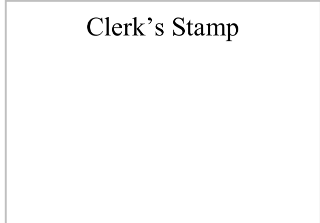
COURT FILE NUMBER	**1901-14615**	 Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANT	ORPHAN WELL ASSOCIATION	
RESPONDENT	HOUSTON OIL & GAS LTD.	
DOCUMENT	**BENCH BRIEF OF THE RECEIVER, re: Application for Approval of Sale and Vesting Order and Related Relief**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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TABLE OF CONTENTS

I. INTRODUCTION ... 1
II. SALE APPROVAL AND VESTING ORDERS ... 2
A. The Proposed Transactions Meet the Soundair Principles ... 2
B. The Purchased Assets Should be Vested Free of the Pioneer GORR and the Inland Interests ... 3
III. DISTRIBUTION OF SALE PROCEEDS ... 7
IV. SEALING ORDER FOR THE CONFIDENTIAL SUPPLEMENT ... 8
V. CONCLUSION ... 8

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of BDO Canada Limited, in its capacity as the court-appointed receiver and manager (the "**Receiver**") of Houston Oil & Gas Ltd. (the "**Debtor**" or "**Houston**"),[1] in support of its application filed on August 24, 2020 (the "**Application**") for approval of sale and vesting orders in respect of several asset purchase transactions (the "**Proposed Transactions**"). The facts in support of the Receiver's Application are set out in the Second Report of the Receiver dated and filed August 24, 2020 (the "**Second Report**").[2]

2. This receivership was commenced by the Orphan Well Association (the "**OWA**") after Houston advised the Alberta Energy Regulator (the "**AER**") that it was shutting-in all of its operations.[3] At the time, Houston owed substantial reclamation and abandonment obligations to the AER, in the vicinity of $81.5 million.[4] In the unique circumstances of this receivership, there is no first-ranking secured creditor,[5] and the OWA and/or AER are the most affected parties as a result of the OWA funding this receivership[6] and the priority afforded to environmental obligations pursuant to *Redwater*.[7]

3. On December 12, 2019, the Receiver obtained this Court's approval of a sale solicitation process (the "**SSP**").[8] The Receiver began the SSP in January 2020 and the Receiver has now entered into Sale Agreements with nine Purchasers, which are each subject to Court approval.

4. The Sale Agreements, and Proposed Transactions contemplated therein, are supported by the OWA, will result in the transfer of assets to responsible parties (and the assumption of reclamation and abandonment obligations by such parties), will generate distributions to certain stakeholders, satisfy the *Soundair* principles and should be approved.

5. In furtherance of the Proposed Transactions, the Receiver also seeks that Houston's assets be vested in the name of the Purchasers free and clear of, *inter alia,* (a) a gross overriding royalty granted in favour of Pioneer Oil Well Service Corp. ("**Pioneer**" and the "**Pioneer GORR**"), and (b) interests registered against Houston's assets in favour of Inland Development Company Ltd. ("**Inland**" and the "**Inland Interests**"). The Pioneer GORR was granted by Houston in respect of all or substantially

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[1] See, Receivership Order pronounced by the Honourable Madam Justice K. Eidsvik on October 29, 2019, as amended by an Order pronounced by the Honourable Madam Justice K.M. Horner in Court File Number 2001-07870 on June 30, 2020 (collectively, "**Receivership Order**").
[2] Unless otherwise indicated, capitalized terms in this Brief have the meanings given to them in the Second Report.
[3] See e.g. First Report of the Receiver filed on December 2, 2019 (the "**First Report**") at paras 7–10.
[4] Affidavit of Lars de Pauw, filed on October 18, 2019, para 15.
[5] First Report, para 12.
[6] Second Report, para 43.
[7] See generally *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, and for e.g. paras 159-160 [**TAB 1**].
[8] See Order Approving Sale and Solicitation Process, pronounced by Justice Jeffrey on December 12, 2019.

all of its production, for no consideration to a related party, and on December 3, 2019, was disclaimed by the Receiver. Hence, the interests of stakeholders as a whole outweigh any interest of Pioneer. Similarly, Inland is a defunct and delinquent company, with no standing, and its encumbrances over any purchased assets should not impede the interests of other stakeholders such as the OWA.

6. Finally, the Receiver seeks orders approving certain distributions, and sealing the Confidential Supplement to Second Report dated August 24, 2020 (the "**Confidential Supplement**"), as is more fully set out herein.

II. SALE APPROVAL AND VESTING ORDERS

A. THE PROPOSED TRANSACTIONS MEET THE SOUNDAIR PRINCIPLES

The Court has Discretion to Approve the Proposed Transactions

7. This Court's decision to approve a sale by a receiver is a matter of discretion.[9] In exercising its discretion, the Court applies the well-established principles in *Royal Bank v Soundair Corp*, namely:[10]

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

    (b) the interests of all parties;

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

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

8. The *Soundair* principles should not to be applied formulaically. Rather, the Court should consider the facts and circumstances of each case, including such things as the prevailing economic environment, and the risk/reward associated with an extended or additional sales process.[11]

9. Furthermore, this Court should defer to the commercial judgment of a receiver in respect of a proposed sale transaction,[12] and exercise "considerable caution" before intervening in a sale transaction.[13] Were the Court to substitute its own view, in place of the receiver's commercial expertise and authority, the court-supervised insolvency sales process would be undermined.[14]

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[9] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 ("***Snowdon***") at para 20 [**TAB 2**].
[10] *Sydco Energy Inc (Re)*, 2018 ABQB 75 ("***Sydco***") at para 50 [**TAB 3**], citing *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA) ("***Soundair***") at para 16 [**TAB 4**].
[11] See e.g., *Sanjel Corp, Re*, 2016 ABQB 257 ("***Sanjel***") at paras 70–71, 112 [**TAB 5**]; see also *Tool-Plas Systems Inc, Re*, 2008 CarswellOnt 6258 (SC) ("***Tool-Plas***") at paras 15–20 [**TAB 6**].
[12] *Soundair, supra* at paras 21, 46 [**TAB 4**].
[13] *B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581 ("***B&M***") at para 43 [**TAB 7**].
[14] *Soundair, supra* at paras 21, 46 [**TAB 4**]; *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433 at para 14 [**TAB 8**].

The Proposed Transactions Meet the Soundair Test

10. As set out in the Second Report, and particularly paragraph 21 therein, the Receiver considers that each of the Proposed Transactions meet the *Soundair* principles and should be approved, since, among other thing:

    (a) Houston's assets were widely marketed, the Receiver has undertaken extensive negotiations with arm's length Purchasers, and the Receiver considers the cash proceeds for the Proposed Transactions to be the best price available in the circumstances;

    (b) in addition to cash consideration, the Proposed Transactions will result in Purchasers assuming responsibility for abandonment and reclamation obligations associated with the various wells, facilities, and pipelines being purchased;

    (c) the KRC transaction will result in payments being made to various affected stakeholders, including municipalities (for property taxes), royalty holders, and mineral lessors (as detailed below) and in the case of the other Proposed Transactions, those Purchasers will be responsible for assuming such obligations;

    (d) the global oil and gas industry continues to be in a dire economic condition, and the COVID-19 Pandemic is ongoing, meaning that the costs and delays associated with any further marketing efforts are highly unlikely to generate any more favourable transactions;

    (e) the OWA is supportive of the Proposed Transactions;

    (f) if the Proposed Transactions are not approved, it is likely that some of the relevant assets would become the responsibility of the OWA; and

    (g) the Proposed Transactions were generated as a result of the SSP, which was a fair and robust process, and approved by this Court.

11. Simply stated, the Proposed Transactions are value maximizing, in the interests of stakeholders as a whole, and should be approved.

B. THE PURCHASED ASSETS SHOULD BE VESTED FREE OF THE PIONEER GORR AND THE INLAND INTERESTS

The Court has Discretion to Grant Vesting Orders

12. It is clear that this Court has the discretion to grant vesting orders to give effect to sale transactions entered into by the Receiver. For example, in *Beazer v Tollestrup Estate*,[15] a foreclosure matter, the Alberta Court of Appeal remarked that this Court has statutory authority to grant vesting orders, which are equitable and discretionary in origin or nature:

[15] *Beazer v Tollestrup Estate*, 2017 ABCA 430 ("***Beazer***") [**TAB 9**].

> The other manner in which the Property could be conveyed to the Mortgagees was through an order which vested the title in them. Vesting orders are now creatures of statute (see Law of Property Act, ss 40, 42 and 76) but have their origin in **equity** and are **therefore discretionary**: *Regal Constellation Hotel Ltd*., Re (2004), 71 O.R. (3d) 355 (Ont. C.A.), 2004 CanLII 206 at para 32.[16] (underlining and bold added)

13. In *Regal Constellation Hotel Ltd., Re,*[17] which concerned a sale by a receiver and was cited by our Court of Appeal in *Beazer*, the Ontario Court of Appeal likewise held that a "vesting order is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery" and that vesting orders are "discretionary in nature".[18]

14. Further, the Receivership Order in these proceedings authorizes the Receiver to apply for "any" vesting order as may be necessary to convey the Houston's property to a purchaser.[19]

15. Finally, this Court's broad power to grant vesting orders in receiverships is readily demonstrated by the many sale approval and vesting orders recently granted in *Orphan Well Association v Trident Exploration Corp* et al (Alberta Court of Queen's Bench File No. 1901-06244). That proceeding, like here, is a receivership conducted pursuant to provincial legislation.[20]

16. In short, this Court has the discretion to grant vesting orders in support of a sale by a receiver. The Court's exercise of its discretion should be guided by considerations of what is just and equitable, as well as the duties imposed on a court-appointed receiver, namely to (i) realize on the debtor's assets,[21] and (ii) act honestly and in good faith and with a view to all interested stakeholders.[22]

This Court has Discretion to Vest-Off Gross Overriding Royalties

17. This Court has also the specific authority to grant vesting orders in respect of a gross overriding royalty (a "**GORR**"), although this discretion may be more limited where the GORR constitutes an "interest in land" (instead of a mere contractual right for payment).[23]

18. The test for whether a GORR constitutes an interest in land remains that set out by the Supreme Court of Canada in *Bank of Montreal v Dynex Petroleum*.[24] In *Dynex,* the Court held that whether a GORR is an interest in land depends on whether:

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[16] *Ibid,* at para 60 [**TAB 9**]; *Law of Property Act*, RSA 2000, c L-7, s 76 [**TAB 10**].
[17] *Regal Constellation Hotel Ltd,* 2004 CarswellOnt 2653 (CA) ("***Regal***") [**TAB 11**].
[18] *Ibid,* at para 32 [**TAB 11**]. The Court's comments were made in relation to Section 100 of Ontario's *Courts of Justice Act*.
[19] Receivership Order, Section 3(m). In *New Skeena Forest Products Inc v Kitwanga Lumber Co*, 2005 BCCA 154 ("***New Skeena***") at para 20 [**TAB 12**], the British Columbia Court of Appeal concluded that a similar provision gave the Court the authority to grant a vesting order.
[20] See e.g. the Approval and Vesting Orders pronounced by the Honourable Mr. Justice D.B. Nixon on March 31, 2020; and the Approval and Vesting Orders pronounced by the Honourable Madam Justice K.M. Horner on June 29, 2020.
[21] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 ("***Reid-Built***") at para 22 [**TAB 13].**
[22] *Jaycap, supra* at para 28 [**TAB 2**].
[23] *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 ("***Accel***") at para 93 [**TAB 14**].
[24] *Bank of Montreal v Dynex Petroleum Ltd,* [2002 SCC 7 ("***Dynex***") [**TAB 15**].

(a) the language used in describing the interest, in the governing agreement, is sufficiently precise to show that "the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land"; and

(b) the interest, out of which the royalty is carved, is itself an interest in land.[25]

19. Working interests in oil and gas assets are interests in land. Hence, whether a GORR carved out of a working interest, is an "interest in land", depends on the first *Dynex* criterion, i.e. the objective intention of the parties at the time the contract was made.

20. In *Accel Canada Holdings Limited, Re*, this Court held that the approach for determining whether the parties' intended to create an interest in land is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."[26]

21. If, based on that analysis, it is concluded the parties *did not* intend for the GORR to be an interest in land, then "there is <u>no issue</u> that the court can vest off the interests".[27] Conversely, if the GORR *is* an interest in land, then the Court's discretion to grant a vesting order may be more constrained. For instance, in *Third Eye Capital Corporation v Dianor Resources Inc*, the Ontario Court of Appeal recently devised a "rigorous cascade analysis" for whether it is appropriate to vest off an interest in land in the context of a receivership. While the *Dianor* "cascade analysis" does not appear to have been applied outside of Ontario, it is generally consistent with Alberta law in that the Court has discretion to grant the relief and the Court "may engage in a consideration of the equities".[28]

The Pioneer GORR is Not an Interest in Land and Should be Vested Off

22. As detailed in the Second Report, on or about April 1, 2018, Houston entered into a royalty agreement with Pioneer (the "**Pioneer Royalty Agreement**"), pursuant to which Houston granted Pioneer a 5% royalty on all of its production.[29] The Receiver disclaimed the Pioneer Royalty Agreement, including the Pioneer GORR therein, on December 3, 2019.[30] Since then, the Receiver has received no response to the disclaimer by Pioneer.[31] Nonetheless, certain of the Purchasers requested that specific vesting relief be obtained from this Court as yet further assurance that the Pioneer GORR will not encumber the purchased assets.[32]

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[25] *Ibid,* at para 22; *Accel, supra* at paras 13–14 [**TAB 14**]; *Manitok Energy Inc (Re)*, 2018 ABQB 488 ("***Manitok 2018***") at para 13 [**TAB 16**].
[26] *Accel, supra* at para 16 [**TAB 14**].
[27] *Ibid*, at para 93.
[28] *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 ("***Dianor***") at paras 109–110 [**TAB 17**].
[29] Second Report, para 22, and Appendix "J".
[30] Second Report, para 24, and Appendix "K".
[31] Second Report, para 25
[32] Second Report, para 26.

23. In this regard, the Receiver has analyzed the Pioneer Royalty Agreement, and considers that the Pioneer GORR is only a contractual right to production revenues (if anything) and not an interest in land. In particular, the Receiver notes that:

(a) Section 2 of the Royalty Agreement states that the "Grantor [Houston] shall **pay** to the Beneficiary [Pioneer] a … gross overriding royalty … on all Petroleum Substances **produced** on the Royalty Lands …".[33] This language evinces an objection intention to create a contractual obligation to pay, and not the grant of lands;[34]

(b) The Pioneer GORR appears to cover all or substantially all of Houston's production, but does not appear to have been granted for any consideration;[35] and

(c) Pioneer and Houston are related parties and both controlled by the Ruggles,[36] which rebuts the creation of a *bona fide* grant of property.

24. In short, these circumstances suggest that Houston did not intend to create an interest in land in favour of Pioneer pursuant to the Pioneer Royalty Agreement. Thus, this Court has the clear authority and discretion to vest off the Pioneer GORR, and should do so since it will enable the Proposed Transactions to proceed, which benefit stakeholders as a whole.

The Inland Interests Should be Vested Off

25. As is also set out in the Second Report, during the SSP the Receiver discovered certain royalty or other interests registered in favour of Inland against Houston's assets.[37] According to corporate search reports, Inland is: (i) a Saskatchewan corporation, but (ii) had its Alberta extra-provincial registration "cancelled" in February 2017, and was deemed "Inactive (Struck Off)" in or about February 2017 by the Saskatchewan corporate registry.[38] The Sale Agreement between the Receiver and KRC contemplates that if the Inland Interests are not vested off the purchased assets, then there will be a reduction in the purchase price to be paid by KRC.[39]

26. The Receiver has not conducted a detailed analysis of all the agreements related to the Inland Interests, given the voluminous nature of the agreements and concerns that the records in the Receiver's possession are incomplete.[40] Hence, the Receiver takes no position as to whether the Inland Interests may be "interests in land".

[33] Second Report, Appendix "J".
[34] *St Andrew Goldfields Ltd v Newmont Canada Ltd*, 2009 CarswellOnt 4582 ("***St Andrews***") at paras 98–102 **[TAB 18]**
[35] Second Report, para 22; *Accel, supra* at para 89 [**TAB 14].**
[36] Second Report, para 22.
[37] Second Report, paras 27-32.
[38] Second Report, paras 29-30, and Appendix "L".
[39] Second Report, para 32.
[40] Second Report, para 28.

27. Nevertheless, this Court has discretion to grant a vesting order in respect of the Inland Interests and should do so since, among other things:

   (a) Inland is not registered with either the Alberta or Saskatchewan corporate registries, and as a result, under applicable corporate law has no standing to enforce any contractual rights in respect of the Inland Interests;[41]

   (b) The Receiver has attempted to contact Inland, at all three of its last known addresses, and has received no response.[42] Inland's non-response is an important factor in the context of these insolvency proceedings, where "speed and efficiency are necessary to maximize recovery for everyone";[43]

   (c) Inland is indebted to Houston and a delinquent party under some or all of its relevant agreements with Houston;[44] and

   (d) If the Inland Interests are not vested off, the sale proceeds available to the Houston estate will be decreased. In this unique receivership, where there is no first-ranking secured lender, the Receiver's fees are being funded by borrowings from the OWA. The Receiver will repay these borrowings through proceeds generated through the SSP.[45] Thus, it is the public interest for the Inland Interests to be vested off so that proceeds are maximized and the OWA is repaid.

28. In short, the Receiver considers it just and equitable for the Inland Interests to be vested off the assets purchased by KRC. This Court should favour the interests of stakeholders as a whole, including the public interest, over those of a defunct and delinquent corporate entity that takes no steps to protect its position.

III. DISTRIBUTION OF SALE PROCEEDS

29. In respect of the Proposed Transaction with KRC, the Receiver is seeking this Court's authorization to make distributions from sale proceeds to certain stakeholders, namely for Crown mineral leases, surface leases, municipal taxes and royalties.[46] The Receiver considers these distributions commercially fair and reasonable since such payments will (i) bring applicable leases or agreements into good standing, so they may be effectively assigned to KRC,[47] or (ii) satisfy non-linear municipal tax obligations which have priority over secured and unsecured claims as a result of a statutory special

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[41] See the Alberta *Business Corporations Act*, RSA 2000, c B-9, s 295(1) (which applies to unregistered extra-provincial corporations) and the Saskatchewan *The Business Corporations Act*, RSS 1978, c B-10, s 275(1) [**TAB 19**].
[42] Second Report, para 33, and Appendix "M".
[43] *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 ("***Northern Sunrise***") at para 31 [**TAB 20**].
[44] Second Report, para 31.
[45] Second Report, paras 42-44.
[46] Second Report, para 35.
[47] See e.g. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 84.1, which should inform this Court's analysis in the instant case [**TAB 21**]

lien.[48] Further, the Receiver understands that the OWA supports this relief, which is the most affected party as the entity funding these proceedings.[49]

IV. SEALING ORDER FOR THE CONFIDENTIAL SUPPLEMENT

30. The test for a sealing order is set out in *Sierra Club of Canada v Canada (Minister of Finance)*. Specifically, the applicant must demonstrate that:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[50] (underlining added)

31. In the instant case, the Confidential Supplement contains confidential information regarding the interest and bids received during the SSP, the Proposed Transactions and the Sale Agreements, including the purchase prices. This information is commercially sensitive, and if disclosed before the Proposed Transactions close or the SSP is completed, the Receiver's ability to market and sell Houston's property may be significantly or seriously prejudiced.[51]

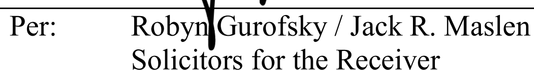
32. A sealing order for the Confidential Supplement is the least restrictive and prejudicial alterative to prevent dissemination of the Houston's commercially sensitive information, and it is fair and just in the circumstances to restrict public access to the Confidential Supplement.

V. CONCLUSION

33. For the reasons above, the Receiver respectfully requests that the Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF AUGUST 2020

BORDEN LADNER GERVAIS LLP



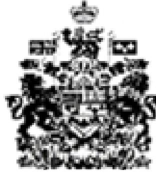
Per: Robyn Gurofsky / Jack R. Maslen
Solicitors for the Receiver

[48] *Municipal Government Act*, RSA 2000, c M-26, s 348 [**TAB 22**]
[49] Second Report, paras 21, 43-44.
[50] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("***Sierra Club***") at para 53 [**TAB 23**].
[51] Second Report, paras 36-37.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5
2.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47
3.	*Sydco Energy Inc (Re)*, 2018 ABQB 75
4.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA)
5.	*Sanjel Corp, Re*, 2016 ABQB 257
6.	*Tool-Plas Systems Inc, Re*, 2008 CarswellOnt 6258 (SC)
7.	*B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581
8.	*Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433
9.	*Beazer v Tollestrup Estate*, 2017 ABCA 430
10.	*Law of Property Act,* RSA 2000, c L-7, s 76
11.	*Regal Constellation Hotel Ltd,* 2004 CarswellOnt 2653 (CA)
12.	*New Skeena Forest Products Inc v Kitwanga Lumber Co*, 2005 BCCA 154
13.	*Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109
14.	*Accel Canada Holdings Limited, (Re)*, 2020 ABQB 182
15.	*Bank of Montreal v Dynex Petroleum,* 2002 SCC 7
16.	*Manitok Energy Inc, Re*, 2018 ABQB 488
17.	*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508
18.	*St Andrew Goldfields Ltd v Newmont Canada Ltd*, 2009 CarswellOnt 4582
19.	*Business Corporations Act*, RSA 2000, c B-9, s 295; *The Business Corporations Act*, RSS 1978, c B-10, s 275
20.	*Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61
21.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 84.1
22.	*Municipal Government Act*, RSA 2000, c M-26, s 348
23.	*Sierra Club of Canada v Canada (Minister of Finance*), 2002 SCC 41

TAB 1



SUPREME COURT OF CANADA

CITATION: Orphan Well Association *v.* Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150	**APPEAL HEARD:** February 15, 2018 **JUDGMENT RENDERED:** January 31, 2019 **DOCKET:** 37627

BETWEEN:

Orphan Well Association and Alberta Energy Regulator
Appellants

and

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches)
Respondents

\- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 164)	Wagner C.J. (Abella, Karakatsanis, Gascon and Brown JJ. concurring)
DISSENTING REASONS: (paras. 165 to 292)	Côté J. (Moldaver J. concurring)

Orphan Well Association *v.* Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150

Orphan Well Association and
Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and
ATB Financial (formerly known as
Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Ecojustice Canada Society,
Canadian Association of Petroleum Producers,
Greenpeace Canada,
Action Surface Rights Association,
Canadian Association of Insolvency
and Restructuring Professionals and
Canadian Bankers' Association *Interveners*

Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.

2019 SCC 5

File No.: 37627.

regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

[27] The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (*OGCA*, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

[28] Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

[29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24). The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the

assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

[30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (*Constitution Act, 1867*, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

[31] However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas

conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the *Abitibi* test

[159] Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill

end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

[160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney*, the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

[161] Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

[162] There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

[163] Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

[164] As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

The reasons of Moldaver and Côté JJ. were delivered by

TAB 2

2019 ABCA 47
Alberta Court of Appeal

Jaycap Financial Ltd v. Snowdon Block Inc

2019 CarswellAlta 160, 2019 ABCA 47, [2019] A.W.L.D. 951, 301 A.C.W.S. (3d) 475, 68 C.B.R. (6th) 7

Jaycap Financial Ltd. (Respondent / Plaintiff) and Snowdon Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation (Appellants / Defendants)

Brian O'Ferrall, Barbara Lea Veldhuis, Ritu Khullar JJ.A.

Heard: November 7, 2018
Judgment: February 4, 2019
Docket: Calgary Appeal 1701-0314-AC

Counsel: A. Henderson, for Respondent
K.W. Jesse, for Appellants

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — General principles

Appeal arose in context of insolvency proceedings — Guarantors appealed chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets — Appeal allowed, order was set aside and matter returned to Queen's Bench for rehearing before different judge — Receiver provided no evidence about termination nor did it explain why it failed to deliver final closing documents, giving rise to termination, when first asset purchase agreement reflected its understanding of purchase price — Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with assistance of legal counsel, will be held to their bargain — Had receiver sought to compel J Ltd. to close first asset purchase agreement, instead of abandoning it, its application may well have been successful.

Table of Authorities

Cases considered:

Beazer v. Tollestrup Estate (2017), 2017 ABCA 429, 2017 CarswellAlta 2689, 63 Alta. L.R. (6th) 25, [2018] 4 W.W.R. 513 (Alta. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board))* 118 O.R. (3d) 800 (note) (S.C.C.) — referred to

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Toronto Dominion Bank v. Canadian Starter Drives Inc. (2011), 2011 ONSC 8004, 2011 CarswellOnt 15140, 90 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — referred to

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

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

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

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

Standard of Review

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

20 The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.).

Analysis

There was no mutual mistake

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

22 This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the $1.3 million difference was comprised of. As the guarantors went from

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facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference cried out for an explanation before this Court and the court below.

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

Lack of fairness and integrity of the process

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

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

26 A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

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

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

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

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TAB 3

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018
Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

Subject: Estates and Trusts; Insolvency; Natural Resources
Headnote
Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous
Insolvent oil company (S) went into receivership in February 2017 and court approved sale process — S's major shareholder RD sent Alberta Energy Regulator (AER) proposed sales process order — AER added condition that successful bidder be at arm`s length to S to which RD opposed with concern it would improperly fetter receiver`s ability to conduct sales process in commercially reasonable manner for benefit of all creditors and stakeholders and also that "at arm's length" was vague term — AER refused to allow second company 203 with virtually same principals as S to transfer some of S's wells to itself and refused to allow third company WR to assume S`s well licences unless it could prove it was not related — Receiver applied for court order approving sale of assets and vesting order to WR and based on AER history, sought specifics from Redwater order to be incorporated respecting AER authority — Application granted — Portions of Redwater order incorporated into application properly interpreted, did not give AER authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in insolvency — While AER had discretion to review transfer applications, it must do so within provincial law in force — In deciding whether or not concerns expressed by third parties during 30-day review process warrant further delay in approval process, AER could not take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require hearing — AER failed to establish their concern that WR Ltd bid was example of unfairness of allowing insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid costs of public obligations — With respect to court's jurisdiction to restrain AER from exercising its discretion regarding licence transfer applications, Supreme Court in AbitibiBowater made it clear that, while regulatory body has discretion on how best to ensure that regulatory obligations were met, and court should avoid interfering, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings" — In most recent amendments to insolvency legislation, decisions of AbitibiBowater and Redwater tried to delineate boundary between creditor and regulatory claims in environmental sphere, but difficult issues remain that must be determined.
Table of Authorities
Cases considered by *B.E. Romaine J.*:

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> provided that the AER shall have the discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, as the term "control" is defined in the *Securities Act* RSA 2000, c S-4.
>
> [emphasis added]

44 The AER submitted that, to the extent that Wormwood is not arm's length to Sydco, the AER was entitled to consider that fact "as it goes to the risk associated with permitting Wormwood to be a licensee", and should be allowed to condition approval accordingly "to mitigate such harm". It submitted that if Wormwood is arm's length, the Receiver should not have a problem amending the approval order to achieve the AER's objective, which it describes as follows:

> The Receiver has refused to amend the [approval order] to address the AER's concerns that the amendments prohibit the AER from considering the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to the proposed transfer of Sydco's licenses ...

45 The AER made it clear at the hearing that it seeks continuing discretion with respect to license transfers, including the right to deny or approve with conditions a license transfer where the AER has concerns regarding the past conduct of the principals of the holder of a current AER license. In other words, the AER takes the position that, despite the wording of section 11(d) of the *Redwater* order, which prohibits the AER from considering the compliance record of directors, officers, employees, security holders and agents of the debtor company in approving a transfer of a license, the language at the end of section 11(d) allows the AER to do so where the transferee is non-arm's length to any of those parties that are caught by the definition of non-arm's length adopted by the AER.

46 The AER submitted that this case was the type of situation described in the dissent of Martin, J.A. in the*Redwater Appeal Decision*, where she commented on the unfairness of allowing an insolvent entity to preserve any assets and avoid the costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

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

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

IV. Analysis

A. Approval of the Wormword Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

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

b) the interests of all parties;

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

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

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

B. Precedential Value of the Redwater Order

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

C. Should the Approval Order Include the Redwater Provisions?

53 Given the history of this matter, I find that it is both reasonable and prudent for the Receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order.

54 The original winning bidder, 203, chosen by the Receiver as being in the best interests of stakeholders, encountered lengthy and inexplicable delay in the consideration of its application for a BA Code. Inquiries were left unanswered, meetings with AER staff were tense and confrontational and the conditions attached to the approval of 203's application prevented it from completing its credit bid.

55 The relationship between the AER, the Receiver and Wormwood, the new bidder, has also been fraught with conflict and uncertainty over the AER's position and its stated intentions.

56 It is no secret that the AER disagrees with the *Redwater* decisions, and its conduct in this receivership illustrates its resistance to the principles set out in these decisions. However, as noted by Wakeling, J.A. in refusing the AER's application for a stay of enforcement of the *Redwater Appeal Decision* pending appeal to the Supreme Court of Canada, 2017 ABCA 278 (Alta. C.A.) at paras 11 and 121:

> A Court of Appeal judgment resolves not only the dispute that the parties presented to a court for resolution but the basis for resolution provides a principle that governs all future similar disputes. I cannot stay the precedential effect of a Court of Appeal opinion and create a new legal regime that affects other receivers and trustees in bankruptcy and other secured creditors who pursue their rights in different and future debt enforcement proceedings. To do so would mean that similar cases are adjudged differently. This [is] not an attribute of the legal system committed to the rule of law ...
>
> The rights of receivers and bankruptcy trustees, secured creditors and the Alberta Energy Regulator whose interests are juxtaposed will in the future be adjudged according to the principles set out in *Grant Thornton Ltd v Alberta Energy Regulator* unless the Supreme Court of Canada grants leave to appeal and allows the appeal. It is inconsequential what the law was three, five or twenty-five years ago.

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TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

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11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air

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[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of

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TAB 5

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

Headnote

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

Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under Companies' Creditors Arrangement Act — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless.

Table of Authorities

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

AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Bloom Lake, g.p.l., Re (2015), 2015 QCCS 1920, 2015 CarswellQue 4072, 27 C.B.R. (6th) 1 (C.S. Que.) — considered

Nelson Education Ltd., Re (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

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B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

69 It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

70 A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

71 Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

72 Similar issues were considered in *Nelson Education Ltd., Re*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]) at paras 31-32, and in *Bloom Lake, g.p.l., Re*, 2015 QCCS 1920 (C.S. Que.) at para 21.

73 The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

74 While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

75 The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

76 Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

77 While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

78 I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted

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D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

107 The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

108 What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

109 The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

111 The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

112 I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

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(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

114 The letter asserts the following:

a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;

b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;

c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;

d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

115 The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients herby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

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TAB 6

2008 CarswellOnt 6258
Ontario Superior Court of Justice [Commercial List]

Tool-Plas Systems Inc., Re

2008 CarswellOnt 6258, [2008] O.J. No. 4218, 172 A.C.W.S. (3d) 112, 172 A.C.W.S. (3d) 113, 48 C.B.R. (5th) 91

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Receiver, RSM Richter Inc.
R. van Kessel for EDC, Comerica
C. Staples for BDC
M. Weinczok for Roynat

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

Headnote

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

Debtor manufactured auto parts — Debtor wished to appoint receiver and execute "quick flip", including terms that purchaser would acquire assets of debtor and hire same employees, and assume debt to secured lenders — Receiver brought motion for approval of transaction — Motion granted — Transaction was best available option, and was reasonable — Plan was in best interests of shareholders — Certain parties would benefit, including secured lenders, certain lessors, and certain employees — Certain employees and suppliers would have no possibility of recovery, but were unlikely to recover under any scenario — Price proposed was higher than liquidation value or value of going concern — Secured lenders supported transaction and subordinated secured lenders did not object — Harm could be caused by delay in that relationship with customers could be harmed by disruption.

Table of Authorities

Cases considered by *Morawetz J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

MOTION by receiver for approval of purchase of debtor corporation.

***Morawetz J.*:**

1 This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

2 The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position — which recommends approval of the sale.

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and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

15 A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

16 In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally — the customers of the mould division who stand to benefit from continued supply.

17 On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

18 I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

19 I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

20 In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) have been followed.

21 In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

22 The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

Motion granted.

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TAB 7

Most Negative Treatment: Check subsequent history and related treatments.

2018 ONCA 581
Ontario Court of Appeal

B&M Handelman Investments Limited v. Drotos

2018 CarswellOnt 10201, 2018 ONCA 581, 293 A.C.W.S. (3d) 758, 61 C.B.R. (6th) 208

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc. (Applicants / Responding Party) and Christine Drotos (Respondent)

David M. Paciocco J.A.

Heard: June 13, 2018
Judgment: June 25, 2018
Docket: CA M49307, (C65474)

Counsel: Eric Golden, for Moving party, Rosen Goldberg Inc.
P. James Zibarras, Leslie Dizgun, Caitlin Fell, for Responding party, World Finance Corporation
David Preger, for Responding party, B&M Handelman Investments Limited
Adam J. Wygodny, for Responding party, Money Gate Investment Corp.
Miranda Spence, for Purchaser, Frederic P. Kielburger

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

Headnote

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

Approval and vesting order was made over property of receiver that was sold to purchaser — Mortgagee of property filed notice of appeal, challenging order — Receiver brought motion for directions, regarding appeal — Motions judge ruled mortgagee had no right of appeal — Sale was approved — Receiver acted properly under appointment order's terms — Receiver obtained best price, and considered all parties' interests in making sale — Postponement of sale would have caused prejudice.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Procedure on opposition to sale

Approval and vesting order was made over property of receiver that was sold to purchaser — Mortgagee of property filed notice of appeal, challenging order — Receiver brought motion for directions, regarding appeal — Motions judge ruled mortgagee had no right of appeal — Sale was approved — Applicable law was not to be given expansive reading, as submitted by mortgagee — Reading proposed by mortgagee would create conflict in insolvency regimes — Applicable law only applied to dispute that would affect same case, in bankruptcy proceedings — Mortgagee could seek leave to appeal in other cases — Mortgagee's grounds of appeal lacked merit.

Table of Authorities

Cases considered by *David M. Paciocco J.A.*:

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — followed

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc. (2017), 2017 ONCA 611, 2017 CarswellOnt 11087, 49 C.B.R. (6th) 173 (Ont. C.A.) — considered

Enroute Imports Inc., Re (2016), 2016 ONCA 247, 2016 CarswellOnt 5045, 35 C.B.R. (6th) 1 (Ont. C.A.) — considered

Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of) (2013), 2013 ONCA 697, 2013 CarswellOnt 15576 (Ont. C.A.) — followed

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35 Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

36 In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

37 First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

38 World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

39 World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

40 Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

41 Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

42 As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

43 None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355, [2004] O.J. No. 2744 (Ont. C.A.), at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

44 Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

45 Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

46 World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

47 In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

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TAB 8

2019 ABCA 433
Alberta Court of Appeal

Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd

2019 CarswellAlta 2418, 2019 ABCA 433, [2019] A.W.L.D. 4519,
312 A.C.W.S. (3d) 237, 74 C.B.R. (6th) 14, 98 Alta. L.R. (6th) 1

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd. (Respondent / Cross-Appellants / Applicant) and 1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd. (Appellants / Cross-Respondents / Respondents) and Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd. (Respondents / Interested Parties)

Thomas W. Wakeling, Dawn Pentelechuk, Jolaine Antonio JJ.A.

Heard: September 3, 2019
Judgment: November 14, 2019
Docket: Edmonton Appeal 1903-0134-AC

Counsel: D.M. Nowak, J.M. Lee, Q.C., for Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.
D.R. Peskett, C.M. Young, for Appellants
C.P. Russell, Q.C., R.T. Trainer, for Respondent, Servus Credit Union Ltd.
S.A. Wanke, for Respondent, Ducor Properties Ltd.
S.T. Fitzgerald, for Respondent, Northern Electric Ltd.
H.S. Kandola, for Respondent, Fancy Doors & Mouldings Ltd.

Subject: Civil Practice and Procedure; Insolvency
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Appellants appeal Approval and Vesting Order which approved sale proposed in Asset Purchase Agreement between Receiver, PWC, and respondent, D Ltd. — Appeal dismissed — Chambers judge was keenly alive to abbreviated marketing period and appraised values of hotels — Nevertheless, having regard to unique nature of property, incomplete construction of development hotel, difficulties with prospective purchasers in branding hotels in area outside of major centre and area which was in midst of economic downturn, she concluded that receiver acted in commercially reasonable manner and obtained best price possible in circumstances — Even with abbreviated period for submission of offers, chambers judge reasonably concluded that receiver undertook extensive marketing campaign, engaged commercial realtor and construction consultant, and consulted and dialogued with owner throughout process, which process appellants took no issue with, until offers were received.
Table of Authorities
Cases considered:

Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered

Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272, 317 A.R. 192, 284 W.A.C. 192 (Alta. C.A.) — referred to

Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc. (2013), 2013 BCSC 2222, 2013 CarswellBC 3640, 12 C.B.R. (6th) 282 (B.C. S.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

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12 We disagree. The chambers judge expressly referred to the *River Rentals* case. *River Rentals*, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the *Soundair* test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: *Salima Investments Ltd. v. Bank of Montreal* (1985), 65 A.R. 372 (Alta. C.A.) at paras 12-13. At its core, *River Rentals* highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the *Soundair* test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

13 At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para 4, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]), aff'd on appeal (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

14 Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: *Soundair* at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": *Soundair* at para 22.

15 The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers — of which there is absolutely none — the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 (Alta. C.A.) at para 13.

16 Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": *Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (B.C. S.C.) at para 20.

17 The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and

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TAB 9

2017 ABCA 430
Alberta Court of Appeal

Beazer v. Tollestrup Estate

2017 CarswellAlta 2696, 2017 ABCA 430, [2018] A.W.L.D. 683,
[2018] A.W.L.D. 684, 287 A.C.W.S. (3d) 557, 85 R.P.R. (5th) 1

Harry D. Beazer, Marion I. Beazer and Leonard L. Jensen (Appellants / Plaintiffs) and James Tollestrup, Litigation Representative for The Estate of Carol Mary Tollestrup (Respondents / Defendants) and Harold N. Moodie Professional Corporation (Respondent / Applicant) and Aaron Lynn Coma and Brittany Tia Coma (Respondents by Order / Intervenors)

Dean Coombs and Francoise Coombs (Appellants / Plaintiffs) and James Tollestrup, Litigation Representative for The Estate of Carol Mary Tollestrup (Respondent / Defendants)

Ronald Berger, Patricia Rowbotham, Brian O'Ferrall JJ.A.

Heard: May 18, 2017
Judgment: December 15, 2017
Docket: Calgary Appeal 1601-0275-AC, 1601-0301-AC

Counsel: D.C. Thompson for Harry D. Beazer and others
D.A. Patzer for Dean Coombs and others
T. Czechowskyj for Aaron Lynn Coma and others
K.E. Staroszik, Q.C., A. Louie for Estate of Carol Mary Tollestrup and others
K.G. Torry, Q.C. for James Tollestrup
A.G. McKay, Q.C. for Harold N. Moodie
K.D.F. Ronan for Keith Pushor

Subject: Corporate and Commercial; Insolvency; Property

Headnote

Real property --- Mortgages — Sale — Practice and procedure — Appeals — Grounds for appeal

Two of eight appeals arising from foreclosure action were predicated on different mortgages against same property — Mortgage granted by owner, now deceased, was acquired by mortgagees and was determined to be valid — Chambers judge directed that property be listed, and it was sold for $1.4 million — Appellants appealed sale order — Appellants in first appeal were mortgagees; appellants in second appeal ("C appellants"), who held certificate of lis pendens, sought specific performance of joint venture agreement claiming one-third interest in property — Appeals dismissed — There was nothing improper in chambers judge managing foreclosure action in addition to estate litigation — Chambers judge followed each step necessary in relation to foreclosure, properly finding that mortgagees did not control procedure — Parties had sufficient notice and time to make their positions known — Sale order did not deprive mortgagees of opportunity to purchase property or obtain vesting order — It was not unreasonable to accept purchasers' offer and order sale of property — While chambers judge waived s. 191 of Land Titles Act without notice to mortgagees, they had obtained benefit contemplated by s. 191(1) — Reasons respecting waiver applied equally to C appellants — Chambers judge did not deprive appellant FC of her one-third interest in property without due process — There was no caveat protecting that interest.

Real property --- Mortgages — Foreclosure — Practice and procedure — Appeals — Grounds for appeal

Two of eight appeals arising from foreclosure action were predicated on different mortgages against same property — Mortgage granted by owner, now deceased, was acquired by mortgagees and was determined to be valid — Chambers judge directed that property be listed, and it was sold for $1.4 million — Appellants appealed sale order — Appellants in first appeal were

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were very much at issue given the numerous court proceedings in the three related lawsuits and the numerous appeals that had been filed. The Mortgagees were given the opportunity to give the chambers judge estimates of their costs and they did. Mr Coombs was invited to articulate his position and he did.

58 There was sufficient notice and time for the parties to make their positions known to the chambers judge. There is no merit to this ground of appeal.

4. The Mortgagees' Opportunity to Purchase the Property or Obtain a Vesting Order

59 As mentioned earlier, there were two ways in which the Mortgagees could obtain the Property. One of these was to make an offer in the judicial sale process. The Mortgagees were given an opportunity to bid. They did. The Mortgagees applied to withdraw their offer and the chambers judge granted their request. There can be no complaint that the Mortgagees were not given an opportunity to purchase the Property.

60 The other manner in which the Property could be conveyed to the Mortgagees was through an order which vested the title in them. Vesting orders are now creatures of statute (see *Law of Property Act*, ss 40, 42 and 76) but have their origin in equity and are therefore discretionary: *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), 2004 CanLII 206 at para 32.

61 Unlike an order for sale where a mortgagee bids in the tender process, a mortgagee is not required to bring an application for a vesting order: *Price* at xxviii.

62 A vesting order may be an available remedy when the amount of the mortgage indebtedness is greater than or close to the appraised value of the property: *Law of Property Act*, s 40(2)(b). That section provides that in an action brought on a mortgage of land, if the land is not sold at the time and place so appointed, the court may "make a vesting order in the case of a mortgage" and on the making of a vesting order "every right of the mortgagee or vendor for the recovery of any money whatsoever under and by virtue of the mortgage . . . ceases and determines": see also *Co-op Centre Credit Union Ltd. v. Greba*, 1984 ABCA 183 (Alta. C.A.), (1984), 55 A.R. 176 (Alta. C.A.). The amounts owing as estimated by the Mortgagees on October 20, 2016 were certainly far in excess of the appraised value of the Property.

63 Was the chambers judge obliged to reject the Comas' offer in favour of a final determination of the amount of the indebtedness and a vesting order? Said otherwise, was it an unreasonable exercise of his discretion to accept the Comas' offer and order the sale of the Property?

64 The court's discretion in a foreclosure action is not unfettered. In the normal course, where the amount of the indebtedness is greater than or equal to the value of the property, a vesting order would be the appropriate remedy.

65 However, this was no ordinary foreclosure. The chambers judge was well aware of the entire context. Apart from purchasing the Maple Trust Mortgage and Mr Jensen discharging a debt for Ms Tollestrup of about $42,000, the amount of money the Mortgagees had advanced was not the same as it would have been in the sense of a conventional loan. In the mortgage validity action Langston J found that Ms Tollestrup wished to repay the Beazers and Mr Jensen for things they had done for her during her lifetime and the mortgages were granted with that intent. Langston J found those mortgages to be valid and we have upheld his decision. Mortgages granted in recognition of an obligation which Ms Tollestrup said she owed and which she calculated, with a face value of $400,000, $100,000 and $50,000, had ballooned to an indebtedness of over $1.4 million.

66 Against this, the chambers judge had an offer to purchase from *bona fide* purchasers in the amount of $1.4 million. He faced a difficult decision and his reasons for judgment demonstrate that he struggled with the choice:

> As a result of the case management meeting today, there appears to be unanimity among all counsel that the offer of [the Beazers and Mr Jensen] should be allowed to be revoked. There is also tacit agreement that the offer of the Comas, as represented by the real estate agent, Keith Pushor, should be rejected in favor of a stay of proceedings on all actions involving the estate matter. This has some advantages. There are several appeals of previous case management orders which would be moot, and that would give sufficient time to allow counsel to determine the costs of the litigation in [the

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TAB 10

Alberta Statutes
Law of Property Act

Most Recently Cited in: Alexis v. Alberta (Environment and Parks), 2020 ABCA 188, 2020 CarswellAlta 863, 318 A.C.W.S. (3d) 409 | (Alta. C.A., May 6, 2020)

R.S.A. 2000, c. L-7

Currency

R.S.A. 2000, c. L-7, as am. S.A. 2002, c. A-4.5, s. 50; 2003, c. F-4.5, s. 118; 2003, c. 24; 2003, c. 26, s. 19(1)(f); 2009, c. 53, s. 96; 2010, c. 16, s. 1(46); 2011, c. 12, s. 33(1); 2014, c. 8, s. 13; 2018, c. 18, s. 5.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 116:12 (June 30, 2020)

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Alberta Statutes
Law of Property Act
Part 8 — Miscellaneous (ss. 62-79)

Most Recently Cited in: Beazer v. Tollestrup Estate, 2017 ABCA 430, 2017 CarswellAlta 2696, 85 R.P.R. (5th) 1, 287 A.C.W.S. (3d) 557, [2018] A.W.L.D. 683, [2018] A.W.L.D. 684 | (Alta. C.A., Dec 15, 2017)

R.S.A. 2000, c. L-7, s. 76

s 76. Vesting order

Currency

76.Vesting order

76(1) When the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest that real or personal estate in the person, and in the manner and for the estate that would be done by the deed, conveyance, transfer or assignment if executed.

76(2) An order under subsection (1) has the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed, conveyance, transfer, assignment or otherwise for the same estate or interest to the person in whom it is so ordered to be vested, or in the case of a chose in action, as if the chose in action had been actually assigned to that person.

Currency

Alberta Current to Gazette Vol. 116:12 (June 30, 2020)

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TAB 11

2004 CarswellOnt 2653
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

2004 CarswellOnt 2653, [2004] O.J. No. 2744, 132 A.C.W.S. (3d) 215, 188 O.A.C. 97, 23 R.P.R. (4th) 64, 242 D.L.R. (4th) 689, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, 71 O.R. (3d) 355

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.
Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited
Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.
James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Headnote

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Table of Authorities

Cases considered by *Blair J.A.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

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Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions [2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

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TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: 1565397 Ontario Inc., Re | 2009 CarswellOnt 3614, 178 A.C.W.S. (3d) 124, 81 R.P.R. (4th) 214, [2009] O.J. No. 2596, 54 C.B.R. (5th) 262 | (Ont. S.C.J., Jun 23, 2009)

2005 BCCA 154
British Columbia Court of Appeal

New Skeena Forest Products Inc. v. Kitwanga Lumber Co.

2005 CarswellBC 578, 2005 BCCA 154, [2005] B.C.W.L.D. 2755, [2005] B.C.W.L.D. 2957, [2005] B.C.J. No. 546, 137 A.C.W.S. (3d) 1137, 210 B.C.A.C. 185, 251 D.L.R. (4th) 328, 348 W.A.C. 185, 39 B.C.L.R. (4th) 327, 9 C.B.R. (5th) 267

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation, Kitwanga Lumber Co. Ltd. (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd., and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corporation (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation (Respondents / Petitioners) And Main Logging Ltd. (Appellant / Respondent)

Southin, Braidwood, Oppal JJ.A.

Heard: February 17, 2005
Judgment: March 18, 2005
Docket: Vancouver CA032519, CA032539, CA032528

Proceedings: affirmed *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.* ((December 13, 2004)), Doc. Vancouver L033220 ((B.C. S.C.))

Counsel: P. Voth, Q.C., M.S. Oulton for Appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.
R.A. Millar for Respondents, Ernest & Young Inc.
F.M. Kirchner for Respondents, Coast T'simshian Resources
S.B. Jackson for Appellant, Main Logging
R. Leong for Attorney General of Canada
D.J. Hatter for H.M.T.Q. in Right of British Columbia
S.R. Ross for Intervenor, Truck Loggers Association

Subject: Natural Resources; Insolvency
Headnote
Timber --- Timber licences — Rights of licensees — General
Municipality was creditor of paper mill — Mill entered protection under Companies' Creditors Arrangement Act (CCAA), and later began liquidation of assets — Mill held replaceable contracts for logging certain areas, which it had contracted out

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17 Frank Bennett in his text, *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341 writes:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

18 I also observe that in *Erin Features*, Donald J. did not appear to take issue with the assertion of the applicant trustee in that case that "a receiver... can confidently be said [to] possess the right to disclaim an executory contract" (at para. 6).

19 In another leading case, *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S. C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

20 The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> . . . . .
>
>> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

21 Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

22 There is no provision in the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The *Act* only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1)(k) of the *Bankruptcy & Insolvency Act* the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

23 The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English *Bankruptcy Act, 1869* (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, *Insolvency Act 1986* (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (*Bankruptcy Act 1966*, (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

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TAB 13

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: City of Edmonton v. Alvarez & Marsal Canada Inc. | 2019 CarswellAlta 1429 | (S.C.C., May 23, 2019)

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109, [2019] 5 W.W.R. 38, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, 85 M.P.L.R. (5th) 1

City of Edmonton (Respondent / Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp. (Appellants / Defendants) and Royal Bank of Canada (Not a Party to the Appeal / Plaintiff) and Reid-Built Homes Ltd and Emilie Reid (Not Parties to the Appeal / Defendants)

Marina Paperny, Sheila Greckol, Ritu Khullar JJ.A.

Heard: February 7, 2019
Judgment: March 25, 2019
Docket: Edmonton Appeal 1803-0050-AC

Proceedings: reversing *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), [2018] 5 W.W.R. 565, 2018 CarswellAlta 305, 2018 ABQB 124, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55, Robert A. Graesser J. (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., A.M. Badami, for Appellants
A. Turcza-Karhut, C.N. Androschuk, for Respondent

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Municipal law --- Tax collection and enforcement — Practice and procedure — Parties

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receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

19 Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

20 The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

21 There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

22 We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

23 The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

> The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

24 With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

25 This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

26 Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's

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TAB 14

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Third Eye Capital v. B.E.S.T. Active 365 Fund | 2020 ABCA 160, 2020 CarswellAlta 750, [2020] A.W.L.D. 1754, [2020] A.W.L.D. 1798, 318 A.C.W.S. (3d) 180, [2020] A.W.L.D. 1807, [2020] A.W.L.D. 1819, [2020] A.W.L.D. 1893, 78 C.B.R. (6th) 241 | (Alta. C.A., Apr 27, 2020)

2020 ABQB 182
Alberta Court of Queen's Bench

Accel Canada Holdings Limited (Re)

2020 CarswellAlta 475, 2020 ABQB 182, [2020] A.W.L.D. 1659, [2020] A.W.L.D. 1710, [2020] A.W.L.D. 1741, 13 R.P.R. (6th) 24, 317 A.C.W.S. (3d) 695, 78 C.B.R. (6th) 207

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

K.M. Horner J.

Heard: February 20-21, March 6, 2020
Judgment: March 6, 2020
Written reasons: March 11, 2020
Docket: Calgary 1901-16581

Proceedings: leave to appeal allowed *Third Eye Capital v. B.E.S.T. Active 365 Fund* (2020), 2020 ABCA 160, 2020 CarswellAlta 750, Elizabeth Hughes J.A. (Alta. C.A.)

Counsel: William Roberts, Jonathan Selnes, Kyle Gardiner, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Alexis Teasdale, Kevin Zych, for Third Eye Capital Corporation
David Legeyt, for ARC Resources Ltd.
Jeffrey Oliver, Danielle Marechal, for B.E.S.T. Active 365 Funds LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership

Subject: Contracts; Corporate and Commercial; Insolvency; Natural Resources; Property
Headnote
Real property --- Interests in real property — Miscellaneous
ARC Ltd. sold certain assets to H Ltd. with H Ltd. not paying entire purchase price but granting ARC Ltd. gross overriding royalties (GOR) agreement with royalty payments by H Ltd. triggered by certain events — H Ltd. financed portion of purchase agreement that ARC Ltd. received with monies from T Corp. and loan was secured by way of first ranking security — T Corp. was largest secured lender of H Ltd. and made significant loans to ARC Ltd. beginning in 2017, and loans were predominantly used by H Ltd. to pursue acquisitions — In 2018 and 2019, T Capital entered into royalty purchase agreements and GOR agreements with H Ltd. and E Ltd. (both parts of A Ltd.) — If stated amount was not paid by respective A Ltd. entity by set date, then T Capital GORs were payable by respective A Ltd. entity until payout had been paid pursuant to royalty payments due under GOR agreements — Monitor applied for and was granted Order Approving Sale and Investment Solicitation Process over all or nearly all of assets of A Ltd. in December 2019 — Monitor and A Ltd. brought applications to accelerate determination of issues to assist potential purchasers and/or investors with certainty surrounding nature of assets offered for sale and jurisdiction to vest off interests — Applications granted — It was determined that T Corp. GOR's were security interests and not interests in land — Certain aspects of provisions weighed toward ARC Ltd. GOR creating interest in land, such as provisions that referred to creation

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purchase price for GOR#1 was $3M and for GOR#2 was $5M. Both sets of agreements were structured in an identical manner. Should either Energy or Holdings repurchase the Royalty by a set date for a stated amount, November 1, 2018 and $3.5M for GOR#1 or December 1, 2018 and $6M for GOR#2, the GOR would terminate. The stated amounts were not paid by either Holdings or Energy on the set dates contracted for.

10 If the stated amount was not paid by the respective Accel entity by the set date, then the BEST GORs were payable by the respective Accel entity until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements. In the case of GOR#1, the Payout was the greater of $4M or an amount equal to $3M and interest at a rate of 59.4% per annum calculated and compounded monthly. In the case of GOR#2, the Payout was the greater of $6M or an amount equal to $5M and interest at a rate of 59.4% per annum calculated and compounded monthly. The term of each BEST GOR continues until the date that BEST has received sufficient royalty payments to reach Payout.

11 The Monitor applied for and was granted an Order Approving Sale and Investment Solicitation Process ("SISP") over all or nearly all of the Assets of Accel on December 13, 2019. Phase one of the SISP has ended. The Monitor and Accel have therefore requested that this court accelerate its determination of the issues in these Applications in order to assist it and the potential purchasers and/or investors with certainty surrounding the nature of the assets offered for sale and this court's jurisdiction to vest off interests.

12 I will address each issue in turn and will deal with additional facts as they are relevant to the discussion and determination.

1. Interest in land or contract for payment

13 The current leading decision in this area in Canada remains the Supreme Court decision in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 (S.C.C.). That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253 (Ont. C.A.) [*Dianor 2018*]. The *Dianor 2018* decision was itself the subject of discussion and application by this court in *Manitok Energy Inc (Re)*, 2018 ABQB 488 (Alta. Q.B.).

14 These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:

1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2. the interest, out of which the royalty is carved, is itself an interest in land.

15 These facts do not engage part 2 of the test. All parties are agreed that Accel's interests underlying the royalties in issue are themselves interests in land.

16 Part 1 of the test, however, requires that the court determine the parties' intention in making the contracts that are outlined above. Our court of Appeal in *Bank of Montreal v. Dynex Petroleum Ltd.*, 1999 ABCA 363 (S.C.C.) at para 73, aff'd 2002 SCC 7 (S.C.C.), quoted with approval in *Dianor 2018* at para 63, set out the approach of a court in determining the parties' intention in these circumstances which is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

17 When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: *Sattva* at para 57.

18 It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": *Sattva* at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when

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2. Para 2.2 of the ARC GOR Agreement uses the following language that makes it clear the parties intended the ARC GOR to be an interest in land:

> " . . . Shall constitute, and is to be construed as, an interest in land .....All terms, covenants, provisions and conditions of this Agreement shall run with and be binding upon the Royalty Lands and Title Documents, and the estates affected thereby for the duration of this Agreement.";

3. Para 2.3(c) of the GOR appoints Holdings as the agent and trustee of ARC with respect to proceeds;

4. Para 2.3(g)(i — iii) provide that ARC's prior written consent is to be obtained by Holdings prior to Holdings entering into a pooling unitization or other combination. Further para 3.1 provides that Holdings may not convert a well covered by the ARC GOR to another type of well. Para 3.4(c) requires Holdings to obtain ARC's consent to the surrender of title documents for the abandonment of a well covered by the ARC GOR;

5. Para 2.5(a) and para 4 provides ARC, upon the default of Holdings, with the right to take in kind its GOR, which ARC submits illustrates a strong badge of ownership as it means ARC may exert the right to take possession of its property;

6. Para 6.2 restricts Holdings from proceeding with certain types of transactions without ARC's consent; and

7. None of the language in the APA or the ARC GOR creates or talks of a security interest, charge or mortgage.

50 Certain aspects of these provisions weigh toward the ARC GOR creating an interest in land, such as provisions that: refer to the creation of an interest in land; provide ARC with a right to take in kind the Petroleum Substances comprising the GOR, including upon default of payment by Accel; create the potential for an interest in perpetuity; and prevent Accel from proceeding with certain transactions that would affect the ARC GOR, such as particular assignments of interest.

51 However, other aspects of the APA and ARC GOR point toward the ARC GOR being a security interest, including that the ARC GOR: predominantly ensures payment of the PP under the APA, plus interest; terminates upon full payment of the DO; does not exist in perpetuity unless Accel fails to meet its payment obligations, in which case only then additional funds would be paid to ARC by virtue of a continuing royalty interest; and is provided to ARC in exchange for payment of the APA's DO, and not in exchange for consideration from ARC beyond permitting Accel more time to meet its payment obligations.

52 Accel points out that various cases in Alberta that have held that a significant feature of a security interest as opposed to an absolute transfer of an interest in land is whether the debtor or grantor retains a right of redemption: *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963 (S.C.C.), *Sharma v. 643454 Alberta Ltd.*, 2006 ABQB 119 (Alta. Q.B.) and *Equitable Trust Co. v. Lougheed Block Inc.*, 2014 ABCA 427 (Alta. C.A.), rev'd on other grounds 2016 SCC 19 (S.C.C.).

53 As Accel points out, the APA provides that the ARC GOR can be redeemed prior to January 2, 2020 as well as at any time after that to the expiration of the Notice of the GEA.

54 Additionally, evidence of the surrounding circumstances at the time of the agreements also indicates that the ARC GOR was intended to be a security interest and not an interest in land.

55 ARC was aware at all times that TEC was providing the financing to Holdings for the acquisition of the Redwater Assets in the APA. At the request of Holdings' counsel and 2 days prior to the closing of the scheduled APA the parties, TEC, ARC and Holdings entered into the Acknowledgment dated August 15, 2018.

56 While it suffers from some ambiguous wording, reading the Acknowledgment in conjunction with correspondence between counsel during the drafting of and the drafts of the document themselves as well as considering the surrounding circumstances and giving the document commercial sense, it is clear that it subordinates the priority of whatever security interests ARC has that secure the payment by Holdings of the DPP and interest accruing due thereunder to the payment by Holdings to TEC of whatever security interests TEC has.

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85 No monies have been paid by Energy or Holdings to BEST under either transaction.

86 As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.

87 BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

88 However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

89 Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

90 With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

91 The BEST GORs are therefore determined to be security interests and not interests in land.

92 BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

93 As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 (Ont. C.A.).

94 Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

95 The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

96 TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST

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TAB 15

Most Negative Treatment: Check subsequent history and related treatments.

2002 SCC 7, 2002 CSC 7
Supreme Court of Canada

Bank of Montreal v. Dynex Petroleum Ltd.

2002 CarswellAlta 54, 2002 CarswellAlta 55, 2002 SCC 7, 2002 CSC 7, [2001] S.C.J. No. 70, [2002] 1 S.C.R. 146, [2002] A.W.L.D. 52, 111 A.C.W.S. (3d) 156, 19 B.L.R. (3d) 159, 1 R.P.R. (4th) 1, 208 D.L.R. (4th) 155, 266 W.A.C. 1, 281 N.R. 113, 299 A.R. 1, 30 C.B.R. (4th) 168, J.E. 2002-230, REJB 2002-27593

Bank of Montreal, Appellant v. Enchant Resources Ltd. and D. S. Willness, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel JJ.

Heard: November 9, 2001
Judgment: January 24, 2002
Docket: 27766

Proceedings: additional reasons to 2001 CarswellAlta 1461 (S.C.C.); affirming (1999), 182 D.L.R. (4th) 640, 74 Alta. L.R. (3d) 219, [2000] 2 W.W.R. 693, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, (*sub nom.* Bank of Montreal v. Enchant Resources Ltd.) 255 A.R. 116, (*sub nom.* Bank of Montreal v. Enchant Resources Ltd.) 220 W.A.C. 116 (Alta. C.A.); reversing (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291 (Alta. Q.B.); and reversing (1997), 50 Alta. L.R. (3d) 44, [1997] 6 W.W.R. 104, 31 B.L.R. (2d) 44, 46 C.B.R. (3d) 36, 145 D.L.R. (4th) 499, 202 A.R. 331, 12 P.P.S.A.C. (2d) 183 (Alta. Q.B.)

Counsel: *Richard B. Jones*, for Appellant
James C. Crawford, Q.C., *Frank R. Dearlove*, *Scott H.D. Bower*, for Respondents

Subject: Natural Resources; Property; Corporate and Commercial; Insolvency

Headnote

Oil and gas --- Exploration and operating agreements — Royalty agreement — General

Overriding royalty interest could, subject to intention of parties, be interest in land.

Oil and gas --- Oil and gas leases — Miscellaneous issues

Overriding royalty interest could, subject to intention of parties, be interest in land.

Pétrole et gaz naturel --- Contrats d'exploration et d'exploitation — Contrat portant sur les redevances — En général

Droit de redevance dérogatoire pouvait constituer un intérêt foncier, à condition que telle ait été l'intention des parties.

Pétrole et gaz naturel --- Concessions pétrolières et gazières — Questions diverses

Droit de redevance dérogatoire pouvait constituer un intérêt foncier, à condition que telle ait été l'intention des parties.

D Ltd. and its predecessor companies granted overriding royalty and net profit interests, respecting D Ltd.'s oil and gas leases, to E Ltd. and W. The bank was D Ltd.'s secured creditor. D Ltd. was petitioned into bankruptcy. The trustee wanted to sell all the oil and gas properties of D Ltd. One issue was whether any sale would be subject to overriding royalties arising out of the working interest held by D Ltd. The bank brought an application for determination that an overriding royalty was incapable of being an interest in land.

The chambers judge granted the application. He found that, as a matter of law, a lessee of an oil and gas lease obtained from a lessor could not pass an interest in land to a third party.

E Ltd. and W's appeal was allowed.

The Court of Appeal concluded that overriding royalty interests could constitute interests in land if intended by the parties.

The bank appealed.

Held: The appeal was dismissed.

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(3) to resolve an inconsistency.

In addition, the change should be incremental, and its consequences must be capable of assessment.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

22 Virtue J. in *Vandergrift* , *supra*, at p. 26 succinctly stated:

> ... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> > 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
> >
> > 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

23 The appeal is dismissed with costs to the respondents.

***Major J.*:**

I. Introduction

1 Le présent pourvoi vise une demande que la Banque de Montréal, appelante, a présentée à un juge de la Cour du Banc de la Reine de l'Alberta siégeant en chambre afin qu'il statue, en droit, qu'une redevance dérogatoire ne peut constituer un intérêt foncier. Plusieurs défendeurs se sont opposés à la demande. Au nombre des opposants figuraient les intimés devant notre Cour, Enchant Resources Ltd. (« Enchant ») et D.S. Willness (« Willness »), titulaires de redevances dérogatoires qui prétendaient détenir un intérêt foncier. Le juge a fait droit à la demande de la Banque. La Cour d'appel de l'Alberta a infirmé cette décision, statuant qu'une redevance dérogatoire peut être un intérêt foncier. Notre Cour a rejeté le pourvoi, avec motifs à suivre.

II. Les faits

2 Les pièces produites et les plaidoiries des avocats révèlent que les arrangements en matière de redevances sont de pratique courante en Alberta dans le secteur de l'exploration et de la production pétrolières et gazières. D'ordinaire, le propriétaire des minéraux *in situ* donne à bail à un producteur potentiel le droit d'extraire ces minéraux. Pour désigner ce droit, on utilise l'expression « participation directe ». Une redevance est une part ou participation fractionnaire non grevée dans la production brute issue de cette participation directe. La redevance du bailleur est une redevance accordée au bailleur initial (ou qu'il se réserve). Une redevance dérogatoire ou redevance dérogatoire brute est une redevance accordée normalement par le titulaire d'une participation directe à un tiers en échange d'une contrepartie qui peut comprendre notamment une somme d'argent ou des services (par exemple, le forage ou les études géologiques). G. J. Davies, « The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev.* 232, p. 233. Les mêmes droits et obligations se rattachent aux deux types de redevance. Seul les différencie le fait que la redevance n'est pas accordée initialement à la même personne.

3 La Banque de Montréal, appelante, était un créancier garanti de Dynex Petroleum Ltd. (« Dynex »), société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de Dynex. La question se posait donc de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par Dynex. De plus, l'appelante se voyait opposer plusieurs réclamations concurrentes dont ne subsistaient plus, au moment du présent pourvoi, que les redevances dérogatoires des intimés Enchant et Willness, qui revendiquaient un rang prioritaire en

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TAB 16

2018 ABQB 488
Alberta Court of Queen's Bench

Manitok Energy Inc (Re)

2018 CarswellAlta 1235, 2018 ABQB 488, [2018] A.W.L.D. 2770,
293 A.C.W.S. (3d) 858, 62 C.B.R. (6th) 109, 71 Alta. L.R. (6th) 357

In the Matter of the Bankruptcy and Insolvency of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Freehold Royalties Partnership (Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Receiver and Manager of Manitok Energy Inc., Raimount Energy Corp. and Corinthian Oil Corp. (Respondents)

K.M. Horner J.

Heard: May 4, 2018
Judgment: June 22, 2018
Docket: Calgary B201-332583, B201-332610, B201-335351

Counsel: Ryan Zahara, Chris Nyberg, for Applicant
Howard Gorman, D. Aaron Stephenson, for Receiver
David M. Price, for Stream Asset Financial Manitok LP
Sean F. Collins, for National Bank of Canada

Subject: Contracts; Insolvency; Natural Resources

Headnote

Natural resources --- Oil and gas — Exploration and operating agreements — Royalty agreement — Interpretation

In June 2015, applicant entered acquisition and royalty agreements with debtor pursuant to which it paid $25 million for "producing royalty" from certain oil and gas properties — Applicant, debtor and bank subsequently entered agreement in which bank confirmed it did not have security interest in royalty — Debtor paid royalty in cash until end of August 2017 when it gave notice applicant should take royalty in kind — Applicant did so until receiver was appointed in February 2018 — Applicant brought application for declaration royalty was interest in land, was its property and that it was entitled to take royalty in kind retroactive to March 2018 — Application was opposed by receiver and by beneficial owner of certain facilities related to lands impacted by royalty — Application granted — While royalty was in respect of specific quantity of production per day, not of share of minerals in situ or of production from specific area of land, acquisition and royalty agreements both referred to royalty as interest in land — That was clearly intention of applicant and debtor — Absence of right of entry and limitations on assignment did not defeat intention — There was no reason royalty should be precluded from attaching to all subject lands.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Bank of Montreal v. Dynex Petroleum Ltd. (2002), 2002 SCC 7, 2002 CarswellAlta 54, 2002 CarswellAlta 55, 19 B.L.R. (3d) 159, 208 D.L.R. (4th) 155, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 281 N.R. 113, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 299 A.R. 1, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 266 W.A.C. 1, [2002] 1 S.C.R. 146, 2002 CSC 7 (S.C.C.) — followed

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12 Article 4 of the Royalty Agreement provides that Freehold is authorized to enter the Royalty Lands to remedy any default in Manitok's compliance with the Committed Capital Program, and would then entitle itself to Manitok's "working interest share of production of Oil Volumes from the Royalty Lands until the proceeds from the sale of that production equals three hundred percent (300%) of all amounts expended by Freehold in the conduct of such operations.

Analysis

13 There are no facts in dispute, and the parties agree that the test for determining whether a royalty is an interest in land was set out by Major J. in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7 (S.C.C.), at para.22, citing the decision of Virtue J. in *Moysa v. Alberta (Labour Relations Board)* (1989), 67 Alta. L.R. (2d) 193 (S.C.C.):

> Virtue J. in *Vandergrift*, *supra*, at p. 26, succinctly stated:
>
> > . . . it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
> >
> > > 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
> > >
> > > 2) the interest, out of which the royalty is carved, is itself an interest in land.

14 The Supreme Court in *Dynex* settled the question of whether a royalty interest *can be* an interest in land. The Respondents argue that, notwithstanding some clear contractual language to the contrary, the Producing Royalty is not an interest in land because a number of the essential components of an interest in land do not arise out of the Royalty Agreement. Specifically, they contend that the Producing Royalty is not an interest in land because:

> (a) the Producing Royalty is in respect of produced substances, regardless of whether Freehold takes the royalty in cash or in kind;
>
> (b) the Producing Royalty represents a fixed quantity of production per day, not a share of in situ minerals or production;
>
> (c) the Producing Royalty continually decreases after 8 years, eventually becoming a negligible amount;
>
> (d) the Producing Royalty is not tied to any specific area of land;
>
> (e) the obligations respecting the Producing Royalty cannot be imposed upon Manitok's assignee by Freehold in the event of a disposition of the lands relating to the Producing Royalty; and
>
> (f) Freehold has no right of entry into the lands other than upon a default by Manitok in performing certain short-term capital commitment covenants.

15 Having regard to these arguments, it is helpful to consider both the approach to the interpretation of royalty agreements described in *Dynex*, and the nature of the royalty agreements at issue in that case.

16 In *Dynex*, both the Court of Appeal and the Supreme Court of Canada made it clear that practicalities and industry custom mandate a flexible approach to the application of some common law concepts, in particular the concept of an interest in land, to the royalty agreements that have developed in the oil and gas industry in Alberta. The Court of Appeal cited with approval the decision of Hunt J., as she then was, in *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 8 Alta. L.R. (3d) 225 (Alta. Q.B.) . At para.50, Hunt J. wrote:

> . . . [T]oo heavy a reliance upon traditional legal concepts, crafted for another time and other circumstances, can prove unhelpful in resolving contemporary problems. The law must be shaped and adapted to meet modern challenges, such

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TAB 17

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Séquestre de Media5 Corporation | 2020 QCCA 943, 2020 CarswellQue 7318, EYB 2020-356086 | (C.A. Que, Jul 20, 2020)

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

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

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days

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ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

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TAB 18

2009 CarswellOnt 4582
Ontario Superior Court of Justice

St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.

2009 CarswellOnt 4582, [2009] O.J. No. 3266, 179 A.C.W.S. (3d) 826

St. Andrew Goldfields Ltd. v. Newmont Canada Limited, Barrick Gold Corporation, Royal Gold, Inc., and RGLD Gold Canada, Inc.

L.B. Roberts J.

Heard: January 30, 2009; February 2-5,11-12, 2009
Judgment: July 23, 2009
Docket: CV-08365533

Counsel: Peter E.J. Wells for Applicant, St. Andrew Goldfields Ltd.
Jessica Kimmel, Daniel Cappe for Respondent, Newmont Canada Limited
Kent E. Thomson, Luis Sarabia, Davit D. Akman, Derek Ricci for Respondent, Barrick Gold Corporation
David I.W. Hamer, Junior Sirivar for Respondents, Royal Gold, Inc., RGLD Gold Canada, Inc.

Subject: Natural Resources; Property; Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Natural resources --- Mines and minerals — Ownership and acquisition of mineral rights — Miscellaneous

Royalty agreement — N Ltd. entered into net smelter return royalty agreement (royalty agreement) with B Corp., which required N Ltd. to pay it or its assigns royalties on net smelter returns for gold, silver or other minerals produced from mine — A Ltd. purchased mine and assumed certain obligations under royalty agreement — Royalty agreement stated that royalty was sliding scale royalty calculated using two-step process, but N Ltd. misread royalty provisions as being flat rate royalty of .013 per cent and it claimed that royalty calculation and currency were ambiguous — A Ltd. brought application seeking declaration relief as result of issues which arose about interpretation of royalty agreement — Application granted — Royalty agreement was clear and unambiguous that N Ltd. alone was responsible under agreement for payment of royalties on net smelter returns for gold and other minerals, and that A Ltd. was required to indemnify N Ltd. up to flat rate of .013 per cent of net smelter returns — Royalty calculation and currency were not ambiguous, B Ltd. was not responsible for N Ltd.'s unilateral error, and no basis existed for relieving N Ltd. of its obligations to B Ltd. or its assigns under royalty agreement — Assignment provisions in royalty agreement were also clear and unambiguous, N Ltd. did not comply with them, and it remained directly liable for payment for royalties — Royalty agreement was not attached to its mine purchase agreement and A Ltd. understood that royalty rate was flat rate of .013 per cent — Royalty agreement did not create interest in land but contractual right to payment, A Ltd. was not directly liable to B Corp. for obligations under royalty agreement, and N Ltd. was solely liable to B Corp. for royalty — A Ltd.'s claim against N Ltd. was not barred by contractual one-year limitation period contained in mine purchase agreement since agreement was dated September 18, 2006 and under s. 22 of Limitations Act, 2002, two-year limitation period applied.

Natural resources --- Mines and minerals — Practice and procedure — Time requirements

Limitation period — N Ltd. entered into net smelter return royalty agreement (royalty agreement) with B Corp. which required N Ltd. to pay it or its assigns royalties on net smelter returns for gold, silver or other minerals produced from mine — A Ltd. purchased mine and assumed certain obligations under royalty agreement — A Ltd. brought application and issue arose about whether its claim against N Ltd. was barred by contractual one-year limitation period — Application granted — A Ltd.'s claim against N Ltd. was not barred by contractual one-year limitation period contained in mine purchase agreement since agreement was dated September 18, 2006 and under s. 22 of Limitations Act, 2002, two-year limitation period applied — Even if contractual period was valid, discoverability principle applied to any contractual limitation period under purchase agreement so that time did not begin to run until A Ltd. discovered facts which gave rise to its claim.

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St. Andrew assumed Holloway's obligation to pay a royalty for gold, silver and other minerals at a flat rate of .013% of net smelter returns.

vi.) Should St. Andrew be directly liable for the royalty obligations to Barrick or its assigns under the Barrick royalty agreement because the royalty obligations run with the land transferred to St. Andrew or because St. Andrew agreed to assume the obligations?

96 Newmont maintains that St. Andrew is also directly responsible to Barrick or its assigns because the obligations arising under the Barrick royalty agreement are an interest in the land transferred to St. Andrew; and that, as a result, the failure of Newmont to obtain Barrick's consent to the assumption agreement does not affect St. Andrew's liability to pay royalties under the Barrick royalty agreement.

97 Royal Gold argues that it is unnecessary for me to decide this issue because, for practical purposes, Royal Gold would likely look only to Newmont to pay the royalty under the Barrick royalty agreement. While that may be so, it is necessary for me to determine whether, as between Newmont and St. Andrew, St. Andrew bears the responsibility for payment of any royalty under the Barrick royalty agreement.

98 Royalty interests can be interests in land if the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the substances recovered from the land, and the interest, out of which the royalty is carved, is itself an interest in land. The intentions of the parties, judged by the language creating the royalty, determine whether the parties intended to create an interest in land or to create contractual rights only. (*Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146 (S.C.C.), at paras. 12, 14 and 22.)

99 Turning then to the language of the Barrick royalty agreement, Newmont "*covenants and agrees...to pay*...a net smelter return royalty...with respect to all valuable minerals *produced* from mining rights and surface leases known as the Holt-McDermott mining claims and leases" (my emphasis added).

100 While I agree with Newmont that there is no magical "incantation" that must be used to create an interest in land, it is trite to say that language used in an agreement is intended to have and does have a certain meaning. As all the witnesses at this hearing acknowledged, each royalty agreement is different. It is therefore necessary to examine the specific wording used by the parties to determine the meaning that they ascribed to the royalty in this case and the rights that they intended to create.

101 The use of the words "covenants and agrees to pay" and "produced" in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.

102 The case law that the parties have submitted makes a valid distinction between the "granting" of royalties attached to or "in" the land or the minerals themselves, thus creating an interest in the land, and the payment of royalties attached to the minerals or revenues "produced" or "removed" from the land, resulting in the creation of contractual rights to the payment of a share of the revenue from the minerals after they have been extracted: see, for example, *Bensette v. Reece*, [1973] 2 W.W.R. 497 (Sask. C.A.), at p. 500; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Alta. Q.B.), at pp. 26 to 28; *Guaranty Trust Co. of Canada v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Alta. Q.B.), at pp. 216 to 222 and 224; *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.* (1963), 45 W.W.R. 26 (S.C.C.), at pp. 31 to 33; and *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, [2008] N.B.J. No. 360 (N.B. Q.B.), at paras. 34 and 40.

103 Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Ltd.*, *supra*, at pp. 28 to 29; and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, *supra*, at pp. 32 to 33.

104 Under the Barrick royalty agreement, the royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out and, as an express condition or limitation of the royalty, the royalty

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TAB 19

R.S.A. 2000, c. B-9, s. 295

s 295. Capacity to commence and maintain legal proceedings

Currency

295.Capacity to commence and maintain legal proceedings

295(1) An extra-provincial corporation while unregistered is not capable of commencing or maintaining any action or other proceeding in any court in Alberta in respect of any contract made in the course of carrying on business in Alberta while it was unregistered.

295(2) If an extra-provincial corporation was not registered at the time it commenced an action or proceeding referred to in subsection (1) but becomes registered afterward, the action or proceeding may be maintained as if it had been registered before the commencement of the action or proceeding.

Currency

Alberta Current to Gazette Vol. 116:12 (June 30, 2020)

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R.S.S. 1978, c. B-10, s. 275

s 275.

Currency

275.

275(1)Unregistered corporation incapable of maintaining actions

A corporation that is not registered under this Act is not capable of commencing or maintaining any action or other proceeding in a court in respect of a contract made in whole or in part in Saskatchewan in the course of, or in connection with, its business.

275(2)Burden of proof

In any action or proceeding, the onus shall be on the corporation to prove that it was registered.

275(3)Non-application to Canada corporation

No provision of this section applies to a Canada corporation.

275(4)Interpretation, "court"

In this section, **"court"** means any court.

Amendment History

1979, c. 6, s. 63

Currency

Saskatchewan Current to Gazette Vol. 116:29 (July 17, 2020)

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TAB 20

Counsel: M.J. McCabe, Q.C., S.N. Finlay, for Appellant, Northern Sunrise County
G.G. Plester, for Appellant, Municipal District of Opportunity No. 17 and Lamont County
P. Saini, C.R. Jones, for Respondent, The Bank of Nova Scotia
G. Bruni, K.D. Kashuba, for Respondent, Alvarez & Marsal Canada Inc

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Bankruptcy and insolvency --- Priorities of claims — Claims for municipal taxes and public utilities rates — Miscellaneous
Debtors were insolvent energy companies that were placed into receivership and subsequently declared bankrupt — Appellants were three of six municipalities through which pipeline operated by debtors passed — Municipalities sought to collect tax arrears on linear property of two insolvent energy companies, namely pipeline and related equipment — Municipalities appealed from part of Order for Advice and Directions and Distribution of Funds — Appeal dismissed — Difficulty with interpretation proposed by municipalities was that Municipal Government Act was comprehensive statute, and s. 348 must be read harmoniously with other sections of Act — Doing so led to conclusion that mechanisms associated with property tax assessment and collection distinguish between taxes related to land and those not related to land — Difficulties would arise if provision was construed otherwise due to ambiguity it would create: to what "land and any improvements to the land" would lien attach — There was no justification for attaching to parcel of land on which linear property was situated, and none for attaching to linear property itself unless operator and linear property owner happened to be same person, which was not necessarily case under legislative scheme.
Municipal law --- Tax collection and enforcement — Tax as debt

(2013), 2013 ABCA 409, 2013 CarswellAlta 2331, 566 A.R. 116, 597 W.A.C. 116, 69 Admin. L.R. (5th) 82, 99 Alta. L.R. (5th) 204 (Alta. C.A.) — referred to

(2012), 2012 BCCA 252, 2012 CarswellBC 1714, 90 C.B.R. (5th) 288, 12 C.L.R. (4th) 5, 350 D.L.R. (4th) 311, 324 B.C.A.C. 152, 551 W.A.C. 152 (B.C. C.A.) — considered