IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Buchan v. Moss Management Inc.,***
2008 BCSC 285

Date: 20080306
Docket: C945937
Registry: Vancouver

Between:

Steven Thomas Buchan and
Prospectors Airways Consolidated Ltd.

Plaintiffs

And

Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards, TVI Pacific Inc. (formerly known as TVI Copper Inc.), Span Corp. Limited, Hydrocarbon Limited, Theodore Max Pandt, Durell Finance Ltd., Palmanvon J. Webster, Tetra World Investments Ltd., Argus Worldwide Holdings Ltd., James D. Clucas, Gordon J. Fretwell, A. Edward McMullin and 331609 B.C. Ltd.

Defendants

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Plaintiffs	R. L. Basham, Q.C. (for a portion of the trial) and T. W. T. Yu
Counsel for the Defendants, Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards and 331609 B.C. Ltd.	T. J. Delaney and S. W. K. Urquhart
Counsel for the Defendant, TVI Pacific Inc. (aka TVI Copper Inc.)	R. Pelletier and P. N. Spinks
Date and Place of Trial/Hearing:	9-11, 15-19, 22-25, 29-31 October, 1-2 and 5-6 November and 14-18 January 2007 Vancouver, B.C.

I Overview

[1] The abandoned mining works at Anyox lie north and slightly east of Prince Rupert on the shores of Granby Bay, in Observatory Inlet, on the west coast of British Columbia.

[2] Granby Consolidated Mining, Smelting and Power Company Ltd. ("Granby") operated the mine (which involved several ore zones, including Hidden Creek and Bonanza) between 1915 and 1935.

[3] Mine production ranged from 1000 to 5000 tons per day, and totalled approximately 24 million tons at a grade of 1.57% copper during the period of operations.

[4] The Great Depression, and falling copper prices, led to the closure of the mine in the mid-1930s. During or about 1936, Granby sold the entire operation, which then included a mill, smelter, town site, hydroelectric generating system and a deep sea port facility, to The Consolidated Mining and Smelting Company of Canada (since 1966, "Cominco").

[5] The mine works and town at Anyox lay virtually abandoned after 1936; much of the smelter facility and equipment was stripped by Cominco and relocated to its Trail operations in the West Kootenays.

[6] Miners and their investors, however, are an optimistic lot and every tick up in the price of base and precious metals seems to encourage the more adventuresome among them to revisit old mines and pick over the remains.

[7] That is what happened here with Anyox in the mid-1980s when some of the players in this commercial litigation dreamed of reopening the Anyox mine, reviving the nearby town site of Kitsault (of much more recent vintage than Anyox) and enjoying the fruits of the new mega project.

[8] One of the defendants called the grandiose vision a completely "blue sky" scenario. Unfortunately an awful lot of clouds have marred that sky-scape. The plaintiff, Steven Thomas Buchan, essentially alleges that the defendants have defrauded him of his interests in the Anyox-Kitsault area through a series of complex corporate machinations.

[9] In the more colourful language of the early days of British Columbia mining, the plaintiffs effectively say that the defendants are nothing more than claim jumpers.

II The Parties

[10] I begin by clarifying the remaining parties to the litigation as there have been a number of deletions from the style of cause.

[11] First, the claims by the plaintiff, Prospectors Airways Consolidated Ltd., have been dismissed by the order of Justice Neilson made 24 March 2004.

[12] Second, the defendants, Span Corp. Limited, Hydrocarbon Limited, Theodore Max Pandt, Durell Finance Ltd., Palmanvon J. Webster, Tetra World Investments Ltd., Argus Worldwide Holdings Ltd., James D. Clucas, Gordon J. Fretwell, and A. Edward McMullin, were never served by the plaintiffs in these proceedings and no relief is sought against them.

[13] On the first day of final submissions at the conclusion of the trial, the plaintiff Buchan discontinued the proceedings against TVI Pacific Inc., formerly known as TVI Copper Inc.

[14] I turn to briefly introduce the cast of characters.

[15] Steven Thomas Buchan is a businessman who in the mid-1980s was introduced to the Anyox opportunity by his so-called mentors, Edward Chisholm and Frank Meryeth, both of whom are now deceased. Chisholm and Meryeth were apparently legends in the Canadian mining industry.

[16] Prospectors Airways Consolidated Ltd., previously Prospectors Airways Co. Ltd., before a share consolidation and before that, Timothy Mountain Explorations Ltd. ("Prospectors"), started as a private company controlled by Buchan. When it changed its name, Prospectors went public on the then Vancouver Stock Exchange.

[17] Moss Management Inc. ("Moss") is a private company, incorporated by Peter Colin Graham Richards' law firm in the fall of 1989. Control of Moss and its assets lies at the heart of this litigation.

[18] Mr. Richards is a retired lawyer and previously was a senior partner and counsel in the Vancouver law firm, Richards Buell Sutton ("RBS"). Alan Frederick Wolrige is a retired chartered accountant who was previously a principal in the accounting firm Wolrige, Mahon.

[19] TVI Pacific Inc. ("TVI") is a Calgary based company which acquired many of the assets of Moss in 1992.

[20] James Frederick Marsh was a close business associate of Mr. Buchan's. They have since parted ways. Mr. Marsh was the president and sole shareholder of Pacific Geo-Roc Explorations Ltd. ("Geo-Roc"), a company which performed exploration work and services on behalf of Prospectors. Buchan (I will use surnames frequently and mean no disrespect to the parties) claims to be beneficially entitled to 50% of the shares of Geo-Roc.

[21] Marsh was also the sole director and shareholder of 331609 B.C. Ltd. ("331"), a private company which came to hold a number of the assets which Moss eventually acquired and in which Buchan claims an interest. Buchan again maintains that he and Marsh each beneficially owned 50% of 331.

[22] Ronald Klassen is a lawyer and former colleague of Mr. Buchan's. He was a long time director of Prospectors. He and Mr. Buchan have fallen out as well.

[23] Richard Swadden is a lawyer and at material times, he was a solicitor for Prospectors and 331.

[24] Separ Limited ("Separ") is an offshore company incorporated in Anguilla. It apparently beneficially owned Moss (Richards and Wolrige executed Declarations of Trust indicating that they held their Moss shares for Separ).

[25] Separ, mysteriously, as I will relate, came to be beneficially owned in part by one Lynwood S. Bell through companies he controlled, and in part by a number of other offshore companies and individuals who did not give evidence at trial — in particular all of the named defendants who, as indicated above, were never served in these proceedings.

[26] Before I leave this section, I should describe the various "hats" which Mr. Buchan wears in this proceeding.

[27] First, of course, he advances the claims in his personal capacity. Importantly, he does not pursue derivative relief on behalf of Prospectors.

[28] Pursuant to an agreement with Mr. Marsh's Trustee in Bankruptcy made 15 December 1994 (the "Litigation Agreement"), the Trustee conveyed the "Marsh Assets" to Mr. Buchan on certain terms and conditions. The "Marsh Assets" are described so:

> (a) all manner of action or actions, cause or causes of action, at law or in equity, any and all suits, debts, liens, agreements, promises, liabilities, demands, damages, loss, cost or expense, of any nature whatsoever, known or unknown, vested or contingent, which Marsh or the Marsh Estate, or any of them, hold or own, or have at any time held or owned against the Richards Defendants, or any of them, which are based upon, or arise out of, or in connection with, any cause, matter, action or thing existing at any time before November 15,1994, or any cause, matter, action or thing done, omitted, suffered or permited [*sic*] to be done at any time before November 15,1994 relating in any way to, or connected with, or arising out of, the management agreement dated March 20,1990 among Buchan, Marsh and Moss Management Inc., the legal representation of Buchan and Marsh by Richards and Richards Buell Sutton, the transfer of the shares of 331609 B. C. Ltd. to Wolrige and the appropriation of assets and business opportunities by the Richards Defendants or any other transaction, agreement, deed, representation, warranty, covenant, undertaking, promise, act, conduct or any other matter regardless of whether any such cause, matter, action or thing done, omitted, suffered or permitted to be done was authorized, permitted, condoned or prohibited relating in any way to, connected with, or arising out of, the management agreement dated March 20,1990 among Buchan, Marsh and Moss Management Inc., the legal representation of Buchan and Marsh by Richards and Richards Buell Sutton, the transfer of the shares of 331609 B. C. Ltd. to Wolrige and the appropriation of assets and business opportunities by the Richards Defendants;
>
> (b) 18,000 common shares of Prospectors registered in the name of Marsh;
>
> (c) all the outstanding shares of 331609 B. C. Ltd, currently registered in the name of Wolrige, and the assets of such company, including 300,660 shares of Prospectors registered in the name of 331609 B. C. Ltd. and water use licences, including the licence granted per application #600434;
>
> (d) all shares of Pacific Geo-Roc Explorations Inc., a non-reporting company, the shares of which are beneficially owned by Marsh;
>
> (e) the shares, or the right to receive the shares, of Moss Management Inc. that were to be issued to Marsh in 1990;
>
> (f) all rights to realty and personalty related to the Anyox mining camp and the deep-sea port at Anyox, B. C.; and
>
> (g) three Crown-granted mineral claims known as the Redwing mine, Anyox, B.C.

[29] So Mr. Buchan stands in the shoes of Mr. Marsh to the extent that the Litigation Agreement is legally effective. (The cloud on it is the fact that Mr. Marsh was discharged from his bankruptcy two years before the agreement was executed).

III Detailed Chronology

(i) Before and Just After March 1987

[30] Buchan, according to his evidence, was encouraged by his mentors, Chisholm and Meryeth, to advance on a scheme to revive the mining operations at Anyox.

[31] To this end he began to acquire interests of various legal kinds in the immediate area.

[32] Through his company, Timothy Mountain Exploration Ltd. ("TME"), Buchan staked and acquired claims in the immediate area of Anyox, known as the Moly May and Granby Peninsula claims.

[33] Through his father and a prospector who gave evidence at trial — David Jaworsky — Buchan was able to acquire the Anyox Mill, Town and Smelter claims.

[34] This was somewhat of a coup, because these claims, overlooked by Cominco and allowed to lapse, lay in the middle of Cominco's claims in the Anyox area and their ownership gave Buchan the leverage he needed to encourage Cominco to enter into the so-called Cominco Option agreement with TME. That agreement became Prospectors' central asset when TME later went public under that name.

[35] Buchan made the most of his introduction to Cominco's Dr. W. J. Wolfe, Manager, Exploration Western Canada, at a mining convention in Toronto. He soon negotiated and executed an agreement with Cominco dated 31 March 1987.

[36] By that agreement (the "Cominco Option") Cominco and TME pooled their interests at Anyox, in the case of Cominco, numerous Crown granted claims and located claims and in the case of TME, the Anyox Mill, Town and Smelter located claims.

[37] The Cominco Option gave TME the right to acquire 40% of Cominco's claims (if exercised, Cominco would correspondingly acquire 60% of TME's claims).

[38] To earn the option, TME was required to expend $3 million in exploration work over a period of three years, including in the aggregate $1 million by 31 December 1988, $2 million by 31 December 1989 and $3 million by 31 December 1990.

[39] The Cominco Option contemplated the parties entering into the Anyox Joint Operating Agreement in the event that TME earned the option.

[40] Buchan had his start. He soon purchased the "Prospectors" name from Chisholm, renamed the original "Prospectors" "Geo-Roc" and took the Prospectors name in place of TME's. Buchan then enlisted the assistance of Marsh, who had just emerged from his first bankruptcy to head up Geo-Roc (which regrettably became the cause of Marsh's second bankruptcy, but more of that below).

[41] At trial, Buchan maintained that he and Marsh beneficially owned Geo-Roc 50/50, although he never disclosed that to Richards, Wolrige or Klassen, who, in particular, as a director of Prospectors, should have been so advised in light of Geo-Roc's extensive dealings with Prospectors.

[42] Buchan was aware of the dam constructed on the lands owned by Cominco at Anyox which had previously powered (through turbines on other lands owned by Cominco) the operations of Granby.

[43] Buchan noted that the water license which backed up the generating capacity was available and Geo-Roc through Marsh, in November 1987, made application for that license through the responsible ministry of the Province of British Columbia.

(ii) 1988

[44] In this same period, Prospectors went public and generated approximately $3.3 million by way of a so-called flow through financing scheme.

[45] This was a fairly novel application of that financing vehicle to the mineral exploration business, but it was quite effective in the result.

[46] The flow through funds were then available to Prospectors to meet its exploration expenses in its efforts to earn the 40% interest under the Cominco Option.

[47] According to Ford Cannon, a banker who worked with Mr. Buchan on the Prospectors financing, the flow through funds could be used by Prospectors to contract with an arms length company for the provision of services to the exploration program. This was done by Prospectors contracting with Geo-Roc (hardly an arms length company if I accept Buchan's evidence).

[48] Geo-Roc was then in a position to enjoy approximately 20-25% of the flow through funds raised as payment for contracted exploration services and the rental of plant and equipment to Prospectors.

[49] In this manner, Prospectors soon expended some $1.7 million on an exploration program at Anyox by year end 1988.

[50] Prospectors had $1.3 million to go on the Cominco Option, but investment in mining exploration dried up in British Columbia in 1989. Geo-Roc had overextended itself and was unable to meet all of its liabilities as they became due. In likely anticipation of problems with Geo-Roc's position, I find, Marsh (and again Buchan, if I accept his evidence that he enjoyed a 50% beneficial interest in Geo-Roc) caused 331 to be incorporated and various "assets" (I use the word advisedly as many of the "assets" were little more than ideas) were transferred from Geo-Roc to 331.

[51] These assets included:

- the water license application;
- (according to Marsh, at least) three Crown granted mineral claims known as Red Wing, Red Jacket and Red Fraction (collectively the "Red Claims"); and
- what counsel for Buchan identified in his opening as a "deep sea port license" at Anyox.

[52] This latter "asset" was simply an application for authorization to carry out work in Granby Bay fronting lands at Anyox which in any event neither 331 nor Buchan owned. The application was granted to 331 on 31 December 1989 under the ***Navigable Waters Protection Act***, R.S.C. 1985, c. N-22. It authorized very modest works and to call it a deep sea port license is hyperbole of an aggressive order.

[53] This is symptomatic, I find, of what Buchan and Marsh were about during this period: they were identifying potential "profit centres" at Anyox and setting about, diligently I will grant, to secure them in some way.

[54] For example, Geo-Roc had caused a consultant to prepare a Port Development Feasibility Study for Anyox in March 1988 at a cost of approximately $10,500.

[55] This study and the subsequent ***Navigable Waters Protection Act*** exemption then became the foundation for the "deep sea port" asset which was later valued at $12 million based on projected (but not incurred) capital costs and potential tonnage through the facility from the revived mining operation.

[56] Mr. Wolrige called it part of a "blue sky" scenario. One might also term it "pie in the sky".

[57] Pursuing the profit centre theme, in August 1988 Geo-Roc caused the "Report on Timber Potential in the Anyox, B.C. Area," to be prepared by Timberline Forestry Consultants. At trial, Buchan indicated that the somewhat negative report overlooked extremely valuable old growth red and yellow cedar in the area.

[58] In an effort to bolster the hydro project, and recognizing that the lands housing the critical turbines were owned in fee simple by Cominco, Buchan testified that he set about searching land titles in the old Anyox town site, and he discovered 16, 25 foot fee simple lots still registered in the name of a private individual.

[59] It was Buchan's evidence that these lots could possibly house turbines and he caused them to be purchased by 331 in December 1988 at a cost of $5,000.

[60] During this period 331 also acquired from Geo-Roc, the plant and equipment utilized by Geo-Roc in the Cominco Option exploration work. This plant and equipment, originally purchased with monies from the flow through financing of Prospectors, was transferred to 331 in consideration of its promissory note to Geo-Roc in the amount of $668,680.

[61] In an ironic twist which did not go unnoticed at trial by counsel for Mr. Richards, 331 then turned around and reconveyed the plant and equipment to Prospectors for an allotment of 3 million shares in Prospectors.

[62] It was at this point, in late 1988 and early 1989, that Buchan turned his sights on the potentially much larger opportunity associated with the Kitsault Mill and town site. Kitsault, which is approximately 20 miles from Anyox, housed a molybdenum mine, which had been developed, but which had ceased operations in the early 1980s. The mine developer had created a fully functioning town site at the same time. The whole operation was essentially mothballed at this time. It was owned by Amax of Canada Ltd. ("Amax").

[63] It was Buchan's evidence that in the fall of 1988, he travelled to New York to meet with representatives of Amax's American parent.

[64] Buchan envisaged that the Kitsault site could be revived to, in part, process the molybdenum from the Moly May claim.

[65] Buchan suggested at trial that he received support for some sort of deal from Amax. It would call for a joint venture, or the vending of the Kitsault assets into another public company, which would in turn carry out a refinancing.

[66] I reproduce this portion of the transcript (T. 11 October 2007, p. 4, ll. 34 to p. 5, l. 6):

> Q Okay. And so having had the discussion with AMEX [*sic*], what did you do next?
>
> A Came back to Vancouver and explained to my board of directors and to Nick Marsh and to Frank what opportunity the opportunity was. I pointed out to him that it was a pretty exciting opportunity, just that how were we going to manage it if we took it on.
>
> Q Okay.
>
> A And because the issue now went from having a joint venture with Cominco to potentially having a joint venture with Cominco and a joint venture with AMEX, and that took a lot of administrative and financial and skills that we would have to acquire from other people to do that, to develop the prospects.
>
> Ron Klassen, who was one of our directors, suggested that I meet with a gentleman named Al Wolrige from Wolrige Mahon in the fall of 1988 to discuss what we were attempting to do in the Anyox/Kitsault area.

[67] I note that at this point, Buchan is treating the Kitsault/Amax potential as very much a corporate opportunity to be pursued by the public company Prospectors.

(iii) 1989

[68] This marked the beginning of Prospectors' and Buchan's long relationship with Alan Wolrige.

[69] Mr. Wolrige said that his role generally was to assist in putting together the various branches of the overall Anyox-Kitsault project in order to develop interest among investors initially for seed money, and ultimately for equity. Wolrige saw his stature as an established downtown accountant as adding credibility to the project.

[70] Wolrige was at all material times the accountant who came to act for Moss. Doane Raymond appear to have acted at material times for Prospectors.

[71] Mr. Wolrige acknowledged that all of his professional time spent on the project in these early days was "on spec". He fully anticipated participating in an equity sense "along the line," in his words.

[72] Based on his discussions with various of the players and primarily Buchan, Wolrige prepared a simple business plan. It is dated 24 August 1989 and it is directed to Brian Lock of Proton Systems Ltd., consulting engineers and construction managers centred in Vancouver.

[73] Proton was apparently looking at the proposed development of a kraft pulp mill at Kitsault, utilizing the decadent timber in the area.

[74] The plan contemplated a $250 million Anyox-Kitsault joint venture which would include these aspects:

- the Anyox Hydroelectric project;
- 40% of the Anyox Cominco Copper Mine;
- $100 million in investors' cash contributions;
- the Anyox Port Development;
- the Moly May property at Anyox;
- the Kitsault Amax Mill;
- the Red Claims deposit; and
- the Anyox town site and tailings development.

[75] In the fall of 1989, Ladner Downs, who had been acting as solicitors for Prospectors, terminated their retainer when their other client, Teck Corporation, merged with Cominco.

[76] Prospectors was unrepresented and Wolrige suggested that Buchan meet with Peter Richards of RBS. Buchan maintains that he did, and that Richards was on board, at least as Prospectors corporate solicitor, in the early fall of 1989.

[77] Richards, on the contrary, puts the retainer in mid-December 1989 and he points to contemporary documents in support of that assertion.

[78] I will introduce two issues which arise in the proceeding at this time. Their resolution, however, will have to wait.

[79] First, and foremost, Buchan maintains that at all, or at least at many material times, Richards acted for Prospectors, Moss and Buchan personally. This, of course, is important in the breach of fiduciary duty analysis. Richards denies that he ever acted for Buchan personally, says that he acted only for Prospectors on a limited retainer until the end of January 1990, and that he performed both legal and non-legal business services for Moss throughout.

[80] Second, Buchan says that with the advent of Richards in the fall of 1989, Richards and Wolrige counselled Buchan and Marsh to arrange their affairs in accordance with what Buchan at trial called the "Fall 1989 Four Party Agreement" (the "Four Party Agreement").

[81] The Four Party Agreement is described in brief form in the plaintiff's opening:

> 33. Richards and Wolrige then recommended that as a first step in their strategy, Buchan and Marsh should consolidate the assets acquired in the various private and public companies into one management company which would hold the assets in trust for Buchan and Marsh. Both Buchan and Marsh would be the legal and beneficial owners of the management company. Richards and Wolrige would participate as managers along with Buchan and Wolrige but Buchan and Marsh would have the power of veto. The managers collectively would get remunerated for their services for managing the assets. In advising Buchan of the legal strategy to implement the management agreement, Richards was acting as counsel to Buchan.

[82] I will turn to describe events from the perspective of Richards.

[83] In 1989 and 1990, Richards was cutting back in his law practice. He had plans to retire in 1992, when he reached 65 years of age. He had, over the course of his practice, worked mostly in corporate/commercial matters.

[84] Richards testified that his first contact with the Prospectors group occurred in mid-December 1989 with a call from Alan Wolrige.

[85] Mr. Richards says that his first meeting with Mr. Buchan was on 22 December 1989, at the offices of RBS.

[86] During this first meeting, Buchan introduced the Cominco Option agreement to Richards. Richards took it home to study it over the Christmas holiday.

[87] Richards immediately recognized the obvious — Prospectors needed to commit approximately $350,000 to the exploration program on or before 31 December 1989, or it would lose the option. Richards arranged an office meeting with at least Buchan and Wolrige for 28 December 1989.

[88] As I understood Richards evidence, he believed that the Cominco Option only required Prospectors to secure those monies as available for the exploration program, which in turn was to be designed by Cominco and approved by the parties under the Cominco Option. In other words, the monies did not yet have to be actually disbursed to Cominco.

[89] It was Richards' evidence that Buchan instructed him that the monies would soon be available from a company called Boston Financial Group Inc. ("Boston Financial"), a Calgary based company of which the ubiquitous Mr. Marsh was president.

[90] It was necessary for Prospectors to then bridge the gap to the Boston Financial payment.

[91] Richards made that arrangement by having a good client with funds post the monies in his trust account on certain terms and conditions (it was, in particular, repayable in a few months). Richards then, at the last minute, formally advised Cominco on 29 December 1989. The Cominco Option was maintained in good standing, but Prospectors still had to fund $1,300,000 in exploration expenditures for the 1990 year.

[92] Richards, at the same time, formally confirmed Prospectors' retainer of RBS. That letter was addressed to Prospectors to the attention of "Mr. Steve Buchan, President". It is a general retainer, but Mr. Richards maintained at trial that it was to be limited to the services involving the immediate work undertaken in respect of the Cominco Option.

[93] The retainer letter contemplated the directors of Prospectors guaranteeing payment of RBS's accounts. However, Mr. Buchan specifically negotiated an alternative arrangement, which I need not detail.

[94] Nothing in the retainer letter, which was signed by Buchan on behalf of Prospectors, suggests that RBS was acting for Buchan personally; nothing precludes that either.

[95] I digress to note that Boston Financial was looking to acquire Prospectors' Cominco Option in early 1990. Buchan issued this news release in the Vancouver Stockwatch on 10 January 1990:

> **News Release ... *Expression of interest from Boston Financial***
>
> Mr. Steve Buchan reports
>
> Boston Financial Group is currently reviewing all of the company's polymetallic properties. Boston Financial has expressed its interest in financing, joint venturing, and/or purchasing various aspects of Prospectors' holdings and interests and is now proceeding with its due diligence.

(iv) 1990

[96] In late December 1989 or early January 1990, Buchan was approached by principals in a company referred to in the evidence at trial only as "Doron".

[97] Buchan was advised that Doron had an arrangement to acquire Cominco's 60% interest in the Anyox area, but Cominco required that Prospectors consent to the transaction in light of its rights under the Cominco Option.

[98] Buchan felt that Cominco was in breach of its obligations to Prospectors by entertaining such an offer from Doron, and he so advised Richards, who, in turn, testified that he did not view it as a breach of any agreement by Cominco. However, Richards did view it as an opportunity for the group to acquire all of Cominco's interests at Anyox.

[99] In early January 1990, Richards as solicitor for Prospectors, received correspondence from Davis & Company, solicitors acting for Boston Financial. This letter confirmed the assignment of Prospectors' interest in the Cominco Option under certain terms and conditions.

[100] Richards was asked to confirm the principal terms of the agreement. At this time (or possibly in late December 1989), Richards was shown a copy of Exhibit 2, Tab 71, another "blue sky" document — this time prepared by Boston Financial — wherein it was contemplated as developing the Anyox mining operation (including copper, molybdenum and gold) the hydroelectric project, the industrial port facility and the Amax/Kitsault Mill and town site.

[101] Richards dedicated many hours to discussions about various aspects of the overall development in January 1990.

[102] On 9 January 1990 he met with Wolrige, Buchan and Steve Youngman, an accountant in the offices of Wolrige Mahon, who was apparently instrumental in devising the scheme to move control of the Anyox assets offshore. Mr. Youngman did not testify.

[103] Richards prepared a memo to file outlining the January 9 discussions. It is an interesting document in light of what followed.

[104] The memo discussed "an outline of how the various component parts of the Anyox- Kitsault project should be developed". Two aspects of the project were discussed. I extract this plan concerning the Amax Mill and town site at Kitsault:

- ownership of the mill and town site will be assigned to a numbered company to be held in trust and eventually assigned to an Anguilla company (AnCo);
- AnCo would lease the town site and mill to the operator of the mineral claims (it was then hoped to be Cypress Anvil) for 15 years at fair market value; and
- 80% of AnCo "is to be divided between the management committee members," *i.e.* Nick Marsh, Steve Buchan and others.

[105] As to the mineral claims, it was contemplated at this meeting of 9 January 1990:

- that Cypress Anvil would have an option to acquire "Prospector/Boston's 40% interest in the Cominco Agreement …"; and
- that Cypress Anvil would have an option "to purchase from the Prospector/Boston Group, Cominco's 60% interest under the Cominco Timothy Mountain Agreement".

[106] What I infer from this memo is that it was contemplated in early January 1990 that Cominco's 60% interest in Anyox was in play and that it could be acquired by the "Prospector/Boston Group".

[107] What I stress here is the fact that the opportunity to possibly acquire Cominco's 60% interest in Anyox came to Buchan with the news of Doron's offer. It seems to have come to Buchan in his capacity as an officer and director of Prospectors because of Prospectors' interest in the Cominco Option.

[108] Arguably, this was a corporate opportunity for Prospectors. That it was considered so by Wolrige, Buchan and Richards is made clear by virtue of the reference to Cypress Anvil purchasing "from the Prospector/Boston Group Cominco's 60% interest under the Cominco Timothy Mountain Agreement".

[109] Boston Financial was synonymous with Prospectors, of course, because it was then contemplated that Boston Financial would take out Prospectors' interest in the Cominco Option.

[110] There is another memorandum "Re Division of Interests" which puts a further gloss on these discussions of the parties at this time. It is found at Exhibit 1, Tab 55. It is undated.

[111] I prefer to leave it noted at this time, but not discussed as I will below move into the more critical instrument which was actually executed by Richards, Wolrige, Marsh and Buchan on 20 March 1990.

[112] But first I turn to the advent of Moss. Richards had entered into discussions with Cominco concerning the acquisition of Cominco's 60% interest in the Anyox assets. These negotiations appear to have progressed through February 1990. Richards testified that the acquisition would require a corporate vehicle which would eventually be moved offshore, as had been earlier discussed by the parties. Presumably matters had developed beyond the possibility of Cypress Anvil acquiring this interest. For this purpose, Richards chose to use Moss, a shelf company already incorporated by the corporate department at RBS.

[113] By 1 March 1990 (Exhibit 7, Tab 73), Moss and Cominco had substantially reached an agreement whereby Moss, with Prospectors' consent, would purchase all of Cominco's interests in the Cominco Option, and all of its other interests in the Anyox-Kitsault area (the "Cominco Moss Agreement").

[114] The Cominco Moss Agreement called for the total payment by Moss of $800,000 payable as follows:

- $25,000 on acceptance;
- $50,000 on closing, that is, 18 April 1990;
- $50,000 on 30 May 1990;
- $375,000 on 30 June 1990; and
- $300,000 on 30 September 1990.

[115] Richards testified that it was expected that funding for the payments would come from Boston Financial. Indeed, the initial $25,000 was advanced by Boston Financial.

[116] The actual agreement is found in a letter from Moss dated 6 March 1990, drafted by Richards, signed by Wolrige and consented to by Prospectors per "Steve Buchan Pres.".

[117] The purchased assets were included in three schedules.

[118] Schedule A consists of the Cominco Option. Schedule B lists 69 Crown granted mineral claims and 75 located claims. Schedule C includes nine fee simple lots, legally described as: District Lots 50, 60, 308, 479, 898, 899, 1078, 1526 and 1675, all within Land District 6, Cassiar District.

[119] District Lot 1526 is of interest because the dam, which was the principal part of Granby's hydroelectric project, is located on it.

[120] The corporate structure of Moss at this time (8 March 1990) saw Richards as secretary holding 500 shares and Wolrige as president holding 500 shares.

[121] It was Buchan's evidence that he knew nothing of Wolrige and Richards issuing shares in Moss to themselves; that he was always told, in particular, by Richards, that he and Marsh beneficially owned Moss 50/50.

[122] It was also Buchan's evidence that as consideration for Prospectors consenting to the transaction, Moss was to forgive the requirement that Prospectors pay a further $1.3 million in exploration costs on the Cominco Option; that Prospectors' 40% option would vest immediately. Indeed, this is reflected in a news release issued by Prospectors on 13 March 1990 (Exhibit 1, Tab 57).

[123] Against Buchan's evidence as to the beneficial ownership of Moss, we have the fact that Wolrige and Richards executed, at some time, the documents are undated, Declarations of Trust (Exhibit 15, Tab 4) in the following terms:

> I, ALAN F. WOLRIGE [or Peter C.G. Richards], DO HEREBY ACKNOWLEDGE AND DECLARE that I am the registered holder of 500 Common shares without par value in the capital stock of MOSS MANAGEMENT INC. represented by Share Certificate No. 2 and that the same is held by me in trust for the sole beneficial use of SEPAR LIMITED, an Anguillan company, and its legal representatives ("SEPAR"), and that the Share Certificate was taken in my name for the sole purpose of temporary convenience, and that the shares and all dividends and advantages accruing thereon are, and have been since March 8, 1990, and shall continue to be, held by me and my legal representatives for the sole beneficial use and ownership of SEPAR, and on demand from it, I will, or my legal representatives shall, assign the same to or to the order of SEPAR, and account to and pay over to SEPAR all dividends and profits which I or my legal representatives shall have received thereon.

[124] This brings us to a critical document in these proceedings.

[125] It is dated 20 March 1990. It was drafted by Peter Richards. It is between Marsh and Buchan, of the first and second parts respectively, and the "Schedule "A" Parties" of the third part. The "Schedule "A" Parties" are defined as Wolrige, Richards, Marsh and Buchan (the "Managers' Agreement").

[126] I will endeavour to summarize the relevant terms of the Managers' Agreement.

[127] The recitals are important, and I reproduce them:

> A. Marsh and Buchan have acquired various interests in the Anyox-Kitsault area, Observatory Inlet, Portland Canal, British Columbia, which said interests are held both in their personal capacity and through shareholdings in public companies known as Prospectors Airways Co. Ltd. ("Prospectors"), Boston Financial Group Inc. ("Boston"), Moss Management Inc. ("Moss") and holdings in various private companies;
>
> B. Marsh and Buchan are desirous that these various interests be developed for the benefit of themselves and the shareholders of the various companies;
>
> C. Marsh and Buchan have approached the Schedule "A" Parties ("Party") with a view that they would join with them in the development of their various interests and as such, join with them in forming a management team;
>
> D. Marsh and Buchan recognize that the management of their various interests will require the devotion of the Managers to the project to the detriment of their other vocations and a loss of other opportunities;
>
> E. It is proposed that Marsh and Buchan will acquire or cause to be acquired the Amax Mill and town site at Kitsault, B.C. with Kitsault Forest Products Ltd., ("Products") which said mill and town site are necessary in order to economically develop their interests and the public companies' interests in the area as set forth on Schedule "B" ("Interests"), and such other Interests and properties as may from time to time be added to Schedule "B" and initialled by the parties hereto.

[128] Notwithstanding recital E, the operative clauses begin with the words "… the parties covenant and agree as follows".

[129] Clause 1 contemplates the acquisition from Amax of the Kitsault Mill and town site by an Anguilla company (AnCo), 80% of the shares of which were to be owned by a second Anguilla company (AnBank).

[130] AnBank's shareholdings were to be issued as set out in Schedule C to the agreement, but Schedule C was never prepared. Buchan testified as follows (T. 15 October 2007, p. 19, ll. 27-35):

> Q Do you recall ever seeing a schedule C to this agreement at tab 58?
>
> A No. I recall a discussion with Peter Richards and Al Wolrige that schedule C was Nick Marsh's and my interest in the corporation that would have held the Kitsault mill and townsite, and that we would own it 50/50, and it would be identified in schedule C in a future date that that's who would own it.

[131] Richards, on the other hand, testified that the 80% interest in AnBank would effectively be held by the four managers: Richards, Wolrige, Buchan and Marsh (T. 25 October 2007, p. 28, ll. 19-30):

> Q All right. Just your understanding what was schedule C supposed to be?
>
> A It was going to consist of four offshore companies that were to be incorporated. One for each of the managers, that would be one for Steve Buchan, one for Marsh, and one for Mr. Wolrige and one for myself, so that those four companies, offshore companies, would hold that 80 percent.
>
> Q All right. They would have the shares in what was at that time defined as AnBank who in turn would have 80 percent ownership of AnCo?
>
> A Yes. AnBank was going to own the Moss properties.

[132] Clause 3 of the Managers' Agreement would see the net proceeds received by AnCo distributed to its shareholders — *i.e.* including AnBank, which in turn would distribute 50% of its net proceeds to the "Managers".

[133] Clause 4 provided a minimum payment to each Manager of $120,000 (indexed) each year.

[134] Clause 8 is important, it provides:

> 8. Upon a Party ceasing to be entitled to any further distributions from AnBank, pursuant to paragraph 4, 6 and 7 hereof, then such Party's interest in AnBank shall be transferred to Marsh and Buchan jointly, or to the survivor thereof, for the sum of $1.00.

[135] Richards testified with respect to this clause as follows (T. 25 October 2007, p. 30, ll. 6-24):

> Q Okay. Now, paragraph 8 says:
>
> > Upon a party ceasing to be entitled to any further distributions from AnBank pursuant to paragraphs 4, 6 and 7 hereof, then such parties interest in AnBank shall be transferred to Marsh and Buchan jointly or to a survivor thereof for the sum of a dollar.
>
> So basically after $24 million or some version of that has been distributed it reverts to Marsh and Buchan is your understanding?
>
> A That's right.
>
> Q What's the reason for that? Can you explain that?
>
> A Well, they, namely Marsh and Buchan, were bringing to the table these rich assets that were going to produce these great cash flows, and it was felt that in the end result they should take the win when all of these other things had been paid.

[136] Clause 12 provided that the Managers would have power "from Moss, Buchan, Prospectors, Boston and Marsh to direct the development of the Interests".

[137] "Interests" had been defined earlier as Marsh, Buchan and the companies' interests set out in Schedule B. That schedule reads:

SCHEDULE "B"

1. Amax Mill and Townsite.
2. Assets acquired from Cominco Ltd. by Moss Management Inc. as described in Schedules "A", "B" and "C" of the letter written to Cominco Ltd. and Moss Management Ltd. and dated March 6, 1990.

3. Interests in Red Wing Mine, Anyox Area.

4. Dam Site, Water Licences and proposed Power Station Lots.

5. Post [*sic*] Facilities at Anyox and Kitsault.

6. Various interests in Anyox Area.

[138] Clauses 13 and 14 again recognize that Marsh and Buchan are bringing assets to the table and that they were to be compensated for these interests:

> 13. Prior to the development of the Interests, the Managers shall fix the price that Marsh and Buchan shall receive for their interests therein and the method of payment of such price, which payment shall at all times rank in priority to the payment of any sums payable to the Managers under paragraph 14 hereof.
>
> 14. Once the price has been fixed by the Managers pursuant to paragraph 13 hereof then the Managers individually shall be entitled to participate equally with respect to any further sums or opportunity that may be available to the Managers and in this respect, each Party shall equalize, or use every effort to equalize, any benefits he may receive by way of director and officer's options, vendor share benefits or other benefits having a monetary benefit.

[139] Clause 19 is interesting in light of Richards' suggestion that the 80% interest in AnBank was to be effectively held by the four Managers (through their respective offshore companies). On the contrary this clause suggests that Marsh and Buchan were to control AnBank:

> 19. Marsh and Buchan shall cause AnBank to indemnify and save harmless the Managers from any liability that they may incur when acting honestly as a Manager.

[140] Finally, clause 21 provides Marsh and Buchan with a partial right to veto decisions of the Managers:

> 21. All decisions of the Managers shall be by a majority provided that in the event of the absence of either Marsh or Buchan then the other shall have the right to veto any decision of a majority of the Managers, providing such veto is exercised at the time such decision was made by the Managers.

[141] Richards explained the rationale for this veto (T. 25 October 2007, p. 34, ll. 14-30)

> Q Now, can you tell us why there was this provision inserted into the agreement that Mr. Marsh and Mr. Buchan would have a right of veto in the absence of the other one?
>
> A Yes. It was because it was represented that Marsh and Buchan would be bringing those schedule B assets to the -- to the company for management, representing potential millions of dollars that they had a value, and therefore, in my view, in drawing this it wasn't equitable for the majority of three, out of three.
>
> For instance, Wolrige and myself, making a decision that Marsh didn't agree with, Buchan not being there, or Buchan not agreeing, if Marsh wasn't there. For that reason whoever was there could exercise a veto and prevent that decision from going forward.

[142] According to Richards, the Managers' Agreement began to unravel before its ink was dry.

[143] In particular, the Amax Mill and town site were never acquired.

[144] The Managers' Agreement was signed by each of the principals at the offices of RBS. Each signature was witnessed by the wife of Peter Richards — Barbara Leigh Richards.

[145] Buchan, at least, did not receive independent legal advice before executing the document.

[146] The next watershed in the chronology occurred two weeks later on 2 April 1990, when four agreements were executed.

[147] I will summarize each.

[148] The first is between Moss and Prospectors. It amends the Cominco Option. By its terms, Moss extends the time for payment of the $1.3 million in exploration funds by Prospectors to 31 December 1991. Contrary to Prospectors' press release, above, the payment of these funds was not forgiven by Moss. Prospectors was to issue shares and warrants to Moss. Schedule A to the Cominco Option was also amended.

[149] By the second agreement, Moss approved the assignment by Prospectors of the Cominco Option to Boston Financial.

[150] The third agreement is between Prospectors and Boston Financial. By its terms Prospectors assigned the Cominco

Option to Boston Financial, which in turn agreed to perform all of Prospectors' obligations thereunder.

[151] The fourth agreement is between Moss and Boston Financial. It permitted Boston Financial to acquire a 40% interest in the Cominco Moss Agreement on certain terms, in part, by paying $675,000 in two payments: the sum of $500,000 on or before 15 June 1990; and the sum of $175,000 on or before 15 September 1990.

[152] The agreements of 2 April 1990 were all prepared in the offices of RBS. They were executed on behalf of Prospectors, by Buchan and Klassen and on behalf of Moss, by Wolrige and Richards.

[153] Mr. Buchan caused a press release to be issued by Prospectors on 26 April 1990 describing the agreements succinctly:

> The company has entered into agreement with Moss dated April 2 1990 with respect to amending the option agreement whereby Moss has granted the company an extension to December 31 1991 in which to fund the balance of the $1.3 million in order to earn the 40% interest, and to amend the area of interest to include only the Hidden Creek claims. The consideration for the extension is the issuance of 3.7 million shares and a warrant to purchase an additional 3.7 million shares for two years at $0.15 in the first year and $0.1725 in the second. The agreement is subject to VSE approval.
>
> The company has entered into an agreement with Boston Financial Group. Under the terms of the assignment agreement, the company has assigned the option agreement as amended to Boston in consideration of the following payments:
>
> 1.) The sum of $71,000 on or before December 31 1990 of which $21,000 has been paid:
>
> 2.) The allotment of 1,000,000 shares of Boston;
>
> 3.) The funding of the balance of the $1,300,000 prior to December 31 1991;
>
> 4.) Payment of $1,700,000 with interest payable in three equal installments after commencement of commercial production; and
>
> 5.) A royalty equal to a 1% NSR.

[154] I return to the Cominco Moss Agreement. It will be remembered that it was expected by Richards that Boston Financial would be funding the payments due under the agreement.

[155] This is curious as to the payments due on closing and 15 May 1990 totalling $100,000, because under the Moss/Boston Financial Agreement of 2 April 1990, Boston Financial's first payment of $500,000 under its option was only due if the option was exercised by 15 June 1990.

[156] Nevertheless, I accept that the parties at this time did expect Boston Financial to come up with the capital to fund the Cominco Moss Agreement.

[157] This conclusion is supported by the presence of Boston Financial in the background of the discussions from the outset; by its proposed acquisition of the Cominco Option from Prospectors; by the fact that Boston Financial paid the $25,000 deposit on the Cominco Moss Agreement; by Richards' notes of the proposed transaction made 27 February 1990 found at Exhibit 7, Tab 70. Finally, the Moss/Boston Financial Agreement of 2 April 1990 gave Boston Financial the option to acquire 40% of the Cominco Moss Agreement for $850,000.

[158] While this was an option, the parties clearly expected Boston Financial to earn it by making the payments. (At least Richards and Wolrige did, Buchan and Marsh for their part undertook some strange dealings with Boston Financial in the summer of 1990 as will appear below.)

[159] I simply cannot explain on the record developed before me why Boston Financial's first payment of $500,000 was only due in mid June 1990, long after the first two payments of $50,000 were due and payable.

[160] In any event, it was Richards' evidence that he expected Boston Financial to come up with the $50,000 due on closing shortly, so he advanced the $50,000 from his own resources. He had Marsh, Buchan and Wolrige acknowledge the loan and the terms of its repayment to him in a document dated 18 April 1990 (Exhibit 7, Tab 90).

[161] This document is interesting to the extent that clause 3 covers repayment to Richards (through RBS) in these terms:

> 3. From the first monies available to Moss or Boston, the said monies are to be divided 5/7ths to Richards Buell Sutton ("RBS") and 1/7th to each of J. Frederick Marsh and Steven Thomas Buchan until RBS has received $50,000.00

[162] A possible inference, in the consideration of this provision, is that the clause recognizes Buchan and Marsh's beneficial ownership of Moss and Boston Financial and that they, in turn, are required by the clause to sacrifice their returns until the $50,000 has been repaid.

[163] The second payment of $50,000 was due 30 May 1990. Richards testified that he was becoming more concerned that Boston Financial had not yet advanced any funds. On behalf of Moss, Richards wrote to Boston Financial to the attention of Marsh as president on 9 May 1990.

[164] The letter referred to the Boston Financial Option of 2 April 1990 and the requirement for a payment to Moss by 15 June 1990.

[165] The letter ended:

> …
>
> We would suggest that, to avoid the risk of losing the property, Boston take immediate steps to ensure that the necessary funding will be available by the required date, as at this time, Moss has no intention of extending the date for the option payment.
>
> Kindly govern yourself accordingly.

[166] To make the payments of $50,000 on 30 May 1990, Richards went to his wife and three friends who each advanced $12,500 on terms (Exhibit 7, Tab 100).

[167] Moss was facing the large payment of $375,000 due on 30 June 1990. Mr. Richards testified that at this point he approached Lynwood Bell, who apparently operated offshore through an entity called Hansa Bank.

[168] Richards testified that Bell promised to make the $375,000 available to Moss.

[169] At trial, Richards said that as a condition of Bell assuring the payment of the $375,000 due on 15 June 1990, he was required to give up control of Moss to Bell.

[170] I interject to note that at this point in the narrative, this is quite confusing. If Marsh and Buchan beneficially owned Moss, how could Richards purport to give up control of it? In any event, Richards and Wolrige had declared that they always held their shares in Moss in trust for Separ. How could Richards purport to so sacrifice Separ's interests?

[171] The explanation for the apparent ease by which Richards *et al.* lost control of Moss appears to lie in the fact, according to Richards, that Bell had caused Separ and the four other offshore companies (which were to be owned by each of the Managers) to be incorporated. Bell held the shares in these companies before their proposed allotment to the Managers. Under this scenario, it was not a case of Bell receiving a transfer of beneficial ownership of Moss, it was a case of Moss' beneficial owner, Separ, never leaving Bell's control.

[172] Finally, the ultimate curiosity arises from the fact that Bell never had to put up the $375,000. Instead, in some technical corporate manoeuvring, Richards was able to revive a dormant Quebec company, realize on its only asset (shares in Stikene Resources Ltd.), patriate the monies to a British Columbia company eventually called Westall Resources Ltd. ("Westall"), which Richards effectively controlled, and advance $375,000 to Moss to allow it to make the payment to Cominco of 30 June 1990.

[173] I do not believe that it is necessary to go into more detail on this aspect of the evidence. It suffices to say that by 15 June 1990, Richards had managed to preserve Moss' interest in the Cominco Moss Agreement, by making the required payments without the assistance of Mr. Bell, or that of Boston Financial or, indeed, of Marsh or Buchan.

[174] On 8 June 1990, the Vancouver Stock Exchange ("VSE") indicated to Prospectors, through Ronald Klassen, that it would not approve the issue of 3.7 million freestanding shares to Moss, as required by the Moss/Prospectors Agreement of 2 April 1990.

[175] On 22 June 1990, Moss formally took the position that Prospectors was in breach of the agreement to issue the shares and gave Prospectors 14 days' notice of termination.

[176] Coincidentally, Prospectors gave notice to Boston Financial that it in turn was in breach of the Prospectors/Boston Financial Option Agreement of 2 April 1990.

[177] At this point, the evidence of Mr. Buchan takes a strange turn.

[178] He testified at trial that at this time a representative of the VSE advised him and he, in turn, advised Richards, Wolrige and Marsh, that a certain unsavoury individual was associated with Boston Financial and that because of this individual's reputation, the VSE would not look favourably on the relationship between Prospectors and Boston Financial.

[179] Buchan maintained that as a result, the four determined to sever relations with Boston Financial. To undercut that company, Buchan, with the cooperation of Marsh, set about driving down Boston Financial's share price by selling large amounts of stock into the market. Buchan says that this took place over the summer months of 1990 and that he was quite successful.

[180] Both Richards and Wolrige at trial, denied any knowledge of this gambit and expressed amazement and some outrage at Buchan's alleged conduct.

[181] The exercise is all the more extraordinary when we remember that Marsh was president of Boston Financial.

[182] I am not sure that this conflict in the evidence need be resolved, as nothing really turns on it, but it does tend to demonstrate the perfidy of at least some of the parties in these proceedings, in this instance, that of Mr. Buchan.

[183] On 26 June 1990, Klassen, on behalf of Prospectors, wrote to the VSE in an effort to obtain its approval to a modified Moss/Prospectors agreement.

[184] Klassen expressly noted that the shareholders of Moss included Wolrige and Richards. Buchan is shown as receiving a copy of this letter. It is noteworthy because Buchan maintained at trial that he had no knowledge that Richards and Wolrige had become shareholders in Moss.

[185] On 5 July 1990, Prospectors and Moss entered into an agreement amending that of 2 April 1990 and so brought it back into good standing.

[186] Moss had another payment of $300,000 due to Cominco on 30 September 1990. Buchan testified that he discussed with Richards obtaining a deferral of that payment by complaining to Cominco of undisclosed environmental pollution issues with some of its Anyox assets.

[187] In any event, Richards was successful in obtaining an extension of this payment to 30 September 1991, but he and Wolrige had to (and did) personally pay Cominco monthly interest on the outstanding amount.

[188] In the fall of 1990, Buchan moved to Vancouver Island for a number of years to assist his in-laws in rescuing a proposed development from threatened foreclosure.

[189] It was Buchan's evidence that this move, and his preoccupation with this project, deflected him from detailed participation in the various Anyox transactions.

[190] Here I will juxtapose Mr. Richards' evidence summarizing his position after April 1990.

[191] He testified that the Managers' Agreement of 20 March 1990 was virtually a dead issue, almost immediately after its execution (T. 25 October 2007, p. 42, ll. 37 to p. 43, l. 22):

> Q And during this time when your group put up the second $50,000 towards the Moss/Cominco payment, did you have any discussions at all with Mr. Marsh or the representatives of Boston Financial about what was going on?
>
> A After I put up the 50,000 --
>
> Q Yes.
>
> A -- in April the 18th, I think it was.
>
> Q Yes.
>
> A And as time went on and I -- no assets were transferred from any of the parties pursuant to the March 20th agreement and no monies had been advanced by any third party other than the 25,000 by Boston. I stated to Mr. Wolrige, Marsh, Mr. Buchan that as far as I was concerned the March 20th agreement was at an end and that I was going to go forward as best I could to salvage whatever could be salvaged from the agreement with Cominco.
>
> Q Yes?
>
> A And I expected them to work with me to try and ensure that the payments, the upcoming payments, would be forthcoming. Being concerned in early May that Boston may not perform, I put Mr. Marsh on notice that I was concerned. I then scrambled to try and raise the $50,000.
>
> I had numerous conversations with all three -- Wolrige, Marsh and Buchan -- and with Barry Whelan as to evaluation, you know, how can we get out of this if we go forward. How can we -- where are we going to find a purchaser to realize something so we can recover something from what we've done.

[192] In the summer and early fall of 1990, Richards set about securing those who had financed the Moss payments to Cominco by preparing and causing Moss to execute various debentures and mortgages. Mr. Richards, as well, caused a mortgage and debenture to be executed in favour of RBS to secure fees charged by RBS in the amount of $230,840.

[193] As part of the promotional material prepared for Moss' discussions with sundry potential investors, a summary of Moss' proposed developments at Anyox was prepared. It is dated 26 September 1990.

[194] It purports to value various aspects of the Anyox proposed developments after accounting for the costs of development.

[195] For example, the tailings adjacent to Hidden Creek are said to have a present value of $39,370,000.

[196] Similarly expansive valuations are offered for the hydroelectric project, the Hidden Creek mine area, and the port facility.

A water export proposal and the development of satellite ore bodies are identified, but not valued.

[197] During this period, Richards apparently became more concerned that his position with Buchan, Marsh and Wolrige be formally clarified. He maintained at trial that he never provided legal services to any of the three individuals, in particular, to Buchan, and that he reiterated this at a number of meetings with the men over the course of their relationship. Mr. Richards maintained that after acting for Prospectors until the end of January 1990, he then acted only for Moss.

[198] On 2 October 1990, at Richards' urging, each of Wolrige, Marsh and Buchan executed an "indenture" prepared by Richards.

[199] In its operative clauses, it states:

> 1. That all legal services rendered to the date hereof by Richards and RBS concerning the Interests have been rendered only to Moss.
>
> 2. That Richards and RBS have not been and are not retained by any one or more of them as legal counsel or to provide legal services of any kind and that in all the past, present and future cases where legal services are or ought to be obtained by the undersigned such have or shall be obtained independently from Richards and RBS or shall be deemed to be voluntarily waived.
>
> 3. That none of the undersigned shall be entitled to rely or to claim to have relied upon legal services rendered by Richards or RBS unless such are rendered pursuant to an express written agreement which refers to and waives this Indenture.
>
> 4. That this Indenture enures to the benefit of and is binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns.

[200] Also in the fall of 1990, Prospectors and Moss entered into negotiations to amend the Cominco Option, because it was clear that Prospectors would not be able to pay the remaining $1.3 million under that agreement.

[201] On 22 November 1990, the amending agreement was executed. Sharon White of RBS acted for Moss and Richard Swadden acted for Prospectors.

[202] The agreement was affirmed at Prospectors' annual general meeting in February 1991.

[203] A press release issued by Buchan on 7 December 1990 summarizes this agreement:

> …
>
> 1. Prospectors' interest in the Hidden Creek claims changes from an option to earn a 40% interest in the claims in exchange for a further expenditure of $1.3 million on or before December 31 1991, to a vested carried interest entitling Prospectors to 5% of the net proceeds of production of the Hidden Creek claims, as defined in the agreement.
>
> 2. Moss will be issued 3.7 million of Prospectors' treasury shares plus a warrant to acquire a further 3.7 million treasury shares at $0.15 per share in the first year and at $0.17 in the second year.
>
> 3. Moss is granted an option to acquire Prospector's 5% carried interest in the Hidden Creek claims for $2 million cash, payable upon exercise of the option.
>
> 4. Moss is required to repay to Prospectors, out of production from the Hidden Creek claims, the $1.7 million expended by Prospectors on past exploration of the Hidden Creek claims.
>
> 5. Prospectors assigns to Moss a 60% interest in various mineral properties located on the Granby peninsula in north-western British Columbia which are now owned 100% by Prospectors.
>
> 6. Prospectors and Moss enter into a joint operating agreement for the further exploration and development of the mineral properties on the Granby peninsula.
>
> …

[204] I will interrupt the chronology here to relate the dealings surrounding 331. It will be recalled that Marsh held the only issued share in 331, although Buchan claims he beneficially owned 50% of the company.

[205] By a document dated 31 May 1990, Marsh applied to the board of 331 to transfer his share in 331 to Moss and this occurred on that date according to 331's Register of Transfers.

[206] Curiously, notwithstanding this transfer, at Exhibit 2, Tab 116, there is an undated letter agreement on the letterhead of Moss with Marsh providing as follows:

> This letter will confirm that Moss Management will undertake the following matters in return for your selling the

shares of #331609 B.C. Ltd. to Moss Management Inc. for $1.00 as at April 30, 1991.

1. Settle $25,000 of legal bills outstanding with Mr. Swadden.

2. Deal with ongoing administration of #331609 B.C. Ltd. including payment of property taxes arrears, bringing legal records into current status and looking after other corporate matters as required.

Please confirm the above and the receipt of $1.00 by signing below.

[207] Wolrige was cross-examined on this document at trial.

[208] He acknowledged that the share was transferred to Moss by Marsh in May 1990, but he maintained that in his mind it was valueless because Swadden had a lien on 331's assets for payment of legal fees owing to him. In Wolrige's mind, the removal of this lien by Moss' promise here, was connected to the transfer of the share in 331 to Moss, although he could not explain the timing difference.

[209] Marsh's evidence is to the same effect. He testified that he transferred the share to Moss on Moss' undertaking to pay that account and to tidy up other corporate items for 331 (Exhibit 29, p. 24, l. 45 to p. 25, l. 3). And Mr. Swadden seems to agree in his evidence — see Transcript 6 November 2007, p. 30, line 37 and following.

[210] The matter is further confused, however, because in August and September 1991, Moss arranged for payment of Swadden's unpaid legal fees by purchasing 331's Red Claims for $25,000, then paying the purchase price directly to Swadden through a direction to pay. I will return to this issue below.

[211] I should point out that Marsh's evidence was taken by deposition before trial because the Moss defendants feared that his age and poor health would prevent him from testifying at trial. Counsel for Mr. Buchan had full notice of that deposition and declined to attend and cross-examine Marsh.

[212] I admitted the deposition at trial and invited Mr. Yu to make any applications he wished concerning the cross-examination of Mr. Marsh during the trial. None were forthcoming.

(v) 1991-1992

[213] In the fall of 1991, Moss and Richards were introduced to Clifford M. James and negotiations began for the acquisition by James (through a company that later came to be known as TVI) of certain of Moss' assets.

[214] Richards maintained at trial that he kept Buchan fully informed about the negotiations which extended over the next year or so. Buchan maintained that he became aware of the dealings only after TVI issued a draft offering memorandum after the negotiations were completed.

[215] It was Richards' evidence that James fundamentally objected to taking the Hidden Creek mineral claims subject to Prospectors 5% carried interest.

[216] Accordingly, Richards wrote to Prospectors, to the attention of Buchan, but care of Klassen's office, on 16 October 1991.

[217] I reproduce the text of this letter which Buchan denies seeing:

This is to advise that the development of the Hidden Creek claims, as contemplated at the time of entering into the above Agreement, will not take place. It now appears that in order for Moss to have the property developed, it will have to convey 100% of the Hidden Creek claims and other properties to the developing company

As discussed, it therefore appears appropriate to amend the Agreement so that Prospectors will receive 2% of the shares received by Moss' parent shareholder, Hansa Bank. Hansa Bank is to receive up to 50% of the developing company's shareholdings, upon that company meeting certain terms and conditions.

It is therefore proposed that the shares be delivered to Prospectors by Hansa Bank by October 15, 1992 providing the developing company fulfills the terms of its agreement.

We would request that you agree that upon receipt by Prospectors of 2% of the developing company's shares issued to Hansa Bank, Prospectors will release and forever discharge Moss from any claims it may have against Moss in connection with the Hidden Creek claims.

We would request an early confirmation of this letter.

[218] I interject to note that, as will appear, Hansa Bank controlled a company which in turn had a substantial interest in Separ. Lynwood Bell apparently controlled Hansa Bank.

[219] On 18 December 1991, Moss and TVI entered into an agreement by which Moss conveyed to TVI various of the Hidden Creek mineral claims (but not all).

[220] The purchase price was $1,428,000 payable *inter alia* in cash, 10 million shares in TVI and by retirement of the debentures issued by Moss to RBS, the Barbara Richards group and Westall.

[221] On 17 January 1992, Prospectors, by Klassen, apparently accepted the proposal to give up its 5% carried interest for 2% of the shares to be granted by TVI to Moss. Buchan is shown as receiving a copy of Prospectors' letter in this regard, but he denies ever seeing it.

[222] Klassen testified that he recalled this transaction and that his practice at the time was to always ensure that Buchan received a copy of all relevant correspondence.

[223] In the result, TVI issued 9,900,000 shares to Moss in the fall of 1992.

[224] The transmission of these shares to Separ and those interested in Separ demonstrates the convoluted beneficial ownership of Moss at that time.

[225] I attach a schematic of that structure prepared by Mr. Richards, as Schedule "A" to these reasons.

[226] In December 1992, Moss, through Richards, purported to confirm with Prospectors, through Klassen, an agreement reached with Mr. Buchan concerning 100,000 of the 200,000 TVI shares to be issued to Prospectors. It was premised on the fact that the Employment Standards Branch had seized Prospectors and Moss' interests in the Granby Peninsula and Moly May claims, by reason of Geo-Roc's failure to pay severance compensation to its employees. In exchange for 100,000 TVI shares, Wolrige and Barbara Richards would fund the required payment to the Employment Standards Branch.

[227] At this point, then, Prospectors has no further interest in the assets represented by the Cominco Option, some of which have been conveyed to TVI and some of which have been retained by Moss.

[228] Richards and Wolrige hold Moss in trust for Separ, which in turn is controlled by a complicated offshore ownership. Marsh and Buchan have nothing, save their personal shareholdings in Prospectors and Boston Financial.

(vi) 1994 and thereafter

[229] 1994 was marked by a number of disputes between the Richards group and the Buchan group at meetings of Prospectors and Westall. This litigation was as well commenced by Buchan.

[230] Richards and Wolrige acquired ownership of Moss from Separ in 2002.

IV Credibility

[231] The credibility of the two central players in this proceeding is critical to its resolution.

[232] I will relate my assessment of each in turn.

(i) Steven Thomas Buchan

[233] Mr. Buchan was in many ways an unsatisfactory witness.

[234] It was not that he was always combative and defensive with counsel, on the contrary, he often calmly and confidently provided some extraordinary explanations for his conduct over the years. It is the inconsistency of that conduct that leads me to assess Mr. Buchan's credibility as quite wanting.

[235] I first note Mr. Buchan's complete lack of candour with the directors of Prospectors in respect of his alleged interests in Geo-Roc and 331.

[236] Geo-Roc had extensive dealings with Prospectors and according to Mr. Klassen, whose evidence on this point I accept, and the corporate records of Prospectors, Mr. Buchan never disclosed his alleged beneficial interest in Geo-Roc, and he never abstained from voting on the transactions as an officer of Prospectors.

[237] I will provide one example of these transactions. It is a debt settlement agreement dated 27 September 1989 between Prospectors and Geo-Roc.

[238] At T. 17 October 2007, p. 14, l. 10, counsel for Moss *et al.* asked Mr. Buchan why he did not abstain from signing the contract on behalf of Prospectors when he alleged he had at least a 50% beneficial interest in Geo-Roc.

[239] The answer plumbs new depths in evasiveness (T. 17 October 2007, p.14, l. 16-p.16, 11):

> A Why? Well, there were two reasons for why: one is, it wasn't considered a requirement for the group that I was working with; and two was that we were up against the Vancouver Stock Exchange and Peter Brown. I

had gone to Peter Brown initially through -- so there was two reasons.

The strategic one was that I had originally tried to list Prospectors Airways and take it public in Toronto. And I originally tried to have Canaccord, which was in Toronto, assess the opportunity and provide us with a market maker in Toronto. And I was able to, through Ted Chisholm, have the people in Toronto assess it -- their people there -- and want to do that. When I came back to Vancouver, I was phoned by Peter Brown and a fellow named Anderson to come up to their office, and they offered to do the financing here in Toronto. I had arrange [*sic*] it at $2 no warrant to do the financing. Here, Peter Brown wanted to do if at $1.25 plus a warrant.

Now, I am not a market maker, and I didn't know how to promote stock, didn't have the time to. For me to take the company public here, that meant that I had to have someone that would manage the market. So when Peter Brown suggested that his Canaccord office in Toronto was not the place to take this public and that he would take it public here, Prospectors Airways, I went and approached another individual named Joe Marin who was a promoter, and I asked Joe Marine whether he would come on to work with Peter Brown and Canaccord. Joe Marine said he didn't want to work with Peter Brown, that I should go over to Haywood, that I would not be required at Haywood to produce any warrants.

The reason I didn't want to produce warrants was that since I wasn't a market maker, and I couldn't get a market maker in Toronto, then the issue of being able to get value for your shares and being able to promote the stock -- which I didn't have the energy for, I had to transfer it to someone else. That normally took around 30 percent of your budget to keep the promoters financed to keep the phones working. So the issue of having to come back into this poker game in Vancouver and deal with the exchange and the houses here basically was a stacked deck since we couldn't promote. So what I did is, I worked a strategy out that would allow us, I hoped, to get Bear Stearn's out in New York onside to come out here and buy the stock. And I was able to get Bear Stearns onside to do that, because I knew and I was told by Peter Brown if I did not go along with their 1.25 offering of financing plus a warrant, that they would beat me up in the market.

And to beat me up in the market was not something that would allow me to continue to finance, so I wanted to go public at $1.50 -- $2 I originally wanted -- I went $1.50 at Haywood. But the issue of having to fight Peter Brown and the brokerage houses at that time in this town created an issue for me of, I had no capacity to compete with them. They could buy the float. They could sell short into the market. They could generate a whole bunch of opportunities for themselves that I couldn't defend my corporation on.

So the poker game I went to in this town at that time created an alternate strategy for me to deal with them on. And that alternate strategy was what I did. I went to flow-throughs. I did most of my financing outside of the brokerage houses. I only went public through Haywood, and then 90 percent of my financing was generated through flow-through financing, which the brokerage houses had no control of.

So that's the background on why I elected to proceed in the fashion I did.

These debt settlements, et cetera, and the accounting for them, I'm going through right now, and I'm prepared to stand on my oatmeal that what I did here was a way of defending myself and the assets and the company. It may not have been the best way, but that's the strategy I worked on.

Q Are you deliberately changing the subject to try [*sic*] deflect my questions?

A No, I'm not.

Q What does any of that has [*sic*] to do with why you sig [*sic*] this agreement between Prospectors and Pacific Geo-Roc on September 27th, 1989?

A I just gave you my explanation.

[240] Similarly, Mr. Buchan did not disclose his alleged interest in 331 to the board of Prospectors when 331 transferred the plant and equipment (which it in turn had acquired from Geo-Roc) to Prospectors for shares in Prospectors.

[241] I next highlight again the extraordinary revelations by Mr. Buchan concerning his intentional sell off of the shares in Boston Financial over the summer months of 1990. Both Mr. Richards and Mr. Wolrige expressed shock at trial when this evidence was led.

[242] I conclude that it was genuine.

[243] While Richards and Wolrige were vainly hoping for Boston Financial to come up with the financing for Moss, Buchan was secretly undercutting Boston Financial and not even making the proceeds earned therefrom available to Moss, as Richards and Wolrige scrambled to raise the monies owing to Cominco. This is not honourable, ethical or honest conduct.

[244] What really tells in my negative assessment of Mr. Buchan's credibility, however, is the inconsistency of his various legal postures over the years.

[245] In these proceedings Buchan seeks personal control of, among other assets, what he defines as the Hidden Creek Crown Grants, the Anyox Lands, the Anyox Port Interest and the shares of Moss.

[246] In the original Statement of Claim in this action, the two original plaintiffs were Buchan and Prospectors, and there was no distinction made regarding the claims being advanced by Mr. Buchan personally and those being advanced by Prospectors.

[247] When the claim by Prospectors was dismissed, Mr. Buchan was directed to amend the Statement of Claim to advance only his personal claims. His Amended Statement of Claim simply amounts to a claim that he owns all of the assets personally. Prospectors, it would seem, was initially only along for the ride.

[248] Mr. Buchan's legal posture today starkly conflicts with his position in earlier proceedings.

[249] In 1997, Mr. Buchan brought an application for an order allowing him to seek derivative relief on behalf of Prospectors.

[250] One of his affidavits filed in support of that application was put to him at trial in cross-examination. I highlight these two paragraphs from the affidavit marked Exhibit H-L for identification:

> 29. Given that the 1987 Cominco-Prospectors Option Agreement was still in good standing, the defendant Richards could not have negotiated the Cominco-Moss Agreement of March 6, 1990 on behalf of his company Moss Management Inc. unless his other client Prospectors Airways gave him and Moss Management Inc. that right. I am informed by my solicitor herein and do verily believe that any rights acquired by Moss Management Inc. pursuant to that March 6, 1990 Agreement, were acquired in the course of and solely as a result of an agency relationship between Moss Management Inc. and Richards on the other hand and Prospectors Airways, the principal/client, on the other.
>
> …
>
> 31. I regarded these provisions of the March 20, 1990 Asset Management Agreement, which were drafted by the defendant solicitor Richards (and typed by his wife) as reflecting what the defendant Richards was telling me: namely that Moss Management Inc. held any rights it acquired under its March 6, 1990 Agreement with Cominco in trust for Prospectors Airways and that he and the defendant Wolrige would develop those rights as agent-managers or fiduciaries for Prospectors Airways. In the recitals to the Asset Management Agreement, the defendant solicitor Richards identifies Marsh and me as shareholders of Moss Management Inc. on March 20, 1990, which again is in keeping with what he was telling us at that time.

[251] Here, Mr. Buchan is clearly deposing that Moss held its interest under the Cominco Moss Agreement in trust for Prospectors. He is also acknowledging that Moss was Richards' company. Mr. Buchan repeated this essential evidence in an affidavit filed in related proceedings (paragraph 48 of Exhibit H-N for identification).

[252] In a supplemental information circular prepared by Mr. Buchan in 1994 for a meeting of the shareholders of Westall (Exhibit 9, Tab 157), Mr. Buchan even claims that Westall has a claim over the Anyox assets.

[253] Mr. Buchan, of course, now claims the Moss interests in his own right.

[254] I have concluded that I can place little reliance on the evidence of Mr. Buchan.

(ii) Peter Richards

[255] There are a number of aspects of Mr. Richards' evidence which are troubling and cause for significant concern.

[256] I begin with the scope of his retainer by Prospectors. Mr. Richards maintained that it was limited to the dealings with Cominco in December 1989 and early January 1990, and that it ended on 31 January 1990.

[257] I do not accept that it was so limited. RBS's account of 31 January 1990 is referenced "Re Amex of Canada Inc." (*sic*), which suggests a wider and different scope to the retainer.

[258] Further, Mr. Richards acted as chairman of Prospectors annual general meeting of 28 February 1990, which suggests that he was still active in the company's affairs.

[259] Finally, it appears that the letter from Prospectors to Boston Financial of 22 June 1990, noting Boston Financial's default of the option agreement of 2 April 1990, was typed by "blr". That, on all the evidence before me, can only be a reference to Barbara Leigh Richards, Peter Richards' wife and secretary at many relevant times in these proceedings. This represents a bit of sleuthing on my part, but I believe that it is appropriate in light of the record before me.

[260] Again, this suggests that Mr. Richards was still involved, to some extent, in assisting Prospectors as late as the early

summer of 1990. How he could act for Moss in its dealings with Prospectors during this period is difficult to understand.

[261] There is no doubt, however, that Richard Swadden took over as counsel to Prospectors for the negotiation and execution of the critical Moss/Prospectors amending agreements of late 1990 and the fall of 1991.

[262] A basic concern further arises with Mr. Richards' central role in assisting in the acquisition by Moss of Cominco's Anyox interests.

[263] Mr. Richards was still counsel to Prospectors. The parties clearly initially viewed the acquisition of Cominco's interests as an opportunity for Prospectors. Arguably to divert this opportunity to Moss, in which Mr. Richards was or hoped to become beneficially interested, was in breach of his fiduciary duties owed to Prospectors.

[264] It is said that Prospectors did not have the funds available at this time to fund the acquisition, but arguably (I need not decide) that is no defence to a claim for breach of fiduciary duty. And, in any event, Moss had no assets at the time either. If the parties could raise the money for Moss, why not for Prospectors?

[265] In any event, while this aspect raises concern, it is not of moment before me to the extent that Prospectors is not a party any longer in this litigation.

[266] Similarly, concern arises with the apparently cavalier mixing by Mr. Richards of his roles as a businessman and lawyer in respect of Moss; his engineering of the debenture/mortgages to protect his loans and those of his wife and friends to Moss and the accounts of RBS. There are no exhibited resolutions of Moss authorizing these and if, as Richards testified beneficial ownership of Moss rested with Separ/Bell, where is their informed consent to these debt instruments?

[267] Once again, however, if I conclude that the plaintiff, Buchan, has no beneficial interest in Moss, this is for someone else's complaint.

[268] Then there is the mystery surrounding Mr. Bell's ascension to beneficial ownership of Moss through Separ.

[269] No documents evidencing this transaction were exhibited at trial and Mr. Bell was not called as a witness.

[270] The consideration said to have been offered by Bell (funding the Moss payment to Cominco of 30 June 1990) was in the result never provided.

[271] Finally, there is a lack of formal written advice to Buchan by Richards that Richards and RBS were not acting for him personally and that he needed to get independent legal advice in respect of his dealings in the ventures, at least until the indenture of 2 October 1990.

[272] Still, Mr. Richards maintains that he always told Wolrige, Marsh and Buchan that he did not act for them personally. This is confirmed by Marsh and Wolrige and, of course, by the noted indenture of 2 October 1990.

[273] On the whole, while Mr. Richards may have been careless and sloppy in clarifying his role with Mr. Buchan, and while he may have breached his professional responsibilities in respect of Moss and Prospectors (which I need not decide because of the ultimate view I take of the case), I find his evidence basically truthful on a number of critical issues and I prefer it where it directly conflicts with that of Mr. Buchan.

[274] I will deal with any necessary credibility findings in respect of the other witnesses as I proceed.

V What Mr. Buchan Seeks

[275] In an effort to state with certainty what Buchan was seeking at the conclusion of trial, his counsel submitted a brief outlining the orders sought.

[276] The plaintiff seeks this declaratory relief (*inter alia*):

1. A declaration that the Defendants Moss Management Inc. ("Moss"), Alan Frederick Wolrige ("Wolrige"), Peter Colin Graham Richards ("Richards") and 331609 B.C. Ltd. and each of them (collectively the "Moss Defendants"), hold in trust for Buchan the following:

    a. The Crown granted mineral claims more particularly known and described as … (… the "Hidden Creek Crown Grants")

    b. The Crown granted mineral claims more particularly known and described as … (… the "Red Wing Crown Grants")

    c. The lands and premises more particularly described as: Lots 1 to 16 of Block 6, District Lot 766, Cassiar District Plan 1007, particulars of which are as follows:

    …

    d. The lands and premises more particularly described as:

Lot 50	PID:	015-574-156
Lot 60	PID:	015-574-164
Lot 479	PID:	015-574-245
Lot 898	PID:	015-574-270
Lot 899	PID:	015-574-342
Lot 1078	PID:	015-613-267
Lot 1675	PID:	015-575-721
Lot 1526	PID:	015 583 937
Lot 308	PID:	015-574-211

2. A declaration that the Moss Defendants and each of them, hold in trust for Buchan, their respective interest in the limited partnership which limited partnership is carrying out the hydroelectric projects over the dam site on Lot 1527 and the dam site in Kitsault (the "Limited Partnership Interest").

3. A declaration that the Moss Defendants and each of them, hold in trust for Buchan, their interest in the port located at Anyox, B.C. (the "Anyox Port Interest").

4. A declaration that Buchan is the sole beneficial owner of the shares of 331609 B.C. Ltd.

5. A declaration that Buchan is the sole beneficial owner of the shares of Moss.

6. A declaration that Buchan is the sole beneficial owner of the shares in Prospectors Airways Consolidated Ltd. ("Prospectors") held in the name of 331.

[277] There are, then, two principal declarations sought as to the beneficial ownership of Moss and 331 and the claim for a tracing remedy in respect of the Moss Defendants' interest in the limited partnership pursuing the hydroelectric development of the dam sites at Anyox and Kitsault.

VI Analysis

[278] Here I will outline my conclusions as to the parties' legal positions and then I will turn to the law relating to joint ventures and fiduciary duties in that and other relationships.

[279] I make the initial finding that Mr. Richards was only retained by Prospectors in mid to late December 1989. I reject Buchan's evidence that it was earlier and that it led to the Fall 1989 Four Party Agreement; that agreement is a figment of Mr. Buchan's fertile imagination.

[280] The advent of the possibility of acquiring Cominco's interests in the Anyox and the Amax Mill and town site, led to discussions between Buchan, Marsh, Richards and Wolrige as to the best method for developing the entire Anyox-Kitsault venture.

[281] In early January (see Richards' memorandum to the file, Exhibit 1, Tab 61), it was contemplated that the Amax Mill and town site would be acquired by a numbered company which would later assign the assets to an offshore Anguillan company.

[282] Eighty per cent of the Anguillan company was to be divided "between the management committee members, *i.e.* Nick Marsh, Steve Buchan and others". I conclude that "and others" was likely, at this time, in the contemplation of the parties, to include Richards and Wolrige.

[283] Relying on the same memorandum (dated 10 January 1990), Cypress Anvil was to receive (for $6 million) an option:

- to "acquire Prospectors Boston's 40% interest in the Cominco Agreement" for $2 million;
- to lease the Amax Mill and town site from "Offshore Co."; and
- the right "to purchase the Prospectors Boston Group, Cominco's 60% interest in the Timothy Mountain Agreement".

[284] Finally, we have in paragraphs 6 and 7 of that memorandum:

> 6. Off-shore will act as a bank to finance development of other projects in Kitsault area recommended by the management committee. For example, pulp and paper plant, coal port, marine transport company, hydro electric, etcetera.

> 7. All other interests in the Kitsault area are to be acquired in the name of the numbered company and to be developed under guidance of the management committee with interest in the project to be allocated under the supervision of the management committee.

[285] I conclude that the "numbered company" likely became Moss. I underline that in these early discussions Moss was not to acquire Cominco's 60% interest in the Cominco Option. That was contemplated as being acquired by the "Prospectors Boston Group".

[286] This description of the venture was modified in future discussions (I infer between the four, Buchan, Marsh, Richards and Wolrige). In particular, this is reflected in the undated "MEMORANDUM RE DIVISION OF INTEREST" (Exhibit 1, Tab 55) prepared by Richards.

[287] I conclude that this memorandum was prepared after that of 10 January 1990 and before the Managers' Agreement of 20 March 1990, because it now introduces AnCo, an entity found described in that latter document.

[288] Under this version of the venture, the Amax Mill and town site were to be acquired "by an Anguilla company" ("AnCo").

[289] Eighty per cent of AnCo was to be owned by A & B "or their Assignees, subject at all times to the claim of the specified managers as set fourth on Schedule A (Manager(s))".

[290] Based on Richards' evidence, A & B were to be Buchan and Marsh.

[291] Fifty per cent in total of AnCo's annual cash receipts were to be distributed by AnCo and 40% of those were to go to the "Managers".

[292] We then find these paragraphs further describing the venture:

> 8. All properties in the A-K area whereby A, B, PC(1) and PC(2) ("Owner(s)") have a major interest shall be developed under the direction of the Managers, provided however the Managers shall set the value of the existing interest of the Owner and such determination shall be made by the unanimous decision of the Managers. Once the value of the interest has been determined the Managers shall use their best efforts to ensure that the Owner will realize the value of his interest.
>
> 9. Upon the Owner's interest having been set by the Managers, the Managers shall then be entitled to participate in any vendors' positions, stock options or other compensation granted, allotted or otherwise obtainable equally and all efforts shall be made by each Manager to equalize any benefit he may receive by virtue of his position as an officer, director or Owner (in excess of the value set of the Owner's interest by the Managers).

[293] Again A & B are Marsh and Buchan and PC(1) and PC(2) likely, I find, represent Prospectors and Boston Financial (PC is an abbreviation for "Public Company").

[294] This iteration of the venture introduces the important concept (which is continued in the Managers' Agreement) that Marsh and Buchan were bringing assets to the venture for which they would be paid and after such payment, the "Managers" would be entitled to participate in revenues generated by the assets.

[295] This theme is also carried forward to the Managers' Agreement.

[296] On 6 March 1990, Moss, of course, entered into the letter agreement to purchase Cominco's Anyox interests. I do not know why Moss stepped into a transaction which for some weeks had been contemplated as being undertaken by "Prospectors Boston Financial" and the parties made no real effort to enlighten me.

[297] I observe that the parties, to my frustration, have left me to draw critical inferences from the evidence, when the court would much better have been served by the parties' direct evidence on the points. But that is the case before me.

[298] This brings us to the Managers' Agreement of 20 March 1990.

[299] I have already quoted extensive extracts from this document, so I will, here, summarize the central thrust of the agreement as I now discern it.

[300] First, recital A sets out what Marsh and Buchan are bringing to the venture — "various interests in the Anyox-Kitsault area".

[301] These include interests held through their shareholdings "in public companies known as (Prospectors), (Boston Financial), (Moss) and holdings in various private companies".

[302] Suddenly, Marsh and Buchan are said to have shareholdings in Moss. In fact, they did not have a legal interest in Moss, as the shares were held by Richards and Wolrige in trust for Separ, according to the undated declarations of trust.

[303] But aspects of the earlier discussions are carried forward in the Managers' Agreement.

[304] For example, AnCo (the Anguilla company) was to acquire the Amax Mill and town site and 80% of AnCo was now to be owned by a second Anguilla company (AnBank) not "A & B" (*i.e.* Marsh and Buchan) as in previous discussions.

[305] But the idea of the revenue of AnCo flowing eventually to be divided equally among the "Managers" (*i.e.* Marsh, Buchan, Richards and Wolrige) is continued.

[306] So too is the concept of Marsh and Buchan being compensated first for their interests brought to the venture, after which the Managers would participate equally.

[307] Who beneficially owns Moss in this version of the venture?

[308] It was, of course, Buchan's evidence that it was he and Marsh. Marsh's out of court deposition evidence was admitted at trial and he maintained that Moss was always Richards' and Wolrige's company.

[309] Richards did not go that far, at least initially. He, as earlier described, maintained that Moss was to be owned by Separ, which in turn was to be owned by four offshore companies each owned individually in turn by the four Managers.

[310] I conclude that it was likely contemplated at this point that Marsh and Buchan, or Boston Financial and Prospectors (in both of which Marsh and Buchan had substantial shareholdings) would beneficially own Moss.

[311] I reach this conclusion by stressing the provisions suggesting such control which I earlier highlighted in the Managers' Agreement when I described it in Part III of these reasons.

[312] In short form:

- recital E which suggests that the Schedule B ("Interests") were brought in by Marsh and Buchan;
- clause 8, the reversionary interest in the assets given to Marsh and Buchan and Richards' evidence on that clause;
- clauses 13 and 14 — the payment to Marsh and Buchan for their interests; and
- clause 21 the *quasi* veto given to Marsh and Buchan and Richards' evidence on that clause.

[313] While it may seem critical to determine whose ownership scenario for Moss I should accept, that is that of Buchan, or that of Richards (and Wolrige), it is not really that important.

[314] This was something that was to happen in the future with the acquisition of the Cominco assets under the Cominco Moss Agreement. That never happened as originally envisaged. Buchan would have us believe that he and Marsh automatically enjoyed ownership in Moss without paying for its only asset — the Cominco Moss Agreement — which in turn was diverted from Prospectors.

[315] And if ownership of Moss had developed, as Buchan maintains, the asset would have been rolled into the Managers' Agreement and all four, Buchan, Marsh, Richards and Wolrige were eventually to equally enjoy the fruits of that asset.

[316] It does not really matter what was actually contemplated by the parties at this point as to the beneficial ownership of Moss, because, as Richards testified and I accept, the venture began to unravel immediately after execution of the Managers' Agreement and, indeed, even before the critical Schedule C (detailing AnBank's shareholders) was drafted.

[317] The fact is that it is undisputed that the Amax Mill and town site were never acquired by Marsh and Buchan as suggested in recital E, and Marsh and Buchan never held shares in Moss or in offshore companies which, in turn, did.

[318] This might have been an important aspect of the venture, but it never came to pass because the two, in particular Buchan, never advanced a dime towards Moss' acquisition of the Cominco interests.

[319] That acquisition was indisputably funded, apart from Boston Financial's initial $25,000, by Richards and Wolrige, their friends and Richards' fortuitous relationship with Westall.

[320] What is probably most telling against Buchan's claim today, that he and Marsh always beneficially owned Moss, is the fact that his contemporaneous conduct utterly belies any such interest.

[321] I begin by noting Richards' evidence that at some point after he was forced to make the first payment of $50,000 under the Cominco Moss Agreement, he told Wolrige, Marsh and Buchan, that as far as he was concerned the Managers' Agreement was at an end and that he would thereafter proceed to salvage what he could out of the aborted venture. I accept this evidence.

[322] That Buchan, in particular, was out of the venture and considered himself to be so, is confirmed by a document which Richards prepared, but which he maintained at trial reflected an offer from Buchan at the time. It is found at Exhibit 7, Tab 94.

[323] The proposal is entitled: "MOSS MANAGEMENT INC. OPTION TO STEVE BUCHAN".

[324] It is dated 18 May 1990, and it provides in part:

> In consideration of $1.00 Moss grants to Steve Buchan an option to acquire a 10% share interest in Moss upon the

following conditions:

$75,000 on or before May 25th 1990

Buchan to arrange for a Letter of Credit for $500,000 transferable and callable on presentation June 29, 1990 by way of a loan.

[325] Clearly this extends a "second chance" to Buchan to participate in Moss by contributing towards the acquisition from Cominco.

[326] Buchan denies ever making such a proposal or seeing this document. I do not believe him.

[327] Mr. Buchan complained at trial that Moss (*i.e.* Richards and Wolrige) reneged on the promise to immediately vest Prospectors' interest in the Cominco Option without the further payment of the exploration costs. Yet Buchan executed the Moss/Prospectors Agreement of 2 April 1990, which simply extended that payment for a period of one year. And Buchan executed the 22 November 1990 agreement changing the 40% interest in the Cominco Option assets into a 5% carried interest in the net profits of production of the orebodies.

[328] The drafting of this later agreement was negotiated by Richard Swadden and it also involved Klassen, as a director of Prospectors. Counsel properly asks: If Buchan felt this was prejudicial to Prospectors and not in keeping with the promise to vest the Cominco Option, why did he not, as the person in substantial control of Moss (according to him), exercise his authority and put a stop to the amendment?

[329] Instead, at the annual general meeting of Prospectors in February 1991, Mr. Buchan spoke in favour of the amending agreement.

[330] The minutes of the meeting disclose this conversation:

> Mr. Lamb expressed frustration at the lack of progress in the company and with past mismanagement. He asked Mr. Buchan what was left and where the company was going. Mr. Buchan explained that the company had attempted to barter certain remaining assets of the company to stay in business. The company had spent $1.7 million on the Hidden Creek Claims, and then flow-through share funding had dried up, so the directors tried to keep as many assets as possible in the company without spending the further $1.3 million required by the Option Agreement. Mr. Buchan said that it was impossible to raise money and that this was in part attributable to the untried management of the company since Mr. Chisholm's illness. The company essentially bartered certain of its assets in order to acquire a vested interest without further expenditure. Initially the company got only a one year extension, but the most recent agreement gave it a carried interest.

[331] If Mr. Buchan effectively controlled Moss at this time with Mr. Marsh, why did he suggest, in effect, that this was the best Prospectors could do?

[332] I ask this, as well, in the context of Mr. Buchan's assertion at trial that he has acted throughout the piece as the protector and champion of Prospectors' interests.

[333] The same questions arise with the amendments to the Moss/Prospectors arrangement in late 1991, where Prospectors gave up its 5% carried interest, as I have related.

[334] Buchan denies knowledge of that agreement. I do not believe him. Klassen, I find, would have kept him fully informed on such a critical matter.

[335] On this theme I backtrack to August 1990.

[336] On 21 August 1990, Buchan and Klassen both signed a letter on behalf of Prospectors to Moss (attention Richards) seeking a way to earn a vesting of the 40% interest. The body of the letter says in part:

> Dear Peter,
>
> Prospectors Airways Co. Ltd. would, in the interest of its shareholders, propose a method whereby the 40% Hidden Creek Property Interest could become vested to the benefit of Prospectors.
>
> In the past Moss has expressed interest in the properties known as the Granby Penninsula [*sic*] and the Moly May. We believe it would be of mutual benefit for Moss to accept, in lieu of the $1.3 MM outstanding exploration expenditure obligation, a 60% undivided interest in the above properties. As the VSE has indicated Moss may, at its discretion, waive the $1.3 MM obligation should it wish and thereby vest Prospector's Interest in the Hidden Creek Area the passing of the above Property Interests (Granby Penninsula, Moly May) as consideration for vesting of the Hidden Creek Interest may better serve all parties concerned.

[337] This does not suggest that Buchan had any interest in, or control of, Moss' approach to these matters. This letter also

belies Buchan's assertion that he always believed that Moss was to vest Prospectors' interest in the Cominco Option without payment of the $1.3 million.

[338] Finally, when he learned about the Moss/TVI transaction in 1992, Buchan did not raise a hue and cry about his company, Moss, being sold out from under him.

[339] On the contrary, he pointed out to Richards and Wolrige that the transaction overlooked some claims which should have been included (see T. 22 October 2007, p. 7 and following).

[340] I find, as a fact, that Buchan accepted, in the spring of 1990, Richards' position that the Managers' Agreement would never be implemented or performed and that Richards and the others would work towards salvaging whatever they could.

[341] While it was proposed that Marsh and Buchan would have an indirect interest in Moss, that never happened. The scheme was abandoned and Buchan accepted that and left Richards and Wolrige to do their best to preserve the Cominco Moss Agreement in the hope of selling off the assets of Moss to repay the outstanding loans to Moss.

[342] It is true that there are a number of examples of Richards, in particular, keeping Buchan informed of dealings involving Moss after April 1990. But this is consistent with Richards' evidence that he was looking to Marsh, Buchan and Wolrige to do all they could to ensure that the investment in Moss was salvaged.

[343] Richards was still on good terms with Buchan. Indeed, he arranged for Buchan to go on the board of Westall during this period.

[344] A further example of Richards apparently involving Buchan in the affairs of Moss is the acknowledgement by Buchan of Richards' letter to Moss (attention Wolrige) found at Exhibit 4, Tab 237. Here Richards is confirming that he is acting for Moss only as an officer and director, not as a lawyer. This letter is dated 29 May 1991. I do not know with certainty why Buchan would be asked to acknowledge this advice if he was no longer involved beneficially in Moss.

[345] I note that while Buchan's signature is apparently on the acknowledgement, it is not directed to him. If he was asked to sign it by Richards — I cannot with complete confidence conclude that he was — it could be consistent with a concern by Richards that he should get such an acknowledgement in light of Buchan's early involvement with Moss.

[346] When I say that the Mangers' Agreement was never implemented, I must address one transaction: the transfer by Marsh to Moss of the share in 331. That took place on 31 May 1990.

[347] Arguably, the transfer of the share to Moss was not pursuant to the Managers' Agreement, because that agreement, contrary to Buchan's view, does not contemplate the vending of Marsh/Buchan assets into Moss.

[348] I return to the Managers' Agreement. I have found that it was never implemented or performed.

[349] It is instructive in this regard to review Schedule B to that document which details the assets said in the recitals to be brought to the venture by Buchan and Marsh.

[350] I have earlier reproduced Schedule B and I will now deal with each item in the schedule:

> "1. Amax Mill and Townsite"

[351] As I have related, these assets were never acquired by Buchan or Moss. They would have cost many millions of dollars.

> "2. Assets acquired from Cominco Ltd. by Moss Management Inc. as described in Schedules "A", "B" and "C" of the letter written to Cominco Ltd. and Moss Management Ltd. and dated March 6, 1990"

[352] I have already dealt with ownership of Moss and with what transpired in the efforts of Richards and Wolrige to preserve it and sell off its assets.

> "6. Various interests in Anyox Area"

[353] No other interests were offered by Buchan or Marsh.

> "3. Interests in Red Wing Mine, Anyox Area
>
> 4. Dam Site, Water Licences and proposed Power Station Lots
>
> 5. Post [*sic*] Facilities at Anyox and Kitsault"

[354] Subject to my observations below, these are the assets in 331.

[355] I have related the fact of Marsh transferring the share in 331 to Moss and his evidence in that regard. Marsh denies that Buchan had any interest in 331 and, in any event, Richards and Wolrige had no notice of Buchan's alleged interest (the Managers' Agreement is not inconsistent with a finding that Marsh alone brought 331 to the venture). Nor did Richard Swadden

have notice of any interest in 331 for Buchan. Swadden was 331's counsel at material times.

[356] The "Dam Site" was not an asset of 331, it was the property of Cominco and it passed to Moss under the Cominco Moss Agreement.

[357] The "Water Licences" were not plural and the single item was not even a license, it was an application for a license at Anyox which was filed with the responsible government office and never apparently pursued. The "proposed Power Station Lots" were the 16 lots at Anyox purchased by 331 for $5,000.

[358] Finally, I refer to "Post (*sic*) Facilities at Anyox and Kitsault".

[359] As to those at Anyox, Cominco/Moss controlled the upland lots and the "port" consisted of the exemption under the ***Navigable Waters Protection Act***.

[360] Neither Buchan nor Marsh ever acquired, on the evidence, port facilities at Kitsault.

[361] On the whole, the much flaunted assets of 331 do not appear to be very significant.

[362] I return to the issue then of Buchan's claim to a beneficial interest in 331.

[363] He rests first on the Litigation Agreement which he says gives him the right to step into Marsh's shoes to pursue (*inter alia*) Marsh's interest in 331 for the benefit of himself and Marsh's trustee in bankruptcy.

[364] The Litigation Agreement is effective for this purpose. Mr. Marsh's discharge does not affect the trustee's right to pursue assets which were not disclosed in the bankruptcy, but which nevertheless vested in the trustee.

[365] But what can Mr. Marsh say with respect to his interest in 331. He said in evidence that he voluntarily transferred the share in 331 to Moss, as consideration for Moss taking over 331's corporate responsibilities.

[366] The possibility of the share of 331 being transferred in the scenario contemplated by the Marsh/Moss agreement exhibited at Exhibit 2, Tab 116 (see paragraphs 204 to 209 *supra*) was even suggested by Buchan himself in his affidavit of 12 June 2003, which was put to him on cross-examination.

[367] As to Buchan pursuing his alleged half interest in 331, the *maxim ex turpi causa non oritur actio* is pled by the defendants.

[368] I have already found that the assets of Geo-Roc were transferred to 331 to avoid the creditors of Geo-Roc. This is a fraudulent conveyance.

[369] Geo-Roc's assets were acquired with monies paid out of Prospectors' flow through financing. If, indeed, Buchan is the beneficial owner of one-half of Geo-Roc, it was improper of him to deal covertly with Prospectors in which he was an officer and director.

[370] The debt settlements between Prospectors and Geo-Roc and 331 by which shares in Prospectors were issued to the companies are likewise tainted by Buchan's non-disclosure to Prospectors of his alleged interests in the companies.

[371] In my view, Mr. Buchan has exceedingly unclean hands. He is pursuing equitable relief (sounding in either resulting or constructive trust) and declaratory relief and I would not assist him. (For a discussion of the clean hands doctrine, see ***Hongkong Bank of Canada v. Wheeler Holdings Ltd.***, [1993] 1 S.C.R. 167, in part holding that equitable principles such as clean hands can play a role in the exercise of the court's discretion to grant even declaratory relief.)

[372] The ultimate irony for Mr. Buchan is that if he did gain control of 331, he would indirectly enjoy assets of little if any value and a debt, by way of the promissory note in excess of $600,000, to Geo-Roc. This would undoubtedly please Mr. Marsh, who was left to shoulder Geo-Roc's debt, leading to a second bankruptcy, without a scintilla of help from Mr. Buchan.

[373] This brings us to the analysis of the parties' positions in respect of the breakdown of the Managers' Agreement, or more properly the total failure of performance under it.

[374] It is necessary to characterize the legal relationship proposed to be created by the Mangers' Agreement.

[375] I note paragraph 18 of the agreement:

> The Managers shall not constitute a partnership but shall act as independent contractors whether acting through corporations or otherwise.

[376] So, a partnership seems to be expressly precluded.

[377] Justice Wedge has recently, helpfully, discussed the law of joint ventures in ***Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership***, 2008 BCSC 27.

[378] At ¶ 57, Justice Wedge cites ***Canlan Investment Corp. v. Gettling*** (1997), 37 B.C.L.R. (3d) 140 (C.A.), as confirming these ingredients to a joint venture:

a) As is the case with partnerships, the joint venture must have a contractual basis; and

b) There must be:

(i) a contribution of money, property, effort, knowledge or other asset to a common undertaking;

(ii) a joint property interest in the subject matter of the venture, which is usually a single or ad hoc undertaking;

(iii) a right of mutual control or management of the venture;

(iv) an expectation of profit and the right to participate in the profits;

[379] The Managers' Agreement includes all of the characteristics noted in (b) and it would have had a contractual basis but for the fact that it failed *ab initio*. The parties, I find, never treated it as an executed contract. This is quite apart from the fact that its terms were not settled on as the critical Schedule C was never drafted and the central asset — the Amax Mill and town site — was never acquired.

[380] If it had come into being whether the joint venture would give rise presumptively to a fiduciary relationship between the joint venturers, would entail a consideration of the law which Justice Wedge canvasses at ¶ 69 to 78 of ***Blue Line Hockey***.

[381] As to Richards' role in the formation of the joint venture, I accept that he orally advised the other venturers that he was not acting for them personally, and that they acknowledged that in the indenture of 2 October 1990.

[382] Richards did draft the Managers' Agreement, but I find that he did so (at its highest) as a lawyer to the joint venture.

[383] In ***Cavallin v. King*** (1984), 51 B.C.L.R. 149 (S.C.), Wallace J. (as he then was) considered claims in negligence and breach of fiduciary duty against a solicitor. The claims were advanced by the plaintiff against the defendant lawyer, with whom he had joint ventured a real estate development in Washington State.

[384] Mr. Justice Wallace considered the issue of duties arising in a solicitor/client relationship. He concluded (at 153):

> It is clear that the relationship between the plaintiffs and Mr. King concerning the acquisition and development of the Washington State properties was one of joint venture partners pursuant to an agreement that each contribute particular services, share the profits and be equally responsible for the losses. They embarked upon a joint business venture giving rise to quite different duties from those which would arise from the usual solicitor/client relationship.
>
> ...
>
> Mr. King owed a duty to the joint venture, of which he was a part, to perform his services with care to avoid causing the joint venture loss. I find, with respect to the legal services he performed, that his duty, as solicitor, was owed to the joint venture and not to the plaintiffs as the plaintiffs' solicitor.

[385] In my view, that describes the extent of Mr. Richards' duty here, as a solicitor, if he owed any duty, it was owed to the joint venture, not to the plaintiff, Buchan, personally.

[386] And, again, the joint venture never, in the result, came into legal existence. The parties set about dismantling it before it ever did.

[387] The plaintiff's final submission is replete with examples of Richards' alleged breaches of fiduciary duties owed to Moss, Prospectors and Buchan and the concomitant breaches of his professional duties as a solicitor.

[388] As to Moss and Prospectors, they are not at bar complaining; as to Buchan, I have found that Richards did not act for him personally which Buchan, a sophisticated businessman, well knew. Indeed, when one considers, in the traditional fiduciary duty analysis, the degree of vulnerability under which the alleged beneficiary laboured (here Buchan), one comes to the conclusion that the alleged fiduciary (here Richards) was far and away the most vulnerable in the relationship.

[389] The plaintiff is at pains to plead its case largely in breach of fiduciary duty, citing Richards' (and Wolrige's) fiduciary duties to Buchan, Prospectors and Moss. But the plaintiff's case is really about fraud and theft at the hands of Richards and Wolrige. And the case boils down to that simple question: Did, as Buchan alleges, Richards and Wolrige steal Moss and other assets from him (and the unsuspecting Marsh)?

[390] I have concluded that they did not.

[391] My analysis leads me to these conclusions:

(i) Marsh, Buchan, Richards and Wolrige proposed to create a joint venture through the Managers' Agreement;

(ii) one of the principal assets in the venture was to be Moss with the Cominco Moss Agreement;

(iii) the Moss payments to Cominco were to be funded by Boston Financial or some other entity, but never by Richards and Wolrige or their sources;

(iv) Buchan did not contribute to the acquisition by Moss of the Cominco assets; he acquiesced in letting Richards and Wolrige do so, and Buchan further acquiesced in their treating Moss as their own to allow them to salvage their investment, which was at serious risk;

(v) the only asset which Buchan could possibly lay claim to is a one-half interest in the share of 331; on a balance of probabilities, given Marsh's evidence and that of Richards, Wolrige and Swadden, the lack of documentary evidence supporting Buchan's claim, and my quite negative assessment of Mr. Buchan's credibility, he has not made out his case; even if he had, I would not assist him with equitable or declaratory relief; and

(vi) the other "jewel" (I use that word advisedly) in the joint venture crown — Prospectors' Cominco Option was bartered away by Prospectors in lawful transactions in which Prospectors had the benefit of competent advice and which in, any event, made business sense in the context of Prospectors' economic position at material times.

[392] I wish to end this section by dealing specifically with one aspect of Mr. Buchan's claim. I refer to the trust claim to the interests of Richards and Wolrige in the limited partnership developing the hydroelectric project at Anyox, utilizing the dam site on District Lot 1526, which Moss acquired in the transaction with Cominco.

[393] The only possible "asset" arguably diverted by Richards and Wolrige from 331, and to which Buchan could possibly fasten his equitable claim, is the water license application.

[394] As I have related, Mr. Buchan has made much of this application; in my view, it is much ado about very little. It was only a simple application filed by Geo-Roc and not pursued by 331. (Indeed it was arguably improperly diverted by Buchan or Marsh from Prospectors).

[395] It was followed up with a Prefeasibilities Review Report prepared by Crippen Consultants for 331 and "Anyox Power Corporation" in December 1989 and an earlier report for Geo-Roc, prepared by Sigma Engineering Ltd.

[396] Even if Buchan personally could pursue opportunities identified by Geo-Roc and 331, and then effectively transferred to Moss, he simply has not made out a case which would support a tracing of the interests comprising what the limited partnership is now pursuing many, many years later at Anyox with the expenditure to date in the many millions of dollars. Indeed, the evidence of just what that limited partnership is doing at Anyox is almost totally lacking in the record before me.

[397] In ***Visagie v. TVX Gold Inc.*** (2000), 187 D.L.R. (4th) 193, the Ontario Court of Appeal considered a joint venture in which the plaintiffs disclosed commercially valuable information to the defendants about a potential mine site in Greece.

[398] The information was protected by a written confidentiality agreement. Ultimately, the Greek government decided not to sell the mine privately. The joint venture terminated as a result.

[399] Thereafter, the defendants successfully bid on the operation in a public offering and developed a lucrative mine. The plaintiffs sued for breach of fiduciary duty and breach of confidence.

[400] Justice Charron delivered the judgment of the court. The learned Justice found that the trial judge erred in finding a fiduciary relationship (at ¶ 16 and 17):

> 16 It is my view that the trial judge erred in finding that there was a fiduciary relationship between TVX and Alpha and that this fiduciary relationship survived the termination of the joint venture funding agreement. This conclusion rests mainly on a consideration of the facts, as found by the trial judge, but in the light of the decision of the Supreme Court of Canada in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), which was released after the trial of this matter. Consequently, I am of the view that nothing precluded TVX from acquiring Kassandra for its own account after terminating the joint venture funding agreement.
>
> 17 TVX remained bound, however, by the terms of the confidentiality agreement and by its common law duty of confidence not to use confidential information obtained from Alpha, except for the joint benefit of the parties. The trial judge's findings that Alpha provided TVX with information that had the necessary quality of confidentiality to be worthy of protection at law and that TVX used this information as a springboard in its acquisition of Kassandra are based on correct legal principles, are entirely reasonable and supported by the evidence. …

[401] In the case before me, the question of surviving fiduciary duties does not arise, because the joint venture never came into existence. The parties abandoned it.

[402] The primary assets supporting the current hydroelectric project are lands owned by Moss under the Cominco Moss Agreement. There is no evidence before me that the limited partnership is making use of any confidential information contained in the old studies I have noted.

[403] Finally, there is no plea of breach of confidence or misuse of confidential information in the Further Amended Statement

of Claim; indeed, no mention is made of Richards and Wolrige's interests in the limited partnership.

[404] The fact of the hydroelectric opportunity at Anyox was obviously, in any event, in the public domain because Granby had indeed operated the facility during its tenure at Anyox.

[405] The case pleaded and the record developed before me simply could not possibly justify any remedy of the sort sought by Mr. Buchan under this head.

[406] I should acknowledge that it was agreed that any accounting issues arising out of any finding of liability (*i.e.* the measure of the plaintiff's loss) would await a remedies phase of this trial. But that does not release the plaintiff of his essential burden of making out the basic claims he advances, here the tracing claim in respect of the current hydroelectric project at Anyox-Kitsault.

VII Disposition

[407] The action is dismissed. The parties have leave to arrange submissions on costs through the registry.

"Bauman J."

SCHEDULE "A"

CORPORATE STRUCTURE MOSS MANAGEMENT INC. AND TRANSFEREES OF 9,900,000 SHARES OF TVI COPPER INC. ORIGINALLY ISSUED TO MOSS MANAGEMENT INC.