

THE ALBERTA ENERGY REGULATOR

IN THE MATTER OF
Regulatory Appeals 1928568 and 1928569
to the Alberta Energy Regulator

AER PROCEEDING

VOLUME 4

VIA REMOTE VIDEO

November 10, 2020

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1 Proceedings Taken via Remote Video

2

3 November 10, 2020

Morning Session

4

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The Chair

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Hearing Commissioner

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Hearing Commissioner

8

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Official Court Reporter

23

24

25

26

1 (PROCEEDINGS COMMENCED AT 9:01 AM)

2 THE CHAIR: Good morning, ladies and
3 gentlemen. Welcome back. Hopefully your commute was a
4 safe one this morning. We have quite a bit of snow
5 here.

6 Is there any preliminary matters that the parties
7 would like to bring to our attention? Mr. Gorman.

8 MR. GORMAN: No, Madam Chair.

9 THE CHAIR: And, Mr. Dumanovski, Ms. Ross.

10 MR. DUMANOVSKI: None from us, Madam Chair.

11 Thank you.

12 THE CHAIR: Okay. With that, Mr. Gorman,
13 you may proceed.

14 Submissions by the Requesters

15 MR. GORMAN: Thank you, Madam Chair, Panel,
16 Ms. Turner, and AER staff. Ms. Turner has run a
17 remarkably efficient ship over the Zoom lines the last
18 few days.

19 In my submissions, I'll be going through the
20 proper governing legal principles, the requesters'
21 virtually unchallenged, uncontradicted evidence, and
22 various AER admissions, and I would suggest
23 improprieties in the record and in Mr. Gosselin's
24 admissions in cross in due course.

25 Typically, I start at the beginning and work my
26 way to the end. I'm going to open my submissions

1 somewhere in the middle before going through the
2 sequence, and I'm jumping to what I'd suggest is a
3 complete answer that confirms the Section 106
4 declarations are inappropriate through some remarkable
5 admissions during Mr. Gosselin's cross and in reviewing
6 the AER record.

7 Section 106 of the Oil and Gas Conservation Act
8 appears in various places in the materials, including
9 in the requestors' authorities at Exhibit 31.02,
10 page 463. And for the AER staff, I'm going to be
11 referring to 31.02 with respect to both authorities and
12 various exhibits; 38.01; and from time to time the
13 AER's submissions which were, I believe, 32.01.

14 The legislation is clear, unambiguous, easy to
15 read, and in the distinct wording of the legislature
16 which governs the AER and drives these proceedings. It
17 says: (as read)

18 An order can be made where one or more
19 directors, officers, agents, or other persons
20 who, in the Regulator's opinions, were
21 directly or indirectly in control of the
22 licencee. [The legislature's words] Directly
23 or indirectly in control of the licencee,
24 approval holder, or working interest
25 participant at the time of the contravention,
26 failure to comply, or failure to pay.

1 The legislature used clear, unambiguous,
2 simple-to-understand words such as "directly" or
3 "indirectly in control", and then the words "at the
4 time of the contravention, failure to comply, or
5 failure to pay".

6 I ask the Panel to be guided and mindful of this
7 direct legislation as it is apparent the AER does not
8 feel bound by it and wants to set its own set of rules.

9 This seemed apparent from the declaration itself,
10 and, again, it's dated October 9, 2019, and it's
11 reproduced at Exhibit 31.02 starting at page 257. And,
12 again, this is the declaration of Mr. Wadsworth who we
13 didn't have the benefit of his attendance through this
14 proceeding.

15 I took Mr. Gosselin to page 262 at the paragraph
16 under the title of "Control", and I asked Mr. Gosselin
17 to agree with this sentence in the declaration, and
18 perhaps that page could be brought up on the screen for
19 the benefit of everyone's review.

20 Okay. And if we scroll down a bit to the
21 paragraph titled "Control". A little bit more, please.
22 Thank you.

23 The second sentence: (as read)

24 As a result of their resignation, they were
25 not directors at the time the order was
26 technically contravened given that the order

1 allowed for a period of time within which to
2 comply with its terms, June 1 for the
3 appointment of an agent and June 14th to
4 transfer the licences or post security.

5 And I have a colleague, Mr. Stevenson, who always says,
6 Being technically right is the best kind of right.
7 That is correct. The legislation is to be applied, and
8 if there are technical issues, they govern with respect
9 to it.

10 I asked Mr. Gosselin about this statement at
11 transcript page 406 starting at line 22. Simple
12 question: Does he agree that the order was not
13 technically -- that they were not technically in
14 control at the time of the contravention? A simple
15 question: page 407, He needed to confer with his
16 colleagues.

17 He did not answer re: June 1 and June 14 but tried
18 to evade the question by talking about April 30th.
19 After CLM counsel objected to my repeatedly asking the
20 question that wasn't answered, Madam Chair, Mr. --
21 directed Mr. Gosselin to answer the page on page 411,
22 line 9.

23 Madam Chair noted it's a simple enough question.
24 He needed to confer again. He had to go off the record
25 and confer again. His ultimate answer at page 411,
26 line 24 is incredible and completely undermines the

1 Section 106 declarations.

2 And so if we could look at page 411 in the
3 transcript, if that could be brought up, please.

4 MS. TURNER: One moment. I'll bring it up.

5 MR. GORMAN: And I think that's a little
6 bit too big to fit on my screen, Ms. Turner, if we
7 could ...

8 All right. So starting at line 4, the question,
9 which for six pages has not been answered is asked
10 again: (as read)

11 Is it his position that Young and O'Brien
12 were in indirect or direct control on
13 June 1st and June 14th, which are the dates
14 that are referenced at page 262 we're looking
15 at. It's a simple yes or no question.

16 There then is some discussion, including Madam Chair
17 requesting that the question be answered. The
18 remarkable answer starts at line 24: (as read)

19 Mr. Gorman, the SDM made that determination.

20 I cannot speak for his mind at that time.

21 The point of control is not important.

22 A statute, which is directly based on whether there's
23 direct or indirect control in the simple wordings of
24 Section 106, the position what -- is the point of
25 control is not important.

26 If we turn to page 414, he doubles down on this

1 remarkable incorrect, devastating-to-the-order
2 admission. And I start at lines 17 through 26:
3 (as read)

4 Q So, sir, as I understand your last
5 answer, you said you and your
6 colleagues had determined control was not
7 important and referenced me to a page in
8 argument; is that right?

9 A Control is not important as the
10 Regulator deems for the question you asked
11 me, which is: Were they in control on 1 June
12 or 14 June?

13 Q Okay. And you -- your -- you and your
14 colleagues considered control was not a
15 relevant factor; correct?

16 A Correct.

17 This is the basis for the 106 declaration that is
18 granted as against Messrs. Young and O'Brien: Control
19 is not a relevant factor to the AER decision makers,
20 which decision is under review by this Panel.

21 The admissions totally undermine the Section 106
22 declaration where the legislature says direct or
23 indirect control at the time of contravention is the
24 underlying basis for a potential order.

25 Now, I'll start at the beginning having perhaps
26 jumped to the, I think, irrevocable conclusion that

1 we've just reviewed.

2 The requesters gave evidence under oath. The AER
3 witnesses did not challenge any of O'Brien or Young's
4 evidence other than Mr. Gosselin challenged
5 Mr. Young's -- Mr. O'Brien's conclusion that they had
6 been good stewards of the assets, and we'll look at
7 that in -- in more detail from the documents.

8 There was no cross-examination, nor challenge of
9 Mr. Young's sworn testimony, and both O'Brien and Young
10 stated that between the two of them, their discussions
11 with the AER with respect to the declaration was a
12 20-minute call on April 29th that involved Mr. O'Brien
13 but not Mr. Young.

14 The requesters also produced four independent
15 witnesses with no dog in this fight. We heard from
16 Gary Gwartney from Veracity. Veracity had provided oil
17 field services to Trident and became interim officers
18 of Trident in the four months prior to the receivership
19 and continues to provide services to Trident's
20 court-appointed receiver to date.

21 The only dispute with respect to Mr. Gwartney from
22 Mr. Gosselin was he disputed that -- Mr. Gwartney
23 reporting that Gosselin and Schacher were clear in
24 saying the AER does not look to management to punish
25 directors unless they did not act with integrity and
26 does not believe he used the word "retribution".

1 We have Mr. Gwartney's memo that was delivered the
2 day of the meeting. Otherwise, Mr. Gwartney's evidence
3 was not disputed or challenged.

4 We also heard from Mr. Helkaa at FTI. His
5 evidence was not disputed or challenged. Mr. Helkaa
6 was the potential monitor if Trident had proceeded
7 through a CCAA proceeding, which did not occur when the
8 AER and ATB could not reach an agreement with respect
9 to funding.

10 We heard from Mr. Corbett at ATB who was Trident's
11 secured lender, and who was involved in the April
12 negotiations where the AER and ATB were negotiating
13 whether an agreed interim financing could occur. It
14 was Mr. Corbett who issued the April 23rd notice of
15 default, effectively freezing the assets of Trident to
16 its revolving facility, and he explained how the
17 revolving account works, including for years the
18 accounts were swept daily. His evidence was not
19 disputed or challenged.

20 And, finally, we heard from Paul Darby at PwC, the
21 court-appointed receiver since May 3rd, 2019. His
22 evidence, again, was not disputed and challenged, and
23 Gosselin and Olsen both confirmed the minor, if any,
24 challenge to those six witnesses' evidence at pages 303
25 through 307. Mr. Reilly could not answer because he
26 had no knowledge one way or another, and that was the

1 third AER witness put forward for cross.

2 The Panel received, for the first time, all of the
3 oral evidence that we just summarized because no one in
4 the process to issue the declaration reached out and
5 asked the witnesses to be interviewed or to provide any
6 commentary. The only request for a response was
7 through counsel.

8 At Exhibit 31.02, at page 80, on April 25th,
9 Mr. Ellis provided an email response to the AER
10 explaining how the automatic sweep of the account
11 occurs. Mr. Gosselin conceded he does not know how a
12 revolving account operates.

13 Mr. O'Brien described how the facility operated at
14 pages 54 and 55 of his transcript, and at page 182, he
15 confirms that Trident could not prevent the sweep.

16 Mr. Helkaa provided a similar overview at
17 pages 116 of the transcripts, lines 9 through 19. And,
18 again, Mr. Helkaa, the experienced insolvency
19 practitioner who was being lined up for a potential
20 CCAA, stated this: (as read)

21 Q And, sir, you said [that] the sweeping of
22 accounts is common. Is that something you
23 have seen in previous matters?

24 A Yeah. You know, I'm not -- I'm not a banking
25 expert, but it's pretty typical. Companies --
26 the way it -- it's like an overdraft account,

1 and maybe that's too simple, but when revenue
2 comes in, they get sold. For companies owed
3 20 million and revenues come in at 5, well,
4 now that -- the line goes down to 15, and
5 then you redraw it back up as you get to your
6 next revenue date.

7 This is similar with the evidence of Mr. Corbett who
8 provided similar unchallenged evidence at pages 135,
9 145, and significantly at page 152, lines 10 through
10 25: (as read)

11 Q Sir, were there any discussions with
12 Mr. O'Brien or Young or anyone at Trident
13 with respect to avoiding Redwater?

14 A No.

15 Q Sir, was ATB and red -- and O'Brien or Young
16 or Trident working together to defeat AER
17 claims.

18 A No.

19 Q Was [the] ATB's real goal in discussing a
20 CCAA to allow it to sweep the Trident
21 accounts on April 24?

22 A. No. The AER had the option of agreeing to a
23 CCA or a receivership and setting a date, and
24 that was one of the things that was discussed
25 on April 18th. It was that the company would
26 be prepared to file CCA as early -- I think it

1 would've landed -- I think it would've landed
2 a few days before the 25th. It was one of the
3 plans that was put forward.

4 And unchallenged evidence of Mr. Corbett.

5 The context with respect to that timing is that on
6 April 23rd, the AER gave a notice of default, and we've
7 looked at it before, but for the Panel's reference at
8 38.01, page 39. There was no discussion between
9 Trident and AER before the notice of default was
10 issued.

11 I must say I was somewhat surprised when
12 Mr. Gosselin conceded that he didn't know that the 25th
13 of each month was the settlement date for oil and gas
14 payments in western Canada. This is a widely known
15 standard practice.

16 At page 53, Mr. O'Brien said that the end of the
17 month was the settlement date. Mr. Helkaa confirmed
18 that this was the standard practice on page 116.

19 Mr. Corbett further confirmed that this is the
20 standard industry practice at page 136, and we looked
21 at the FTI cash flows that were prepared at
22 Exhibit 31.02, page 33, and it shows revenues coming in
23 once a month in the last week of each month, and these
24 were provided to the AER on or about the 23rd.

25 We know that the pricing in Q1 of 2019 for dry gas
26 was very low causing challenges for numerous producers,

1 not just Trident.

2 Mr. O'Brien confirmed that Origami put \$5 million
3 into Trident in late December at page 32, saying AIMCo
4 declined to put more money in, and ATB were looking to
5 exit the facility, not put money in.

6 Mr. Gosselin confirmed with respect to this
7 investment. Again, four months before the receivership
8 at page 317, lines 23 to 26: (as read)

9 Q Okay. Would you agree that this would
10 be evidence of good faith with them trying to
11 move the company forward?

12 A Yes.

13 And that was in the context of the 5 million dollars
14 that they put in in late December of '18.

15 The Panel's had the benefit of hearing
16 Mr. Gwartney from Veracity. Again, Veracity was
17 engaged by Trident through O'Brien in early 2019, and
18 their role expanded in February.

19 At page 92, he confirms that Veracity did not
20 identify any operational issues with words like "no
21 leaks", "no fires". And, again, their role expanded to
22 become interim officers in early February of '19.

23 At around that time, Mr. O'Brien, through an
24 industry contact, reached out proactively to
25 Mr. Wadsworth in mid-February, and there was a meeting
26 on or around the 18th or 19th.

1 At this time, Trident was not on any watch list.
2 They were not singled out by the AER as having any
3 difficulties. They were, like the rest of the
4 industry, facing significant pricing concerns.

5 Mr. Wadsworth met with Mr. O'Brien. At page 39 --
6 and this is a significant enough quote, I'd ask
7 Ms. Turner to bring 39 of the transcript up rather than
8 just referencing it and reading it in. And I'm
9 starting at line 11 partway through the answer about
10 what Mr. Wadsworth knew or understood about Trident:
11 (as read)

12 So in the meeting, as I inquired about
13 Trident standing with the regulator,
14 Wadsworth commended Trident and its long
15 history of safe and sound practices, its
16 safety record, its compliance record, and
17 described Trident as a very good corporate
18 citizen.

19 Unchallenged, uncontradicted evidence of
20 Mr. Wadsworth's overview of Trident in February of
21 2019.

22 There's similar supportive AER comments conveyed
23 in Mr. Gwartney's April 15th meeting where -- with the
24 AER where Mr. Schacher reports internally, and this is
25 at Exhibit 31.02, page 63. Schacher says as to
26 Trevor's points in his Friday email: (as read)

1 [Point] They do not appear to be a danger to
2 public health or the environment at this
3 time. [Point] Nor do they appear to be
4 squandering the resources.

5 And this was in response to Mr. Gosselin's email saying
6 that's what he wanted updates with respect to, that's
7 what he looked at and considered.

8 At pages 96 and 97 of the transcript, Mr. Gwartney
9 confirmed that there were no concerns as to Trident's
10 maintaining the assets at the April 15th meeting.

11 Similarly, at a later meeting on April 18th, that
12 neither -- that Mr. Gosselin also did not attend, but
13 we have the AER's notes.

14 At page 31.02, page 66, the AER reports
15 internally: (as read)

16 No environmental or safety concerns with
17 assets. Have retained employees needed to
18 address safety.

19 Mr. Gwartney confirms nothing with respect to Trident's
20 operations changed between April 15th and April 29th,
21 and he says that's because he was expecting the CCA
22 funding to be organized.

23 And in that regard, I'd refer to page 98 of the
24 transcript starting at line 24: (as read)

25 Q Okay. And did Trident do anything
26 different between April 15th and 29th with

1 respect to becoming a public health or
2 environmental danger or --

3 A No.

4 Q -- squandering the resource?

5 A No. Between April 15th and the 29th, we were
6 still under the perception that we would
7 likely be going into a CCAA.

8 And we know the discussions with respect to going into
9 CCAA between the 18th and the 29th dealt with ATB and
10 the AER reaching a funding agreement.

11 Now, we know that the CCA became a -- more of a front
12 burner issue when Mr. O'Brien advised that he was told
13 he had to prepare 13-week cash flows, and he did so
14 with his advisors, and then it became apparent that
15 there may be cash issues as early as early May, such
16 that the April 18th meeting was convened with the AER
17 and the ATB to see if funding for CCA could arrange.

18 Between those days -- over those 11 days, we
19 looked, and we heard emails and discussions and calls
20 and follow-ups where Mr. O'Brien was trying to see if
21 an agreement could be brokered.

22 Mr. Corbett reports he was on a family vacation,
23 on the phone daily trying to see if an agreement for
24 funding could be brokered. We know Mr. Corbett -- or,
25 pardon me, Mr. O'Brien through the April 27th and 28th
26 meeting weekend was sending emails seeking confirmation

1 if funding could be arranged and concurrently seeking
2 guidance with respect to the transfer of the wells if
3 funding could not be arranged because the company had
4 no funds to operate beyond April 30th. That includes
5 with respect to employees. That includes with respect
6 to hiring contractors. That includes with respect to
7 all of the operational issues.

8 We learned from Mr. Gosselin's evidence late in
9 the piece that the Regulator was not wanting to become
10 involved in insolvency funding. Why not tell the ATB
11 and the AER that -- or -- and Trident that on April
12 18th? Why wait 'til the 29th to confirm funding isn't
13 available? In those 11 days, O'Brien and Young were
14 led to believe that the AER might engage in a CCA
15 process if arrangements could be made with the ATB.

16 If we knew on April 18th that was not the case,
17 Trident and Veracity would have had 11 more days to
18 deal with the shutdown and decommissioning of these
19 assets.

20 During those 11 days, if the AER had decided that
21 unlike Lexin they wouldn't be the applicant in a
22 receivership proceeding, the OWA could have been
23 engaged earlier.

24 We heard from Mr. Gosselin he thinks it was after
25 the 29th or 30th when they reached out to the OWA. He
26 can't remember if he was a director of the OWA at that

1 time or another time, but he certainly knew the person
2 at the OWA, and the transition could have occurred
3 without the three-day gap even earlier than the 29th or
4 30th if the possibility of the CCAA without funding was
5 known to be unavailable and that the OWA would have to
6 be getting involved. And, remember, on the 22nd, PwC
7 was contacted by the AER. By the 23rd, they were ready
8 to move in and become the receiver if an appointment
9 was made.

10 Mr. Dumanovski crossed various of the witnesses
11 with respect to an email of Ms. Szacki, April 29th to
12 Mr. Corbett at 5:08, and, again, this is after the
13 draft order was delivered to Trident and certainly
14 after it was apparent that the CCAA would not proceed.
15 And if we could pull up Exhibit 31.02, page 152,
16 please.

17 And Mr. Dumanovski in his questioning referred
18 witnesses to "we support" -- the second line in the
19 second paragraph: (as read)

20 We support reasonable and appropriate fees
21 for services to conduct the potential CCA
22 process, including DIP financing fees and
23 support that these fees take first priority
24 in this instance.

25 And, again, this talks about the fees, not the DIP loan
26 itself, and Mr. Dumanovski seemed to be suggesting in

1 his questioning isn't this evidence that the AER was
2 willing to cooperate with the ATB who had repeatedly
3 had three conditions that were not accepted and
4 internally the AER documents recommended not accepting
5 them.

6 Reading the rest of the paragraph, you see that
7 there is no funding in place. There was no agreement
8 in place: (as read)

9 We cannot, in the abstract, support your
10 condition. [Next sentence] Once we know
11 what the bids are, we could then consider
12 whether our objective aligns with your
13 interest. [And then it continues at the end]
14 For example, if all assets are sold, then AER
15 would not seek proceeds of sales as
16 end-of-life obligations.

17 So there clearly was no agreement. There was no
18 ability for a lender to agree to wait until all the
19 assets were sold and to see whether the purchasers
20 align with the AER's interest, which is selling wells
21 for a dollar rather than selling smaller packages of
22 wells to repay amounts. And when we look at the
23 ultimate receivership, we'll see that's exactly what's
24 happened, sales of wells in packages, not looking at
25 the price, looking at the assumption of end-of-life
26 obligations.

1 In conjunction with confirming that funding was
2 urgently required, the directors, prior to the
3 unexpected April 29th order and not as a result of the
4 surprising April 29th order, said that the company
5 would be out of funds, and they would have to resign --
6 and back to Mr. Corbett -- we have a CCAA or we have a
7 receivership, and ultimately that decision was in the
8 AER's hands with respect to allowing the funding of a
9 CCAA.

10 Mr. O'Brien repeatedly asked for guidance with
11 respect to the efficient transfer of assets. The
12 response was a completely unhelpful Schacher email at
13 5:41 on April 29th attaching a three-year-old
14 pre-Redwater bulletin. No description, no thought, no
15 analysis with respect to the Trident particular assets
16 was -- was provided.

17 The directors resigned on the 30th, as they had
18 previously advised would occur, with the understanding
19 that a receivership application was imminent and
20 indeed, in that regard, the AER had drafted materials
21 to appoint a receiver May 1, the morning after their
22 resignation.

23 The fact that directors always resign was
24 confirmed by Mr. Helkaa at pages 112 and 121 and by
25 Mr. Darby at pages 158 and 159.

26 Gwartney, O'Brien, and Trident did what they could

1 in the limited time following the AER's unexpected
2 position from late in the afternoon of April 29th.
3 Gwartney drafted the list of essential matters to be
4 completed by April 30th. The reference to that is
5 Exhibit 31.02, page 174, and through April 30th,
6 Gwartney updated the AER as to its efforts. The
7 response from the AER's Mr. Schacher at 5:56 PM -- and
8 the reference to this is 31.02, page 178: (as read)

9 Guys in the field went above and beyond. It
10 is a refreshing and admirable act during an
11 unfortunate situation.

12 Tellingly, Mr. Gwartney confirmed at page 257 that he
13 could sleep at night after his efforts of April 30th.
14 He never felt compelled to call the AER emergency
15 line -- that reference is at pages 257 and 258 -- and
16 he confirmed that what was done over the next six weeks
17 required funding from the receiver, required additional
18 time, required additional cooperation from landowners,
19 et cetera.

20 The receivership application material was provided
21 also on April 30th by Ms. Ross, and that is at page
22 31.02 -- or Exhibit 31.02, page 188, and the response
23 from the directors was they couldn't consent to it
24 because they were no longer directors. They had
25 resigned at 4:00. Perhaps if it came in at 3:00, they
26 would've been in a position to consent, but it came

1 later in the day from that.

2 The AER adjourned that application knowing the
3 directors had resigned and that the employees and
4 consultants had to be terminated through lack of
5 funding. The former Trident directors didn't delay the
6 receivership appointment. The AER did. Mr. Gosselin
7 said he's not certain who at the AER made that
8 decision, and we ultimately know on May 3rd, unlike
9 Lexin, which was known to the public -- it was a
10 prominent file -- the AER decided not to be the
11 applicant and put that burden on the OWA who appointed
12 the same proposed receiver under the same type of order
13 with a different name as the applicant, appointed PwC
14 as receiver.

15 The receivership order is at 31.02. Starting at
16 page 202, paragraph 3 of the order confirms powers of
17 receivers that are to the exclusion of the former
18 directors and management.

19 At pages 162 and 253 of the transcript, Mr. Darby
20 confirms former directors have no role post
21 receivership.

22 Mr. O'Brien at page 68 and Mr. Darby at page 163
23 confirmed the receiver never reached out to the former
24 directors, and the former directors had no involvement
25 in the sales process or otherwise.

26 At page 169, lines 8 through 10, Mr. Darby

1 summarized it as this: (as read)

2 Q And since May 3rd, Trident and its
3 assets were under the receiver's exclusive
4 control?

5 A That is correct.

6 Mr. Gosselin acknowledged this, including at page 392,
7 lines 9 through 12, and I'll pull -- I don't think we
8 need to see the page, but I'll read the answer in for
9 the record: (as read)

10 Q Okay. And you knew that the directors
11 had resigned and Pricewaterhouse had all
12 those powers under the receivership -- [the
13 question says "board" -- the transcript says
14 "Board", I believe it would've been order]

15 A Yes.

16 There is no suggestion that Mr. Young or O'Brien
17 exercised or sought to exercise any authority or
18 control of Trident, its assets, or its accounts
19 following their resignation.

20 For 18 months, Trident's been under the control
21 and authority of the receiver, including overseeing
22 ongoing sales efforts. We know it's the AER, through
23 Mr. Gosselin and perhaps others, who are instructing
24 the receiver with respect to sales efforts and what
25 sales are to be approved.

26 From the monitor's October 19th, 2020, fifth

1 report, we know from page 120 at Exhibit 38.01, 1,743
2 licences remain outstanding. That's after 18 months of
3 marketing by the court-appointed receiver.

4 Now, that is the factual basis that is before this
5 Panel, much of which was not sought out and, as such,
6 was not before Mr. Gosselin in issuing the -- or,
7 pardon me, Mr. Wadsworth in issuing the declaration and
8 Mr. Gosselin and Ms. Olsen in preparing the internal
9 reports.

10 Now, with this factual basis, we can now review
11 the law governing the declaration, which it's apparent
12 from the documents and the declaration itself were not
13 considered or were not properly applied by the
14 decision-makers to date.

15 The first principle for this Panel is that this is
16 a de novo proceeding, and so absolutely no deference
17 should be given to the October 9 declaration even if it
18 was not as demonstrably wrong as it certainly is. The
19 fact that it's de facto -- pardon me, a de novo
20 proceeding is acknowledged by CLM at page 47 of its
21 brief, and, again, its brief is at Exhibit 32.01. And
22 they use this de novo aspect as a defence to the
23 Wadsworth potential bias, having been involved in the
24 DIP discussions and rejection, which is a lynchpin as
25 to why the CCAA that the directors were considering did
26 not proceed.

1 In the Pure Environmental regulatory appeal -- the
2 Panel noted this at Exhibit 31.02, page 541, and could
3 that be brought up, please. And if we could -- the
4 paragraph 19 that is highlighted reviews: (as read)
5 AER authorizations provided us with a filed
6 record of the materials it considered in
7 deciding to approve application [with the
8 number]. As well, we received new
9 information not before AER authorizations
10 when the approval decision was made. Given
11 the hybrid de novo nature of this hearing and
12 its distinction from a typical appeal on the
13 record, we do not consider it necessary to
14 apply a standard of review. Little purpose
15 is served in deciding if AER's authorization
16 decision to approve 1901 [sic] was reasonable
17 or correct when it was made based on a
18 different record from the one before us. As
19 set out in REDA, we must decide whether to
20 confirm, vary, suspend, or revoke that
21 decision based on the record before us.
22 And that's what a de novo proceeding is. The Panel
23 decides from the record before it, and it's not
24 necessary and no purpose is served in deciding if the
25 AER's decision on a different record was reasonable or
26 correct.

1 Now, notwithstanding, as we noted, the CLM agreed
2 in their brief it's a de novo proceeding, we saw
3 shortly before this proceeding talked -- or proceeding
4 began, they sent out their cases, and they're once
5 again trotting out the inapplicable ATA v. Alberta
6 decision which talks about deference with respect to
7 the home statute. That's not with respect to a de novo
8 proceeding. That was with respect to a review, and, as
9 such, the paragraph where they talk about it is a de
10 novo proceeding is accurate, and it is consistent with
11 the authorities and is consistent with common sense,
12 this Panel has a lot better information than was
13 assembled by the -- by the AER to -- today.

14 CLM makes further mistakes in paragraphs 16 and 17
15 of their submission, which, again, is at 32.01.

16 Incredibly, they acknowledge they are governed by
17 the statute. They complain at paragraph 16: (as read)

18 The requestors' submissions focus on a strict
19 and literal interpretation of Section 106 of
20 the OGCA and specifically the words were
21 directly or indirectly in control of the
22 licencee, approval holder, or working
23 interest participant at the time of the
24 contravention, failure to comply, or failure
25 to pay.

26 Incredibly, the government agency is criticizing that

1 we are focusing on the strict and literal words of the
2 section that governs their actions. It's not their
3 place to do so; it wasn't Mr. Wadsworth's place to do
4 so; it wasn't Mr. Gosselin's place to do so; and,
5 respectfully, it's not this Panel's place to do so.

6 None of those AER individuals nor this Panel have
7 the ability to rewrite the words of the statute to meet
8 their own personal or private goals.

9 In paragraph 17, they carry on: (as read)
10 CLM respectfully submits the requesters
11 reading an interpretation of Section 106 of
12 the OGCA is inaccurate as they have only
13 considered the meaning of Section 106.

14 That's an incredible -- an incredible argument that we
15 are improperly reading and interpreting the meaning of
16 the section which governs this proceeding. These
17 complaints are contrary to the first rule of statutory
18 interpretation, which is you read the words, and you
19 give them their plain and ordinary meaning. Direct or
20 indirect control at the time of contravention have a
21 plain and ordinary meaning, which cannot be avoided.
22 They somehow suggest that because they have some
23 discretion under Section 106.3 with respect to
24 sanctions, that that somehow gives them a discretion to
25 ignore the wording in Section 101.

26 Section 106.3 is only invoked if 106.1 is engaged

1 on its expressed terms. Those provisions include the
2 directors must have been in direct or indirect control
3 at the time of contravention or (9) noncompliance.
4 This is the same error that appears in the October 9th
5 notice of decision, and this is where we previously had
6 referred to it in the transcript where Mr. Gosselin
7 couldn't answer with two breaks and objections from
8 counsel and then started talking about control isn't
9 important.

10 As Madam Chair noted, the question of control on
11 June 14th was a simple question. It's a simple
12 question that the AER cannot answer but in the
13 negative, and so it won't answer because it destroys
14 the declaration that they had issued as against Young
15 and O'Brien.

16 The requesters at 31.02, page 616, reproduce a
17 leading Canadian text on interpretation of legislation
18 being Sullivan on Construction of Statutes, and if we
19 could pull up that page, please, again, 616. And I'm
20 going to refer to the highlighted paragraph 1537,
21 Introduction: (as read)

22 It is presumed that the legislature does not
23 intend to abolish, limit, or otherwise
24 interfere with the rights of subject.

25 Legislation is designed to curtail the rights
26 that may be enjoyed by citizens or residents

1 is strictly construed.

2 A quote from the leading Morguard decision from the
3 Supreme Court of Canada: (as read)

4 The Courts require that in order to adversely
5 affect a citizen's rights, whether a taxpayer
6 or otherwise, the legislature must do so
7 expressly. The resources at hand in the
8 preparation and enactment of legislation are
9 such that a Court must be slow to presume
10 oversight or inarticulate intentions when the
11 rights of citizens are involved.

12 And, of course, the Section 106 declaration does
13 interfere with the rights of Young and O'Brien and, as
14 such, a strict interpretation need be applied.

15 The Morguard case itself is attached at -- pardon
16 me, starting at page 638, and the quote of
17 Justice Estey that is referenced in the Sullivan text
18 appears at page 509, and, again, in more modern
19 terminology: (as read)

20 The Courts require that in order to adversely
21 affect the citizen's right, whether a
22 taxpayer or otherwise, the legislature must
23 do so expressly.

24 The legislature expressly said when Section 106
25 declarations could interfere with a director's rights,
26 and that is when they are in direct or indirect control

1 at the time of a contravention.

2 In other contexts, we have some recent Alberta
3 Court decisions, and I'll refer to the Farhat decision
4 which starts at page 1191 of -- excuse me for popping
5 out of screen. I had to reach for a different binder.
6 Page 1191 of Exhibit 31.02. Here Dr. Farhat was a
7 radiologist trained outside of Canada. He was denied
8 his licence to practice. The Court noted at paragraph
9 56 on page 1203 -- and if page 1203 could be brought
10 up, please.

11 In paragraph 54, the Court reviewed the process of
12 making a decision as against an individual and
13 concludes significantly at paragraph 56 near the bottom
14 of the page: (as read)

15 It is recognized, for example, that a higher
16 standard of justice is required when the
17 right to continue in one's profession or
18 employment is at stake.

19 That higher standard is invoked as Mr. Young and
20 O'Brien's right to continue in the oil and gas industry
21 in Alberta is at stake by virtue of the Section 106
22 declaration. So not only do we know the strict and
23 literal reading is required, there is even a higher
24 onus as it affects an individual, and it affects their
25 ability in their profession.

26 Similarly, in the Alberta Court of Queen's Bench

1 in the University of Calgary v. Wilson, reviewed
2 disciplinary proceedings as against some students, and
3 at page 1262 -- again, at the same exhibit, if that
4 page could be brought up, please. Thank you. It
5 starts at paragraph 53: (as read)

6 At the same time, it must be remembered that
7 the decision in question is disciplinary in
8 nature. Although in this instance, the
9 sanction imposed against the students was
10 limited to a formal written warning,
11 Ms. Houghton's decision that failure to
12 comply with the directives of campus security
13 staff in the future will result in more
14 severe sanctions through the nonacademic
15 misconduct policy.

16 I note in 4.31 the policy provides for various
17 sanctions up to and including a fine, suspension, and
18 expulsion.

19 The Court continued at paragraph 54, which I had
20 overlooked the highlighting, talking about the Supreme
21 Court of Canada decision in Kane v. University of
22 British Columbia, that expulsion from university is
23 comparable to professional discipline or suspension in
24 the working world. In Kane, Justice Dickson held in
25 quote: (as read)

26 A high standard of justice is required when

1 the right to continue in one's profession or
2 employment is at stake. [It cites the Abbott
3 decision]. A disciplinary suspension can
4 have grave and permanent consequences upon a
5 professional career.

6 So here the test with respect to professional
7 discipline is, again, said to have such a high standard
8 of justice required, that standard is not close to
9 being met in the present circumstance.

10 Clearly, the AER did not strictly and literally
11 apply the sections of -- provisions of Section 106.1.
12 The AER seems to argue the requestors should've done
13 the impossible between 5:52 PM on April 29th and their
14 resignations effective 4:00 on April 30th. Again,
15 aided by Mr. Gwartney and Trident contractors, they
16 accomplished much. With 11 more days notice, they may
17 have accomplished more, but, in any event, there is no
18 breach of any order during that period of time when
19 they last had any remnants of control of a hopelessly
20 insolvent corporation, notwithstanding them putting
21 \$5 million into it just four months earlier.

22 We know from the documents in evidence that
23 Trident was operating under a revolving facility, and I
24 briefly gave an overview of how that works from the
25 witnesses and from the documents. And the notice of
26 default on April 23rd -- for your notes, again, 38.01,

1 page 39 is the notice of default -- in essence froze
2 access to the account. So even prior to April 30,
3 Trident and its directors' ability to continue
4 operations, pay bills, or post security was severely
5 constrained.

6 In the McKinnon decision starting at page 1020 of
7 the authorities, the Federal Court of Appeal considered
8 potential personal liability as against directors for
9 nonremittance of GST. For the period -- for post
10 receivership, the Court had no issue in finding no
11 liability for the post receivership amounts. They also
12 excused the directors for not -- for any personal
13 liability for payments not made prior to the formal
14 receivership appointment as the account was under the
15 control and direction of the banks in what they called
16 a soft receivership period.

17 And I would refer to page 1037 in the authorities,
18 and this is a relatively lengthy quote so perhaps that
19 page can be brought up.

20 And compare the situation that Mr. McKinnon found
21 himself in to where Young and O'Brien were under the
22 revolving account, especially after the notice of
23 default on April 23rd. Starting at paragraph 53
24 referring to the Clarke decision: (as read)

25 In that case, directors were held not liable
26 for remittances due after the appointment of

1 a receiver-manager who assumed the legal
2 powers of directors or for those that had
3 become due earlier when the bank had put the
4 company into "soft receivership". In
5 contrast, the directors were found liable for
6 source deductions that should have been
7 remitted during the month when, concerned
8 about the financial state of the company and
9 its ability to recover its loan, the bank had
10 appointed a firm of accountants to monitor
11 the company and to report to the bank on the
12 company's financial status and prospects. In
13 the cheque written -- in that same month, a
14 cheque written by the company to the Receiver
15 General of Canada was dishonoured by the bank
16 for insufficient funds. MacKay J. found at
17 paragraph 7 that while the company was in
18 soft receivership, the firm of chartered
19 accountants appointed by the bank for this
20 purpose was to have the final say in all
21 operations including accounts receivable,
22 sale of inventory and equipment, contracts,
23 purchases, payables and payments, personnel,
24 changes in and forecasting of operations.
25 [The next line I believe is significant]. In
26 addition, the company's chequebook was taken

1 into the custody of the soft receiver, and
2 the bank exercised ultimate authority over
3 the cheques that it would honour.

4 And we know that was the case certainly from the 23rd
5 when the bank said that no draws would be allowed,
6 although they would consider requests for necessary
7 operations, which is how the company struggled through
8 to the 30th.

9 Paragraph 55: (as read)

10 MacKay J. held that since the directors had
11 no control, in fact, over the company,
12 liability under Section 227.1 was accordingly
13 never engaged. [He quoted with approval the
14 following words of Addy J. in Robitaille] The
15 exercise of freedom of choice on the part of
16 the director is essential in order to
17 establish personal liability.

18 Freedom of choice of the director for there to be
19 personal liability established directors had no input
20 or involvement after April 30, and even after
21 April 23rd, the freedom of choice was in the hands of
22 the -- the bank.

23 Similarly, in the Boyd decision at -- page 1044 is
24 the start of the decision. The federal tax court was
25 considering potential personal liability of directors
26 who unlike the Trident directors were still directors

1 when the GST debt was occurred.

2 After noting the control that the banks had over
3 the accounts and access to funds, the Court found at
4 page 1050 -- and if that page could be brought up,
5 please. I think we need to go a little bit higher.
6 I'm starting at page 32, please, Mr. ...

7 It starts with reviewing the Fancy v. Minister of
8 National Revenue, noting that: (as read)

9 The bank of the company in question had been
10 monitoring all cheques issued by it and only
11 authorizing certain payments. The bank
12 refused to approve remittance payments to
13 Revenue Canada, and the appellant directors
14 informed the latter of this fact. It was
15 held that the directors were victims of
16 circumstance over which they had no effective
17 control and were, therefore, exempt from
18 liability under the due diligence provisions.

19 And what we're talking about is GST is to be remitted
20 the 15th day following the month that it arises.

21 It then, again, is a reference to the Robitaille
22 decision, which was previously referenced in a separate
23 quote down to paragraph 34 similarly in Champeval v.
24 The Minister of Revenue and Worrell v. R., the Court
25 held that: (as read)

26 In cases where the bank and not directors had

1 the ultimate authority to decide which
2 cheques to pay, the appellants had no freedom
3 of choice in the matter and could not be held
4 liable for the company's failure to remit.
5 Conclusion: The appellants Boyd and Boudreau
6 did not have the freedom of choice to remit
7 GST to the Receiver General from B&B as B&B's
8 funds were under the strict control by the
9 bank, and the appellants Boyd and Boudreau
10 tried to resolve the GST difficulty after the
11 bank refused to allow B&B to issue cheques by
12 working through a proposal in bankruptcy
13 during the period [over to the next page,
14 1051, please] January to April 1993. They
15 also, at the end, tried to issue a cheque in
16 April '93 to satisfy the liability. Lastly,
17 they believed when bankruptcy did happen that
18 the proceeding would result in satisfaction
19 of the GST claim. I, therefore, conclude
20 Boyd and Boudreau to the degree they could
21 beyond the structures of the bank's control
22 did exercise due diligence.

23 And here we have O'Brien and Young. Whilst the account
24 is under the bank's control looking at alternatives,
25 including a CCAA to minimize the impact and to allow
26 operations to continue beyond April 30th.

1 The Netupsky decision at page -- which starts at
2 page 1069 confirms: (as read)

3 The absolute right of a director to resign,
4 including if the resignation is to avoid
5 potential liabilities.

6 And that reference is page 1091.

7 The directors reasonably expected the AER to
8 appoint a receiver as -- as was being drafted and which
9 draft documents came on the 30th on May 1. Instead,
10 the decision of the AER delayed that application until
11 May 3rd.

12 Now, in addition to the expressed words in the
13 order -- and we referenced it, it starts at 202 --
14 paragraph 3 is the provision that empowers the receiver
15 to the exclusion of others. The uncontested evidence
16 of Helkaa and Darby was that directors resign and
17 directors have no authority going forward.

18 We can also look to Section 95 of the Alberta
19 Business Corporations Act, which is reproduced at 751
20 of our authorities, and if Ms. Turner could bring up
21 page 751, please. The highlighted provision confirms
22 what the witnesses said. (as read)

23 Directors' powers during receivership. If a
24 receiver-manager is appointed by the Court or
25 under an instrument, the powers of the
26 directors of the corporation that the

1 receiver-manager is authorized to exercise
2 may not be exercised by the directors until
3 the receiver-manager is discharged.

4 So even if Young and O'Brien hadn't previously
5 resigned, their powers could not be exercised until the
6 receiver-manager is discharged, and we know Mr. Darby
7 is still the receiver-manager, and Messrs. Young and
8 O'Brien are not directors in any event.

9 At one point, Mr. Gosselin suggested he intended
10 to be pragmatic, not Utopian in his order. We'll take
11 a look at the order, which is at page 160 in
12 Exhibit 31.02, and it is beyond Utopian. It is
13 fictional. It is beyond any reasonable belief that
14 this order could be complied with.

15 Paragraph 1 isn't relevant because they never
16 tried to hold additional licences. Paragraph 2:
17 (as read)

18 The licensee has until June 1, 2019, to
19 appoint an agent.

20 Well, we know that by May 3rd the licensee would be
21 directors, and indeed Trident had no ability to appoint
22 anyone because the company was under the control of the
23 receiver. But let's look beyond that. Who is going to
24 become agent of a company that has no cash flow, that
25 would become the agent of a company which the AER is
26 suggesting has \$250 million in end-of-life obligations

1 in paragraph 3(b)?

2 By June 14th transferred the -- it says "the well
3 licences" -- "well facility and pipeline licences", not
4 some of or a portion of, to a person eligible to the
5 AER. 4,700 wells, 2,000 of which had been in some form
6 of suspension, and in 45 days you're going to transfer
7 all of those wells to someone accepting all of those
8 liabilities? We know the receiver, being instructed by
9 the AER, has been unsuccessful in 18 months to -- to
10 accomplish that, and there's still 1,700 to transfer.

11 By June 14th, post 245 million and 13 million as
12 security for a company that can't make payroll. It's
13 fanciful to believe that the directors could have
14 caused Trident to -- to complete these. They didn't
15 frustrate Trident complying with the order. The order
16 was impossible to be dealt with.

17 And in that regard, I'd refer the Panel to the
18 Regulator's Cooney decision, which is at Tab 1052.

19 Now, Mr. Cooney was the director of companies that
20 had a large number of abandonment orders that had been
21 issued -- that had expired and that had not been
22 complied with. The panel, in reviewing the case as
23 against Mr. Cooney, noted that some of the orders
24 could've been achieved, and, as such, he was personally
25 liable. But in numerous -- again, but not all --
26 instances, the orders were not reasonably achievable by

1 the company, and, as such, Mr. Cooney as director was
2 excused from personal liability with respect to those
3 particular orders. And if we could pull up page 1059
4 and at the second half of the highlighted paragraph,
5 19: (as read)

6 However, the declaration panel is of the view
7 that licencees cannot be held accountable for
8 contravening orders where there was not a
9 reasonable opportunity for or expectation of
10 compliance with these orders.

11 Who really believes there was a reasonable expectation
12 that Trident was going to sell 4,700 wells or post \$260
13 million in 45 days? That is not a reasonable
14 expectation. That's nothing the company could do, and
15 there's nothing the directors could do to cause the
16 company to -- to do it.

17 Now, the obligations with respect to June 1 and
18 June 14 after the directors had resigned -- and we're
19 going to move on shortly to the area about the timing,
20 applying the strict wording of the legislation -- I'd
21 like to go back to page 222 of Exhibit 31.02, which is
22 Ms. Olsen's memorandum, also perhaps not coincidentally
23 of June 14, which is the day that the order was not
24 complied with with respect to posting the funds.

25 Again, the first statement in the memorandum,
26 corporate structure, O'Brien and Young are the current

1 directors of Trident Corp., Trident (Alberta) and
2 Trident (WX). The first sentence is completely wrong.
3 They then correct it in other places and say, Well, it
4 was wrong. It was wrong. But this is the first step
5 down a wrong path. This is the memo that starts --
6 that ultimately starts into the October 9 declaration.

7 Now, with respect to this, there is some
8 difficult-to-understand explanations by Mr. Gosselin
9 with respect to this -- and they're short, so I don't
10 know that we need to pull up the pages -- but they're
11 at pages 393: (as read)

12 Q You'll agree with me that the first
13 sentence in Ms. Young's analysis is wrong?

14 A Yeah. The verb tense is wrong.

15 [Over on page 195 [sic]]

16 Q Page 2 of the report from Ms. Olsen
17 contradicts the first sentence internally;
18 correct?

19 A Yes. And on the basis of verb conjugation.
20 So we're told verb tense and verb conjugation is what
21 explains this error. The -- the legislation at 106 is
22 very clear with respect to verb tense and verb
23 conjugation, and that is "at the time of the breach".
24 That's pretty clear verb tense, and that's pretty clear
25 verb conjugation. Saying someone is dead or someone is
26 going to die is a difference in verb tense and verb

1 conjugation, but it affects the individual quite
2 significantly which tense is used and which conjugation
3 is used.

4 All right. So now I'm going to turn the Panel to
5 ample repeated authority, which applies the plain
6 language of Section 109, which the AER has failed or
7 refused to apply based on verb tense and verb
8 conjugation.

9 At page 576 of the authorities, we have the
10 decision involving Bryce Karl.

11 Bryce Karl's companies violated 18 abandonment
12 orders over three years. These abandonment orders
13 came, went, and were expired. Mr. Karl didn't respond
14 to numerous hearings that were scheduled. He didn't
15 participate in the appeal proceeding, yet even there
16 the panel properly reviewed the elements to be
17 considered at paragraph 16 on page 584. And if we
18 could pull that page up, please, Ms. Turner.

19 In this case, paragraph 16: (as read)
20 The elements of the test or issues that must
21 be determined are the following: Were there
22 contraventions or failures to comply with AER
23 orders? If there was a contravention or
24 failure, was Mr. Karl a director, officer, or
25 other person in direct or indirect control of
26 the relevant company at the relevant time?

1 [They understand the relevant company and the
2 relevant time. And then and only then] If
3 there was a failure -- a contravention or
4 failure and Mr. Karl was in control, is the
5 requested declaration and order in the public
6 interest?

7 So you only get to a consideration of the public
8 interest if the first two elements are -- are met.

9 Carrying on to the next page, 585. The
10 paragraph 22: (as read)

11 Since the lapsed orders highlight various
12 noncompliances that relate to properties that
13 were already ordered abandoned and since they
14 were each the final order in a series of
15 orders giving time to comply -- again, a
16 series of orders giving time to comply -- the
17 panel finds that the lapsed orders are
18 properly included in the application
19 materials to demonstrate the entirety of the
20 compliance assurance processes. These
21 processes provided each of the licencees with
22 multiple opportunities for compliance.

23 That is where Mr. Karl found himself liable three years
24 after a series of abandonment orders.

25 I refer next to the ERCB decision in the matter
26 involving Marc Dame and Murray Craig, which starts at

1 page 662. And on that page at the bottom, it starts:
2 (as read)

3 This panel reviewed the March 31, 2010, CES
4 submissions and attachment and found that
5 these documents constituted prima facie
6 evidence of a contravention of the
7 abandonment orders by Legacy and Matrix and
8 prima facie evidence that Dame and Craig were
9 persons directly or indirectly in control of
10 Legacy and/or Matrix when the contraventions
11 occurred.

12 So this was -- we discussed with Mr. Gosselin the
13 reverse onus once a prima facie case had been made out,
14 the elements of which -- that there was a contravention
15 of an order and that the directors were indirectly or
16 directly in control of the companies when the
17 contraventions occurred. I can't emphasize those words
18 enough in the present case because that's what the
19 legislation mandates.

20 With respect to that, at page 671, at paragraph
21 56, that panel, as I would urge this panel, properly
22 applies that the test -- (as read)

23 The CES application under Section 106 of the
24 ERCA deals with contravention of orders
25 issued by the EUB. The declaration panel
26 accepts that a contravention occurs when a

1 licencee, approval holder, or working
2 interest participant fails to comply with a
3 board order [again, emphasize the following
4 words] by the date set by the EUB.

5 What was set by the Regulator in this case? June 1,
6 June 14th. That's when the contravention occurs.

7 Now, this concept is not unique to the AER as a
8 regulator. We see it in various tax and other cases,
9 and I refer first to the decision in Regina v. Marsh,
10 and I will be referring to page 712 of the decision
11 which starts at 698.

12 In Marsh, Mr. Marsh failed or refused to file his
13 census report. On page 712, the Court reviewed various
14 other decisions often in the tax case and for example
15 paragraph 40, the -- the Court notes the Ontario Court
16 of Appeal decision that: (as read)

17 Once the time period provided in an order for
18 compliance has lapsed, [again, once the
19 period has lapsed] the offence has been
20 committed.

21 The next page at 713, they, again, refer to the quote
22 from Sakellis. According to Sakellis: (as read)

23 The first date that Mr. and Mrs. Marsh were
24 noncompliant was September 17th, 2011, as
25 their letter of compliance gave them until
26 September 16 to reply.

1 So issuing the letter that they didn't comply
2 with wasn't contravention; it was when the period
3 expired.

4 Another case dealing with taxes is Sakellis, which
5 is at 726, and there at pages 729 and 730, it talks
6 about -- it's when the expiration of the compliance
7 date occurs is when the offence occurs, and if I could
8 pull up page 730, please. The highlighted provision:
9 (as read)

10 I have examined the authorities referred to
11 in R. v. Donen as well as others. Apart,
12 however, from any authorities, I'd have no
13 hesitation in reaching the conclusion that
14 the offence herein is a Section CE continuing
15 offence commencing from the date of the
16 expiry of the prescribed 15 days. The
17 information in this instance was that the
18 accused was in default on the 16th day, the
19 earliest time at which he could be said to be
20 in default.

21 So in the present case, the earliest event of default
22 would be June 2nd or June 15th, the day after the --
23 the time periods required.

24 There are additional tax authorities repeating the
25 same simple concept, and I apologize if I'm referring
26 to too many authorities, but for some reason, we're

1 still in this hearing arguing over when noncompliance
2 occurred, so I would next refer to Currie v. The
3 Minister of National Revenue at page 735, if that could
4 be pulled up, please.

5 We have another reference to the Currie decision
6 at page 12 or paragraph 12 after the reference to
7 Currie: (as read)

8 On January 19th, 1988, a creditor of the
9 corporation appointed an agent to manage the
10 corporation, and on January 29th, 1988, the
11 corporation made an assignment in bankruptcy.
12 Currie -- Taylor, J. allowed the Currie
13 appeal with respect to the month of January
14 1988 because the directors of the company
15 were no longer in control of its operations
16 and finances on February 15th when the source
17 deductions for January were required to be
18 remitted. But he dismissed the appeal with
19 respect to the last four months of 1987.

20 So by the time compliance was required for January on
21 February 15th, the company was in receivership, and the
22 directors were not responsible even though they were
23 directors for the first 29 days of the month.

24 And with respect to the present case, following
25 the decision in Currie: (as read)

26 I allow the appeal herein with respect to the

1 April 1983 source deductions of Ajax because
2 when those source deductions were required to
3 be remitted on May 15th, 1983, the directors
4 were no longer in control of the assets. The
5 trustee in bankruptcy had assumed control of
6 all assets from and after April 22nd.

7 And, again, significantly, the directors were not
8 liable for the GST remittances that occurred on the
9 first 21 days of the months prior to the -- the
10 insolvency event.

11 Finally, with respect to authorities in this
12 regard, I refer to the Henning v. The Queen, another
13 tax decision, which starts at page 738.

14 Mr. Henning was a legal practitioner in
15 Edmonton -- or a senior legal practitioner, so they
16 noted he was well aware of a director's duties. Again,
17 this is a case where taxes are to be remitted the 15th
18 day of the month following them occurring.

19 The Court noted at page 746 -- if -- if that could
20 be brought up. Paragraph 37 references the -- the
21 Sakellis decision again, and, interestingly, I think
22 it's important to look at paragraph 38: (as read)

23 In my opinion, the last proposition should
24 stand. If, as was held in Sakellis, the
25 payer is not in default before the 16th day,
26 I see no -- I do not see why a heavier burden

1 should be imposed on a director.

2 So if the company's not in default until June 1 or
3 June 14, why is the AER attempting to apply a heavier
4 burden on the directors? It's a proposition that
5 cannot stand.

6 And then they noted, as Mr. Henning had resigned
7 as a director -- on page 747 -- I'll go to five lines
8 from the end of the highlighted first paragraph:
9 (as read)

10 Accordingly, if someone resigns a
11 directorship after the time the amounts were
12 deducted at source but before the deadline
13 for remittance [so he was a director when
14 they were deducted, resigned prior to their
15 remittance] I am of the view that this person
16 should not be held jointly and severally
17 liable together with the payer corporation
18 for the amounts that it failed to remit.

19 As soon as the director resigns, he no longer has any
20 power to prevent the corporation's failure to remit,
21 and, again, with respect to compliance, we have not
22 only the resignation of the directors before the date,
23 we have the appointment of the receiver. And that is
24 why I'd suggest conclusively this order cannot stand.

25 Now, I'm briefly -- and I'm on my last page of
26 notes, which will be a relief to the reporter no doubt.

1 I want to talk about some of the aspects of -- of
2 public interest. And, again, public interest only
3 comes into consideration if an event under 106, direct
4 or indirect control at the time of contravention, is
5 made out, then there's still the consideration as to
6 whether the order should be granted. It doesn't work
7 in the other direction. You can't say it's in the
8 public interest that we mess around with the wording of
9 Section 106.

10 We know that Trident was in a precarious financial
11 position in 2015, and Origami acquired a significant
12 amount of debt at a discount. At that time, it had
13 2,000 inactive wells. Prior to Origami's investment,
14 Trident was regulated by the AER who had oversight with
15 respect to the company, 2,000 inactive wells before
16 Origami and AIMCo invest.

17 Origami's largest investor, AIMCo, encouraged
18 Origami to invest in Alberta, and to their financial
19 misfortune, Trident was the vehicle they invested
20 approximately \$60 million into and Origami -- or,
21 pardon me, AIMCo over time invested approximately
22 another \$60 million by subordinate debt.

23 The CBC arrangement reduced indebtedness by
24 approximately \$2 00 million. As we previously noted,
25 in December of 2018, Origami doubled down by investing
26 a further \$5 million when no other funds were

1 available.

2 O'Brien proactively reached out to the AER in
3 February to advise of Trident's predicament. They
4 hired Veracity to assist and kept the AER updated with
5 respect to its predicament, including when the
6 determination was made in April that a CCAA filing
7 would be necessary. They convened with the meeting on
8 April 18th with its lender and the regulator.

9 The AER with respect to requests for guidance
10 points to Bulletin 2016-10 at page 154 of
11 Exhibit 31.02. Sorry. I've referenced the wrong page
12 number here. 164. That's my bad handwriting catching
13 up to me.

14 The final three-year old guidance that they refer
15 to says: (as read)

16 The AER encourages any licensee considering
17 ceasing operations or entering into
18 insolvency proceedings to contact the AER's
19 closure and liability group.

20 Trident reached out even before they were considering
21 ceasing operations or entering into insolvency
22 proceedings and kept in contact with the AER
23 throughout.

24 The AER's response was to negotiate with ATB with
25 respect to a potential CCAA financing, which we now
26 know it would not pursue. And what did they do? Well,

1 Mr. O'Brien and Mr. Young think -- were negotiating
2 with respect to a CCAA. They say, We better get this
3 order out Monday when they know the directors are
4 resigning Tuesday, and now they're trying to hold the
5 order up as against the directors for noncompliance for
6 24 hours between the issuance and the -- their
7 resignation, which had been foretold long before the
8 existence or the possibility the order was known.

9 So you want to talk about public policy? What
10 this decision would tell directors is, Shut up, resign,
11 and don't give the AER an opportunity to issue a
12 \$260 million order that they say you had contravened
13 while you were in direct or indirect control. Don't
14 tell anyone. There won't be an order issued. Just let
15 the company slide into receivership. That cannot be a
16 proper exercise of public policy for the next directors
17 who are facing a challenge to consider, Should I tell
18 CLM that I have difficulties, and while I'm doing that,
19 is Mr. Gosselin or his replacement putting together an
20 order that is impossible to achieve?

21 Madam Chair, panel, subject to any questions,
22 those are the oral submissions of the requestors,
23 O'Brien and Young.

24 THE CHAIR: Thank you, Mr. Gorman.

25 So I'm going to give everybody a bit of a break,
26 but before doing so, I'm going to ask Ms. Ross or

1 Mr. Dumanovski, whoever is planning to deliver the
2 argument, how much break would you need?

3 MR. DUMANOVSKI: Just a bathroom break, Madam
4 Chair. I'm ready to go.

5 THE CHAIR: Oh, okay. So panel counsel,
6 the Panel may have questions for Mr. Gorman before we
7 proceed to your argument. So when we come back, if
8 there is any questions, we will first start with those,
9 and then move to the argument. With that, I'm going to
10 give -- well, how about we come back at 11? So we can
11 think about if there is any questions by the panel,
12 counsel, or -- and the panel, and then we proceed to
13 your argument. Would that work for everyone?

14 MR. GORMAN: That works here, Madam Chair.
15 I will again turn my camera off and mute and turn it
16 back on in 18 minutes.

17 THE CHAIR: I appreciate that. Thank you.
18 Thank you, Mr. Dumanovski. See you at 11:00.

19 (ADJOURNMENT)

20 THE CHAIR: Welcome back, everyone.

21 Ms. Turner, do we have everybody?

22 MS. TURNER: Yes, I believe so.

23 THE CHAIR: Okay. I don't believe there's
24 any questions for Mr. Gorman from counsel or the Panel.

25 So, Mr. Dumanovski, you may proceed.

26 Submissions by Compliance and Liability Management

1 MR. DUMANOVSKI: Thank you, Madam Chair, Panel
2 Members.

3 Before I present CLM's final argument, I would
4 like to note that I will cite for the record the
5 necessary evidence references throughout the argument
6 to make it easier and more efficient for the panel and
7 everyone else to follow.

8 The first part of the argument will address the
9 relevant facts in this proceeding, and the second part
10 will deal with the legal questions.

11 The facts in this case are simple. This case --
12 this is a case of a bad investment by Origami Capital
13 in Trident. The requestors were the common denominator
14 for both companies. Mr. O'Brien considered this in his
15 testimony when he said: (as read)

16 This is an investment that we wish we had not
17 made.

18 Transcript Volume 1, PDF page 32,, Lines 15 and 16.
19 Trident's creditor, ATB Financial, used the dire
20 financial situation of Trident in order to improve and
21 advance its relationship with the AER in the
22 post-Redwater decision world seemingly without any
23 intention to actually finance the CCAA process for
24 Trident.

25 ATB was the primary secured creditor in the
26 Redwater insolvency and supported Grant Thornton in

1 opposing the AER during that lengthy litigation.
2 Transcript Volume 2, PDF page 233, lines 18 through 24.
3 Mr. Corbett of ATB confirmed this in his testimony:
4 (as read)

5 If it wasn't on the back of Redwater, I don't
6 think our organization would've had the
7 appetite to fund the DIP financing even if
8 the AER had agreed to all three conditions
9 because the assets were so challenging.

10 Transcript Volume 2, PDF page 235, lines 24 to 26
11 and PDF page 236, lines 1 and 2. ATB proposed
12 financing terms knowing that those terms were not
13 acceptable to the AER. The AER could not accept those
14 terms because of its statutory mandate to ensure that
15 Trident's end-of-life obligations were met.

16 This is clearly evidenced by Ms. Szacki's email to
17 Mr. Corbett on April 29, 2019. Exhibit 6.04, PDF
18 page 312. In that email, Ms. Szacki stated the
19 following: (as read)

20 With regard to the licensee, Trident, our
21 primary goal is to have end-of-life
22 obligations addressed by ensuring that
23 licensees are transferred to responsible
24 operators.

25 The requestors as "sophisticated and experienced
26 businesspeople" knew the regulatory scheme under which

1 Trident was operating in Alberta and were familiar with
2 the AER's regulatory requirements. The requestors
3 through the companies under their control, invested
4 over \$65 million in Trident. It is difficult to
5 imagine that they were not familiar with end-of-life
6 obligations and how to properly cease operations in
7 Alberta.

8 According to their testimony, all of the
9 requestors' witnesses in this proceeding were experts
10 with significant experience in the oil and gas industry
11 in Alberta, in general, and insolvency and
12 restructuring in particular.

13 Mr. Gwartney of Veracity is a mechanical engineer
14 registered with APEGA who has been working for more
15 than 30 years in various areas of oil and gas
16 operations and exploration, primarily in Alberta, but
17 also in BC, Saskatchewan, and overseas in Asia and
18 South America. Transcript Volume 1, PDF page 85, lines
19 15 to 22.

20 THE CHAIR: Mr. Dumanovski, I apologize
21 I'm interrupting you. Could you slow down. I can see
22 that the court reporter is in distress. Thank you.

23 MR. DUMANOVSKI: I will.

24 Mr. Helkaa of FTI Consulting is a chartered
25 accountant, insolvency restructuring professional, and
26 a licenced insolvency trustee with over 20 years in

1 restructuring, and in the last 17 years, focused on
2 western Canada's oil and gas sector. He has worked on
3 both lenders and company-side engagements.

4 Transcript Volume 1, PDF page 107, lines 24 to 26,
5 and PDF page 108, lines 1 through 6. Mr. Corbett of
6 ATB has a masters degree in accounting and has the
7 following professional designations: A chartered
8 accountant, a chartered insolvency and restructuring
9 professional, a licenced trustee, a chartered business
10 evaluator, and certified financial forensics
11 professional.

12 Transcript Volume 2, PDF page 132, lines 6 through
13 14. All of the persons involved in this matter, namely
14 the requestors and the representatives of -- from
15 Veracity, ATB, and FTI are either experienced
16 businesspeople or reputable professionals highly
17 familiar with the obligations of licencees in
18 insolvency and when ceasing operations.

19 There was no lack of relevant knowledge and
20 expertise, and yet everybody expected the AER to
21 provide the crucial guidance to the requestors on how
22 to behave as good stewards of Trident's assets in
23 financial distress. The requestors' resignations were
24 nothing more than a cold-hearted business decision
25 which considered only their own personal bottom line.

26 Whether there was a collusion between Trident and

1 ATB might not be clear. However, the apprehension of
2 it cannot be denied. It was Trident who insisted on
3 bringing its creditor, ATB, to attend meetings with the
4 AER. And as we heard from Mr. Gosselin, this is not
5 normal for the AER to meet with creditors of a
6 licencee.

7 Transcript Volume 3, PDF page 273, lines 24 -- 22
8 to 24. Another indication that something was going on
9 behind the scenes was the ATB's notice of default to
10 Trident, which is Exhibit 38.01, PDF page 39. More
11 specifically, looking at the notice, the following
12 things jump out: First, the curious timing of it;
13 second, the reasons for the issuance of the notice;
14 and, third, the consequences it had on Trident's
15 ability to use the financial faculty it had with ATB.

16 As per the notice, ATB learned of the tax default
17 on February 11th, 2019, and yet it did not issue the
18 notice until April 23rd, 2019. The reason for the
19 notice was Trident's municipal tax payment default and
20 not an ATB default.

21 And according to Mr. Corbett, the notice resulted
22 in several material consequences for Trident. Its loan
23 was transferred from the regular sales team to the
24 turnaround and restructuring group, which is a team
25 that specializes in dealing with companies in distress.
26 Two, severe restrictions were put in place on Trident's

1 account, and Trident was no longer able to access the
2 operator or the revolver credit. And, three, an amount
3 of around \$6 million was swept by ATB from Trident's
4 account on the same date, namely, April 23rd, 2019.

5 Mr. O'Brien testified that he did not notify the
6 AER of the notice of default.

7 Transcript Volume 2, PDF page 183, lines 20 to 26
8 and PDF page 184, lines 1 and 2. Mr. Gosselin
9 confirmed that "The cash sweep was a complete surprise
10 to us".

11 Transcript Volume 3, PDF page 276, line 25. All
12 of this transpired during the specific discussions
13 through April 18 to April 25th between Trident, ATB,
14 and the AER on the use of the \$6 million, which was
15 swept to finance Trident's CCAA process.

16 The AER -- the AER's understanding of Trident's
17 two proposals on the table at that time and the AER's
18 surprise when learning about the cash sweep is further
19 captured in the email dated April 25, 2019, sent at
20 3:27 PM by Maria Lavelle, AER counsel, to Mr. Gorman.

21 Exhibit 38.01, PDF pages 42 and 43. (as read)
22 Hi, Howard. Further to our meeting on
23 Trident this morning, we wanted to follow up
24 with you with respect to the payment that was
25 provided to ATB from the March production
26 revenue. At our meeting on April 18th, you

1 had described two different scenarios for
2 funding the sales process. In the first
3 scenario, you advised us that Trident will be
4 looking to use the March production revenue,
5 at that time, an estimated 5 to \$6 million,
6 plus an additional \$2.3 million in financing
7 to run the sales process. Alternatively, the
8 \$6 million in production revenue would flow
9 through the ATB, and they would then provide
10 the full financing for the sales process on
11 the understanding that the \$6 million, plus
12 any additional financing, would be paid on
13 first priority to ATB. You expressly sought
14 AER's support that the initial \$6 million,
15 plus any additional financing to run the
16 sales process, would be repaid in priority to
17 ATB over any AER Redwater claim. We met this
18 morning to provide you with an answer to your
19 question only to learn that the March
20 production revenues have been paid -- had
21 been paid directly to ATB, a result that was
22 not in either scenario from you provided.
23 Please advise on what basis this payment to
24 ATB was made. We would also be interested to
25 understand why this option was not described
26 to us at the initial meeting or in advance of

1 today's meeting.

2 This email shows that any discussion with regard to the
3 financing priority became moot because of the secret
4 cash sweep. This was the state of affairs of the file
5 in the afternoon of April 25th, 2019. At that time, it
6 became obvious to the AER that something was missing in
7 addition to the \$6 million. Mr. Gosselin issued his
8 enforcement order on April 29th, 2019, just four days
9 after it became apparent to the -- that the requestors
10 did not have any intention to properly cease
11 operations.

12 Madam Chair, CLM does not ask this panel to make a
13 bad faith determination, nor do we think that a bad
14 faith determination is necessary to adjudicate this
15 regulatory appeal. All we are saying is that there's
16 an apprehension that something was happening behind the
17 scenes that allowed ATB to sweep funds that might've
18 been sufficient for an orderly cessation of Trident's
19 operation, which in turn would've avoided the need for
20 the Section 106 declaration against the requestors.

21 The abdication of the directors' regulatory
22 obligations is further reinforced by their behaviour in
23 relation to Trident's insurance, which was expiring on
24 the same date that the directors resigned and walked
25 away. As Mr. O'Brien testified in this proceeding, he
26 did not know anything about the insurance renewal

1 frequency, the insurance policy value, the insurance
2 premium Trident paid, the renewal deadlines, and
3 whether the company received a renewal notice.
4 Mr. O'Brien also confirmed that he did not even try to
5 renew the insurance.

6 Transcript Volume 2, PDF page 184, lines 16
7 through 26, and PDF page 185, lines 1 through 12.

8 The issue here, Madam Chair, is not whether the
9 licencees fail but how they fail. The requesters made
10 a conscious decision to fail in the worst possible way
11 in Alberta. Mr. Gosselin issued his order to provide
12 options to Trident.

13 Transcript Volume 3, PDF page 346, lines 16 to 21.
14 At the time the order was issued, the requestors were
15 still in direct control of Trident. Mr. Gosselin
16 testified that he was open to continue to work with the
17 requestors after the order was issued, which is usual
18 AER practice.

19 Transcript Volume 3, PDF page 282, lines 11
20 through 13. The requestors were adamant about reaching
21 out to the AER the whole time except when it mattered
22 the most, which was after the order was issued. The
23 requestors were not forced to resign. They could've
24 decided to stay after April 30th, 2019, and continue to
25 work with the AER. Mr. Gosselin's expectation for the
26 requestors was clear: (as read)

1 I didn't want Mr. O'Brien and Mr. Young to
2 resign. I wanted them to steward their
3 assets to either an orderly ceasing of
4 operations or an insolvency proceeding.

5 Transcript Volume 3, PDF page 352, lines 11 through 14.
6 Mr. O'Brien testified that Mr. Young and he were forced
7 to resign and that they didn't have -- they didn't have
8 a choice. When questioned by Commissioner Stock with
9 regard to the reasons for the conclusion that they were
10 forced to resign, Mr. O'Brien stated they received
11 legal advice to do so.

12 According to that advice, as directors in Canada,
13 the requestors were subject to a personal obligation
14 for unpaid wages and unpaid payroll taxes even though
15 after the termination of all Trident employees on the
16 April 30th, there was no wage obligation on May 1st
17 and onward.

18 Transcript Volume 2, PDF pages 241 and 242.
19 Furthermore, there was no specific statutory authority
20 or case law provided in support of this assertion.

21 Madam Chair, now I will address the legal
22 questions in this proceeding. First, I would like to
23 remind the panel that the enforcement order issued on
24 April 29, 2019, by Mr. Gosselin is not the subject
25 matter of this proceeding. The requestors had the
26 opportunity to challenge that order, including its

1 terms, in accordance with the applicable deadlines, and
2 they chose not to do so.

3 Now, I will address the interpretation of
4 Section 106 of the Oil and Gas Conservation Act or
5 OGCA.

6 Section 106 has two distinct timelines built in
7 it. One is directed at the past, and the other one is
8 looking at the future. The first timeline is provided
9 in Subsection 106(1). It relates to past actions or
10 omissions and requires the following: One, a licensee
11 to have contravened or failed to comply with an order
12 of the AER. The order in this case is Mr. Gosselin's
13 April 29 enforcement order. A licensee has an
14 outstanding debt to the AER or to the account of the
15 orphan fund in respect of suspension, abandonment,
16 remediation, or reclamation costs.

17 The evidence in this proceeding is that many
18 Trident wells, pipelines, and facilities will
19 ultimately be transferred to the OWA with outstanding
20 abandonment, remediation, and reclamation costs.

21 And, finally, it is in the public interest to
22 issue a declaration against the directors who had --
23 who had direct control of that licensee at the time of
24 the contravention, failure to comply, or failure to
25 pay. The requestors had direct control over Trident
26 when it failed to comply with the April 29 enforcement

1 order.

2 The first timeline is not directly a subject
3 matter of a Section 106 declaration. The initial
4 compliance order addresses that past noncompliance. In
5 this case, that initial order is Mr. Gosselin's
6 April 29 compliance order, which has not been
7 challenged or amended, and it is still in force.

8 The second timeline imposes conditions on the
9 directors that were in control of the licensee by
10 limiting future privileges -- not rights but privileges
11 of those directors. As provided in Directive 67,
12 holding a licence in Alberta is a privilege and not a
13 right. The 106 declaration conditions are not designed
14 to address the past noncompliances but to prevent
15 directors from repeating any future noncompliances, if
16 it is in the public interest to do so.

17 Consequently, once the failure to comply is
18 established in accordance with Subsection 106(1), the
19 only question that remains is whether or not it is in
20 the public interest to limit the potential future
21 privileges of Mr. O'Brien and Mr. Young by a
22 Section 106 declaration.

23 This interpretation is supported by the broad
24 language in Subsection 106(3) pursuant to which the
25 declaration may include terms and conditions the AER
26 considers appropriate, including suspend any operations

1 of a licensee or approval holder under the OGCA or the
2 Pipeline Act. Refuse to consider an application for an
3 identification code, licence, or approval under the
4 OGCA or the Pipeline Act. Refuse to consider an
5 application for a licence transfer under the OGCA or
6 the Pipeline Act. Require security for abandonment,
7 remediation, and reclamation prior to granting any
8 licence under the OGCA and require security for
9 abandonment, remediation, reclamation for any wells or
10 facilities of any licensee if the person named in the
11 declaration is a director who, in the AER's opinion is
12 directly or indirectly in control of the licensee,
13 approval holder, applicant, transferor, or transferee
14 referred to in the above clause.

15 None of the terms and conditions in
16 Subsection 106(3) are limited to the licensee who
17 breached the original order or to the operations of
18 that licensee only. The Subsection 106(3) language is
19 much broader. The 106 terms may apply to any
20 operations, any applications, any licences, and any
21 wells or facilities of any licensee with which the
22 directors are involved or may become involved. Simply
23 put, the Section 106 declaration is designed to limit
24 future privileges because of past noncompliances.

25 The noncompliance of Section 106(1) is not in
26 dispute in this proceeding. The only determination

1 this Panel needs to make after considering the specific
2 circumstances of this case is whether it is in the
3 public interest to limit the potential future
4 privileges of the requestors in case they decided to
5 engage again in the oil and gas business in Alberta.

6 Both the requestors and CLM agree that the purpose
7 of a Section 106 declaration is to, one, protect the
8 public and the environment, ensure confidence in the
9 regulatory scheme, deter like-minded individuals from
10 engaging in similar -- similar conduct, and serve as a
11 warning to others who may engage in business with the
12 named individual.

13 CLM respectfully submits that the declarations
14 issued against the requestors serve each of the above
15 purposes, which purposes are all in the public
16 interest. The timing of the resignations is absolutely
17 irrelevant for this determination and is nothing more
18 than a distraction.

19 The requestors claim that the breaches of the
20 deadlines in the order occurred after they were not in
21 control of Trident. What alternatives should the AER
22 have taken -- what alternative action should the AER
23 have taken after the requestors walked away? Should
24 the AER have waited for the deadlines in the order to
25 expire before initiating the receivership, risking
26 serious environmental and safety consequences? The

1 deadlines set in the April 29 order were reasonable and
2 showed that the AER, even after issuing the order,
3 still had hope that the requestors would stay on and
4 properly discharge their duties. Any 24-hour deadlines
5 for appointing an agent or posting security just to
6 catch the requestors before the resignation would've
7 been unreasonable, and then the requestors had other
8 options in addition to those two, to provide a
9 compliance plan and work with the AER.

10 When it comes to the interpretation of
11 Section 106, the relevant case law requires giving
12 deference to an administrative tribunal when
13 interpreting its home statute or a statute that are
14 closely related to its function.

15 A.T.A. v. Alberta at paragraph 30 and L.(P.A.) v.
16 Alberta at paragraph 19. The OGCA is a statute that is
17 closely related to the AER's function. Consequently,
18 CLM's interpretation of Section 106 of the OGCA should
19 be given deference. It is a well-established principle
20 of statutory interpretation that the legislature does
21 not intend to produce absurd consequences. A level of
22 absurdity can be attributed to interpretations if it
23 defeats the purpose of a statute or if it renders some
24 aspect of it pointless or futile. *Tran v. Canada* at
25 paragraph 31.

26 In our respectful submission, the requestors'

1 interpretation of Section 106 is absurd. If this panel
2 were to adopt the requestors' interpretation, it would
3 render Section 106 of the OGCA pointless. This
4 absurdity would allow every director or officer to
5 avoid responsibilities simply by resigning from the
6 licence in case of a financial distress. This was --
7 this would open the floodgates in Alberta allowing any
8 director or officer or licencee to walk away and just
9 pass the costs of associated with end-of-life
10 obligations on to the public and the other industry
11 players who actually follow the rules and comply with
12 regulatory requirements. And this is even without
13 considering the potential massive environmental damage
14 and significant increase in the safety risk to the
15 public.

16 Granting the requestors' regulatory appeal would
17 allow them to come back to Alberta and repeat the same
18 scenario over and over again with impunity, and this is
19 not a theoretical exercise either. We actually have a
20 glimpse of what could happen. Mr. Gwartney testified
21 that there were around 2,000 wells that were left
22 operating without being properly and safely shut in
23 after the requestors walked away.

24 Transcript Volume 2, PDF page 218, lines 12 to 15.
25 This was confirmed by PwC, the court-appointed
26 receiver. On PDF page 285 of Exhibit 31.02,

1 Section 2.5 of the PwC's report dated December 30th,
2 2019, states the following: (as read)

3 Subsequent to the resignation date,
4 approximately 1,700 wells continued to flow
5 and remained open to Trident's pipeline
6 system which continue to accumulate pressure.

7 Mr. Gwartney testified that it took around six weeks to
8 properly put those wells and facilities under control.
9 Transcript Volume 2, PDF page 195, lines 16 through 22.
10 And even then, all of the facilities were not properly
11 shut-in since the receiver had financial constraints
12 and had to decide what facilities must be addressed
13 sooner and what facilities could be left for later
14 because of the lower risk profile.

15 Transcript Volume 2, PDF page 195, lines 19
16 through 22. The requestors' counsel makes light of the
17 risk by asking Mr. Gwartney whether he slept well
18 during the shut-in work performed on April 30th, 2019.

19 Transcript Volume 2, PDF page 257, lines 20 to 25.
20 Hindsight is 20-20, Madam Chair. It is easy to laugh
21 about it now knowing that nothing happened. At that
22 time, however, no one could've predicted the risk, and
23 as Mr. Gosselin testified, it did represent a
24 significant risk.

25 Transcript Volume 3, PDF page 293, lines 12
26 through 14. The requestors were not satisfied with the

1 AER's Bulletin 2016-10 which provided guidance
2 regarding the obligations of licencees when an
3 insolvency or when ceasing operations because it was
4 three years old. Instead, the requestors expected a
5 bespoke guidance from the AER with regard to Trident.

6 Madam Chair, the AER's home statute, the
7 Responsible Energy Development Act, is even older than
8 Bulletin 2016-10. It was enacted in 2012. Does it
9 mean that the AER and the regulated companies should
10 not follow it? Of course not. The expectations to
11 follow the requirements in Bulletin 2016-10 were
12 consistently expressed by AER's staff during the
13 engagement of Trident.

14 The requestors seek to abdicate responsibility by
15 relying on a technicality created solely by them by
16 resigning and literally walking away and throwing the
17 keys at the AER. This type of behaviour is not just
18 contrary to both, the letter and the spirit of the
19 OGCA, but it is also wrong. The people of Alberta
20 cannot tolerate let alone condone this kind of
21 behaviour, and any decision in this proceeding other
22 than outright dismissal of this regulatory appeal would
23 do just that.

24 Madam Chair, those are all my submissions. I'm
25 happy to answer any questions that the Panel may have.

26 THE CHAIR: Mr. Dumanovski, if you just

1 give us five minutes, I want to check with everyone to
2 see if they have a question or not.

3 MR. DUMANOVSKI: Of course.

4 THE CHAIR: Bear with us. If I could ask
5 the Panel Members and counsel to join the breakout
6 room, please.

7 (ADJOURNMENT)

8 THE CHAIR: Ms. Turner, do we have
9 everyone in the room, the virtual room?

10 MS. TURNER: Yes.

11 THE CHAIR: Okay. So we had a quick
12 discussion. I think we have decided that we're going
13 to take a break. We are going to take the lunch break
14 before we ask our questions, and come back at 1:00, ask
15 the questions to CLM.

16 And then after that, if, Mr. Gorman, you require a
17 break before you provide your reply, that's perfectly
18 fine with us. We can get a break after our questions
19 to perhaps maybe reword or -- parts of your reply, and
20 then at that point, we can move to the reply whenever
21 you are ready.

22 Is that a plan that may work for everyone? Sorry.
23 I don't have everybody. Okay. Now I do.

24 MR. GORMAN: That works for me, Madam
25 Chair.

26 THE CHAIR: Okay. Mr. Dumanovski?

1 MR. DUMANOVSKI: That's fine, yeah.

2 THE CHAIR: So we will reconvene at 1:00
3 with questions to CLM. And then should you need a
4 break, Mr. Gorman, you will get one, and then we will
5 move to the reply arguments. Okay. See you.

6 _____

7 PROCEEDINGS ADJOURNED UNTIL 1:00 PM

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1 Proceedings Taken via Remote Video.

2

3 November 10, 2020

Afternoon Session

4

5 P. Meysami

The Chair

6 C. Chiasson

Hearing Commissioner

7 T. Stock

Hearing Commissioner

8

9 A. Hall

AER Counsel

10 F. De Luca

AER Counsel

11 T. Turner

AER Staff

12 A. Shukalkina

AER Staff

13 W. Handayani

AER Staff

14 E. McKellar

AER Staff

15

16 C. Ross

For Compliance and

17 K. Dumanovski

Liability Management

18

19 H. Gorman

For Requesters

20 A. Harvie

21

22 A. Vidal, CSR(A)

Official Court Reporter

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24

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26

1 (PROCEEDINGS COMMENCED AT 1:02 PM)

2 THE CHAIR: Ms. Turner, do we have
3 everybody?

4 MS. TURNER: Yes.

5 THE CHAIR: Okay. Hello, everyone, and
6 thank you for coming back. We have some questions.
7 Counsel doesn't have any questions, but the Panel, we
8 have questions.

9 With that, I will ask -- Commissioner Chiasson,
10 please start.

11 MS. CHIASSON: Okay. Thank you, Madam Chair.
12 Alberta Energy Regulator Panel Questions the Compliance
13 and Liability Management Counsel (Mr. Dumanovski and
14 Ms. Ross)

15 Q MS. CHIASSON: So, Counsel, my question is:
16 You've made the submission to us that we should give
17 deference to CLM's interpretation of Section 106, and
18 I'm interested to hear how you reconcile this with our
19 powers as a panel to deal with regulatory appeals under
20 Section 41(2) of REDA which gives us the authority to
21 confirm, vary, suspend, or revoke the appealable
22 decision.

23 A MR. DUMANOVSKI: In -- in our view, we think
24 that the deference test to the question applied to
25 administrative tribunals is the same regardless of the
26 level of the decision-maker making evident the

1 Regulator. For example, in this case, we have -- the
2 initial decision was made by -- by a statutory
3 decision-maker, and the same -- the same reasonable
4 test should apply to that as opposed -- as opposed to
5 if this decision of this panel goes to the Court, the
6 Court will, again, apply the same deference standard.

7 So -- so this panel may decide based on the --
8 partially -- this hearing is de novo. But then the
9 records of the decision-maker was available at the time
10 the decision was made, and then in this proceeding, the
11 requestors have the opportunity to file new evidence.

12 And based on that, the panel may decide -- we
13 don't see that the -- the authority of the Panel under
14 REDA is contradicting the -- the deference -- the
15 deference requirements that the Courts have set because
16 the other -- the other test is correctness. And I
17 think that would apply for questions that relate to
18 interpretations to (AUDIO FEED LOST).

19 THE CHAIR: Sorry, Mr. Dumanovski. You
20 were cut off for a little bit.

21 MS. TURNER: Actually, his --

22 A MR. DUMANOVSKI: (AUDIO FEED LOST) general
23 importance to the legal system.

24 Q MS. CHIASSON: Mr. Dumanovski, we lost -- we
25 lost the last part of your answer. Your screen froze
26 up, and you garbled. Could you repeat that part?

1 A Can you please tell me where -- where you lost me? I
2 don't -- didn't notice that, if you could --

3 THE CHAIR: Mr. Vidal.

4 MR. DUMANOVSKI: Sorry?

5 THE COURT REPORTER: Sure. I can read the last
6 part of his answer.

7 THE CHAIR: Yes, please. The part that we
8 heard and then --

9 THE COURT REPORTER: Right. Okay. So I have:
10 (by reading)

11 We don't see that the authority of the Panel
12 under REDA is contradicting the -- the
13 difference -- the deference --

14 MR. DUMANOVSKI: The deference.

15 THE COURT REPORTER: -- requirements that the
16 Courts have set because the other test is correctness.
17 And I think that would apply -- [hold on. My screen
18 moved]. And I think that would apply for questions
19 that relate to interpretations to --
20 And then it started cutting out.

21 A MR. DUMANOVSKI: The interpretations of the law
22 or questions of general importance to the legal system
23 which we don't think apply in this case.

24 MS. CHIASSON: Okay. Those are all -- that's
25 all I have for questions, Madam Chair.

26 THE CHAIR: Thank you, Ms. Chiasson.

1 Please, Commissioner Stock.

2 MR. STOCK: Thank you, Madam Chair.

3 Q MR. STOCK: Mr. Dumanovski, could you
4 please speak to the question: When did contravention
5 of the order occur?

6 A MR. DUMANOVSKI: The contravention occurred in
7 our view when the directors decided to resign from the
8 company and -- and to -- to walk away.

9 Q Do you have any authority to that view?

10 A Sorry?

11 Q Do you have authority to that view that you can share
12 with us?

13 A I don't have anything -- anything specific.

14 A MS. ROSS: Can I speak to that briefly,
15 sir? The -- in our view, the breach occurred the
16 minute the directors resigned because they left a
17 company that had no legal ability to do anything,
18 including comply with the order. Essentially, it was
19 an empty vessel without any way to steward the assets.
20 So the order could not be complied with at that moment.

21 Q Okay. So the interpretation is a contravention
22 occurred when the resignations occurred. There's no
23 authority that you have for that view?

24 A Well, simply, corporate law authority that -- that
25 states that a company without directors or any sort of
26 management has no ability to act.

1 Q Thank you.

2 MR. STOCK: Thank you, Madam Chair.

3 THE CHAIR: Thank you, Commissioner Stock.

4 I have one -- I apologize. Do you have any
5 further questions --

6 MR. STOCK: No.

7 THE CHAIR: -- Mr. Stock?

8 Q THE CHAIR: I have one question, and that
9 is: Counsel, would you ask this Panel to make -- to
10 make an interpretation of Section 106 which may not be
11 consistent with the past decisions of board members,
12 board panels, or AER for that matter, commissioners,
13 such as Karl, Dame, Cooney decisions and, if yes, why?

14 A MR. DUMANOVSKI: The answer to that question
15 would be yes because, generally speaking, tribunals are
16 not bound by their own decisions, past decisions.

17 And there's a case law that -- I don't have -- I
18 don't have any cases on hand right now, but I'm sure
19 there's case law on that, and in deciding that, the
20 Panel has to take into account the -- the circumstances
21 of each past decision. For example, what legislation
22 was enforced at that time? REDA came into force in
23 2012, 2013.

24 And also the Panel has to look at the government
25 policy enforced at that time of the government of the
26 day, what was the -- what was the economic

1 circumstances surrounding those decisions, and also
2 what was the liability on -- on the orphan well fund
3 when those policy decisions was -- were made.

4 Another -- another big circumstance that's changed
5 in this case was the issuance of the Redwater decision
6 by the Supreme Court, and so I think those are all the
7 criteria that the Panel has to take into account to be
8 able to distinguish any prior decisions in relation to
9 Section 106 declarations from -- from the current one.

10 Q And that's my question. Thank you for that.

11 THE CHAIR: Mr. Gorman, would you like
12 some time before we move to your reply?

13 MR. GORMAN: Not at all, Madam Chair. I'm
14 ready to reply.

15 THE CHAIR: Please proceed.

16 Reply Submissions by The Requesters

17 MR. GORMAN: The Panel Members touched on
18 some of the -- the issues in my notes, so some of my
19 reply will be answering the questions that
20 Mr. Dumanovski and Ms. Ross didn't reply and can't
21 reply to.

22 One would've thought, if they tuned into the Zoom
23 broadcast with Mr. Dumanovski's complaints, we were at
24 an ATB regulatory hearing. The complaints, we had a
25 long history of ATB in -- in Redwater. We were unhappy
26 that ATB swept the account. We didn't know about it

1 'til later. Complaints about ATB, items that are
2 outside of the former directors' control, and,
3 significantly, items that do not raise to create an
4 issue with 106. Section 106 is dealing with breaching
5 an order. There was no order that ATB can't sweep the
6 accounts. There was a loan agreement that says they
7 can. The AER hadn't read it. There was an ongoing
8 practice that said they can. The AER hadn't apparently
9 read it. And Mr. Gosselin didn't know what -- how a
10 revolving account worked, yet there are complaints
11 about the ATB sweeping the account.

12 Mr. Dumanovski took you to an email exchange
13 between Ms. Lavelle and me at page 42 of
14 Exhibit 31.02 [sic] where they complained -- and he
15 read the part where they complained that the money was
16 removed. My response: (as read)

17 Maria, I think we are generally consistent
18 with the second scenario as evolved over the
19 last week. ATB preferred the setoff the
20 March proceeds and to reissue a priority
21 interim finance loan with the benefit of the
22 court-confirmed priority. Pursuant to the
23 loan docs, all cash receipts go through the
24 ATB operating account where a cash sweep
25 occurs automatically daily. That occurred
26 today. (We were uncertain if we would file

1 before or after April 25). It was a typical
2 banking event, not an extraordinary payment
3 or transfer.

4 And the AER and CLM offered nothing to rebut that, yet
5 we are hearing complaints that somehow -- I think we
6 heard the word "collaboration" even used between the
7 directors and ATB when there's no evidence of that, but
8 that sets the tone for the AER's complaints.

9 With respect to this being a de novo hearing, I
10 cannot believe we are still having this discussion.

11 Paragraph 47 of CLM's brief provides: (as read)

12 Furthermore, this hearing is conducted by an
13 AER panel of hearing commissioners on behalf
14 and in the name of the AER in accordance with
15 Section 12 of the REDA [which is the AER's
16 home statute; your home statute as well]. As
17 a result, the potential bias in relation to
18 Mr. Wadsworth is moot at this stage given the
19 de novo nature of the hearing before a new
20 decision-maker.

21 So we're not supposed to be concerned about
22 Mr. Wadsworth's potential bias because it's a de novo
23 hearing, but suddenly, let's give it deference as well.
24 They don't mash together, and the only attempt in that
25 regard comes from the ATA decision, which is in the
26 AER's materials, and I apologize, I don't have a page

1 number for Exhibit 31.02, which was an appeal of a
2 decision, not a de novo hearing. And in paragraph 30,
3 which the AER highlights, where it says that deference
4 will usually result where a tribunal is interpreting
5 its own statute, and that is a Court interpreting a
6 regulator statute, not the de novo hearing by a
7 regulator of a lower regulator decision, even then it
8 provides, again at paragraph 30: (as read)

9 This principle applies unless the
10 interpretation of the home statute falls into
11 one of the categories of questions to which
12 the correctness standard continues to apply.

13 A de novo hearing means the correctness standard
14 applies. So even the ATA decision, which is contrary
15 to paragraph 47 of their brief tells you this is a de
16 novo hearing, and we read the aspect from AER decision
17 in this regard where they noted the obvious, that Panel
18 is a de novo hearing including the fact they have
19 additional evidence that wasn't previously available.

20 For over a year now, we have said the central
21 issue is the statute which reads at Section 106(1) --
22 and I'm having to read it again because I'm not sure
23 everyone making submissions on behalf of the regulator
24 has. 106(1): (as read)

25 Where a licensee, approval holder, or working
26 interest participant contravenes or fails to

1 comply with an order of the regulator.

2 Okay? Contravenes an order, not collaborates with the
3 setoff, which was allowed under a loan agreement. The
4 106 requires -- and this is with respect to the -- one
5 of the Panel's questions: (as read)

6 Were directly or indirectly in control of the
7 licencee, approval holder, or working
8 interest participant at the time of the
9 contravention.

10 They have never answered this. We've provided ample
11 authority that the regulator and other courts,
12 including tax courts and census courts, understand
13 what -- the words "at the time of the contravention".
14 And if there's a period to grace, if there is a period
15 to fund something the 15th of the month following, the
16 contravention occurs on the 15th of the month
17 following.

18 Here there is no contravention before June 1 and
19 June 14, and the regulator has no answer for that, no
20 answer for the prior decisions, which they now -- I
21 hear Mr. Dumanovski say you can ignore Dame and Karl
22 and Cooney. He also apparently wants you to ignore a
23 bunch of Court decisions as well because government
24 policy, economic circumstances, and the Orphan Well
25 Association burden has changed. Where in the
26 legislation does it say this legislation is repealed or

1 amended if the Orphan Well Association gets too big?
2 If government policy has changed, the way to implement
3 a changed policy is to amend or repeal the legislation.
4 The legislature hasn't done so -- and one interesting
5 thing when I was looking at 106(3), which is -- these
6 are the kind of things you can do, and it starts "where
7 the regulator makes a decision" under (1); right? So
8 it has to have made a declaration under (1), which is a
9 breach or a contravention by someone in control at the
10 time. It gives some flexibility with respect to the
11 type of sanctions. The sanctions don't create the
12 breach. The breach creates the potential for
13 sanctions.

14 But I noticed when looking at it -- and this is at
15 page 464 of the -- the authorities -- in 2020,
16 apparently a new section was added, 106.1, which
17 provides appointment of receiver, receiver-manager,
18 trustee, liquidator. The legislature has now said the
19 regulator may, subject to the regulations, apply to the
20 Court of Queen's Bench for the appointment of a
21 receiver, receiver-manager, trustee, or liquidator of
22 the property of a licensee.

23 So they did it in Lexin apparently before that
24 enactment. This just confirms that, right, and we
25 heard from Mr. Gosselin the AER doesn't want to get
26 involved in that. That is the OWA's issue.

1 So with respect to the Dame and Karl and -- and
2 Cooney, which read the clear legislation that governs
3 the AER, which, again, it's a statutory body. It does
4 not have inherent jurisdiction. They now suggest,
5 Ignore those decisions which properly applied it, but
6 give deference to Mr. Wadsworth who clearly did not
7 comply with the exact words calling it a technical
8 breach or otherwise. It is clear the events that could
9 lead to a 106 declaration did not occur whilst Young
10 and O'Brien were directors and did occur when the void
11 had been filled by the receiver, which happened May 3rd
12 because the OWA did it as opposed to May 1 because the
13 ATB did not do it.

14 What is being urged upon this panel is to ignore
15 the law. We've got a big economic problem out there
16 with respect to orphan wells, and fill the void by
17 creating a new law, a new set of sanctions as against
18 officers and directors that the legislature has not
19 deemed necessary by amending the Act to appoint -- to
20 allow the appointment of a receiver, but not to change
21 the timing with respect to contravention,
22 notwithstanding, no doubt, the legislature knew about
23 all of the authorities, including Dame and Karl, that
24 were being reviewed with respect to the timing of the
25 breach, they didn't amend the Act. Mr. Wadsworth could
26 not amend the Act. Mr. Gosselin could not amend the

1 Act. Mr. Dumanovski could not amend the Act, and,
2 respectfully, this panel could not amend the Act,
3 change the rules that Young and O'Brien were operating
4 under.

5 Unless there are any questions, those are our
6 submissions in reply.

7 THE CHAIR: Thank you, Mr. Gorman.

8 Any other matters -- any questions from
9 Ms. Chiasson, Mr. Stock?

10 MS. CHIASSON: None for me.

11 THE CHAIR: I have no further questions.

12 If there are no other matters, thank you very much
13 for participating in this hearing. The panel will
14 review the evidence and the submissions of the parties
15 and make its decision on Proceeding 400 in due course.
16 The panel will prepare and issue a decision when the
17 decision is ready. Each of the parties who have
18 participated in this hearing will receive a copy. The
19 hearing is now closed. Thank you.

20

21 PROCEEDINGS CONCLUDED

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1 CERTIFICATE OF TRANSCRIPT:

2

3 I, Andres Vidal, certify that the foregoing pages
4 are a complete and accurate transcript of the
5 proceedings taken down by me in shorthand and
6 transcribed from my shorthand notes to the best of my
7 skill and ability.

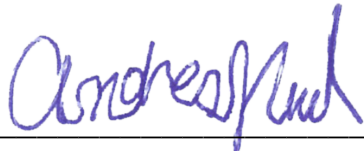
8 Dated at the City of Edmonton, Province of
9 Alberta, this 10th day of November 2020.

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Andres Vidal, CSR(A)

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Official Court Reporter

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