

Court of Appeal rejects the constructive trust analysis in Brookfield

By Nigel Bankes

Cases Considered:

Brookfield Bridge Lending Fund Inc. v. Vanquish Oil and Gas Corporation, [2009 ABCA 99](#), reversing [2008 ABQB 444](#)

The Court of Appeal by a 2:1 majority (Justices Frans Slatter and Patricia Rowbotham for the majority, Justice Ronald Berger dissenting) has overruled the decision at trial by Justice Bruce McDonald to impose a constructive trust on the assets of an operator beyond the express trust provided for by clause 507 of the CAPL Agreement.

I had criticized the trial judgement in an earlier [post](#) on two main grounds. The first ground was that in deciding to impose a constructive trust Justice McDonald failed to satisfy himself that the case fell within the four criteria of *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The second ground was that Justice McDonald failed to give good reasons for granting the joint operator an equitable proprietary remedy thereby defeating the interest of both secured creditors (here Brookfield) and unsecured creditors.

I think that the majority of the Court has accepted both of those criticisms. Thus, Justice Slatter emphasised that there was no evidence to suggest that the incremental monies in the commingled account were the fruit of the breach of trust (at para. 20). Justice Slatter also concluded that there was no reason to prefer the joint operator over the interests of the secured creditor, Brookfield. It was unrealistic to think that Brookfield was in a position to protect itself from the operator's breach of trust by monitoring the operator's accounts. The joint operator created the risk here by permitting the commingling of trust and non-trust monies (at para. 25).