COURT FILE NUMBER	24-3356741
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ENDRUM ENERGY CORP.
DOCUMENT	**BRIEF OF LAW OF THE APPLICANT**

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Commercial List Chambers Application

Scheduled for the 17th day of September, 2026

Before the Honourable Justice Neilson

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicant, Endrum Energy Corp. (the "**Applicant**" or "**Endrum**"), in these proceedings under its Notice of Intention to Make a Proposal filed on April 7, 2026 (the "**NOI Proceedings**") pursuant to the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (the "**BIA**").

2. The Applicant seeks two orders. First, an order under section 50.4(9) of the BIA extending the Stay Period by nineteen (19) days, to October 7, 2026 (the "**Stay Extension Order**")[1] allowing Endrum time it needs to complete a viable proposal to its creditors. Second, an order extending the interim injunction and preservation order granted by Justice Harris on August 28, 2026 (the "**Injunction and Preservation Order**") restraining Jake Energy Inc., 2672682 Alberta Ltd., and Brad Peake (collectively, the "**Respondents**") from interfering with the 5-29 Well, the 6-34 Well, and

[1] The *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, (the “***BIA***”) section 50.4(9) **[TAB 1]**

the 2-11 Well (collectively, the "**Disputed Assets**") and putting in place a mechanism to preserve the revenues they generate (the "**Injunction Extension Order**"). The Injunction Extension Order would extend the injunction until the earliest of:

a. the date Endrum is deemed bankrupt;

b. the date the application to determine whether the Disputed Assets are subject to the procedure outlined in section 81 of the BIA is heard; or

c. the date an agreement is reached between Endrum and the Respondents.

3. The Stay Extension Order is necessary and appropriate. Endrum has continued to act in good faith and with due diligence, and its efforts since the Third Extension Order have advanced a viable path forward for its stakeholders. No creditor will be prejudiced by a short extension; by contrast, Endrum's bankruptcy would leave insufficient working capital to abandon, reclaim, and remediate its licensed wells, producing a materially worse outcome for creditors than continuation of the NOI Proceedings.

4. The Injunction Extension Order is also required. The Applicant and Respondents have not resolved ownership of the Disputed Assets. Extending the status quo is therefore necessary to prevent irreparable harm to Endrum, including interrupted supplier relationships, interference with its operations, exposure and a reduced ability to make a viable proposal to its creditors.

II. FACTS

A. Background

5. Endrum is a private oil and gas producer operating in central Alberta, with approximately 165 gas wells and 15 oil wells on a contiguous 35,000-acre land base, and full ownership of its field facilities and gas processing plant.[2]

6. Endrum's assets originate from a Share Purchase Agreement dated June 1, 2023 (the "**SPA**") among Brad Peake, Dean McCaffrey and Jeff Holmberg, as vendors of Westdrum Energy Ltd., and Great West Petroleum Inc., as purchaser.[3] The SPA was assigned to Endrum on January 29, 2024, and Endrum was added as "New Purchaser" by a Fourth Amendment dated January 30, 2024.[4] Brad Peake — later relevant to the ownership dispute below — was a vendor under the SPA.[5]

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[2] Fourth Affidavit of Norman Antonio Morales, sworn September 9, 2026 (the "**Fourth Morales Affidavit**") at para 10.
[3] Affidavit of Norman Antonio Morales, sworn July 27, 2026 (the "**Third Morales Affidavit**") at para 19, Exhibit C.
[4] Third Morales Affidavit at paras 21-22 and Exhibits D and E.
[5] Third Morales Affidavit at para 23.

7. Great West Petroleum Inc., the purchaser under the SPA, commissioned an independent reserve evaluation from Chapman Petroleum Engineering Ltd. ("**Chapman Engineering**"). That evaluation identified 15,808,317 Mcf of remaining recoverable gas reserves.[6] Based on production records from January 2023 to July 2026, Endrum has produced 5,745,702 Mcf, leaving approximately 10,062,298 Mcf — roughly 63.7% of total recoverable reserves — unproduced.[7]

8. Although the SPA does not specifically reference the Disputed Assets, Endrum acquired 100% of Westdrum's assets with no exclusions, which necessarily includes the Disputed Assets.[8] Consistent with this, Endrum holds the Alberta Energy Regulator ("**AER**") licence for the Disputed Assets, has paid the associated P&NG Lease payments since acquiring them in March 2024, and has produced and sold oil from them throughout.[9]

B. The NOI Proceedings

9. Endrum filed its NOI on April 7, 2026, and G. Chan & Associates Inc. was appointed Proposal Trustee.[10] This Court has thrice extended Endrum's proposal deadline, most recently to September 19, 2026.[11] Since the Third Extension Order, Endrum has worked diligently with counsel and the Proposal Trustee to formulate a viable proposal.[12]

C. The Disputed Assets and the Chain of Quitclaims

10. Since May 2026, the Respondents have asserted ownership of the Disputed Assets and repeatedly interfered with Endrum's operation of them,[13] until the Injunction and Preservation Order was granted.

11. That assertion rests on four quitclaims purporting to transfer the Disputed Assets from Endrum to Prestige Worldwide Services Inc. ("**Prestige**"), then to 2770860 Alberta Inc., a company controlled by Brett Fizzell ("**Fizzell Corp**"), and finally to 2672682 Alberta Ltd. ("**267**"). These quitclaims are collectively referred to as the "**Transfer Documents**":

    a. **First Quitclaim** (September 20, 2024): Endrum to Prestige, for no monetary consideration other than "the covenants herein contained." Stephen Hughes ("**Mr. Hughes**") signed for Endrum without the boards knowledge or authorization.[14]

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[6] Fourth Morales Affidavit at para 24 and Exhibit E.
[7] Fourth Morales Affidavit at para 25 and Exhibit F
[8] Third Morales Affidavit at para 24.
[9] Third Morales Affidavit at paras 25, 35, 57 and 58.
[10] Third Morales Affidavit at para 8.
[11] Fourth Morales Affidavit at para 11.
[12] Fourth Morales Affidavit at paras 15 and 21.
[13] Third Morales Affidavit at paras 61-70.
[14] Third Morales Affidavit at paras 26-27, Exhibit G.

b. **Second Quitclaim** (December 15, 2025): Prestige to Fizzell Corp, for $1.00. Brett Fizzell signed both sides, as Grantor for Prestige and Grantee for Fizzell Corp, which was incorporated only six days earlier.[15]

c. **Third Quitclaim** (February 1, 2026): Fizzell Corp to 267, purporting to transfer the 5-29 Well for $132,250.00. Mr. Hughes signed for Fizzell Corp. while simultaneously serving as a director and CEO of Endrum.[16]

d. **Fourth Quitclaim** (March 31, 2026): Fizzell Corp to 267, purporting to transfer 87% of the 6-34 Well and 100% of the 2-11 Well for $210,250.00.[17]

12. Only $342,500.00 ever allegedly changed hands, paid by 267 to Fizzell Corp, shortly before Endrum filed its NOI. Endrum received nothing, but remains responsible for the regulatory, environmental, reclamation, royalty and lease obligations attaching to the Disputed Assets.[18] The estimated abandonment and reclamation liability attributed to Endrum for the Disputed Assets is $503,622.50[19].

13. Since the application for the Injunction and Preservation Order was filed, additional information has emerged undermining the validity of the Transfer Documents.

14. Endrum's counsel served the primary agent for service for Prestige, Stephanie St. Louis, with the Injunction and Preservation Order application materials on or about July 31, 2026.[20] Stephanie St. Louis is separated from Brett Fizzell and the sole director and shareholder of Prestige.[21]

15. She advised that, before their separation in September 2024, Brett Fizzell used Prestige as a subcontractor while providing soil-testing services, but was never a director or officer of Prestige and never had authority to sign for it.[22]

16. Critically, Stephanie St. Louis advised that despite being Prestige's sole director and shareholder, she had no involvement in, or knowledge of, its alleged September 2024 purchase of the Disputed Assets as described in the First Quitclaim.[23]

17. Endrum's land records tell a different story from the Transfer Documents. They show the 5-29 Well is held 1% by Endrum and 99% by Fizzell Corp, based on an unsigned

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[15] Third Morales Affidavit at paras 29-30, Exhibits H and I.
[16] Third Morales Affidavit at paras 31-32, Exhibit K
[17] Third Morales Affidavit at para 33, Exhibit L.
[18] Third Morales Affidavit at para 35.
[19] Fourth Morales Affidavit at Exhibit D.
[20] Affidavit of Firyal Hamdan sworn August 4, 2026 (the "**Hamdan Affidavit**") at para 2.
[21] Hamdan Affidavit at paras 2-4, Exhibits A and B.
[22] Hamdan Affidavit at para 4, Exhibit B.
[23] Hamdan Affidavit at para 4, Exhibit B.

document dated December 1, 2025, titled “Fifth Quitclaim” (the “**Fifth Quitclaim**”).[24] The Fifth Quitclaim names Ralston Resources Inc.—not Fizzell Corp.—as the transferee and contemplates execution by Mr. Hughes as President on behalf of Endrum, but no one ever signed it.

18. Endrum's land consultant, Ms. Fournier, confirmed that the document was never executed, the underlying leases were never assigned, and it was intended to be dated April 10, 2026, with Fizzell Corp, not Ralston Resources Inc., as assignee. Mr. Hughes never explained why the agreement named Ralston Resources Inc. rather than the numbered company.[25]

19. The Fifth Quitclaim is difficult to reconcile with the First Quitclaim, undermining the entire chain of Transfer Documents. The First Quitclaim purports to have transferred Endrum's interest in the 5-29 Well to Prestige on September 20, 2024.[26] Yet just over a year later, on December 1, 2025, a document was prepared purporting to have Endrum, again through Mr. Hughes, transfer that same well to Ralston Resources Inc.[27]

20. Both transactions cannot be genuine: if Endrum had truly divested itself of the 5-29 Well to Prestige in 2024, it had no remaining interest to assign to Ralston Resources Inc. in December 2025; conversely, if Endrum still held the interest contemplated to be assigned to Ralston Resources Inc. in December 2025, the 2024 transfer to Prestige could not have been a genuine, completed transaction. This internal inconsistency, on the face of a document contemplating Mr. Hughes' signature on Endrum's behalf, casts doubt on the validity of the entire chain of Transfer Documents. The inconsistency is compounded by the fact that Ralston Resources Inc., the intended transferee, is a company of which Mr. Hughes is himself President and CEO — placing him on both sides of yet another purported transfer of Endrum's assets.[28]

21. The timing of the Fifth Quitclaim's true intended date is also significant. Ms. Fournier advised that the agreement was meant to be dated April 10, 2026 — a date that falls after Mr. Hughes' resignation as CEO of Endrum on March 25, 2026, and after Endrum filed its NOI on April 7, 2026.[29] By that date, Mr. Hughes held no office at Endrum entitling him to bind the company, and Endrum was already subject to the BIA provision prohibiting a non-ordinary course sale without court approval triggered by the NOI filing.[30]

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[24] Third Morales Affidavit at paras 37-39.
[25] Third Morales Affidavit at para 39.
[26] Third Morales Affidavit at para 26, Exhibit G.
[27] Third Morales Affidavit at para 38, Exhibit M.
[28] Third Morales Affidavit at para 38, Exhibit M; Supplemental Affidavit of Norman Morales sworn July 28, 2026 (the “**Supplemental Affidavit**”) at para 6, Exhibit A.
[29] Third Morales Affidavit at paras 8, 28 and 39, Exhibit N.
[30] BIA, s. 65.13 [**TAB 1**].

22. Endrum denies the validity of the Transfer Documents in their entirety. They are contradicted by multiple independent sources:

a. AER Records: Publicly available AER information shows Endrum as the 100% working interest holder in the 5-29 Well/ This is inconsistent with the Transfer Documents and the Fifth Quitclaim, which purport to transfer that interest away from Endrum. The same information shows Endrum as the 90% working interest holder in the 6-34 Well and the 88% working interest holder in the 2-11 Well.[31]

b. Financial and Production Accounting Records: Endrum's financial and production accounting records for the 6-34 Well show a 99% interest held by "2676282 Alberta Ltd." — an entity that does not appear in Endrum's land documents and does not exist on the Alberta corporate registry.[32] This is also inconsistent with the Transfer Documents, which purport to have assigned the 6-34 Well first to Prestige in 2024, then to Fizzell Corp. in 2025.

c. Electronic Transfer System (Crown Mineral Rights): The Government of Alberta's Electronic Transfer System, which publishes rights in Crown minerals, shows:

1. Endrum is the registered owner of 100% of Petroleum and Natural Gas Lease 0484010030, which is the lease in respect of the 6-34 Well;[33]

2. Endrum is the registered owner of an 88% interest in Petroleum and Natural Gas Lease 0490070099, which is the lease in respect of the 2-11 Well;[34] and

3. Fizzell Corp. is recorded as the beneficiary of a 99% interest in Petroleum and Natural Gas Lease 047707007, which is the lease in respect of the 5-29 Well, with Endrum holding a 1% interest. Critically, this record appears to have been updated on June 25, 2026 — after Endrum filed its NOI and became prohibited from transferring assets outside the ordinary course of business without court approval.[35]

D. Related-Party Concerns

23. The individuals and entities on both sides of the Transfer Documents raise questions about their validity.

[31] Fourth Morales Affidavit at para 58(b), Exhibit K.
[32] Third Morales Affidavit at paras 40-41, Exhibits N and O.
[33] Fourth Morales Affidavit at para 53 and Exhibit G.
[34] Fourth Morales Affidavit at para 54 and Exhibit H.
[35] Fourth Morales Affidavit at para 55 and Exhibit I.

a. **Brad Peake and Jake Co.**: 267 was incorporated on January 10, 2025; its directors are Brad Peake and Steven Oldale. Jake Energy Inc., incorporated in 2021, has overlapping directors including Brad Peake, and describes itself as 267's "financial operator" for the Disputed Assets. Brad Peake, the same individual who sold Westdrum's shares under the original SPA, thus sits as a director of both entities now claiming ownership of the assets he helped sell to Endrum's predecessor.[36]

b. **Stephen Hughes.** Mr. Hughes sits at the center of the chain of transactions challenged in this application, and his conduct, corporate affiliations and relationship with Brett Fizzell warrant particular attention.

    1. **Role at Endrum and in the chain of transactions.** Mr. Hughes was Endrum's Chief Operating Officer from January 31, 2024 to October 2025, and then its Chief Executive Officer until his resignation on March 25, 2026.[37] He signed the SPA as a director of Great West Petroleum Inc., the original purchaser under the SPA.[38] He then signed the First Quitclaim on Endrum's behalf — a transaction the board never authorized or knew of — and later signed the Third Quitclaim on behalf of Fizzell Corp. while he was simultaneously a director and CEO of Endrum.[39] He also produced the unsigned "Fifth Quitclaim," which contemplated his own signature on Endrum's behalf and named Ralston Resources Inc. as transferee of the 5-29 Well, though it was never executed by anyone.[40] Throughout his tenure, he had unfettered access to Endrum's corporate records and agreements, and was the only person with apparent knowledge of the arrangements described below.[41] Endrum's board was not informed of any of the Transfer Documents until Jake Co.'s counsel produced them on June 26, 2026, and did not learn of the payments to Brett Fizzell until after Mr. Hughes' departure.[42]

    2. **Connection to Ralston Resources Inc. and Endrum.** Mr. Hughes has served as President and CEO of Ralston Resources Inc. — the intended transferee under the unsigned Fifth Quitclaim — since January 30, 2024, the same period during which he held office at Endrum.[43] He is also CEO of Mast Energy Ltd., a shareholder of Endrum Holdings Corp.[44]

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[36] Third Morales Affidavit at paras 42-45, Exhibit P.
[37] Third Morales Affidavit at para 28.
[38] Third Morales Affidavit at para 20.
[39] Third Morales Affidavit at paras 31-32, Exhibit K.
[40] Third Morales Affidavit at paras 38-39, Exhibit M.
[41] Third Morales Affidavit at para 47.
[42] Third Morales Affidavit at para 47.
[43] Supplemental Affidavit at para 6, Exhibit A.
[44]Third Morales Affidavit at para 47.

3. **Relationship with Brett Fizzell.** While CEO of Endrum, Mr. Hughes approved and arranged direct payment of invoices totaling $69,055.53 to 2756520 Alberta Inc. ("**275**"), a company owned by Brett Fizzell, without board knowledge or a formal engagement agreement.[45] Those invoices are vague, unsupported by time records or work product, and Brett Fizzell has failed to substantiate them despite Endrum's counsel demanding documentation on May 28 and June 16, 2026.[46] Endrum's staff have no recollection of Mr. Fizzell performing any work for the company, and the invoices began in November 2025 — precisely when the Second and Third Quitclaims were being executed by Mr. Fizzell and Mr. Hughes.[47] Notably, Fizzell Corp.'s registered email address (bfizz@steepleltd.com) shares the same corporate domain — steepleltd.com — as the email address Mr. Hughes used when signing the Shareholder Agreement on behalf of Mast Energy Ltd. (sth@steepleltd.com).[48] As noted above, Prestige is Mr. Fizzell's ex-wife's corporation.[49] Taken together with the unauthorized quitclaims, the unexplained payments, and Mr. Hughes' role signing on behalf of Fizzell Corp. while a director of Endrum, this evidence gives rise to concerns that Mr. Hughes and Mr. Fizzell acted in concert to divert Endrum's assets for their own or related parties' benefit.

24. It is commercially illogical that Endrum would surrender 100% of its working interest in two wells while remaining the AER-licensed operator responsible for royalties, lease payments, abandonment and reclamation obligations in the sum of $503,622.50 and regulatory compliance, for no consideration to Endrum. If any of the Transfer Documents are ultimately found valid, Endrum does not intend to continue as licensee on that basis.[50]

F. Regulatory Concerns

25. Endrum remains the AER licence holder for all of the Disputed Assets, and no licence transfer has been applied for or approved.[51] A purported transfer of a 100% working interest without the licence holder's knowledge raises compliance concerns under section 16 of the *Oil and Gas Conservation Act,*[52] which prohibits holding a licence without a working interest in the well. Before the Injunction and Preservation Order was granted, the Respondents effectively shut-in the 5-29 Well, raising further concerns,

[45] Third Morales Affidavit at para 48.
[46] Third Morales Affidavit at para 48.
[47] Third Morales Affidavit at para 49.
[48] Third Morales Affidavit at para 54.
[49] Hamdan Affidavit at paras 2-4, Exhibit A and B.
[50] Third Morales Affidavit at para 56.
[51] Third Morales Affidavit at para 58.
[52] *Oil and Gas Conservation Act*, RSA 2000, c O-6, section 16 (the "**OGCA**") **[TAB 2]**

because a party holding only a working interest, and not the licensee, requires AER approval to shut in a well.[53]

G. Escalating Interference and Reputational Harm

26. On May 26, 2026, Sarge's Trucking hauled oil from the 5-29 Well to the Pine Cliff Facility; Brad Peake then filed an RCMP report characterizing the oil as stolen.[54] Endrum first learned of Jake Co.'s ownership claim through a related email in which Brad Peake asserted Jake Energy had acquired the three wells and warned of RCMP involvement.[55]

27. On June 15, 2026, Endrum's counsel sent Jake Co. a cease-and-desist letter demanding that it cease all activity respecting the Disputed Assets and produce supporting documentation.[56] On June 16, 2026, Jake Co. nonetheless arranged for Sarge's Trucking to haul a load from the 6-34 Well to Secure. The field ticket listed "2672682 Alberta Ltd." as generator instead of Endrum, the load was worth approximately $9,000.[57] Between June 20 and 23, 2026, the parties corresponded further, with Jake Co. asserting that it held executed documentation of a chain of title.[58]

28. On June 26, 2026, Lawson Lundell LLP, counsel for Jake Co., provided the Transfer Documents to Endrum's counsel for the first time. No member of Endrum's current board knew of the First Quitclaim or the subsequent chain before that date.[59]

29. On July 16, 2026, Endrum's personnel attended the 5-29 Well and found it shut in, with a padlock installed on the electrical panel, physically excluding Endrum from its own operations without its knowledge, consent, or any court order.[60]

30. The Respondents' interference jeopardized Endrum's relationships with its service providers to the point that Endrum reasonably feared it could no longer reliably process oil from any of its wells, not only the Disputed Assets.

31. Endrum's oil is hauled to, and processed for sale Secure Waste Infrastructure Corp. ("**Secure**"), or Pine Cliff Energy Ltd.'s MudSprings Oil Battery ("**Pine Cliff**").[61] On or around August 20, 2026, Pine Cliff stopped accepting Endrum's oil from any of its wells pending resolution of the ownership dispute.[62] Pine Cliff has not confirmed that it will

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[53] OGCA, section 108 **[TAB 2]** and Alberta Energy Regulator Directive 013 – Suspension Requirements for Wells **[TAB 3]**
[54] Third Morales Affidavit at para 62.
[55] Third Morales Affidavit at para 63, Exhibit T.
[56] Third Morales Affidavit at para 64, Exhibit U.
[57] Third Morales Affidavit at para 65, Exhibit V.
[58] Third Morales Affidavit at paras 66-67, Exhibits W and X.
[59] Third Morales Affidavit at para 68, Exhibit Y.
[60] Third Morales Affidavit at para 69, Exhibit Z.
[61] Affidavit of John McMahon, sworn August 21, 2026 (the "**McMahon Affidavit**") at para 4.
[62] The McMahon Affidavit at para 7.

resume accepting Endrum's oil and is awaiting the filed Injunction and Preservation Order before making this determination.[63]

32. On or around July 13, 2026, Secure indicated to Endrum and the Respondents that it wished to stay out of the ownership dispute, and that it might suspend services altogether.[64]

33. On or around July 30, 2026, Endrum's foreman communicated to Endrum that Secure would no longer accept oil from any of Endrum's wells.[65] Text messages evidencing the chain of communication were put into evidence via the Affidavit of John McMahon, sworn August 21, 2026 in these proceedings.

34. On September 4, 2026, following discussions with legal counsel for Secure, it became apparent that the information conveyed in this chain of communication was incorrect. Secure did not intend to refuse Endrum's oil outright, but rather intended to advise Endrum that it would be placed on prepayment status. Endrum has confirmed to Secure that it is agreeable to prepayment status. Due to the current situation with Pine Cliff, it is Endrum's intention to deliver all of its oil to Secure for processing.[66]

H. Endrum's Continued Operation of the Disputed Assets

35. Notwithstanding the Transfer Documents, Endrum has continued to operate and profit from the Disputed Assets throughout.[67] Records from Trafigura Canada Limited, the purchaser of Endrum's oil, confirm that Endrum was credited for oil from the 2-11 Well in nearly every month between March 2024 and March 2026, for total revenue of $170,253.00.[68]

36. Records from Pine Cliff confirm that Endrum received revenues from the 6-34 Well as recently as April 2026 and from the 5-29 Well as recently as May 2026.[69] Field trucking data corroborates continuous haulage from all three Disputed Assets to the Pine Cliff Facility and Secure as recently as July 2026.[70]

37. Tellingly, neither Fizzell Corp. nor Prestige ever wrote to Endrum demanding it cease production, requesting an accounting, or seeking compensation for revenues generated from assets they allegedly owned before May 2026.[71]

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[63] Fourth Morales Affidavit at para 76.
[64] Third Morales Affidavit at para 70, Exhibit AA.
[65] Fourth Affidavit at para 95.
[66] Fourth Morales Affidavit at paras 77 and 78.
[67] Third Morales Affidavit at para 25.
[68] Third Morales Affidavit at para 72-73, Exhibit CC.
[69] Fourth Morales Affidavit at para 86(a) and Exhibit O.
[70] Third Morales Affidavit at para 74, Exhibit DD; Fourth Morales Affidavit at para 86(f), Exhibit P.
[71] Third Morales Affidavit at para 75.

38. The Respondents' own evidence is inconsistent with the alleged chain of title set out in the Transfer Documents. The Affidavit of Steven Oldale, sworn August 6, 2026 (the "**Oldale Affidavit**"), includes evidence consistent with Endrum owning and operating the Disputed Assets as recently as March of 2026, long after the purported transfer to Prestige in 2024:

    a. At paragraphs 13 and 14, Mr. Oldale provided text messages showing Endrum's foreman learned of 267's acquisition of the 5-29 Well on or about February 25, 2026 and said: "Saves us driving down there for free." Endrum's continued attendance at the 5-29 Well in early 2026 is inconsistent with a 2024 sale to Prestige.

    b. At paragraphs 16 and 17, Mr. Oldale recounts an early-March 2026 conversation in which Mr. Hughes apologized for Endrum's "mistaken" shipment and sale of oil from the 5-29 Well in February 2026 and reimbursed Jake Energy on March 25, 2026, the day he resigned from Endrum. That conduct is inconsistent with a 2024 sale to Prestige.

    c. The log sheets for the 5-29 Well attached as Exhibit 5 to the Oldale Affidavit for March through July 2026 production are titled "West Drum Energy," Endrum's former corporate name. That evidence is inconsistent with a 2024 sale to Prestige.

    d. At paragraphs 25 and 27, Mr. Oldale states that, before April 1, 2026, Endrum had outsourced operation of the 6-34 Well and 2-11 Well to a contract operator. That outsourcing is inconsistent with Endrum having sold those assets to Prestige in 2024.

39. The Oldale Affidavit also states that after acquiring the Disputed Assets, 267 took steps to, among other things, engage a production accountant who updated Petrinex to reflect that 267 owns the Disputed Assets.[72]

40. Petrinex is a secure online system used to share data among industry partcipants, the AER, and the Alberta Ministry of Energy and Minerals.[73] It is the central source of volumetric data for wells, facilities, and pipelines.[74] The AER uses Petrinex to audit licensees, and operators, and to enforce the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (the "**OGCA**") and its regulations.

41. The operator of a facility listed in Petrinex is known as the "operator of record". Changing the operator of record in Petrinex is subject to a concurrence process, under which the

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[72] Oldale Affidavit at para 31(a).
[73] Alberta Energy Regulator Directive 007 – Volumetric and Infrastructure Requirements at 1 ("**Directive 007**") [**TAB 4**].
[74] Directive 007 at 1.1 [**TAB 4**].

current operator of record and new operator have to consent to the transfer in order for it to occur.[75]

42. Before the Respondents contacted Endrum's counsel to assert ownership, Endrum understood that it held the licences, owned a working interest, and was the operator of record for the Disputed Assets.[76]

43. On or about September 3, 2026, John McMahon, Endrum's president ("**Mr. McMahon**"), asked Pat Pearce ("**Ms. Pearce**"), Endrum's production accountant, to pull a history of licensee and operator information for the Disputed Assets on Petrinex. Ms. Pearce did not respond. When Mr. McMahon followed up on September 8, 2026, Ms. Pearce provided him with Petrinex login credentials rather than the operator history he had requested.[77]

44. Mr. McMahon then pulled the Petrinex records himself. Those records show that 267 became operator of record for all three Disputed Assets on April 1, 2026, while Endrum remained operator of record until March 31, 2026. Notably, neither Prestige (the purported September 2024 transferee) nor Fizzell Corp (the purported December 2025 transferee) was ever designated operator in Petrinex — only Endrum was designated until the unexplained transfer to 267. [78]

45. No one at Endrum directed this transfer. By April 1, 2026 — the effective date of the operatorship change — Mr. Hughes had already resigned, leaving Norman Morales and Jenny Zhan as Endrum's only officers. Neither instructed Ms. Pearce to change the operator of record in Petrinex, and the transfer was unknown to Endrum's president, Chief Operating Officer, or board of directors until early September 2026.[79]

46. Mr. McMahon also pulled the volumetric facility activity reports for July 2026 production (the "**July Volumetric Reports**"). Those reports list 267 as operator for all three Disputed Assets, with Ms. Pearce as the contact who submitted the volumetric data on 267's behalf.[80]

47. These records indicate that Ms. Pearce works as a production accountant for both Endrum and 267, with access to both parties' Petrinex accounts for submitting volumetric data and updating operator information.[81]

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[75] Directive 007 at 2.2.5 [**TAB 4**].
[76] Third Morales Affidavit at paras 9 and 24.
[77] Fourth Morales Affidavit at paras 59 and 60 and Exhibit N.
[78] Fourth Morales Affidavit at paras 61 to 63 and Exhibit J.
[79] Fourth Morales Affidavit at paras 72 to 74.
[80] Fourth Morales Affidavit at paras 65 and 66 and Exhibit M.
[81] Fourth Morales Affidavit at para 67.

I. The Respondent's Shut In of the 5-29 Well

48. A key basis for the Injunction and Preservation Order was the Respondents' installation of a padlock on the electrical panel of the 5-29 Well, which shut in the well and physically excluded Endrum from its own operations.

49. In the Oldale Affidavit at paragraphs 38 to 42, Mr. Oldale states that Mr. Peake determined on July 13, 2026 that the pumpjack at the 5-29 Well was not rotating, and on that basis padlocked the electrical box.

50. On or about September 2, 2026, after the Injunction and Preservation Order was granted, Endrum personnel attended the 5-29 Well to assess repair costs. Upon arrival, they discovered that the Respondents' padlock had been removed. After troubleshooting, Endrum's operator determined that the drive motor was not faulty as Mr. Peake had represented in July 2026; rather, the wellhead safety shutdown had tripped, preventing the motor from starting. Following basic troubleshooting and pressure checks, Endrum's operator restarted the drive motor, and the 5-29 Well returned to production.[82]

51. Mr. Peake's conduct does not withstand scrutiny. Based on Mr. Oldale's conversations with Mr. Peake, Mr. Peake conducted only a "preliminary visual inspection" on July 13, 2026, concluded there was "likely" an electrical motor problem, and immediately padlocked the electrical box, thereby shut in a producing well based on an unqualified guess that proved wrong. Mr. Peake is not a qualified electrician or motor technician, and his cursory assessment did not warrant the stopping production from the Well.[83]

52. Mr. Oldale's assertion that the padlock did not prevent the well from operating is difficult to reconcile with the Respondents' own inaction. From July 13 to August 28, 2026 — over six weeks before the Injunction Order — the Respondents took no steps to restart the well, diagnose the actual cause, or engage the electrician they claim they "intended" to hire. They professed to be "ready, willing, and able" yet did nothing. The 5-29 Well sat idle for over six weeks, causing a complete loss of oil production and consequent financial harm to Endrum and its creditors.[84]

53. This conduct reflects a broader pattern: the Respondents act first and justify later. Mr. Peake shut in a producing well without competent diagnosis or consultation with Endrum, and only after injunction proceedings began did the Respondents attempt to characterize his conduct as a prudent safety measure. Had they taken the basic troubleshooting steps Endrum's operator completed on September 2, 2026, the well

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[82] Fourth Morales Affidavit at para 79.
[83] Fourth Morales Affidavit at para 80.
[84] Fourth Morales Affidavit at para 81.

could have been back in production within days — not months — and the resulting losses avoided entirely.[85]

J. Sales-Gas Compressor Fire and Response

54. On July 3, 2026, a gas compressor at Endrum's Rumsey Facility (5-35-33-21W4) was destroyed by fire following a mechanical failure.[86] No personnel were injured. Endrum quickly extinguished the fire, secured the site, and located a backup compressor.[87]

55. Endrum pursued an insurance claim under its property-damage and "Extra Expense" coverage.[88] The adjuster disclosed a property-loss valuation range of $1.1 million to $2.2 million.[89] The Proof of Loss was submitted on August 27, 2026, with settlement expected in early October 2026.[90] Business-interruption coverage was added to Endrum's 2026–2027 policy, effective once the surplus compressor is operational.[91]

56. Endrum identified a surplus compressor near the Rumsey Facility suitable for relocation. PALM, Endrum's insurance broker agreed that Extra Expense coverage may fund the removal, transport, and installation.[92] As of August 29, 2026, PALM deposited $297,500 with SteegeXP Ltd. for this work, with vendors invoicing SteegeXP directly.[93] Installation is expected by approximately October 2, 2026, with driver-end maintenance (approximately $200,000, 7–10 days) to follow.[94] Startup is anticipated around October 15, 2026, at which point Endrum expects restoration to 100% of pre-fire sales-gas rates.[95]

57. Endrum acknowledges that it inadvertently failed to notify the Proposal Trustee immediately of the fire and resulting production change while managing the initial response. Going forward, Endrum has committed to notifying the Proposal Trustee of any material operational change within 24 hours and to providing bi-weekly operations summaries covering the insurance settlement and compressor installation progress.[96]

K. The Proposal Trustee's Support of the Injunction and Preservation Order Application

[85] Fourth Morales Affidavit at para 82.
[86] Fourth Morales Affidavit at para 31.
[87] Fourth Morales Affidavit at para 32.
[88] Fourth Morales Affidavit at para 33.
[89] Fourth Morales Affidavit at para 35.
[90] Fourth Morales Affidavit at paras 34 and 36.
[91] Fourth Morales Affidavit at para 37.
[92] Fourth Morales Affidavit at para 38.
[93] Fourth Morales Affidavit at para 39.
[94] Fourth Morales Affidavit at para 40.
[95] Fourth Morales Affidavit at para 41.
[96] Fourth Morales Affidavit at para 42.

58. The application for the Injunction and Preservation Order was heard over two days, on August 24, 2026 and August 28, 2026 (the "**Application**").

59. The Proposal Trustee was supportive of the Application. In its Third Report, the Proposal Trustee noted that:[97]

    a. It had concerns about the circumstances surrounding the Transfer Documents;

    b. the unilateral shut-in of the 5-29 Well exposed Endrum to potential regulatory liability;

    c. the actions of the Respondents had placed Endrum's commercial relationships at risk and was causing harm to the estate that would be detrimental to creditors should Endrum succeed in substantiating ownership; and

    d. the preservation relief was substantially neutral between the parties.

60. The Proposal Trustee filed a Material Adverse Change report after learning that Endrum's processors had decided to stop accepting oil from Endrum or Jake Energy pending resolution of the dispute,[98] and after discovering that Endrum's main gas compressor was destroyed in a fire, reducing its gas production to approximately 50% of prior levels.[99]

61. The Proposal Trustee was of the view that if the Injunction and Preservation Order was not granted, Endrum—as well as its creditors—would be prejudiced.[100]

62. At the Application, Endrum and the Proposal Trustee took the position that the Respondents' claim is, in substance, a claim to property in the possession of Endrum and as such should be determined through the summary procedure in section 81 of the BIA.[101]

63. The Injunction and Preservation Order was granted effective until September 19, 2026, being the current expiry of the stay of proceedings. The parties were directed to bring an application to determine whether the ownership dispute may properly be determined under section 81 of the BIA. That application is currently scheduled for November 12, 2026.

III. ISSUES

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97 Third Report of the Proposal Trustee dated July 31, 2026 at para 27.
98 Fourth Report of the Proposal Trustee dated August 27, 2026 (the "**Fourth Report**") at paras 27-28.
99 Fourth Report at paras 15-17.
100 Fourth Report at paras 42-43.
101 Fourth Report at para 44.

64. The issues before this Honourable Court are:

    a. Should the Applicant's Stay Period be extended to October 7, 2026?

    b. Should the Applicant's Injunction and Preservation Order be extended?

IV. LAW AND ARGUMENT

A. The Stay Period Should be Extended to October 7, 2026

65. The Stay Period expires on September 19, 2026. Without a Court-ordered extension, the Applicant must file a proposal by that date or face automatic bankruptcy.

66. Section 50.4(9) of the BIA authorizes the Court to extend the Stay Period where the applicant acts in good faith and with due diligence, and no creditor would be materially prejudiced. [102] The Applicant satisfies each criterion.

67. The Applicant has acted in good faith and with due diligence. Since the Third Extension Order, it has:

    a. responded promptly and effectively to a fire that destroyed its main gas compressor, secured insurance coverage and arranged for installation of a surplus replacement compressor expected to restore pre-fire gas production by mid-October 2026;[103]

    b. collaborated with the Proposal Trustee to manage cash flow projections, accounting for variables including creditor negotiation outcomes and gas price estimates;

    c. brought the application for the Injunction and Preservation Order to ensure that it can operate the Disputed Assets without interference from the Respondents and repair its relationships with vendors and suppliers;

    d. negotiated with its principal creditor;

    e. engaged with other creditors regarding pre-NOI claims;

    f. corresponded with all creditors regarding Endrum's proposal;

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[102] BIA section 50.4(9) **[TAB 1]**
[103] Fourth Morales Affidavit at paras 31 to 42.

g. operated the business with positive net cash flow; and

h. acted and continues to act in good faith and with due diligence to prepare a proposal.[104]

68. These actions demonstrate the Applicant's commitment to advancing the proposal in a timely and transparent manner consistent with the good faith and due diligence requirement under section 50.4(9)(a) of the BIA.

69. The requested 19-day extension to October 7, 2026 is necessary for the Applicant to formulate and present a viable proposal to its creditors.[105]

70. A 19-day extension to October 7, 2026 represents the maximum aggregate amount of time that the Company can request an extension of the stay of proceedings under section 50.4(9) of the BIA.[106] The Applicant is likely to be able to make a viable proposal to its creditors if the Stay Extension Order is granted.[107]

71. No creditor will be materially prejudiced by this extension. To the contrary, the stay protects value by enabling an orderly restructuring. The Applicant's assets have substantial remaining value: according to the Chapman Engineering evaluation, the assets contained 15,808,317 Mcf of remaining recoverable gas reserves at the date of assessment. Based on production records from January 2023 to July 2026, Endrum has produced 5,745,702 Mcf, leaving approximately 10,062,298 Mcf, roughly 63.7% of total recoverable reserves, unproduced and available for future exploitation. This reserve base supports Endrum's ability to generate future revenue and provides significant for creditors through a viable proposal. [108]

72. The alternative — a deemed assignment into bankruptcy — would be catastrophic for all stakeholders. According to Endrum's Liability Assessment Summary, exported from the AER's OneStop Platform, the Applicant's total estimated abandonment and reclamation liability is $13,642,571.[109] At current AECO Standard market prices, the cost of abandoning, reclaiming, and remediating Endrum's approximately 165 gas wells and 15 oil wells would consume the overwhelming majority, if not all, of the remaining economic value of its gas inventory. In a bankruptcy scenario, there would be insufficient working capital to discharge these obligations, and the Company's property would in all likelihood have to be surrendered to the Orphan Well Association — an outcome detrimental not only to creditors, who would receive little or no recovery after priority claims of the AER

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[104] Fourth Morales Affidavit at para 15.
[105] Fourth Morales Affidavit at para 17.
[106] BIA, s 50.4(9) [**Tab 1**].
[107] Fourth Morales Affidavit at para 18.
[108] Fourth Morales Affidavit at paras 24 to 26 and Exhibits E and F.
[109] Fourth Morales Affidavit at para 23 and Exhibit D.

and the Crown are satisfied, but also to the Alberta oil and gas industry at large, which funds the Orphan Well Association through a levy. [110]

73. By contrast, proposal proceedings allow Endrum to continue as a going concern, generate revenue, and present a proposal offering creditors a materially better return than a liquidation. Continued operations and a structured timeline, provide the only realistic prospect of a meaningful distribution.[111]

74. For these reasons, the Applicant respectfully submits that the requested extension to October 7, 2026 is reasonable and necessary and should be granted.

B. The Injunction Should Be Extended

75. Section 183 of the BIA grants this Honourable Court with broad legal and equitable discretion to enable it to exercise original, auxiliary and ancillary jurisdiction in proposal proceedings[112].

76. This section endows this Honourable Court with the authority to grant interlocutory relief, including an injunction and preservation order[113].

77. The test for obtaining an interlocutory injunction requires the applicant to satisfy three requirements established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*:[114]

    a. there must be a serious issue to be tried;

    b. the applicant will suffer irreparable harm if the injunction is not granted; and

    c. the balance of convenience favours the applicant's request for injunctive relief.

78. The test to extend a previously granted interlocutory injunction is no different.[115]

79. Each of these three grounds is addressed in turn below.

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[110] Fourth Morales Affidavit at para 27.
[111] Fourth Morales Affidavit at para 28.
[112] BIA, s 183(1)(d) **[Tab 1]**.
[113]*Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co. (Receiver of)*, 2005 NBAC 54, at para 13 [**TAB 5**].
[114] *RJR-MacDonald Inc. v. Canada (Attorney General)*1994 CarswellQue 120 ("**RJR-MacDonald**") **[TAB 6]** at para 53
[115] See e.g.: *McKinnon v. British Columbia Society for the Prevention of Cruelty to Animals,* 2020 BCSC 1933 at paras 2, 21 and 23 [**TAB 7**].

I. There is a Serious Issue to be Tried

80. The threshold under this branch is low: the Court need only conduct a preliminary assessment of the merits and be satisfied, for a prohibitory injunction, that the claim is not frivolous or vexatious.[116]

81. The Applicant's claims raise serious issues to be tried. The Respondents' claim to the Disputed Assets rests entirely on the Transfer Documents.

82. The Transfer Documents and the circumstances surrounding them raise serious concerns about their legitimacy and fail to establish that title to the Disputed Assets ever left Endrum:

    a. The sole director and shareholder of Prestige—the first purported transferee in the chain of transactions—is not aware of her company having purchased the Disputed Assets from Endrum in 2024, and has advised that Mr. Fizzell, the signatory of Prestige in the First Quitclaim, never had authority to bind Prestige;[117]

    b. Mr. Hughes executed the First Quitclaim without the knowledge or authorization of the Applicant's board of directors, for no monetary consideration, and in breach of the duties he owed the Applicant as its then COO.[118] He then signed the Third Quitclaim on behalf of Fizzell Corp., while simultaneously holding office as Endrum's CEO, placing him in a conflict of interest;[119]

    c. Mr. Hughes then apparently attempted to transfer ownership of the 5-29 Well from Endrum to either himself (via Ralston Resources Inc.),[120] or Brett Fizzell (via Fizzell Corp.) in and around the filing of the NOI through the unexecuted Fifth Quitclaim with an intended date of April 10, 2026,[121] two months <u>after</u> Fizzell Corp. allegedly transferred ownership of the 5-29 Well from Fizzell Corp. to 267 pursuant to the Third Quitclaim;

    d. The Transfer Documents do not match Endrum's land records. Those records show a 99% interest in the 5-29 Well held by Fizzell Corp, pursuant to the Fifth Quitclaim.[122] The Electronic Transfer System records likewise reflect Fizzell Corp. as the beneficiary of a 99% interest in of the P&NG Lease 04770700 for the 5-29 Well.[123] This raises serious concerns because:

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[116] RJR-MacDonald at paras 61-62 **[TAB 6]**
[117] Hamdan Affidavit at paras 2-4, Exhibit A and B.
[118]Third Morales Affidavit at paras 26-34, Exhibits G-L.
[119] Third Morales Affidavit at paras 31-32, Exhibit K; Fourth Morales Affidavit at para 49(a).
[120]Third Morales Affidavit at paras 37-38, Exhibit M; Supplemental Affidavit at para 6, Exhibit A.
[121] Third Morales Affidavit at paras 38-39, Exhibit M.
[122] Third Morales Affidavit at para 37.
[123] Fourth Morales Affidavit at para 55, Exhibit I.

1. no such executed quitclaim to Fizzell Corp. dated April 10, 2026 exists anywhere in Endrum's records or the Transfer Documents;[124]

2. April 10, 2026 post-dates Endrum's April 7, 2026 NOI filing, after which Endrum could not transfer assets other than in the ordinary course of business without breaching the BIA;[125] and

3. the chain is internally contradictory: if, as the First Quitclaim purports, Endrum (through Mr. Hughes) already transferred its full interest in the 5-29 Well to Prestige in September 2024, Endrum could not have held an interest capable of being transferred again to Ralston Resources Inc. in December 2025 or to Fizzell Corp. in April of 2026;[126]

e. The Transfer Documents do not match the mineral rights recorded in the Government of Alberta Electronic Transfer System. The Third Quitclaim and Fourth Quitclaim purported to transfer the Crown P&NG Leases associated with the Disputed Assets from Fizzell Corp. to 267.[127] Despite this, the Electronic Transfer System continues to reflect Endrum as the beneficiary of 100% interest in the P&NG Lease underlying the 6-34 Well, an 88% interest in the P&NG Lease underlying the 2-11 Well, and a 1% interest in the P&NG Lease underlying the 5-29 Well;[128]

f. The Transfer Documents do not match the licensee and operator information of the Disputed Assets in Petrinex, which show Endrum as licensee of all three Disputed Assets, and as operator of record until March 31, 2026, at which point an unauthorized transfer of operatorship occurred;[129]

g. The Transfer Documents do not match the licensee and working interest information in One Stop and publicly-available AER data;[130] and

h. Endrum does not have any record of the AER approving a transfer of its licence to operate the Disputed Assets which, if the Transfer Documents are legitimate, would put it offside section 16 of the OGCA, as discussed below.[131]

83. The chain of title documented by the Transfer Documents has no basis in reality. Endrum is the AER licence holder for all Disputed Assets and held a working interest in

[124] Third Morales Affidavit at para 34, paras 38-39, Exhibit N.
[125] Fourth Morales Affidavit at para 55(a).
[126] Third Morales Affidavit at paras 26-27, para 38, Exhibit M.
[127] Third Morales Affidavit at paras 31-33, Exhibits K and L.
[128] Fourth Morales Affidavit at paras 53 to 55, Exhibits G, H and I.
[129] Fourth Morales Affidavit at para 58(a) and Exhibit J
[130] Fourth Morales Affidavit at paras 58(b) and (c), Exhibits K and L.
[131]Third Morales Affidavit at para 58.

and operated them continuously since March 2024. During that time, it has borne all associated operating and regulatory costs (including labour, maintenance, Crown royalties, and P&NG lease payments),[132] continued to haul and process oil from the Disputed Assets,[133] earned revenue from them,[134] and remains their licensee and operator of record in AER records.[135]

84. It defies logic that Endrum would have remained licensee and operator of the Disputed Assets for almost 18 months after divesting itself of any working interest in the wells and associated mineral lease rights. It is equally implausible that the two intervening purchasers between Endrum and 267 would have taken no steps to assume the licensing, ownership, operating, and accounting responsibilities for the Disputed Assets—or claimed their revenues during that same period.

85. The inconsistencies between the Transfer Documents on the one hand and the regulatory records, public registry searches, Endrum's internal records, the involvement of interrelated parties, and the parties' operational control of the Disputed Assets on the other establish two issues for trial:

   a. whether title to the Disputed Assets ever left Endrum. Endrum's position is that it did not; and
   b. whether, in any event, 267 can be a bona fide purchaser for value without notice given the publicly available records and the other facts a reasonable purchaser in 267's position would have known or discovered.

86. Endrum's position is that title to the Disputed Assets never left it. In any event, the publicly available AER and Electronic Transfer System records, Petrinex information, and other indicia of Endrum's ownership gave 267 actual or constructive notice of Endrum's interest. 267 therefore cannot establish that it was a bona fide purchaser for value without notice.

87. What likely happened is that Mr. Hughes, a former insider with access to Endrum's records and authority, attempted to remove estate resources for himself or related parties when Endrum's insolvency became apparent. The Transfer Documents therefore appear to be part of an asset-stripping scheme by a former insider. For public policy reasons, such conduct should not be tolerated; permitting it would undermine the integrity of insolvency proceedings. This is a further reason there is a serious issue to be tried.

[132] Third Morales Affidavit at para 25.
[133] Fourth Morales Affidavit at paras 65-68, Exhibits O-P.
[134] Third Morales Affidavit at paras 72-73, Exhibit CC.
[135] Fourth Morales Affidavit at para 38(a), Exhibit J.

88. As outlined above, the totality of the facts suggests that these are neither frivolous or vexatious issues to be tried.[136]

II. Endrum Will Suffer Irreparable Harm if the Injunction is not Extended

89. The second branch of the tripartite test requires the Applicant to demonstrate that it will suffer irreparable harm if the injunction is not granted. Irreparable harm concerns the nature of the harm, not its magnitude: it is harm that cannot be quantified in monetary terms or otherwise cured. Examples include circumstances where a party is put out of business, suffers a permanent loss of market, or sustains irrevocable damage to its business reputation.[137]

90. If the injunction expires, Endrum's ability to operate and generate revenue will likely be impaired to the point that it can no longer formulate or perform a proposal to its creditors. The Respondents' conduct threatens this outcome in three ways:

    a. by diverting Endrum's limited resources away from the proposal process at precisely the time those resources are needed to formulate a viable proposal;
    b. by damaging Endrum's relationships with critical suppliers — damage that extends well beyond production from the Disputed Assets and threatens Endrum's broader operations; and
    c. by jeopardizing Endrum's AER licences, without which there is no value left in the company and no proposal.

Need to Preserve Revenue for Proposal Process

91. Without the Injunction Extension Order, Endrum will be forced to divert its limited resources to fighting the property dispute at precisely the time those resources should be directed toward preparing a viable proposal for its creditors. This diversion of management time, operational capacity, and financial resources threatens the NOI proceedings themselves and undermines Endrum's ability to file a proposal within the statutory timeframe.[138] If Endrum is unable to devote the necessary resources to preparing a viable proposal, the result may be bankruptcy — a harm that cannot be remedied by a later damages award.

92. The Respondents' padlocking and shut-in of the 5-29 Well directly prevented Endrum from producing oil, and caused an ongoing loss of production revenue of approximately $225 per day while it was not operating. While this revenue would not be immediately available to Endrum until the property dispute is resolved, if the Respondents are

[136] Fourth Morales Affidavit at para 68.
[137] RJR-MacDonald at para 73 **[TAB 6]**
[138] Fourth Morales Affidavit at para 103.

unsuccessful at establishing valid title to the Disputed Assets, this revenue will assist Endrum in servicing its payment obligations under a proposal.

93. The Injunction and Preservation Order allowed Endrum to bring the 5-29 Well back into production, as it could attend at the site and service the facility without interruption by the Respondents.[139]

94. Continued operation of the Disputed Assets, and preservation of the revenue they generate, is essential throughout these proceedings. If Endrum is ultimately found to be the rightful owner of the Disputed Assets, those preserved revenues will be critical to funding payments to creditors under a proposal and sustaining Endrum's ongoing operations, including the substantial abandonment, reclamation, and remediation obligations in respect of the Disputed Assets which is currently estimated to total $503,622.50[140]. Without the Injunction Extension Order, the Respondents will be free to resume their interference with the Disputed Assets, diverting revenue away from Endrum and the trust mechanism established under the Preservation Order and depriving Endrum's creditors of funds that should be available to satisfy their claims (assuming Endrum is found to be the rightful owner of the Disputed Assets).

95. Courts have recognized irreparable harm where a party's ability to generate revenue necessary to sustain its operations and its restructuring is threatened. In *Medical Laboratory Consultants Inc. v. Calgary Health Region*,[141] the court held that irreparable harm was established because denying the injunction would force the business to close, resulting in job losses, loss of equipment and business relationships, and damage to reputation.[142]

96. Moreover, the Respondents have already demonstrated both the ability and the willingness to divert revenue generated by the Disputed Assets away from Endrum. This conduct establishes a concrete, ongoing risk of loss that cannot be quantified with precision, given the volatility of oil markets, production fluctuations, and the escalating nature of the Respondents' interference.

Interference with Endrum's Supply Arrangements

97. The Respondents' conduct has caused damage to Endrum's relationships with its key suppliers and service providers, harm that courts have recognized as irreparable because it cannot be quantified in monetary terms.

[139] Fourth Morales Affidavit at paras 79-81
[140] Fourth Morales Affidavit at Exhibit D.
[141] *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2003 ABQB 995 **[TAB 8]**
[142] Ibid at para 42 **[TAB 8]**

98. This loss of supplier and purchaser relationships satisfies the irreparable harm requirement. In *C2 Recycling Inc. v. All West Demolition Ltd.*,[143] the Alberta Court of King's Bench recognized that damage to customer relationships, reputation, and goodwill, together with the risk that a business interruption could put a company out of business, may qualify as irreparable harm.[144]

99. In *Polesystems Inc. v. Martec Manufacturing Ltd*.,[145] the court similarly held that where business relationships are impaired, "customers once lost may never come back and financial stability once lost may never be recovered."[146]

100. The harm here is of precisely this character. Secure and the Pine Cliff Facility are essential to Endrum's ability to move and sell its product. Both have already taken steps to restrict and revise their relationships with Endrum due to the confusion caused by this dispute.

101. The reputational harm caused by the Respondents' conduct compounds that damage and adds to supplier and vendor confusion. Brad Peake's RCMP report characterizing Endrum's own production as "stolen" oil, and his warning that individuals could have "names attached with the RCMP industrial crimes,[147]" expose Endrum and its contractors to reputational harm that cannot be undone by a later damages award. This fits within *RJR-MacDonald's* recognition that irrevocable damage to business reputation qualifies as irreparable harm.

102. The Injunction and Preservation Order has provided stability and certainty to Endrum's operations and supply relationships. If it expires, Endrum risks being returned to the uncertain commercial landscape created by the dispute.

Jeopardy to the Applicant's Regulatory Licences

103. The Respondents' conduct also jeopardizes Endrum's regulatory standing. Endrum remains the AER licence holder for all Disputed Assets, and no licence transfer has been applied for or approved. The Respondents' purported acquisition of 100% of the working interest in two Disputed Assets, without Endrum's knowledge or consent, raises compliance concerns under section 16 of the OGCA[148], which prohibits holding a well licence without a corresponding working interest.

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[143] *C2 Recycling Inc. v. All West Demolition Ltd,* 2022 CarswellAlta 3816 **[TAB 9]**
[144] Ibid at paras 79-80 **[TAB 9]**
[145] *Polesystems Inc. v. Martec Manufacturing Ltd*.,1989 CarswellAlta 84 **[TAB 10]**
[146] Ibid at para 28 **[TAB 10]**
[147]Third Morales Affidavit at para 63, Exhibit T.
[148] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 16 ("**OGCA**") **[TAB 2]**; Brief of Law of the Alberta Energy Regulator, filed August 26, 2026, at paras 3-4 (the "**AER Brief**").

104. The Respondents' effective shut-in of the 5-29 Well compounded that exposure. A working-interest holder that is not the AER licensee requires the Regulator's approval before shutting in a well; there is no evidence the Respondents sought or obtained it.[149] Nor did they comply with the technical suspension requirements in Alberta Energy Regulator Directive 013 – Suspension Requirements for Wells, which mandates specific wellhead-securing, signage, and reporting steps for inactive wells. By padlocking the electrical panel and effectively suspending the well without following those requirements, the Respondents exposed Endrum, as licensee, and the Disputed Assets to unmanaged regulatory and physical risk.[150]

105. If the Injunction and Preservation Order expires and the Respondents engage in similar conduct, Endrum as licensee, faces potential regulatory liability, enforcement action, and possible loss of its licence. That loss would be catastrophic. As the Supreme Court of Canada recognized in *Orphan Well Association v. Grant Thornton Ltd.*,[151] an oil and gas deposit has little practical value without the associated licence, because without it the holder cannot conduct any drilling, producing, or injecting operations.[152] The licence is what gives Endrum's working interest its value; losing it would effectively destroy Endrum's business.

106. In *Victoria Oil & Gas Plc v. Alhambra Resources Ltd.*,[153] the Alberta Court of Appeal upheld an injunction preventing the disposal of an oil and gas licence, finding irreparable harm where fresh evidence showed the respondent was transferring the licence to another company. The circumstances here are analogous: like the respondent in Victoria Oil & Gas, the Respondents are asserting control over the Disputed Assets and have already demonstrated both the willingness and the ability to divert revenue and physically exclude the licensee from its own operations.

107. The Respondents' unauthorized shut-in, their interference with the well sites, and their assertions of ownership directly threaten Endrum's ability to maintain compliance with its AER obligations, exposing it to a tangible risk of regulatory sanction or licence forfeiture.

108. The AER has communicated to the Proposal Trustee that it will apply additional scrutiny to Endrum's licence transfer applications, and prohibit Endrum from acquiring new licences.[154] Given that prohibition, preserving Endrum's existing licences is critical: if it cannot acquire new licences and loses its existing ones, the result would be catastrophic.

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[149] OGCA at s.11(2)(b) and s. 27 **[TAB 2]**
[150] Alberta Energy Regulator Directive 013 – Suspension Requirements for Wells **[TAB 3]**
[151] *Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5 **[TAB 11]**
[152] Ibid at para 12 **[TAB 11]**
[153] *Victoria Oil & Gas Plc v. Alhambra Resources Ltd*., 2009 ABCA 64 **[TAB 12]**
[154] Third Report at para 13(c).

Regulatory Non-Compliance and Risk of Well Shut-In

109. The AER has confirmed that Endrum is the licensee of record for the Disputed Assets. Under section 16 of the OGCA, a licensee must hold a working interest in the wells for which it is licensed. If it does not, the AER requires the situation to be corrected or the wells to be shut in, as stated in the Brief of Law of the Alberta Energy Regulator, filed August 26, 2026.[155]

110. Because the Transfer Documents purport to show that Endrum no longer holds a working interest in the Disputed Assets, even though Endrum remains their licensee, the AER's position in the AER Brief is that the wells will have to be shut in unless the situation is corrected. A shut-in would divert Endrum's resources from cash-flow-positive operations and from formulating a viable proposal. That regulatory risk and diversion of resources constitute irreparable harm weighing in favour of extending the Injunction and Preservation Order.

111. In summary, the evidence establishes irreparable harm of a nature and degree sufficient to satisfy the second branch of the *RJR-MacDonald* test.

III. <u>Balance of Convenience Favours Extending the Injunction</u>

112. The balance of convenience consists of an assessment of which party will suffer the greater harm if the interlocutory injunction is or is not granted pending a decision on the merits. This inquiry requires consideration of numerous factors on a case-by-case basis.[156]

113. The balance of convenience strongly favours granting the Injunction Extension Order, for the reasons that follow.

114. The Respondents' pre-injunction conduct constituted a breach of the automatic stay imposed by sections 50.4(1) and 69(1)(a) of the BIA, which is intended to protect the Applicant's assets for the benefit of all creditors. Filing a Notice of Intention under section 50.4(1) triggers an automatic stay under section 69 of the BIA, staying all proceedings against the debtor by its creditors immediately upon issuance of the NOI.[157]

115. Section 69(1) of the BIA states:

> **"Stay of proceedings — notice of intention**
>
> 69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

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[155] AER Brief at para 4.
[156] RJR-MacDonald at paras 76-77 **[TAB 6]**
[157] *F.A.S.T. Industries Ltd. v. Sparta Engineering Inc.*, 2016 ABQB 215 at paras 7-9, 28 **[TAB 13]**

a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

…

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person."

116. The Court in *Blade Energy Services Corp (Re)*[158] reiterated that the purpose of the stay of proceedings is to give "a reorganizing debtor an opportunity to have some breathing room during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements.[159] A purposive interpretation of the word "remedy" in section 69(1)(a) suggests that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern".[160]

117. In *Blade Energy Services Corp (Re),* the Alberta Court of King's Bench considered circumstances similar to the present case: a gas plant operator disconnected a gas producer from the gas-gathering system over approximately $8 million in arrears, and the producer subsequently filed an NOI under the BIA. The operator characterized the lockout as a "one-time permanent step" falling outside the stay; the court rejected this characterization, finding the lockout to be an ongoing continuing remedy — "a reversible step designed to stay in place until [the debtor] cleared or otherwise addressed its pre-NOI debt to [the operator's] satisfaction."[161] The lockout's ongoing effect, daily preventing the debtor from producing, constituted the operator's contractually-permitted leverage to extract payment of arrears.[162]

118. The Respondents' pre-injunction conduct was directly analogous to the lockout in *Blade Energy*. The Respondents attended at the 5-29 Well, shut it in, and installed a padlock on the electrical panel, physically excluding the Applicant from its own operations, and are using the lockout as leverage to assert their disputed claim. This is precisely the type of continuing remedy stayed by the filing of the NOI: a reversible step designed to remain in place until the Applicant accedes to the Respondents' disputed property claim. Its ongoing effect, daily preventing the Applicant from producing oil from the 5-29 Well, constitutes a continuing remedy caught by the section 69(1)(a) stay.

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158 *Blade Energy Services Corp (Re),* 2024 ABKB 100 **[TAB 14]**
159 Ibid at para 22 **[TAB 14]**
160 Ibid at paras 14-17, 22 **[TAB 14]**
161 Ibid at para 35 **[TAB 14]**
162 Ibid at paras 1-4, 6, 33-44, 66-68 **[TAB 14]**

119. The balance of convenience favours granting the Injunction Extension Order for several additional reasons:

a. the Applicant remains the AER licence holder for the Disputed Assets and is both willing and able to operate them. Preserving Endrum's operational control avoids exposing the Applicant to further regulatory risk and maintains vendor relationships pending resolution of the ownership dispute;

b. the suspicious circumstances surrounding the transactions purportedly transferring the Disputed Assets undermine the credibility of the Respondents' claimed ownership and weigh against permitting the Respondents to retain control over the Disputed Assets pending resolution of the property dispute;

c. Mr. Peake's own involvement in the original SPA raises further concerns regarding the nature and extent, if any, of his role in the subsequent transaction chain, reinforcing the weakness of the Respondents' position; and

d. the terms of the Injunction Extension Order ensure that no party suffers prejudice while ownership of the Disputed Assets is determined: Endrum will remit net revenues to Ogilvie LLP in trust, maintain complete production and revenue records, and provide a full accounting to the Respondents. This transparent process preserves the status quo. The Respondents have identified any prejudice caused by the Injunction Extension Order which outweighs that faced by Endrum.

120. Finally, if the Injunction Extension Order is not granted, there is a real possibility that the wells will have to be shut in, given the AER's position in the AER Brief that a licensee without a working interest must correct the situation or face shut-in under section 16 of the OGCA.[163]

121. Control and operation of the Disputed Assets should therefore remain with Endrum while the proposal process continues. Maintaining the status quo avoids loss of production revenue and potential regulatory consequences, preserves value for creditors and stakeholders, and prevents a shut-in from undermining the proposal process.

V. CONCLUSION AND RELIEF SOUGHT

122. The Stay Extension Order is a straightforward exercise of this Court's discretion under section 50.4(9) of the BIA. Endrum has acted in good faith and with due diligence in advancing a viable proposal, and no creditor will be prejudiced by a further short extension. The only alternative is a deemed assignment into bankruptcy, cessation of

[163] AER Brief at para 4.

operations, and the surrender of Endrum's licensed wells to the Orphan Well Association, a materially worse outcome for every stakeholder in these proceedings.

123. The Injunction Extension Order is equally compelling. The Respondents' claim to the Disputed Assets rests on a chain of related-party quitclaims that is internally inconsistent, unverified by third parties in the chain, unauthorized by Endrum's board, inconsistent with publicly available records regarding ownership of the Disputed Assets, and unsupported by any real consideration to Endrum — more than sufficient to raise a serious issue to be tried regarding whether title to the Disputed Assets ever left Endrum. Left unrestrained, the Respondents' interference will continue to deprive Endrum of essential revenue which may result in Endrum's bankruptcy, damage supplier relationships, and put Endrum's AER licences at risk — each a form of harm that cannot be cured after the fact.

124. The Respondents' self-help conduct, including padlocking a well, diverting oil shipments, and reporting Endrum to the RCMP, is also a continuing breach of the automatic stay under sections 50.4(1) and 69(1)(a) of the BIA. The balance of convenience favours restoring Endrum's operational control, subject to the proposed preservation mechanism, pending resolution of the ownership dispute.

125. For these reasons, the Applicant respectfully submits that this Honourable Court should grant both the Stay Extension Order and the Injunction and Preservation Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF SEPTEMBER, 2026

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TABLE OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Oil & Gas Conservation Act*, Revised Statutes of Alberta 2000, c. O-6
3. Alberta Energy Regulator Directive 013 – Suspension Requirements for Wells
4. Alberta Energy Regulator Directive 007 – Volumetric and Infrastructure Requirements
5. *Sunny Corner Enterprises Inc v St Anne Nackawic Pulp Co (Receiver of), 2005 NBCA 54*
6. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120
7. *McKinnon v British Columbia Society for the Prevention of Cruelty to Animals*, 2020 BCSC 1933
8. *Medical Laboratory Consultants Inc. v. Calgary Health Region,* 2003 ABQB 995
9. *C2 Recycling Inc. v. All West Demolition Ltd.*, 2022 CarswellAlta 3816
10. *Polesystems Inc. v. Martec Manufacturing Ltd.,* 1989 CarsWellAlta 84
11. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5
12. *Victoria Oil & Gas Plc v. Alhambra Resources Ltd.,* 2009 ABCA 64
13. *F.A.S.T. Industries Ltd. v. Spart Engineering Inc.*, 2016 ABQB 215
14. *Blade Energy Services Corp (Re)*, 2024 ABKB 100

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

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

Current to March 17, 2026

Last amended on December 12, 2024

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Loi sur la faillite et l’insolvabilité

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n’y figurant qu’à titre de repère ou d’information.

NOTE

This consolidation is current to March 17, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of March 17, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

NOTE

Cette codification est à jour au 17 mars 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 17 mars 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

Restriction à l'égard de la propriété intellectuelle

(9) Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

Insolvent person may disclaim or resiliate commercial lease

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

Lessor may challenge

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

Résiliation d'un bail commercial

65.2 (1) Entre le dépôt d'un avis d'intention et celui d'une proposition relative à une personne insolvable qui est un locataire commercial en vertu d'un bail sur un immeuble ou un bien réel, ou lors du dépôt d'une telle proposition, cette personne peut, sous réserve du paragraphe (2), résilier son bail sur préavis de trente jours donné de la manière prescrite.

Contestation

(2) Sur demande du locateur, faite dans les quinze jours suivant le préavis, et sur préavis aux parties qu'il estime indiquées, le tribunal déclare le paragraphe (1) inapplicable au bail en question.

Property included for enforcement purposes

(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

When obligation to pay ceases

(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.

R.S., 1985, c. B-3, s. 68; 1992, c. 27, s. 34; 1997, c. 12, s. 60; 2005, c. 47, s. 58; 2007, c. 36, s. 33.

Assignment of wages

68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

1992, c. 27, s. 35; 1997, c. 12, s. 61; 2005, c. 47, s. 59.

Stay of Proceedings

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

Biens pouvant faire l'objet d'une exécution

(15) Pour l'application du présent article, la somme à verser à l'actif de la faillite peut être recouvrée par voie d'exécution contre le revenu total du failli.

Cessation des versements

(16) L'obligation du failli qui est une personne physique de faire des versements à l'actif de la faillite au titre du présent article cesse, en cas d'opposition à sa libération d'office, le jour où il aurait été libéré n'eût été l'avis d'opposition, rien n'empêchant toutefois le tribunal de reconduire l'obligation pour la somme qu'il estime indiquée.

L.R. (1985), ch. B-3, art. 68; 1992, ch. 27, art. 34; 1997, ch. 12, art. 60; 2005, ch. 47, art. 58; 2007, ch. 36, art. 33.

Cession de salaire

68.1 (1) La cession de salaires présents ou futurs faite par le débiteur avant qu'il ne devienne un failli est sans effet sur les salaires gagnés après sa faillite.

Cession de créances comptables

(2) La cession de sommes — échues ou à percevoir — à titre de paiement, de commission ou d'honoraires professionnels pour la prestation de services, faite par un débiteur qui est une personne physique avant qu'il ne fasse faillite, est sans effet sur les sommes de même provenance qui sont gagnées après sa faillite.

1992, ch. 27, art. 35; 1997, ch. 12, art. 61; 2005, ch. 47, art. 59.

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

69 (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

a) les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) est sans effet toute disposition d'un contrat de garantie conclu entre la personne insolvable et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'elle

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

dépose un avis d'intention aux termes de l'article 50.4, est déchue des droits qu'elle aurait normalement de se servir des avoirs visés par le contrat de garantie ou de faire d'autres opérations à leur égard;

c) est suspendu l'exercice par Sa Majesté du chef du Canada des droits que lui confère l'une des dispositions suivantes à l'égard de la personne insolvable, lorsque celle-ci est un débiteur fiscal visé à cette disposition :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui, à la fois :

(A) renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(B) prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est ***une province instituant un régime général de pensions*** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un ***régime provincial de pensions*** au sens de ce paragraphe.

Stay on issue of order

182 (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

Suspension de l'émission de l'ordonnance

182 (1) L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

g) dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Province of Alberta

OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of May 14, 2026

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Oil and Gas Conservation Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Oil and Gas Conservation Act *(The following list does not include certain special or particular orders made under the Oil and Gas Conservation Act which are exempted from filing under the Regulations Act: see AR 288/99.)*		
Oil and Gas Conservation Rules	151/71	*241/71, 69/72,* 140/72, *233/72, 93/73, 103/73, 51/74, 71/74, 80/74, 144/74, 264/74, 341/74, 41/75, 2/76, 179/76, 202/76, 15/77, 104/77, 250/77, 178/78, 295/78, 428/78, 469/78, 229/79, 326/79, 2/80, 79/80, 51/81, 205/81, 89/82, 206/82, 267/82, 286/82, 337/82, 433/82, 460/82, 221/83, 336/83, 364/83, 399/83, 416/83, 15/84, 112/84, 264/84, 189/85,*

*265/85, 27/86, 234/86,
302/86, 283/87, 350/87,
485/87, 70/88, 188/88,
217/88, 360/88, 70/89,
153/89, 19/90, 146/90,
169/90, 321/90, 40/91,
79/91, 267/91, 374/91,
199/92, 332/92, 371/92,
9/93, 168/93, 186/93,
225/93, 226/93, 117/94,
237/94, 156/95, 105/96,
144/96, 222/97, 10/98,
11/98, 12/98, 13/98,
14/98, 25/98, 67/98,
78/98, 128/98, 143/98,
179/98, 224/98, 229/98,
47/99, 131/99, 151/99,
82/2000, 99/2000,102/2001,
182/2001, 206/2001, 6/2002,
83/2002, 136/2002, 194/2002,
226/2002, 32/2003, 190/2003,
215/2003, 222/2003, 256/2003,
390/2003, 119/2004, 202/2004,
17/2005, 122/2005, 184/2005,
185/2005, 189/2005, 40/2006,
142/2006, 153/2006, 269/2006,
12/2007, 109/2007, 152/2007,
254/2007, 26/2008, 114/2008,
115/2008, 159/2008, 180/2008,
9/2009, 85/2009, 234/2009,
7/2010, 39/2010, 130/2010,
156/2010, 216/2010, 2/2011,
65/2011, 203/2011, 208/2011,
209/2011, 18/2012, 31/2012,
50/2012, 121/2012, 157/2012,
170/2012, 220/2012, 222/2012,
1/2013, 2/2013, 41/2013,
44/2013, 55/2013, 62/2013,
70/2013, 75/2013, 89/2013,
115/2013, 1/2014, 45/2014,
88/2014, 140/2014, 6/2015,
33/2015, 114/2015, 1/2016,
128/2016, 197/2016, 10/2017,
30/2017, 158/2017, 243/2017,
23/2018, 219/2018, 10/2019,
17/2019, 40/2020, 109/2020,
165/2020, 259/2020, 277/2020,
52/2021, 70/2021, 71/2021,
113/2021, 161/2021, 209/2021,
45/2022, 57/2022, 117/2022,*

(b) as to the location of wells and facilities and the methods of operation to be observed during drilling and construction and in the subsequent management and conduct of any operations for the prevention of pollution;

(c) prescribing the measures to be taken to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Regulator has jurisdiction.

(3) If rules made pursuant to subsection (1) or (2) authorize the Regulator to approve any operation, the Regulator may prescribe conditions under which it grants approval in any case.

(4) If rules under subsection (1)(a) have prescribed the information to be included in or to accompany an application pursuant to a given provision of this Act or the rules, the Regulator is not precluded from considering or acting on an application pursuant to that provision that does not contain that information or from requiring additional information.

(5) When no form has been prescribed pursuant to subsection (1)(zz) for use under a provision of this Act or the rules, the Regulator may prescribe or accept any form it considers suitable.

(6) Rules made pursuant to subsection (1)(mm) respecting confidentiality of records, reports or information submitted to or acquired by the Regulator under this Act prevail despite the *Access to Information Act*.

RSA 2000 cO-6 s10;2002 c12 s5;2008 c7 s5;2009 cA-26.8 s85; 2009 c20 s7;2010 c14 s3;2011 c11 s5;2012 cR-17.3 s97(6); 2020 c4 s1(5);2022 c21 s59;AR 141/2025

Part 6
Licences and Approvals

Requirement for licence

11(1) No person shall commence to drill a well or undertake any operations preparatory or incidental to the drilling of a well or continue any drilling operations, any producing operations or any injecting operations unless

(a) a licence has been issued and is in full force and effect, and

(b) the person is the licensee.

(2) Notwithstanding subsection (1),

(a) the site for a well may be surveyed, (a.1) on the direction or with the consent of the Regulator, a delegated authority under Part 11 may continue producing or injecting operations where it takes over the management and control of a well under section 105, or

(b) on the direction or with the consent of the Regulator, operations to suspend or abandon a well may be undertaken,

without a licence or by a person other than the licensee.

(2.1) Where a delegated authority takes over management and control of a well and is not the owner or holder of the mineral rights associated with the well, the delegated authority shall not undertake any production without the consent of the owner or holder of the mineral rights and the person who has the right to win, work and recover the minerals.

(3) No well shall be drilled elsewhere than at the exact location specified in the licence or, if the licence has been amended with respect to the location of the well, at the exact location specified in the amendment.

RSA 2000 cO-6 s11;2012 cR-17.3 s97(31);2020 c4 s1(6)

Licence or approval for facility

12(1) No person shall commence to construct or to operate a facility or undertake any operations preparatory or incidental to the construction or operation of a facility or continue any construction or operation of a facility unless

(a) a licence or approval has been granted and is in full force and effect and the person is the licensee or approval holder, or

(b) the facility is exempt from the requirement of a licence or approval by rules or by direction of the Regulator.

(2) Notwithstanding subsection (1),

(a) the site for a facility may be surveyed,

(a.1) on the direction or with the consent of the Regulator, a delegated authority under Part 11 may continue operations referred to in subsection (1) where it takes over the management and control of a facility under section 105, or

(b) on the direction or with the consent of the Regulator, operations to suspend or abandon a facility may be undertaken,

Entitlement for well licence

16(1) No person shall apply for or hold a licence for a well

(a) for the recovery of oil, gas or crude bitumen, or

(b) for any other authorized purpose

unless that person is a working interest participant and is entitled to the right to produce the oil, gas or crude bitumen from the well or to the right to drill or operate the well for the other authorized purpose, as the case may be.

(2) If, after 30 days from the mailing of a notice by the Regulator to a licensee at the licensee's last known address, the licensee fails to prove entitlement under subsection (1) to the satisfaction of the Regulator, the Regulator may cancel the licence or suspend the licence on any terms and conditions that it may specify.

(3) Where a licence is cancelled or suspended pursuant to subsection (2),

(a) all rights conveyed by the licence are similarly cancelled or suspended, and

(b) notwithstanding the cancellation or suspension of the licence, the liability of the licensee to complete or abandon the well and reclaim the well site or suspend operations as the Regulator directs continues after the cancellation or suspension.

RSA 2000 cO-6 s16;2012 cR-17.3 s91(31)

Entitlement for facility licence

17(1) No person shall apply for or hold a licence for a facility unless that person is a working interest participant.

(2) If, after 30 days from the mailing of a notice by the Regulator to a licensee at the licensee's last known address, the licensee fails to prove to the satisfaction of the Regulator that it is a working interest participant in the facility, the Regulator may cancel or suspend the licence on any terms and conditions that it may specify.

(3) Where a licence is suspended or cancelled pursuant to subsection (2),

(a) all rights conveyed by the licence are similarly cancelled or suspended, and

(b) notwithstanding the cancellation or suspension of the licence, the liability of the licensee to abandon the facility measures to prevent impairment or damage in respect of the well, facility, well site or facility site and may impose any terms or conditions that the Regulator determines are necessary in the order.

(4) The provision of reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site must be carried out in accordance with the rules and any terms or conditions imposed by the Regulator.

2020 c4 s1(8)

Suspension and abandonment

27(1) Subject to subsection (2), a licensee or approval holder shall suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules.

(2) Notwithstanding subsection (1),

(a) if the Regulator so directs, a well or facility must be suspended or abandoned by a working interest participant other than the licensee or approval holder, and

(b) with the consent of the Regulator, a well or facility may be suspended by a working interest participant other than the licensee or approval holder.

(3) The Regulator may order that a well or facility be suspended or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment.

(4) A suspension or abandonment must be carried out in accordance with the regulations or rules.

RSA 2000 cO-6 s27;2012 cR-17.3 s97(31),(33)

Suspension, abandonment by Regulator

28 If, in the opinion of the Regulator, a well or facility is not suspended or abandoned in accordance with a direction of the Regulator or the regulations or rules, the Regulator may

(a) authorize any person to suspend or abandon the well or facility, or

(b) suspend or abandon the well or facility on the Regulator's own motion.

RSA 2000 cO-6 s28;2012 cR-17.3 s97(31),(32),(33)

Continuing liability

29 Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.

2000 c12 s1(15)

Offences and Penalties

Waste prohibited

107(1) Waste is prohibited and any person who commits waste is guilty of an offence.

(2) No prosecution may be instituted under subsection (1) without the consent in writing of the Regulator.

(3) In a prosecution under this section, no person is deemed to have committed waste by reason of a wasteful operation referred to in section 1(1)(ddd)(iv) or (v) unless the person has been directed by the Regulator to do the things, the failure of which constituted the wasteful operation, and has failed to do the things within the time specified in the direction of the Regulator.

(4) A prosecution under this Act does not deprive any person suffering damages or injury of any cause of action that the person may have.

(5) Notwithstanding any prosecution under this Act, the Regulator may commence and maintain an action

(a) to enjoin any person from committing waste, or

(b) for contravention of any regulation or rules or of any order or direction of the Regulator.

RSA 2000 cO-6 s107;2012 cR-17.3 s97(26),(31)

Offences

108(1) Every person who

(a) whether as a principal or otherwise, contravenes or defaults in complying with any provision of this Act, the regulations or rules, an order or direction of the Regulator made under this Act or the regulations or rules or the terms and conditions under an order of the Lieutenant Governor in Council granting an approval or authorization under this Act,

(b) either alone or in conjunction or participation with others causes any person to contravene or to default in complying with a provision referred to in clause (a), or

(c) instructs, orders, directs or causes any officer, agent or employee of any person to contravene or to default in complying with a provision referred to in clause (a),

is guilty of an offence.

(2) Every person who contravenes or defaults in complying with any provision of this Act or of the regulations or rules, or any order or direction of the Regulator, or any term or condition of a licence granted under this Act, is guilty of an offence.

RSA 2000 cO-6 s108;2012 cR-17.3 s97(27)

Limitation period for prosecution

109 A prosecution for an offence under this Act may not be commenced more than 2 years after

(a) the date on which the offence was committed, or

(b) the date on which evidence of the offence first came to the attention of the Regulator,

whichever is later.

RSA 2000 cO-6 s109;2012 cR-17.3 s97(28)

Penalties

110(1) A person who is guilty of an offence under this Act is liable

(a) in the case of a corporation, to a fine of not more than $500 000, and

(b) in the case of an individual, to a fine of not more than $50 000.

(2) No person shall be convicted of an offence under this Act if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

(3) A person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.

RSA 2000 cO-6 s110;2012 cR-17.3 s97(29)

Regulations

Regulations

110.1 The Lieutenant Governor in Council may make regulations

(a) respecting an application by the Regulator or a delegated authority under Part 11 to the Court of King's Bench for the appointment of a receiver, receiver-manager, trustee or liquidator of the property of a licensee;

(b) defining any term that is used but not defined in this Act;

(c) qualifying the exclusion of facilities as defined in the *Geothermal Resource Development Act* or the *Mineral*

Directive 013

Release date: February 7, 2025

Effective date: February 7, 2025

Replaces previous edition issued October 19, 2022

Suspension Requirements for Wells

Contents

1 Introduction

This directive sets out suspension requirements and reactivation requirements for wells as required under section 3.020 of the *Oil and Gas Conservation Rules* (*OGCR*).

1.1 What's New in This Edition

Changes were made as a result of the continued *Liability Management Framework* implementation (see *Bulletin 2025-04*), primarily the removal of references to the discontinued area-based closure program.

1.2 Definitions

An inactive well is defined as follows:

- Critical sour wells (perforated or not) that have not reported any type of volumetric activity (production, injection, or disposal) for six consecutive months
- All other wells that have not reported any type of volumetric activity (production, injection, or disposal) for 12 consecutive months

Critical sour wells are licensed as critical wells and defined under *Directive 056: Energy Development Applications and Schedules*.

Additional definitions are set out in appendix 2.

2 Suspension Requirements for All Wells

2.1 General Requirements

All inactive wells must be classified and properly suspended as defined in this directive.

1) The licensee must complete the initial suspension and reporting requirements for all inactive wells within 12 months from the *Directive 013* inactive status date (as listed in the inactive well licence list on the designated information submission system).

   The *Directive 013* inactive status date is calculated based on the definition of the inactive well. If the well has never produced or has no volumetric activity reported on Petrinex, a final drill date is used as a last volumetric activity date when calculating *Directive 013* inactive status date. Flaring or venting is not considered to be a volumetric activity.

2) For inactive cavern wells, the licensee must submit a nonroutine application to WellOperations@aer.ca for the suspension of the well and cavern.

Observation wells are exempt from *Directive 013* requirements.

3) For wells to remain in compliance with this directive, the licensee must complete the ongoing well inspection requirements and report to the AER via the designated information submission system by the end of the calendar year in which the inspection due date is calculated.

   The inspection due date is calculated from the initial suspension date and based on the inspection frequency indicated for each risk class in section 3. The process for reporting and information required in the report is outlined in section 2.5.

Example

For a high-risk well (see section 3 for details on risk-based requirements): If the "*Directive 13* Inactive Status Date" is June 30, 2015, the licensee must complete the initial suspension and reporting by June 30, 2016. If the high-risk well is suspended with a packer and tubing plug, the inspection frequency is one year and the inspection due date is June 30, 2017. Therefore, the inspection requirements must be completed and reported in the designated information submission system by December 31, 2017.

Section 3 outlines the initial suspension requirements, ongoing inspection requirements, and frequency of inspections according to well risk category.

2.2 Changing Well Risk Category

4) Wells in a particular risk category may also be suspended in accordance with the requirements of any higher risk category; however, the well must meet the initial suspension and ongoing inspection requirements based on the higher risk category.

5) For wells with multiple zones,

   a) the well must be classified based on the highest-risk zone in the wellbore that has not been abandoned, in accordance with *Directive 020: Well Abandonment*; and

   b) if all zones are abandoned (and the well has not yet been surface abandoned), the shallowest completion must be used to classify the risk category for the well.

For the purpose of this directive, proper zonal abandonment of all completed intervals in accordance with *Directive 020* is an equivalent suspension method to a bridge plug for low- and medium-risk wells, and to a bridge plug capped with eight metres of cement for high-risk wells.

6) All the ongoing inspection requirements and timelines must be met for all inactive wells.

For a well to move from the high-risk category to medium or low risk, the status of critical sour, class 1a well would have to be terminated. Until the status is terminated by the AER, the well will remain under the high-risk category.

To remove "Critical Sour" status, a declassification request must be sent to WellOperations@aer.ca in accordance with *Interim Directive 90-01: Completion and Servicing of Sour Wells*, section 5.2. If the approval is granted, the licensee would receive a declassification letter and the electronic record of the well will be updated to "Declassified Critical Sour."

7) To remove an acid gas designation, either the scheme must be terminated or the well licence must be removed from the scheme.

The licensee must submit a request in accordance with *Directive 065: Resources Applications for Oil and Gas Reservoirs*, providing all the supporting documentation to verify the reason for termination. Reasons could include the following:

- The licensee has never completed (perforated) the zone approved for acid gas injection.
- The licensee has never injected acid gas into the approved zone and there are no offset wells in the area that are injecting or have injected acid gas into the same zone.
- The zone with acid gas was abandoned in accordance with level-A requirements of *Directive 020*.

If the *Directive 065* application is approved, the scheme approval is terminated, or the well licence is removed from the scheme, the well is no longer considered to be an acid gas well for the purpose of this directive.

Licensees requiring assistance regarding these requirements should contact the AER at WellOperations@aer.ca.

2.3 Surface and Wellhead Requirements

2.3.1 Surface Requirements

The licensee must

- immediately take reasonable steps to contain and clean up spills or releases in accordance with *OGCR* sections 8.050(1), (2), and (3);
- have appropriate signage at the well in accordance with *OGCR* section 6.020; and
- have a 24-hour emergency telephone number posted in accordance with *Directive 071: Emergency Preparedness and Response*.

8) The licensee must also
   a) leave pumpjacks in a secure condition, and
   b) remove all debris from the site.

2.3.2 Wellhead Requirements

9) The licensee must
   a) ensure that there are no wellhead leaks;
   b) service and pressure test a wellhead, sealing elements at time of suspension and at each subsequent inspection;
   c) ensure that valves are functional (open/close), and grease and service valves as required to maintain functionality;
   d) chain and lock (or remove) valve handles; and
   e) install bull plugs or blind flanges on all outlets except surface casing vents. Bull plugs and blind flanges must be equipped with plugged needle valves; and
   f) ensure that all wellheads are conspicuously marked or fenced such that they are visible in all seasons with well identification sign in plain view in accordance with *OGCR* section 8.192. In agricultural areas, farming operations must be restricted to safe distances from the wellhead.

The licensee must also

- ensure that the wellhead is secured in accordance with *OGCR* section 8.193, and
- leave the surface casing vent open in accordance with *OGCR* sections 6.100(1), (2), and (3).

For sour wells, the wellhead must also meet the requirements of AER *Interim Directive 90-01* and Drilling and Completion Committee (DACC) *Industry Recommend Practice (IRP) Volume 2: Completing and Servicing Critical Sour Wells*.

It is recommended that a surface casing vent flow test be conducted in accordance with *Directive 020*. If there is no vent assembly as required under *OGCR* section 6.100, the licensee should conduct an annular flow test (refer to *Directive 087: Well Integrity Management*).

2.3.3 Associated Infrastructure

10) The licensee must leave all single well facility equipment associated with a suspended well in a secure state.

The licensee must discontinue or abandon pipelines associated with the suspended well in accordance with *Pipeline Rules*, part 9, section 75.

2.4 Repair Requirements

Wells that are suspended in accordance with this directive are not required to meet the isolation packer testing requirements of *Directive 087*.

If a packer is used for the downhole suspension, the licensee must test the packer in accordance with the requirements of section 3. However, a failure in the packer must be reported and repaired in accordance with *Directive 087*.

Detection of a surface casing vent flow, gas migration, or both must be reported, monitored, and repaired in accordance with *Directive 087*.

11) The suspension report must also indicate the presence of the surface casing vent flow, gas migration, or both.

Casing failures must be reported and repaired in accordance with *Directive 087*.

All other well integrity failures (example, leaking casing patch, remedial perforations, leaking plugs, etc.) must be reported through the designated information submission system and repaired within 90 days of failure detection, in accordance with *Directive 087*.

12) All failures identified during ongoing inspections must be indicated in the inspection report as required. The noncompliant status will remain for the well until the deficiencies are repaired and the well inspection report is updated, respectively.

2.5 Reporting Requirements

The initial suspension and ongoing inspections for the inactive well must be reported to the AER via the designated information submission system in accordance with section 2.1. The reactivation of a well from suspension must be reported to the AER via the designated information submission system within 30 days after the well obtained an active status in accordance with section 4.

Licensees are responsible to ensure both the well status (Petrinex) and the Well Licence Status (AER designated information submission system) is updated and aligned with one another.

Note: Refer to *Directive 007: Volumetric and Infrastructure Requirements and Directive 059: Well Drilling and Completion Data Filing Requirements* for submitting amendments to the well status in Petrinex.

13) The following information must be reported to the AER:

Suspension date	Inhibitor program	Casing failure detected
Suspension class (risk)	Inspection date	Wellhead failure detected
Well operational type	Inspection reason	Inspection outcome
Downhole operation	Packer/plug failure detected	Remedial work completed
H_2S content (%)	Gas migration detected	
CO_2 content (%)	Vent flow detected	

3 Risk-Based Suspension Requirements

All inactive wells are divided into three categories based on the risk: low, medium, and high. Inactive wells must be classified and suspended as defined in this directive. Table 1 summarizes the suspension requirements for all inactive wells according to the risk level the well falls under.

3.1 Low-Risk Wells

Low-risk well is defined as one of the following:

Type 1. Cased-hole wells that are not critical sour and have no perforations (noncompleted)

Type 2. Gas wells less than 28 000 m^3/day that are low risk (see appendix 1)

Type 3. Water source wells

Type 4. Class IV injectors (see *Directive 051*)

Type 5. Nonflowing[1] oil wells with an H_2S content less than or equal to 50 moles per kilomole (mol/kmol)

[1] Nonflowing refers to wells without sufficient reservoir pressure to sustain flow against atmospheric pressure without artificial lift. The flowing product is a fluid.

3.1.1 Initial Suspension Requirements

Initial Suspension

There are no downhole requirements for low-risk wells, as the wells do not pose a significant risk while suspended.

14) The licensee must measure and record the shut-in tubing pressure (if tubing is present) and shut-in casing pressure.

Wellbore Fluid

15) Filling the wellbore with fluid is not required; however, if fluid *is* to be placed in the wellbore for suspension purposes,

    a) the fluid must be nonsaline water or an inhibited (noncorrosive) fluid, and

    b) the top two metres of the wellbore must be filled with a nonfreezing fluid.

Wellhead

Completed wells must have a standard wellhead installed as outlined in *OGCR* sections 6.100(3), 6.130(1)(2), 7.050(3), and 7.060(8).

16) Wells that have no perforations (noncompleted) must have either a wellhead or a welded steel plate equipped with a test port on the production casing stub, or equivalent.

3.1.2 Ongoing Inspection Requirements

The wellhead must be maintained and tested in accordance with section 2.3.

17) For the low-risk well under type 1, type 2, type 3, and type 4, the licensee must measure and record the shut-in casing pressure and shut-in tubing pressure (if tubing is present) every five years.

18) For the low-risk wells under type 5, the licensee must measure and record the shut-in casing pressure and shut-in tubing pressure (if tubing is present) every year.

Licensees must notify the AER of any well integrity issues (i.e., surface casing vent flows, gas migration, wellhead seal leaks, casing failures, and packer failures, etc.) and repair them in accordance with *Directive 087*.

3.2 Medium-Risk Wells

Medium-risk well is defined as one of the following:

Type 1. Gas wells that are medium risk (see the appendix 1)

Type 2. Nonflowing oil wells with an H_2S content more than 50 mol/kmol

Type 3. Flowing oil wells

Type 4. Class II & III injection, carbon dioxide (CO_2) injection/disposal wells (see *Directive 051*), *excluding* CO_2 EOR storage and CO_2 sequestration wells as described in *Directive 065*

Type 5. Class Ib waste disposal wells (see *Directive 051*)

Type 6. Low-risk wells inactive for more than 10 years

All inactive cavern wells. The licensee must submit a nonroutine application to WellOperations@aer.ca for the suspension of the well and the cavern in accordance with section 2.1 of this directive.

3.2.1 Initial Suspension Requirements

Initial Suspension

It is recommended that licensees refer to *Directive 020* when determining the bridge plug type and setting depths. Not all suspension methods (for example, retrievable bridge plugs, packers with a tubing plug) are acceptable abandonment methods.

19) For medium-risk wells, the licensee must do one of the following:

- Option 1 – set a packer and a tubing plug as close as possible to the packer setting element. The casing and tubing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.
- Option 2 – set a bridge plug above the uppermost completed interval. The casing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.

20) For medium-risk type 6 wells only, licensees may alternatively use option 3.

- Option 3 – measure and record the shut-in casing pressure and shut-in tubing pressure (if tubing is present).

Wellbore Fluid

For medium-risk type 1, 2, 3, 4, and 5 wells:

21) The licensee must fill the wellbore with nonsaline water or an inhibited (noncorrosive) fluid, and the top two metres of the wellbore must be filled with a nonfreezing fluid.

For medium-risk type 6 wells:

22) If option 1 or option 2 is used to suspend the well, then the licensee must fill the well with nonsaline water or an inhibited (noncorrosive) fluid. The top two metres must be filled with a nonfreezing fluid.

If option 3 is used to suspend the well, filling the wellbore with fluid is not required; however, if fluid *is* to be placed in the wellbore for suspension purposes, it must be nonsaline water or an inhibited (noncorrosive) fluid, and the top two metres of the wellbore must be filled with a nonfreezing fluid.

Wellhead

The licensee must ensure that a standard wellhead is installed as outlined in *OGCR* sections 6.100(3), 6.130(1)(2), 7.050(3), and 7.060(8).

23) For medium-risk type 6 wells that were previously classified as low-risk type 1, licensees must ensure that the well is equipped with either a wellhead or a welded steel plate equipped with a test port on the production casing stub, or equivalent.

3.2.2 Ongoing Inspection Requirements

24) For medium-risk wells, the licensee must do either option 1 or option 2:

- Option 1 – The casing and tubing each must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes every three years.
- Option 2 – The casing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes every five years.

25) For medium-risk type 6 wells only, licensees may alternatively use option 3.

- Option 3 – The licensee must do all of the following:
  - – Measure and record the shut-in casing pressure and shut-in tubing pressure (if tubing is present) every year. The AER must be notified if any pressure anomalies are noted during the annual testing.
  - – Perform the wellhead inspection requirements in accordance with section 2.3 either
    - every year for wells previously classified as low-risk type 5 or
    - every five years for other low-risk well types.

Licensees must notify the AER of any well integrity issues (i.e., surface casing vent flows, gas migration, wellhead seal leaks, casing failures, and packer failures, etc.) and repair them in accordance with *Directive 087*.

3.3 High-Risk Wells

High-risk well is defined as one of the following:

Type 1. Critical sour wells, perforated or not.

Type 2. Acid gas wells.

Type 3. Class Ia waste disposal wells (see *Directive 051*).

Type 4. CO_2 EOR storage or CO_2 sequestration wells as described in *Directive 065*.

3.3.1 Initial Suspension Requirements

Initial Suspension

26) For all high-risk wells, the licensee must complete the following:

- Option 1 – set a packer and a tubing plug as close as possible to the packer setting element. The casing and tubing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.
- Option 2 – set a permanent bridge plug above the uppermost completed interval and cap it with eight linear metres of cement. The casing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.

It is recommended that licensees refer to *Directive 020* when determining the setting depths and downhole plug type. Not all suspension methods (for example, packers with a tubing plug) are acceptable abandonment methods.

Wellbore Fluid

27) The licensee must fill the wellbore with nonsaline water or an inhibited (noncorrosive) fluid, and the top two metres of the wellbore must be filled with a nonfreezing fluid.

Wellhead

The licensee must ensure that a standard wellhead is installed as outlined in *OGCR* sections 6.100(3), 6.130(1)(2), 7.050(3), and 7.060(8).

3.3.2 Ongoing Inspection Requirements

The wellhead must be maintained and tested in accordance with section 2.3.

28) For option 1, the licensee must complete the following every year:

a) The casing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.

b) The tubing must be pressure tested to a stabilized pressure of 7000 kPa for 10 minutes.

29) For option 2, the licensee must pressure test the casing to a stabilized pressure of 7000 kPa for 10 minutes every five years.

Table 1. Suspension requirements for all inactive wells

<table>
<tr><th></th><th>Low-risk well</th><th>Medium-risk well</th><th>High-risk well</th></tr>
<tr><td>Well types</td><td>Type 1. Cased-hole wells that are not critical sour – no perforations.
Type 2. Gas wells < 28 000 m^3/day[1] that are low risk (see the appendix).
Type 3. Water source wells.
Type 4. Class IV injectors (see Directive 051[2]).
Type 5. Nonflowing[3] oil wells with an H_2S content ≤ 50 moles per kilomole (mol/kmol).</td><td>Type 1. Gas wells that are medium risk (see the appendix)
Type 2. Nonflowing[3] oil wells > 50 mol/kmol H_2S.
Type 3. Flowing oil wells.
Type 4. Class II & III injection, carbon dioxide (CO_2) injection/disposal wells (see Directive 051), excluding CO_2 EOR storage and CO_2 sequestration wells as described in Directive 065.
Type 5. Class 1B waste disposal wells (see Directive 051)
Type 6. Low-risk wells inactive longer than 10 years.</td><td>Type 1. Critical sour wells, perforated or not.
Type 2. Acid gas wells.
Type 3. Class Ia waste disposal wells (see Directive 051).
Type 4. CO_2 EOR storage or CO_2 sequestration wells as described in Directive 065.</td></tr>
<tr><td>Downhole requirements</td><td>There are no downhole requirements.</td><td>Option 1. Packer and a tubing plug.
Option 2. Bridge plug.
Option 3. Read and record shut-in tubing pressure (if tubing is present) and shut-in casing pressure (applicable only to type 6 wells).</td><td>Option 1. Packer and a tubing plug.
Option 2. Permanent bridge plug capped with 8 linear metres of class “G” cement.</td></tr>
<tr><td>Initial suspension & Ongoing Inspection requirements</td><td>Types 1, 2, 3, 4, 5. Read and record shut-in tubing pressure and shut-in casing pressure.</td><td>Option 1. Pressure test casing and tubing to 7 MPa for 10 minutes.
Option 2. Pressure test casing to 7 MPa for 10 minutes.
Option 3. Read and record shut-in tubing pressure (if tubing is present) and shut-in casing pressure (applicable only to type 6 wells).</td><td>Option 1. Pressure test casing and tubing to 7 MPa for 10 minutes.
Option 2. Pressure test casing to 7 MPa for 10 minutes.</td></tr>
<tr><td>Inspection frequency</td><td>Types 1, 2, 3, 4 – 5 years.
Type 5 – 1 year.</td><td>Option 1 – 3 years.
Option 2 – 5 years.
Option 3 – Read and record shut in tubing pressure (if tubing is present) and shut in casing pressure every year (applicable to only type 6 wells).</td><td>Option 1 – 1 year.
Option 2 – 5 years.</td></tr>
<tr><td>Wellbore fluid</td><td>None</td><td colspan="2">Wellbore fluid is to be nonsaline water or a noncorrosive (inhibited) fluid, with a nonfreezing fluid in the top 2 m.
<u>For medium-risk type 6 wells only, being suspended using option 3</u>, filling the wellbore with fluid is not required; however, if fluid is to be placed in the wellbore for suspension purposes, it must be nonsaline water or an inhibited (noncorrosive) fluid, and the top two metres (m) of the wellbore must be filled with a nonfreezing fluid.</td></tr>
<tr><td>Wellheads</td><td>Unperforated (noncompleted) wells may use a welded steel plate atop the production casing stub. The plate must provide access to the wellbore for pressure measurement.
Perforated wells are to have standard wellheads.</td><td colspan="2">Standard wellheads as outlined in the OGCR, sections 6.100(3), 6.130(1)(2), 7.050(3), and 7.060(8).
<u>For medium-risk type 6 wells only that were previously low-risk type 1</u>, unperforated (noncompleted) wells may use a welded steel plate atop the production casing stub. The plate must provide access to the wellbore for pressure measurement.</td></tr>
<tr><td>Reporting</td><td colspan="3">For initial suspension: within 12 months from the “Directive 013 Inactive Status Date” and after the completion of initial suspension.
For ongoing inspections: by the end of the calendar year in which the inspection due date is calculated and after the completion of the inspection. For the reactivation: within 30 days after attaining active status.</td></tr>
<tr><td>Wellhead maintenance</td><td colspan="3">There shall be no wellhead leaks. Regular wellheads require servicing and pressure testing of sealing elements at time of suspension and at each subsequent inspection. All outlets except surface casing vents are to be bull plugged or blind flanged with needle valves. Valves must be functional (open/close). Grease and service as required to maintain functionality.</td></tr>
<tr><td>Security</td><td colspan="3">All wellheads are to be conspicuously marked or fenced such that they are visible in all seasons with well identification sign in plain view. In agricultural areas, farming operations must be restricted to safe distances from the wellhead. Pumpjacks must be left in a secure condition. Valve handles must be chained and locked, or as an alternative, valve handles may be removed.</td></tr>
<tr><td>Surface casing vent flows</td><td colspan="3">Systems must be open and comply with the OGCR, sections 6.100(1), (2), and (3).
Vent flows, if detected, are to be handled as described in Directive 087: Well Integrity Management.</td></tr>
</table>

[1] This flow rate is the stabilized wellhead absolute open flow.

[2] *Directive 051: Injection and Disposal Wells – Well Classifications, Completions, Logging, and Testing Requirements*.

[3] Nonflowing refers to wells without sufficient reservoir pressure to sustain flow against atmospheric pressure without artificial lift. The flowing product is a fluid.

4 Reactivating Suspended Wells

30) The licensee must complete all the following procedures (as applicable) to reactivate a suspended well.

All Wells

- Inspect, service, and pressure test the wellhead.
- Inspect and service control systems and lease facilities.
- Report reactivation of well on the designated information submission system within 30 days after it attained an active status and retain records.

Medium-Risk Type 1, 2, 3, 4, and 5 and High-Risk Wells

- Pressure test the casing to 7 MPa for 10 minutes. If this test fails, then the problem must be investigated and repaired.
- If tubing is present, pressure test the tubing to 7 MPa for 10 minutes. If this test fails, then the problem must be investigated and repaired.

Pressure test results are valid for 12 months. Pressure testing casing and tubing for the reactivation of a well is not required if the initial well suspension was completed less than 12 months before reactivation.

A well attains active status after it reports volumetric activity for at least one hour per month for three consecutive months. A well that cannot meet this requirement retains an inactive status.

Flaring or venting is not considered to be a volumetric activity.

5 Long-Term Suspension Requirements

31) All low-risk wells must meet suspension requirements for medium-risk wells after being inactive for 10 consecutive years after the first year of inactivity.

The following examples demonstrate the timing of the long-term suspension requirements.

Example: A never-perforated low-risk well (type 1) that was drilled in August 2005.

On August 31, 2006, the well will become inactive and the licensee will have 12 months to suspend the well in accordance with the low-risk well requirements of this directive and report it to the AER on the designated information submission system. Thus, the compliance deadline date for the low-risk initial suspension is August 31, 2007.

On August 31, 2016, if the well is still inactive, the licensee will have 12 months to suspend this well in accordance with the medium-risk well requirements of this directive. This means all the required work must be completed and reported on the designated information submission system by August 31, 2017.

6 Audit and Enforcement Process

The initial compliance assessment is conducted by the AER and the results are compiled on the inactive well licence list available on the designated information submission system. "*Directive 013* Compliance Status" and "Noncompliance Details" provided in the inactive well licence list are automatically calculated based on the information reported on the designated information submission system under Well Licence Suspension Report and based on historical volumetric activity reported on Petrinex.

The licensee is expected to submit true and accurate information in reports submitted through the designated information submission system. It is also expected that the licensee has read and understood all *Directive 013* requirements. Failure to submit true and accurate information or to comply with *Directive 013* requirements may result in subsequent enforcement by the AER.

32) The licensee must keep all documentation related to suspension operations (field reports, test results, suspension details, inspection records, pictures, etc.) for suspended wells until the well abandonment is completed in accordance with *Directive 020*.

The AER will conduct audits or field inspections, or both, to verify the licensee's compliance with *Directive 013*.

33) Upon written notification that a well has been selected for audit, the licensee must submit the required information within 20 calendar days.

Information on compliance and enforcement can be found on the AER website. Under the AER's compliance assurance program, self-disclosures or extensions pertaining to *Directive 013* requirements will not be accepted.

Appendix 1 Classifying Suspended Gas Wells

In order to classify the risk of gas wells containing H_2S for well suspension purposes, an equation determining distances to predicted concentrations is used.

The following equation for low H_2S release rates (0.01 $m^3/s < Q$ [flow rate] < 0.3 m^3/s of H_2S) gives the distance to in kilometres (km) to an ambient concentration of 100 parts per million (ppm):

$$\text{Distance to 100 ppm} = 2.0\,(Q)^{0.58}$$

A similar equation to the above with a slightly different constant (1.9145) and exponent (0.5765) can be derived assuming an exposure to 100 ppm of H_2S from a ground-based release with no plume rise and with a wind speed of 2 m/s using the U.S. Environmental Protection Agency rural plume dispersion parameters (one hour average) for very stable F-class (from the Pasquill-Gifford stability classification) stability conditions. These are typically considered to be the worst-case dispersion conditions.

The equation can be modified to predict the distance for other values of H_2S. If the occupational exposure limit of 10 ppm for an eight-hour working day is applied to the same averaging time, the equation becomes:

$$\text{Distance to 10 ppm} = 2.0 \cdot \left(\frac{100}{10}\right)^{0.58} \cdot (Q)^{0.58} = 7.6 \cdot (Q)^{0.58}$$

Figure 1 shows acceptable combinations of total flow rate and H_2S concentration for a release to disperse to 10 ppm at the 50 m lease edge. For example, a well with a 28 000 m^3/day (~1 million standard cubic feet of gas per day) potential (stabilized wellhead absolute open flow [AOF]) release rate containing 533 ppm H_2S will result in an H_2S concentration of 10 ppm at 50 m from the wellhead, the edge of a typical lease.

The AER defines a low-risk well as a combination of flow rate and H_2S concentration, with a maximum flow rate less than 28 000 m^3/day (stabilized wellhead AOF). The 28 000 m^3/day is considered to be surface killable derived from fluid momentum theory. Medium-risk wells have combinations of flow rate and H_2S concentrations above and to the right of the vertical line.

If from a given AOF and H_2S content, the conditions for the well fall below the line into the low-risk zone, the well will be considered to be low risk. If the well falls above this line, it will be considered medium risk, unless the well is considered critical sour.

To determine whether a gas well falls into the low-risk category, use the following equation, which is derived from the above-mentioned conditions:

$$\frac{15\ 000}{H_2S\,(\text{ppm})} = \text{Allowable flow rate}\ (10^3\ m^3/\text{day})$$

The maximum flow rate for any concentration of H_2S remains at 28 000 m^3/day (stabilized wellhead AOF).

The following examples demonstrate how to calculate an allowable flow rate for a given H_2S concentration. This result is then used to classify the wells as low or medium risk.

Example 1: A gas well has a flow rate of 26 000 m^3/day (stabilized wellhead AOF) at 352 ppm H_2S.

The allowable flow rate at that concentration is

$$\text{Allowable flow rate} = \frac{15\ 000}{352\ \text{ppm}} = 42.614\ 10^3\ m^3/\text{day} = 42\ 614\ m^3/\text{day}$$

The actual flow rate of 26 000 m^3/day is less than the allowable flow rate of 42 614 m^3/day, making this well low risk.

Example 2: A gas well has a flow rate of 5230 m^3/day (stabilized wellhead AOF) at 4000 ppm H_2S.

The allowable flow rate at that concentration is

$$\text{Allowable flow rate} = \frac{15\ 000}{4000\ \text{ppm}} = 3.750\ 10^3\ m^3/\text{day} = 3750\ m^3/\text{day}$$

The actual flow rate of 5230 m^3/day is greater than the allowable flow rate of 3750 m^3/day, making this well medium risk.

Example 3: A gas well has a flow rate of 32 000 m^3/day (stabilized wellhead AOF) at 0 ppm H_2S.

The allowable flow rate at that concentration is irrelevant; the actual flow is greater than 28 000 m^3/day, making this well medium risk.

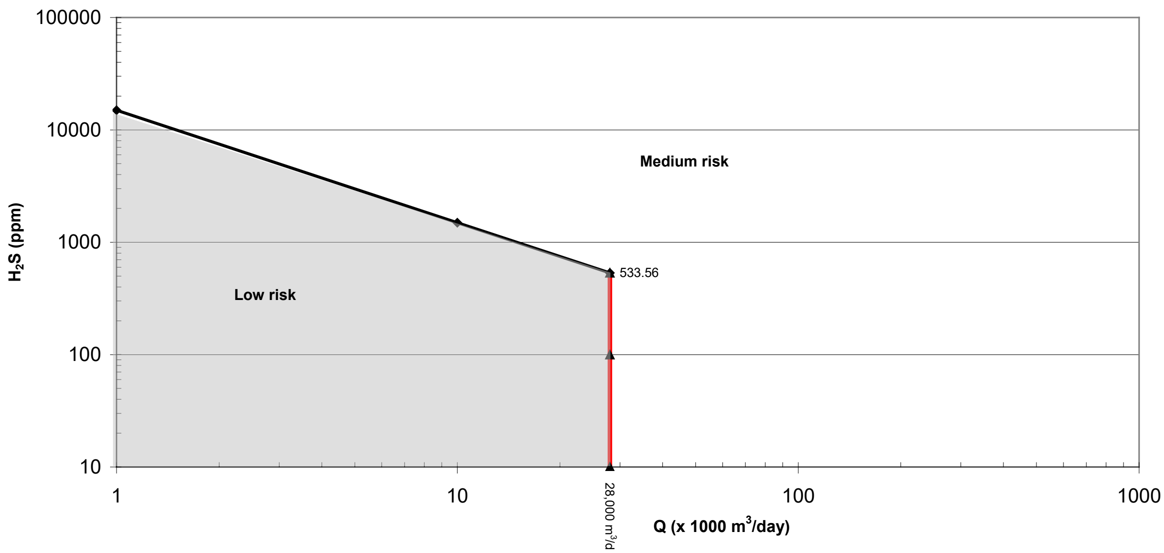

Figure 1. Source flow rate and H_2S for 50 m distance to 10 ppm H_2S

Appendix 2 Definitions

abandoned well A well that has been downhole abandoned, surface abandoned and the well licence status is "abandoned."

absolute open flow The stabilized wellhead absolute open-flow rate.

cased-hole well A well that has production casing or any combination of surface casing, intermediate casing, production casing, and/or liner.

CO_2 EOR storage An area approved for enhanced oil recovery and net geological storage of CO_2 as described in *Directive 065*.

CO_2 sequestration Wells approved for the permanent geological storage of CO_2 as described in *Directive 065*.

compliance An inactive well is considered to be compliant with *Directive 013* if it meets the following requirements:

- downhole (if applicable)
- surface
- ongoing inspections
- reporting on the designated information submission system

completed well A well that has been perforated, has a liner installed with openings for production or injection, or has an open-hole section.

critical sour well A well licensed as a critical well under *Directive 056: Energy Development Applications and Schedules*.

inactive well An inactive well is defined as follows:

- Critical sour wells (perforated or not) that have not reported any type of volumetric activity (production, injection, or disposal) for six consecutive months.
- All other wells that have not reported any type of volumetric activity (production, injection, or disposal) for 12 consecutive months.

licensee The holder of a facility, pipeline, or well licence according to the records of the AER; includes the trustee or receiver-manager of a licensee's property.

noncompleted well A well that has not been perforated, has no liner installed with openings for production or injection, or has no open-hole section.

nonflowing oil well A well without sufficient reservoir pressure to sustain flow against atmospheric pressure without artificial lift. The flowing product is a fluid.

nonsaline water Water that has total dissolved solids less than or equal to 4000 milligrams per litre.

open-hole well A well that has an open-hole interval and is required to be downhole abandoned before the drilling rig is released.

suspended well A well whose initial suspension has been completed and reported as per *Directive 013* requirements.

zonal abandonment The abandonment of a completed or open-hole interval in a cased well in accordance with *Directive 020*.

Directive 007

Release date: January 9, 2025

Effective date: January 9, 2025

Replaces previous edition issued March 27, 2023

Volumetric and Infrastructure Requirements

1 Introduction

1.1 Purpose of This Directive

This directive sets out the Alberta Energy Regulator's (AER) requirements for reporting volumetric data for wells, pipelines, and facilities, temperature data for geothermal wells, heat and power data for geothermal facilities, and well status changes using Canada's Petroleum Information Network, Petrinex (www.petrinex.ca). Under Part 12 of the *Oil and Gas Conservation Rules*, Part 4 of the *Geothermal Resource Development Rules*, and Part 4 of the *Brine-Hosted Mineral Resource Development Rules*, each oil, gas, geothermal, or brine-hosted mineral resource licensee or operator in Alberta must keep and file with the AER a record of the monthly activities at a well, facility, or pipeline in accordance with this directive.

Gathering this data allows the AER to track activities and production from wellhead to market so that it can maintain an accurate historical record of each well's resource production (i.e., hydrocarbons, by-products, brine-hosted mineral resources, and geothermal resources). The data collected are used in various ways, such as calculating and verifying royalties, assessing production operations, and preparing statistical reports on supply and market demand for the production of oil, gas, other energy products, and brine-hosted mineral resource products.

1.1.1 *Manual 011: How to Submit Volumetric Data to the AER*

Guidance on how to submit volumetric data required by the AER using Petrinex is provided in *Manual 011: How to Submit Volumetric Data to the AER*, available on the AER website at aer.ca.

1.1.2 Petrinex

Petrinex is a shared, interactive, secure database accessed via the internet. It facilitates the exchange of data among energy industry partners and between industry, the AER, and the Alberta Ministry of Energy and Minerals. As a central source of all volumetric data, Petrinex's web-based interface gives users online access to information. The data submitted to Petrinex are subject to system controls and front-end editing procedures before they are finally posted to Petrinex. Front-end editing immediately identifies discrepancies for the submitting operator so that corrections can be made before final posting.

Each operator has its own method for submitting data to Petrinex, which is controlled through the operator's user security administrator (USA). For details, see the Petrinex learning modules available under the "Learning Centre" tab on the Petrinex website.

1.2 AER Requirements

Following AER requirements is mandatory for the responsible duty holder as specified in legislation (e.g., licensee, operator, company, applicant, approval holder, or permit holder). The term "must" indicates a requirement, while terms such as "should," "recommends," and "expects" indicate a recommended practice.

Each AER requirement is numbered.

The AER encourages all duty holders to be proactive by monitoring their compliance with AER requirements. If a duty holder identifies a noncompliance, it should inform the AER of the noncompliance.

In this directive, the term "operator" refers to an operator under the *Oil and Gas Conservation Rules* or a licensee under the *Geothermal Resource Development Rules* or *Brine-Hosted Mineral Resource Development Rules*, as the case may be.

Information on compliance and enforcement can be found on the AER website.

1.2.1 Submission Deadlines

Operators report volumetric and waste management data to the AER using Petrinex. The reporting deadline is specified in the Petrinex Alberta reporting calendar and is usually between the 18th and 22nd of the month. Reporting is required for

- a facility or pipeline with an "Active" status,
- a facility or pipeline that had activities during the preceding month, or
- a facility or pipeline that was shut in for the entire month.

In extenuating circumstances, the AER may, at its discretion, revise the reporting due dates in Petrinex.

To encourage accurate historical volumetric data, Petrinex will allow volumetric amendments back to Petrinex inception ("2002-10" production month); however, only amendments for production months up until the Alberta Energy and Minerals "statute barred date" will be considered for royalty purposes.

1.2.2 Fees

To address the costs and quality issues caused by late submissions and data discrepancies in reporting volumetric data, the AER has a schedule of fees in Part 17 of the *Oil and Gas Conservation Rules*, Part 6 (Schedule 1) of the *Geothermal Resource Development Rules*, and Part 6 (Schedule 1) of the *Brine-Hosted Mineral Resource Development Rules*. The AER may issue a volumetric deficiency invoice to an operator for missing data or data discrepancies that are not corrected before a filing deadline. A complete list of error numbers, error descriptions, and associated fees is provided in the "Related Information" section at the bottom of the *Directive 007* webpage (see the AER Error Message Identifier Description and Associated Fee table).

1.2.3 Review of a Notice of Noncompliance (Volumetric Deficiency Invoice)

Operators may request that the AER Production Data Services team review a volumetric deficiency invoice.

- Requests must be submitted within 15 calendar days of the invoice date.
- Operators will receive the results of a review within ten calendar days of making the request.

Refer to *Manual 011* for information on how to request a review of a volumetric deficiency invoice.

1.3 What's New in This Edition

The directive has been updated to include the requirements to report brine-hosted mineral activities and supplementary information for oil and condensate receipts from miscellaneous facilities (ABMC) and unlinked wells to the AER using Petrinex.

2 Requirements

This section sets out the requirements for accurate monthly reporting of products, volumes, and activities associated with well, facility, or pipeline operations. Requirements are also provided for reporting geothermal well temperatures.

2.1 Well Information

1) The licensee of a well must notify the AER through Petrinex of a change in well status within 14 days of the change in well status or before it submits volumetric data, whichever comes first.
2) The licensee of a well must notify the AER of the following changes:
    a) the date on which products are produced during drilling and completion operations (such as swabbing or drillstem tests [DSTs]);

b) the date on which well testing or other operations took place before the well status changed to production, injection, or disposal or the first occurrence of production of crude oil, crude bitumen, gas, helium, brine-hosted mineral resources, or geothermal resources;

c) the date on which a well first produced crude oil or crude bitumen or the date on which a well with operational status of gas, helium, brine, or geothermal was placed on production, except for swabbing and DSTs;

d) the date on which the well was placed on regular injection or disposal;

e) the date on which a well's production, injection, or disposal operations were suspended;

f) the date on which a well's production, injection, or disposal operations resumed after a suspension;

g) the date on which commingled production first occurred from a well producing oil, gas, helium, or brine at which commingling of two or more zones occurs; and

h) the date on which any other change in status of a well occurred.

3) To change a well's fluid status from one substance to another (i.e., oil, gas, helium, or brine), the licensee of a well must apply to the AER's Reserves Group for approval.

4) The licensee of a well must ensure that all inactive wells are suspended in Petrinex and in accordance with *Directive 013: Suspension Requirements for Wells*.

2.1.1 Well-to-Facility Links

5) The licensee of a well with an "Active" well status must link the well to an appropriate reporting facility identifier (ID).

Well-to-facility links are completed in Petrinex. Well-to-facility links are done using one of the following methods, depending on whether it is associated with a well status change:

- For link changes associated with a well status change, the edit well status process is used to identify the new facility link. The start date of the well-to-facility link will default to the well status date. An exception to this method is when the well status date is before Petrinex implementation, in which case the well-to-facility link is October 1, 2002.
- For link changes that are not associated with a well status change (e.g., when changing from a single battery to a multiwell battery), the "request well-to-facility link change" process is used.

Most types of production wells may only be linked to one facility ID, and injection wells may only be linked to one injection facility ID; however, well-to-facility linkages can be changed at any time but remain a one-to-one relationship.

Some active well statuses require linking a well to two facility IDs at the same time. Cyclical wells, steam-assisted gravity drainage (SAGD) wells, and storage wells are linked to both a battery ID and an injection facility ID at the same time. Depending on the activity, wells are reported each month at one ID or both IDs (the injection facility and battery).

Geothermal wells are linked and reported monthly to a geothermal facility ID. If there is incidental hydrocarbon production, the well must also be linked to and reported at a battery ID at the same time.

2.1.2 Commingling

Directive 065: Resources Applications for Oil and Gas Reservoirs sets out the processes and application requirements for wells that are completed in more than one pool to produce without downhole segregation (commingled production).

6) An operator/licensee must

   a) report commingled production from all pools as a total volume to one well event and

   b) update the well status through Petrinex for the well event that will be reporting production in order to identify the well events involved in the commingling.

All commingled well events will have a common gross completion interval, commingled pool code, and start date of the well status. A well event reporting production will have a “Producing” status. Well events involved in the commingling but not reporting production will have their well status changed to “Commingled.”

However, in certain instances, the AER may approve commingling on the basis that production continues to be allocated to individual pools and that this allocation is based on prescribed percentages. When this is required, the AER will identify the percentages to be used when allocating the total production to individual pools.

7) Where the AER has approved commingling with a percentage allocation back to each individual pool, the operator/licensee must

   a) not change the well status to “Commingled” and

   b) report production for each well event separately based on the prescribed percentage in the commingling approval.

2.1.3 Well Volumetric

8) Using Petrinex, the operator of an active well must report to the AER by the AER volumetric data and waste management reporting deadline specified in the Petrinex Alberta reporting calendar, which is usually between the 18th and 22nd of each month. In extenuating circumstances, the AER may, at its discretion, revise the reporting due date. Reporting is required if, during the preceding month, the well

    a) tested, produced, or received crude oil, condensate, crude bitumen, gas, water, helium, brine, or other substance or temperatures were recorded for a geothermal well;

    b) had crude oil, gas, solvent, water, air, helium, brine, or other substance injected or disposed of; or

    c) was shut in for the entire preceding month.

9) The operator must accurately report using Petrinex the preceding month's particulars of activities, hours, products, temperatures (for geothermal wells), and volumes associated with the testing, production, injection, and disposal operations at the wells, which must include

    a) the volumetric amounts of crude oil, condensate, crude bitumen, gas, water, helium, brine, or other substance produced from the well;

    b) the volumetric amounts of oil, gas, solvent, water, air, brine, or other substance injected or disposed of into the well;

    c) the number of hours during which the well was tested, produced, injected, or used for disposal activities;

    d) the volumetric amounts of sulphur emissions at the well;

    e) the volumetric amounts of gas flared, vented, or used for fuel at the well;

    f) for wells reporting helium production, the volumetric amounts of nitrogen, carbon dioxide, or helium vented;

    g) for geothermal wells (excluding geothermal observation wells), the wellhead minimum, average, and maximum temperatures, and for all geothermal wells (including geothermal observation wells), the bottomhole temperature (if collected); if a closed-loop geothermal well is not circulating fluids, do not report the temperatures;

    h) the shut-in activity if the well was shut in for the entire preceding month; and

    i) any further particulars the AER may require.

2.1.4 Well Activity

10) The operator of a facility that has an "Active" well status must

  a) submit an accurate report of all activities, products, volumes, temperatures (for geothermal wells), and product movements for each active well;

  b) continue to submit an activity for the well until the well status is changed to an inactive well status and the well is not producing, injecting, or disposing; and

  c) report the gas that was produced at a facility when oil production is reported at a crude oil or crude bitumen facility.

11) For a well linked to more than one facility ID, such as those with a well status of "Cyclical," "Storage," "Steam-Assisted Gravity Drainage," or "Geothermal Oil/Gas/Bitumen," the facility operator must report at one of the facility IDs each month.

12) When a well is linked to a new second facility ID during the month, the facility operator must report the well at both facility IDs.

13) If a well's status from a previous month is changed to an "Active" status retroactively, the facility operator must make the required monthly submissions for each missing month from the date the well status is changed.

14) If the classification of a well's volumetric gas well liquid code changes, the operator must submit amendments from the start date of when the change was made.

2.1.5 Concurrent/Consecutive Injection

15) If a well injects more than one product during the month, the facility operator must report a concurrent/consecutive injection (CCI) code.

16) If a well injects more than one distinct product consecutively with AER approval, the facility operator must report each product injected, along with the hours of injection for that product.

17) If products are injected concurrently and reported separately and AER approval is obtained when the scheme is approved, the facility operator must enter the same CCI code on each row and report the hours only once on one of the rows.

2.2 Facility Information

2.2.1 Volumetric Submissions

18) The facility operator must report the activity, the product, and the volume received at a facility from a well or facility for every transaction.

2.2.1.1 Amendments to Volumetric Submissions

19) The facility operator must submit an amendment as soon as it becomes aware of an error or when advised by the AER of an error in a monthly activity.

The AER will accept or may require an amendment to any monthly activity submitted for the previous five years or as otherwise directed by the AER.

2.2.2 Facility IDs

20) Where a facility is constructed and operated, the licensee or approval holder of the facility must immediately obtain the appropriate facility ID from Petrinex for reporting purposes.

2.2.2.1 Compressor Station Facility IDs

All licensed compressor stations must have a facility ID. Facility IDs for compressor stations are generated automatically by Petrinex upon receipt of a compressor station licence from the AER. This facility ID is used to report fuel, flare, and vent volumes at the nearest reporting facility. A compressor station is not a reporting facility, so a monthly facility volumetric submission is not required.

2.2.2.2 Water Source ID Requests

21) Operators of enhanced oil recovery thermal in situ injection facilities with a new, shallow, unlicensed well or surface water source (river/lake) must request a water source ID through Petrinex. Once the system validates the data, a water source ID is issued.

2.2.3 Facility Change Requests

If details about a facility need to be changed, an operator of a facility may update the changes through Petrinex. Changes can be made to the facility name, steam quality percentage, and meter station to pipeline link using the Edit Facility Information screen in Petrinex. The facility type and subtype cannot be changed because the facility type is part of the facility ID.

2.2.4 Facility Operational Status

A facility's operational status is the status of the facility for a specific period of time. The most common statuses used are "Active" and "Suspended." Each time the status is changed, a history of the previous status is kept. The facility operational status is used when checking for missing volumetric data. Missing volumetric data is subject to noncompliance consequences.

22) If the facility is active, its operator must report volumetric submissions monthly.

23) The facility operator must ensure that the facility has the correct operational status.

24) If a retroactive facility operational status change is required, the facility operator must ensure that a volumetric submission is completed for all months where the retroactive status was made "Active."

When the status of a facility is "Active," regardless of whether it was made active retroactively, a submission of volumetric data is required to avoid noncompliance fees. When the status of a facility is "Abandoned," no submission of volumetric data is required.

2.2.5 Facility Operator Changes

25) If the facility operator changes, the operator of record must request a facility operator change before the AER volumetric data and waste management reporting deadline specified in the Petrinex Alberta reporting calendar, which is usually between the 18th and 22nd of each month. In extenuating circumstances, the AER may, at its discretion, revise the reporting due date.

The new operator will not be able to submit volumetric data to Petrinex until the change in operator has been updated in Petrinex via the concurrence process. The operator of record will remain responsible for any volumetric submissions until the new operator accepts the operatorship transfer request.

2.2.6 Corporate Amalgamations

26) Where the operator of record's business associate (BA) ID has amalgamated with another BA ID, the operator of record must submit a request for a facility operator change using the operator of record's BA ID. The operator must submit the request before the AER volumetric data and waste management reporting deadline specified in the Petrinex Alberta reporting calendar, which is usually between the 18th and 22nd of each month. In extenuating circumstances, the AER may, at its discretion, revise this reporting due date.

The new operator of record of the affected facilities does not have to be the successor in the amalgamation; however, only BAs with an "Active" status in Petrinex can be selected as the next operator of the facilities.

2.3 Facility and Pipeline Information

27) Using Petrinex, the operator of an active facility or pipeline must report to the AER by the AER volumetric data and waste management reporting deadline specified in the Petrinex Alberta reporting calendar, which is usually between the 18th and 22nd of each month. In extenuating circumstances, the AER may, at its discretion, revise the reporting due date. For the preceding month, the facility or pipeline operator must accurately report:

a) the particulars of the crude oil, synthetic crude oil, gas, marketable gas, acid gas, ethane, propane, butanes, natural gas liquids, helium, sulphur products, crude bitumen, water, waste products, heat, power, brine, and other substances purchased, received, processed, disposed of, and sold;

b) the particulars of the source from which the component, product, and substance listed in requirement (a) above were received or processed;

c) the particulars of the volumetric amount from each source for each component, product, and substance listed in requirement (a) above;

d) the inventories, disposition, and delivery destinations of all components, products, and substances received, processed, and recycled listed in requirement (a) above;

e) the particulars of disposition when product leaves the province;

f) the particulars of gas flared, vented, or used as fuel;

g) the volumetric amount of sulphur emissions at the facility;

h) the “SHUTIN” activity if the facility or pipeline was shut in for the entire preceding month;

i) supplementary information identifying the sources of oil or condensate receipts from a miscellaneous facility (ABMC) or an unlinked well where the exceed the volume threshold established by the AER; and

j) any further particulars the AER may require for a particular facility or pipeline.

An accurate report of all activities, products, volumes, and product movements must be submitted for each active facility.

28) Where a facility has an “Active” status and an opening inventory and was shut in for the entire month, the facility operator must make a volumetric submission with the activity closing inventory reported.

Because the opening inventory is autopopulated based on the previous month’s closing inventory, it is only pending and is not a submission until an activity is entered.

29) Where a facility has an “Active” status and no opening inventory and was shut in for the entire month, the facility operator must make a volumetric submission with the activity reported as “SHUTIN.”

2.3.1 Proration Factors

30) If the reporting facility type is a battery (BT) with a facility subtype of proration and the well production activities are reported, or if the facility type is a custom treater (CT) and receipts are reported, the operator must report the proration factors for oil, gas, and water.

2.3.2 Inventory

If a facility had closing inventory (INVCL) from the previous month, Petrinex will autopopulate the facility opening inventory (INVOP) product and volume for the current month. At the AER volumetric data and waste management reporting deadline specified in the Petrinex Alberta reporting calendars, Petrinex will roll over all closing inventory volumes to the next month’s opening inventory and be ready for the next month’s volumetric submission. The facility operator will never be able to enter the opening inventory activity, nor will the facility operator be able to change a volume autopopulated by Petrinex for the facility.

If an amendment occurs for a previous month and the amendment changes the closing inventory volume, Petrinex will create a pending volumetric submission for the next month with the changed opening inventory volume. The facility operator is also required to submit an amendment for this month.

At Petrinex implementation, the AER populated the October 2002 opening inventory using September 2002 closing inventories for facility statements received at the AER by October 18, 2002. If changes to the October 2002 opening inventory are required, the facility operator must balance the facility using the inventory adjustment activity (INVADJ).

2.3.3 Receipts and Dispositions

In most cases, deliveries to another facility must be reported as a receipt by the receiving facility operator, and a corresponding disposition will be autopopulated by Petrinex at the delivering facility. However, if the reporting facility is a pipeline (PL), meter station (MS), or terminal (TM), there may be situations where the delivering facility operator reports the disposition. If this is the case, a corresponding receipt will be autopopulated by Petrinex at the receiving facility.

Petrinex will flag a facility’s volumetric activity as “Pending” when it has autopopulated the disposition or receipt volumes for the facility. This pending disposition or receipt is not part of the facility submission until the facility operator accepts the pending disposition or receipt, even when the facility operator has completed facility submission and is only waiting for the autopopulated volumes. It is the facility operator's responsibility to ensure that the autopopulated volume is accepted and becomes part of facility submission.

A facility operator cannot modify volumes that have been autopopulated based on another facility's submission. If a facility operator disagrees with a volume, the operator should contact the receiving or disposing facility operator who created the autopopulated volume and request a correction to the volume.

When a volume is disposed of to a nonreporting facility (e.g., out of province), the disposing facility operator must report the disposition.

2.3.4 Balance

Petrinex will run a process that calculates activities, totals individual activities, and balances the facility. When the facility operator completes an online edit or queries a facility's volumetric data, the system will run this process automatically so that the current up-to-date balance for the facility is displayed. Operators of a facility will see an online message if problems exist, and they may request that an error (noncompliance) report be run on specific facilities or all facilities. Petrinex will automatically run a balance on all facilities two days before the AER filing deadline and again at the filing deadline to identify facilities in error and/or out of balance.

The run two days before the filing deadline is a facility operator's final notice before the submission filing deadline. Any balance errors not corrected before the filing deadline are subject to AER noncompliance fees. If an operator of a facility submits volumetric data for a facility during this two-day period, the operator should request a noncompliance report to ensure that the final balancing of its facilities is correct.

3 Records Management and Retention

31) A licensee of a well that is (or is capable of) producing, injecting, or disposing, or a licensee of a pipeline, or an operator of a facility, must keep at its field office or other place of business in Alberta, a daily record of operations for a period of one year in a form satisfactory to the AER.

3.1 Wells

32) The daily record must include the original recording of measurements used to determine the particulars for the record and must demonstrate

   a) the volumetric amounts of crude oil, condensate gas, natural gas liquids, crude bitumen, water, air, steam, helium, brine, and any other component, product, and substance produced and reproduced from, injected, or disposed of into the well;

   b) the source from which the products and substances listed in requirement 2(a) above were obtained;

c) for geothermal wells (excluding observation wells), the wellhead temperatures and any bottomhole temperatures taken;

d) the particulars of any treatment to which the products were subjected and average separator or treater pressures if in use;

e) the total number of hours of production, injection, and disposal of each product or substance during each month; and

f) any further particulars the AER may require.

3.2 Facilities and Pipelines

33) The daily record of operations of crude oil, synthetic crude oil, gas, marketable gas, ethane, propane, butanes, natural gas liquids, helium, crude bitumen, sulphur products, water, brine, waste products, heat, power, and any other component, product, or substance, must include the following:

a) list of the products and substances purchased or received into the facility;

b) particulars of the source from which the products and substances were received;

c) particulars of the price payable, quantity, and quality of the products and substances received from each source;

d) particulars of the inventories, consumption, disposition, and delivery destinations for all the products and substances received, refined, processed, and sold;

e) particulars of the deliveries of all sales to retail distributors or for ultimate use within the province, including volumes, number of customers, and classification of customer accounts;

f) particulars of the amount realized from the sale of the products and substances; and

g) any further particulars the AER may require.

2005 NBCA 54
New Brunswick Court of Appeal

Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co. (Receiver of)

2005 CarswellNB 280, 2005 CarswellNB 279, 2005 NBCA 54, [2005] A.N.B. No. 203, [2005] N.B.J. No. 203, 12 C.B.R. (5th) 90, 139 A.C.W.S. (3d) 621, 286 N.B.R. (2d) 19, 748 A.P.R. 19

In the Matter of the Bankruptcy of St. Anne-Nackawic Pulp Company Ltd.

In the Matter of an Application for an Interim Injunction and/or Preservation Order

St. Anne Industries Ltd. and Green Jain Wedlake Incorporated in its capacity as Receiver of St. Anne-Nackawic Pulp Company Ltd. (Respondents - Appellants) and Sunny Corner Enterprises Inc. and Lorneville Mechanical Contractors Ltd. (Applicants - Respondents) and A.C. Poirier & Associates Inc., successor of Green Jain Wedlake Inc., trustee in bankruptcy of St. Anne-Nackawic Pulp Company Ltd. (Respondent - Respondent) and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 219 and National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 1159 (Respondents - Respondents)

Turnbull, Deschénes, Robertson JJ.A.

Heard: January 27, 2005
Judgment: March 27, 2005
Written reasons: May 26, 2005
Docket: 147/04/CA

Proceedings: affirmed *Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co. (Receiver of)*, 2004 CarswellNB 709, 2004 NBQB 375 ((N.B. Q.B.))

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Raymond P. Gorman, Q.C. for Respondent, A.C. Poirier & Associates Inc. successor to Green Jain Wedlake Inc. as Trustee
Robert D. Breen, Q.C., Barbara J. Cooper for Respondents, CAW-Canada Local 219, CAW-Canada Local 1159

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

X Priorities of claims
- X.1 Secured claims
  - X.1.b Forms of secured interests
    - X.1.b.iii Miscellaneous

Remedies

II Injunctions
- II.2 Prohibitive injunctions
  - II.2.c Interim and interlocutory injunctions
    - II.2.c.i Threshold test
      - II.2.c.i.A Serious issue to be tried

Headnote

Injunctions --- Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Strength of applicant's case

S Co. operated pulp mill until it made voluntary assignment in bankruptcy in 2004 — SA Ind., parent corporation of S Co., was secured creditor of S Co. with respect to its accounts receivable and inventory — Inventory and accounts receivable represented 85 per cent of bankrupt's realizable assets that remained available to its creditors — "Estimated to produce" figure for inventory was $20.1 million and, with respect to accounts receivable, $10.8 million — Receiver had collected $2.6 million of outstanding amount and paid money over to SA Ind. — Claims of creditors SC Inc. and LM Inc. totalled $2 million for work done to pulp mill beginning in August 2004 and ending on date S Co. filed for bankruptcy — SC Inc. and LM Inc. moved successfully for interlocutory injunctive relief in form of preservation order — Preservation order had effect of placing net proceeds from S Co.'s accounts receivable in trust in bank account — Moneys would have been paid to SA Ind. — SA Ind. and receiver appealed — Appeal dismissed — Fact that S Co. had given security to parent corporation SA Ind. less than two years before bankruptcy raised legitimate question as to whether security interest given was valid — Trustee in bankruptcy refused to make independent assessment of validity of security interest — Preservation order was granted with view to providing SC Inc. and LM Inc. with time in which to seek removal of original trustee and to have successor trustee assess validity of SA Ind.'s security — Apparent conflict of interest between S Co. and its parent corporation SA Ind., and inadequate inquiry made by trustee with respect to security agreement, satisfied seriousness issue of tripartite test for granting injunction.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Specific assignments

Preservation order pending assessment of security agreements — S Co. operated pulp mill until it made voluntary assignment in bankruptcy in 2004 — SA Ind., parent corporation of S Co., was secured creditor of S Co. with respect to its accounts receivable and inventory — Inventory and accounts receivable represented 85 per cent of bankrupt's realizable assets that remained available to its creditors — "Estimated to produce" figure for inventory was $20.1 million and, with respect to accounts receivable, $10.8 million — Receiver had collected $2.6 million of outstanding amount and paid money over to SA Ind. — Claims of creditors SC Inc. and LM Inc. totalled $2 million for work done to pulp mill beginning in August 2004 and ending on date S Co. filed for bankruptcy — SC Inc. and LM Inc. moved successfully for interlocutory injunctive relief in form of preservation order — Preservation order had effect of placing net proceeds from S Co.'s accounts receivable in trust in bank account — Moneys would have been paid to SA Ind. — SA Ind. and receiver appealed — Appeal dismissed — Fact that S Co. had given security to parent corporation SA Ind. less than two years before bankruptcy raised legitimate question as to whether security interest given was valid — Trustee in bankruptcy refused to make independent assessment of validity of security interest — Preservation order was granted with view to providing SC Inc. and LM Inc. with time in which to seek removal of original trustee and to have successor trustee assess validity of SA Ind.'s security — Apparent conflict of interest between S Co. and its parent corporation SA Ind., and inadequate inquiry made by trustee with respect to security agreement, satisfied seriousness issue of tripartite test for granting injunction.

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s. 135(3) — referred to

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Rules considered by *Robertson J.A.*:

Rules of Court, N.B. Reg. 82-73

R. 35.02 — considered

APPEAL by secured creditor and receiver from preservation order with respect to secured assets of bankrupt in judgment reported at *Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co. (Receiver of)* (2004), 2004 NBQB 375, 2004 CarswellNB 709, 12 C.B.R. (5th) 70 (N.B. Q.B.).

***Per curiam*:**

The appeal is dismissed with costs.

***Robertson J.A.*:**

1 The appeal of this matter was heard on January 27, 2005. On March 27, 2005 we issued our judgment, dismissing the appeal with costs. We also indicated that reasons would follow. These are the reasons.

2 The question raised on this appeal is whether the motion judge erred in granting a "preservation order" pending a determination as to the validity of security taken by the appellant, St. Anne Industries Ltd. ("St. Anne Industries"), over the assets of St. Anne-Nackawic Pulp Company Ltd. (St. Anne Pulp). The latter corporation filed for bankruptcy on September 15, 2004. The preservation order had the effect of placing the net proceeds from St. Anne Pulp's accounts receivable in trust in a bank account maintained at a branch of a Canadian chartered bank located in New Brunswick. Those moneys would have been paid to St. Anne Industries, but for the preservation order which issued on October 15, 2004 under Rule 35.02 of the *Rules of Court* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). It is common ground that the right to the order was dependent on the proper application of the tripartite test used in granting interlocutory injunctive relief: serious issue, irreparable harm and balance of convenience. Stripped to its essentials, this appeal whittles down to a solitary question: whether there is a "serious issue". While I agree with the motion judge that a serious issue exists, I differ on how that issue is to be formulated. Subject to that caveat, I am of the respectful view that the motion judge did not err in granting the order.

3 St. Anne Industries is the parent corporation of St. Anne Pulp. In turn, St. Anne Industries is a wholly owned subsidiary of Parsons & Whittemore Incorporated of New York. The latter corporation is not a party to the proceedings. The appellant,

Green Jain Wedlake Incorporated ("Green Jain") is a party in its capacity as receiver, privately appointed under the security agreement between St. Anne Pulp and St. Anne Industries. Green Jain was also the original trustee in bankruptcy, but was removed from that office after the preservation order issued because of a conflict of interest. The removal order issued on October 21, 2004 and was effective as of October 25, 2004. The respondent, A.C. Poirier & Associates Inc., is the successor trustee in bankruptcy. The respondents, Sunny Corner Enterprises Inc. ("Sunny Corner") and Lorneville Mechanical Contractors Ltd. ("Lorneville Mechanical"), are creditors of St. Anne Pulp. These respondents are the ones who sought the preservation order. The respondents, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Locals 219 and 1159 respectively, are the exclusive bargaining agents for certain workers formerly employed by St. Anne Pulp. Those workers have filed Proofs of Claim.

4 At the appeal hearing, a number of housekeeping items were addressed. The successor trustee's name did not appear on the Notice of Appeal. With the concurrence of all parties, the Court lifted any stay that might have arisen under Rule 13.01 and removed Green Jain as a party to the appeal in its capacity as trustee. The style of cause was further amended by showing A.C. Poirier & Associates Inc. as the successor trustee. As well, Local 219 and Local 1159 were not named parties to the appeal and sought intervener status, even though they had been granted intervener status in the court below. With the consent of all parties, the style of cause was amended by adding Local 219 and Local 1159 as respondents. Finally, all parties agreed that it was not necessary for the appellants to seek leave to appeal the motion judge's order. The appeal comes to us as a matter of right under s. 193(*c*) of the BIA.

5 A brief review of the essential facts leading up to the issuance of the preservation order will facilitate my legal analysis. St. Anne Pulp operated a pulp mill at Nackawic, New Brunswick until it made a voluntary assignment in bankruptcy on September 15, 2004. St. Anne Industries is a secured creditor of St. Anne Pulp and, in particular, with respect to its accounts receivable and inventory, as evidenced by a loan agreement dated June 25, 2002 and security documents registered June 26, 2002. The secured loan agreement came about as a result of a refinancing effected after the banker for St. Anne Pulp withdrew its financial support. As it should happen, the inventory and accounts receivable represent 85% of the bankrupt's realizable assets that remain available to its creditors. The "estimated to produce" figure for the inventory is $20.1 million. With respect to the accounts receivable, the amount is $10.8 million. Prior to the issuance of the preservation order, the receiver had collected $2.6 million of the outstanding amount. That money was paid over to St. Anne Industries, which in turn transferred the money to Parsons & Whittemore in New York. The claims of Sunny Corner and Lorneville Mechanical total $2 million for work done to the pulp mill beginning in August of 2004 and ending on the date St. Anne Pulp filed for bankruptcy. In their amended Notice of Motion, Sunny Corner and Lorneville Mechanical alleged that St. Anne Pulp was insolvent at the time it granted the impugned security to St. Anne Industries in 2002 and, therefore, its security was invalid. The two applicants also alleged that they requested the original trustee in bankruptcy to disallow St. Anne Industries' claim to security over the assets of St. Anne Pulp, but that the original trustee had failed or refused to do so.

6 Three affidavits were filed in support of the application for the preservation order. The first was sworn by a lawyer with the law firm representing the applicants (the O'Brien affidavit). That affidavit simply attests to the existence of pertinent security documents that have been registered under provincial laws. The second affidavit was sworn by a chartered accountant and a registered trustee in bankruptcy (the Munro affidavit). This affiant attested to the inability of the applicants' lawyers to obtain financial statements from the original trustee in bankruptcy. He goes on to say that he has reasonable grounds for concluding that at the time the impugned security was granted "the realizable value of the assets of the Bankrupt ... were substantially less than its liabilities." That conclusion was based on St. Anne Pulp's financial circumstances as of September 2004. From that document, the affiant drew the inference that if St. Anne Pulp was insolvent in 2004, it must have been insolvent at the time the security was granted in 2002. The third affiant is the president of Lorneville Mechanical (the Dumouchel affidavit). That affidavit attests only to the work completed prior to the assignment in bankruptcy.

7 The respondents, Green Jain and St. Anne Industries filed three affidavits in response to the applicants' affidavit evidence. The controller of St. Anne Pulp filed an affidavit to which he attached a copy of the audited financial statements for 2002 (the Connell affidavit). The president of St. Anne Pulp and St. Anne Industries filed the second affidavit, to which he attached documents surrounding the 2002 refinancing arrangements (the White affidavit). The third affidavit was sworn by the vice-

president of St. Anne Industries and Parsons & Whittemore. That affidavit attached a document prepared by a financial institution indicating the "enterprise values" for St. Anne Pulp as of June 2001 (the Sweeney affidavit).

8 In response to the respondents' affidavits, the applicants filed two additional affidavits. The first attached a letter from the solicitors of the original trustee indicating that the legal opinion that it had prepared for the original trustee, with respect to the validity of St. Anne Industries' security, would be provided to the applicants (the O'Brien affidavit). The second affidavit was sworn by a chartered accountant retained by the applicants for purposes of assessing the solvency of St. Anne Pulp (the Stehelin affidavit). This affiant indicated that an opinion on the solvency issue could not be given until such time as further information was obtained. The affidavit went on to list the information required.

9 In response to the applicants' response affidavits, the respondents to the motion filed a further affidavit prepared by the then solicitors for the original trustee. That affidavit confirms that the legal opinion provided to the original trustee, with respect to the validity of the security granted to St. Anne Industries, had been forwarded to counsel for the applicants. The appeal record does not include that opinion letter, but the record does reveal that the opinion was based on the unchallenged premise that St. Anne Pulp was solvent at the time the security was granted.

10 On the basis of the above evidence and after applying the tripartite framework governing interlocutory injunctive relief the motion judge granted the preservation order. With respect to whether a serious issue existed the motion judge reasoned as follows:

> The serious issue to be tried in this case is whether St. Anne-Nackawic Pulp Company Ltd. was solvent at the time it gave security to its parent company, St. Anne Industries, Ltd. and whether the security held by St. Anne Industries, Ltd. is valid and enforceable in accordance with its terms. In this regard, Counsel for St. Anne Industries, Ltd. has provided a copy of St. Anne-Nackawic Pulp Company Ltd.'s financial statements for the year ended December 31, 2002. Note 5 to those financial statements states as follows:
>
> During the first quarter of 2002, the Company received Parent Company U.S. dollar cash advances of Canadian equivalent $34.3 million and converted a prior year intercompany advance of approximately Canadian $4.3 million into long-term debt. These loans ("Parent Company Loan") are denominated in U.S. dollars of $24.8 million and bear interest at a rate of 6.7% per annum. The cash funds received were used to repay outstanding U.S. dollar denominated operating and term loan amounts aggregating USD $21.3 million (Canadian equivalent of $36.0 million).
>
> During the term of the Provincial Loan, the Company is permitted to pay interest on the Parent Company Loan calculated on the outstanding principal amount expressed in Canadian dollars less CAD $20.0 million. Principal repayments are restricted by the terms of the Provincial Loan.
>
> The Parent Company Loan has pledged as collateral a convert to cash $63 million (USD $40 million) debenture and a general security agreement taking a security interest on accounts receivable and inventory.
>
> Conditions of the Provincial Loan restrict the level of management fee[s], sales commission and interest payments to the Parent Company.
>
> There would appear to be $4.3 million of unsecured debt which was converted to secured debt which is at least one issue that would have to be addressed. It is not to be determined on the hearing of this motion but at least, in my opinion, is an issue to be tried.

11 As to the matter of irreparable harm, the motion judge held that the applicants and other creditors of St. Anne Pulp would suffer irreparable harm if the net proceeds from the accounts receivable were transferred to Parsons & Whittemore in New York. As for the balance of convenience factor, the motion judge noted that the preservation order did not seek to prevent the receiver from realizing on St. Anne Industries' security in a commercially reasonable manner. Rather, the effect of the order would be to ensure that the receiver placed the proceeds of realization, in trust, with a Canadian chartered bank. There was no evidence that St. Anne Industries needed the moneys to fund present business operations, a conclusion which is consistent with the fact

that prior to the appointment of the receiver the receivables would have been used by St. Anne Pulp in the ordinary course of its business. In short, the motion judge held that St. Anne Industries would not suffer irreparable harm if the receivables collected remained in a trust account until such time as the validity of the impugned security was properly assessed. For these reasons, the motion judge concluded that the balance of convenience favoured the applicants and the granting of the preservation order.

12 In granting the preservation order, the motion judge also ordered that the matter be reviewed on November 12, 2004, at which time a determination would be made as to whether the order should remain in force. At the November 12, 2004 hearing, St. Anne Industries argued once again that no serious issue existed. The motion judge referred to the affidavit evidence submitted by the applicants to which was attached the opinion letter prepared by the solicitors for the original trustee in bankruptcy. In that letter the solicitors acknowledged that they had not addressed the solvency issue. The motion judge also noted that the successor trustee had yet to make a decision with respect to the validity of the impugned security. Armed with this evidence, the motion judge held that the preservation order should remain in effect, subject to a further review to be held on December 21, 2004. At the December 21 hearing, St. Anne Industries argued that even if St. Anne Pulp were insolvent at the time it granted security in 2002, St. Anne Industries qualified as a *bona fide* purchaser under s. 91(3) of the BIA and therefore its security interest in the accounts receivable remained valid, notwithstanding any insolvency. Nonetheless, the motion judge was not prepared to dissolve the preservation order. Noting that the successor trustee had yet to make a determination with respect to the validity of the impugned security and that further examinations were to be conducted under the provisions of the BIA, the motion judge ordered that the order continue in effect, subject to a further review on February 9, 2005. Prior to that date, this Court heard the appeal with respect to the granting of the initial preservation order and to which these reasons are addressed. Subsequently, the motion judge heard and granted a consent order, dated February 9, 2005. The consent order properly acknowledged that the preservation order would remain in effect until such time as this Court rendered its decision and that the applicants for the order (the respondent creditors) would not have to give security for damages so long as proof of their financial circumstances were filed. As well, the consent order provided for a time schedule which would allow the successor trustee to take the steps necessary to assess the validity of the impugned security and, correlatively, whether to issue a notice of determination or disallowance, as provided for under s. 135(3) of the BIA.

13 On appeal, the appellants focused on one issue: whether the motion judge erred in finding a serious issue. Before addressing that question, I wish to address one raised in the appellants' written submission, but not pursued during oral argument. I realize that in invoking Rule 35.02, as a basis on which to ground the granting of the preservation order, it was open to the appellants to argue that Rule 35.02 has no application because it contemplates an underlying proceeding. As there was no underlying proceeding at the time the applicants sought the preservation order, it necessarily follows that the Rule cannot be relied on to support the issuance of the preservation order. In response, I note that s. 183 of the BIA vests the Court of Queen's Bench with such jurisdiction at law and in equity as to enable that Court to exercise original, auxiliary and ancillary jurisdiction in bankruptcy. It is well known that s. 183 may be invoked so long as its application does not conflict with another provision of the BIA. In my opinion, s. 183 is broad enough to authorize the granting of interlocutory relief pending proceedings authorized under the BIA to address a trustee's refusal to challenge the validity of a security interest in the bankrupt's property (see generally *Dugas Estate, Re* (2004), 268 N.B.R. (2d) 290 (N.B. C.A.)). Undoubtedly, the applicants had several remedial options open to them stemming from the original trustee's decision not to assess the validity of the impugned security. Section 37 provides that where a creditor is aggrieved by a decision of the trustee, that creditor may apply to the court to challenge the trustee's decision. Section 38 provides the mechanism by which creditors may proceed with an action when the trustee refuses or fails to act. Finally, it was open to the applicants to seek removal of the original trustee, as permitted under s. 14.04. Ultimately, the applicants chose this remedial option. In the interim, an order was needed to preserve the status quo pending removal of the trustee for cause.

14 Serious issue is defined in terms of whether the underlying grievance is frivolous or vexatious. It is also settled law that the threshold is a low one (see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 335; *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P* (1998), 207 N.B.R. (2d) 102 (N.B. C.A.) at para. 18; *Metz Farms 2 Ltd. v. Committee Against Hog Factories* (2001), 236 N.B.R. (2d) 4 (N.B. C.A.) at para. 19).

15 The appellants accept that a challenge to the validity of a security interest in property is indeed a serious question. What they challenge is the evidentiary basis on which the respondent creditors allege invalidity and, more specifically, the lack of evidence to support the allegation that St. Anne Pulp was insolvent at the time it granted the security in 2002. The appellants submit that there was no admissible evidence supporting the allegation that St. Anne Pulp was insolvent at the time it granted St. Anne Industries security over its assets, including the accounts receivable and, therefore, the respondent creditors failed to raise a serious issue. Alternatively, the appellants contend that the evidence was insufficient to support the allegation of insolvency. The appellants' position is found at paragraph 40 of its submission and is worth reproducing:

> ... the learned trial judge misapprehended the nature of the evidence properly before him and committed palpable and overriding errors:
>
>> (1) In issuing the Injunction restraining the Receiver from paying to Industries the proceeds of realization of Pulp's accounts receivable because: (a) the admissible evidence then before the learned trial judge demonstrated: (i) the solvency of Pulp in 2002; (ii) a licensed trustee in bankruptcy representing the interests of all unsecured creditors of Pulp's estate had received the independent Valid Security Opinion confirming the enforceability of the Security; (iii) the Respondents had only indicated a mere possible intention to: (A) investigate the solvency of Pulp; and (B) challenge the validity of the Security; and (iv) the Respondents had no evidence as to Pulp's lack of solvency in 2002; and (b) therefore, there was no serious issue to be tried relating to the assets subject to the Injunction.

16 The lack of evidence surrounding St. Anne Pulp's solvency at the time it granted security to St. Anne Industries is reinforced once consideration is given to the slender thread on which the motion judge based his finding of serious issue. That slender thread takes the form of a footnote in St. Anne Pulp's 2002 financial statement that acknowledges that St. Anne Industries had converted $4.3 million of short-term unsecured debt to long-term secured debt as a result of the refinancing arrangements. However, in my respectful view, that evidence does not lend support to the argument that St. Anne Pulp was insolvent at the time it granted the security to St. Anne Industries. At best, that evidence supports the argument that the latter corporation may not have given sufficient consideration to support the conversion of unsecured short term debt into secured long-term debt.

17 The respondent creditors argued that the evidence surrounding St. Anne Pulp's solvency at the time it granted the security interest to St. Anne Industries had to be assessed in the context of the additional information that became available after the initial hearing of the motion. I have difficulty in accepting that argument. The sufficiency of the evidence to support the issuance of the preservation order must be assessed as of the date of the hearing of the motion. Otherwise, it would be impossible for a court of appeal to adjudicate on the merits of a decision to issue an injunction or preservation order. This leads one to conclude that bootstrapping is not permitted. However, there is case law emanating from New Zealand that supports the respondents' position. In *Roseneath Holdings Ltd. v. Grieve*, [2003] 2 N.Z.C.A. 302 (New Zealand C.A.)at para. 42 it was held:

> We accept ... that it will be open to a Court to grant interim relief against a party to preserve the present situation on the basis of the overall justice of the case, although not yet persuaded that there is a serious issue to be tried against that party, if it seems likely that further critical information will be shortly available.

18 It could be asked whether the overall justice of the present case warrants interim relief, notwithstanding the paucity of evidence to support the allegation of a triable issue. If I had to decide this case on that basis, I would have no difficulty in upholding the issuance of the preservation order. But, in my view, the same result can be reached through conventional analysis.

19 The question remains whether the applicants had raised a serious issue. If that issue is framed in terms of whether St. Anne Pulp was insolvent at the time it granted security to St. Anne Industries, the answer must be no. The applicants had no hard evidence to support the allegation of insolvency. Indeed, initially they did not even have access to relevant financial statements. The only person in a position to obtain information relevant was the original trustee who had refused to conduct an independent assessment of the validity of the security held by St. Anne Industries. In turn, the opinion given by the trustee's solicitors was of no consequence as it was based on the premise that St. Anne Pulp was solvent at the relevant time.

20 In my view, the serious issue should not have been framed in terms of whether St. Anne Pulp was solvent at the time it granted security to St. Anne Industries. The true and serious issue was whether the applicants had sufficient or valid grounds on which to seek the removal of the original trustee. The following recitation of relevant facts reveals the answer to that question.

21 We begin with the realization that the respondent creditors had already poured nearly $2 million worth of labour and materials into a pulp mill that within a few weeks would be placed into bankruptcy by the very corporation that retained their services. The fact that the bankrupt corporation had given security to the parent corporation (a non-arms length company) less than two years earlier would raise a legitimate question as to whether the security interest given was valid. Recall that s. 91(2) of the BIA provides for insolvency within five years of the bankruptcy. In the normal course of a bankruptcy, it is the trustee who is vested with the right to assess the validity of a security interest and to make a determination as to whether the security interest should be disallowed under s. 135 of the BIA. In the present case, however, the trustee refused to make an independent assessment of the validity of the security interest. It was prepared to rely on its solicitors' opinion which expressly stated that the opinion was premised on the debtor's solvency at the time the security interest was granted. The fact that the trustee in bankruptcy and the privately appointed receiver under the security contract were one and the same would, to the average person, give the appearance of a conflict of interest. Admittedly, the applicants for the preservation order had a right to seek the removal of the trustee under s. 14 of the BIA. However, such relief would have been inconsequential had the receiver been able to remit the proceeds of the accounts receivable to St. Anne Industries and ultimately its parent corporation in New York.

22 It is apparent to me that the preservation order was granted with a view to providing the respondent creditors with time in which to seek the removal of the original trustee and to have the successor trustee assess the validity of St. Anne Industries' security over the accounts receivable and inventory. The applicants' request of the original trustee to assess the validity of the impugned security was neither frivolous nor vexatious. The trustee's response to the request was woefully inadequate. That fact coupled with the apparent conflict of interest was sufficient for purposes of satisfying the serious issue component of the tripartite test. Hence, it was proper for the motion judge to grant the preservation order, thereby maintaining the status quo pending an independent assessment of the validity of the security interest and also to permit the motion judge to continue monitoring the progress of that independent assessment. In short, the applicants for the preservation order came to the court with clean hands. The original trustee and St. Anne Industries came with hands coated in latex. In time, the successor trustee will be able to peel back the outer covering and determine the state of their cleanliness.

23 I would dismiss the appeal. The respondent creditors are entitled to one set of costs of $1,500. The respondent successor trustee in bankruptcy is also entitled to costs of $1,500. The respondent interveners are entitled to one set of costs of $1,500.

Appeal dismissed.

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Reimer v. Fox | 2025 MBKB 161, 2025 CarswellMan 431, 2025 A.C.W.S. 5971 | (Man. K.B., Dec 19, 2025)

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: Colin K. Irving for Applicant, RJR-MacDonald Inc.
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Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
  XXIII.18 Appeal to Supreme Court of Canada
    XXIII.18.e Stay pending appeal
Remedies
II Injunctions
  II.1 Principles relating to availability of injunctions
    II.1.e Public interest
Remedies
II Injunctions
  II.7 Injunctions in specific contexts
    II.7.k Injunctions involving Crown or government entities

Remedies
II Injunctions
II.9 Form and operation of order
II.9.f Stay of injunction
II.9.f.i Pending appeal

Headnote

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Injunctions --- Availability of injunctions — Public interest
Injunctions --- Availability of injunctions — Need to show irreparable injury
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal

Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.

Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.

Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.

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Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.

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***Sopinka and Cory JJ.*:**

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment,* SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act,* R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act,* particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*l*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

45 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra*. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

46 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

47 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

48 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

49 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

50 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores,* at p. 127, Beetz J. expressed the position in these words:

51 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

52 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

53 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

54 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid,* however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that

there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

55 In *Metropolitan Stores,* Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

56 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.
>
> It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

57 To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

58 And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

59 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

60 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores,* at p. 128, that "the *American*

Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

61 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra,* at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

62 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

63 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods,* [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.
> 64 Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

65 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried <u>in the sense of a case with enough legal merit</u> to justify the extraordinary intervention of this court in making the order sought without any trial at all.
>
> [Emphasis added.]

66 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

67 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

68 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores,* at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms,* could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

69 A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

70 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

> To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

71 Beetz J. determined in *Metropolitan Stores,* at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

72 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

73 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation *(American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration *Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

74 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

75 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of juris-prudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

76 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the First test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

77 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid,* Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

78 The decision in *Metropolitan Stores,* at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

79 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives,* 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

2020 BCSC 1933
British Columbia Supreme Court

McKinnon v. British Columbia Society for the Prevention of Cruelty to Animals

2020 CarswellBC 3142, 2020 BCSC 1933, 326 A.C.W.S. (3d) 478

Elizabeth McKinnon (Plaintiff) and British Columbia Society for the Prevention of Cruelty to Animals also known as BCSPCA (Defendant)

Jackson J.

Heard: December 1, 2020
Judgment: December 1, 2020
Docket: Duncan 20165

Counsel: E. McKinnon, Plaintiff, for herself
C. Rhone, for Defendant
K. Fast, for Ministry of Attorney General

Subject: Civil Practice and Procedure; Constitutional; Criminal; Human Rights

Related Abridgment Classifications

Remedies

II Injunctions
  II.2 Prohibitive injunctions
    II.2.c Interim and interlocutory injunctions
      II.2.c.i Threshold test
        II.2.c.i.C Balance of convenience

Headnote

Remedies --- Injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Balance of convenience

In summer of 2020, British Columbia Society for the Prevention of Cruelty to Animals (BCSPCA) executed three warrants, taking custody of one dog, 13 cats, and eight chickens from plaintiff's property — BCSPCA upheld decision to take custody of animals following internal review and affirmed notice that animals would be destroyed, sold, or otherwise disposed of — Plaintiff appealed decision to Farm Industry Review Board (Board) — In October 2020 decision, Board permitted BCSPCA to destroy, sell, or otherwise dispose of animals — Plaintiff commenced action against BCSPCA which included allegations of trespass and violations of Charter rights — Plaintiff was granted interim injunction on October 6, 2020 for four weeks, preventing BCSPCA from selling, disposing, or euthanizing any of plaintiff's animals — Interim injunction was extended to December 1, 2020 with respect to cats — Extension required plaintiff to pay BCSPCA for care of cats — Plaintiff commenced petition for judicial review of Board's October 2020 decision — Plaintiff brought application for extension of interim injunction pending determination of action or judicial review petition — Application dismissed — Given low threshold with respect to merits, plaintiff's action raised serous question to be tried — If injunction was not extended, Board's decision would be in effect, and BCSPCA, in its discretion, would be permitted to destroy, sell, or otherwise dispose of animals — That harm was irreparable in nature — Animals that remained in BCSPCA's custody were semi-feral cats and traditional interim fostering situations were not appropriate — Even if plaintiff pursued action and petition diligently, it would take at least several months to conclude litigation — To contain cats in interim, in conditions to which they were not accustomed, was not in their best interest — Balance of convenience did not favour extending injunction.

Table of Authorities

Cases considered by *Jackson J.*:

British Columbia (Attorney General) v. Wale (1986), [1987] 2 W.W.R. 331, 120 N.R. 212, [1987] 2 C.N.L.R. 36, 9 B.C.L.R. (2d) 333, 1986 CarswellBC 413 (B.C. C.A.) — followed

British Columbia (Attorney General) v. Wale (1991), [1991] 2 W.W.R. 568, (sub nom. *Wale v. British Columbia (Attorney General))* [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189, 120 N.R. 208, 1991 CarswellBC 15, 1991 CarswellBC 914 (S.C.C.) — referred to

Cambie Surgeries Corporation v. British Columbia (Attorney General) (2019), 2019 BCCA 29, 2019 CarswellBC 96, 28 C.P.C. (8th) 213, 19 B.C.L.R. (6th) 130 (B.C. C.A.) — followed

Google Inc. v. Equustek Solutions Inc. (2017), 2017 SCC 34, 2017 CSC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728, 410 D.L.R. (4th) 625, 3 C.P.C. (8th) 219, 98 B.C.L.R. (5th) 1, [2017] 10 W.W.R. 1, [2017] 1 S.C.R. 824, 72 B.L.R. (5th) 100, 154 C.P.R. (4th) 1 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 39 — considered

Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330

s. 3.1 [en. 2003, c. 47, s. 50] — considered

Offence Act, R.S.B.C. 1996, c. 338

s. 13 — considered

Prevention of Cruelty to Animals Act, R.S.B.C. 1996, c. 372

Generally — referred to

s. 1(2)(a.1) [en. 2011, c. 7, s. 1(c)] — considered

s. 11 — considered

s. 18(a) — considered

s. 18(b) — considered

s. 20.2(1) [en. 2012, c. 15, s. 7] — considered

s. 20.2(2) [en. 2012, c. 15, s. 7] — considered

s. 20.2(3) [en. 2012, c. 15, s. 7] — considered

s. 20.2(4) [en. 2012, c. 15, s. 7] — considered

s. 20.3 [en. 2012, c. 15, s. 7] — considered

s. 20.4 [en. 2012, c. 15, s. 7] — considered

s. 20.6 [en. 2012, c. 15, s. 7] — considered

s. 20.41(1) [en. 2015, c. 10, s. 150] — considered

Privacy Act, R.S.B.C. 1996, c. 373

Generally — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 10-4 — considered

APPLICATION by plaintiff for extension of interim injunction.

***Jackson J.*:**

1 These reasons were delivered as Oral Reasons for Judgment and have been edited for publication.

2 The plaintiff brings an urgent application to extend an interim injunction pending the determination of her action against the BC Society for the Prevention of Cruelty to Animals ("BCSPCA") and her petition seeking judicial review of a decision of the Farm Industry Review Board ("Board") which permits the BCSPCA, in its discretion, to destroy, sell, or otherwise dispose of animals it seized from the plaintiff's property.

3 The application seeks additional relief, but those aspects of the application were adjourned generally as there was not enough time to deal with all matters and the injunction issue was the most time sensitive since by its terms it expired today unless extended by the Court.

4 This application is not about whether the plaintiff has a strong emotional attachment to the animals. Nor is the issue of whether the Board's decision not to return the animals to the plaintiff was reasonable before me for determination. The issues I must decide are whether an extension of the interlocutory injunction is appropriate and if so, whether it should be ordered with or without conditions.

LEGISLATIVE REGIME

5 The *Prevention Of Cruelty To Animals Act*, R.S.B.C. 1996, c. 372 [*Act*], permits an authorized agent of the BCSPCA who is of the opinion that an animal is in distress and the person responsible for the animal either does not promptly take steps that will relieve the animal's distress, or cannot be found immediately and be informed of the animal's distress, to take actions permitted under the *Act* which they consider necessary to relieve the animal's distress, including, without limitation, taking custody of the animal and arranging for food, water, shelter, care and veterinary treatment for it: *Act*, s. 11.

6 The *Act* also permits an authorized agent of the BCSPCA who believes, on reasonable grounds, that an animal is in distress in any premises or that an offence under the *Act* has been committed and there is evidence of the offence in any premises, to apply to a justice (as defined in the *Offence Act*, R.S.B.C. 1996, c. 338) for a warrant to enter the premises: *Act*, s. 13.

7 If an animal is taken into custody on the basis that it is in distress, the BCSPCA must give notice to the person from whom the animal was taken (and its owner, if the animal was not taken from the owner) that it may destroy, sell, or otherwise dispose of the animal and that a review of the decision to take custody of the animal on the basis that it was in distress is available under the *Act*: s. 18(a). The BCSPCA cannot take steps to destroy, sell, or otherwise dispose of the animal any earlier than 14 days after this notice is provided, which is also the time within which a review must be requested: *Act*, ss. 18(b), 20.2(1) and (2). Once a review is requested, the BCSPCA must not destroy, sell, or otherwise dispose of the animal, except to return it, until the review has been completed: *Act*, s. 20.2(3) and (4).

8 Following a review, the BCSPCA must either return the animal, with or without conditions, or affirm the notice that the animal will be destroyed, sold, or otherwise disposed of: *Act*, 20.2(4). If, upon review, the BCSPCA affirms the notice that the animal will be destroyed, sold, or otherwise disposed of, the *Act* provides for a further right of appeal to the Board: *Act*, s. 20.3. An appeal to the Board acts as an interim stay preventing the BCSPCA from destroying, selling, or otherwise disposing of the animal until the Board makes a final determination of the appeal: *Act*, s. 20.4. On hearing an appeal, the Board can either require the BCSPCA to return the animal, with or without conditions, or permit the BCSPCA, in its discretion, to destroy, sell, or otherwise dispose of the animal: *Act*, s. 20.6.

BACKGROUND

9 Over the course of the summer of 2020, the BCSPCA executed three warrants, during which time it took custody of one dog, thirteen cats, and eight chickens from the plaintiff's property. One of those cats gave birth to four kittens, which also remained in the custody of the BCSPCA.

10 The plaintiff initiated an internal review, under the *Act*, of the decision to take custody of the animals and sought their return. The BCSPCA upheld the decision to take custody of the animals and affirmed the notice that the animals would be destroyed, sold, or otherwise disposed of.

11 The plaintiff further appealed the decision of the BCSPCA to the Board.

12 The Board set a date of September 22, 2020, for the plaintiff's review hearing. The plaintiff sought an adjournment of the hearing, which was denied. The hearing proceeded on September 22, 2020, as scheduled. In a decision dated October 5, 2020, the Board permitted the BCSPCA, in its discretion, to destroy, sell, or otherwise dispose of the animals.

13 In the interim, on September 9, 2020, the plaintiff filed a notice of civil claim against the BCSPCA which includes allegations of trespass and violations of her rights under the Canadian *Charter of Rights and Freedoms* and seeks various relief, including:

- a declaration that s. 2(a.1) of the *Act* does not apply to dwelling houses or, in the alternative, is of no force and effect on the basis that it unreasonably violates the *Charter*;
- an order setting aside the warrants;
- an order seeking return of the animals; and
- injunctive relief prohibiting the BCSPCA from destroying, selling, or otherwise disposing of the animals and preventing the BCSPCA from obtaining further warrants against the plaintiff, pending determination of her *Charter* claims.

14 The Board does not have jurisdiction over constitutional questions or *Charter* issues: *Act*, s. 20.41(1); *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330, s. 3.1.

15 On October 6, 2020, Justice Crerar issued an interim injunction for four weeks, preventing the BCSPCA from selling, disposing, or euthanizing any of the plaintiff's animals. No injunction preventing the BCSPCA from obtaining further warrants or initiating any other process against the plaintiff was issued.

16 On October 28, 2020, the plaintiff applied for an extension of the injunction, which Justice Verhoeven granted, but on conditions:

a. The BCSPCA must hold the plaintiff's cats consisting of 13 cats seized from her premises by the BCSPCA and 4 kittens born from the seized cats while in the Society's custody, and any additional cats that may be born from those seized cats (the "Injunction").

b. Unless extended by further court order, the Injunction will lapse and no longer have effect on the earlier of December 1, 2020 or the date of judgment in proceedings the plaintiff may commence for judicial review of the B.C. Farm Industry Review Board order dated October 5, 2020.

c. While the Injunction is in effect, the plaintiff will pay to the BCSPCA by way of money order, certified cheque or bank draft the sum of $13.35 per day per cat for the 13 adult cats, being the sum of $173.55 per day as follows, delivered to and received by the BCSPCA's lawyers, Branch MacMaster LLP, at 1410-777 Hornby Street, Vancouver, British Columbia, V6Z 1S4, marked to the attention of Christopher Rhone, with such delivery of funds being made on or prior to the following dates and times and in the following amounts:

i. By 4 p.m. on November 6, 2020, the sum of $1,214.85, being the cost of care of the cats for the seven day period from October 31 to November 6, 2020, inclusive;

ii. By 4 p.m. on November 20, 2020, the sum of $2,429.70, being the cost of care of the cats for the 14 day period from November 7 to November 20, 2020, inclusive; and

iii. By 4 p.m. on November 30, 2020, the sum of $1,735.50 being the cost of care of the cats for the 10 day period from November 21 to November 30, 2020, inclusive.

d. In the event the plaintiff fails to pay any money to the BCSPCA on a date stipulated at paragraph (3) above, the Injunction will lapse immediately.

e. In the event that the plaintiff pays only a portion of the money stipulated at paragraph (3) above, the BCSPCA will immediately be at liberty at its sole discretion and without notice to the plaintiff to dispose of a number of cats prorated to the amount of money that the plaintiff actually pays. For the purposes of proration, the cost of maintaining each cat is fixed at $13.35 per day. The plaintiff will have no authority to direct that the BCSPCA dispose of any particular cat or cats in any particular order.

f. In the event that the BCSPCA does dispose of one or more of the cats pursuant to term 5 above while the Injunction is in effect, it shall provide a statement to the plaintiff of the number of cats remaining in its care after the disposition.

g. Receipt by the BCSPCA of any monies from the cats will be without prejudice to the BCSPCA's right to pursue the plaintiff for any sums that -6- the BCSPCA may claim to be its actual cost of maintaining the animals since they were seized and for otherwise enforcing the BCFIRB's order dated October 5, 2020.

h. The BCSPCA is directed to file an affidavit within seven days to confirm that the dog, chicken and chicks were disposed of by the BCSPCA before the BCSPCA learned of the injunction order issued by Mr. Justice Crerar.

i. The signature of the plaintiff is dispensed with on this order.

17 The plaintiff did not appeal that order.

18 The parties later agreed to reduce the amounts payable, based on the number of the plaintiff's animals that remain in the defendant's custody.

19 On November 19, 2020, the plaintiff filed a petition seeking judicial review of the Board's October 5, 2020 decision under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

20 The BCSPCA continues to incur costs respecting the animals that remain in their custody.

21 The plaintiff applies to extend the interim injunction pending the determination of her action or her judicial review petition, but without conditions.

INJUNCTION FRAMEWORK

22 This court's inherent jurisdiction to grant injunctive relief is recognized in the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39 and the *Supreme Court Civil Rules*, Rule 10-4.

23 The applicable legal framework is the commonly applied three-stage approach described in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334, (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR — MacDonald*]:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused.

Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. . . .

24 The three factors are not to be treated like a checklist of separate watertight compartments, but instead are interrelated and strength in one part of the test can compensate for weakness in another: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.) at 346 — 47, (1986), [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189 (S.C.C.); *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 (B.C. C.A.) at para. 19.

25 The fundamental question is whether granting the stay is just and equitable in the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 (S.C.C.) at para. 25.

HAS THE APPLICANT DEMONSTRATED A SEROUS QUESTION TO BE TRIED?

26 At stage one, the determination of whether there is a serious question to be tried is made "on the basis of common sense and an extremely limited review of the case on its merits": *RJR — MacDonald* at 348. The burden is on the applicant, but the threshold is low. This stage of the test is satisfied unless the claim or issue raised in the proceeding is frivolous or vexatious: *RJR — MacDonald* at 348.

27 As noted earlier in these reasons, the plaintiff alleges trespass, breaches of her *Charter* rights, and breaches of the BC *Privacy Act*, R.S.B.C. 1996, c. 373. I do not have the benefit of the reasons for judgment of either Crerar or Verhoeven JJ. However, given the low threshold with respect to merits, and the fact that two judges of this Court have already granted interlocutory injunctions, from which I infer they were satisfied the claim raised a serious question to be tried, I find the claim raises serious questions to be tried.

HAS THE APPLICANT ESTABLISHED SHE WILL SUFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED?

28 At stage two, irreparable harm "refers to the nature of the harm suffered rather than its magnitude": *RJR — MacDonald* at 341. Irreparable harm includes harm that cannot be quantified in monetary terms or where it will be difficult to obtain monetary redress: *RJR — MacDonald* at 341. In order to satisfy this stage of the test, the applicant must establish that if the injunction is not granted she will suffer irreparable harm in the months leading up to the hearing of the action, and that the injunction will prevent that harm from occurring.

29 The legislative regime is such that if the injunction is not extended, the Board's decision will be in effect, and the BCSPCA, in its discretion, will be permitted to destroy, sell, or otherwise dispose of the animals. I find that harm to be irreparable in nature.

WHERE DOES THE BALANCE OF CONVENIENCE LIE?

30 At the final stage, the court considers whether it is the applicant or the respondent who will suffer greater harm if the injunction is granted or denied: *RJR — MacDonald* at 342. The factors which must be considered in assessing the "balance of inconvenience" will vary in each individual case. Given the nature of the *Act*, which is a statute aimed at the public interest, I must balance the plaintiff's private interests with the public interest objectives served by the *Act*.

31 I have already found the applicant has established she will suffer irreparable harm if the injunction is not extended. The harm identified by the BCSPCA includes monetary harm arising from the ongoing costs to house the animals, which can be quantified in damages, but also concern about harm to the animals' best interests. The animals that remain in the BCSPCA's custody are semi-feral cats and traditional interim fostering situations are not appropriate. Even if the plaintiff pursues her action and petition diligently, it will take at least several months to conclude the litigation, particularly because the plaintiff has indicated her desire to pursue certain aspects of the litigation individually as threshold issues, although I make no finding about the appropriateness of doing so. To contain these cats in the interim, in conditions to which they are not accustomed, is not in their best interest.

32 I accept that the plaintiff loves these animals. But I find the balance of convenience does not favour extending the injunction.

CONCLUSION

33 Injunctive relief is discretionary. The initial injunction granted by Crerar J. was for a limited period of time, namely four weeks. No petition seeking judicial review of the Board's appeal decision was filed during that time. It was not until November 19, 2020, that any such petition was filed.

34 Verhoeven J. extended the injunction, but on conditions. The plaintiff has made all of the Court ordered payments to date, but she wants the injunction to be extended without conditions. Although the plaintiff described her current income, she has not provided evidence, such as a statement of her assets, including savings, sufficient to satisfy me that she is unable to afford the payment conditions imposed by Verhoeven J.

35 I understand that my decision to deny the plaintiff's application will cause her grief, and I am sorry for that. However, I must take into account all the relevant factors and competing interests. Having done so, I am satisfied the proper exercise of my discretion in this case is to deny the plaintiff's application to extend the injunction.

36 For all these reasons the plaintiff's application is denied.

37 In the circumstances, I am exercising my discretion to order that each party bear their own costs of the application.

Application dismissed.

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Al-Ghamdi v. Alberta Health Services | 2015 ABQB 469, 2015 CarswellAlta 3271 | (Alta. Q.B., Jul 23, 2015)

2003 ABQB 995
Alberta Court of Queen's Bench

Medical Laboratory Consultants Inc. v. Calgary Health Region

2003 CarswellAlta 1731, 2003 ABQB 995, [2003] A.J. No. 1500, [2004] A.W.L.D. 143, 127 A.C.W.S. (3d) 1228, 33 Alta. L.R. (4th) 242, 347 A.R. 291

Medical Laboratory Consultants Inc. and Dr. Inderman H. Jadusingh (Plaintiffs) and Calgary Health Region (Defendant)

Park J.

Heard: October 15, 2003
Judgment: December 4, 2003
Docket: Calgary 0301-13302

Counsel: E. Groody for Plaintiffs
E. Halt for Defendant

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Health law
IV Regional matters
IV.3 Other health facilities
IV.3.b Independent health facilities offering insured services
Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.iv Miscellaneous
Headnote
Injunctions --- Availability of injunctions — Mandatory injunctions — Threshold test — General
MLC operated private laboratory where it performed pathology and medical laboratory services — J was medical director of MLC and was employed by MLC as pathologist — CHR was responsible for administering public health care system in Calgary region — CHR entered into agreement with MLC for provision of certain laboratory and pathology services — J commenced legal proceedings against CHR for damages for wrongful dismissal from his previous employment as pathologist at Calgary hospital — CHR refused to enter into negotiations to renew contract with MLC on basis that it would be inappropriate to do so until outstanding litigation between CHR and J was resolved — MLC and J brought action for permanent injunction prohibiting CHR from implementing its plan to terminate MLC's funding — MLC and J brought application for interlocutory injunction to prevent termination of MLC's funding pending trial of action — Application granted — MLC and J had presented strong prima facie case that actions of CHR went beyond authority that had been statutorily delegated to it by Minister — Serious issue to be tried existed with respect to whether CHR was statutorily permitted to refuse to pay MLC and J for medical services they performed — Serious issue to be tried also existed with respect to issue of whether CHR was in breach of contract with MLC — If injunction were not granted, MLC would be forced to close as CHR was only body authorized to pay MLC for medically necessary laboratory and pathology services — If MLC were forced to close, it would have to sacrifice employees, equipment

and relationships with doctors and patients, and J would not only lose income, he would suffer damage to his reputation — MLC and J would suffer irreparable harm if injunction were not granted — Balance of convenience favoured MLC and J.

Table of Authorities

Cases considered by *Park J.*:

American Cyanamid Co. v. Ethicon Ltd. (1975), [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, 119 Sol. Jo. 136, [1975] 2 W.L.R. 316 (U.K. H.L.) — followed

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co. (1992), 3 Alta. L.R. (3d) 247, [1992] 5 W.W.R. 431, 130 A.R. 252, 1992 CarswellAlta 89 (Alta. Q.B.) — referred to

Clarke, Irwin & Co. v. George G. Harrap & Co. (1980), 9 B.L.R. 97, 1980 CarswellOnt 119 (Ont. H.C.) — referred to

Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd. (1986), [1986] 1 S.C.R. 57, 25 D.L.R. (4th) 649, 65 N.R. 23, 71 N.S.R. (2d) 353, 171 A.P.R. 353, 1986 CarswellNS 147, 1986 CarswellNS 147F (S.C.C.) — referred to

Inter-Rail Auto Handling Inc. v. Canadian Pacific Ltd. (2000), 2000 BCSC 1011, 2000 CarswellBC 1360 (B.C. S.C.) — referred to

Lubicon Lake Indian Band v. Norcen Energy Resources Ltd. (1985), (sub nom. *Ominayak v. Norcen Energy Resources Ltd.)* 36 Alta. L.R. (2d) 137, (sub nom. *Ominayak v. Norcen Energy Resources Ltd.)* 58 A.R. 161, [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 1985 CarswellAlta 15 (Alta. C.A.) — referred to

Medical Laboratory Consultants Corp. v. Calgary Regional Health Authority (2002), 2002 ABQB 200, 2002 CarswellAlta 263, [2002] 6 W.W.R. 512, 1 Alta. L.R. (4th) 235, 41 Admin. L.R. (3d) 63, 311 A.R. 6 (Alta. Q.B.) — referred to

Pasar Micro Controls Ltd. v. Q-Tron Ltd. (1998), 1998 ABQB 182, 1998 CarswellAlta 56, 215 A.R. 36 (Alta. Q.B.) — referred to

R.G.O. Office Products Ltd. v. Knoll North America Corp. (1996), 37 Alta. L.R. (3d) 113, [1996] 4 W.W.R. 321, 180 A.R. 1, 1996 CarswellAlta 25 (Alta. Q.B.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, (sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général))* 171 N.R. 402 (note) (S.C.C.) — followed

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (1997), 1997 CarswellAlta 427, [1997] 7 W.W.R. 707, 40 M.P.L.R. (2d) 91, 204 A.R. 24, 51 Alta. L.R. (3d) 357 (Alta. Q.B.) — referred to

Wigglesworth v. Phipps (2001), 2001 ABQB 113, 2001 CarswellAlta 191, 7 C.C.E.L. (3d) 37, 284 A.R. 322 (Alta. Q.B.) — considered

Statutes considered:

Alberta Health Care Insurance Act, R.S.A. 2000, c. A-20

s. 1(b) "basic health services" (i) — referred to

s. 1(n) "insured services" (i) — referred to

s. 1(t) "physician" (i) — referred to

s. 1(u) "Plan" — referred to

s. 1(x) "resident" or "resident of Alberta" — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 4(1) — referred to

s. 4(2) — referred to

s. 6(1) — referred to

s. 8(1) — referred to

s. 20 — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — considered

Medical Profession Act, R.S.A. 2000, c. M-11

Generally — referred to

Regional Health Authorities Act, R.S.A. 2000, c. R-10

Generally — referred to

s. 5(a)(iii) — referred to

s. 5(a)(v) — referred to

s. 5(b) — referred to

Regulations considered:

Alberta Health Care Insurance Act, R.S.A. 2000, c. A-20

Medical Benefits Regulation, Alta. Reg. 173/93

s. 3.1 [en. Alta. Reg. 250/95]

APPLICATION for mandatory interlocutory injunction.

***Park J.*:**

1 This is an application for a mandatory interlocutory injunction. The Applicants, Medical Laboratory Consultants Inc. ("MLC") and Dr. Inderman H. Jadusingh ("Dr. Jadusingh") seek to enjoin the Respondent, the Calgary Health Region ("CHR"), from terminating payments to MLC for medically necessary services performed by the Applicants.

I Undisputed facts

2 MLC operates a private laboratory in downtown Calgary where it performs pathology and medical laboratory services. Dr. Jadusingh is the medical director of MLC and is employed by MLC as a medical pathologist. There is no question that Dr. Jadusingh is a highly qualified medical laboratory physician and is licenced to practice medicine in Alberta.

3 The CHR is a corporation created pursuant to the *Regional Health Authorities Act*, R.S.A. 2000, c. R-10. The CHR is responsible for administering the public health care system in the Calgary region.

4 Since 1996, pathology and medical laboratory services have been "delisted" from the Alberta Health and Wellness Department's *Schedule of Medical Benefits*, which sets out the fees physicians are paid for performing specific medical procedures. Payments for pathology and medical laboratory services are now governed by s. 3.1 of the *Medical Benefits Regulation*, Alta. Reg. 173/93, as amended:

> (1) The rates of benefits payable for laboratory medicine and pathology services provided to residents in Alberta shall be determined by the regional health authority.
>
> (2) Benefits referred to in subsection (1) are not payable unless they are provided by persons authorized by a regional health authority to provide laboratory medicine and pathology services.

5 When the delisting of these services occurred, the CHR entered an agreement with Calgary Laboratory Services ("CLS"), whereby CLS would provide all medical laboratory and pathology services in Calgary, with the exception of those provided by MLC. At the same time, the CHR and MLC entered into an agreement whereby MLC would be paid a flat rate of $36,400

Summary of Requirement 1

32 I have found that on both the Statutory Ground and the Contractual Ground, the Applicants have demonstrated a strong and clear *prima facie* case on serious issues that can be tried. As a result, the first leg of the tripartite test for a mandatory injunction is met.

B. Requirement 2: Irreparable harm will result if the injunction is not granted

33 The second leg of the test for an injunction requires the applicant to demonstrate that irreparable harm will result if the injunction is not granted. In *RJR MacDonald* at 341, Cory and Sopinka JJ. discuss what is meant by this requirement:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory injunction.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision [or] where one party will suffer permanent market loss of irrevocable damage to its business reputation ...

34 The Applicants submit, and Dr. Jadusingh deposed in his Affidavit, that if the injunction is refused MLC will be forced to close in the near future. This is because the CHR is the only body authorized to pay MLC for medically necessary laboratory and pathology services. The Applicants submit that if they were successful at trial after being denied the mandatory injunction, the harm would be irreparable, because the damages would not permit MLC to re-open.

35 In their submissions, the Applicants set out specific examples of the irreparable harm that they claim will result to the Applicants and the public if MLC's funding is terminated. The following are ways that the Applicants submit that MLC will be irreparably harmed if the injunction is not granted:

1. MLC will not be able to pay its employees' salaries and will have to let them go.

2. They will most likely move on to new positions.

3. MLC will have to vacate its premises and would likely have to dispose of its equipment.

4. MLC will lose valuable relationships with referring physicians and patients because of its unavailability.

5. MLC's reputation with physicians, patients, and the general public will be damaged.

6. MLC will fall behind even further in technological advances.

7. The costs of setting up a new laboratory would be prohibitive.

8. The synthesis of particular techniques and methods of patient care developed through the combined experience of the physicians who have been involved in MLC would be lost.

9. Valued staff will have moved on to new positions, relationships with patients and referring physicians will have been severed, and equipment and premises will have been lost.

36 The Applicants submit that Dr. Jadusingh will be irreparably harmed in the following ways if the injunction is not granted:

1. He will be prevented from practising his profession in Calgary and will at a minimum be forced to relocate.

2. He will lose goodwill built up over many valuable years of experience.

3. He will be deprived of his professional income and livelihood and the opportunity to keep his skills updated and honed.

4. He will suffer irreparable damage to his reputation, in particular because the defendant has taken the implicit position that his abilities as a pathologist are not of value to the region.

The Applicants also allege that the public is likely to suffer irreparable damage if funding is terminated:

1. Physicians will be deprived of the level of care to which they are accustomed to receiving from MLC, which is expedient, expert, and of exceptional quality.

2. If MLC closes down, continuity of care will be lost and [MLC's] patients' health may be compromised.

3. Patients will lose access to the consistently high quality laboratory and pathology services provided by MLC.

4. Patients and referring physicians will be deprived of choice in laboratory services, as the only other provider of laboratory services in Calgary is CLS.

5. MLC is the only laboratory in the region that is in compliance with the Principles of Ownership of the Alberta College of Physicians and Surgeons.

37 To summarize, the Applicants argue that if the injunction is not granted, irreparable harm will result to MLC, Dr. Jadusingh, MLC's employees, and the public. The potential harm to these individuals is said by the Applicants to be "irreparable" because it could not be remedied by the awarding of damages in judgment.

38 The Respondent acknowledges that some harm will result from the refusal of the Court to grant an injunction, but disagrees that such harm would be "irreparable." The Respondent argues that if MLC were successful at trial, the loss suffered by the Applicants could adequately be compensated through damages.

39 First, the Respondent maintains that because the CHR is entitled to terminate the agreement between the CHR and MLC, any damages that result from inadequate notice of termination are to be compensated by damages paid to MLC. However, whether or not the CHR is entitled to terminate the agreement with MLC is a live issue that will not be resolved until a trial on this matter is heard.

40 Second, the Respondent points out that the market is extremely competitive for pathologists and laboratory technologists in the CHR and elsewhere in Alberta. Thus, the Respondent submits that it would not be particularly difficult for Dr. Jadusingh and the other employees of MLC to find comparable employment and minimize the resulting harm to them. I hasten to add, however, that merely because open positions for pathologists and laboratory technicians exist in no way guarantees that these jobs would be obtained by the former employees of MLC. This is particularly true if the job openings are primarily at CLS, the direct competitor of MLC.

41 Finally, the Respondent submits that the effect on the public will be only marginal and transitory, as there are 18 CLS labs in Calgary that perform all of the services that are currently performed by MLC. The Respondent argues that it would in no way cause irreparable harm to require patients and doctors to change the laboratory that they commonly have dealings with.

42 I do not intend to separately deal with each of the Applicant's alleged grounds of irreparable harm. However, I am satisfied on a broad analysis that MLC and Dr. Jadusingh would suffer irreparable harm if I were to refuse to grant a mandatory interlocutory injunction. If this Application is denied, MLC would undoubtedly be forced to close its laboratory and would also have to sacrifice employees, equipment, and relationships with doctors and patients. Dr. Jadusingh would not only lose his current source of income but would also suffer irreparable damage to his reputation and his professional skills if MLC was forced to close.

43 In summary, I am satisfied that the Applicants would suffer irreparable harm if this application is not granted. The second leg of the tripartite test has been satisfied.

C. Requirement 3: The balance of convenience favours granting the injunction

44 In its submissions, the Respondent conceded that if the Applicants are able to satisfy the first two requirements of the tripartite test, the balance of convenience would clearly lie with granting the injunction in order to preserve the *status quo*. I agree with the Respondent on this point. Therefore, the third and final leg of the tripartite test has been satisfied.

IV Conclusion

45 Having satisfied all three requirements of the sequential tripartite test, the Applicants are entitled to a mandatory interlocutory injunction whereby the CHR is restrained from terminating payments to MLC and Dr. Jadusingh for medically necessary services provided by them to the residents of Alberta. The application is therefore granted.

Application granted.

2022 CarswellAlta 3816
Alberta Court of King's Bench

C2 Recycling Inc. v. All West Demolition Ltd.

2022 CarswellAlta 3816, [2023] A.W.L.D. 4711, 2022 A.C.W.S. 5838

C2 RECYCLING INC. (Plaintiff) and ALL WEST DEMOLITION LTD., 2057223 ALBERTA LTD., INNOVATIVE REDUCTION STRATEGIES INC. and CHRIS OLSON (Defendants)

Fagnan J.

Heard: November 29, 2022
Judgment: November 29, 2022
Docket: Edmonton 2203-02427

Counsel: K.T.H. Smith, for C2 Recycling Inc.
B.W. Mielke, for All West Demolition Ltd. and 2057223 Alberta Ltd.
No one for Innovative Reduction Strategies Inc.
No one for C. Olson

Subject: Civil Practice and Procedure; Contracts; Environmental
Related Abridgment Classifications
Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.n Miscellaneous
Headnote
Remedies --- Injunctions — Injunctions in specific contexts — Miscellaneous
Party to access and operator agreement seeking injunction in response to notice to vacate.
Table of Authorities
Cases considered by *Fagnan J.*:

Brown v. First Contact Software Consultants Inc. (2009), 2009 CarswellOnt 5482, 77 C.C.E.L. (3d) 295 (Ont. S.C.J.) — referred to

Corus Radio Inc. v. Harvard Broadcasting Inc. (2019), 2019 ABQB 880, 2019 CarswellAlta 2449, 172 C.P.R. (4th) 141 (Alta. Q.B.) — referred to

Dreco Energy Services Ltd. v. Wenzel (2004), 2004 ABCA 95, 2004 CarswellAlta 264, 42 B.L.R. (3d) 26, [2004] 6 W.W.R. 54, 27 Alta. L.R. (4th) 81, 346 A.R. 356, 320 W.A.C. 356 (Alta. C.A.) — referred to

Golden Globe Pizza Inc. v. Domino's Pizza of Canada Ltd. (2015), 2015 BCSC 356, 2015 CarswellBC 590 (B.C. S.C.) — referred to

Homestead House Paint Co. Inc. v. Jamieson (2019), 2019 ONSC 2660, 2019 CarswellOnt 6615 (Ont. S.C.J.) — referred to

Northwest Territories v. Sirius Diamonds Ltd. (2001), 2001 FCT 702, 2001 CarswellNat 1381, 13 C.P.R. (4th) 486, 208 F.T.R. 7, 2001 CFPI 702, 2001 CarswellNat 5890 (Fed. T.D.) — referred to

Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership (2011), 2011 SKCA 120, 2011 CarswellSask 678, [2012] 2 W.W.R. 659, 341 D.L.R. (4th) 407, 377 Sask. R. 78, 528 W.A.C. 78 (Sask. C.A.) — considered

Quality Pallets & Recycling Inc. v. Canadian Pacific Railway (2007), 2007 CarswellOnt 2477 (Ont. S.C.J.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Stop 'N Cash 1000 Inc. v. 1553785 Ontario Ltd. (2006), 2006 CarswellOnt 11652, 332 O.A.C. 392 (Ont. Div. Ct.) — referred to

Proceeding
Motion/Application for Injunction.

APPLICATION by business operator for interim injunction preventing defendant from evicting it from property, restricting access, or interfering with quiet enjoyment.

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***Fagnan J.*:**

PROCEEDINGS

1 THE COURT: Is there anything in terms of updates before we start?

2 MR. SMITH: I don't believe so, My Lady. We had discussed the terms of an interim interim but hadn't reached anything so there will be no updates from last time around.

3 THE COURT: All right. Thank you. One thing that when I was going through my notes is I hadn't delved into which was raised, Mr. Smith, is the fact that the parties on the injunction application don't match the parties on the Statement of Claim, and I just wanted to get some clarification from you in that regard.

4 MR. SMITH: I don't have it pulled up. I am, as I mentioned last time, I am out of the office at the moment. Can you just help me, My Lady, on the difference?

5 THE COURT: Yes. So as far as I can tell the Statement of Claim had All West, 205, IRSI and Chris Olson as defendants. The injunction application, I believe, added J. Carr Holdings, Marjorie Carr, Daniel Carr, WF Fleming Holdings, etcetera. So quite a number of additional entities.

6 MR. SMITH: I apologize. We have been working on an amended Statement of Claim when this had come up so I apologize, I think my junior who had prepared those materials had just used the wrong headnote.

Reasons for Judgment

7 THE COURT: All right. Thank you very much. So we are here for the decision on the injunction application of C2 as against All West, 2057223 Alberta Ltd. and Innovative Reduction Strategies Inc. and Chris Olson. I will refer to Innovative Reduction Strategies Inc. as IRSI.

8 So by way of introduction, Ward Fleming is a director of All West and 2057223 Alberta Ltd. which I will refer to as 205. 205 owns property consisting of 17.6 acres on which there are nine buildings. There are 10 tenants, including All West. All West has been a tenant of 205 for four years conducting a general demolition business, including recycling metal and concrete. C2 operates its commercial recycling and disposal business on the property.

9 All West and C2 are parties to an access and operator agreement executed on August 1, 2020 which grants C2 a license to occupy a portion of the property and conduct its business thereon. The initial three-year term of the agreement expires on July 21, 2023 with an option to renew for a further three years exercisable by written notice delivered between two to three months prior to expiry.

75 All West also notes that the Agreement itself contemplates that on expiration or termination of the Agreement, C2 will have five days to shut down its operation and 20 business days to vacate. All West submits that whether the Agreement was terminated or not renewed, C2 would have to incur the costs of a move in any event. C2 responds that termination under the Agreement requires an actual material breach of which C2 would have been aware and, therefore, it would have been in a position to rectify or to make plans to relocate.

76 All West argues strenuously that any loss to C2 would be measurable in damages. All West submits that there is no actual evidence that C2 cannot simply relocate; that the current site is unique; that suitable alternative sites are not available or C2 will suffer reputational harm. C2 counters that expert evidence is not required on an injunction application which is typically brought in emergent situations.

77 The Court in *Potash Corp.*, which I have already cited at paragraphs 51 and following, discussed the standard of proof for irreparable harm citing cases demonstrating that there is a wide spectrum in the case law and Canadian courts have no fixed view of how this matter should be approached. The Saskatchewan Court of Appeal said at paragraphs 58 and 59, the exercise involves a weighing of risks rather than certainties. The Court must evaluate the limited materials before it with a view to assessing the likely merits of the plaintiff's position. It can often do no more. The same applies to the possibility of harm being suffered by one or both parties if the injunction is granted or denied. The overall exercise is one involving probabilities and possibilities. The true overall risk of irreparable harm will always be a function of both the likelihood of the harm occurring and its size or significance should it occur.

78 The Court concluded at paragraph 61, (as read)

> Therefore, in the end, it is sufficient that, as a general rule, a plaintiff seeking interlocutory injunctive relief be required to establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted. This is a relatively low standard which will serve to fairly easily move the analysis into the balance of convenience stage of the decision-making. It is there that all of the relevant considerations can be read and considered with as much subtlety as the circumstances require. This said, I should add once again that I do not mean to deny any possibility of there being any exceptions to this rule. The approach being endorsed here is one of general, but not necessarily universal, practice.

79 There is case law to the effect that damage to customer relationships reputation and goodwill may qualify as irreparable harm. I cite as an example *Dreco Energy Services Ltd. v. Wenzel,*[2004] 6 WWR 54, (Alta CA), as may a serious risk of jeopardizing the survival of the applicant's business. I cite *Northwest Territories v. Sirius Diamonds*, 2001 FCT 702 at paragraph 57, *Quality Pallets v. Canadian Pacific Railway Company*, [2007] OJ 1567, (Sup Ct J) and *Golden Globe Pizza v. Domino's Pizza* 2015 Carswell B.C. 590 (SC).

80 A number of the specific harms evoked by C2 standing alone are quantifiable and compensable in damages. However, C2 would be required to shut down operations and vacate within what is an extremely short timeframe in all of the circumstances with no reasonable opportunity to find another suitable location. While it is true that the affidavit evidence of C2 in this regard is based on C2's experience, the Court can draw certain reasonable inferences that support C2's evidence to the effect that eviction, pursuant to the timeline in the Agreement would result in a business interruption that could very well put C2 out of business. Therefore, C2 has established there is a meaningful risk of irreparable harm.

81 With respect to balance of convenience, the Court in *Potash* that I have cited already summarized this factor at paragraph 113. (As read)

> The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable

1989 CarswellAlta 84
Alberta Court of Queen's Bench

Polesystems Inc. v. Martec Manufacturing Ltd.

1989 CarswellAlta 84, [1989] 5 W.W.R. 697, [1989] A.W.L.D. 646, [1989] C.L.D. 882, [1989] A.J. No. 486, 15 A.C.W.S. (3d) 346, 27 C.P.C. (3d) 259, 27 C.P.R. (3d) 259, 67 Alta. L.R. (2d) 159, 96 A.R. 218

POLESYSTEMS INC. and POLESYSTEMS (BRALORNE RESOURCES LIMITED) v. MARTEC MFG. LTD. and 72510 MANITOBA LTD. (MARTEC MFG.)

Virtue J.

Judgment: May 12, 1989
Docket: Calgary No. 8801 18225

Counsel: *A.R. Robertson*, for plaintiffs.
D. Steele, for defendants.

Subject: Intellectual Property; Property; Civil Practice and Procedure
Related Abridgment Classifications
Intellectual property
I Copyright
I.14 Remedies
I.14.e Seizure before judgment
Remedies
II Injunctions
II.7 Injunctions in specific contexts
II.7.m Intangible property rights
II.7.m.v Miscellaneous
Headnote
Copyright --- Remedies — Seizure before judgment
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Duty to make out prima facie right — Copyright — General
Injunctions — Interlocutory or interim injunctions — Anton Piller orders — Individual defendants being former employees of plaintiffs employed by corporate defendants which manufactured products in competition with plaintiffs — Plaintiffs obtaining ex parte order allowing them to search for and seize documents belonging to plaintiffs in possession of corporate defendants and granting injunctive relief — Plaintiffs executing order and seizing documents belonging to them — Plaintiffs having established extremely strong prima facie case, very serious possible or actual damage and real possibility defendants might destroy material before application inter partes could be made — Plaintiffs also having made full disclosure — Court dismissing defendants' application to set aside or vary order.
Injunctions — Interlocutory or interim injunctions — Setting aside — Individual defendants being former employees of plaintiffs employed by corporate defendants which manufactured products in competition with plaintiffs — Plaintiffs obtaining ex parte order allowing them to search for and seize documents belonging to plaintiffs in possession of corporate defendants and granting injunctive relief preventing defendants from using information obtained while employed by plaintiffs — Court finding it just and convenient that injunction should stay in place until trial — Questions of balance of convenience and irreparable damage not arising in copyright cases.
Intellectual property — Copyright — Remedies for infringement — Injunction — Individual defendants being former employees of plaintiffs employed by corporate defendants which manufactured products in competition with plaintiffs — Plaintiffs obtaining ex parte order allowing them to search for and seize documents belonging to plaintiffs in possession of

corporate defendants and granting injunctive relief preventing defendants from using information obtained while employed by plaintiffs — Court finding it just and convenient that injunction should stay in place until trial — Questions of balance of convenience and irreparable damage not arising in copyright cases.

Intellectual property — Copyright — Remedies for infringement — Seizure — Individual defendants being former employees of plaintiffs employed by corporate defendants which manufactured products in competition with plaintiffs — Plaintiffs obtaining ex parte order allowing them to search for and seize documents belonging to plaintiffs in possession of corporate defendants and granting injunctive relief — Plaintiffs executing order and seizing documents belonging to them — Plaintiffs having established extremely strong prima facie case, very serious possible or actual damage and real possibility defendants might destroy material before inter partes application could be made — Plaintiffs also having made full disclosure — Court dismissing defendants' application to set aside or vary order.

Civil procedure — Judgments and orders — Setting aside — Ex parte orders — Individual defendants being former employees of plaintiffs employed by corporate defendants which manufactured products in competition with plaintiffs — Plaintiffs obtaining ex parte order allowing them to search for and seize documents belonging to the plaintiffs in possession of corporate defendants — Plaintiffs executing order and seizing documents belonging to them — Plaintiffs having established extremely strong prima facie case, very serious possible or actual damage and real possibility defendants might destroy material before inter partes application could be made — Plaintiffs also having made full disclosure — Court dismissing defendants' application to set aside or vary order.

Copyright. See Intellectual property.

Practice. See Civil procedure.

The plaintiffs were manufacturers of streetlamps. The five individual defendants were former employees of the plaintiffs who had either left their positions or been terminated. D., one of the employees who had been terminated, set up the defendant E. Ltd., which with the defendant M. Ltd. operated in direct competition with the plaintiffs. The individual defendants were placed in senior management positions. Following his dismissal, D. had commenced a wrongful dismissal action against the plaintiffs. That action was settled, mutual releases were exchanged, and D. executed a confidentiality agreement.

The plaintiffs subsequently discovered M. Ltd. was using documents in the design, manufacture and sale of the defendants' products which were the property of the plaintiffs. The plaintiffs applied for an ex parte Anton Piller order permitting the plaintiffs to enter M. Ltd.'s premises to search for and retain certain specified documents and restraining M. Ltd. from using any data owned by the plaintiffs which had been obtained by the individual defendants in circumstances of confidence while employed by the plaintiffs. In their application the plaintiffs did not disclose the releases exchanged with D. The judge held that a prima facie case was established, that the plaintiffs might suffer irreparable harm and damage if the defendants were allowed to continue to use the plaintiffs' confidential information, and that unless the ex parte order were granted the materials might disappear or be secreted prior to discovery of documents. The order was granted, and materials were seized, including a number of the plaintiffs' drawings. The defendants applied to set aside or vary the order, and the plaintiffs applied for an order declaring certain of the defendants in contempt.

Held:

Applications dismissed.

An ex parte Anton Piller order allowing the plaintiff to enter the defendant's premises during normal business hours and to search for and remove for safekeeping named documents and materials can be granted when there is an extremely strong prima facie case, very serious potential or actual damage for the plaintiff, and a real possibility the defendants might destroy the material before any application inter partes could be made. Moreover, it is essential that the plaintiff disclose all matters relevant to the application. Even after the order has been executed, it is open to the judge who granted the order to discharge it if it is established the order should not have been made. In this case the order should not be discharged. Although the plaintiffs did not disclose the existence of D.'s release, that was neither relevant nor material to the application for an order protecting its confidential material. As well, in the circumstances it was reasonable for the court to draw the inference there was a real possibility the materials might be destroyed or secreted away. Accordingly, as there were no grounds upon which the Anton Piller order should be vacated, it should remain in force.

Except for an amendment agreed to by the parties, it was just and convenient that the interim injunction should stay in place until trial. The plaintiffs established that they raised a serious issue to be tried, and the evidence disclosed that if the defendants were allowed to continue to use the plaintiffs' designs and marketing information their relationship with their customers would be

impaired and the core of their business irretrievably harmed. Finally, the balance of convenience favoured leaving the injunction in place. In any event, this case involved a violation of copyright, and in such a case the questions of irreparable injury and balance of convenience are not applicable.
It was not necessary to make a declaration finding the defendants in contempt at this time. The documents in question had been recovered and the terms and status of the injunctive relief clarified and reconfirmed. However, the plaintiffs were at liberty to renew their application if the injunction were not observed.
Table of Authorities
Cases considered:

Amer. Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.) — *considered*
Anton Piller K. G. v. Mfg. Processes Ltd., [1976] Ch. 55, [1976] 2 W.L.R. 162, [1976] 1 All E.R. 779 (C.A.) — *applied*
Jeffrey Rogers Knitwear Productions Ltd. v. R.D. Int. Style Collections Ltd., [1985] 2 F.C. 220, 6 C.I.P.R. 263, 6 C.P.R. 409 (T.D.) — *followed*
Man. (A.G.) v. Metro. Stores Ltd., [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1, 25 Admin. L.R. 20, 18 C.P.C. (2d) 273, 87 C.L.L.C. 14,015, 38 D.L.R. (4th) 321, (sub nom. *Metro. Stores (MTS) Ltd. v. Man. Food & Commercial Wkrs., Loc. 832)* 46 Man. R. (2d) 241, 73 N.R. 341*considered*
Ominayak v. Norcen Energy Resources Ltd., 36 Alta. L.R. (2d) 137, [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 58 A.R. 161 (C.A.) [leave to appeal to S.C.C. refused 35 Alta. L.R. (2d) xl, 58 N.R. 122, application for rehearing of leave to appeal quashed 36 Alta. L.R. (2d) lxi, [1985] 3 C.N.L.R. 111 at 112] — *applied*
Thermax Ltd. v. Schott Indust. Glass Ltd., [1981] F.S.R. 289 — *considered*

Statutes considered:

Judicature Act, R.S.A. 1980, c. J-1

s. 13(2)

Authorities considered:

Myers, "Search and Seizure in Civil Cases: The Anton Piller Order" (1984), 42 Advocate 41.
Words and phrases considered:

ANTON PILLER ORDER

The general nature of an Anton Piller order is set out by E. Meyers, in a paper, "Search and Seizure in Civil Cases: The Anton Piller Order" (1984), 42 Advocate 41, as follows:

Although this order has several variants its most stringent form, which is granted ex parte, is unique. It allows the plaintiff, with its solicitor, to enter the Defendant's premises during normal business hours, show the defendant a copy of the order and search the premises for the documents or materials mentioned in the order. If any of these materials are found, the plaintiff may remove them for safekeeeping pending the normal discovery process and trial. The order is an extremely powerful one. It is of use where it is expected that the material sought to be seized may disappear or be secreted prior to discovery of documents. Although its primary use has been in copyright and related areas, it can and has been of use in any area where this suspicion justifiably arises. The order does not depend upon a proprietary interest. The sine qua non of the order is the need to protect vital material from possible destruction.

IRREPARABLE HARM

In [*Ominayak v. Norcen Energy Resources Ltd.*, [1985] 3 W.W.R. 193 (Alta. C.A.)], Kerans J.A. defines "irreparable harm", at p. 201:

We accept the proposition in High on the Law of Injunction, 4th ed., vol. 1, p. 36, that:

"By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice".

20 There being no grounds upon which the Anton Piller order should be vacated, it will remain in force. That aspect of the defendants' application is denied.

Interim injunction

21 The defendants also moved to vary or discharge the interim injunction.

22 The court's authority to grant an injunction is found in s. 13(2) of the Judicature Act, R.S.A. 1980, c. J-1:

> (2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

23 Guidelines as to when a court might consider it "just or convenient" to exercise its discretion in favour of granting an interlocutory injunction are set out in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.), and more recently in *Ominayak v. Norcen Energy Resources Ltd.*, 36 Alta. L.R. (2d) 137, [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 58 A.R. 161 (C.A.), where, at p. 196, Kerans J.A. states:

> It is settled law that an applicant for an interim injunction must establish: (1) that he raises a serious issue to be tried; (2) that he will before trial suffer irreparable harm if no injunction is granted; and (3) that the balance of convenience between the parties favours relief to him.

24 In *Man. (A.G.) v. Metro. Stores Ltd.*, [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1, 25 Admin. L.R. 20, 18 C.P.C. (2d) 273, 87 C.L.L.C. 14,015, 38 D.L.R. (4th) 321, (sub nom. *Metro. Stores (MTS) Ltd. v. Man. Food & Commercial Wkrs., Loc. 832)* 46 Man. R. (2d) 241, 73 N.R. 341, Beetz J. is somewhat less positive in his statement of the first aspect of the tripartate test. He says at pp. 15-16:

> The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.
>
> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: *Chesapeake & Ohio Ry. Co. v. Ball*, [1953] O.R. 843 at 854-55, [1953] O.W.N. 801, per McRuer C.J.H.C. The House of Lords has somewhat relaxed this first test in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the court that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J., speaking for himself and five other members of the court in a unanimous judgment, referred to but did not comment upon this difference in *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 9 and 10, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241.
>
> *Amer. Cyanamid* has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance, Toronto (1983), at pp. 66-77.
>
> In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *Amer. Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured: see Hanbury and Maudsley, Modern Equity, 12th ed., pp. 736-43. In my view, however, the *Amer. Cyanamid* "serious question" formulation is sufficient in a constitutional case

> where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

25 Having in mind the tests enunciated in those authorities, I am of the view that it was just and convenient to issue the interim injunction when it was originally granted, and that, subject to the change of wording agreed upon by the parties (as set out earlier), the injunction should remain in place until trial.

26 The defendants concede that the first part of the tripartate test has been met by the plaintiffs, but say that the plaintiffs will not suffer irreparable harm because they can be compensated in damages. The defendants say further that the balance of convenience (or inconvenience) favours the defendants, as they may well lose business and suffer economic loss if the injunction remains in place until trial.

27 In *Ominayak*, Kerans J.A. defines "irreparable harm", at p. 201:

> We accept the proposition in High on the Law of Injunction, 4th ed., vol. 1, p. 36, that:
>
>> By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.
>
> For the purposes of interim relief, and for the purposes of the test expressed by this court in *Law Soc. of Alta. v. Black*, [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 347, this is what we mean by irreparable harm: it is harm for which no fair and reasonable redress would be available after trial.

28 In the case before me, the evidence discloses that if the defendants are allowed to use the plaintiffs' designs and marketing information, the plaintiffs' relationship with its customers will be impaired and the core of the plaintiffs' business irretrievably harmed. To my mind, this is harm for which no fair and reasonable redress would be available after trial. Customers, once lost, may never come back. Financial stability, once lost, may never be recovered.

29 Weighing all the relevant factors, including the strength of the plaintiffs' case, the extent of the harm that will be suffered by the plaintiffs, and the inconvenience caused to the defendants, the balance favours leaving the injunction in place until trial. The defendants' business surely does not depend upon its use of the plaintiffs' designs and sales information, and if it does, it seems inequitable to allow the defendants to continue using those materials to the plaintiffs' great disadvantage, pending the conclusion of what may well be a long trial process.

30 A further matter was raised upon the application to set aside the order. This is a case of violation of copyright, and in such cases questions of irreparable injury and balance of convenience do not arise. In *Jeffrey Rogers Knitwear Productions Ltd. v. R.D. Int. Style Collections Ltd.*, [1985] 2 F.C. 220, 6 C.I.P.R. 263, 6 C.P.R. 409 (T.D.), Dubé J. (as she then was) states at p. 266:

> ... in matters of clear violations of copyrights registered under the Copyright Act, R.S.C. 1970, c. C-30, the jurisprudence of the Federal Court has been to grant interlocutory injunctions without concerning itself with irreparable injury or the balance of convenience.

31 I adopt this as a correct statement of the law in copyright cases.

32 The tripartate test, generally required in cases of interlocutory injunctions, having been met, and because this is a copyright case, it appears to me that the interim injunction as amended should remain in place until trial.

Counter application for contempt

33 The plaintiffs seek an order declaring that certain of the defendants are in contempt of court. It does not seem to me to be necessary to make such a declaration at this time. The search of the defendants' premises has been carried out and the documents in question have been recovered and placed in the protective custody of the plaintiffs' solicitors. The terms of the

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Abbey Resources Corp. v. Saskatchewan Assessment Management Agency | 2021 SKQB 100, 2021 CarswellSask 230, 332 A.C.W.S. (3d) 623 | (Sask. Q.B., Apr 7, 2021)

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 CSC 5, 2019 SCC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury 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)

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

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.e Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
Natural resources
III Oil and gas
III.3 Constitutional issues
III.3.c Miscellaneous
Natural resources
III Oil and gas
III.8 Statutory regulation
III.8.a General principles

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): 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 G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did 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. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la

Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

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s. 2 "creditor" — considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

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s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

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s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — referred to

s. 14.06(4)-14.06(8) [en. 1997, c. 12, s. 15] — referred to

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

s. 14.06(8) [en. 1997, c. 12, s. 15] — considered

s. 20 — referred to

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(2) [en. 1992, c. 27, s. 36(1)] — considered

s. 72(1) — considered

s. 80 — referred to

s. 121(1) — considered

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s. 141 — considered

s. 197(3) — referred to

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Generally — referred to

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s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

s. 92A(1)(c) — considered

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Generally — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

s. 1(ddd) "reclamation" — considered

ss. 112-122 — referred to

s. 134(b) "operator" — considered

s. 134(b) "operator" (vi) — considered

s. 137 — considered

s. 140 — considered

s. 142(1)(a)(ii) — considered

ss. 227-230 — referred to

s. 240 — referred to

s. 240(3) — referred to

s. 245 — referred to

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Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(w) "facility" — considered

s. 1(1)(cc) "licensee" — considered

s. 1(1)(eee) "well" — considered

s. 11(1) — considered

s. 12(1) — considered

s. 18(1) — referred to

s. 24(2) — referred to

s. 25 — referred to

s. 27(3) — considered

ss. 27-30 — referred to

s. 30(5) — referred to

s. 30(6) — referred to

s. 68(d) "facility" — considered

s. 70(1) — considered

s. 70(2)(a) — considered

s. 73(1) — referred to

s. 73(2) — referred to

s. 106 — referred to

s. 106(3)(a) — referred to

s. 106(3)(b) — referred to

s. 106(3)(c) — referred to

s. 106(3)(d) — referred to

s. 106(3)(e) — referred to

s. 108 — referred to

s. 110 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(n) "licensee" — considered

s. 1(1)(t) "pipeline" — considered

s. 6(1) — referred to

s. 9(1) — referred to

s. 23 — considered

ss. 23-26 — referred to

ss. 51-54 — referred to

Responsible Energy Development Act, S.A. 2012, c. R-17.3

s. 2(1)(a) — considered

s. 2(2)(h) — referred to

s. 3(1) — referred to

s. 28 — referred to

s. 29 — referred to

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s. 1(h) "operator" — considered

s. 15 — considered

Statutes considered by *Côté J.* (dissenting):

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s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

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s. 14.06(5) [en. 1997, c. 12, s. 15] — considered

s. 14.06(6) [en. 1997, c. 12, s. 15] — considered

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

ss. 16-38 — referred to

s. 20(1) — considered

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Generally — referred to

s. 91 ¶ 21 — considered

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Generally — referred to

s. 240(3) — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 1(1)(cc) "licensee" — considered

s. 27 — referred to

s. 29 — referred to

s. 30 — referred to

s. 30(5) — referred to

s. 70(1)(a)(ii) — referred to

s. 70(2) — considered

s. 74 — referred to

s. 108 — referred to

s. 110(1) — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 1(1)(n) "licensee" — considered

s. 23 — referred to

s. 25 — referred to

s. 52(2) — referred to

s. 54(1) — referred to

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R. 3.012(d) — considered

Rules considered by *Côté J.* (dissenting):

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Treaties considered by *Côté J.* (dissenting):

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612

Generally — referred to

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Generally — referred to

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Words and phrases considered:

facility

A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*[Oil and Gas Conservation Act, R.S.A. 2000, c. O-6], s. 1(1)(w)).

operator

. . . an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

orphans

. . . "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings.

profit à prendre

Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)).

Termes et locutions cités:

exploitant

[Un] « exploitant » [est] la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1(h) et art. 15).

installation

L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières ([*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6], art. 1(1)(w)).

orphelins

[L]es « orphelins » [sont] les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité.

profit à prendre

Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387).

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

10 A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

11 Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

12 The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act*, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (*OGCA*, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (*OGCA*, s. 12(1)).

13 The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled ... for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates,

and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

15 The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

16 "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation ... in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings ... land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

17 A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

19 Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta*

2009 ABCA 64
Alberta Court of Appeal

Victoria Oil & Gas Plc v. Alhambra Resources Ltd.

2009 CarswellAlta 235, 2009 ABCA 64, [2009] A.W.L.D. 1365, [2009] A.W.L.D. 1463, [2009] A.W.L.D. 1481, 175 A.C.W.S. (3d) 852, 447 W.A.C. 374, 448 A.R. 374

Victoria Oil & Gas Plc, Feax Investment Co. Ltd. and Victoria Energy Central Asia LLP (Respondents) and Alhambra Resources Ltd. and Saga Creek Gold Company LLP (Appellants / Defendants) and Olga Elefteriadi (Not a Party to the Appeal)

C. Kenny J. (ad hoc), C. O'Brien J.A., and P. Rowbotham J.A.

Heard: February 12, 2009
Judgment: February 26, 2009
Docket: Calgary Appeal 0801-0283-AC

Counsel: J.D. Blair for Appellants
R.G. McLennan, Q.C., J.G. Oppenheim for Respondents

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

Related Abridgment Classifications

Conflict of laws

II Property
  II.1 Jurisdiction over real property
    II.1.d Miscellaneous

Natural resources

II Mines and minerals
  II.5 Remedies
    II.5.i Miscellaneous

Remedies

II Injunctions
  II.2 Prohibitive injunctions
    II.2.c Interim and interlocutory injunctions
      II.2.c.i Threshold test
        II.2.c.i.C Balance of convenience

Headnote

Conflict of laws --- Property — Jurisdiction over real property — In miscellaneous personal actions

Plaintiffs commenced action in Alberta alleging that defendants engaged in conspiracy to defraud plaintiffs of oil and gas licence in Kazakhstan (licence) — Plaintiffs sought declaration that defendants held licence on constructive trust for benefit of plaintiffs, as well as injunction and order directing defendants to take steps to transfer licence to one of plaintiffs — Plaintiffs brought application for interlocutory injunction restraining defendants from taking steps to dispose of licence — Plaintiffs submitted that facts alleged in statement of claim permitted them to claim unjust enrichment since they paid $14.5 million and lost licence, one defendant, S Co., held licence, and no juristic reason existed for deprivation and corresponding enrichment — Application was granted, but defendants appealed interlocutory injunction raising issue of court's jurisdiction — Appeal dismissed — Generally courts have no jurisdiction to determine title to or interest in foreign land — Court may exercise in personam jurisdiction and enforce rights that affect land in foreign countries if personal obligation runs between parties — Defendants alleged that no personal connection existed since there was no contract between defendants and main plaintiff nor plea of equitable relationship

— Chambers judge did not err in asserting jurisdiction since allegations in statement of claim disclosed personal obligation between parties, and defendant A Ltd. was subject to court's jurisdiction and controlled S Co. which was bare trustee of licence.

Natural resources --- Mines and minerals — Remedies — Miscellaneous

Interlocutory injunction — Plaintiffs commenced action in Alberta alleging that defendants engaged in conspiracy to defraud plaintiffs of oil and gas licence in Kazakhstan (licence) — Plaintiffs sought declaration that defendants held licence on constructive trust for benefit of plaintiffs, as well as injunction and order directing defendants to take steps to transfer licence to one of plaintiffs — Plaintiffs brought application for interlocutory injunction restraining defendants from taking steps to dispose of licence — Plaintiffs submitted that facts alleged in statement of claim permitted them to claim unjust enrichment since they paid $14.5 million and lost licence, one defendant, S Co., held licence, and no juristic reason existed for deprivation and corresponding enrichment — Application was granted, but defendants appealed interlocutory injunction raising issue of application of test for injunctive relief and adequacy of undertaking ordered — Defendants submitted that if defendant A Ltd. was seen as flouting governmental authorities in Kazakhstan, its gold licences would be jeopardized, but order could be varied and chambers judge directed plaintiffs to post security of $50,000 — Appeal dismissed — Allegations in statement of claim raised serious issues — Chambers judge concluded that respondents would suffer irreparable harm if defendants were able to dispose of licence — Fresh evidence demonstrated that prior to being notified of plaintiff's claim, one defendant was in process of transferring licence to another company controlled by defendant OE — Although defendants raised spectre of repercussions from OE and Kazakhstan authorities if injunction was not lifted, balance of convenience did not favour them — Chambers judge's discretionary order was entitled to appellate deference as was exercise of discretion with respect to amount of undertaking.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Balance of convenience

Plaintiffs commenced action in Alberta alleging that defendants engaged in conspiracy to defraud plaintiffs of oil and gas licence in Kazakhstan (licence) — Plaintiffs sought declaration that defendants held licence on constructive trust for benefit of plaintiffs, as well as injunction and order directing defendants to take steps to transfer licence to one of plaintiffs — Plaintiffs brought application for interlocutory injunction restraining defendants from taking steps to dispose of licence — Plaintiffs submitted that facts alleged in statement of claim permitted them to claim unjust enrichment since they paid $14.5 million and lost licence, one defendant, S Co., held licence, and no juristic reason existed for deprivation and corresponding enrichment — Application was granted, but defendants appealed interlocutory injunction raising issue of application of test for injunctive relief and adequacy of undertaking ordered — Defendants submitted that if defendant A Ltd. was seen as flouting governmental authorities in Kazakhstan, its gold licences would be jeopardized, but order could be varied and chambers judge directed plaintiffs to post security of $50,000 — Appeal dismissed — Allegations in statement of claim raised serious issues — Chambers judge concluded that respondents would suffer irreparable harm if defendants were able to dispose of licence — Fresh evidence demonstrated that prior to being notified of plaintiff's claim, one defendant was in process of transferring licence to another company controlled by defendant OE — Although defendants raised spectre of repercussions from OE and Kazakhstan authorities if injunction was not lifted, balance of convenience did not favour them — Chambers judge's discretionary order was entitled to appellate deference as was exercise of discretion with respect to amount of undertaking.

Table of Authorities

Cases considered:

Catania v. Giannattasio (1999), 1999 CarswellOnt 950, 28 C.P.C. (4th) 207, 118 O.A.C. 330, 174 D.L.R. (4th) 170, [1999] I.L.Pr. 630 (Ont. C.A.) — referred to

Dreco Energy Services Ltd. v. Wenzel (2008), 2008 CarswellAlta 1145, 2008 ABCA 290, 48 B.L.R. (4th) 43, 93 Alta. L.R. (4th) 260, [2008] 10 W.W.R. 445, 440 A.R. 273, 438 W.A.C. 273 (Alta. C.A.) — referred to

Duke v. Andler (1932), 1932 CarswellBC 101, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 (S.C.C.) — referred to

Minera Aquiline Argentina SA v. IMA Exploration Inc. (2007), 43 C.P.C. (6th) 45, 68 B.C.L.R. (4th) 242, [2007] 10 W.W.R. 648, 32 B.L.R. (4th) 242, 406 W.A.C. 1, 2007 CarswellBC 1291, 2007 BCCA 319, 246 B.C.A.C. 1 (B.C. C.A.) — referred to

Minera Aquiline Argentina SA v. IMA Exploration Inc. (2007), 2007 CarswellBC 3065 (S.C.C.) — referred to

Precious Metal Capital Corp. v. Smith (2008), 2008 CarswellOnt 5422, 2008 ONCA 577, 297 D.L.R. (4th) 746, 92 O.R. (3d) 701 (Ont. C.A.) — referred to

APPEAL by defendants from interlocutory injunction restraining them from disposing of oil and gas licence.

***Per curiam*:**

1 This is an appeal of an order enjoining the appellants from disposing of an oil and gas licence in Kazakhstan. The appeal raises issues of the Alberta court's jurisdiction and of the application of the tripartite test for injunctive relief. The appellants also take issue with the adequacy of the undertaking ordered. The respondents' application for fresh evidence was not opposed and we have accepted and considered that evidence.

Background

2 The appellant Alhambra Resources Ltd. (Alhambra) is a public company registered to carry on business in Alberta and its head office is in Calgary. Alhambra carries on business in Kazakhstan. Its primary business there is gold mining. Saga Creek Gold Company LLP (Saga Creek) is Alhambra's wholly owned Kazakhstan subsidiary. Saga Creek is the registered holder of the Kemerkol oil and gas licence, the subject of the injunction.

3 The respondents are Victoria Oil and Gas Plc (Victoria), a British public company and its two wholly owned subsidiaries, Feax Investments Co. Ltd. and Victoria Energy Central Asia LLP (VECA). They carry on oil and gas exploration in Kazakhstan.

4 Olga Elefteriadi (Olga), a defendant in this action, was not served with the Statement of Claim or the injunction application. The injunction issued against her but she is not a party to the appeal.

5 In 2004 Saga Creek was the registered holder of the Kemerkol licence. Victoria alleges that Olga was the beneficial owner of the licence. In January 2005 she caused Saga Creek to transfer the licence to VECA, which, at that time, was a company controlled by Olga. Victoria acquired the licence when it bought Feax Investments, the 100 per cent shareholder of VECA. Victoria paid $14.75 M (US). In September 2005 the licence was registered to VECA and it carried out operations and expended money (allegedly $21 M) under the licence.

6 In 2008 Rasova Enterprises Company Limited, a company also controlled by Olga, commenced an action in Kazakhstan against VECA and Saga Creek alleging that the transfer of the licence was invalid. A Kazakhstan court declared the transfer invalid, and an appeal was dismissed. It appears that Olga successfully created a voidable transaction under Kazakhstan law. VECA and Saga Creek attorned to the jurisdiction and participated fully in the litigation. The licence is currently registered to Saga Creek. The respondents seek to have the licence transferred back to VECA. They allege that Saga Creek is now attempting to resell the licence.

7 On September 26, 2008, the respondents commenced an action in Alberta and applied for an interlocutory injunction restraining the appellants from taking steps to dispose of the licence. The respondents' application for an injunction was granted. The chambers judge found that there was a serious issue to be tried, that there was evidence of irreparable harm, and that the balance of convenience favoured the respondents as a further transfer of the licence would cause greater harm to the respondents than any harm which the appellants might suffer. The appellants submitted that if Alhambra was seen as flouting or circumventing the judicial, regulatory or governmental authorities in Kazakhstan, Alhambra's gold licences would be jeopardized. The order permits the appellants to apply to the Court of Queen's Bench to vary the order if "real harm results with respect to their activities in Kazakhstan or from the government of Kazakhstan." The chambers judge directed the respondents to post security in the amount of $50,000.

Standard of Review

8 The granting of an interlocutory injunction involves the exercise of judicial discretion and is entitled to deference unless the judge proceeded arbitrarily or on wrong legal principles. Correctness is the appropriate standard where the judge failed to consider an applicable legal test or principle, or failed to properly apply it: *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290, 440 A.R. 273 (Alta. C.A.) at paras. 8-10.

Analysis

Jurisdiction

9 As a general rule Canadian courts have no jurisdiction to determine title to or an interest in foreign land: *Duke v. Andler*, [1932] S.C.R. 734 (S.C.C.), at 738. However, a Canadian court may, in certain circumstances, exercise *in personam* jurisdiction and enforce rights that affect land in foreign countries: *Catania v. Giannattasio* (1999), 118 O.A.C. 330, 174 D.L.R. (4th) 170 (Ont. C.A.); *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319, 68 B.C.L.R. (4th) 242 (B.C. C.A.), leave to appeal refused [2007] S.C.C.A. No. 424 (S.C.C.); and *Precious Metal Capital Corp. v. Smith*, 2008 ONCA 577, 92 O.R. (3d) 701 (Ont. C.A.)

10 We have assumed for the purposes of this appeal that the Kemerkol licence is a foreign immovable. This is a fact which must be proved at trial on the basis of Kazakhstan law. Accordingly, the issue is whether the *in personam* exception applies. The *in personam* exception asks whether there is a personal obligation running between the parties.

11 The appellants assert that there is no such personal connection as there is no contract between the appellants and Victoria, nor is there any plea of an equitable relationship such as breach of fiduciary duty as existed in the *Minera* and *Precious Minerals* cases.

12 The Statement of Claim pleads that the appellants are engaged in a conspiracy to defraud the respondents of the licence; that the fraud is being executed by Olga and facilitated by the appellants. The respondents seek a declaration that the appellants hold the Kemerkol licence on a constructive trust for the benefit of the respondents, an injunction and an order directing the appellants take all steps necessary to cause the licence to be transferred to VECA. At the hearing, the respondents submitted that the facts alleged in the Statement of Claim permit them to claim unjust enrichment; they have paid $14.5 M, they have lost the licence, Saga Creek now holds the licence and there is no juristic reason for the deprivation and corresponding enrichment. Alhambra acknowledges that Saga Creek is a trustee of the licence and has no beneficial interest in it.

13 We conclude that allegations in the Statement of Claim disclose a personal obligation between the parties. Morever, Alhambra is subject to this court's jurisdiction and at the time of the hearing controlled Saga Creek which is a bare trustee of the licence. Accordingly, the chambers judge did not err in asserting jurisdiction.

Test for Injunctive Relief

14 The allegations in the Statement of Claim raise serious issues. The chambers judge concluded that the respondents would suffer irreparable harm if the appellants were able to dispose of the licence. The fresh evidence demonstrates that prior to being notified of the respondents' claim, Alhambra was in the process of transferring the licence to another company controlled by Olga. Although the appellants raise the spectre of repercussions from Olga and the Kazakhstan authorities if the injunction is not lifted, we are not persuaded that the balance of convenience favours them.

15 The chambers judge's discretionary order is entitled to appellate deference, as is the exercise of her discretion with respect to the amount of the undertaking. The appeal is dismissed.

Appeal dismissed.

End of Document

2016 ABQB 215
Alberta Court of Queen's Bench

F.A.S.T. Industries Ltd. v. Sparta Engineering Inc.

2016 CarswellAlta 681, 2016 ABQB 215, [2016] A.W.L.D. 1919,
265 A.C.W.S. (3d) 300, 35 C.B.R. (6th) 293, 55 C.L.R. (4th) 31

F.A.S.T. Industries Ltd., Plaintiff and Sparta Engineering Inc. and CWC Energy Services Corp., Defendants

Master R.P. Wacowich, In Chambers

Heard: April 4, 2016
Judgment: April 14, 2016
Docket: Edmonton 1503-08800

Counsel: Dean Hitesman, for Plaintiff
Tyler Derksen, for Defendants

Subject: Contracts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.3 Effect of proposal
Headnote
Bankruptcy and insolvency --- Proposal — Effect of proposal — General principles
Defendant was hired by third party to carry out maintenance and repairs on oil services rig — Defendant hired plaintiff to conduct repairs on rig — Agreement between parties was verbal — Plaintiff had received invoice from defendant for parts and services provided by defendant to plaintiff on previous project in amount of $111,249.08 — Plaintiff had not paid invoice due to cash flow problems — Plaintiff invoiced defendant for $348,586.68 for its work on rig — Defendant set off earlier debt by plaintiff — Plaintiff claimed defendant could not use set-off because plaintiff had filed Notice of Intention to make Proposal ("NOI") before its invoice was rendered — Plaintiff brought application for summary judgment on its invoice and determination that defendant was caught by stay of proceedings in s. 69 of Bankruptcy and Insolvency Act so as to preclude set-off against plaintiff's invoice for work on rig — Application granted — Work on rig was not completed by plaintiff and invoice had not been issued, before NOI issued — Debt by plaintiff to defendant existed at time of NOI, but debt of defendant to plaintiff did not exist until work was completed — Debt came into existence when plaintiff invoiced defendant — Defendant was caught by s. 69 of Act and precluded from setting off pre-NOI indebtedness of plaintiff against post-NOI indebtedness of defendant — Plaintiff was granted summary judgment for amount of $111,249.08, which was amount of indebtedness unjustifiable set off by defendant and outstanding balance of defendant's indebtedness.
Table of Authorities
Cases considered by *Master R.P. Wacowich, In Chambers*:

Aero Trades (Western) Ltd. (Receiver of) v. Canada (1988), 71 C.B.R. (N.S.) 97, [1989] 1 W.W.R. 723, (sub nom. *Clarkson Co. v. R.)* 89 D.T.C. 5050, (sub nom. *Clarkson Co. v. R.)* Can. S.T.R. 80-041, (sub nom. *Clarkson Co. v. R.)* 18 C.E.R. 139, (sub nom. *Clarkson Co. v. R.)* 2 T.C.T. 4042, (sub nom. *Clarkson Co. v. Canada)* [1989] 1 C.T.C. 142, (sub nom. *Aero Trades (Western) Ltd. (Receivership) v. Canada)* 91 N.R. 380, 1988 CarswellNat 487, 24 F.T.R. 321 (note) (Fed. C.A.) — considered

Cobourg Felt Hat Co., Re (1925), 5 C.B.R. 622, 28 O.W.N. 131, [1925] 2 D.L.R. 997, 1925 CarswellOnt 22 (Ont. S.C.) — considered

Jones, Re (2003), 2003 CarswellOnt 3184, (sub nom. *Jones v. R.)* 2003 D.T.C. 5663, 175 O.A.C. 263, [2004] 1 C.T.C. 65, 66 O.R. (3d) 674 (Eng.), 66 O.R. (3d) 683 (Fr.), 45 C.B.R. (4th) 263, 66 O.R. (3d) 674, 66 O.R. (3d) 683 (Ont. C.A.) — referred to

Sabey, Re (1996), 1996 CarswellBC 2816, 46 C.B.R. (3d) 77 (B.C. S.C.) — referred to

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — distinguished

728835 Ontario Ltd., Re (1998), 1998 CarswellOnt 2025, 3 C.B.R. (4th) 211 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

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

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(1)(a) — considered

s. 66(1) — considered

s. 69 — considered

s. 69(1)(a) — considered

s. 97(3) — considered

APPLICATION for summary judgment on plaintiff's invoice and determination that defendant was caught by stay of proceedings in s. 69 of *Bankruptcy and Insolvency Act* so as to preclude set-off against plaintiff's invoice.

***Master R.P. Wacowich, In Chambers*:**

Introduction:

1 The plaintiff F.A.S.T. Industries Ltd. (FAST) is a corporation which has worked in the oilfield services industry since 2010. The defendant Sparta Engineering Inc. (Sparta) is a corporation which since 2009 has been in the business of design project management and design of mechanical systems including equipment used for oil and gas well maintenance. Sparta was hired by a third party, CWC Energy Services Corp. to carry out maintenance and repair work on a CWC oil services rig (rig). CWC is no longer a party to this action.

2 Sparta and FAST had worked on similar projects in the past and in November 2014 Sparta hired FAST to conduct repairs on the rig in question. FAST was to do the hands on work and Sparta was to oversee the project and provide mechanical advice and other expertise as required.

3 The agreement between Sparta and FAST to do the work was verbal. They had previous similar agreements between them, all verbal. FAST was to provide labour and parts to bring the rig into good working condition and subsequently bill Sparta for the parts and labour provided.

4 Previous to this agreement FAST received an invoice from Sparta dated April 11, 2014 for parts and services provided by Sparta to FAST on a previous project. As was their practice, this was pursuant to a verbal agreement. It was in the amount of $111,249.08 which debt is not in dispute.

5 FAST was one of a number of corporations involved in the oil services who were having cash flow difficulties in 2014. This caused financial difficulties for FAST which resulted in the bill from Sparta not being paid.

6 Fast invoiced Sparta on April 6, 2015 for $348,586.68 for its work on this rig. Sparta set off the 2014 debt by FAST to it after April 6, 2015. FAST claims Sparta cannot use set off because FAST had filed a Notice of Intention to make a Proposal (NOI) on March 5, 2015.

7 FAST filed the NOI under section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the BIA). This combined with section 69 of the BIA resulted in a stay of proceedings against FAST by all its creditors which was imposed immediately on the issuance of the NOI.

8 Section 50.4(1) of the BIA states:

> Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating:
>
> > (a) the insolvent person's intention to make a proposal ....

9 Section 69(1) of the BIA states:

> ... on a filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy ...

Issue

10 Was the April 2014 debt of FAST to Sparta caught by the stay of proceedings set out in section 69 so as to preclude set-off against FAST's invoice of April 6, 2015 for work on this rig?

Analysis

11 Sparta's position is that the majority of the FAST work was completed previous to the date of the NOI and is a debt owing. The evidence indicates that approximately 75% of the work on the rig had been completed by FAST on March 5, 2015.

12 The uncontroverted evidence of Bret Wetthuhn a director of FAST is set out in his Affidavit as follows:

> 21. On March 5, 2015, being the date that FAST filed a Notice of Intention to Make a Proposal, the Fast services had only been partially completed. On that date the rig was disassembled and was in many different pieces on the floor at the Sedgewick Shop.
>
> 22. On March 5, 2015, in order for FAST to complete the FAST services, FAST still had to assemble all of the parts for the rig and paint the rig. While by March 5, 2015, the majority of the labour required to complete the FAST services had been completed, a significant amount of labour was still required by FAST employees to complete the FAST services which labour was performed after March 5, 2015 as evidenced by the Records attached as Exhibits "C", "D", "E", "F" and "G" to my Affidavit. In addition, on March 5, 2015, FAST was continuing to wait for a number of parts that had not yet arrived which were required to complete the FAST services.
>
> 23. On March 5, 2015, FAST was not in a position to invoice Sparta for the partially completed FAST services. The agreement between FAST and Sparta pursuant to the Contract was that FAST would invoice Sparta for the FAST services only once the FAST services were complete. There would be no prepaid deposits or progress payments made by Sparta to FAST until the FAST services were completed. Not only was this the agreement for the Contract, this had been the agreement and understanding between FAST and Sparta on previous occasions where FAST had performed services for Sparta.

27 Sparta received what it bargained for. It received a repaired rig after the NOI was filed. It must now stand in line with other unsecured creditors for FAST's 2014 debt to it.

28 Accordingly, Sparta is caught by s. 69 and precluded from setting off the pre-NOI FAST indebtedness against the post NOI Sparta indebtedness. FAST is awarded Summary Judgment for the sum of $111,249.08 being the amount of the FAST indebtedness that Sparta unjustifiably set-off and the outstanding balance of the Sparta indebtedness.

29 If the parties cannot agree on costs, they can speak to me within 30 days of the Order prepared reflecting this decision.

Application granted.

2024 ABKB 100
Alberta Court of King's Bench

Blade Energy Services Corp (Re)

2024 CarswellAlta 356, 2024 ABKB 100, [2024] 4 W.W.R. 660, [2024] A.W.L.D. 1195, 11 C.B.R. (7th) 319, 2024 A.C.W.S. 802, 68 Alta. L.R. (7th) 321

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Blade Energy Services Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Energy Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Holdings GP Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Royalties Limited Partnership (Respondent)

M.J. Lema J.

Heard: February 16, 2024
Judgment: February 21, 2024
Docket: Calgary B301-0373300, B301-037334, B301-037338, B301-037340

Counsel: Kelly Bourassa, for Applicant (FTI Consulting Canada Inc) Proposal Trustee
Sean Collins, Patellis Kyriakis, Nathan Stewart, for Razor Energy Group
Keely Cameron, Michael Selnes, Lisa Rodriguez, for Conifer Energy Inc.
Jessica Cameron, for Arena Investors LP

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Operator claimed producer owed $8 million in arrears — Relying on right in operating-procedure agreement, operator notified producer that it intended to disconnect producer from gas-gathering system if it did not clear arrears or agree to satisfactory payment arrangement — Neither happened and operator disconnected producer from system — Shortly after, producer filed notice of intention (NOI) to file proposal under Bankruptcy and Insolvency Act — Producer sought order declaring stay applied and directing reconnection to gas-gathering system and processing of its production on certain payment terms — Order directed operator to discontinue lockout — When it came to future services, parties had same rights and liabilities under their agreements as before and there was no role for court when it came to parties' going-forward arrangements — Operator's lockout step, commenced before NOI stay began, was continuing collection remedy and was stayed when NOI was filed — Lockout step fell within scope of s. 69(1)(a) stay and was not defensible status quo — Operator's actual or possible secured-creditor status made no difference — Scope of "remedy" and "other proceeding" in s. 69(1(a) of Act was broad including both judicial and

extrajudicial debt-collection steps — Stay under s. 69(1)(a) of Act did not have retroactive effect, in sense of undoing completed steps and implied power for court to grant orders to enforce stay and restore parties to pre-breach position as much as possible — Section 65.1 of Act did not apply — Section 65.1(4) of Act did not create freestanding right in creditor to insist on immediate payment post-NOI Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 65.1(4); Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 69(1)(a).

Table of Authorities

Cases considered by *M.J. Lema J.*:

BCIMC Realty Corp. v. Fernandes (October 4, 2021), Doc. CEL-00543-21 (Ont. L.T.B.) — referred to

Bank of Nova Scotia v. Avramenko (2020), 2020 SKQB 54, 2020 CarswellSask 107, 59 C.P.C. (8th) 216 (Sask. Q.B.) — considered

Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd. (2010), 2010 BCCA 469, 2010 CarswellBC 2852, 96 R.P.R. (4th) 157, [2010] 12 W.W.R. 189, 10 B.C.L.R. (5th) 235, 70 C.B.R. (5th) 180, 295 B.C.A.C. 201, 501 W.A.C. 201 (B.C. C.A.) — considered

Condominium Plan No. 78R15349 v. Fayad (2001), 2001 SKQB 104, 2001 CarswellSask 152, 206 Sask. R. 78 (Sask. Q.B.) — referred to

Durham Sports Barn Inc. Bankruptcy Proposal (2020), 2020 ONSC 5938, 2020 CarswellOnt 14288, 84 C.B.R. (6th) 293, 22 R.P.R. (6th) 235 (Ont. S.C.J.) — referred to

Ford Credit Canada Ltd. v. Crosbie Realty Ltd. (1992), 12 C.B.R. (3d) 282, 88 D.L.R. (4th) 706, 95 Nfld. & P.E.I.R. 322, 301 A.P.R. 322, 1992 CarswellNfld 19 (Nfld. C.A.) — referred to

Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc. (2005), 2005 CarswellOnt 9935, 29 C.B.R. (5th) 62, 277 D.L.R. (4th) 568 (Ont. S.C.J.) — considered

Goldenkey Oil Inc (Re) (2023), 2023 ABKB 365, 2023 CarswellAlta 1577, 7 C.B.R. (7th) 243 (Alta. K.B.) — referred to

Hutchingame Growth Capital Corporation v. Independent Electricity System Operator (2020), 2020 ONCA 430, 2020 CarswellOnt 9200, 13 P.P.S.A.C. (4th) 102 (Ont. C.A.) — referred to

Hutchingame Growth Capital Corporation v. Independent Electricity System Operator (2021), 2021 CarswellOnt 739, 2021 CarswellOnt 740 (S.C.C.) — referred to

Peel Housing Corp. v. Siewnarine (2008), 2008 CarswellOnt 3807, 45 C.B.R. (5th) 313, 239 O.A.C. 88 (Ont. Div. Ct.) — referred to

Plancher Heritage Ltée / Heritage Flooring Ltd., Re (2004), 2004 NBQB 168, 2004 CarswellNB 358, 3 C.B.R. (5th) 60, (sub nom. *Heritage Flooring Ltd., Re)* 279 N.B.R. (2d) 1, (sub nom. *Heritage Flooring Ltd., Re)* 732 A.P.R. 1, 2004 NBBR 168 (N.B. Q.B.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 2 C.B.R. (3d) 303, 1990 CarswellBC 384 (B.C. C.A.) — considered

Schendel Mechanical Contracting Ltd (Re), (2021), 2021 ABQB 893, 2021 CarswellAlta 2828, 38 Alta. L.R. (7th) 406 (Alta. Q.B.) — considered

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — considered

Statutes considered:

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

Generally — considered

s. 65.1 [en. 1992, c. 27, s. 30] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(2) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

s. 69(1)(a) — considered

s. 69(2) — referred to

s. 121 — referred to

s. 244(1) — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 11 — referred to
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

RULING on whether lockout constituted continuing debt-collection remedy and was stayed under *Bankruptcy and Insolvency Act*.

***M.J. Lema J.*:**

Reasons for Judgment of Honourable Justice M. J. Lema

I. Introduction

1 Is the arrears-triggered disconnection (or lockout) of a gas producer by a gas-plant operator a continuing remedy and accordingly one stayed under the producer's notice-of-intention proceedings under the *Bankruptcy and Insolvency Act*?

2 The producer seeks an order declaring that the stay applies and directing reconnection to the gas-gathering system and processing of its production on certain payment terms.

3 The operator characterizes the lockout as a completed step and thus, not offside the *BIA* stay. Alternatively, if the stay applies and reconnection follows, the operator seeks going-forward terms including immediate payment, a critical-supplier's charge, and payment of some of the existing arrears.

4 I find that the lockout was a continuing remedy, that it was stayed when the *BIA* notice of intention was filed, that reconnection is required, and that, with the stay not applying to any post-NOI arrears that may accrue, the parties' existing agreements will govern future services and payments for them i.e., without the Court setting such terms.

II. Background

5 Razor and Conifer are oil and gas producers. Conifer is also the operator of a gas plant in the South Swan Hills area in which both are producing natural gas.

6 Per Conifer, Razor owes approximately $8 million to it, relating in part to processing-charge and capital-cost shortfalls. Razor disputes that figure.

7 After long-running attempts to negotiate the clearance of those arrears, Conifer notified Razor that, relying on a right in their operating-procedure agreement, it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a satisfactory payment arrangement.

8 Neither happened, eventually leading to Conifer disconnecting Razor from the system, Razor shortly afterwards filing a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*, and the current debate over the scope of the resulting stay and its impact (if any) on the lockout.

III. Issues

9 The first issue is whether the lockout constitutes a continuing debt-collection remedy. If so, it is stayed by the *BIA* stay. The second is the appropriate remedy in such case. Assuming it includes reconnection, the third is on what term(s) should future services be provided by Conifer.

IV. Analysis

A. Stay provision

10 Here is the applicable *BIA* provision (para 69(1)(a)):

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6 [none of which apply here, at least not currently], on the filing of a notice of intention under section 50.4 by an insolvent person,
>
>> (a) no creditor has **any remedy** against the insolvent person or the insolvent person's property, or shall commence or continue **any** action, execution or **other proceedings**, for the recovery of a claim provable in bankruptcy[.] [emphasis added]

11 Conifer did not argue, and it could not plausibly have argued, that Razor is not an insolvent person, that a notice of intention has not been filed, or that its claim for contractual amounts owing by Razor through to the lockout is not a claim provable in bankruptcy i.e. would not fall within the scope of s 121 *BIA* if a bankruptcy had occurred on the NOI filing date.

12 Leaving the questions of whether the lockout constitutes a remedy or other proceeding (or both) and, if so, whether the stay captures the lockout when it occurred before the NOI was filed.

13 I start by examining the scope of the key terms here.

B. Broad scope of "remedy" and "other proceedings"

14 The scope of "remedy" and "other proceedings" is broad, including both judicial and extrajudicial debt-collection steps. Per *Vachon v Canada Employment and Immigration Commission*, [1985] 2 SCR 417:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", **giving to it and to the words "*autres procédures*" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
>> The **means by which a right is enforced** or the violation of a right is prevented, redressed, or compensated.
>
> and below:
>
>> Remedy means **any remedial right** to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
>> **the means by which the violation of a right is prevented, redressed, or compensated**. Remedies are of four kinds: (1) by act of the party injured . . . ; (2) by operation of law . . . ; (3) **by agreement between the parties** . . . ; (4)

> > by judicial remedy, *e.g.* action or suit. **The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.**
>
> The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* **very broadly**.
>
> [discussion of cases involving distress for unpaid municipal taxes, incomplete seizures, and bids to cut off utilities].
>
> This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion **the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.**
>
> As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:
>
> > **An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.**
>
> The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that **the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.**
>
> Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent [unemployment-insurance] benefits, such as the recovery at issue here. [paras 21-31] [emphasis added]

15 Recall as well that para 69(1)(a) refers to "*any* remedy" and "*any* . . . other proceedings", without any limitation to legal remedies or proceedings.

16 Further examples of extrajudicial steps found to constitute "remedies" or "proceedings" include:

- *setting off* current payments (for coal deliveries) against pre-existing arrears: *Quintette Coal Ltd v Nippon Steel Corp*, 1990 CanLII 430 (BCCA), found to fall within the scope of a s 11 *CCAA* stay of "proceedings" (see paragraph beginning "Quintette continued to make coal deliveries . . . " and paragraphs from that beginning with "It is evident from the above that . . . " .. up to and including that beginning with "As Thackray, J. has not been shown to have erred . . . "]

- "*sweeping [the debtor's] operating account* and *[capping]* the amount available to [the debtor] [under a *revolving credit facility]: Heritage Flooring BIA Proposal (Re)*, 2004 NBQB 168 (para 82);

- *distraining* for unpaid rent: *Ford Credit Canada Ltd v Crosbie Realty Ltd*, 1992 CanLII 7132 (NLCA) (paras 21-26) and *Durham Sports Barn Inc (bankruptcy proposal)*, 2020 ONSC 5938 (42-49);

- *registering a caveat* as a prelude to enforcing a condominium levy: *Condominium Plan No 78R15349 v Fayad*, 2001 SKQB 104 (paras 23 and 24); and

- seeking an *injunction to enforce continued business operations* in leased premises: *Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc*, 2005 CanLII 81263 (ONSC) (paras 11-15).

17 The focus of such steps is collection or attempted collection of existing indebtedness i.e. "remedies" or "other proceedings" for the "recovery of claims provable in bankruptcy."

18 By contrast, *terminating an agreement* was found to fall outside the scope of s. 69: *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*, 2010 BCCA 469 (paras 20, 28 and 29). For the same (outside scope of s 69) treatment of *contract termination*, see also *Hutchingame Growth Capital Corporation v Independent Electricity System Operator*, 2020 ONCA 430 (paras 32-26) (leave denied: 2021 CanLII 2823 (SCC)). Examples of the same treatment in a landlord-tenant context include

Peel Housing Corp v Siewnarine, 2008 CanLII 31815 (ONSC DC) (paras 12-26) and *BCIMC Realty Corporation v Fernandes*, 2021 CanLII 140640 (ON LTB) (determinations 1-7).

19 The distinction with termination is the focus on ending the commercial relationship, not on recovery of outstanding arrears.

20 I note that Conifer does not argue that the agreement in question has terminated, whether because of Razor's defaults or otherwise.

21 Other "outside scope" examples noted in *Canadian Petcetera* are seeking *Criminal Code compensation orders*, pursuing a *contempt order*, or *enforcing post-bankruptcy indebtedness* (paras 30 and 31), all found not to involve claims provable in the insolvency proceeding. (I discuss the latter aspect later, with "post-bankruptcy" translated to "post-NOI".)

C. Purpose of stay

22 *Golden Griddle* (cited above) accurately describes the purpose of staying such remedies and proceedings in a proposal setting:

> While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, **giving**, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 - Stays of Proceedings, under the *Bankruptcy and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."**
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the **impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed**, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.
>
> The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a **mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's**. To operate as a Golden Griddle restaurant requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.
>
> **To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.**
>
> I, therefore find that the **nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed**. [paras 11-15] [emphasis added]

D. Nature of lockout per Conifer

23 Conifer itself recognizes the remedial nature of its lockout step. Per the February 15, 2024 Affidavit of its deponent (Heather Wilkins - Conifer's VP Finance):

> On or around December 23, 2023, **after multiple attempts to get Razor to address its arrears**, Conifer exercised its rights under section 602(b)(ii) of the [Construction, Ownership and Operation Agreement], and **stopped receiving and processing Razor's gas by physically closing and locking valves** at 16 separate points within the South Swan Hills Gas Gathering System **on the basis of close to $8 million in unpaid arrears**. [para 8]
>
> Conifer has not received any payments and **no further enforcement steps** were taken following the disconnecting of services. [para 9]
>
> **Due to Razor's unwillingness to address its obligations**, on or about November 2, 2023, conifer notified Razor that Conifer would **revoke Razor's privileges and disconnect services** at the Judy Creek Gas Plant in seven days . . . **if Razor failed to remedy its arrears and bring its account into good standing.** . . . [para 28]
>
> . . . Conifer reiterated that **it would disconnect Razor's Services within seven days if Razor did not implement a monthly payment plan to bring its account into good standing**. [para 31]
>
> On December 20, 2023, Conifer wrote . . . to Razor that [a certain] proposal was not acceptable, and that **Conifer would follow through with Service Disconnection if Conifer did not receive at least $2.5 million to pay towards Razor's arrears** by December 22, 2023. . . . [para 34]
>
> On December 29, 2023 . . . , Conifer completed the Fuel Disconnection. At that time, **service to Razor's South Swan Hills Unit assets was completely disconnected from the fuel supply at the Judy Creek Gas Plant** with the exception of one generator running for building heat and pipeline tracers to preserve infrastructure integrity. [para 42]
>
> I confirm that **Conifer has taken no further steps to enforce payment of Razor's arrears since the Fuel Disconnection** on December 29, 2023. [emphasis added]

24 Conifer did not argue that its exercise of the described disconnection step, one its contractual rights under the agreement in question with Razor (and other parties), was not a "remedy" or "other proceeding" within the meaning of para 69(1)(a).

25 Nor could it plausibly have done so, given the above-described breadth of the provision and the clearly acknowledged use of the lockout right to recover, or try to recover, Razor's arrears. Per *Vachon*, this was undoubtedly "[a] kind of attempt at recovery, judicial or extrajudicial" of amounts qualifying as a "provable claim in bankruptcy."

26 By invoking the lockout provision of its agreement with Razor (and others), Conifer was attempting to extract payment from Razor of the approximately $8 million in arrears claimed by Conifer (not all of which are acknowledged by Razor) or some subset satisfactory to Conifer and accompanied by a satisfactory payment arrangement for the balance.

27 As was acknowledged by Conifer's counsel in the bolded passages below:

> . . . Conifer is preserving the *status quo*, which as of the date of Disconnection means **no further Services will be provided without the substantial past accounts being paid or satisfactory arrangements being reached.**
>
> The key question in determining this [legitimacy-of-disconnection] issue is whether or not Conifer **already exercised its rights** prior to Razor filing its NOI. If it has, the issue is moot; **Conifer cannot breach the stay for an action taken prior to the existence of the Stay**, which was only triggered by the filing of the NOI.
>
> Conifer agrees that the Stay was created pursuant to section 69(1)(a) of the *BIA*; however, Razor's submissions fail to acknowledge two key points: (1) **the remedy, in this case the Disconnection and cessation of the Services, was exercised on notice and prior to January 30, 2024 when Razor filed the NOI**; and (2) the Disconnection was implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. . . .

> Conifer reasonably exercised its rights by ceasing to provide Services at a loss through implementing the Disconnection when Razor failed to provide a viable plan to address its arrears. **The Disconnection was not a continuing action as characterized by Razor but rather a one-time permanent step** taken in December 2023 resulting from the disconnection at 16 separate points within the South Swan Hills Gas Gathering System. [Conifer brief, paras 12-15] [emphasis added]

28 As seen here, Conifer is not arguing that its lockout step was not a remedy or other proceeding per para 69(1)(a), instead that the remedy was taken *and completed* before the NOI was filed and, having no ongoing effect, is thus beyond the reach of the NOI-triggered stay. (It also anchors the lockout in the anticipated avoidance of further losses, which I discuss later.)

29 It is common ground that the lockout occurred, or at least began, before the NOI was filed.

30 It is also common ground that the para 69(1)(a) stay does not have retroactive effect, in the sense of undoing completed steps. For instance, the stay did not reach back to undo Conifer's accomplished set-offs (pre-NOI) of amounts owing to Razor against the latter's debts to Conifer. Same if Conifer had obtained a judgment against Razor, obtained proceeds from execution, and applied them to Razor's debts. Or Conifer had otherwise taken and completed a collection step before the NOI was filed.

31 It is also common ground, or at least cannot be disputed, that para 69(1)(a) captures, and stays, both the commencement *and continuation* of proceedings to recover provable claims. (Per *Vachon*, "remedies" and "other proceedings" are effectively synonymous, at least in the case of extrajudicial recovery steps i.e. the bar on commencing or continuing "other remedies" is equally a bar on commencing or continuing extrajudicial "remedies" generally.)

32 Was the lockout here a completed remedy?

E. Lockout a continuing remedy

33 The answer is no: it was an ongoing (i.e. continuing) remedy.

34 Despite Conifer's characterization of the lockout as a "one-time permanent step", it was anything but. Per Conifer's counsel's February 6, 2024 letter to Razor:

> **Should Razor desire access** to the Judy Creek Facility, **Razor must make acceptable provisions to address its arrears** and provide pre-payment for all costs associated with obtaining access to the facility, fuel gas and processing costs going forward. We have been advised by Conifer that **should an acceptable arrangement be met, . . . it would take approximately 3 business days for its to reinstate production for Razor**. [emphasis added]

35 That paragraph reflects the true nature of the lockout: a reversible step designed to stay in place until Razor cleared or otherwise addressed its pre-NOI debt to Conifer's satisfaction.

36 It was the very ongoing effect of the lockout - daily preventing Razor from producing from the field(s) in question - that constituted Conifer's (contractually-permitted) leverage here.

37 This was not a completed step i.e. a *former* remedy no longer providing leverage or pressure to pay.

38 It was a continuing step, creating ongoing leverage and resulting in or contributing to Razor's decision to pursue a *BIA* proposal, starting with filing a NOI and triggering the para 69(1)(a) stay of proceedings.

39 How can the lockout fairly be regarded as a completed remedy, having no ongoing effect, when its express purpose - clearance of Razor's arrears or at least some portion (with a satisfactory payment arrangement for the balance) - was not achieved to any degree? And when (per the quoted letter) Conifer stood ready to reverse the lockout i.e. following a hoped-for clearance of Razor's arrears or a subset with a satisfactory payment arrangement for the balance? And until that happened, Conifer continued the lockout?

40 The lockout is functionally equivalent to a judgment creditor seizing and removing the judgment debtor's key equipment and advising that will restore the equipment if the judgment debt is cleared in full or satisfactory payment arrangements are made.

41 The common feature is a creditor step interrupting the debtor's business operations, designed to pressure the debtor to clear or arrange to clear the debt.

42 In both cases the genesis of the pressure is a legal right i.e. a contractual right in the first case and a judgment-enforcement right in the second.

43 The question is not whether the creditor has the given right or whether it was appropriate to exercise it.

44 It is whether the remedy pursued was completed (in which case the stay does not reach it) versus being an ongoing step (in which case it does), with the *BIA* aiming to quell such creditor actions pending (at minimum) preparation and circulation of a proposal.

45 I return to this point after examining two other arguments from Conifer defending its lockout step.

F. Continuing lockout not a permissible status quo

46 Conifer argued that continuing the lockout after post-NOI simply maintained the pre-NOI status quo.

47 But that ignores para 69(1)(a)'s bar on commencing *or continuing* debt-collection steps. Given that bar, an in-progress collection action cannot be the status quo to be preserved. Otherwise, the only question would be whether the collection action had started pre-NOI. If that were right, any already-started collection action would be permitted to continue e.g. an ongoing effort to seize the debtor's property via writ, an in-progress auction to sell seized property, a garnishment continuing to attach a periodic receivable, and so on.

48 But (as explained earlier) para 69(1)(a) shuts down in-progress collection actions, leaving no room for preservation of a "continuing action status quo."

49 For an example of status-quo-maintaining step not breaching a *BIA* stay, see *BNS v Avramenko*, 2020 SKQB 54 (Elson J.), where an unsecured creditor sought to renew its judgment despite the bankruptcy of the debtor:

> I am compelled to add, perhaps in *obiter*, that I would have granted the renewal [of the unsecured creditor's judgment under SKQB rules], even if the trustee had not been discharged. In my view, and construing s. 69.3(1) purposively**, the stay of proceedings does not apply to steps a judgment creditor takes to preserve a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, **the reality is that these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** To conclude otherwise would be to force a judgment creditor to stand aside while its judgment expires through circumstances that may well be beyond its control. [para 17] [bold emphasis added]

50 The renewal step so authorized allowed the judgment creditor to continue as such; it did not extend to enforcing the judgment, which would have offended the stay.

51 Conifer did not point to this kind of status-quo-maintaining step here, only to its ongoing collection action via the lockout.

G. Conifer not a secured creditor in this context

52 At the application, Conifer's counsel argued that Conifer is a secured creditor of Razor, pointing to a lien and charge provision (s 602(a)) in the operating agreement.

53 Per that provision, Conifer indeed has a lien and charge "with respect to the *Functional Unit Participation* of each Owner in the *Facility* and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by the Operator for the Joint Account."

54 "*Functional Unit Participation*" means "with respect to any *Functional Unit*, the percentage interest ownership of each Owner in such Functional Unit as set forth opposite such Owner's name under the Appendix entitled "FACILITY AND FUNCTIONAL UNIT PARTICIPATION"[.]

55 "*Functional Unit*" means a separate component of the Facility described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC", and all real and personal property of every nature and kind attached to, forming part of or used in connection with the operation thereof"[.]

56 "*Facility*" means "all real and personal property of every nature and kind attached to, forming part of or use in connection with Joint Operations, maintained and held by Operator in accordance with this Agreement and as described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC"[.]

57 The lien and charge, focused on Razor's ownership stake in the described oil and gas assets, is not the root of Conifer's lockout right. The latter arises under a separate provision (s 602(b)(ii)) and focuses on denial of one of Razor's "privileges" under the operating agreement.

58 In any case, Conifer did not argue that its lockout right arises from or is otherwise a feature of the lien and charge.

H. No difference if Conifer secured

59 Instead, Conifer appeared to argue that its status as a secured creditor (arising from the lien and charge) conferred general immunity from the stay i.e. even if the lockout right is not security-based itself.

60 However, the stay analysis would remain the same, whether Conifer is a secured creditor "at large" or even if the lockout right itself should be characterized as or stemming from security.

61 Paragraph 69(1)(a) applies to "creditor[s]" generally, whether secured, preferred, or unsecured.

62 Subsection 69(2) contains an exception to the stay in para 69(1)(a) for secured creditors; however, it is limited to the following circumstances:

> *(2)* The stays provided by subsection (1) do not apply
>
> > (a) to prevent a *secured creditor who took possession of secured assets of the insolvent person for the purpose of realization* before the notice of intention under section 50.4 was filed from dealing with those assets;
> >
> > (b) to prevent a *secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person* more than ten days before the notice of intention under section 50.4 was filed, *from enforcing that security*, unless the secured creditor consents to the stay; [or]
> >
> > (c) to prevent a *secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security* if the insolvent person has, under subsection 244(2), *consented to the enforcement action*[.]

63 Conifer did not "[take] possession of secured assets of [Razor]" here or, if it did, did not do so "for the purpose of realization" of such assets. Conifer was exercising its lockout right, not attempting to somehow dispose of that right to others for proceeds.

64 Neither did Conifer issue a prescribed form notice under ss 244(1) *BIA*. (See *BIA* General Rule 124 and Form 88 for the prescribed form.)

65 Accordingly, even if characterized as a secured creditor for the purposes of para 69(1)(a), Conifer still falls within its scope, with no ss 69(2) or other secured-creditor exception applying.

I. Conclusion on stay and lockout

66 For these reasons, I find that the lockout step was a continuing remedy or "other proceeding", that it accordingly fell within the scope of the para 69(1)(a) stay, that continuing that remedy was not a defensible status quo, and that Conifer's actual or possible secured-creditor status makes no difference here.

67 The net result is that Conifer's lockout step, commenced before the NOI stay began, was a continuing collection remedy and was thus stayed when the NOI was filed.

68 Conifer's continuation of the lockout since then has been in breach of the stay.

69 The question becomes: what can and should be done in response?

J. Parties' positions on appropriate response

70 Per Razor:

> . . . the appropriate relief , in the circumstances is to cure the breach of the Stay by ordering Conifer to: (i) **permit Razor . . . to access the Judy Creek Gas Plant**; and (ii**) resume providing Services on terms** that include Conifer continuing its practice of marketing [Razor's] production, setting off the revenue against post-filing amounts, and calling upon $200,000 security if there is a shortfall [as particularized in Razor's counsel's February 1, 2024 letter]

71 Per Conifer (making alternative submissions i.e. "if Conifer must supply"):

> If this Court holds that Razor's rights under the Ownership Agreement compel Conifer to continue processing and selling their products, then Razor must **pay for those Services up front and in advance.** The *BIA* is clear that a party providing post-filing services may **require <u>immediate</u> payment for those services** and that service providers are not required to advance further money or credit. Specifically, section 65.4(1) states:
>
>> . . . Nothing in subsections (1) to (3) shall be construed
>>
>>> (a) as prohibiting a person from *requiring immediate payment for* goods, *services*, use of leased or licensed property or other valuable consideration provided after the filing of
>>>
>>>> (i) the notice of intention, if one was filed . . . or
>>>
>>> (b) as requiring the further advance of money or credit . . . .
>
> . . . Forcing Conifer to provide the Services without guaranteeing payment up front is equivalent to forcing Conifer to provide the Services on credit, a requirement that is expressly prohibited under [para] 65.1(4)(b).
>
> As Razor is seeking a declaration [that the stay applies], which is an equitable remedy, this Court must consider the equities of both parties. [bold emphasis added]

72 Conifer also seeks a "critical suppliers" charge and repayment of some "cure costs" (i.e. some of the pre-NOI arrears, as detailed in paras 29-42 of its brief.

K. Remedies for stay breach

1. Court's power to remedy breach of stay

73 The *BIA* does not expressly endow the Court with powers to remedy a stay breach.

74 However, many examples exist of courts granting orders undoing or reversing a stay-breaching action or pulling the proceeds of such actions into the proposal or bankruptcy estate (as applicable): see the cases summarized in 5:289 - Proceedings Taken Without Leave in Bankruptcy and Insolvency Law of Canada, 4 th Edition (online edition), which feature remedial orders such as reversing a property seizure, barring further proceeding in offside actions, and turning over garnishment recoveries,

75 I find that para 69(1)(a) implies a power for the Court to grant such orders i.e. to enforce the stay and, as much as possible, restore the parties to their pre-breach position.

2. Remedy appropriate here

76 In this case, the stay breach did not generate any proceeds.

77 The clear remedy for the breach here - continuing an arrears-collection lockout in the face of the stay - is an order directing Conifer to discontinue the lockout i.e. restoring the system connections Razor had before the lockout.

78 Given Conifer's estimate of "approximately 3 business days" to reconnect Razor, I direct Conifer to perform the reconnection work by 6 pm on Friday, February 23, 2024 or such other deadline as the parties may agree on.

3. Payment terms for future services

79 The other relief suggested by the parties (alternatively, in Conifer's case) goes to the *terms on which future services are to be provided by Conifer*.

80 As noted, Razor suggested continuation of the pre-lockout set-off arrangement or situation, bolstered by a $200,000 deposit. Conifer argued in favour of immediate payments, a critical-supplier charge, and payments towards arrears.

81 I do not see any role for the Court when it comes to the parties' going-forward arrangements.

82 Paragraph 69(1)(a) focuses on shutting down collection steps on pre-NOI arrears, as reflected in the above order reversing the lockout.

83 It says nothing about the terms on which services must, should or may be provided going forward.

4. Section 65.1 inapplicable

84 As noted, Conifer invokes s. 65.1. However, that section does not apply here. Per ss 65.1(1), it only applies where a person "terminate[s] or amend[s] any agreement . . . with the insolvent person, or claim[s] an accelerated payment, or a forfeiture of the term, under any agreement . . . with the insolvent person", limiting the moving party's rights to take any such steps in certain circumstances.

85 In invoking its lockout right, Conifer did not engage in any of the noted activities.

86 As a result, nothing in s. 65.1 applies here.

87 That includes ss. 65.1(4) (quoted above). The purpose of that provision is to shelter a creditor's immediate-payment right (if it exists) from limitations imposed by one or more of ss. 65.1(1), (2) and (3). As noted, ss. 65.1(1) does not apply here. And neither does ss. 65.1(2) (leases and licensing agreements) or 65.1(3) (public utilities).

88 If (for example) we were dealing with a public utility, and the utility had the right under its contract with its customer to require immediate payment (versus extending credit) for services provided, ss. 65.1(4) tells us that that right survives the imposition of no-discontinuance-for-arrears limitation imposed under ss. 65.1(3).

89 In other words, while the utility cannot discontinue service for arrears, it can rely on its immediate-payment-required term for ongoing utility services.

90 In yet other words, ss. 65.1(4) does not create a freestanding right in a creditor to insist on immediate payment post-NOI.

91 It depends on whether the creditor has that right under its contract with the debtor.

92 I cannot tell from the materials filed whether Conifer has the right to require immediate payment for future services, whether under the Accounting Procedure described in s 902 of the Ownership and Operation Agreement, Article VI of the Operating Procedure (Accounting Measures), or otherwise.

5. Conifer's enforcement rights not stayed re debts for future services

93 The critical point here is that Conifer's use and enforcement of its timing-of-payment and enforcement-of-payment rights, relating to future services, are not subject to the para 69(1)(a) stay.

94 The reason is simple: the NOI filing created two distinct eras, the period leading up to the filing and the period after. Claims existing in the first era are subject to the stay; claims arising in the second are not.

95 Here see *Canadian Petcetera Limited Partnership* (cited above):

> [An earlier-described] interpretation of s. 69(1) is also demonstrated by the jurisprudence dealing with **new indebtedness incurred by a debtor after he or she has gone bankrupt**. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the **new indebtedness is not a claim provable in the bankruptcy**. (See *Richardson & Co. v. Storey* (1941), 1941 CanLII 334 (ON SC), 23 C.B.R. 145, [1942] 1 D.L.R. 182(Ont. S.C.); *Re Bolf* (1945), 26 C.B.R. 149(Que. S.C.); *Venneri v. Bomasuit* (1950), 31 C.B.R. 150(Ont. S.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), 12 C.B.R. (N.S.) 115(Que. S.C.). Also see *Wescraft Manufacturing Co. (Re)* (1994), 1994 CanLII 2883 (BC SC), 27 C.B.R. (3d) 28(B.C.S.C.), which appears to have held, correctly in my view, that **s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal** . . . .[para 31] [emphasis added]

96 And *Schendel Mechanical Contracting (Re)* 2021 ABQB 893 (Mah J.):

> . . . it is known that Hatch **supplied goods** to various Schendel projects **during the post-NOI period** to the tune of $34,476.75. Hatch advised the Receiver of which specific invoices to which the $40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.
>
> **The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy"** per section 69(1): ***Wosk's Ltd Re***, 1985 CanLII 624 (BC SC), 1985 Carswell BC 807 (SC), 58 CBR 312; ***728835 Ontario Ltd., Re***, 1998 CanLII 2019 (ON CA), 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and ***Jones, Re***, 2003 CanLII 21196 (ON CA), 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258. [paras 25 and 26] [emphasis added]

97 Accordingly, when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings.

98 It may be that Conifer will choose to proceed on the basis suggested by Razor (setoffs accompanied by deposit). Conifer might choose to rely on other payment-enforcement rights it has under the agreements i.e. as they may be triggered by Razor's payment performance or non-performance. The parties may end up agreeing to new or varied payment arrangements.

99 It is not the Court's role, in a stay-enforcement context, to get involved in those going-forward business decisions.

6. Critical-supplier charge and "cure" payments

100 While Conifer requested a critical-supplier charge, it did not apply for such relief. I recognize that the application heard last Friday (February 16 th) was brought forward with very tight timing and that Conifer was already dealing with accelerated timelines.

101 I simply note that I did not have the benefit of any written submissions from Razor on the critical-supplier aspect, with none required i.e. with no application for such cross-relief.

102 As well, I am not convinced that every gap or difference between the *BIA* (which does not provide for critical-supplier charges, at least expressly) and the *CCAA* (which does) is necessarily answered by filling in the gap i.e. by finding that a feature or aspect in one is necessarily to be read into the other. I would (ideally) have more fulsome submissions from each side on this point before considering such a charge further.

103 Same for Conifer's request for payment of a portion of Razor's pre-NOI arrears. This is at odds with the equality-of-unsecured-creditors approach under the *BIA*. It too would benefit from an application and more fulsome submissions from both sides.

104 If Conifer continues to seek either or both forms of relief, I invite its counsel to so advise, following which I will provide procedural directions for a follow-up application (with which I am seizing myself), on accelerated timelines, if necessary.

7. Lockout to avoid anticipated future arrears

105 As noted, Conifer attempted to explain its lockout decision in part by a wish to avoid or pre-empt anticipated future arrears. Per its brief (para 14):

> . . . the Discontinuance was [also] implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. [I added "also" given the clear evidence, recited earlier, that Conifer was also seeking, via the lockout, to enforce collection of all or at least some of the pre-NOI arrears.]

106 I do not see anything in the agreements here authorizing a lockout for *anticipated* arrears, even with Razor's arrears history.

107 As explained above, the parties are effectively back to square one when it comes to future services. If Razor allows new arrears to accrue, it faces the prospect of Conifer taking any, some or all of the enforcement steps available to it under the agreements, without any impediment from the para. 69(1)(a) stay.

108 Absent further defaults, I do not see Conifer having any lockout power.

V. Closing note

109 I thank the parties for their excellent written materials and oral submissions.

110 On costs, if either side seeks a ruling other than "bear own costs", on which *Goldenkey Oil Inc (Re)*, 2023 ABKB 365 may provide some guidance, I invite counsel to contact my assistant to arrange for a phone conference to discuss and set procedural directions for costs submissions.

Order accordingly.

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