1988] 4 W.W.R. 232, 68 C.B.R. (N.S.) 1, 87 A.R. 133 (Alta. C.A.) — considered

Canada Deposit Insurance Corp. v. Principal Savings & Trust Co. (1998), [1999] 4 W.W.R. 188, 24 E.T.R. (2d) 239, 1998 CarswellAlta 631, 63 Alta. L.R. (3d) 68, 224 A.R. 331 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd and Norcen v. Pembina Resources Ltd.*) 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251 (Alta. C.A.) — referred to

McEachren v. Royal Bank (1990), 2 C.B.R. (3d) 29, [1991] 2 W.W.R. 702, 111 A.R. 188, 78 Alta. L.R. (2d) 158, 1990 CarswellAlta 234 (Alta. Q.B.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

HEARING regarding existence of trust regarding money placed in account used by agent.

***B.E. Romaine J.*:**

Introduction

1 In this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), Jacobs Canada Inc. asserted that certain funds that had at one point been deposited into a special bank account by BA Energy Inc. were impressed with an express, implied or constructive trust. Jacobs also submitted that it was a post-filing creditor unaffected by a Plan of Arrangement because the breach of trust occurred after B.A. Energy's initial filing date under the CCAA. I dismissed Jacobs' application on these grounds, and these are my reasons.

Facts

2 Pursuant to a contract dated July 20, 2004, B.A. Energy retained Jacobs to act as its agent to procure goods and services of third parties as required to complete a project known as the Heartland Upgrader Project ("the Project"). Attached as a schedule to this contract was an agency agreement ("the Agency Agreement") pursuant to which Jacobs agreed to act as agent and bare trustee for B.A. Energy. The Agency Agreement does not contain a reciprocal obligation pursuant to which B.A. Energy would act as agent, or in any other capacity, on behalf of Jacobs. The contract also set out a "Bank Schedule" that outlined a process for funding the purchase of goods and services.

3 In addition, B.A. Energy and Jacobs entered into a written arrangement dated March 23, 2006 clarifying the funding arrangements and establishing a method of making payments to Jacobs through two bank accounts (the "Payment Arrangement"). The Payment Arrangement provided that Jacobs and B.A. Energy would each open a new bank account in their own names at the TD Bank. Through these accounts, B.A. Energy would make payment for invoices in relation to the Project.

4 In accordance with the Payment Arrangement, B.A. Energy opened the "Clearing Account" and Jacobs opened the "Zero Balance Account" with the TD Bank. In the normal course:

> (a) every week, Jacobs would issue to B.A. Energy a list of invoices to be paid;
>
> (b) after it had approved the invoices, B.A. Energy would transfer sufficient funds into the Clearing Account to cover those invoices;
>
> (c) once B.A. Energy had deposited funds into the Clearing Account, Jacobs would write cheques to third party suppliers out of the Zero Balance Account to pay approved invoices; and
>
> (d) at the end of each day, TD Bank would automatically transfer sufficient funds from the Clearing Account to the Zero Balance account to cover any cheques that were cashed that day, so as to maintain a zero balance in the Zero Balance Account.

In the summer of 2008, Jacobs arranged for the procurement of the Flowserve Pumps from an overseas third-party equipment supplier. In early October, 2008, Jacobs received an invoice in the amount of $495,518.60 relating to the Flowserve Pumps, and provided the invoice to B.A. Energy for approval and payment pursuant to the Payment Arrangement. B.A. Energy approved the invoice and deposited funds to the Clearing Account to cover the invoice on November 5, 2008.

5 The supplier required payment via international wire transfer. On or about November 7, 2008, Jacobs paid for the Flowserve Pumps from its own resources. Jacobs did not seek reimbursement out of the Zero Balance Account for several months.

6 On December 30, 2008, B.A. Energy obtained an Initial Order under the CCAA in these proceedings. In February, 2008, B.A. Energy withdrew the funds from the Clearing Account. Counsel for the Monitor reported that this was done on the recommendation of the Monitor.

7 On February 11, 2009, Jacobs wrote itself a cheque on the Zero Balance Account in the amount of $495,518.60 to cover the amount forwarded to the supplier to pay the invoice. That cheque was subsequently dishonoured by the TD Bank.

Analysis

8 Jacobs submits that either a trust exists by reason of an intention to create such trust, either express or implied, or that the law should impose a constructive trust on the funds.

9 It is clear that there are no express words or agreement in the contractual documents that establish that the funds in question were intended to be beneficially held in trust for Jacobs. The funds were held in the Clearing Account, an account in B.A. Energy's name. Jacobs had no interest in the Clearing Account and no access to the funds unless and until they were transferred into the Zero Balance Account in accordance with the contractual arrangements between the parties.

10 The issue, therefore, is whether the parties intended to create an express or implied trust. The parties agree that for a trust to exist, there must be three certainties:

(a) certainty of the subject matter or trust property of the trust;

(b) certainty of the object or persons intended to be the beneficiaries of the trust; and

(c) certainty of intention on the part of the settlor to create a trust.

D.W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 132.

11 Jacob's submission that an express or implied trust exists fails with respect to both the requirements of certainty of object and certainty of intention.

12 With respect to certainty of the object or person intended to be the beneficiary of the trust, Jacobs appears to argue that, since the Clearing Account was opened to benefit the payees of cheques written on the Zero Balance Account, the funds deposited into that account would benefit Jacobs and that Jacobs was thus the object of the trust. As B.A. Energy points out, this analysis would lead more readily to a finding that the vendors who provided goods and services to B.A. Energy and who would be paid by a cheque on the Zero Balance Account would be the beneficiaries of the trust, if the other certainties were established. Even so, that was not what actually occurred with respect to this specific invoice as Jacobs altered the usual method of payment.

13 Jacobs departed from the Payment Arrangement and paid the vendor for the Flowserve Pumps out of Jacobs' own resources. Jacobs departed further from the Payment Arrangement by failing to write itself a cheque on the Zero Balance Account in the week this transaction occurred. Some four months later, after the CCAA proceedings had been commenced, Jacobs attempted to reimburse itself by writing a cheque on the Zero Balance Account (thus becoming both the payor and the payee of the funds). I accept that it is not plausible or supportable under the contractual arrangements that B.A. Energy ever intended Jacobs to be a beneficiary of money paid into the Clearing Account. Instead, the contracts provide that Jacobs would be a conduit through which funds would flow to third party vendors.

14 Even more problematic for Jacobs is the requirement of certainty of intention. To find certainty of intention, I must find "an intention that the trustee is placed under an imperative obligation to hold the property on trust for the benefit of another.": Eileen E. Gillese, The Law of Trusts, (Concord, Ont.; Irwin Law, 1997) at 39.

15 The intention of the parties as expressed in the Agency Agreement and the Bank Schedule is to create a contractual agency relationship, rather than a trust relationship, with Jacobs as an "agent and bare trustee" for its principal B.A. Energy for the limited purposes of the Agency Agreement. While the reference to "bare trustee" may impose on Jacobs the requirement to convey property it holds for B.A. Energy to B.A. Energy upon demand, there is nothing in the contracts or schedules that supports an intention that through this mechanism, B.A. Energy would settle funds for the benefit of Jacobs, or indeed that it would create a trust to settle funds for the benefit of third party vendors.

16 The contractual provisions set up a process to facilitate the efficient flow of funds through to third party suppliers with Jacobs as agent for B.A. Energy.

17 Jacobs submits that certainty of intention can be ascertained though an examination of the surrounding circumstances and conduct of the parties, citing *Bank of Nova Scotia v. Société Générale (Canada)*, [1988] A.J. No. 332

(Alta. C.A.) at para.9, where Stratton, J.A. held that the creation of a trust does not require express words but can be found where the agreement as a whole shows evidence of an intention to create trust. *Bank of Nova Scotia* involved a situation where the applicants were non-operators involved in joint venture with a bankrupt operator. The non-operators had provided funds to the operator under an agreement pursuant to which the operator was to act for the non-operators in the exploration and development of lands for the joint account. Similarly, in *McEachren v. Royal Bank*, [1990] A.J. No. 1145 (Alta. Q.B.), an applicant had provided funds to a mortgage company with specific instructions to invest the funds in safe mortgages. In both cases, the party exercising discretion or control over funds provided by the applicants was deemed a trustee.

18 The present situation is quite different. B.A. Energy was providing funds over which Jacobs could exercise control by following the established banking arrangements set out in the Payment Arrangement.

19 The process, if followed strictly by Jacobs, reduces Jacobs' risk under the contract. The problem is that Jacobs failed to protect itself using the contractual mechanisms available to it until the funds were no longer in the Clearing Account.

20 Jacobs asserts that the arrangement was evidence of B.A. Energy's intention to transfer a beneficial interest in the funds to Jacobs for the purpose of paying third party suppliers. There is, however, no indication in the contractual language of such an intention and nothing arising from the circumstances that would support such an assertion. The Payment Arrangement sets out a method of making payments to third parties, not a deposit "in trust' for Jacobs. While the Clearing Account was set up for a specific purpose, that factor alone is insufficient to establish a trust relationship in the absence of other evidence that would indicate such an intention. As B.A. Energy notes, language creating a trust could easily have been incorporated into the Bank Schedule or the Payment Arrangement.

21 Jacobs submits that once funds were deposited into the Clearing Account, B. A. Energy lost control of them. That this was not the case is clearly evidenced by what actually happened. Jacobs' protection under the contractual arrangements arose from its ability to act diligently to access the funds through the Payment Arrangement. Its failure to do so does not convert a purely contractual arrangement into a trust. It is important to note that B.A. Energy does not deny that Jacobs is a creditor, but submits that it must rank with other unsecured creditors for the purpose of a Plan of Arrangement. Jacob has not established the requisite certainty of intention that would elevate its claim through the finding of an express or implied trust above those of other unsecured creditors.

22 With respect to whether the funds should be impressed with a constructive trust, the parties are in agreement with respect to the requirements that must be met before a court makes such a finding. The remedial constructive trust is recognized as an appropriate remedy in two situations:

> (a) where there has been a wrongful act, such as fraud or breach of duty of loyalty (a "good conscience" trust); and
>
> (b) where there has been unjust enrichment and corresponding deprivation (a trust based on unjust enrichment).

Ambrozic v. Burcevski, 2008 ABCA 194 (Alta. C.A.) at para. 48.

23 In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) at para. 45, McLachlin J. identifies four conditions that generally should be satisfied before a court imposes a constructive trust based on good conscience:

> 1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> 2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> 3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

> 4) There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case; e.g. the interests of intervening creditors must be protected.

24 McLachlin J. also addresses at para. 33 the equitable foundations and rationale underpinning the imposition of the good conscience trust, stating that:

> Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised ...
>
> The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

25 While it is not necessary for the purpose of this application to determine if a fiduciary relationship existed between B.A. Energy and Jacobs arising from the Agency Agreement, any fiduciary obligations imposed under that agreement were imposed on Jacobs as agent for B.A. Energy, and not on B.A. Energy as a principal. While it is clear that a constructive trust may arise in the context of a fiduciary relationship, it does not follow that this is always the case: *Waters' Law of Trusts* at 43.

26 In this case, the relationship between B.A. Energy and Jacobs does not evidence the conditions that will generally be required to be present before a good conscience constructive trust is imposed. B.A. Energy had no equitable duty or obligation to Jacobs. Its duty to place funds in the Clearing Account was a contractual duty only. While a breach of contractual obligation, if one occurred, may give rise to the imposition of a constructive trust, it appears that this generally arises where, as in *Soulos*, the breach of contract is related to specific property and involves "the acquisition of that property in a way which is causally connected to the breach." *Waters' Law of Trusts* at 507.

27 As there was no equitable breach that arose when B.A. Energy finally withdrew the funds from the Clearing Account, there was no "wrongful conduct" of the type generally thought necessary to engage the equitable jurisdiction of the court or that would move the court to impose a constructive trust on the basis of the good conscience. The relationship between B.A. Energy and Jacobs was a commercial relationship between sophisticated business entities, well-documented through detailed contracts. This relationship does not engage the wider considerations and deterrence factors generally present where there has been the imposition of a constructive trust.

28 Unfortunately for Jacobs, it was the victim of its failure to claim payment through the Payment Arrangement in a timely manner. It would be unfair to B.A. Energy's other creditors to impose a constructive trust in the circumstances. As noted in *Canada Deposit Insurance Corp. v. Principal Savings & Trust Co.*, [1998] A.J. No. 756 (Alta. Q.B.) at para. 44, because a constructive trust is an equitable remedy imposed by the court, the effects of imposing such a remedy on all parties must be considered prior to making such an order.

29 With respect to a constructive trust based on unjust enrichment, it is doubtful whether Jacobs could establish that B.A. Energy has obtained an enrichment because "where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract: *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35 (Alta. C.A.) at para. 117.

30 Thus, even if B.A. Energy breached the Payment Arrangement by closing the Clearing Account before Jacobs attempted to access the funds, this would be merely a breach of the contractual provision between the parties. While a breach of contract can give rise to the imposition of a constructive trust, this situation does not involve property of a unique nature that should be returned to its rightful owner, but an indebtedness owed by B.A. Energy to Jacobs. As noted previously, B.A. Energy does not deny its indebtedness to Jacobs.

31 Even if the criteria of enrichment and corresponding deprivation could be established, however, there exists a juristic reason for the enrichment in Jacobs' failure to access the funds when that option was open to it. The situation is similar to the situation that existed in *Caterpillar Financial Services Ltd. v. 360networks Corp.*, [2007] B.C.J. No. 22 (B.C. C.A.), where Tysoe, J. found that Caterpillar's failure to perfect its security interest resulted in the secured lenders having priority with respect to these unperfected interests. As the court noted at para 62:

> ... it is clear that when Caterpillar entered into the leases, it intended to secure the obligations owed by 360 by retaining title to the units. Pursuant to the PPSA, Caterpillar could perfect its security by registration. The failure to register or perfect its security meant that, as between Caterpillar and any third parties, Caterpillar was a general creditor in respect of its units 2 and 3. Although Caterpillar had negotiated with 360 to be a secured creditor, it ultimately failed to protect its status as a secured creditor under the PPSA. As such, Caterpillar must be taken to have accepted the risk posed by 360's eventual insolvency. In my view, Caterpillar should not be able to invoke constructive trust principles to alter its reduced creditor status.

32 In this case, B.A. Energy withdrew funds from the Clearing Account when Jacobs failed to attempt to access them in a timely way in accordance with the Payment Arrangement. Jacobs thus lost its right to assert a claim over the funds, and ought not be given priority over other unsecured creditors through the use of the constructive trust remedy.

Conclusion

33 Jacobs failed to establish an intention to create a trust, express or implied, and failed to establish that it was entitled to the imposition of a constructive trust. Given that no trust existed, B.A. Energy's obligation to reimburse Jacobs for the payment Jacobs made on its behalf arose on or about November 5, 2009 and Jacobs' claim cannot be characterized as a post-filing claim.

Order accordingly.

End of Document

TAB

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2015 NSSC 274
Nova Scotia Supreme Court

Kel-Greg Homes Inc., Re

2015 CarswellNS 814, 2015 NSSC 274, 1151 A.P.R. 274, 259
A.C.W.S. (3d) 217, 365 N.S.R. (2d) 274, 49 C.L.R. (4th) 322

In the Matter of the Bankruptcy of Kel-Greg Homes Inc.

Peter Rosinski J.

Heard: June 25, 2015
Judgment: October 2, 2015
Docket: Hfx 418312

Counsel: Gavin MacDonald, for Trustee, BDO
John Shanks, for Enfield Hardware Ltd.
Adam Crane, for George Bergman Electric
Glenn Jones, for Toby and Jill Steffin

Subject: Contracts; Corporate and Commercial; Estates and Trusts; Family; Insolvency; Property

Headnote

Bankruptcy and insolvency --- Property of bankrupt — Trust property — Miscellaneous

Bankrupt was serving as general contractor for several residential housing projects in Nova Scotia — Certain funds received by contractor were designated as trust funds under Builders' Lien Act — Bankrupt used single bank account for trust and non-trust funds, did not maintain different accounts related to each construction project on which it was general contract, and once in account, monies were mixed and arguably indistinguishable — Subcontractors supplied services and materials but were not paid and registered builders' liens — Bankrupt became bankrupt and dispute arose as to whether $50,483.96 in bankrupt's bank account and $9,157.63 collected by trustee from two projects had status of trust funds — Trustee in bankruptcy brought application for determination of status of funds — Application granted — Funds at issue were trust funds within meaning of s. 67(1)(a) of Bankruptcy and Insolvency Act and therefore not part of bankrupt's estate — Mere co-mingling of trust funds with other funds did not necessarily result in loss of "certainty of subject matter" element of trust funds — Critical to determination was whether trust funds could be identified or traced — Entire $50,483.96 in bank account was necessarily traceable as trust funds derived from $82,796.38 trust fund deposit shortly before bankruptcy — Authority indicated bankrupt could be presumed to have expended all non-trust funds before expending any trust funds — Trustee failed to rebut this presumption — Amounts collected by trustee also remained exempt trust funds despite being deposited along with other funds in trustee's account.

Construction law --- Construction and builders' liens — Trust fund — General principles

Bankrupt was serving as general contractor for several residential housing projects in Nova Scotia — Certain funds received by contractor were designated as trust funds under Builders' Lien Act — Bankrupt used single bank account for trust and non-trust funds, did not maintain different accounts related to each construction project on which it was general contract, and once in account, monies were mixed and arguably indistinguishable — Subcontractors supplied services and materials but were not paid and registered builders' liens — Bankrupt became bankrupt and dispute arose as to whether $50,483.96 in bankrupt's bank account and $9,157.63 collected by trustee from two projects had status of trust funds — Trustee in bankruptcy brought application for determination of status of

funds — Application granted — Funds at issue were trust funds within meaning of s. 67(1)(a) of Bankruptcy and Insolvency Act and therefore not part of bankrupt's estate — Mere co-mingling of trust funds with other funds did not necessarily result in loss of "certainty of subject matter" element of trust funds — Critical to determination was whether trust funds could be identified or traced — Entire $50,483.96 in bank account was necessarily traceable as trust funds derived from $82,796.38 trust fund deposit shortly before bankruptcy — Authority indicated bankrupt could be presumed to have expended all non-trust funds before expending any trust funds — Trustee failed to rebut this presumption — Amounts collected by trustee also remained exempt trust funds despite being deposited along with other funds in trustee's account.

Table of Authorities

Cases considered by *Peter Rosinski J.*:

Air Canada v. M & L Travel Ltd. (1993), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1, 15 O.R. (3d) 804 (note), 1993 CarswellOnt 568, 1993 CarswellOnt 994, 15 O.R. (3d) 804 (S.C.C.) — referred to

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia (2009), 2009 SCC 15, 2009 CarswellBC 809, 2009 CarswellBC 810, 386 N.R. 296, 304 D.L.R. (4th) 292, [2009] 8 W.W.R. 428, 268 B.C.A.C. 1, 452 W.A.C. 1, 58 B.L.R. (4th) 1, 94 B.C.L.R. (4th) 1, [2009] 1 S.C.R. 504 (S.C.C.) — considered

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 216 A.R. 328, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199, 1998 ABCA 198 (Alta. C.A.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — referred to

Brookfield Bridge Lending Fund Inc. v. Vanquish Oil & Gas Corp. (2009), 2009 ABCA 99, 2009 CarswellAlta 682, 5 Alta. L.R. (5th) 1, [2009] 7 W.W.R. 1, 454 A.R. 162, 455 W.A.C. 162 (Alta. C.A.) — considered

Carter v. Long (1896), 26 S.C.R. 430, 1896 CarswellOnt 28 (S.C.C.) — considered

Citadel General Assurance Co. v. Lloyds Bank Canada (1997), 152 D.L.R. (4th) 411, 1997 CarswellAlta 823, 1997 CarswellAlta 824, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 206 A.R. 321, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 156 W.A.C. 321, 19 E.T.R. (2d) 93, 35 B.L.R. (2d) 153, 47 C.C.L.I. (2d) 153, [1997] 3 S.C.R. 805, 219 N.R. 323, [1999] 4 W.W.R. 135, 66 Alta. L.R. (3d) 241 (S.C.C.) — followed

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613, 38 Alta. L.R. (2d) 168 (S.C.C.) — referred to

Ecarnot (Trustee of) v. Western Credit Union Ltd. (1990), [1990] 6 W.W.R. 550, 2 C.B.R. (3d) 286, 87 Sask. R. 9, 1990 CarswellSask 35 (Sask. Q.B.) — referred to

Ecarnot (Trustee of) v. Western Credit Union Ltd. (1991), [1991] 5 W.W.R. 268, 7 C.B.R. (3d) 207, (sub nom. *Ecarnot, Re)* 93 Sask. R. 179, (sub nom. *Ecarnot, Re)* 4 W.A.C. 179, 1991 CarswellSask 41 (Sask. C.A.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 74 O.R. (3d) 382 (Ont. C.A.) — considered

Graphicshoppe Ltd., Re (2005), 2005 CarswellOnt 7008, 49 C.C.P.B. 63, 15 C.B.R. (5th) 207, 2005 C.E.B. & P.G.R. 8178 (headnote only), 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, (sub nom. *Graphicshoppe Ltd. (Bankrupt), Re)* 205 O.A.C. 113, 78 O.R. (3d) 401 (Ont. C.A.) — considered

Hallett's Estate, Re (1880), 13 Ch. D. 696, [1874-1880] All E.R. Rep. 793 (Eng. C.A.) — followed

Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America (2014), 2014 ABQB 347, 2014 CarswellAlta 940, 40 C.L.R. (4th) 289 (Alta. Q.B.) — referred to

Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America (2015), 2015 ABCA 240, 2015 CarswellAlta 1286, 26 C.B.R. (6th) 173, 387 D.L.R. (4th) 67, [2015] 9 W.W.R. 469, 19 Alta. L.R. (6th) 87, 44 C.L.R. (4th) 165 (Alta. C.A.) — referred to

John M.M. Troup Ltd. v. Royal Bank (1962), [1962] S.C.R. 487, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556, 1962 CarswellOnt 42 (S.C.C.) — referred to

Lennox Industries (Canada) Ltd. v. R. (1987), 87 D.T.C. 5041, [1987] 1 C.T.C. 171, 34 D.L.R. (4th) 297, 29 C.R.R. 175, [1987] 3 F.C. 338, 8 F.T.R. 124, 1987 CarswellNat 337, (sub nom. *Lennox Industries Ltd. v. Canada)* 1987 CarswellNat 862 (Fed. T.D.) — considered

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, 260 D.L.R. (4th) 411, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 136 C.R.R. (2d) 121, [2006] 4 W.W.R. 605, (sub nom. *R. c. Henry)* [2005] 3 S.C.R. 609, 342 N.R. 259 (S.C.C.) — referred to

R. v. Molina (2008), 2008 ONCA 212, 2008 CarswellOnt 1629, 60 M.V.R. (5th) 31, 234 O.A.C. 384, 231 C.C.C. (3d) 193, 90 O.R. (3d) 223 (Ont. C.A.) — followed

Rainville c. Québec (Sous-ministre du Revenu) (1979), [1980] 1 S.C.R. 35, (sub nom. *Bourgault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266 (S.C.C.) — referred to

Royal Bank of Canada v. Atlas Block Co. (2014), 2014 ONSC 3062, 2014 CarswellOnt 8345, 15 C.B.R. (6th) 272, 37 C.L.R. (4th) 286 (Ont. S.C.J.) — referred to

Ruwenzori Enterprises Ltd. v. Walji (2006), 2006 BCCA 448, 2006 CarswellBC 2461, 58 B.C.L.R. (4th) 23, 27 E.T.R. (3d) 171, [2007] 1 W.W.R. 255, 231 B.C.A.C. 166, 381 W.A.C. 166, 274 D.L.R. (4th) 696 (B.C. C.A.) — referred to

Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel (2015), 2015 SCC 43, 2015 CSC 43, 2015 CarswellMan 500, 2015 CarswellMan 501, [2015] 10 W.W.R. 205, 388 D.L.R. (4th) 296, 44 C.L.R. (4th) 1, 475 N.R. 117 (S.C.C.) — considered

Waxman v. Waxman (2002), 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1, [2002] O.T.C. 443 (Ont. S.C.J.) — considered

Waxman v. Waxman (2004), 2004 CarswellOnt 1715, 186 O.A.C. 201, 44 B.L.R. (3d) 165 (Ont. C.A.) — referred to

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — considered

0409725 B.C. Ltd., Re (2015), 2015 BCSC 1221, 2015 CarswellBC 1998 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 — considered

s. 67(1) — considered

s. 67(1)(a) — considered

s. 136(1)(a)-136(1)(j) — referred to

ss. 136-147 — referred to

Builders' Lien Act, R.S.N.S. 1989, c. 277
Generally — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 9 — considered

s. 13 — referred to

s. 13(2) — referred to

s. 13(4) — referred to

s. 44A [en. 2004, c. 14, s. 20] — considered

s. 44B [en. 2004, c. 14, s. 20] — considered

s. 44B(1) [en. 2004, c. 14, s. 20] — considered

s. 44B(1)(a) [en. 2004, c. 14, s. 20] — considered

s. 44B(1)(b) [en. 2004, c. 14, s. 20] — considered

s. 44B(2) [en. 2004, c. 14, s. 20] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Social Services Tax Act, R.S.B.C. 1979, c. 388
s. 18 — considered

s. 18(1) — considered

APPLICATION by trustee for determination of status of bankrupt's funds.

***Peter Rosinski J.*:**

Introduction

1 In 2013, Kel-Greg Homes Inc. was operating as a general contractor for residential housing projects, including several in Belnan, Nova Scotia:

- 37 Pine Ridge Lane-the Steffin project
- 159 Royal Oaks way - the Penton/Lidstone Project
- 254 Royal Oaks way - the Miller project

2 A number of contractors had supplied services and materials to these projects and remain unpaid. Consequently, there are lien claims pursuant to ss. 6 and 9 of the *Builders Lien Act*, R.S.N.S. 1989 c. 277 (*BLA*). The BLA also creates a statutory charge over hold-back monies, and a trust over monies received by or owed to contractors, pursuant to ss. 13 and 44B, respectively. On August 2, 2013, Kel-Greg became bankrupt. It had a single bank account through which flowed trust and non-trust monies. As at the time of bankruptcy, the disputed monies are:

i. $50,483.96 (residual bank account balance); $8,657.63 and $500.00 (amounts due to Kel-Greg from the Steffin and Miller projects): "the Collected Funds";

ii. $33,909.00 and $34,978.00 (s.13(4) *BLA* holdback amounts for Miller and Steffin projects) held in trust accounts of Burchell MacDougall, former counsel to Kel-Greg (but which the parties agreed at the hearing would likely entitle the Millers/Steffins to "secured creditor" status under s.2 of the *BIA*): "the Holdback Funds."

3 Remaining at issue is, whether or not, the Collected Funds constitute property held "in trust" for the lien claimants pursuant to s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). If they do, they are exempt from the property of the trustee in bankruptcy, and available for distribution instead among properly qualified lien claimants.

4 The trustee in bankruptcy argues that the Collected Funds are not trust funds. Therefore, he asks the court to determine and declare that the Collected Funds are the property of the trustee.

5 In the circumstances here, I conclude that the Collected Funds are trust funds within s. 67(1)(a) of the *BIA*.

6 In relation to the $50,483.96 bank account balance, I reach that conclusion by two related, but different reasoning pathways.

7 For trust monies to retain their trust character in circumstances such as in the case at bar, they must exhibit the three pre-conditions of a "trust": certainty of intention, object and subject matter. Only the latter is in issue herein.

8 As a matter of law, the mere co-mingling of trust monies with other, trust or non-trust, monies does not necessarily result in there no longer being "certainty of subject matter" regarding the original trust monies.

9 Critical to that determination is whether the original trust monies can be identified *or* traced. The use of those two words is not without significance.

10 What that backdrop in mind, I turn to the two reasoning pathways.

11 Firstly, a portion of the $50,483.96 transferred by the trustee to its account from Kel-Greg's account is necessarily traceable as trust monies deriving from the $82,796.38 trust monies deposit by the Steffins on August 1, 2013.

12 On August 1, 2013, the Kel-Greg account had a balance of $23,926.15. $82,796.38 was the only deposit before the trustee transferred $50,483.96 to its account on August 6, 2013. $56,238.57 were expended in the interim. Therefore, even if all the $56,238.57 were taken from the $82,796.38 trust funds, at least $26,557.81 thereof would necessarily still remain as part of the $50,483.96, transferred to the trustee's account.

13 Secondly, I would go further and conclude that the entire $50,483.96 remained trust funds at the time of their transfer to the trustee's bank account.

14 I rely on the principle in *Hallett's Estate, Re* (1880), 13 Ch. D. 696 (Eng. C.A.) that Kel-Greg, as a trustee, may be presumed to have expended all its bank account's non-trust monies before expending any trust monies, and that the onus is on the trustee to rebut such presumption by identifying its own funds.

15 Therefore, of the August 1, 2013, $106,722.53 bank account balance ($82,796.38 original trust monies and $23,926.15 - source unknown in fact - monies) I must presume, because no evidence to the contrary was presented, that Kel-Greg expended $23,926.15 of its own monies and $32,312.42 of the $82,796.38 Steffin trust monies between August 1 - 6, 2013.

16 Therefore, all the remaining $50,483.96 are traceable as "trust" monies.

Facts

17 At the time of bankruptcy, viz. August 2, 2013, Kel-Greg had a single account through which its operations were conducted. It did not maintain different accounts related to each construction project on which it was the general contractor. Nor did it otherwise use any means to create an actual or nominal separation between funds collected for its general operations and construction projects. Trust and non-trust monies, once in the account, were mixed and arguably indistinguishable.

18 Those lien holders who have, pursuant to ss. 6 and 9 *BLA*, perfected their claims, and are participating in this motion include:

(a) Enfield Hardware Limited - $37,646.59

(b) 4536631 Canada Inc. cob. RONA - $8,216.15

(c) Install-A-Floor Limited cob. Floors Plus - $54,777.10

(d) Progressive Cabinets and Millwork Limited - $31,219.66

(e) George Bergman Electric Limited - $36,015.13

(f) Coastal Drywall Nova Scotia Limited - $4,034.06

$171,908.69

19 On July 31, 2013, the opening balance in Kel-Greg's account was $35,200.05; from which $11,273.90 was deducted, leaving a closing balance of $23,926.15.

20 On August 1, 2013, Burchell MacDougall, Kel-Greg's then counsel, received a $128,239.72 payment from counsel for the Steffins.

21 After a $45,443.34 holdback retained by Kel-Greg's counsel, the remaining $82,796.38 was deposited to Kel-Greg's account that day. $34,978.00 of that hold back amount is still retained by Burchell MacDougall in relation to the Steffin project; as was $33,909.00 in relation to the Miller project. Further transactions, irrelevant to the outcome, left a closing balance of $54,645.48 on August 2, 2013.

22 On August 6, 2013, the trustee transferred $50,483.96 to its account. The Kel-Greg account was closed shortly thereafter.

23 The trustee collected the following amounts that were owing to Kel-Greg at the time of its bankruptcy:

(a) $8,657.63 - the Steffin project;

(b) $500 - the Miller project.

24 The trustee, Mr. Mark S. Rosen, who I find credible, confirmed that early in his appointment, he attempted to make a determination as to what amount of the monies in the Kel-Greg bank account were trust funds, and to which projects they related. He nominally assigned $60,606.06 for the Steffin project; $13,535.53 for the Penton/Lidstone project; and $500 for the Miller project. This attempt to allocate the bank account monies as between projects was based on his estimated proportional interest of each of the relevant parties in question. Kel-Greg had no specific records detailing the trust funds received, or paid out, in relation to each individual project. He characterized Kel-Greg's company records as "not in good shape".

25 When asked by the court how confidently he could accurately attribute the source of monies in Kel-Greg's bank account to any particular project, he confirmed that he could not do so; he acknowledged that he was merely doing his best to guesstimate the amounts.

26 At the time of the bankruptcy, on the facts presented, because the trust monies were not segregated from other trust or non-trust monies, I cannot precisely identify the extent to which, in fact, the monies in Kel-Greg's account were, attributable to specific project s. 44B *BLA* trust monies received by Kel-Greg. However, that is not the end of the matter. Tracing the monies is of assistance to the lien claimants.

The position of the parties

27 A number of the *BLA* lien claimants pooled their resources ("the lien claimants") and contested the trustee's claim to these various monies. The lien claimants suggest that they are owed $171,908.69.

28 The trustee argues that specifically the amounts of $50,483.96, $8657.63 and $500.00 in its possession, are in law, the property of the trustee.

29 None of the participants to this hearing have suggested that any of the claimed trust monies fall within any of the subsections (i.e. as preferred unsecured creditors) (a) to (j) in s. 136 of the *Rainville c. Québec (Sous-ministre du Revenu)* (1979), [1980] 1 S.C.R. 35 (S.C.C.).

30 The lien claimants rely on s. 44B of the *BLA*. The relevant sections read as follows:

> 6(1) Unless he signs an express agreement to the contrary and in that case subject to Section 4, **any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making**, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor, or subcontractor, **shall by virtue thereof have a lien for the price of such work, service or materials upon the** erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees and appurtenances, and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, **limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.**
>
> (2) A person who rents to an owner, contractor or subcontractor equipment used on land or in such place in the immediate vicinity thereof as is designated by the owner, contractor, subcontractor or agent thereof, performs a service within the meaning of subsection (1). R.S., c. 277, s. 6; 2004, c. 14, s. 6.
>
> **TRUST PROVISIONS**
>
> Owner trustee of trust fund for contractor
>
> 44A (1) All amounts received by an owner that are to be used in the financing of any of the purposes enumerated in Section 6, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where amounts become payable under a contract to a contractor by the owner, an amount that is equal to an amount that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> (3) Where the substantial performance of a contract has been deemed, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> (4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to any of the purposes enumerated in Section 6 owed to the contractor by the owner. *2004, c. 14, s. 20.*
>
> **Contractor trustee of trust fund**
>
> 44B (1) **All amounts**
>
> (a) **owing to a contractor** or subcontractor, whether or not due or payable; **or**
>
> (b) **received by a contractor** or subcontractor,

on account of the contract or subcontract price of any of the purposes enumerated in Section 6 constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to any of the purposes enumerated in Section 6 who are owed amounts by the contractor or subcontractor.

(2) **The contractor or subcontractor is the trustee of the trust fund** created by subsection (1) and the contractor or subcontractor **shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to any of the purposes enumerated in Section 6 are paid all amounts** related to any of the purposes enumerated in Section 6 owed to them by the contractor or subcontractor. *2004, c. 14, s. 20.*

31 The lien claimants argue that:

(a) Pursuant to s. 44B(1) of the *BLA*, Kel-Greg was required to treat the monies received herein, as "a trust fund for the benefit of the subcontractors and other persons supplied services or materials to any of the purposes enumerated in s. 6 who are owed amounts by the contractor or subcontractor.";

(b) Kel-Greg should, in the absence of evidence to the contrary, be presumed to have acted in compliance with s. 44B(2) of the *BLA*, and therefore, to have used its own funds first when making payments out of its general operating account, leaving by necessary implication at least some trust funds remaining in that account at the date of bankruptcy;

(c) Pursuant to s.67(1)(a) of the *BIA*, the statutorily created trust under the *BLA* does constitute "property held by the bankrupt in trust for any other person", and such *BLA* trust monies are therefore excluded from the property of the trustee;

(d) The state of the jurisprudence is such that, in order to be excluded from the trustee's property under s. 67(1)(a) of the *BIA*, statutorily created trusts must meet the three specific preconditions of common law trusts: certainty of identity; certainty of object; and certainty of subject matter;[notably the counsel herein only dispute whether the latter condition has been satisfied];

(e) Even where trust funds are co-mingled not only among themselves, but also with non-trust funds in one account, provided that the trust funds can be traceable with reasonable certainty, the jurisprudence dictates that there is still certainty of subject matter; and

(f) In circumstances of this case, there are still sufficient bases to conclude that there is certainty of subject matter, such that s. 44B *BLA* trust monies are excluded from the property of the trustee.

32 The position of the trustee may be summarized as follows:

(a) Regarding the monies in Kel-Greg's bank account on August 2, 2013, even if the sum owed to the lien holders can be calculated with certainty, unless the statutory trust funds have been held separate and apart from the rest of the bankrupt's monies, the certainty of subject matter required by the law of trusts is not present, and no "trust" exists as referred to in s. 67(1)(a) *BIA*:

(i) *Bassano Growers Ltd. v. Price Waterhouse Ltd.*, 1998 ABCA 198 (Alta. C.A.);

(ii) *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 3062 (Ont. S.C.J.);

(iii) *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, 2014 ABQB 347 (Alta. Q.B.) [overturned on appeal while the decision herein was on reserve - 2015 ABCA 240 (Alta. C.A.)].

(b) Regarding the *BLA* trust funds gathered by the trustee since August 2, 2013, because the trustee has all Kel-Greg's monies in a single account, he has, by co-mingling thereof, destroyed the certainty of subject matter required to maintain the "trust" status of these funds;

(c) Regarding the *BLA* holdback funds (ss. 13(2) and 13(4)) to the extent of 10%, they are a "charge" and give those lien holders status as a "secured creditor" pursuant to s. 2 of the *BIA*. Thus, their subsisting interests entitlement should be assessed as such, and not under ss. 136 - 147 of the *BIA* which governs unsecured creditors: *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.); *Ecarnot (Trustee of) v. Western Credit Union Ltd.* (1990), 87 Sask. R. 9 (Sask. Q.B.) [Though I note that in a brief oral decision which affirmed the result, Sherstobitoff J.A. observed that whether *Henfrey* applied was not raised before the judge or in the Court of Appeal (1991), 93 Sask. R. 179 (Sask. C.A.).]

1. Does the jurisprudence dictate that there is still certainty of subject matter even where trust funds are co-mingled not only among themselves, but also with non-trust funds in one account, provided that the trust funds can be traceable with reasonable certainty? It does.

33 Counsel organized their positions based on what they considered to be a leading case from the Supreme Court of Canada: *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.). I conclude that the reasoning in *Henfrey* applies and that the demonstration that there is certainty of subject matter will rise or fall depending on whether the monies claimed to be held in trust are traceable.

34 The weight to be given to precedents, and their usefulness as support for the legal positions taken by counsel and guidance for courts, are inherently related to what is the *ratio decidendi* of the case. It is àpropos to consider what the Supreme Court of Canada has said about *ratio decidendi*.

35 In *R. v. Henry*, 2005 SCC 76 (S.C.C.), the court, per Binnie J., made the following observations:

52 The Attorney General of Ontario, in particular, argued more strenuously about some of the *obiter* commentary in *Noël* than about its actual result, such as Arbour J.'s suggestion that circumstances enabling a *Kuldip* type cross-examination might be "rare" (para. 60). The Attorney General worries that this sort of *obiter* will be seen as binding on trial courts. I do not think this "concern" is plausible. The comment was neither part of the legal analysis nor a direction to trial courts. It was simply an observation by an experienced judge. More significantly, the respondent and the intervening attorneys general contend that everything said in *Noël* about the application of s. 13 to an accused in a retrial on the same charge is *obiter*. While I agree that every judgment has to be read in light of the facts the Court was dealing with, and that *Noël* was emphatically not a case of a retrial of the same accused on the same indictment, nevertheless I believe the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops.

53 The traditional view expressed by the Earl of Halsbury L.C. was that "a case is only an authority for what it actually decides", and that

> every judgment must be read as applicable to the particular facts proved, or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.
>
> (*Quinn v. Leathem*, [1901] A.C. 495 (H.L.), at p. 506)

The caution was important at the time, of course, because the House of Lords did not then claim the authority to review and overrule its own precedents. This is no longer the case.

. . .

> **57 The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding"** in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.
>
> [my emphasis added]

36 With those comments in mind I will turn to the *Henfrey* decision and its progeny.

37 Section 67(1) of the *BIA* reads:

> 67. (1) **The property of a bankrupt divisible among his creditors shall not comprise**
>
> (a) **property held by the bankrupt in trust for any other person; ...**
>
> but it shall comprise
>
> (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
>
> (i) is not subject to the operation of this Act, or
>
> (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
>
> (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

38 In *Henfrey*, the bankrupt car sales dealership, Tops Pontiac Buick Ltd. (Tops), had collected sales tax for the provincial government. It maintained the unremitted sales tax in a co-mingled bank account. After its bankruptcy, all the bank account amounts were used to reduce Tops' indebtedness to the bank.

39 The Province contended that the unremitted sales tax, as monies held "in trust", were excluded from the bankrupt's property under the predecessor to s.67(1)(a) *BIA*.

40 The Province relied on s. 18(1) of the *Social Services Tax Act* as creating a "trust", which would fall within the reference in s. 67(1)(a) *BIA* to "property held by the bankrupt in trust for any other person".

41 Section 18 read:

> 1 Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

2 The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of [the person required to collect and/or remit the tax amounts].

42 McLachlin J. (as she then was) characterized the issue as follows:

Section 18 of the *Social Service Tax Act* creates a statutory trust which lacks the essential characteristics of a [common law] trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within [the present s.67(1)(a)] *Bankruptcy Act* or a mere Crown claim under [the present s.136(1)(j)]?

43 She then applied the principles of statutory interpretation to the wording, "property held by the bankrupt in trust for any other person", and concluded that the present s.67(1)(a) *BIA* reference to "in trust" must be interpreted as including statutorily created trusts, if and only if, such trusts meet the common law pre-conditions of a trust: certainty of intention; certainty of object; certainty of subject matter.

44 Next she examined, whether as a matter of fact, the unremitted tax monies met the requirements for a common law trust, and constituted "property held by the bankrupt in trust". She concluded that they did not in in the circumstances of that case.

45 In reaching that conclusion, she acknowledged that while initially the tax monies collected are readily identifiable:

The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. **The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point, it is no longer a trust under general principles of law..... the answer to the question of whether the province's interest under s. 18 is a "trust" under [present s. 67(1)(a)] or a "claim of the Crown" under [present s. 136(l)(j)], depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt** from distribution to creditors by reason of [present s. 67(1)(a) *BIA*].... The Province has a claim secured only by a charge or lien, and [present s. 136(l)(j)] applies.

In the case at bar, no specific property impressed with a trust can be identified. It follows that [the sales tax monies collected by the bankrupt Tops do not exhibit certainty of subject matter, and therefore, present s. 67(1)(a)] of the *Bankruptcy Act* should not be construed as extending to the Province's claim in this case.

[my emphasis added]

46 She confirmed that:

The Province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character... the Province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, supplemented by a lien and a charge over all the bankrupts' property under s. 18(2).

[my emphasis added]

47 In the case at bar, Kel-Greg received monies into its single bank account pursuant to a provincially created statutory trust. Section 44B(2) of the *BLA* makes Kel-Greg "the trustee of the trust fund created by Subsection (1)".

48 *Henfrey* decided that: monies held pursuant to provincial statutory trusts can constitute "property held by the bankrupt in trust", if the statutory trust also satisfies the three pre-conditions ("certainties") to a common law trust on the particular facts in the case; and whether there is certainty of subject matter is dependent on the trust property being identifiable or traceable. Co-mingling of monies, by itself, is not necessarily fatal to a claim that monies are held "in trust".

49 To my mind, the reasoning in *Henfrey* is applicable to the case at bar. The s. 44B *BLA* trust will be also a common law trust if the three certainties (intention, object, and subject matter) are satisfied.

50 The dispute here is centered on whether there is certainty of subject matter in the circumstances of this case. Whether the claimed trust monies exhibit certainty of subject matter will depend on their being identifiable or traceable. That factual issue will be dealt with later.

51 A number of cases have wrestled with certainty of subject matter/tracing issues:

i. *Bassano Growers Ltd. v. Price Waterhouse Ltd.*, 1998 ABCA 198 (Alta. C.A.);

ii. *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.);

iii. *Graphicshoppe Ltd., Re* (2005), 78 O.R. (3d) 401 (Ont. C.A.);

iv. *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 3062 (Ont. S.C.J.);

v. *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, 2015 ABCA 240 (Alta. C.A.).

52 Absent *Atlas Block* (para 45), these cases do not dispute my interpretation, or the applicability of *Henfrey*. The outcome in each of those cases turns on their particular facts.

53 I respectfully conclude that *Atlas Block* overstates the ratio in *Henfrey*. Justice McLachlin did not state that, as a matter of law, "once co-mingling has occurred, that is the end of the matter."

54 While Feldman J.A. in *TCT Logistics* at para. 19 did state:

> Once the purported trust funds are co-mingled with other funds, they can no longer be said to be "effectively segregated" for the purpose of constituting a trust at common law";

I prefer as representative of the ratio in *Henfrey*, the words of Moldaver J.A. (as he then was) in *Graphicshoppe Ltd., Re* at para. 123:

> For present purposes, I am prepared to accept that *Henfrey Samson* falls short of holding that co-mingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the *BIA*. Once, however, the trust funds have been converted into property that cannot be traced, that is fatal.

55 Turning to *Iona Contractors*, I conclude that the reasoning of the majority is not directly applicable to the corresponding, but distinguishable, trust provisions in the Nova Scotia *BLA*. The Nova Scotia *BLA* more closely approximates the Saskatchewan legislation. In *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43 (S.C.C.), at para. 3, in the context of the Manitoba legislation, the court re-iterated that the lien and the statutory trust provisions provide "two separate" remedies.

56 The Ontario Court of Appeal directly took on the issue of when monies are traceable in *Graphicshoppe Ltd., Re* (2005), 78 O.R. (3d) 401 (Ont. C.A.). The bankrupt had deducted their pension contributions from its employees

pay, but failed to remit them to the plan administrator. The contributions were co-mingled with the bankrupt's own funds in its only bank account. There was a positive balance in that bank account at the date of bankruptcy. The trustee disallowed the claim by the employees, finding the money could not be traced into property of the bankrupt on the date of bankruptcy as the bankrupt had converted the trust monies to other property, or spent it on running its business, destroying the trust. The Register in Bankruptcy allowed the employees' appeal. An appeal to the Superior Court was dismissed. That court found there was certainty of subject matter under trust principles because the collective agreement governing the employees' pension specified defined percentages to be deducted from each employee and held on trust. The trustee appealed to the Court of Appeal, which allowed the appeal in a split decision.

57 In dissent, Justice Jurianz agreed that the employees were able to trace their pension contributions to the bank account. He took a broader view of tracing:

> **8** "Tracing" comes into play after the trust has been created and there has been a wrongful disposition of trust property and the beneficiary claims what has been substituted for the original trust property. At this stage, the claimant must be able to identify property as the substitute for the trust property in order to claim proprietary relief. **If tracing is no longer possible** - where, for instance, the plaintiff's money is spent on a dinner or squandered at the racetrack - **the claimant may still seek personal relief, but will no longer have an effective proprietary remedy.**
>
> . . .
>
> **43** In the 2005 edition of Waters' Law of Trusts in Canada, the authors carefully review the principles that apply to the remedies of a beneficiary for recovering trust property when trust property has been mixed with other property. They say, at p. 1279, that these principles "apply not only to notional mixtures such as bank accounts, but to genuine physical mixtures of indistinguishable things, like sawlogs or grain."
>
> . . .
>
> **90 Relying on *Greymac*, Blair J.** [in *Law Society of Upper Canada v. Toronto Dominion Bank*, [1998] O.J. No. 5115] **regarded a mixed fund as a whole fund that constitutes an asset in the trustee's hands**:
>
> > What follows from this, it seems to me, is that a mixed fund of this nature should be considered as a whole fund, at any given point in time, and that the particular moment when a particular beneficiary's contribution was made and the particular moment when the defalcation occurred, should make no difference. The happenstance of timing is irrelevant. The fund itself - although an asset in the hands of the trustee to which the contributors have recourse - is an indistinguishable blend of debits and credits reflected in an account held by the trustee in a bank or other financial institution. It is a *blended* fund. Once the contribution is made and deposited it is no longer possible to identify the claimant's funds, as the claimant's funds. All that can be identified, in terms of an asset to which recourse may be had, is the trust account itself, and its balance [emphasis in original]. (p. 272)
>
> **91 Blair J. contrasted the blended fund concept with the concept of the fund as an amalgam.** Looking at a mixed fund as an amalgam, the contributions mixed in the account can be regarded as having, for certain purposes, a continued separate existence. As explained by Lord Greene M.R. in *Re Diplock's Estate*, [1948] 2 All E.R. 318 (C.A.), equity adopted a more "metaphysical approach" and "regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts."
>
> **92 The mixed fund as an amalgam is the conceptual framework for equitable proprietary tracing of transactions within a mixed fund. Conceiving of the mixed fund as a blended whole renders the tracing of transactions within a mixed fund irrelevant.**
>
> **93** Blair J. noted that the concepts of the mixed fund as an amalgam and as a blended fund both enable equity to offer a remedy in relation to the remaining balance in the fund. However, the amalgam fund approach unnecessarily limits the reach of equitable proprietary remedies:

> While "proprietary tracing" may serve as the equitable vehicle which enables a claimant to have recourse to a mixed trust fund in the first place, equity can move beyond the strictures of that doctrine to provide a remedy to the claimant *once the connection to the fund has been made*. The nexus is to be found in the concept of the equitable charge, lien or constructive trust. These concepts need not, in my view, be confined to any part of the fund because, by their very nature, they have always been applied against the whole of the fund. (p. 273)

94 Blair J. therefore preferred the blended fund approach, which views a mixed account as an indivisible whole and makes available a wider range of equitable remedies.

. . .

98 In my view, there is no principled basis on which to confine Blair J.'s reasoning and conclusions in *LSUC* to a situation where all the money in an account is trust money. Such a distinction would result in innocent beneficiaries being worse off when the trustee, who has acted wrongfully, adds his or her own money (as opposed to that of another innocent beneficiary) to a mixed fund. It would result in a late contributor who is a wrongdoer receiving a better recovery than a late contributor who is another innocent beneficiary.

[my emphasis added]

58 In contrast, the majority decision written by Justice Moldaver (as he then was) stated:

118 In my view, the trustee in bankruptcy correctly determined that the employee contributions did not constitute trust funds under s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

119 The salient facts are not in dispute. It is accepted that Graphicshoppe held its employees pension contributions in trust when it deducted them from their pay. At that moment, the trust property was identifiable and the trust met the requirements for a trust under established principles of trust law.

120 Shortly thereafter, **however, the trust property ceased to be identifiable. The employee contributions were co-mingled with Graphicshoppe's funds and prior to the date of bankruptcy, they were converted into other property and were no longer traceable.** On this point, it is clear from the record that **as of the date of bankruptcy, none of the employee contributions that had been deposited into Graphicshoppe's bank account remained intact. We know that with certainty because prior to the date of bankruptcy, the account went into a negative balance.** We likewise know that the funds in the account on the date of bankruptcy came from Textron, the company that was factoring Graphicshoppe's receivables. Replenishment is a non-issue on the facts before us.

. . .

124 It should be noted here that the facts of this case are very different from the facts in the two cases upon which my colleague so heavily relies, namely, *Re Ontario Securities Commission* and *Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (C.A.), aff'd [1988] 2 S.C.R. 172 ("Greymac"), and *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (C.A.) ("*LSUC*").

125 In *LSUC*, all of the funds in issue were trust funds. Even though the defalcating lawyer had made an assignment into bankruptcy, there was no issue about whether the funds in question formed part of the estate divisible among his creditors; they did not. Rather, in *LSUC*, the court was solely concerned with how best to allocate the funds remaining in the mixed trust account between competing beneficiaries.

126 **In the case at bar, we are only at the first stage of this analysis. That is, we are still trying to determine if any or all of the funds in the bankrupt's bank account at the date of bankruptcy were trust funds and therefore not part of the bankrupt's estate pursuant to s. 67(1)(a) of the BIA.** At this preliminary stage, we are not concerned about calculating the amount each beneficiary may claim from the trust funds, if it turns out that some such funds do in fact exist.

Instead, we are simply trying to determine what, if any, of the money in the Graphicshoppe's bank account at the date of bankruptcy was trust money and therefore did not belong to it.

130 In the case at bar, the employees had a trust interest and hence a right to seek a proprietary remedy with respect to the pension contributions so long as they could be identified or traced. **However, as McLachlin J. noted at p. 742 of Henfrey Samson, once the contributions lost that character, any common law or equitable property interest disappeared.** While this may seem harsh, it must be remembered that in the commercial context and particularly in the realm of bankruptcy, innocent beneficiaries may well be competing with innocent unsecured creditors for the same dollars. This raises policy considerations which the courts in *Greymac* and *LSUC* did not have to face.

131 **My colleague purports to distinguish Henfrey Samson on the basis that in this case there is a connection between the employees' pension contributions and Graphicshoppe's bank account, whereas in Henfrey Samson, the Province did not establish a connection with any particular account or asset, advancing a claim against the entire estate of the bankrupt instead.** My colleague states that in this case the pension contributions can be traced to Graphicshoppe's bank account, and that pursuant to the reasoning in LSUC, this bank account should be considered an indivisible asset in the hands of Graphicshoppe, over which the employees may assert a proprietary interest.

132 With respect, I have already explained in these reasons why the reasoning in LSUC ought not to apply to the facts of this case, and I do not think it is necessary to elaborate on this issue any further. I would only point out that regardless of the particular facts in *Henfrey Samson*, it must be remembered that in that case a majority of the Supreme Court of Canada held that once monies held on trust can no longer be traced, that is fatal to the application of s. 67(1)(a) of the BIA. In the case at bar, it is clear on the evidence that the pension contributions cannot be traced. Accordingly, the employees' claim under s. 67(1)(a) of the *BIA* must fail.

[my emphasis added]

59 As earlier indicated, each case will turn on its own particular facts regarding whether the claimed trust monies can be sufficiently identified or traced to permit a conclusion that there is certainty of subject matter. It is to that aspect that I will next turn.

2. Can Kel-Greg be legally presumed, or factually inferred, to have acted in compliance with s. 44B(2) of the Builders Lien Act regarding the movement of monies into and out of its bank account? It can be legally presumed to have spent its own money first, before spending trust monies.

(a) The Evidence

60 There is no direct evidence from any person knowledgeable about, or responsible for, the pre-bankruptcy handling of funds in Kel-Greg's bank account. The lien claimants' suggestion that I infer that Kel-Greg acted in compliance with the *BLA* would require me to speculate. I cannot do so.

61 Regarding the drawing of a factual inference that Kel-Greg handled its bank account in such a manner so as to deliberately expend non-trust funds before accessing trust funds, I have no evidence to support such an inference. Moreover, the undisputed facts indicate that Kel-Greg's personnel accessed the trust funds in contravention of s. 44B of the *BLA*, since they depleted the account to amounts less than the demonstrable total amount of trust fund deposits that should have been on hand, on and before August 2, 2013.

62 Because of the lack of evidence, and reliability concerns arising from the evidence that Kel-Greg's records were "not in good shape", I cannot precisely identify the extent to which, in fact, the monies in Kel-Greg's account on August 2, 2013, were attributable to specific project *BLA* trust monies received by Kel-Greg.

63 Nevertheless, as I have said in paras. 11 - 12, at least $26,557.81 of the $50,483.96 bank account balance, necessarily must be trust monies.

(b) A Legal Presumption?

64 The lien claimants provided no case law which specifically supports a legal presumption of compliance with s. 44(2)B of the *BLA*. (i.e. that Kel-Greg spent its own monies entirely before it properly began to spend trust monies).

65 Generally speaking however, if a trust is imposed by statute, persons in receipt of monies impressed with such trust are deemed to have known of the trust - *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.), at para. 38, per Iacobucci J. for the majority [however, see also *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.) and Laforest J.'s comments regarding an important distinction between "knowing assistance" and "knowing receipt" circumstances - *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.) at para. 48]. In any event, such legal presumption, by itself, does not determinatively assist the lien claimants in establishing as a matter of fact that Kel-Greg acted in compliance with the spirt of s. 44B(2) of the *BLA*.

66 The argument of the lien claimants could arguably rest on the rationale underlying the doctrine of "the presumption of regularity", which was considered in the criminal context by the Ontario Court of Appeal in *R. v. Molina*, 2008 ONCA 212 (Ont. C.A.):

> The Presumption of Regularity
>
> 10 The Crown argues here - as it did below - that the "presumption of regularity" operates to cure any deficiencies in the s. 260(1)(c) notification procedure in the absence of evidence from the defence establishing that the provisions of the section were not complied with.
>
> 11 **The presumption of regularity is a reflection of the Latin maxim: omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium (everything is presumed to be rightly and duly performed until the contrary is shown). As Watt J. noted in *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 at 68 (Ont. H.C.), it "has especial application in the case of persons who discharge a public or statutory duty."**
>
> 12 Various authorities have drawn on the treatise of the great American authority on evidence, Professor John Henry Wigmore, in dealing with the underpinnings of the doctrine. For example, Prowse J.A., speaking for the Alberta Court of Appeal in the context of a breach of probation case in *R. v. Scott* (1980), 56 C.C.C. (2d) 111 at 113-114, said:
>
> > This statement [1] constitutes an admission by the accused, and is therefore admissible as evidence of compliance with s. 663(4)(a) and (b). The issue is whether, in the absence of positive evidence, the statement supplies an element of probability justifying the presumption that the explanation of ss. 664(4) and 666 was delivered by the sentencing Judge himself, as required.
> >
> > In **Wigmore** A Treatise on the Anglo-American System of Evidence in Trials at Common Law on Evidence, 3d ed. (1940), vol. IX, p. 488, that learned author **proposes several conditions for the application of the omnia praesumuntur rule**:
> >
> > > ... first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and finally, that the circumstances of the particular case add some element of probability. [Emphasis added.]
>
> 13 This Court approved that statement in *R. v. McNamara* (1982), 66 C.C.C. (2d) 24 at 28-29, leave to appeal to S.C.C. refused, [1982] S.C.C.A. No. 271
>
> . . .

> 14 **Generally, the presumption of regularity has been resorted to in circumstances where there has been an irregularity in the creation of an official court document**. For example, it has been used where an information or summons is regular on its face but is attacked on the basis of some irregularity pertaining to the way in which it was signed or sworn
>
> . . .
>
> also been used to regularize an information by presuming that a justice of the peace - in the absence of evidence to the contrary - had held the necessary hearing prior to issuing process: Re Morton and The Queen (1992), 70 C.C.C. (3d) 244 (Ont. Gen. Div.).
>
> [my emphasis added]

67 A brief review of the jurisprudence confirms that the presumption of regularity has steadfastly been applied only in the cases of persons who have public functions to perform. A bankrupt in the pre-bankruptcy period is not such a person. A trustee under the *BIA* is arguably such a person. Notably, however, there was an unsuccessful attempt to apply the presumption to a monitor appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 in *Winalta Inc., Re*, 2011 ABQB 399 (Alta. Q.B.), at para.32.

68 On the other hand, common law trustees are treated differently. In *Carter v. Long* (1896), 26 S.C.R. 430 (S.C.C.), Sir Henry Strong stated for the court:

> A great number of cases decided in courts of equity ranging over more than a century have established that trust moneys may always be traced into property of any species into which it may have been converted, in such a way that the court will give the *cestui que* trust as nearly as possible the same interest in the property as that which he had in the money of which it is the produce (see *Re Hallett's Estate*, 13 Ch. D. 696.).

69 In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15 (S.C.C.), Deschamps J. for the court, endorsed *Carter* at paras. 85 - 86:

> ...**I accept the view advanced** by Lord Millett in *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at p. 132, **that the rules for tracing money are the same as those for tracing into physical mixtures**. This view is also supported by Professor L. D. Smith in his treatise *The Law of Tracing*, at pp. 74 and 194 ff. For our purposes, there is no need to review all the rules applicable to physical mixtures (*Lawrie v. Rathbun* (1876), 38 U.C.Q.B. 255; *Carter v. Long & Bisby* (1896), 26 S.C.R. 430, at pp. 434-35; J. Ulph, "Retaining Proprietary Rights at Common Law Through Mixtures and Changes", [2001] *L.M.C.L.Q.* 449). **Suffice it to say that, as between innocent contributors, contributions are followed first to amounts they have withdrawn**. In the case at bar, since the withdrawals of all those who received funds far exceeded their contributions, RBC can trace its own contribution to the balances remaining in the accounts.
>
> As Atkin L.J. mentioned in *Hambrouck*, the question to be asked is whether the money deposited in these accounts was "the product of, or substitute for, the original thing".
>
> [my emphasis added]

70 *Hallett's Estate, Re* has been interpreted as standing for the proposition that "where a trustee acts in breach of trust in the mingling and spending of trust and non-trust funds, he is deemed to have spent his own money first, and trust money last", per Grauer J., at para. 22 in *0409725 B.C. Ltd., Re*, 2015 BCSC 1221 (B.C. S.C.).

71 I acknowledge that there has been negative commentary regarding the continued persuasiveness of some of the court's reasons in *Hallett's Estate, Re: Hallett's Estate, Re* (1880), 13 Ch. D. 696 (Eng. C.A.); e.g. see *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448 (B.C. C.A.) at para. 43.

72 However, there has been acceptance of the principle arising from *Hallett's Estate, Re* that, if trustees co-mingle trust with non-trust funds, they are presumed to have spent the non-trust funds first:

i. Moldaver J.A. favourably commented in *Graphicshoppe Ltd., Re* (2005), 78 O.R. (3d) 401, [2005] O.J. No. 5184 (Ont. C.A.) at para. 39:

> The right to trace into a mingled fund has long been part of the law of equity. One of the leading cases establishing the right to trace into a mingled fund is *Re Hallett's Estate*, which dates back 125 years: (1880), [1874-1880] All E.R. Rep. 793 (C.A.). In A.W. Scott & W.F. Fratcher, the Law of Trusts, 4th ed. (Boston: Little Brown and Co., 1989) at para. 515, the authors state that this case is commonly cited for the principle that, "where a fiduciary, even though he is not a trustee of an express trust, wrongfully mingles money of his principal with money of his own, his principal is entitled to a charge on the mingled fund."

ii. Reed J. stated in *Lennox Industries (Canada) Ltd. v. R.* (1987), 34 D.L.R. (4th) 297, [1987] F.C.J. No. 2 (Fed. T.D.):

> It is also clear that when misappropriated funds, or the proceeds therefrom are mixed with the wrong-doers own funds, and monies are withdrawn from that mixed funds, the wrongdoer will be deemed to have withdrawn his own funds first (the first out principle): In *Re Hallett's Estate (1878)*, 13 Ch. Div. 696 esp. at pages 727: In *re Oatway*, [1903] 2 Ch. 356 especially at page 360.

iii. Sanderson J. in *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1, [2002] O.J. No. 2528 (Ont. S.C.J.) at para. 1653, accepted as good law that:

> If the beneficiary's money is mixed with the fiduciary's own funds, and afterwards withdrawals are made, the fiduciary must be taken to have drawn out his own money first;
>
> . . .
>
> If there is confusion in the tracing, the onus is on the fiduciary to identify his own funds.
>
> [affirmed on this point [2004] O.J. No. 1765 (Ont. C.A.)]

iv. Slatter J.A. in *Brookfield Bridge Lending Fund Inc. v. Vanquish Oil & Gas Corp.*, 2009 ABCA 99 (Alta. C.A.), stated at paras. 11 - 13:

> .... If the trust funds are co-mingled with non-trust funds, the trustee is generally presumed to have honest intentions, and to have spent the non-trust funds first.... Thus any remaining balance will be presumed to be trust funds.

73 I keep in mind that tracing is not a remedy *per se*. As Deschamps J. stated in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15 (S.C.C.), at para. 75:

> Tracing is an identification process.

And at para. 85:

> In my view, *Taylor*, *Agip*, and *Hambrouck* show that it is possible at common law to trace funds into bank accounts if it is possible to identify the funds.

74 Moreover, as Justice Laforest elaborated in *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 57:

> ... the principles relating to the tracing at law and in equity were thus set out by the English Court of Appeal in *Agip (Africa) Ltd.* supra at pp. 463-64 and 466:
>
> > Tracing at law does not depend upon the establishment of an initial fiduciary relationship. Liability depends upon receipt by the defendant of the plaintiff's money and the extent of the liability depends on the amount received. Since liability depends upon receipt, the fact that a recipient has not retained the asset is irrelevant. For the same reason dishonesty or lack of inquiry on the part of the recipient are irrelevant. Identification in the defendant's hands of the plaintiff's asset is, however, necessary. It must be shown that the money received by the defendant was the money of the plaintiff. Further, the very limited common law remedies make it difficult to follow at law into mixed funds.
> >
> > . . .
> >
> > Both common law and equity accepted the right of the true owner to trace his property into the hands of others while it was in an identifiable form. The common law treated property as identified if it had not been mixed with other property. Equity, on the other hand, will follow money into a mixed fund and charge the fund.

75 I am bound to follow this long established principle. I must presume, in the absence of evidence to the contrary, that Kel-Greg spent its own money before any of the *BLA* trust monies that had been deposited. Therefore, as I said in paras. 13 - 16, if Kel-Greg spent $23,926.15 of its own money first towards the $56,238.57 in expenses, then all the monies remaining in Kel-Greg's account on August 2, 2013, are presumed to be trust monies under the *BLA*.

76 No evidence to the contrary has been presented.

77 Therefore, by operation of the principle in *Hallett's Estate, Re*, there is certainty of subject matter regarding these monies remaining in Kel-Greg's bank account on August 2, 2013.

78 Consequently, all those monies (namely, the $50,483.96) are trust monies as argued by the lien claimants, and excluded from the property of the bankrupt/trustee.

3. The Trustee's Post-Bankruptcy Collection of Amounts Owing to Kel-Greg

79 The $8,657.63 and $500.00 amounts also remained exempt trust monies, post-bankruptcy. The trustee's argument is that, although the amounts remain identifiable, by the trustee's co-mingling them with other monies in his bank account, he has destroyed the certainty of subject matter that might have otherwise been preserved. As a bald statement of law, it is not necessarily so. For similar reasons to those given regarding the remaining bank balance monies, these collected monies continue to maintain their trust character, and are exempt under s. 67(1)(a) *BIA*.

Summary

80 The $50,483.96, $8,657.63 and $500 amounts in dispute are all trust monies, exempt under s. 67(1)(a) *BIA*, and not property of the trustee.

81 If the parties are unable to agree on costs herein, I will consider the costs of this motion. The parties should submit their positions in writing no later than 20 clear days after the release of my decision.

Application granted.

End of Document

TAB

8

1993 CarswellBC 240
British Columbia Court of Appeal

Canadian Imperial Bank of Commerce v. Sayani

1993 CarswellBC 240, [1993] B.C.W.L.D. 2430, [1993] B.C.J. No. 1898, [1994] 2 W.W.R. 260, 11 B.L.R. (2d) 28, 33 B.C.A.C. 85, 42 A.C.W.S. (3d) 782, 54 W.A.C. 85, 83 B.C.L.R. (2d) 167

CANADIAN IMPERIAL BANK OF COMMERCE v. SADRUDIN ALIBHAI SAYANI, BADRUDIN SAYANI and NIZAR SAYANI

Macfarlane, Taylor and Wood JJ.A.

Heard: September 9, 1993
Judgment: September 23, 1993
Docket: Doc. Vancouver CA014868

Counsel: *J. Fairburn*, for appellants.
G.B. Gomery, for respondent.

Subject: Corporate and Commercial

Headnote

Banking and Banks --- Banking records — Disclosure of records by bank

Banking — Relationship between institution and customer — Duties and liability of institution — Confidentiality — Defendants applying to trust company for large construction loan without informing trust company of their default under loan from plaintiff bank — Bank providing information to trust company causing withdrawal of loan approval — Bank not liable for breach of confidentiality — Bank owing defendants no duty to assist in deception of trust company.

The defendants negotiated with a trust company for financing of a large condominium project. In doing so they provided personal financial statements which failed to disclose that they were in default on a loan from the plaintiff bank and that they owed the bank more than $300,000. The trust company approved the loan and referred the matter to its Vancouver lawyers for completion. By coincidence, the same firm was already acting for the bank. A lawyer in the firm called the trust company to say that the firm would be unable to act because it was already acting for a financial institution which had a conflict with the defendants. The trust company did further checking, in the course of which it called the plaintiff and learned about the dispute. The trust company then made further inquiries of other companies which had done business with the defendants and learned of further problems. The trust company then withdrew its approval of the proposed financing and offered other financing on less favourable terms. In the end, the condominium project did not proceed. The plaintiff sued for the moneys owed to it and recovered judgment for $518,064. The defendants counterclaimed for damages for breach of confidentiality. The counterclaim was dismissed and the defendants appealed.

Held:

Appeal dismissed.

The contract between a bank and its customer includes an implied term preventing the bank from disclosing information concerning the customer's dealings with it. The authorities recognize four exceptions to the implied term: where disclosure is under compulsion of law; where there is a duty to the public to disclose; where the interests of the bank require disclosure; and where the disclosure is made with the express or implied consent of the customer. The duty to the public to disclose includes the prevention of fraud or crime. While the authorities have not exhaustively defined all of the exceptions, there must be one in the case of misrepresentation of the sort involved in this case, whether or not it constituted fraud. The defendants' position was that they had a right to mislead the trust company and that the plaintiff was contractually obligated to facilitate that by maintaining silence. It would be unreasonable to expect the plaintiff to do so.

Table of Authorities

Cases considered:

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *referred to*

Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461 (C.A.) — *applied*

Appeal from judgment of Callaghan J., [1991] B.C.W.L.D. 2684, granting bank judgment for balance due and owing on loans and dismissing counterclaim for damages for breach of confidentiality.

The judgment of the court was delivered by *Taylor J.A.*:

1 This case has to do with the duty imposed on a bank to keep in confidence information gained in the course of its dealings with or for its customer concerning its customer's affairs.

2 Mr. Justice Callaghan gave judgment at trial [[1991] B.C.W.L.D. 2684] in favour of the Canadian Imperial Bank of Commerce against the Sayani brothers for $518,064, being the balance owing on loans advanced to them and accrued interest, and dismissed their counterclaim for damages for breach by the bank of its contractual duty of confidentiality with respect to the existence and history of this debt.

3 The Sayani brothers do not dispute the judgment against them but appeal the dismissal of their counterclaim.

4 They say the trial judge ought to have found that the bank, through its solicitor and a loan officer, breached the term as to confidentiality implied by law in the contract between bank and customer by disclosing to a mortgage lender which was about to refinance a housing project for them that they had defaulted on a settlement with the bank in respect of their indebtedness to it, and that they then owed the bank more than $300,000, information which was not disclosed in the financial statements supplied to the proposed lender on their behalf.

5 The appellants say that as a result of the bank's disclosures the lender thereafter declined to make the advance on terms previously agreed between them, and was in the end willing to advance funds only on unacceptable terms.

(a) The Background

6 The Sayani brothers entered into negotiations for the financing for their housing project with the mortgage lender, Confederation Trust, in the fall of 1988 through City Fund, a brokerage firm retained as their agent.

7 The judge summarizes the state of these negotiations in September, 1988, as follows [pp. 15-16]:

> As a result, City Fund prepared a mortgage presentation package which contained, amongst other things, personal financial statements for Sayani brothers dated December 31, 1987, a credit report, developers' financing requirement and a copy of the construction cost estimate for servicing the development. The Sayanis were seeking a loan of $10,500,000 at prime + 1 1/2% for a period of twelve months. The personal financial statements, for the Sayani brothers, did not include a reference to the amount outstanding to the Canadian Imperial Bank of Commerce.
>
> Further correspondence ensued between City Fund and Confederation Trust. By letter dated September 19th, 1988, on the basis of information provided and representations made by City Fund on behalf of Badru, Sadru and Nazir Sayani, Confederation Trust authorized financing in the amount of $6 million for a 90-unit townhouse project located at 2900 block Guildford Way, Coquitlam, and authorized a further $4,500,000 to provide interim mortgage financing on unimproved land at 2900 block Guildford Way, Coquitlam.

Confederation Trust referred completion of the proposed financing to its Vancouver lawyers. By coincidence, this same firm was already acting for the bank in connection with the default by the appellants in repayment of their indebtedness to it.

8 For the history of dealings between the appellants and the bank it is necessary to go back to July, 1985. As a result of default on repayment of loans totalling $515,926 the bank then commenced foreclosure proceedings against properties in North Vancouver on which the loans were partially secured.

9 The appellants as a result made a settlement offer. The bank agreed to take $310,000 in full payment, $200,000 to be paid in November, 1985, and the balance by September 11, 1986. The settlement was agreed to by the bank on the advice of its loan inspector who felt that the appellants' assets were effectively "sheltered", and that there would be little hope of collecting on a judgment. The appellants defaulted on the November, 1985 payment, with the result that the balance of the original indebtedness again became due. The matter stood thus until August, 1987, when they made a new settlement with the bank. Under the new agreement they would be discharged in return for payment of $(U.S.)92,500, of which $(U.S.)40,000 was paid forthwith and the balance of $(U.S.)52,000 was to be paid by a series of post-dated cheques, the first due September 30, 1987. It was again provided that default in any payment would result in the full balance of the original indebtedness becoming due.

10 The Sayanis again defaulted. In late 1987 the bank put the account into the hands of its solicitors for collection, the amount owing then being in excess of $(Can.)300,000. It was a year after this that Confederation Trust put its refinancing for the Sayanis into the hands of the same solicitors.

(b) The Disclosures

11 Roger Howay, a solicitor in the law firm, then telephoned Robert MacFarlane, regional manager of the trust company, to say that the law firm would be unable to act for his company because of a conflicting prior retainer.

12 The judge describes the conversation between Mr. Howay and Mr. MacFarlane as follows [p. 16]:

> Mr. Howay informed him that the firm was acting for a financial institution which had a dispute with the Sayanis involving loan arrangements and there was a possibility that the dispute could lead to litigation. At that point, Mr. MacFarlane asked Mr. Howay if he could disclose the name of his client but he was told he could not. Howay indicated to MacFarlane that if he wished further information regarding the dispute, he should ask the right questions of the Sayanis regarding the matter. He offered the observation that the Sayanis had not conducted themselves in a reliable manner and that it may be in the interest of Confederation Trust to obtain a credit analysis.

While the judge says that this conversation occurred on October 14, 1990, it is apparent that the conversation must have taken place on October 14, 1988.

13 Five days later Mr. MacFarlane telephoned the bank's loan superintendent, Don Ellwood. The judge says [pp. 16-17]:

> Mr. Elwood gave Mr. MacFarlane the usual disclaimer with respect to providing confidential information. MacFarlane then asked whether the loans of the Sayanis were nonperforming. This was confirmed. He wanted to know whether the bank had commenced litigation. He was advised that was not the case. Mr. Elwood was then asked, specifically, what debts were outstanding and he indicated the bank was in the process of making interest calculations and had not determined the exact amount, but that the balance due and owing to the Granville & Dunsmuir branch would be in the area of $300-400,000. Mr. MacFarlane then advised Mr. Elwood that if Confederation Trust proceeded with the loan, it would only be on the basis that the Sayanis had a settlement agreement with the bank.

Apparently as a result of his initial conversation with Mr. Howay, Mr. MacFarlane had by then made inquiries of other companies which had done business with the appellants, and had learned of some financial and construction problems encountered by the appellants in connection with previous ventures.

14 It is conceded that neither Mr. Ellwood nor Mr. Howay had authority from the appellants to make the disclosures which they did concerning the appellants' dealings with the bank. As a result of the enquiries undertaken by Mr. MacFarlane, the trust company, at his suggestion, cancelled the intended mortgage loan to the appellants. The Sayanis were unable to accept the new terms on which the company later made a different offer of financing, and the project as a consequence did not proceed as planned. By their counterclaim the Sayanis claim substantial damages for the losses which they said they suffered.

15 The judge found that Mr. Howay was not in a "direct fiduciary relationship" with the appellants, but "nonetheless owed the Sayanis a duty, by his agency relationship with the plaintiff bank, to respect the confidences of the Sayanis". He concluded that the fiduciary relationship had its basis in contract. He found that Mr. Howay's disclosure was made for the protection of the bank's interests and for this reason permissible under the implied covenant described in the leading case of *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K.B. 461 (C.A.).

16 The judge describes the nature of the financial statements supplied to the trust company by the Sayanis [pp. 26-27]:

> But it was the conduct of the Sayanis that placed the bank and Mr. Howay in a difficult and delicate situation.
>
> The financial statements that were forwarded by City Fund to Confederation Trust in July of 1988 were prepared by the Sayanis' accountant pursuant to instructions received. The accountant was not advised of the amount due and owing to the Bank of Commerce by the Sayanis and, consequently, the financial statements were incomplete and inaccurate. If Confederation Trust had been aware of the Sayanis' true financial picture, it is doubtful whether it would have committed itself to the project, at least without further investigation.

The judge concludes [p. 27]:

> Mr. Howay, in keeping within the exceptions to the contract of confidentiality, enunciated in *Tournier*, was entitled to reveal the existence of the dispute between the plaintiff bank and the Sayanis in order to protect the interests of the bank in collecting on its debt when the Sayanis were attempting to incur additional debt obligations, and to protect the interests of Confederation Trust, who had not been informed of the dispute between the bank and the Sayanis.

The judge did not deal with the disclosure subsequently made by Mr. Ellwood, the bank's loan officer.

17 The judge went on to find that the collapse of the financing did not, in any event, result from these disclosures.

(c) The Case on Appeal

18 The appellants argue that the judge ought to have found the disclosures to be a breach of the bank's duty of confidentiality, that they could not be justified on the basis that they were made to serve the interests either of the bank or of the trust company, and that they caused the collapse of the loan arrangement with Confederation Trust, while the bank contends that Confederation Trust was "a victim of misrepresentation" and the bank was entitled to alert it to this fact.

19 I regard the last point as decisive of this appeal.

20 It has now long been recognized in the common law world that the contract between customer and bank includes an implied term imposing on the bank an obligation subject to exceptions not to disclose information concerning the customer's dealings with it; but the scope of the exceptions to this obligation have rarely been discussed in the cases, and never clearly defined.

21 Of the very few decisions in this area of banking law that most frequently cited is the decision of the Court of Appeal in *Tournier v. National Provincial & Union Bank* (above). It is to the judgment of Bankes L.J. that reference is most often made, because it includes (at p. 473) four enumerated classifications within which the exceptions are sometimes said to be encompassed:

> (*a*) Where disclosure is under compulsion by law; (*b*) where there is a duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer.

It must be observed at once that these are broadly defined categories. It must also be noted that two other eminent commercial-law judges sat on the appeal, and each expressed his own view on the implied duty of confidence.

22 Scrutton L.J. restricted his remarks to "the exceptions material to the present case". He said (at p. 481):

> I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft; or to an extent reasonable and proper for carrying on the business of the account, as in giving a reason for declining to honour cheques drawn or bills accepted by the customer, when there are insufficient assets; or when ordered to answer questions in the law Courts; *or to prevent frauds* or crimes. I doubt whether it is sufficient excuse for disclosure, in the absence of the customer's consent, that it was in the interests of the customer, where the customer can be consulted in reasonable time and his consent or dissent obtained. [Emphasis added]

The third member of the court, Atkin L.J., while equally reluctant to provide any exhaustive definition of the exceptions to the duty of confidence, said (at p. 486):

> But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer, or *for protecting* the bank, or *persons interested*, or the public, *against fraud* or crime. [Emphasis added]

Thus both Scrutton L.J. and Atkin L.J. specifically include protection against fraud among the purposes for which a bank may disclose a customer's confidential information to a third party. It seems that this exception — that is to say *prevention* of fraud as opposed to its prosecution — probably falls also within the second category enunciated by Bankes L.J., that is to say: "where there is a duty to the public to disclose".

23 It seems to me that such an exception would have to be part of the implied term of the contract between bank and customer defining the bank's duty of confidentiality. It seems to me inconceivable that an honest banker would ever be willing to do business on terms obliging the bank to remain silent in order to facilitate its customer in deceiving a third party. I think it equally unreasonable that any would-be customer could expect a bank to be willing to be silent in

such circumstances. Implied terms must, of course, be such as reasonable people making such a contract would expect and accept.

24 The financial statements prepared by the Sayanis' accountant and forwarded to Confederation Trust were plainly incomplete and materially misleading.

25 They are said in the accountant's accompanying comments to have been compiled from information supplied by the appellants. The accountant who prepared them confirmed in evidence that he spoke to the appellants for that purpose and that they at no time mentioned to him the fact that they were in any way indebted to the Canadian Imperial Bank of Commerce.

(d) The "Fraud" Exception

26 The two judges in *Tournier* who spoke of the prevention of "fraud or crime" as a basis for exception from the duty of confidentiality chose language intended to show that the exception is not limited to fraud in the criminal sense, and all of the judges make it clear that the exceptions could not be exhaustively defined and would develop through the cases.

27 I have concluded that there must be an exception which meets the case of a misrepresentation such as that involved here, whether or not it constitutes fraud or deceit in law.

28 But for the bank's disclosure of the truth, the trust company would have acted in reliance on financial statements which were materially misleading. They contained no reference to any obligation to the bank, yet the appellants owed the bank several hundred thousand dollars at the date as at which the statements were prepared, and that amount had increased by the date when the statements were forwarded to the trust company. Such an outstanding debt would obviously be an important consideration for a prospective lender assessing a debtor's ability to repay a further substantial borrowing, and particularly be so where, as here, the loan was in substantial default, no payment whatever by then having been made for more than a year.

29 If the misrepresentation was due to some misunderstanding or oversight, one would not expect the customer to object to the representee learning from a third party that which had been omitted. But the position of the appellants in these proceedings seems to be that they had a right to mislead the trust company, and that the bank was contractually obligated to facilitate this by maintaining silence in the present circumstances.

30 The only explanation suggested to us for the appellants' failure to disclose their indebtedness to the bank is that contained in a letter to their broker dated October 25, 1988. It was written by one of the appellants after settlement negotiations with the bank had been re-opened. It says:

> Finally, we realize that Mr. MacFarlane was concerned with the fact that this portion of the liability was not explicitly mentioned in our Financial State ments. We assure you that the U.S. dollar debt was calculated as a part of the accounts payable by Qualico Homes Inc. In so far as Dawson account is concerned, we have never executed any personal guarantees; the Bank has never sent any demand notices to commence legal action; and after five years, cannot say for certain what the actual amount should be. We further assure you that the final settlement amount due Canadian Imperial Bank of Commerce in total would be less than $100,000. We shall endeavor to clear off the U.S. dollar amount within the allotted period of 30 days; and the Dawson account within a year, or less.

Yet it was known to the appellants that their personal indebtedness to the bank at that time well exceeded $300,000, and that a prospective lender would, of course, be concerned to know the amount for which their creditors could take judgment and execute against available assets after the proposed financing was in place, not the amount for which they hoped to be able to settle the debt as a condition of the money being loaned. The letter does not seem to me to explain the misleading omission of their debt to the bank from the financial statements.

31 The dilemma which faced the bank at the time of its disclosures is described by its loan officer, Mr. Ellwood, in a memorandum of October 19, 1988:

> We advised our solicitor of our concern that we were in double jeopardy by divulging information which might result in the loss of a mortgage commitment and, on the other hand, possibly been accused of concealing information which resulted in the Trust Company making a loan which proved to be undesirable.

It would, in my view, be unreasonable for the law to imply a covenant on the part of the bank that it would resolve such a dilemma in such circumstances by remaining silent.

32 I am for these reasons satisfied that the case falls within an exception from the banker's duty of confidentiality.

(e) Conclusion

33 The disclosures made by Mr. Howay and Mr. Ellwood did not reveal more than that which the trust company would have learned had the appellants' dealings with the bank been disclosed by them in the financial statements, as they should have been.

34 At the time he first spoke to Mr. MacFarlane, Mr. Howay had not, of course, seen the misleading financial statements. But the circumstances were such as to show that the trust company had not been informed of important facts concerning the appellants' affairs of which a proposed lender would expect to be informed. Counsel for the appellants could suggest no rational basis on which a distinction might for the present purpose be drawn between, on the one hand, situations in which a bank makes a disclosure which prevents someone from being misled by its customer when the bank is unaware of the customer's actual misleading representation, and, on the other hand, cases in which the bank is aware of the customer's misleading representation before it makes such a disclosure. I can think of no good reason why liability should be imposed in the former cases and not in the latter.

35 In making such a disclosure a bank may, of course, be "taking a chance" if it does not know with certainty that the party to whom it is made has been misled by its customer. But if purpose and effect of the disclosure is to prevent that party from being misled by the customer, it seems to me, for the reasons which I have given, that the case cannot come within the scope of the bank's implied covenant of confidentiality.

36 I agree, therefore, with the conclusion reached by the trial judge, but for somewhat different reasons.

37 I would not wish to seem to support the view that the bank's representatives acted in the bank's own interests, or that the disclosures if made in the bank's own interests would in this case fall within the "third exception" suggested by Bankes L.J. in *Tournier*. The scope of that exception must, of course, be a limited one, for if the bank could make disclosure of its customer's confidential information whenever this served its interests, the duty of confidentiality would have little meaning, but I need not deal with this. I find it also unnecessary to deal with the principles discussed in *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), since the appellants sought to rest their case solely on the contractual duty described in *Tournier*, and in this they have failed.

38 At the conclusion of argument for the appellants I was for these reasons of the view that the appeal must be dismissed, without hearing counsel for the bank.

Appeal dismissed.

TAB

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2011 ONSC 3129
Ontario Superior Court of Justice [Commercial List]

Canada Revenue Agency v. TNG Acquisitions Inc. (Trustee of)

2011 CarswellOnt 3908, 2011 ONSC 3129, [2011] W.D.F.L. 4226, [2011] O.J. No. 2420, 203 A.C.W.S. (3d) 11, 70 E.T.R. (3d) 34, 79 C.B.R. (5th) 315

In the Matter of the Bankruptcy of TNG Acquisitions Inc. (successor estate of Nexinnovations Inc., a bankrupt) of the City of Mississauga, in the Province of Ontario

Canada Revenue Agency (Applicant) and A. Farber & Partners as Trustee in Bankruptcy of the Estate of TNG Acquisitions Inc. (Respondent)

Newbould J.

Heard: May 19, 2011
Judgment: May 24, 2011 *
Docket: 32-157407

Counsel: Shahana Kar, Angela Shen for Applicant
David S. Ward for A. Farber & Partners, Trustee in Bankruptcy of TNG Acquisitions Inc.

Subject: Insolvency; Estates and Trusts; Family; Property

APPEAL by Canada Revenue Agency pursuant to s. 81(2) of *Bankruptcy Insolvency Act* from disallowance by trustee of its claim to interest in property of bankrupt made under s. 81(1).

Newbould J.:

1 The Canada Revenue Agency ("CRA)" appeals under s. 81(2) of the BIA from the disallowance by the trustee of its claim to an interest in property of the bankrupt made under s. 81(1) of the BIA.

2 Because the appeal from the trustee's disallowance of the claim was not made within fifteen days after the trustee had sent the notice disputing the claim, CRA also requested an order under s. 187(11) of the BIA extending the time for this appeal.

3 The trustee's disallowance of the claim was served on November 25, 2008. Because of a mix up in delivery procedures at the CRA, it was not received by the responsible person in CRA until December 18, 2008, more than the fifteen days permitted for an appeal. Once the responsible person received the trustee's disallowance, the appeal was made on December 22, 2008. Counsel for the trustee said he had no authority to consent to an extension of the time but left the matter in the hands of the court. In the circumstances, I made an order extending the time for the appeal.

Relevant facts

4 This appeal arises from GST refunds claimed and received by the bankrupt ("Nex") from CRA prior to the bankruptcy. It also involves refund claims made by Nex to the Ministry of Revenue in Quebec for QST refunds.

5 Nex, a GST registrant, filed GST returns with CRA on a monthly basis. A GST registrant is required to report and remit the GST which it charged and collected on sales to its customers. It is entitled to claim input tax credits which represent the GST that the registrant was charged on goods and services that it purchased to carry out its commercial

activities. If the input tax credits exceed the GST that the registrant charged and collected on sales to its customers, the registrant is entitled to a refund of the net amount.

6 Nex carried on business in Quebec and was required to file QST returns. The same situation as with GST pertains with respect to a Quebec sales tax refund claim. A QST registrant is entitled to a refund if its input tax refunds, the term used in the QST regime for amounts of QST paid by the registrant to its suppliers, exceed the QST charged and collected by the registrant on sales to its suppliers.

7 Nex filed monthly GST returns for January through July 2007. Included in the input tax credits for that period claimed by Nex was the amount of $1,554,854.80, said to have been GST paid by Nex to its suppliers. That turned out to be wrong. CRA accepted the returns and paid the GST refunds claimed by Nex for that period, totalling $2,699,387.91, which included the claim for $1,554,854.80.

8 Nex also filed a claim with MRQ requesting refunds due to having paid QST to its suppliers. For the months January to June 2007, its input tax refunds claimed included the sum of $1,554,854.80, representing QST paid to its suppliers. On October 10, 2007, MRQ contacted CRA in connection with Nex's claim for a QST refund and advised CRA that during an audit by MRQ of Nex's QST refund claims, it discovered that Nex had recorded $1,554,854.80 on its books as GST having been paid to its suppliers. That was incorrect as the $1,554,854.80 was QST that had been paid by Nex to its suppliers and MRQ realised that Nex had incorrectly claimed that amount as an input tax credit on the GST returns that had been made by Nex.

9 MRQ determined that Nex was entitled to a refund of QST based on these input tax refunds of $1,554,854.80.

10 The result was that Nex had improperly received a GST refund of $1,554,854.80. The CRA issued an assessment to reduce the GST refund claimed by Nex in that amount and Nex did not make any objection to that assessment. Nex filed an amended GST return to correct the error.

Property claim by Nex

11 Nex obtained creditor protection under the CCAA on October 2, 2007. It was shortly after that date that MRQ informed CRA of the mistaken GST claim by Nex.

12 On January 17, 2008 Nex brought a motion in the CCAA proceedings for an order approving the distribution of sales proceeds to creditors, including CRA. The portion dealing with this payment to CRA was adjourned.

13 On May 20, 2008, CRA issued a notice of application naming Nex and MRQ as respondents in which a declaration was sought that the QST refund owed by MRQ to Nex in the amount of $1,554,854.80 was CRA's property, and it requested a mandatory order requiring MRQ to pay that amount directly to CRA on the grounds that MRQ held the QST refund owing to Nex as constructive trustee for CRA.

14 On April 8, 2008, the CCAA proceedings were terminated and Nex was adjudged a bankrupt, without prejudice to CRA's constructive trust claim respecting the QST refund.

15 On June 6, 2008, CRA's counsel was advised by MRQ's counsel that MRQ had offset the entire QST refund against QST debt owed by Nex with the result that Nex was said to have owed MRQ $207,000. On October 31, 2008, the trustee's counsel advised CRA's counsel that a QST refund in the amount of approximately $900,000 was payable to Nex but that MRQ was reluctant to pay it in light of the outstanding application against it. By agreement, MRQ later paid the outstanding amount owing to Nex to the trustee in trust pending the determination of this appeal. The amount paid was a little in excess of $1 million. It is this amount in which CRA claims to have a property interest.

Analysis

16 The trustee takes the position that there can be no claim by CRA under s. 81 of the BIA because s. 81 permits a claim on property that was in the possession of the bankrupt at the time of the bankruptcy. The trustee asserts that the money later paid by MRQ was not property in the possession of the bankrupt at the day of the bankruptcy.

17 I do not accept this position of the trustee. The MRQ made its determination that Nex was entitled to a QST refund of $1,554,854.80 sometime prior to the bankruptcy of Nex. That is, Nex had an account receivable from MRQ. That is not, as asserted by the trustee, simply an accounting entry. The account receivable was an asset of Nex. Thus the property to which CRA has made a claim was the account receivable of Nex that was in existence prior to the bankruptcy.

18 CRA's claim is based on a claim for unjust enrichment and the imposition of a constructive trust as a remedy for the unjust enrichment. If successful, the MRQ refund payment being held in trust would go to CRA rather than to the unsecured creditors of Nex, one of which is CRA. The position of the trustee is that there is no basis for the imposition of a constructive trust and that it would inequitable and contrary to the scheme of distribution under the BIA for CRA to be paid in priority to the other unsecured creditors.

19 The test for unjust enrichment is well established in Canada. The cause of action has three elements: i) an enrichment of the defendant; ii) a corresponding deprivation of the plaintiff; iii) an absence of juristic reason for the enrichment. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.) at para 30.

20 There is little doubt that these three tests have been met. Nex was enriched when it received the GST refund based upon its incorrect GST return. CRA was deprived of that refund paid to Nex and there was no juristic reason for the payment.

21 A constructive trust is a remedy that may be ordered in appropriate cases for compensating an unjust enrichment. It is a propriety concept. In *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), McLaughlin J. (as she then was) stated:

> 22. In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, *supra*, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, *supra*.
>
> 26. For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.

22 It does not appear to be a bright line test as to whether the link between the contribution of a plaintiff and the disputed asset is sufficient to permit the imposition of a constructive trust. In *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), Dickson CJC stated the following:

> 21. ...in *Pettkus*, however, one also finds articulations of the causal connection test in more general terms. It is suggested simply that there should be "a clear link between the contribution and the disputed asset" (p. 852). The question of a connection between the deprivation and the property is further explained as "an issue of fact". That is, courts must ask whether the contribution is "sufficiently substantial and direct" to entitle the plaintiff to an interest in the property in question.
>
> 22. In a number of cases, this more general formulation of the causal connection test has been adopted and courts have held that constructive trusts can be imposed in situations where the contribution does not relate to the

acquisition of property. See, for example, *Pierce v. Timmons*, Ontario Court of Appeal, Feb. 26, 1985, unreported; *Murray v. Roty*, *supra*; *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.) Nevertheless, in each of these cases, some reasonable connection did exist between the contribution or deprivation and the property (i.e. property improvement, maintenance or preservation).

23 A critical issue, therefore, is whether there is a direct link between the plaintiff's contribution and the subject of the trust being claimed.

24 In this case, the asset being claimed by CRA to be subject to a constructive trust is the account receivable of Nex from MRQ that existed prior to the bankruptcy. That account receivable was based upon the QST input tax refunds of Nex resulting from its purchase of goods and services on which it paid QST. It was those same purchases of goods and services by Nex on which it paid QST that Nex incorrectly claimed GST input tax credits and received a refund in the same amount.

25 Thus, the CRA asserts that because the same expenditures were used to claim GST and QST refunds, albeit incorrectly, there is a direct link between the payment by CRA of the GST refund and the payment by MRQ of the QST refund.

26 CRA relies upon two recent decisions, one being a decision of the Registrar in Bankruptcy in *Ascent Ltd., Re* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.) and the other being *Credifinance Securities Ltd., Re* (2010), 63 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]); aff'd at 2011 ONCA 160 (Ont. C.A.). Both cases were examples in which a constructive trust was imposed upon property that resulted in the property claimant being paid ahead of the unsecured creditors of a bankrupt. In *Credifinance Securities Ltd.*, the bankrupt had obtained a loan of $400,000 from the claimant based on fraudulent misrepresentations made to the claimant. Part of the loan was used by the bankrupt but the claimant had managed to obtain an order freezing the remaining funds of $310,500. It was held that those funds were directly traceable to the $400,000 loan. Thus, a constructive trust was imposed on the very property obtained by fraud. While the facts in *Ascent Ltd.* are somewhat unclear, LaForme J.A. in *Credifinance Securities Ltd.* viewed *Ascent Ltd.* as a case in which the misconduct by the bankrupt was a basis upon which property was obtained and that to permit the bankrupt estate to retain that property would amount to an unjust enrichment and permit a constructive trust being imposed.

27 I do not think these cases assist CRA and I do not think it can be said that there is a sufficient link between the overpayment made by CRA to Nex and the receivable owing by MRQ to Nex that would permit the imposition of a constructive trust on the MRQ payable. There was nothing improper that led to the MRQ payable. It was the result of a proper claim by Nex for a QST refund. To permit Nex to receive that refund from MRQ is not to permit Nex to gain from any wrongdoing. Unlike *Ascent Ltd.* or *Credifinance Securities Ltd.*, there was nothing improper at all on the part of Nex that gave rise to the QST refund payable by MRQ. The wrongdoing was in Nex making an incorrect claim on CRA.

28 Put in another way, the unjust enrichment was not caused by Nex being entitled to a QST refund from MRQ. It was caused by Nex making an improper claim against CRA and receiving a refund from CRA based on that improper claim. The refund of QST from the MRQ when paid to Nex, or now to its trustee in bankruptcy, is entirely proper and does not result in Nex, or now its trustee, receiving anything to which it was not entitled.

29 There is not a nexus between the improper CRA refund claim made by Nex and the QST refund that was based on a proper claim. The GST refunds that went into Nex's general accounts were paid out of that account over a period of time and in the course of its business. There is no connection to those funds received by Nex from CRA and the funds owing by MRQ and thus no basis to impose a constructive over the MRQ refund.

30 What the CRA seeks here is to obtain a constructive trust over assets of Nex to which it provided no contribution. This appears to be precisely the situation that the Ontario Court of Appeal held in *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (Ont. C.A.) to be improper. In that case it was stated that the constructive trust imposed by the motion judge over all of the property of the bankrupt was contrary to clear law which required that a constructive trust be imposed

over a specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest. While the order sought by CRA is not to have a constructive trust over all of the assets of the bankrupt, but only over the amount ultimately paid by MRQ, I do not see how CRA could ever have expected to have obtained a property interest in that MRQ rebate. It is seeking the constructive trust to advance its interest ahead of the creditors. What was stated in *Barnabe v. Touhey* as follows appears apt:

> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

31 In the circumstances, the appeal from the disallowance of the property claim by the trustee is dismissed. CRA is limited to its unsecured claim.

32 The trustee is entitled to its cost. If costs cannot be agreed, brief written submissions by the trustee along with a cost outline in accordance with the rules may be made within ten days and CRA shall have ten further days to reply to it.

Appeal dismissed.

Footnotes

* Additional reasons at *Canada (Revenue Agency) v. TNG Acquisitions Inc. (Trustee of)* (2011), 2011 ONSC 5960, 2011 CarswellOnt 10572 (Ont. S.C.J. [Commercial List]).

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1995 CarswellOnt 1167
Ontario Court of Appeal

Barnabe v. Touhey

1995 CarswellOnt 1167, [1995] O.J. No. 3456, 10 E.T.R. (2d) 68, 26 O.R. (3d) 477, 37 C.B.R. (3d) 73, 59 A.C.W.S. (3d) 151

JEFFREY C. BARNABE, TERRILL C. JAMESON, TIMOTHY D. RAY, WILLIAM J.S. DEVONISH and DEREK G. NICHOLSON (applicants/respondents in appeal) v. JAMES W. TOUHEY and JOHN R. SIGOUIN (respondents/respondents in appeal)

JAMES W. TOUHEY and JOHN R. SIGOUIN (plaintiffs/respondents in appeal) v. JEFFREY C. BARNABE, TERRILL C. JAMESON, TIMOTHY D. RAY, WILLIAM J.S. DEVONISH and DEREK G. NICHOLSON (defendants/respondents in appeal); CANADIAN IMPERIAL BANK OF COMMERCE (intervenor/appellant)

McKinlay, Catzman and Abella JJ.A.

Heard: November 8-9, 1995
Judgment: November 14, 1995
Docket: Doc. CA C18932

Counsel: *Sean E. Cumming* and *Percy Ostroff*, for appellant, Canadian Imperial Bank of Commerce.
James M. O'Grady, Q.C., and *Barry Kwasniewski*, for respondent Jeffrey Barnabe.
John A. Hollander, for respondent John R. Sigouin.

Subject: Restitution; Estates and Trusts; Corporate and Commercial; Insolvency

Appeal from judgment reported at (1994), 4 E.T.R. (2d) 22, 18 O.R. (3d) 370 (Gen. Div.) granting declaration of constructive trust.

***Per curiam*:**

1 We agree with counsel for the appellant that the order of Bell J. requiring that property of the bankrupts Touhey and Sigouin be held on a constructive trust in favour of the respondents has the effect of granting to the respondents a floating charge over all of the assets of the bankrupts in priority to the other creditors of the bankrupts.

2 We are of the opinion that the remedy of constructive trust is not appropriate in the circumstances. To dispose of this appeal, it is not necessary to refer to all of the arguments dealt with by counsel, since we are of the view that the unjust enrichment on which the constructive trust remedy is based does not exist in this case. To establish the unjust enrichment, there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention.

3 As to the first requirement, in this case there is no specific property which is the subject of the trust. The property ordered held comprises all of the property of the bankrupts. This alone would probably be sufficient to decide the appeal. However, we will comment on the other requirements to establish an unjust enrichment.

4 As to the second requirement, that the property must be held in deprivation of the party claiming the unjust enrichment, it is clear that the parties which are said to hold the trust property, the Canadian Imperial Bank of Commerce ("the bank") or Messrs. Touhey and Sigouin, do not hold it in deprivation of the respondents. The property said to be the subject of the trust is money which, by the order of Farley J., dated May 17, 1990, should have been paid back to

the accountant administering the assets of the original "1986" partnership. The motions judge found that these monies, which were not paid back as they should have been, were deposited in the bank and used to support the operations of the new "1990" partnership. There is no evidence which clearly establishes that this money was ever paid into the account of the new partnership at the bank. However, even if it was, there is no evidence that indicates that the funds remain in the hands of the bank. Indeed, the account involved has generally been in negative balance, and, since it was an operating account of the new partnership, funds were paid in and out of the account over a period in excess of four years before the motions judge made the order imposing a constructive trust. Under those circumstances, it is almost impossible to show any true connection between funds which may have been deposited in the "1990" partnership account and the assets of that partnership or of the bankrupts. To overcome this problem, the motions judge imposed a constructive trust over all of the assets of the bankrupts. This is contrary to clear law which requires that a constructive trust be imposed over specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest. While the respondents may not have succeeded in having funds returned to the accountant by Touhey and Sigouin, as required by the order of Farley J., they were not deprived of any of the assets which were made the subject of the constructive trust. They were merely unsecured creditors of Touhey and Sigouin.

As to the third requirement, that there be no juristic reason for the retention of the property, there are at least two juristic reasons why the bank should retain the funds involved (if they were in fact deposited in the "1990" partnership account). First, the bank, through the account of the "1990" partnership, financed at least some of the operations of that partnership. In order to do so, it obtained security over the receivables and other assets of the partnership, which are subject to the order of Bell J. It was in reliance on that security that the bank financed the operations of the "1990" partnership. It was entitled to retain any funds which may have been paid into the account to reimburse it for payments out of the account, and it was entitled to its security for the purpose of securing payment. The second juristic reason for retention of the funds is that the order of Farley J., by its terms, anticipated that the funds paid over by the accountant administering the assets of the "1986" partnership would be returned only if needed and demanded. Funds were also paid over to the other partners in the "1986" partnership, and none were required by the order to hold any funds in trust; indeed, any such order would have rendered the original payment over of no practical benefit to any of the partners.

While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose* . This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

The appeal is allowed with costs, and the judgment of Bell J. is set aside to be replaced by a judgment dismissing the application with costs.

Appeal allowed.

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2015 BCSC 836
British Columbia Supreme Court

Yukon Zinc Corp., Re

2015 CarswellBC 1357, 2015 BCSC 836, [2015] B.C.W.L.D. 4468, [2015] B.C.W.L.D. 4472, [2015] B.C.W.L.D. 4559, [2016] 1 W.W.R. 781, 254 A.C.W.S. (3d) 79, 25 C.B.R. (6th) 171, 4 P.P.S.A.C. (4th) 80, 77 B.C.L.R. (5th) 379

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Yukon Zinc Corporation, Petitioner

Fitzpatrick J.

Heard: April 10, 17, 24, 2015; May 4, 2015
Judgment: May 20, 2015*
Docket: Vancouver S152166

Counsel: Kibben Jackson, Danielle Toigo, Mark Oulton, W.D. McEwan for Petitioner
Mary Buttery, Lance Williams for Monitor, PricewaterhouseCoopers Inc.
Dennis Fitzpatrick, Lucy Schilling, N. Kansy, G. Crouch (A/S) for Transamine Trading S.A.
Sean Collins, Theo Stathakos for Royal Gold Inc.
John Porter, Laurie Henderson for Government of Yukon
C. Brousson for Maynards Financial Limited Partnership
Karen Martin, John Sandrelli, Cindy Cheuk, S. Chasey (A/S) for Procon Mining & Tunnelling Ltd., Procon Mining Partnership and Kaska Alliance/Procon Joint Venture

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

Headnote

Personal property security --- Practice and procedure — Jurisdiction

Petitioner was owner of silver and zinc mine which struggled financially and had significcant debt — Petitioner was under protection of Companies' Creditors Arrangement Act and began restructuring — Creditors who were supplier and purchaser who each claimed entitlement to zinc carbonate from mine worth approximately $8 million U.S. — Supplier filed miner's lien regarding carbonate in Yukon, and trucking company also had lien against carbonate — Application held to determine ownership of carbonate — Purchaser had bought carbonate and was entitled to it over lien of supplier — Court had jurisdiction to deal with matter — Real and substantial connection to British Columbia existed — Most carbonate was in British Columbia — Contracts between supplier and petitioner, and most contracts between purchaser and petitioner, were governed by BC law — Whatever forum was used would require consideration of BC contract law and Yukon mining law, and issues could not be bifurcated — Yukon court was more likely more appropriate forum for determining supplier's lien — BC court was more appropriate forum for current dispute and present application.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous

Petitioner was owner of silver and zinc mine which struggled financially and had significcant debt — Petitioner was under protection of Companies' Creditors Arrangement Act and began restructuring — Creditors who were supplier

s. 2(1)(f) — considered

s. 2(2) — considered

ss. 4-6 — referred to

s. 6 — referred to

s. 8 — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 2(1)(a) — considered

ss. 5-8.1 — referred to

s. 30 — considered

Personal Property Security Act, R.S.Y. 2002, c. 169
s. 2 — considered

Sale of Goods Act, R.S.B.C. 1996, c. 410
Pt. 3 — referred to

s. 1 "specific goods" — considered

s. 21 — considered

s. 22 — considered

s. 22(2) — considered

s. 23(1) — considered

s. 23(7) — referred to

s. 23(8) — referred to

s. 23(9) — considered

s. 25 — considered

s. 30 — considered

APPLICATION regarding ownership of mineral carbonate in proceedings under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

Introduction

1 The Petitioner, Yukon Zinc Corporation ("Yukon Zinc"), commenced these restructuring proceedings just recently on March 13, 2015, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 Yukon Zinc is the owner of the Wolverine mine (the "Mine"), located at kilometer 192 on Robert Campbell Highway, Yukon Territory, which primarily produced zinc and silver. Production at the Mine began in 2011 but, even since that short time, it has struggled financially. Eventually, operations ceased in mid-January 2015.

3 There is significant debt owing by Yukon Zinc. The present dispute concerns the claims of two parties: Transamine Trading S.A. ("Transamine"), who claims to have bought zinc concentrate that came from the Mine; and Procon Mining and Tunnelling Ltd. ("Procon"), who supplied mining services and equipment and materials to Yukon Zinc at the Mine.

4 Transamine and Procon both now claim entitlement to 14,126.17 metric tonnes of zinc concentrate which is in various locations: Firstly, at the Mine; secondly, in a bulk terminal in Stewart, British Columbia awaiting shipment to Asia; and, finally, in certain trucks in transit between the Mine and Stewart or in Stewart itself. Transamine's claim is primarily based on the contention that title to this concentrate was transferred to it some time ago. Transamine also alleges that Procon has already specifically released any interest in this concentrate and it seeks specific performance of what it alleges was an agreement to that effect.

5 Procon's claim is based on a miner's lien filed in Yukon, which it contends has priority over Transamine's claim. Procon also raises the preliminary issue as to whether this Court should decline jurisdiction in respect of the resolution of the issues, taking the position that the matter is more appropriately heard by the Yukon Territory Supreme Court.

6 Transamine asserts that it is urgent that this matter be heard. The value of the concentrate is considerable, estimated to be $8 million US. In addition, without shipment of the concentrate, Transamine is in potential difficulty with its own lender, who financed the acquisition of the concentrate, and expected certain shipping deadlines to be met. Sale commitments to customers in Korea require delivery by May 31, 2015. In addition, Transamine points to the fact that further time will be required to ship some of the concentrate from the Mine to Stewart, British Columbia, particularly given the changing road conditions in the spring.

7 Even Yukon Zinc points to urgency in the sense that the terminal operator in Stewart, who is holding a substantial amount of the concentrate, is potentially able to charge significant stand-by fees if shipments are not made. Transamine, if able to ship, will pay any such fees, but will claim those fees from Yukon Zinc and thereby increase the debts owing by it.

8 Given that the matter has been brought forward on an urgent basis, Procon does not seek an adjournment.

9 It is useful to separately discuss the circumstances of the respective claims of Transamine and Procon before considering the nature of those claims and the past and present intersection and priority of the claims.

Transamine's Contractual Claims

10 Transamine is a commodities trading company that specializes in the purchase and sale of non-ferrous raw materials.

11 Throughout the summary of the evidence, I will refer to wet metric tonnes ("WMT"), and dry metric tonnes ("DMT"), which are measures of volume in relation to concentrate. There is a difference in volume (approximately 7%), in respect of WMT based on moisture content. This is, in part, the reason why some of the volumes are not quite exact, since the accurate tonnage of concentrate is only known upon final weighing and determination of moisture content. As counsel put it during argument, you do not buy water, so shipment volumes are in WMT, while purchase volumes are in DMT.

12 Commencing in late 2013, Transamine entered into various contracts with Yukon Zinc, providing for the shipment of zinc concentrate from the Mine by truck to the terminal facilities of Stewart Bulk Terminals Ltd. ("SBT"), located in Stewart, British Columbia. From Stewart, the concentrate was to be loaded in vessels for transportation to Transamine's customers located in Asia. Transamine financed its acquisition of the concentrate through Banque Cantonale Vaudoise ("BCV Bank").

(e) Effect of the September 2014 Agreement

173 Other issues arise relating to the transactions between Yukon Zinc, Transamine and Procon in late September and early October 2014 in anticipation of entering into Contract 380.

174 Transamine takes the position that, by reason of the agreements reached with Procon, Procon specifically released its December 2013 and September 2014, Liens and any future lien in respect of the concentrate to be purchased by Transamine under either Contract 369 or Contract 380.

175 I will recount in more detail the course of the negotiations and the agreements reached.

176 There can be no doubt that, by September 2014, Transamine was aware that Procon had filed liens against Yukon Zinc's assets. Procon argues that this is an indication that Transamine was not a *bona fide* purchaser, having been put on notice about the previous defaults of Yukon Zinc. However, Transamine did not ignore the liens; rather, it took concrete steps to address the liens prior to proceeding with the significant purchase of concentrate under Contract 380.

177 On September 23, 2014, Procon's counsel wrote to Transamine's counsel:

> I understand that your client [Transamine] is prepared to purchase certain concentrate from the Wolverine Mine. As you know, Procon has registered against all concentrate, wheresoever situate. We have instructions to prepare a no interest letter with respect to the concentrate that your client is purchasing. Could you please provide us with the details of your client and proposed language describing the concentrate, etc.

178 Transamine's counsel replied in his September 23, 2014, email to Procon's counsel:

> Transamine Trading, S.A. will be purchasing concentrate and providing an advance payment facility through 2017 pursuant to an offtake agreement. The scope of the collateral subject to the security interest in favour of Transamine is not yet settled, but will include all concentrates and inventory of Yukon Zinc during the term of the offtake. Presumably if your client intends on executing a no interest letter it will be discharging as against the concentrates and inventory (and other collateral?)? Please confirm.

179 On September 25, 2014, the parties were negotiating the amount that Procon could claim under its lien. On that date, Procon was specifically told by Yukon Zinc's counsel that, without a full resolution of its lien, the sale of the concentrate would not go forward and no funds would be received by either Yukon Zinc or Procon. Yukon Zinc threatened legal action against Procon in the event that Procon acted unreasonably in releasing its liens.

180 In her emails on September 26, 2014, Procon's counsel indicated that Procon would release its lien "in its entirety (that is, against both the concentrate and the quartz claims)", in exchange for payment of a certain agreed-upon amount. Procon's counsel confirmed in her later email that same day that, in accordance with these arrangements, Procon would confirm that "it has no interest in the concentrate which is to be purchased."

181 Presumably, arising from discussions between Yukon Zinc, Transamine and Procon, the confusion on Procon's part concerning the collateral description under the registration of its security interest at the PPR was also corrected. On September 25, 2014, the registration was deleted with respect to "concentrates" and clarified, consistent with the security agreement that it related only to equipment.

182 Similar to her earlier email of September 26, 2014, Procon's counsel also confirmed in her letter of September 29, 2014, to Transamine's counsel that:

> [T]he arrangements for the delivery of Procon's full discharge of miners lien no. RL09215... and "no interest" letter... in the concentrate to be purchased by Transamine Trading SA..., in exchange for payment to Procon, as part of the intended transaction between Transamine and [Yukon Zinc].

[Emphasis added.]

183 On October 1, 2014, Procon executed a discharge of lien relating to both the December 2013 Lien and the September 2014 Lien in consideration of the payment of the sum of $2,958,341, which was sourced from Transamine's advance payment for the concentrate under Contract 380. By the terms of the discharge, Procon acknowledged that Yukon Zinc had satisfied any and all liabilities and obligations related to the two liens. Also by this document, Procon released, discharged, quit claimed, transferred and surrendered all of its right, title and interest in and to the "severed minerals", being all of Yukon Zinc's "present and after-acquired concentrates".

184 Also in accordance with these agreements, Procon provided Yukon Zinc and Transamine with a "no interest letter" executed October 3, 2014. This no interest letter referred to Procon's security interest registered at the PPR (defined as the "Security"). It also referred to Contract 380 (defined as the "Agreement"). If there had been any doubt about what "concentrates" were referred to in the previous exchanges between counsel, by the no interest letter, Procon confirmed and agreed as follows:

> 1. it is aware that [Yukon Zinc] intends to transfer certain concentrates as described in Schedule "B" ("Concentrates") to [Transamine] on the terms and conditions set forth in the Agreement (the "Transaction");
>
> 2. it hereby consents to the Transaction;
>
> 3. it hereby releases and discharges the Concentrates from the Security and confirms that the Concentrates may be transferred by the Seller free and clear of the Security.

[Emphasis added.]

185 Schedule "B" to the no interest letter specifically states that Yukon Zinc was to deliver to Transamine 70,000 DMT of concentrate, on a schedule that conformed to the shipping schedule under Contract 380 (10,000 DMT to be shipped in the first quarter of 2015), and also included a further 20,000 DMT in the second quarter of 2015 in lots of 5,000 DMT each. Transamine argues that this would include the further 5,000 DMT, which was to be delivered under Contract 369, although no such statement is found in any of the communications or documents exchanged.

186 The no interest letter also provided:

> 5. [Procon] will execute and deliver, at [Yukon Zinc's] sole expenses, all such further releases and discharges as the Parties or their respective counsel may reasonably request to give effect to the provisions of this No Interest Letter[.]

187 Procon's position relies on a strict and narrow reading of the discharge of lien and the no interest letter. Specifically, it says that the neither of those documents provide that Procon may not register liens in the future as against the concentrates. It also points to the no interest letter which refers to a potential transfer to Transamine, but says that this agreement only related to its "Security", which was expressly defined as its PPR registration (which was not effective against concentrates in any event).

188 I consider that Procon's arguments are highly technical and do not accord with the commercial realities, intentions, expectations and agreements as evidenced in the various communications between Procon and Transamine's counsel and the exchanged documents themselves. It was manifestly clear to Procon that the whole purpose of addressing its liens was to clear the way so that Yukon Zinc could conclude its contractual arrangements with Transamine and transfer the concentrate to Transamine as contemplated by Contract 380.

189 There are numerous references to the proposed transaction. The discharge of lien refers to "after-acquired concentrates", which infers that there was agreement regarding any assertion of lien rights by Procon in the future. Further, Schedule "B" to the no interest letter also certainly referred to future shipments throughout 2015 and into 2017.

While it is possible to read these two documents very narrowly and strictly, such an approach would defeat the clear intentions of the parties, as evidenced by the overarching agreement reached in the earlier emails between counsel for Transamine and Procon.

190 The absurdity of Procon's position is made plain by its position that, even after the conclusion of this transaction and the payment of the significant funds to it on October 8, 2014, Procon could have almost immediately filed a lien against the severed minerals which Transamine was purchasing. By that date, certain nominal amounts were already owed by Yukon Zinc and were unpaid. Further, an invoice had been issued on September 30, 2014, which was payable within 15 days, and which was not paid by Yukon Zinc. Accordingly, Procon takes the fairly incredible position that, by no later than October 15, 2014, some one week after this transaction, it could have liened the severed minerals which Procon knew Transamine had purchased, and which all could have expected to still be present at the Mine.

191 If such a scenario had been suggested to either Transamine or Procon's counsel at the time, I expect that both would have resoundingly proclaimed that such could not be the case. Certainly, from Transamine and BCV Bank's point of view, given the course of the negotiations and the agreement, I expect that they would have been astounded to have considered that, after this transaction, the concentrate was still at risk in relation to Procon filing a lien.

192 This is so, notwithstanding that clause 10.1 of Contract 380 provided that title was to pass from Yukon Zinc to Transamine "free and clear of all liens, claims, mortgages, charges, security interests or other encumbrances", which would presumably arise whenever title passed, either at the time of the advance payment, or later. Contrary to the arguments of Procon, Transamine was clearly not relying on the general contractual obligations of Yukon Zinc to ensure that no liens would be filed. The express terms of this agreement *required* payment to Procon (which Transamine did directly to Procon), to ensure that the liens were satisfied prior to the simultaneous payment to Yukon Zinc and the implementation of Contract 380.

193 In that sense, the scenario that Procon now asserts is available to it (that Procon could still assert a lien to stop Transamine's purchase of the concentrate), was the very scenario that Transamine specifically sought to avoid by this agreement: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 36 B.C.L.R. (3d) 155 (B.C. C.A.), at 159.

194 Procon suggests that there were various ways that Transamine could have acted so as to take steps to "protect itself" from any future lien. This would have included obtaining proof of payment of contractors, such as in the form a statutory declaration. This argument is without merit. If nothing else, it would require a contracting party to engage in an investigation of the other party's internal affairs, a matter that goes beyond normal commercial practice. The best response to this argument is that, having been alerted to the fact that Procon held liens, Transamine did take significant steps to satisfy those liens on the basis, as agreed, that this would allow the purchase of the concentrate to proceed without issue. In that vein, Transamine did take steps to protect itself, although Procon has now cast an interpretation of those arrangements which defies commercial logic.

195 In conclusion, Procon specifically agreed that it would not assert any lien or claim against the first 10,000 DMT of concentrates to be delivered to Transamine under Contract 380, whether in accordance with its earlier liens or any future lien that it might file. The matter is less clear in relation to concentrate to be shipped under Contract 369. In that regard, Transamine points to the fact that Schedule "B" to the no interest letter refers to quantities of concentrate above 60,000 DMT, as required under Contract 380. There is, however, no indication that Procon ever received a copy of Contract 380 or Contract 369, which might have highlighted the difference in the quantities in the Schedule and Contract 380.

196 This issue relating to Contract 369 is, in any event, moot given my conclusions on the other issues as above. Certainly, by the time the concentrate was appropriated to Contract 369, Transamine had no notice of any lien having been registered by Procon. After the discharge of Procon's liens in the fall of 2014, no issue of notice of Procon's rights, whether constructive or actual, arises. While Transamine would certainly have understood that liens could arise in the future, no such potential right to enforce a lien did arise until January 15, 2015, by which time the passage of title under Contract 369 had occurred.

Conclusion

197 Accordingly, the relief sought by Transamine is granted on the terms sought. This will include an order that the concentrate held either in Stewart, British Columbia or at the Mine, is for the benefit of Transamine and is free and clear of all court ordered charges granted in this proceeding. Further, the order granted will confirm that the concentrate is not attached by the 2015 Procon Lien.

198 In light of my decision on the above issues, it is not necessary to address the marshalling arguments advanced by Transamine. Nor is it necessary to address Transamine's allegation that Procon was acting less than honestly in respect of its performance of the agreement with Transamine from the fall of 2014.

199 If any party wishes to address the matter of costs, and failing agreement, they may contact Supreme Court Scheduling to arrange for a further hearing before me.

Order accordingly.

Footnotes

* Additional reasons at *Yukon Zinc Corp., Re* (2015), 2015 CarswellBC 3147, 2015 BCSC 1991, 77 B.C.L.R. (4th) 429, [2016] 1 W.W.R. 831 (B.C. S.C.).

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