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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(PROCEEDINGS COMMENCED AT 9:01 AM)
THE CHAIR: Good morning, ladies and gentlemen. Welcome back. Hopefully your commute was a safe one this morning. We have quite a bit of snow here.

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

MR. GORMAN: No, Madam Chair.

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

MR. DUMANOVSKI: None from us, Madam Chair. Thank you.

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

Submissions by the Requesters

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

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

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

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

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

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

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

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

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

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

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

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

The second sentence: (as read)

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

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

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

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

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

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

Section 106 declarations.

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

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

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

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

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

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

Mr. Gorman, the SDM made that determination.

I cannot speak for his mind at that time.

The point of control is not important.

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

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

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

> Q So, sir, as I understand your last answer, you said you and your colleagues had determined control was not important and referenced me to a page in argument; is that right?
>
> A Control is not important as the Regulator deems for the question you asked me, which is: Were they in control on 1 June or 14 June?
>
> Q Okay. And you -- your -- you and your colleagues considered control was not a relevant factor; correct?
>
> A Correct.

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

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

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

we've just reviewed.

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

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

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

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

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

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

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

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

third AER witness put forward for cross.

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

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

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

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

> Q And, sir, you said [that] the sweeping of accounts is common. Is that something you have seen in previous matters?
>
> A Yeah. You know, I'm not -- I'm not a banking expert, but it's pretty typical. Companies -- the way it -- it's like an overdraft account,

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

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

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

A No.

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

A No.

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

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

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

And unchallenged evidence of Mr. Corbett.

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

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

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

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

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

not just Trident.

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

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

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

A Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A No.

Q -- squandering the resource?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

later in the day from that.

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

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

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

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

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

summarized it as this: (as read)

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

A That is correct.

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

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

A Yes.

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

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

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

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

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

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

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

In the Pure Environmental regulatory appeal -- the Panel noted this at Exhibit 31.02, page 541, and could that be brought up, please. And if we could -- the paragraph 19 that is highlighted reviews: (as read)

> AER authorizations provided us with a filed record of the materials it considered in deciding to approve application [with the number]. As well, we received new information not before AER authorizations when the approval decision was made. Given the hybrid de novo nature of this hearing and its distinction from a typical appeal on the record, we do not consider it necessary to apply a standard of review. Little purpose is served in deciding if AER's authorization decision to approve 1901 [sic] was reasonable or correct when it was made based on a different record from the one before us. As set out in REDA, we must decide whether to confirm, vary, suspend, or revoke that decision based on the record before us.

And that's what a de novo proceeding is. The Panel decides from the record before it, and it's not necessary and no purpose is served in deciding if the AER's decision on a different record was reasonable or correct.

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

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

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

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

Incredibly, the government agency is criticizing that

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

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

In paragraph 17, they carry on: (as read)

> CLM respectfully submits the requesters reading an interpretation of Section 106 of the OGCA is inaccurate as they have only considered the meaning of Section 106.

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

Section 106.3 is only invoked if 106.1 is engaged

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

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

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

> It is presumed that the legislature does not intend to abolish, limit, or otherwise interfere with the rights of subject. Legislation is designed to curtail the rights that may be enjoyed by citizens or residents

is strictly construed.

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

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

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

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

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

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

at the time of a contravention.

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

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

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

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

Similarly, in the Alberta Court of Queen's Bench

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

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

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

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

> A high standard of justice is required when

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 55: (as read)

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

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

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

when the GST debt was occurred.

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

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

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

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

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

> In cases where the bank and not directors had

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

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

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

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

And that reference is page 1091.

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

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

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

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

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

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

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

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

The licencee has until June 1, 2019, to appoint an agent.

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

in paragraph 3(b)?

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

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

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

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

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

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

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

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

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

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

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

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

A Yeah. The verb tense is wrong.

[Over on page 195 [sic]]

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

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

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

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

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

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

In this case, paragraph 16: (as read)

The elements of the test or issues that must be determined are the following: Were there contraventions or failures to comply with AER orders? If there was a contravention or failure, was Mr. Karl a director, officer, or other person in direct or indirect control of the relevant company at the relevant time?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> I allow the appeal herein with respect to the

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

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

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

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

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

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

should be imposed on a director.

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

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

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

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

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

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

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

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

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

available.

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

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

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

> The AER encourages any licencee considering ceasing operations or entering into insolvency proceedings to contact the AER's closure and liability group.

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

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

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

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

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

THE CHAIR: Thank you, Mr. Gorman.

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

Mr. Dumanovski, whoever is planning to deliver the argument, how much break would you need?
MR. DUMANOVSKI: Just a bathroom break, Madam Chair. I'm ready to go.
THE CHAIR: Oh, okay. So panel counsel, the Panel may have questions for Mr. Gorman before we proceed to your argument. So when we come back, if there is any questions, we will first start with those, and then move to the argument. With that, I'm going to give -- well, how about we come back at 11? So we can think about if there is any questions by the panel, counsel, or -- and the panel, and then we proceed to your argument. Would that work for everyone?
MR. GORMAN: That works here, Madam Chair. I will again turn my camera off and mute and turn it back on in 18 minutes.
THE CHAIR: I appreciate that. Thank you.
Thank you, Mr. Dumanovski. See you at 11:00.
(ADJOURNMENT)
THE CHAIR: Welcome back, everyone.
Ms. Turner, do we have everybody?
MS. TURNER: Yes, I believe so.
THE CHAIR: Okay. I don't believe there's any questions for Mr. Gorman from counsel or the Panel.
So, Mr. Dumanovski, you may proceed.
Submissions by Compliance and Liability Management

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

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

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

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

> This is an investment that we wish we had not made.

Transcript Volume 1, PDF page 32,, Lines 15 and 16.

Trident's creditor, ATB Financial, used the dire financial situation of Trident in order to improve and advance its relationship with the AER in the post-Redwater decision world seemingly without any intention to actually finance the CCAA process for Trident.

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

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

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

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

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

> With regard to the licencee, Trident, our primary goal is to have end-of-life obligations addressed by ensuring that licencees are transferred to responsible operators.

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

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

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

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

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

MR. DUMANOVSKI: I will.

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

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

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

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

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

Whether there was a collusion between Trident and

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

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

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

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

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

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

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

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

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

Exhibit 38.01, PDF pages 42 and 43. (as read)

Hi, Howard. Further to our meeting on Trident this morning, we wanted to follow up with you with respect to the payment that was provided to ATB from the March production revenue. At our meeting on April 18th, you

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

today's meeting.

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

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

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

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

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

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

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

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

I didn't want Mr. O'Brien and Mr. Young to resign. I wanted them to steward their assets to either an orderly ceasing of operations or an insolvency proceeding. Transcript Volume 3, PDF page 352, lines 11 through 14. Mr. O'Brien testified that Mr. Young and he were forced to resign and that they didn't have -- they didn't have a choice. When questioned by Commissioner Stock with regard to the reasons for the conclusion that they were forced to resign, Mr. O'Brien stated they received legal advice to do so.

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

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

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

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

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

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

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

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

order.

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

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

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

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

of a licencee or approval holder under the OGCA or the Pipeline Act. Refuse to consider an application for an identification code, licence, or approval under the OGCA or the Pipeline Act. Refuse to consider an application for a licence transfer under the OGCA or the Pipeline Act. Require security for abandonment, remediation, and reclamation prior to granting any licence under the OGCA and require security for abandonment, remediation, reclamation for any wells or facilities of any licencee if the person named in the declaration is a director who, in the AER's opinion is directly or indirectly in control of the licencee, approval holder, applicant, transferor, or transferee referred to in the above clause.

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

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

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

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

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

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

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

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

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

In our respectful submission, the requestors'

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIR: Mr. Dumanovski, if you just

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

MR. DUMANOVSKI: Of course.

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

(ADJOURNMENT)

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

MS. TURNER: Yes.

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

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

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

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

THE CHAIR: Okay. Mr. Dumanovski?

MR. DUMANOVSKI: That's fine, yeah.

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

PROCEEDINGS ADJOURNED UNTIL 1:00 PM

Proceedings Taken via Remote Video.

November 10, 2020	Afternoon Session
P. Meysami	The Chair
C. Chiasson	Hearing Commissioner
T. Stock	Hearing Commissioner
A. Hall	AER Counsel
F. De Luca	AER Counsel
T. Turner	AER Staff
A. Shukalkina	AER Staff
W. Handayani	AER Staff
E. McKellar	AER Staff
C. Ross	For Compliance and
K. Dumanovski	Liability Management
H. Gorman	For Requesters
A. Harvie	
A. Vidal, CSR(A)	Official Court Reporter

(PROCEEDINGS COMMENCED AT 1:02 PM)

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

MS. TURNER: Yes.

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

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

MS. CHIASSON: Okay. Thank you, Madam Chair.

Alberta Energy Regulator Panel Questions the Compliance and Liability Management Counsel (Mr. Dumanovski and Ms. Ross)

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

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

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

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

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

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

MS. TURNER: Actually, his --

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

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

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

THE CHAIR: Mr. Vidal.

MR. DUMANOVSKI: Sorry?

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

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

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

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

MR. DUMANOVSKI: The deference.

THE COURT REPORTER: -- requirements that the Courts have set because the other test is correctness. And I think that would apply -- [hold on. My screen moved]. And I think that would apply for questions that relate to interpretations to --

And then it started cutting out.

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

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

THE CHAIR: Thank you, Ms. Chiasson.

Please, Commissioner Stock.

MR. STOCK: Thank you, Madam Chair.

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

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

Q Do you have any authority to that view?

A Sorry?

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

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

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

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

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

Q Thank you.

MR. STOCK: Thank you, Madam Chair.

THE CHAIR: Thank you, Commissioner Stock.

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

MR. STOCK: No.

THE CHAIR: -- Mr. Stock?

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

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

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

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

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

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

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

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

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

THE CHAIR: Please proceed.

Reply Submissions by The Requesters

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

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

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

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

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

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

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

With respect to this being a de novo hearing, I cannot believe we are still having this discussion. Paragraph 47 of CLM's brief provides: (as read)

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

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

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

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

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

> For over a year now, we have said the central issue is the statute which reads at Section 106(1) -- and I'm having to read it again because I'm not sure everyone making submissions on behalf of the regulator has. 106(1): (as read)
>
> Where a licencee, approval holder, or working interest participant contravenes or fails to

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

> Were directly or indirectly in control of the licencee, approval holder, or working interest participant at the time of the contravention.

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

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

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

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

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

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

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

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

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

THE CHAIR: Thank you, Mr. Gorman.

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

MS. CHIASSON: None for me.

THE CHAIR: I have no further questions.

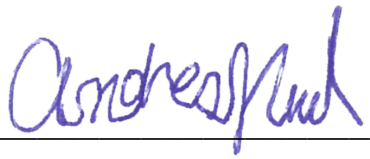
If there are no other matters, thank you very much for participating in this hearing. The panel will review the evidence and the submissions of the parties and make its decision on Proceeding 400 in due course. The panel will prepare and issue a decision when the decision is ready. Each of the parties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

PROCEEDINGS CONCLUDED

CERTIFICATE OF TRANSCRIPT:

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

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



Andres Vidal, CSR(A)
Official Court Reporter

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