Court of Queen's Bench of Alberta

Citation: Alberta Local Authorities Reciprocal Insurance Exchange v. Alberta Beach, 2017 ABQB 560

Date
Docket: 1603 13949
Registry: Edmonton

Between:

Alberta Local Authorities Reciprocal Insurance Exchange

Applicant

- and -

Alberta Beach, Alberta Capital Region Wastewater Commission, Alberta Municipal Health and Safety Association, Alberta Recreation & Parks Association

Respondents

Reasons for Decision of the Associate Chief Justice J.D. Rooke

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I. Introduction

[1] This is an application for advice and direction under s. 43(1) of the *Alberta Trustee Act*, R.S.A. 2000 c.T-8 ("*Trustee Act*") for a final distribution Order of net assets belonging to the Applicant, the Alberta Local Authorities Reciprocal Insurance Exchange (the "Exchange"). The distribution Order must set out a prescribed calculation method for dividing the assets amongst the many subscribers ("Subscribers") to the Exchange.

[2] There are approximately 500 Subscribers to the Exchange. The Respondent, Strathcona County; and the Respondents: Battle River Regional Division No. 31; Buffalo Trail Public Schools Regional Division No. 28; Chinook's Edge School Division No. 73; Fort Vermillion School Division No. 52; Golden Hills School Division No. 75; Palliser Regional Division No.

26; Peace River School Division No. 10; Peace Wapiti School Division No. 76; Prairie Rose School Division No. 8; St. Paul Education Region Division No. 1; Sturgeon School Division No. 24; and Wolf Creek School Division No. 72 ("Battle River *et al.*"); are some of the Subscribers to the Exchange.

[3] Having decided to cease operations, the Exchange obtained approval from the Minister of Finance for voluntary liquidation and dissolution of its net assets. The Exchange also retained an independent forensic accountant expert from MNP LLP, to assist in the distribution of its net assets, which total approximately $13.5 million (MNP Report at 8, 10).

[4] MNP issued a report ("MNP Report") to the Exchange outlining three possible calculation methods for distributing its net assets: the Base Calculation, the Capital Calculation and the Comprehensive Calculation. Applying each calculation method yields different results for Subscribers (MNP Report at 31-34).

[5] MNP recommended the Comprehensive Calculation, the only calculation method taking into account all of the activities of the Exchange, as the appropriate method of distributing the net assets of the Exchange. The Applicant and Respondents, Battle River *et al.* agreed with MNP. The Respondent, Strathcona County, disagreed, and submitted that the Capital Calculation is the appropriate calculation method for distributing the net assets of the Exchange (MNP Report at 11, 35; Applicant Brief at para. 25; Respondent, Strathcona County Brief at paras. 1, 28; Respondents, Battle River *et al.* Brief at para. 34).

[6] The ultimate issue to be decided by this Court is: what is the appropriate calculation method for distributing the Applicant's net assets to Subscribers?

[7] The only evidence before the Court is affidavits filed by the Exchange. None of the evidence has been tested or contradicted; but none of the underlying facts are in dispute. No party could locate any precedent (binding or otherwise) for the voluntary dissolution of an insurance exchange in Canada. Nor could MNP (MNP Report at 34).

[8] In making a determination as to the appropriate calculation method, the Court must consider: the agreements entered into by the parties, their intentions and actions, and the context in which the parties operated; and a number of sub-issues in contract law and trust law. The Court must not be driven by end results, but must give consideration to what is fair and reasonable in all the circumstances. Included within the circumstances to be considered by the Court are: the fact that the operations of the Exchange exceeded the terms of the agreements that were entered into by the parties, with the full intention and knowledge of the parties, and without objection from the parties throughout the many year operations of the Exchange; and the recognition that the net assets of the Exchange that remain to be distributed amongst Subscribers arose primarily from interest earnings on Subscribers' Capital funds payments and underwriting surpluses.

II. Agreed Facts

The Purpose of the Exchange & Delegation of Powers

[9] The Exchange was created in 1990 for the purpose of pooling risk, through reciprocal contracts of indemnity (inter-insurance) amongst Subscribers belonging to three Member Associations ("Members"): the Alberta Urban Municipalities Association ("AUMA"), the

Alberta Association of Municipal Districts and Counties ("AAMDC") and the Alberta School Trustee's Association (now the Alberta School Boards Association, "ASTA/ASBA"). Upon forming the Exchange, the Members created an Alberta Local Authorities Reciprocal Insurance Exchange Agreement ("Subscribers Agreement") and appointed board members ("Advisory Board") to instruct a Power of Attorney ("Attorney") to act on behalf of the Exchange in accordance with a Power of Attorney instrument ("Power of Attorney instrument") (MNP Report at 6; Applicant Brief at para. 6; Articles 1.14, 2.02, 3.01, 5.02).

[10] All business for the Exchange was conducted through the Attorney. Pursuant to Article 5.02 of the Subscribers Agreement, the Attorney was empowered to "do all things necessary and proper in order to facilitate the operations of the Exchange and the carrying out of the terms of the [Subscribers] Agreement." All parties agreed that the Attorney is a trustee with respect to assets held by the Exchange for Subscribers (Applicant Brief at para. 11; Respondent, Strathcona County Brief at para. 11).

[11] In accordance with Article 3.19 of the Subscribers Agreement, the decisions of the Advisory Board bound Subscribers. Pursuant to Article 3.20 of the Subscribers Agreement, members of the Advisory Board were to "(a) [a]ct in good faith, with a view of the best interests of the Subscribers; and (b) [e]xercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

[12] The Advisory Board had "absolute discretion" to "do any and every act and thing necessary, proper, convenient or incidental" to accomplish the purposes of the Exchange (Article 2.02). The Advisory Board was empowered to "give any approvals and to make any decisions and determinations required or permitted to be given or made by the Subscribers with respect to the Exchange in any matter arising under or by virtue of [the Subscribers] Agreement..." (Article 3.02).

[13] The Advisory Board was required to hold regular meetings (Article 3.12), to give notice of those meetings (with an agenda) to members (Articles 3.14-3.15), and to keep and distribute to members minutes of those meetings (Article 3.11). Quorum was constituted by all members being present (Article 3.18). Members could add agenda items to the meetings (Article 3.15) for voting.

[14] The Advisory Board was also empowered to call Subscribers Meetings "from time to time", with advance notice and agendas (Article 7.01, 7.03-7.04). Subscribers could add matters to the agenda (Article 7.04). Unless all members consented, no vote could occur on matters that were not on the agenda (Articles 7.05-7.06).

[15] The Advisory Board was expressly empowered to approve amendments or modifications to the Subscribers Agreement (Article 1.08). However, no amendments or modifications to the Subscribers Agreement were ever written (MNP Report at 12).

[16] The Subscribers Agreement contained provisions for a basic ("Base") insurance operation but did not contain provisions for more complex operations of the Exchange, involving the collection of Capital funds and the facilitation of excess insurance coverage under Joint Venture Agreements ("JVAs"). Both former and current managers of the Exchange understood that the Subscribers Agreement was silent on many of the actual activities of the Exchange. Nonetheless, operations of the Exchange were conducted intentionally and with full consent of the Advisory Board (MNP Report at 10, 35).

Base Operations

[17] Over 500 Subscribers joined the Exchange between 1990 and 2002. Each new Subscriber to the Exchange was required to apply; and upon joining, to sign the Subscribers Agreement, appoint the Attorney to act on its behalf, and pay a Base premium (Article 6.01; MNP Report at 10).

[18] Subscribers continued to be held liable for claims arising during the period of time the Member was a Subscriber, unless arrangements were made with the Advisory Board to buy out any such future liabilities (Articles 6.02-6.03). Member subscription termination was allowed for failure to pay any deposit, premium or additional or other assessment when due (Articles 6.02, 8.05).

[19] Base insurance coverage for losses up to $10,000.00 was provided through the Exchange. Base premiums were assessed by the Advisory Board annually for each Subscriber according to risk (Articles 3.02, 8.04). The Advisory Board was specifically empowered by the Subscribers Agreement to determine: premiums payable by categories of Subscribers in accordance with the terms set out in the Reciprocal Levy Allocation Plan; and additional assessments based on the actual loss experience of individual Subscribers (Articles 8.03-8.04). Article 8.06 of the Subscribers Agreement also empowered the Advisory Board to apply any accumulation of excess funds (in an amount greater than those required to meet the obligations of the Exchange in respect of claims arising in any policy year) to reduce the premium that would otherwise be charged in subsequent policy years. The intention was to set the Base premiums at a break-even level with the Base claims for all Subscribers, such that no excess accumulation of funds would arise. However in several years of its operations, the Exchange operated at a loss (MNP Report at 27-28).

Capital Funds

[20] In order to increase its equity to establish greater Base coverage for losses up to $1 million, additional "Capital funds" were also collected for the Exchange between 1990 and 1995 from some Subscribers. Capital fund payments varied amongst Subscribers and were assessed by the Advisory Board, not according to risk, but according to the difference between Subscribers' pre-Exchange (1987) insurance rates and their insurance rates under the Exchange in the current year. The Advisory Board did not want to assess rates that were higher than what Subscribers were paying for private insurance prior to joining the Exchange (MNP Report at 6-7, 27-28).

[21] Additional Base coverage for losses up to $1 million was never provided to Subscribers of the Exchange. Instead, the Capital funds that had been initially collected for this purpose, were utilized for another purpose – to cover Base operational losses of the Exchange (MNP Report at 6-7, 27-28).

Joint Venture Agreements

[22] Through the Attorney, additional/excess insurance coverage (exceeding $10,000.00 in losses) was also arranged for Subscribers of the Exchange through Joint Venture Agreements ("JVAs") with private insurance providers or brokers (Preamble, Power of Attorney instrument).

This additional/excess coverage was optional and varied amongst Subscribers (MNP Report at 6-7).

[23] The JVAs allowed for retrospective adjustments (refunds or charges) to Subscribers through the Exchange based on Subscribers' claims experiences. The JVAs required some or all Subscribers to pay additional charges almost every year the Exchange operated.

[24] The JVAs also paid dividends to Subscribers. On behalf of Subscribers, the Attorney paid excess coverage levies and charges, and collected refunds and dividends from JVAs, tracking these monies to and from individual Subscribers' accounts (MNP Report at 6-7, 27).

Accounting

[25] The Attorney was to keep "proper and complete books, records and accounts … in conformity with generally accepted accounting principles and the Insurance Act" (Article 4.02). Individual Member accounts were to be kept (Article 4.03); and annual reporting was to be accounted to each Subscriber, including summaries of premiums and claims paid during the year, and "[a] statement of the financial position of the Exchange at the end of such year" (Article 4.04). While the Subscribers Agreement contemplated that accounts be maintained for each Member, the Attorney maintained a practice of utilizing worksheets to track each Subscriber's premiums, claims and adjustments on an individual basis, as opposed to a Member basis (MNP Report at 15-26).

[26] The Attorney was required, by s. 1 of the Power of Attorney instrument to maintain a single trust account into which all funds were to be deposited and distributed. The Agreement contemplated the use of more than one bank account to accomplish its purpose (Article 4.07). Throughout the operation of the Exchange, the Attorney used two bank accounts: a general bank account and an investment account. Funds were transferred freely between the two accounts, as required for cash flow. All funds that came to the Exchange, including Base premiums, Capital funds, JVA refunds and dividends came into these two accounts. All funds that came out of the Exchange, including Base claims and JVA charges came out of these two accounts (MNP Report at 20-26).

[27] The Attorney prepared an annual Statement of Participation and Summary of Deposits Made for each individual Subscriber. The Statement of Participation showed an "Annual Levy" comprised of layers of coverage, including for Base operations of the Exchange (up to $10,000 in losses) and for JVAs (exceeding $10,000 in losses). The Statement of Participation also showed the "Annual Levy Allocation" which included Capital funds collected and equity reclaimed. The Summary of Deposits Made included contributions from the "Equity Levy", "Member Organizations" and interest earnings. While the Attorney tracked dividends earned from JVAs for individual Subscribers, the Attorney did not separate premiums collected for Base operations from premiums collected for JVAs (MNP Report at 15-26).

Interest

[28] The Exchange earned significant interest on the funds contained in its investment account (totaling approximately $9 million). Some interest was also earned on funds from the Exchange's Base operations because of the time lag between collecting premiums and paying claims (MNP Report at 22-23).

[29] MNP concluded that it was not possible to determine each individual Subscriber's interest earnings. While the total interest earned for each year the Exchange operated (1990 to 2002) is available, bank statements were not available to MNP for 2002 to 2007 (MNP Report at 8, 20-26).

Termination

[30] In addition to individual Subscriber termination, the Subscribers Agreement also contemplated termination of the entire Exchange, by unanimous resolution of the Advisory Board (Article 9.01). Article 9.01(c) of the Agreement provided a basic clause for distribution of any remaining assets of the Exchange upon termination:

> Upon termination, the assets of the Exchange after payment of all obligations, and after setting aside an adequate reserve for future claims, shall be returned to the current Subscribers, i.e. those who are Subscribers at the time when the termination takes place. The distribution of the net assets to each such Subscriber shall be in proportion to the amounts by which the cumulative annual premiums paid by such Subscriber to the Exchange exceed the cumulative claims paid by the Exchange to or on behalf of such Subscriber (emphasis added).

MNP Calculation Methods

[31] Upon cessation of its operations, MNP provided, as noted, three possible calculation methods of distributing the net assets of the Exchange: 1. The Base Calculation, 2. The Capital Calculation and 3. The Comprehensive Calculation (MNP Report at pp 31-35). The formulae for all three calculation methods (below) include some or all of the following variables, wherein:

A = [Base] Premiums – All premiums for <$10,000 coverage paid by Subscribers.

B = [Base] Claims – All <$10,000 claims for each Subscriber.

C = Capital Premiums – All Capital Premiums paid into the Exchange for each Subscriber.

D = Dividends and other payments from [Member] [A]ssociations for each Subscriber.

E = JVA Adjustments – These were calculated annually once all claims were closed for the year. They are calculated for each pool (i.e. AUMA, AAMDC and ASBA) in total. Amounts are then allocated to Subscribers based on their premiums paid in the year as a percent of the total premiums paid by Subscribers in the same pool multiplied by the total JVA Adjustment.

F = Distribution Assets – This represents the total dollars that are available to be distributed.

Base Calculation **[A – B (each Subscriber)]/Total of all Subscribers = % x F**

[32] The Base Calculation, as formulated by MNP, was designed to follow the literal meaning of the termination clause of the Subscribers Agreement and is determined by: taking the

cumulative total of all Base Premiums less all Base Claims paid by each Subscriber; and allocating Subscribers with a percentage of the net figure in proportion to their share. The Base Calculation does not take into account the distribution of any assets remaining from the collection of Capital funds, or from the facilitation of JVAs. The termination clause in the Subscribers Agreement does not provide any guidance on the distribution of the net assets of the Exchange when Base Claims exceed Base Premiums. Indeed, upon a strict application of the Base Calculation, each Subscriber would get $*nil* if Base Premiums are exceeded by Base Claims. For all of these reasons, MNP did not recommend use of the Base Calculation to distribute the net assets of the Exchange (MNP Report at 33). All parties also agree that the Base Calculation is an inappropriate means of distributing the net assets (Applicant Brief at paras. 19-20; Respondents, Battle River *et al.* Brief at paras. 15-16).

Capital Calculation **C (each Subscriber)/Total C = % x F**

[33] The Capital Calculation, as formulated by MNP, distributes assets remaining from Capital funds only (plus interest earned thereon) and is determined by: taking the cumulative total of each Subscriber's Capital fund payments as a portion of the total Capital to be distributed; and allocating Subscribers with a percentage of the net figure in proportion to their share. The Capital Calculation does not include any assets remaining from the Exchange's Base operations or the facilitation of JVAs. As indicated (at page 33) in the MNP Report:

> [t]he Capital Calculation is based on the following:
>
> - The operations of the Exchange (Base coverage to $10,000) did not generate any surplus;
> - Excess Coverage payments went to the actual Excess Insurer, and did not remain in the Exchange; and
> - Therefore, what must be left in the Exchange is capital collected from Subscribers and interest earned thereon.

Comprehensive Calculation **(A + C + D – B + E)/Total for all Subscriber = % x F for each Subscriber**

[34] The Comprehensive Calculation, as formulated by MNP, is an attempt to follow the terms of the Subscribers Agreement and the source of the remaining funds in the Exchange. The Comprehensive Calculation is determined by: taking the sum total of all of the Base Premiums, Capital Premiums and Dividends for each Subscriber; subtracting the total Base Claims; adding/subtracting the Joint Venture Agreement refunds/charges as a portion of the total for all Subscribers; and allocating Subscribers with a percentage of the net figure in proportion to their share. The Comprehensive Calculation is the only calculation that takes into account all financial activities for the Exchange (MNP Report at 33).

[35] None of MNP's calculation methods included interest on an individual Subscriber basis because, as indicated above, interest on an individual Subscriber basis was unknown and unknowable given the records available and the way the Exchange operated (MNP Report at 32-33).

[36] Also as indicated above, applying each of the calculation methods yields different results for Subscribers (MNP Report at 34). As submitted at the hearing of the application by the Respondent, Strathcona County, Strathcona County contributed $212, 125.44 in Capital funds and receives $*nil* under the Comprehensive Calculation and $343,067.92 under the Capital Calculation. Conversely, Battle River *et al.*, contributed $*nil* in Capital funds and receives $418,445.64 under the Comprehensive Calculation and $35,228.34 under the Capital Calculation. Other Subscribers also experience similar results (Transcript p. 21, li. 17-p. 26, li. 29). However, it should also be noted that Strathcona County had $336,982.96 in Base premiums, $132,887.87 in dividends, -$188,511.61 in JVA adjustments, and -$574,328.48 in claims, for a total (net result) of -$80,843.82. By way of comparison, Battle River *et al.*, had $23,617.45 in Base premiums and -$36,233.54 in claims, for a total (net result) of -$12,616.09 (MNP Report, revised Schedule 4 (filed November 9, 2016) at 3-4).

II. Issues

[37] The ultimate issue before the Court (as noted in paragraph 6) is: what is the most appropriate calculation method for distributing the net assets of the Exchange to Subscribers? In making this determination, the Court must consider: the agreements entered into by the parties, the parties' intentions and actions, and the context in which the parties operated; and decide a number of sub-issues (as submitted by the parties) in contract law and trust law, including:

A. Contract Law

1. Does the termination clause within the Subscribers Agreement apply, despite the fact that the Base operations of the Exchange did not yield net premiums?
2. If the termination clause applies, does the Comprehensive Calculation result in individual Subscribers being made responsible to pay for their own claims history, contrary to the Subscribers Agreement/the intention of the Subscribers and the law?

B. Trust Law

1. If the Comprehensive Calculation is lawful, was an automatic or resulting trust created for Capital funds under the ***Quistclose*** (as defined below) "second persons" trust principles, when the Advisory Board decided not to increase insurance coverage for the Exchange?
    a. Were the Capital funds solicited/volunteered; or premiums, levies or assessments Subscribers were contractually obligated to pay?
    b. Were the Capital funds collected for a specific purpose or a general long-term purpose?
        i. Was the Advisory Board restricted in the use of Capital funds or did the Advisory Board have discretion in the use of the Capital funds?
    c. Were the Capital funds segregated from other funds of the Exchange?

2. If a ***Quistclose*** trust arose, the Capital funds must be returned to the Subscribers *pro rata*. If no ***Quistclose*** trust arose, does the Alberta *Perpetuities Act*, R.S.A. 2000, c. P-5 [*Perpetuities Act*] or the doctrine of "monies had and received" require the Capital funds to be returned to the Subscribers *pro rata*?
3. If the *Perpetuities Act* or the doctrine of "monies had and received" does not apply, what is the appropriate method of distributing the net assets of the Exchange to Subscribers, having regard to what is fair and reasonable after considering all the circumstances?

IV. Positions of the Parties and Findings

A. Contract Law

1. Does the termination clause within the Subscribers Agreement apply despite the fact that the Base operations of the Exchange did not yield net premiums?

[38] The Alberta *Insurance Act* governs reciprocal insurance exchanges and contains provisions requiring the licensing and management of such exchanges. The parties agree that it is clear from the *Insurance Act* and case law that reciprocal insurance exchanges are contracts of insurance indemnity, wherein Subscribers exchange reciprocal contracts of inter-insurance (***Canadian Lawyers Insurance Law v. Alberta***, 1995 ABCA 222).

[39] It is trite law that a valid contract contains the following elements: offer; acceptance; consideration; mutuality of obligation; competency and capacity; and in many cases, a writing component (*The Law of Contracts*, 7th ed. (Canada Law Book: Toronto, 2017)). These elements are evidenced in the Exchange through the written Subscribers Agreement; and the actions of the Advisory Board, Attorney and the Subscribers: Article 6.01 pertains to Subscription Applications (the offer and acceptance); Articles 8.03-8.05 pertain to Determination of Levies Payable, Additional Assessments and Obligation to Pay (consideration); Article 2.02 pertains to the Purpose of the Exchange; Article 2.09 pertains to Several Liability (mutuality of obligation); and Article 3.03 pertains to the Qualification of Members of the Advisory Board (competency and capacity).

[40] While the *Insurance Act* does not provide any guidance for winding up an insurance exchange, the Subscribers Agreement for the Exchange contained a termination clause:

> 9.01(c) Upon termination, the assets of the Exchange after payment of all obligations, and after setting aside an adequate reserve for future claims, shall be returned to the current Subscribers. … The distribution of the net assets to each such Subscriber shall be in proportion to the amounts by which the cumulative annual premiums paid by such Subscriber to the Exchange exceed the cumulative claims paid by the Exchange to or on behalf of such Subscriber (emphasis added).

[41] The Respondent, Strathcona County, submitted at the hearing of the application that because the termination clause contemplated a premium surplus (i.e. that premiums paid by Subscribers would exceed claims paid by the Exchange), and because no premium surplus arose

from the Base operations of the Exchange, the termination clause does not apply (Transcript p. 33, li. 34). I disagree, for the reasons set out below:

[42] On a plain reading of the termination clause, it is clear that the Subscribers Agreement contemplated:

1. The Base operations of the Exchange.
2. That assets arising from the Exchange would remain for distribution.
3. That the net assets would not be distributed until all obligations were paid and an adequate reserve was set aside for future claims.
4. That the net assets would be returned to the current Subscribers – the Subscribers who were members of the Exchange at the time of the termination.
5. That the distribution of the net assets to each Subscriber would be in proportion to the amount by which the cumulative annual premiums paid by each Subscriber to the Exchange exceed the cumulative claims paid by the Exchange on behalf of such Subscriber.

The Subscribers Agreement does not define assets. The *Oxford English Dictionary* defines assets as: "[a]n item of property owned by a person or company, regarded as having value and available to meet debts, commitments, or legacies" (OED Online, Oxford University Press, June 2017 at https://en.oxforddictionaries.com/definition/asset).

[43] The parties agree that the Capital funds collected (and the interest earned on the Capital funds collected) constitute monies to be distributed amongst the Subscribers. The Capital funds (and the interest earned thereon) are assets of the Exchange. That the Exchange's operations grew to collect Capital funds and to administer JVAs, and that the net assets that remain to be distributed are largely Capital funds (and interest earned on Capital funds collected), does not mean that the termination clause does not apply.

2. If the termination clause applies, does the Comprehensive Calculation result in individual Subscribers being made responsible to pay for their own claims history, contrary to the Subscribers Agreement/the intention of the Subscribers and the law?

[44] The Respondent, Strathcona County, argued that the Comprehensive Calculation breaches the contracts of reciprocal (inter-insurance) indemnity by making Subscribers liable for their own claims history prior to the distribution of net assets (Respondent, Strathcona County Brief at 7-8). The Applicant argued that no such breach arose, as the Subscribers Agreement contemplated holding individual Subscribers accountable for their own claims history, as evidenced by Articles 3.02 and 8.04 (Additional Assessments) and the Attorney's practice of tracking individual Subscriber's premiums, loss claims and premium adjustments (Applicant Reply Brief at 1-2). The Respondents, Battle River *et al.* agreed that no such breach arose (Respondents, Battle River *et al.* Reply Brief at 1).

[45] It is well established doctrine that contracts of insurance are to be construed with regard to the intention of the parties, the terms of the contract and the context in which the terms were

agreed to (***Brissette Estate v. Westbury Life Insurance Co.***; ***Brissette Estate v. Crown Life Insurance Co.***, [1992] 3 SCR 87, 1992 CanLII 32 (SCC); ***Frenette v. Metropolitan Life Insurance Co.***, 1992 CanLII 85 (SCC), [1992] 1 S.C.R. 647 [***Frenette***]); and ***Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.***, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888. In ***Frenette***, L'Heureux-Dubé J. stated for the Court, at pages 667-668:

> In construing the terms of an insurance contract, it is now well recognized that the principles of construction which apply are the same as those generally applicable to commercial contracts . . . . Thus, should a contract need interpretation, the cardinal rule is that the intention of the parties must prevail . . . . In the search for this intention, particular consideration must be given to the terms used by the parties, the context in which they are used and finally the purpose sought by the parties in using these terms.

[46] The Applicant relied upon ***Bathgate v. National Hockey League Pension Society***, 1994 CarswellOnt 643, 110 D.L.R. (4th) 609, 16 O.R. (3d) 761 at para. 18, a decision from the Ontario Court of Appeal, to encourage this Court to carefully consider the context in this case:

> ...The basic issues raised are not susceptible to resolution by the simple application of a general principle but, rather, can only be determined following a careful consideration of the picture which emerges from the consideration of the documents and the facts which provide context for understanding the documents.

[47] The Respondent, Strathcona County, relied upon ***Sattva Capital Corp.*** v. ***Creston Moly Corp***, 2014 SCC 53 at para. 57 in cautioning this Court to refrain from deviating so far from the text of the Subscribers Agreement (in this case) as to create a new agreement:

> ... The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. ... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement...

[48] On plain reading of the termination clause, it is clear that the Subscribers Agreement contemplated consideration of individual Subscriber's claims history upon termination of the exchange, i.e. that the distribution of the net assets to each Subscriber would be in proportion to the amount by which the cumulative annual premiums paid by each Subscriber to the Exchange exceed the cumulative claims paid by the Exchange on behalf of such Subscriber. The Comprehensive Calculation includes this consideration by taking the sum total of the Base Premiums, Capital Premiums/Funds and Dividends for each Subscriber; subtracting the total Base Claims; and adding/subtracting the Joint Venture Agreement refunds/payment as a portion of the total for all Subscribers. Each Subscriber is then allocated a percentage of the net figure in proportion to their share. That individual Subscribers would be subjected to additional assessments based on their individual claims experience (as provided for in Article 8.04), and as evidenced by the Attorney's practice of tracking individual Subscriber's premiums, loss claims and premium adjustments supports this interpretation.

[49] The uncontradicted evidence before the Court is that the Subscribers knew the terms of the Agreement (including the termination clause) upon application, acceptance and joining the Exchange. Over the seven years that the Exchange operated (from 1995 to 2002), there was no

evidence to suggest that any Subscriber at any time acted to amend the termination clause in the Subscribers Agreement or any other terms in that Agreement. Indeed, it is only upon this application to the Court (15 years later) that Strathcona County has come forward and objected to the actions of the Advisory Board. Thus, I find that the parties intended to be accountable for their claims experience upon termination of the Exchange.

[50] As was simply stated by the Respondents, Battle River *et al.*, at page 1 of their Reply Brief:

> The Subscribers were free to agree to any method of distributing a surplus. In this case, the Subscribers chose to take into account the cumulative claims paid out to each Subscriber. … That termination provision was included despite the general obligation of the Subscribers to indemnify each other. There is nothing wrong in principle with the Subscribers agreeing to this type of distribution and the Court attempting to give effect to it.

Taking into account the text of the Subscribers Agreement (including the termination clause) and the context in which the parties continued to act, I agree that the Comprehensive Calculation accounts for Subscribers claims history upon termination of the Exchange. In the absence of any timely objection from Subscribers, I must conclude that this result (to account for Subscribers' claims history upon termination of the Exchange) was intentional; and in these circumstances, is not contrary to law. In the absence of some other valid legal reason (such as a trust), the Court cannot ignore the intention of the Subscribers or the termination clause as written in the Subscribers Agreement.

B. Trust Law

1. If the Comprehensive Calculation is lawful, was an automatic or resulting trust created for Capital funds under the ***Quistclose*** "second persons" trust principles, when the Advisory Board decided not to increase insurance coverage for the Exchange?

[51] Section 1 of the *Trustee Act* defines a trustee as arising by "construction or implication of law as well as an express trustee." Creation of an express trust requires certainty of intention, subject matter and object (***Century Services Inc.*** **v.** ***Canada (Attorney General)***, [2010] 3 SCR 379, 2010 SCC 60). The Applicant cited ***Waters' Law of Trusts in Canada*** (in turn, citing G.W.Keeton and L.A. Sheridan, *The Law of Trusts*, 10th ed. (London: Barry Rose Law Publishers, 1993) at 3) for the commonly held understanding of a trust relationship as:

> …the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust (Applicant Brief at 6).

See also ***Valard Construction Ltd*** **v.** ***Bird Construction Company***, 2016 ABCA 249 (at footnote reference 44), citing Waters and other authorities in explaining a trust. I agree with the parties that the Attorney is a trustee with respect to assets held by the Exchange, with the Subscribers as beneficiaries.

[52] The Respondent, Strathcona County, argued that all of the necessary elements of a general trust (certainty of intention, subject matter and object) and of a "second persons" ***Quistclose*** trust existed with respect to the collection of the Capital funds (Respondent, Strathcona County Brief at 8-9). The name ***Quistclose*** trust dates back to the House of Lords decision in ***Barclays Bank Ltd. v. Quistclose Investments Ltd.*** [1970] AC 567 (***Quistclose***). The Alberta Court of Appeal in ***Carevest Capital Inc. v. Leduc (County)***, 2012 ABCA 161 at para. 11 (***Carevest***), indicated generally, that a ***Quistclose*** trust arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose. At paragraph 13 in ***Carevest***, the Court of Appeal did not find it necessary to consider whether a ***Quistclose*** trust arose because an express trust existed. The concept of ***Quistclose*** trusts have also been considered in bankruptcy cases in Alberta in ***National Foundation for Hepatitis C (Bankrupt) v. GWE Group Inc.***, (1999) 239 A.R. 268 (Reg.), ***Southway Transport Ltd. v. Alberta Re-Tech (1995) Ltd.***, (2000) 1999 ABQB 430 (CanLII), ***Northern Alberta Nitrogen Ltd. (Bankrupt)***, Edmonton Bkcy 03-73129, May 29, 2000, ***Re Li (Bankrupt)***, 2000 ABQB 719, and ***Reed v. Toronto-Dominion Bank, Re Bohnet (Bankrupt)***, 2002 ABQB 300, 2003 ABQB 240.)

[53] The test for a ***Quistclose*** trust, as provided by the Respondent, Strathcona County, referring to ***Re Westar Mining Ltd.***, 2001 BCSC 618 at para.45 (upheld on appeal at 2003 BCCA 11) (***Westar Mining***), is:

> (1) The essential feature of the ***Quistclose*** analysis is the existence of a primary purpose trust, together with a secondary "persons" trust.
> (2) The primary purpose trust must be clearly intended and expressed. It appears that a common intention is required on the part of both the transferor and the transferee (i.e. the settlor and the trustee). This factor may appear to be at odds with orthodox trusts theory, where the intended trustee on a transfer to him of property cannot have any standing to establish the trust. There is no requirement that the indirect "beneficiaries" of the purpose trust share this common intention, nor, it is suggested, that they have any knowledge of the existence of the trust, before the trust becomes effective to bind the trustee.
> (3) The secondary trust is an automatic resulting trust. In that limited sense only can it also be characterised as a constructive trust. It does not depend for its existence on any expression of intention to establish it.
> (4) The primary purpose trust comes to an end once the expressed purpose is performed. The secondary trust will end at this point also, although if a surplus of property remains in the hands of the trustee that secondary trust will continue to bite on that surplus.
> (5) The primary purpose trust also comes to an end if the expressed purpose is impossible to perform. At this point the secondary trust comes into effect.
> (6) The analysis can be applied to any case where the money or other property is transferred for a specific purpose only, and not as an accumulation to the property of the transferee. The specific purpose will often be the payment of a debt owed to a third party (the third party becoming the indirect "beneficiary" of a purpose trust), but this is apparently not necessary.
> (7) A variety of equitable rights and obligations arise in respect of the primary purpose trust:
>
> (i) the transferor can enforce the trust, and it is suggested, restrain any breach of the trust on the part of the transferee;

(ii) the "direct" or "factual" beneficiaries can also enforce the trust, so as to acquire by the transfer of the money or property to them an absolute title, and, it is suggested, can also restrain any breach of the trust.
(iii) certain other "interested parties" might be treated as having standing also to enforce or restrain breaches, e.g. subsidiary companies where the transferee is the parent company and the transfer was made in the context of a corporate salvage plan.

(8) While the primary purpose trust endures, the beneficial interest in the property remains in suspense (emphasis added) (Respondent, Strathcona County Brief at 8).

On appeal, the British Columbia Court of Appeal held at paragraph 12 in ***Westar Mining*** that "***Quistclose*** does not modify the certainty of intention, subject matter, and object required of trusts generally" (emphasis added). No party disputes this articulation of the test for a ***Quistclose*** trust; or the subject matter or the object of the trust in the case at bar.

[54] In applying the test as enunciated in ***Westar Mining***, the Respondent, Strathcona County, argued that the objects of the trust were clear: the Capital funds were solicited for the express purpose of building a larger reserve fund that would permit a higher coverage of Base insurance ($1 million instead of $10,000.00). This purpose was ultimately abandoned. Thus, according to the Respondent, Strathcona County, intention (to hold Capital funds in trust), subject matter (the deposits of Capital funds), and object (to accumulate a reserve for $1 million in Base coverage) were all established to create a primary purpose trust. When the objective primary purpose was abandoned, the ***Quistclose*** trust operated in favour of the deposit holders (i.e. the Subscribers who paid Capital funds) (Respondent, Strathcona County Brief at 9).

[55] The Applicant argued that there is no evidence to support a ***Quistclose*** trust relating to the Capital funds, as the necessary elements of such a trust were not established. In particular, the Applicant relied upon case law authority to argue that there was no certainty of intention to create a mutual "second persons" trust (Applicant Reply Brief at 3-6).

a. Were the Capital funds solicited/volunteered; or premiums, levies or assessments Subscribers were contractually obligated to pay?

[56] The Applicant argued that a ***Quistclose*** trust did not arise as the primary purpose trust was not clearly intended and expressed insofar as the Capital funds were not solicited or volunteered – they were included in the premiums imposed by the Advisory Board, and Subscribers were contractually obligated to pay the premiums in accordance with Articles 8.03-8.05 of the Subscriber's Agreement (Applicant Brief at 3). The Respondent, Strathcona County, argued that the levies collected in accordance with Article 8.03 are Base premiums and that there is no evidence to suggest that they form part of the Additional Assessments referred to in Article 8.04 (Respondent, Strathcona County Further Brief at 7-8).

[57] Article 8.03 Determination of Levies Payable authorizes the Advisory Board to determine levies payable by categories of Subscribers "in accordance with the terms of the Reciprocal Levy Allocation Plan." Article 8.04(a) allows for Additional Assessments, based upon the "actual loss

experience of individual Subscribers ... based on any amounts owing to the Exchange which the Exchange is unable to collect." Article 8.04(b) states:

> In the event that a further assessment is required, the Advisory Board shall so notify each Member, setting forth the additional assessment for which each such Member is responsible, and setting out in reasonable detail the reasons for the additional assessment.

Article 8.05 sets out the obligation of each Subscriber to "pay forthwith Premium Deposit, levy or additional assessments required of them pursuant to the terms of the Agreement." Premium Deposit is defined in the Subscribers Agreement as "the amount agreed to be contributed by each Subscriber upon execution of a contract of inter-insurance" (Article 1.14(i)). Article 6.00 of the Subscribers Agreement (pertaining to Subscription) does not expressly refer to the payment of Premium Deposits, but does (in Article 6.02(a)(iii)) allow for Subscription Termination for failure to pay "any levy or other assessment promptly when due."

[58] Not all Subscribers paid Capital funds. Capital funds were determined according to the difference between Subscribers' pre-Exchange (1987) insurance rates and their insurance rates under the Exchange in the current year (MNP Report at 6-7, 27-28).

[59] I agree with the Respondent, Strathcona County that Capital funds were not initially collected as Base premiums or levies which Subscribers were obligated to pay under Article 8.03 and the Reciprocal Levy Plan. Nor were they determined based upon or the "actual loss experience of individual Subscribers" and initially collected as Additional Assessments under Article 8.04. Rather, Capital funds were assessed competitively, at a rate that was lower than what Subscribers were paying for private insurance prior to joining the Exchange (MNP Report at 6-7, 27-28). As such, the Capital funds were volunteered or solicited from Subscribers.

> b. Were the Capital funds collected for a specific purpose or a general long-term purpose?
>
> > i. Was the Advisory Board restricted in the use of the Capital funds or did the Advisory Board have discretion in the use of the Capital funds?

[60] The Applicant argued that Capital funds were collected for a general long-term purpose, as opposed to a specific purpose, contrary to the necessary elements for the operation of a ***Quistclose*** trust. The Applicant relies upon ***Ontario (Minister of Training, Colleges and Universities)*** **v.** ***Two Feathers Forest Products L.P.*** 2013 ONCA 598 [***Two Feathers***] to advance this argument (Respondent, Strathcona County Brief at 5).

[61] The issue to be determined (as enunciated at paragraph 1) in ***Two Feathers*** was:

> ... whether grant monies that were advanced by the [R]espondent, Ontario's Minister of Training Colleges and Universities (the "Ministry"), to a First Nations limited partnership in northern Ontario, but not spent before the partnership sought to dissolve ..., were subject to a "***Quistclose*** trust" for the benefit of the Ministry.

The Ontario Superior Court (2012 ONSC 5077) held that the monies were trust monies and should be paid to the Ministry. On appeal (at paragraphs 1, 39-40), the Ontario Court of Appeal reversed that decision, finding instead that the monies were debt.

[62] In reaching this conclusion, the Ontario Court of Appeal relied upon ***Cliffs Over Maple Bay Investments Ltd. (Re)***, 2011 BCCA 180 (CanLII) [***Cliffs Over Maple Bay***] which reversed a decision that had found a ***Quistclose*** trust in circumstances where funds loaned were to be used for a general, long-term purpose. In addition, the Ontario Court of Appeal held (at paragraph 39) in *Two Feathers* that a ***Quistclose*** trust also did not arise because the partnership had "significant discretion to spend the majority of the funds as long as it was for the general purpose stated" (emphasis added).

[63] While not binding, *Two Feathers* is helpful in demonstrating that, part of the determination of whether Capital funds in the case at bar were collected for a specific purpose or a general long-term purpose, may include consideration of whether or not restrictions were imposed upon the use of the subject funds. This is particularly relevant as the purported use of the Capital funds changed during the operations of the Exchange.

[64] The uncontradicted evidence is that the Advisory Board commenced the collection of Capital funds in 1992 to increase the Base coverage of the Exchange from (losses up to) $10,000.00 to $1 million. By 1995, it had "become apparent that ALARIE [the Exchange] could not reach a sufficiently large reserve base for this to occur, and the decision was made to stop collecting these amounts" (MNP Report at 6-7). The Capital funds were subsequently deposited into the investment account for the Exchange; and the Advisory Board used funds from the investment account to cover the JVA adjustments (charges) (MNP Report at 6-7, 27-28).

[65] The Applicant argued that broad authority was granted to the Attorney (under s. 1 of the Power of Attorney instrument) and the Advisory Board (under Article 2.02 and 3.02 of the Subscriber's Agreement) to the use of the Capital funds (Respondent, Strathcona County Brief at 5). The Respondent, Strathcona County, argued that the Advisory Board was restricted in the use of the Capital funds by express limitations included within Articles 2.02 and 3.02 of the Subscribers Agreement (Respondent, Strathcona County Further Brief at 8).

[66] The Preamble of the Power of Attorney instrument empowered the Attorney to arrange for additional/excess insurance coverage (exceeding $10,000.00 in losses) for Subscribers through Joint Venture Agreements ("JVAs") with private insurance providers or brokers. Section 1 of the Power of Attorney instrument, empowered the Attorney to:

> ... act on behalf of the undersigned Subscriber in its place and stead in regard to all matters involving the Exchange specifically, but without limiting the generality of the foregoing, to:... (n) Do and perform every other act and thing necessary or proper to be done in order to fully carry out and perform the terms thereof.

[67] The Advisory Board was also empowered to "do any and every act and thing necessary, proper, convenient or incidental to the accomplishment of its purposes" (Article 2.02). The Advisory Board was empowered to:

> ... give any approvals and to make any decisions and determinations required or permitted to be given or made by the Subscribers with respect to the Exchange in any matter arising under or by virtue of [the] Agreement, including but not limited to...

(a) Setting the rates, annual levy and/or additional assessments required of Subscribers pursuant to the provisions of this Agreement, ...

(b) Appointment of and giving directions to the Attorney; ... (Article 3.02 emphasis added).

[68] On plain reading, and in the absence of any evidence to indicate that any Subscriber objected to the actions of the Attorney or the Advisory Board during the operations of the Exchange, as being outside the delegated authority, or contrary to the best interests of the Subscribers, or to the standard of care that a reasonably prudent person would exercise in the circumstances, I find that the terms of the Power of Attorney instrument and the Subscribers Agreement were sufficiently broad to authorize the Attorney and the Advisory Board to exercise discretion in the use of the Capital funds. While I agree that the Capital funds were initially collected with the intention of building a large reserve fund to permit the Exchange to offer a higher coverage of base insurance, I find that the Advisory Board, with the full authority of the Subscribers, exercised discretion to change the use the Capital funds to cover losses of the Exchange, rather than subject Subscribers to additional assessments year after year. As in ***Cliffs Over Maple Bay***, this finding that the Advisory Board had broad use of the funds leads to the conclusion that the funds were not collected for a specific purpose, but for a general long-term purpose of funding the Exchange; there was no certainty of intention on the part of the parties to create an express primary purpose trust and accordingly, no ***Quistclose*** trust arose.

c. Were the Capital funds segregated from other funds of the Exchange?

[69] The Applicant argued that, fatal to a ***Quistclose*** trust, the Attorney was not required to keep the Capital funds separate from other funds; rather, the Attorney was required by the terms of the Power of Attorney instrument (at s. 1(d)) to maintain a single trust account into which all funds were deposited and distributed (Applicant Brief at 5). On the contrary, the Respondent, Strathcona County, argued that the funds were not comingled to the exclusion of a ***Quistclose*** trust, as they were accounted for on an individual Subscriber basis (Transcript p. 37, li.14-30).

[70] The absence of an obligation to segregate funds is fatal to the existence of a ***Quistclose*** trust (***Re Jameson House, Bank of Montreal*** **v.** ***British Columbia (Milk Marketing Board)*** 1994 CarswellBC 334 at paras. 10-13). Having already found that no ***Quistclose*** trust arose, I need not consider whether the Capital funds were segregated from other funds of the Exchange.

2. If a ***Quistclose*** trust arose, the Capital funds must be returned to the Subscribers *pro rata*. If no ***Quistclose*** trust arose, does the *Perpetuities Act* or the doctrine of "monies had and received" require the Capital funds to be returned to the Subscribers *pro rata*?

[71] The Respondent, Strathcona County, submitted that, by operation of s. 20(2) of the *Perpetuities Act* and the common law doctrine of "monies had and received", the Capital funds must be utilized for the purpose in which they were received; failing which, they must be returned subject only to agreed-upon deductions (Respondent, Strathcona County Brief at 9-10). The Applicant argued that the *Perpetuities Act* does not apply because s. 20(1) of the Act must be read together with s. 20(2); and s. 20(1) of the Act clearly applies to a trust that creates "no enforceable equitable interest in a specific person", yet the trust created by the Subscriber's

Agreement has specific named beneficiaries – the Subscribers. The Applicant also argued that: the doctrine of "monies had and received" has been incorporated into the modern concept of unjust enrichment (***International Longshore & Warehouse Union Local* 502 v. *Ford***, 2016 BCCA 226); neither doctrine are of assistance as all parties agree that the assets should be returned to the Subscribers; there is no benefit to the Applicant as the Attorney holds the assets in trust for the Subscribers; and the juristic reason for the retention of benefit by the Applicant is included in the terms of the Subscribers Agreement (Applicant Brief at 6-8). The Respondents, Battle River *et al.*, argued that the "monies had and received" doctrine is subsumed in the ***Quistclose*** trust analysis; or is otherwise inapplicable because it is not unjust for the net assets to be distributed according to the Subscribers Agreement (Respondents, Battle River *et al.* Reply Brief at 4-5).

[72] Section 20(1) of the *Perpetuities Act* states:

> 20(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person
>
> (a) shall be construed as a power to appoint the income or the capital, as the case may be, and
>
> (b) is, unless the trust is created for an illegal purpose or a purpose contrary to public policy, valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.
>
> (2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended
>
> (a) within a period of 21 years, or
>
> (b) within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital, each person or that person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to the unexpended income or capital (emphasis added).

[73] I need not consider this issue. Having found that the net assets of the Exchange are being held in trust for the Subscribers and that the Capital funds were not collected for a specific purpose, the *Perpetuities Act* does not apply. Having found that the Advisory Board acted with the authority of the Subscribers to change the purpose of the use the Capital funds to cover losses of the Exchange, the "monies had and received" doctrine does not apply.

3. If the *Perpetuities Act* or the doctrine of "monies had and received" does not apply, what is the appropriate means of distributing the net assets of the Exchange to Subscribers, having regard to what is fair and reasonable after considering all the circumstances?

[74] The Applicant agreed with MNP and argued that the Comprehensive Calculation is the appropriate method of distribution as it takes into account all of the financial operations of the Exchange, remaining true to the spirit of Base operations for the Exchange, the Subscribers Agreement and the intent of the Subscribers. The Applicant argued further that the Capital Calculation ignores the termination clause in the Subscribers Agreement, in making no allowance for individual Subscriber losses in the Base operations of the Exchange (Applicant Brief at para. 22-23).

[75] The Respondents, Battle River *et al.* agreed with MNP and the Applicant that the Comprehensive Calculation is the appropriate method of distributing the remaining assets under basic contract law, as it is most consistent with the intention of the Subscribers; and is an equitable compromise between the extreme positions of the Base Calculation and the Capital Calculation. The Respondents, Battle River *et al.*, also argued that some deference is owed to the calculation method recommended by the Applicant, who operated the Exchange for 12 years; is "best positioned ... certainly better than any single Subscriber" to determine what is in the best interests of all Subscribers; and obligated by the terms of the Subscribers Agreement to act in the best interests of the Subscribers. The Respondents, Battle River *et al.* argued that some deference is also owed to MNP, who, "in addition to its normal expertise on finances and accounting, gained significant experience in the course of preparing its recommendation" (***Barrie Public Utilities* v. *Canadian Cable Television Assn.***, 2003 SCC 28 at para. 16; ***Dr. Q.* v. *College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at paras. 28-29) (Respondents, Battle River *et al.* Brief at para. 26-33).

[76] The Respondent, Strathcona County, objected to the calculation method recommended by MNP and the Applicant, submitting instead that the Capital Calculation is the most appropriate method of distribution. In addition to the contract law and trust law arguments considered above, the Respondent, Strathcona County, argued that the Comprehensive Calculation is an incorrect method of distributing the net assets of the Exchange because it accounts for interest upon the distribution of the net assets to all Subscribers, and "recants on Statements of Deposit which shows that interest was credited to [individual] subscribers who paid Capital Premiums." Moreover, the Respondent, Strathcona County, argued that the Comprehensive Calculation exaggerates the losses of some Subscribers, including Strathcona County, who made large Capital fund contributions but whose claims losses exceeded the premiums paid, and as such, receive $*nil*. Conversely, the Respondent, Strathcona County, argued that the Capital Calculation is the fairest distribution of the net assets of the Exchange because it allocates interest earned on the net assets to every Subscriber that contributed Capital funds. Since most of the Subscribers contributed Capital funds, this is the wider and flatter distribution of the net assets of the Exchange (Respondent, Strathcona County Further Brief at 1-4).

The Base Calculation is Not an Appropriate Calculation

[77] The Base Calculation only contemplates the Base operations of the Exchange. Yet the actual and intentional activities of the Advisory Board exceeded Base operations of the

Exchange and included the acquisition of Capital premiums (and interest earned thereon) and the brokering of JVAs. I find that the Base Calculation does not account for these activities/funds.

[78] Nor does the Base Calculation account for the situation in which the Exchange operated – at a loss, wherein Base claims exceeded Base premiums. Strict application of the Base Calculation would result in most Subscribers whose Base claims exceeded their Base premiums receiving $*nil*; and few Subscribers whose Base premiums exceeded their Base claims receiving millions.

[79] For all of these reasons, I agree with all the parties and MNP that the Base Calculation is not an appropriate method of distributing the net assets of the Exchange.

The Capital Calculation is Not an Appropriate Calculation

[80] The Capital Calculation is an attempt to follow the source of the remaining assets. It distributes assets remaining from the Capital Premiums only (plus interest earned thereon). It ignores the termination clause contained within Article 9.01 of the Subscribers' Agreement. In the absence of any action to amend the Subscribers Agreement on any party, and in the absence of the operation of a specific trust, such as a ***Quistclose*** "second persons" trust, the Court cannot look past the wording of the Subscribers Agreement, the intention of the Subscribers, and the actions of the parties to create a new obligation. As such, I find that the Capital Calculation is not an appropriate method of distributing the net assets of the Exchange.

[81] The Court cannot be driven by end results. Rather, the Court must, first and foremost: consider and apply the law to the evidence, including the wording of the Subscribers Agreement, the intention of the Subscribers, and the context within which the parties acted; before determining what is fair and reasonable in all the circumstances, including considering the allocation of interest and the effect of the distribution of the net assets of the Exchange on individual Subscribers.

[82] It is true that the Capital Calculation may be a wider and flatter distribution of the net assets of the Exchange overall. It is also true that the Comprehensive Calculation results in some parties, including the Respondent, Strathcona County, receiving $*nil*. While this is an unfortunate result for those parties, I find that this result is what was intended and what was contractually agreed upon. In the absence of any evidence to modify the terms of the Subscribers Agreement, it is the lawful result.

The Comprehensive Calculation is the Appropriate Calculation

[83] Thus, having determined that the Base Calculation and the Capital Calculation are not appropriate methods of distributing the net assets of the Exchange, I agree with the Applicant and the Respondents, Battle River *et al.*, that the Comprehensive Calculation is the most appropriate method of distribution. The Comprehensive Calculation reconciles both the Base Calculation and the Capital Calculation insofar as it is an attempt to follow the wording of the Subscribers Agreement and the source of the remaining assets. I find that the Comprehensive Calculation is the only calculation that takes into account all of the financial activities of the Exchange, following the intention of the Subscribers, and the actions of the Attorney and the Advisory Board acting with the full authority of the Subscribers.

[84] That the Comprehensive Calculation method of distributing the net assets of the Exchange results in some parties, including the Respondent, Strathcona County, receiving $*nil* is not an unfair or unreasonable result in law, or otherwise, considering: first, that the parties did not object to the actions of the Advisory Board at any time during the operation of the Exchange – it was only upon this application that the Respondent, Strathcona County, objected; second, that the parties who will receive funds from the distribution of the net assets of the Exchange did not experience significant claims losses; third, that the Comprehensive Calculation was the method recommended by the Applicant who operated the Exchange for 12 years and who owed a duty of care to act in the Subscribers best interests; and fourth, that the Comprehensive Calculation was recommended by an expert, who gained extensive insight into the actual operations of the Exchange.

V. Summary of Findings

[85] Following the above, I have found:

A. Contract Law

1. The termination clause within the Subscribers Agreement does apply (despite the fact that the Base operations of the Exchange did not yield net premiums) because the termination clause refers to (but does not define) net assets of the Exchange and the Exchange accumulated significant net assets to be distributed amongst Subscribers.
2. The Comprehensive Calculation does account for individual Subscribers' claims history upon termination of the Exchange – this is consistent with the intention of the Subscribers and the actions of the Advisory Board and their instructions to the Attorney; and is not contrary to law.

B. Trust Law

1. An automatic or resulting trust was not created for Capital funds under the ***Quistclose*** "second persons" trust principles, when the Advisory Board decided not to increase insurance coverage for the Exchange.
    a. The Capital funds were solicited/volunteered. They were not collected as or premiums, levies or assessments Subscribers were contractually obligated to pay.
    b. The Capital funds were collected for a general long-term purpose (as opposed to a specific purpose). This is fatal to the existence of ***Quistclose*** trust.
        i. The Advisory Board was not restricted in the use of Capital funds; and exercised broad discretion in the use of the Capital funds.
    c. I need not consider whether the Capital funds were segregated from other funds of the Exchange, having

found that the Capital funds were collected for a general long-term purpose.

2. Having found that the net assets of the Exchange are being held in trust for the Subscribers and that the Capital funds were not collected for a specific purpose, the *Perpetuities Act* does not apply. Having found that the Advisory Board acted with the authority of the Subscribers to change the purpose of the use the Capital funds to cover losses of the Exchange, the "monies had and received" doctrine does not apply.
3. The Comprehensive Calculation is the only calculation that takes into account all of the financial activities of the Exchange, following the intention of the Subscribers and the actions of the Attorney and the Advisory Board, acting with the full authority of the Subscribers. The Comprehensive Calculation is therefore the appropriate method of distributing the net assets of the Exchange to Subscribers, having regard to what is fair and reasonable after considering all the circumstances.

VI. Conclusion

[86] In the end, after considering the positions of the parties and the uncontradicted evidence, and having regard to the law and what is fair and reasonable in all the circumstances, I direct that the net assets of the Exchange be distributed in accordance with the Comprehensive Calculation, following which, the Exchange may be dissolved.

VII. Costs

[87] I agree with the parties that the issues to be determined arose due to the failure of the Subscribers Agreement to sufficiently define the operations of the Exchange over the course of two decades, through an amendment to the Subscribers Agreement or other written documentation (Applicant Reply Brief at 9; Respondent, Strathcona County Brief at para. 30). It has therefore been necessary for the parties to come to Court to resolve these issues to terminate the Exchange. Accordingly, costs on a solicitor-client basis are to be paid to the Applicant and the Respondents, Strathcona County and Battle River *et al.*, from the net assets to be distributed from the Exchange, in accordance with the following provisos (as included in the Applicant's Reply Brief):

a. the costs payable are reasonable solicitor-client costs of the proceedings up to and including the release of this decision and the reasonable costs of settling of any Order arising from this decision;
b. no Order for costs arises from this decision in relation to any further proceedings in this action, in this Court or other Courts; and

c. any dispute with respect to the reasonableness of costs may be referred to the Assessment Officer pursuant to Part 10 of the Alberta *Rules of Court*.

Heard on the 15th day of March 2017.
Dated at the City of Edmonton, Alberta this 15th day of September 2017.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

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P Buijs
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