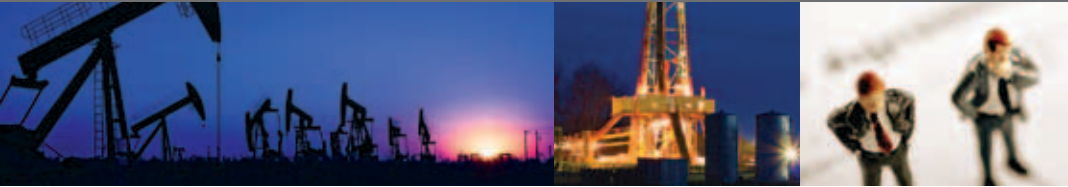


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Set-Off Rights in CCAA Proceedings: Clarification by the Alberta Court of Appeal

by Simina Ionescu-Mocanu and Megan Ross

Introduction

The law of set-off allows a party who has mutual dealings with another to literally “set off” (or offset) amounts that it owes the other party against whatever amounts the other party owes to it. The right of set-off applies notwithstanding insolvency and restructuring proceedings.

In typical insolvencies, most creditors recover only a portion of the amounts owing to them by the insolvent debtor. Set-off is therefore particularly beneficial in this context because creditors do not have to take a discounted value for the debts owed to them and pay in full the obligations that *they owe* to the debtor at the same time.

Recently, the Alberta Court of Appeal released two decisions that address the law of set-off in both insolvency and oil and gas contexts.

The Facts

(a) The Nexen Decision

In *Nexen Marketing v. SemCAMS ULC*¹ (“Nexen”), Nexen Marketing (“Nexen”) was a party to four agreements with SemCAMS and its affiliates:

1. Nexen was the purchaser and seller of gas pursuant to a natural gas purchase and sale agreement (the “CEG Gas Agreement”) entered into by Nexen and CEG Energy Options Inc. (“CEG Energy”).
2. Nexen was the purchaser and seller of crude oil pursuant to a crude oil purchase contract (“SemCans Crude Agreement”) entered into with SemCanada Crude Company.
3. Nexen and SemCAMS had entered into GasEDI base contract for sale and purchase of natural gas (the “Gas Agreement”). Under this agreement either party could be purchaser or seller. However, in practice, Nexen had always been the purchaser.
4. Nexen purchased condensate under a crude and petroleum contract (the “Condensate Agreement”) between it and SemCAMS ULC (“SemCAMS”).

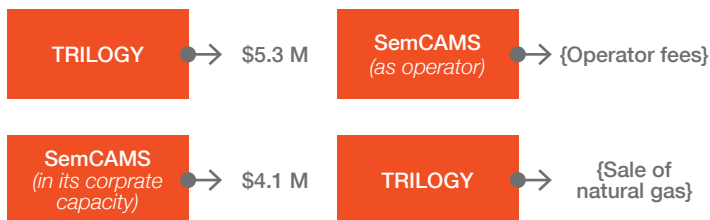
SemCAMS and its affiliate companies were owned by the same American parent, SemGroup LP². These companies operated under the umbrella of a single credit department, run by the corporate parent. Parties contracting with the affiliated companies were invited to evaluate their credit on a group basis, and the group otherwise held itself out to be a single group of companies. SemGroup LP granted a guarantee in favour of Nexen and Nexen Marketing USA Inc. of the obligations of subsidiary companies that potentially had credit risk exposure to Nexen—including SemCan Crude and CEG. That guarantee did not, however, include SemCAMS’ obligations.

In July of 2008, SemCAMS initiated *Companies' Creditors Arrangement Act* (“CCAA”) proceedings. At that time, Nexen owed SemCAMS a combined \$1.2 million under the Condensate Agreement and the Gas Agreement. Nexen refused to pay this amount. SemCAMS brought an application before the Alberta Court of Queen’s Bench to recover the amounts from Nexen (plus interest) and Nexen claimed a right of equitable set-off.

(b) The Trilogy Decision

In *Trilogy Energy LP v. SemCAMS ULC*³ (“Trilogy”), Trilogy Energy LP (“Trilogy”) was an oil and gas producer and a joint owner of certain pipeline facilities. It sold gas to SemCAMS ULC (“SemCAMS”) pursuant to an Inlet Purchase Agreement (the “IPA”). SemCAMS owed Trilogy \$4.1 million in respect of the sale, in its own corporate capacity.

SemCAMS, as operator of a number of gas processing plants and pursuant to numerous construction, ownership and operation agreements (the “CO&O Agreements”) and gas processing agreements (the “GPAs”), provided gathering, transportation and processing services to Trilogy. Trilogy was a joint owner of some, but not all of the plants. Trilogy owed SemCAMS \$5.3 million (exclusive of interest) for SemCAMS’ services as operator.



SemCAMS sought to enforce Trilogy’s indebtedness as soon as SemCAMS initiated CCAA proceedings. In response, similar to Nexen, Trilogy brought an application to the Alberta Court of Queen’s Bench and argued that it was entitled to set off SemCAMS’ liability arising from the IPA against its debt for outstanding operator fees.

Analyzing Set-Off Rights by Contract, at Law, and at Equity – The Court of Appeal Position

Hoping to reduce some of its overall exposure, Trilogy claimed that it was entitled to set-off by contract, at law and/or at equity. The Court of Queen’s Bench denied all three types of claims.⁴

In *Nexen*, Nexen was unable to rely on contractual or legal set-off as the claims sought to be set off were between separate legal entities. Nexen therefore based its claim on equitable set-off only. Its application was also dismissed at the lower court level.

Both Nexen and *Trilogy* sought leave to appeal. As Trilogy addresses all three genres of set-off, we will discuss its principles first notwithstanding the fact that the decision was released after Nexen chronologically.

(a) Contractual Set-Off

With respect to contractual set-off, the Court in *Trilogy* found that neither the CO&O Agreements nor the GPAs provided Trilogy with set-off rights. Although the IPA contained broad set-off clauses that entitled Trilogy to set off amounts owing under the IPA against amounts owing under “any other agreements” between it and SemCAMS, the Court found that the language in the IPA was not broad enough to cover agreements where SemCAMS contracted as operator or acted as trustee⁵ for the other joint owners.⁶

(b) Legal Set-Off

Trilogy also argued that it was entitled to legal set-off. The Court dismissed this argument based on the fact that SemCAMS and Trilogy did not have mutual claims or cross-obligations. SemCAMS contracted as operator under the CO&O Agreements and the GPAs. SemCAMS was therefore a trustee for its joint owners and was not a party acting in its own right.⁷ While working in this capacity, SemCAMS could not use joint account funds that were maintained for the benefit of the joint owners to repay indebtedness incurred by it in its individual corporate capacity.

(c) Equitable Set-Off

As discussed by the Court of Appeal in *Trilogy*, the right to equitable set-off is premised on the fact that the cross-claims are “so clearly connected” with one another that it would be unjust to allow one party to enforce payment without taking into consideration the other party’s cross-claims.

The Court found that the only connection between SemCAMS’ and Trilogy’s claims was that the agreements in question related to the gathering and processing of natural gas and had a common operator. Although obligations need not arise out of the same contract to establish a right of equitable set-off, over the course of the last 10 years, the parties had entered into 29 different contracts. Trilogy’s claim to equitable set-off was therefore dismissed.

The Nexen Case: Clarifying Notions of Equitable Set-Off

As discussed above, Nexen also relied on the right of equitable set-off in hopes of recovering some of its outstanding indebtedness.

Madam Justice Romaine delivered the judgment from the Court of Queen’s Bench, which was subsequently accepted at the Court of Appeal. The Court first set out the five-part test for equitable set-off from the Supreme Court of Canada’s decision of *Hold v. Telford*⁸ (the “*Telford Test*”):

1. The party relying on a set-off must show some equitable ground for being protected against his adversary’s demands.
2. The equitable ground must go to the very root of the plaintiff’s claim before a set-off will be allowed.
3. A cross-claim must be so *clearly connected* with the demand of the plaintiff that it would be *manifestly unjust* to allow the plaintiff to enforce payment without taking into consideration the cross claim.
4. The plaintiff’s claim and the cross-claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims [emphasis added].

In her analysis of the “manifest injustice” test (the third arm of the *Telford Test*), Madam Justice Romaine concluded that it is the *claims* that must be closely connected (i.e. arise out of the same transaction or series of transactions), not the parties to the contracts.⁸ As such, the fact that various SemGroup corporations had marketed themselves as group entities with a single credit department was of limited relevance to the real question: *do the claims arise from transactions that are closely related or from contracts that are inter-related?*

To maintain contractual rights to set-off, participants may want to consider using contractual provisions which specifically allow contractual set-off even when such participants are acting in the capacity of operators or trustees.

Madame Justice Romaine also held that the contracts did not support a finding of close connection sufficient to establish equitable set-off. She determined that they were negotiated and executed in different time periods with different parties and for different purposes. She concluded that mere membership in the same corporate group could not establish a sufficient connection to create a right of equitable set-off.⁹

Food for Thought and Concluding Remarks

With the newly released decision in *Nexen*, the Court has reiterated that equitable set-off is only available in very limited circumstances. This case clarifies what types of connections the court will consider in its determination of manifest injustice: it is the transactions that must be connected and not the parties.

Similarly, *Trilogy* suggests that parties ought to be aware of the capacity in which their contracting counterparties are acting, as such capacity may impact their ability to utilize not only set-off rights which are typically available at equity, but also contractually or at law.

To maintain contractual rights to set-off, participants may want to consider using contractual provisions which specifically allow contractual set-off even when such participants are acting in the capacity of operators or trustees. Alternatively, non-operators may wish to take additional security to protect their exposure. As per *Nexen*, security should be obtained for all contracts entered into with a group of companies, even when there is no direct risk of credit exposure.

While some may argue that the decisions evidence a potential narrowing of the law of set-off, the Court of Appeal maintained in both instances that its analysis was consistent with over 20 years of pre-existing common law. At a minimum, the cases establish a clear assertion that, in Alberta, the law of set-off will not be liberally applied.

Footnotes

¹ (2009), 457 A.R. 336 (C.A.)

² SemGroup LP and its US affiliates are now subject to Chapter 11 proceedings in the US.

³ (2009), 460 A.R. 269 (C.A.)

⁴ See *SemCanada Crude Company (Re)*, 2009 ABQB 397.

⁵ Prior to making its decision, the Court of Appeal first found that the CO&O Agreements created a trust relationship between Trilogy (as operator) and the other joint owners. The Court of Appeal upheld Madam Justice Romaine's decision in this regard. The Court of Queen's Bench had found that, SemCAMS' role was similar to that of an operator of a well under the CAPL joint operating procedure. In doing so, Madam Justice Romaine referred to (and upheld the reasoning used in) the case of *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 87 A.R. 133 (C.A.).

⁶ For Trilogy to succeed, the IPA's set-off language would have had to be broad enough to cover agreements in which SemCAMS was contracting as an operator. Alternatively, Trilogy would have had to successfully argue that sufficient ambiguity existed in the IPA to make evidence of the surrounding circumstances or the intention of the parties a relevant consideration.

⁷ *Holt v. Telford*, [1987] 2 S.C.R. 193; *Citibank Canada v. Confederation Life Insurance Co.*, [1996] O.J. No. 3409, 42 C.B.R. (3d) 288 at para. 35, aff'd, [1998] O.J. No. 114, 37 O.R. (3d) 226 (C.A.).

⁸ *Ibid.*

⁹ *Supra* note 1, at para. 9.

⁹ *Supra* note 1, at para. 13.

What We've Been Up To

Carolyn Wright is currently a Director of the Canadian Energy Law Foundation (CELf) and a member of the Organizing Committee for the CELf Jasper Conference. In June 2010 Carolyn, together with **Doug Mills** and **Julie Inch** from our litigation group, will be presenting a paper at the CELf Jasper Seminar entitled "Exploring the Balance of Power in the Operator/Non-Operator Relationship under the CAPL Operating Procedure".

John Lowe presented a paper, Legal/Public Policy Perspectives on Performance Based Regulation, at the Van Horne Institute PBR Workshop May 26-27, 2010.

John Taylor will be leading a Workshop entitled, "Comprehensive Guide to Negotiating Construction Contracts" for the Canadian Institutes' Managing Risks in Construction Contracts" Conference in Edmonton from November 16 to 19th, 2010.

Carolyn Wright is an executive member of the Canadian Bar Association ("CBA") Natural Resources Section and teaches "An Interpretive Approach to Dealing With ROFR Issues" for the Canadian Association of Petroleum Landmen Continuing Education Program.

Candice Jones is a Director-at-Large Legal of the Petroleum Joint Venture Association ("PJVA").

Stuart Money annually teaches "A Practical Guide to Title Review and Acquisitions" for the Canadian Association of Petroleum Landmen Continuing Education Program.



Announced Changes to the “New Ensuring Alberta’s Investment Competitiveness

by Alicia Quesnel and Aaron Rogers

The New Royalty Framework, October, 2007

On October 25, 2007, the Alberta provincial government (“the Province”) announced that effective January 1, 2009, industry would become subject to significant increases in royalties. The “New Royalty Framework” (“NRF”) was premised on the notion that the Province, on behalf of Albertans, should obtain a “fair share” of the value obtained from the exploitation of Crown resources. At the time, the Province predicted a 20% increase in royalty revenues.

Times changed quickly. In addition to the fall out from the global economic crisis that threatened to shake the foundations of Alberta’s oil and gas (including oil sands) industry, producers decided to look for resource opportunities in other jurisdictions. For 2008-2009, non-renewable resource revenues from the energy industry accounted for approximately 32% of Alberta’s total revenues. This sharply declined to approximately 16% in 2009.¹ In the period 1999-

2007, Alberta accounted for 67% of provincial lands sales among British Columbia, Alberta and Saskatchewan, with British Columbia accounting for 25% and Saskatchewan accounting for 8%. In the year leading up to the effective date of the NRF, 2008-2009, Alberta’s share of provincial lands sales dropped to 26%, with British Columbia’s share increasing to 55% and Saskatchewan’s share increasing to 19%.²

Investment Competitive Study, July 2009

In July of 2009, amid industry and government concerns about Alberta’s ability to compete for oil and gas investment dollars, the Alberta Department of Energy commissioned the *Alberta Natural Gas and Conventional Investment Competitive Study* (ICS) to determine the investment competitiveness of Alberta’s conventional oil and gas resources. The project committee (“the Committee”) released its report (the *Competitiveness Report*) on February 16, 2010.

The following were among the conclusions reached by the Committee in relation to Alberta’s “fiscal regime” (the NRF), which was one of 5 competitive factors reviewed by the Committee:

- Alberta’s fiscal regime is perceived as being unstable and unpredictable by investors. The introduction of the NRF and subsequent changes eroded investor confidence in the stability and predictability of Alberta’s fiscal regime;
- Alberta’s royalty system negatively impacts investment competitiveness and industry profitability. When existing incentive programs expire, Alberta’s maximum royalty rates and royalty rates at the front end of production are higher than other jurisdictions for both natural gas and conventional oil.³



Royalty Framework”

Competitiveness Report Recommendations

The Committee made a number of recommendations for modifying the NRF to address competitiveness and to ensure industry activity in Alberta is sustainable and vibrant, including:

- re-balancing the royalty curves using current price and production variables so Alberta remains competitive with other jurisdictions;
- reducing front end royalties to recognize high upfront costs and to return capital to companies more quickly resulting in increased investment;
- reducing royalties at higher price levels;
- developing a transition program from the current system which does not disadvantage current drilling activity; and
- enhancing the simplicity of the royalty framework.

Latest Changes to Royalty Framework

On March 11, 2010, the Province announced changes (“the latest changes”) to Alberta’s royalty framework intended to increase Alberta’s competitiveness in the upstream oil and natural gas sectors. The announced changes are consistent with the recommendations of the Competitive Report.

Effective January 1, 2011, the maximum royalty rate payable in respect of conventional oil production will be reduced from 50% to 40% and the maximum royalty rate payable in respect of natural gas production will be reduced from 50% to 36%. In addition to these changes to royalty rates, the current new well royalty incentive program, applying to deep conventional oil and natural gas wells was made permanent. This provides a reduced royalty rate of 5% for the first 12 months of production on a maximum of 50,000 barrels of oil or 500 MMcf of natural gas.

On March 11, 2010, the Province announced changes to Alberta’s royalty framework intended to increase Alberta’s competitiveness in the upstream oil and natural gas sectors.

The Province also amended the current transitional royalty rate program, which permitted producers of new deep conventional oil or natural gas wells, drilled between 1,000 and 3,500 metres, to elect to pay transitional royalty rates for a 5-year period rather than Alberta’s conventional royalty framework. Pursuant to the latest changes, producers will only be able to elect to adopt the transitional royalty rates prior to January 1, 2011. Producers that have already elected to adopt the transitional royalty rates as of that date will be permitted to switch to Alberta’s conventional royalty framework. On December 31, 2013, all producers operating under the transitional royalty rates will automatically become subject to Alberta’s conventional royalty framework.

The royalty framework for oil sands implemented under the NRF was unchanged by the latest changes to Alberta’s royalty framework.

Further details with respect to the changes to Alberta’s royalty framework, including the finalization of royalty curves for both conventional oil and natural gas, are expected to be provided by May 31, 2010.

Footnotes

¹ *Project Committee Final Technical Report on Alberta’s Natural Gas & Conventional Oil Investment Competitiveness to the Alberta Department of Energy*, February 16, 2010 at p. 15 [“Competitiveness Report”].

² *Competitiveness Report* at p. 4.

³ *Competitiveness Report* at p. 47.

GORR Payments

Actions Can Speak Louder than Words

by Bronwyn Inkster, Student-at-law

Introduction

In a recent case from the Alberta Provincial Court, that of *Lyatsky Geoscience Research and Consulting Ltd. v. Geocan Energy Inc.*¹ (“the *Lyatsky case*”), the Court weighed in on the determination of the appropriate calculation of a gross overriding royalty payment.

Facts

In November of 2003, Lloyd Lloyd Venture 1 Inc. (“Lloyd”), granted Lyatsky Geoscience Research and Consulting Ltd. (“Lyatsky”), a gross overriding royalty (the “GORR Agreement”) of 3% of 100% of production of various working interests owned by Lloyd.

Subsequent to the execution of the GORR Agreement, Lloyd along with others, entered into a farmout agreement, where Lloyd was the farmor and Westerra 2000 Inc. (“Westerra”) was the farmee (the “Farmout Agreement”). The Farmout Agreement provided, amongst other things, that the gross overriding royalty granted to Lyatsky through the GORR Agreement (the “Lyatsky GORR”) was a permitted encumbrance. The Farmout Agreement described the Lyatsky GORR as a 3% gross overriding royalty “...payable on the pre-farmout interest of Lloyd...”.

After receiving several payments from Westerra pursuant to the Farmout Agreement, Lyatsky complained that the amount of its payments did not reflect the payments it should receive if the calculations were done according to the GORR Agreement. Lyatsky argued that the payments it received were payments of 3% on 7.5% of production and not 3% on 100% of production, as contemplated by the GORR Agreement. Lyatsky’s complaints were conveyed by Lloyd to Westerra who concurred and made adjustments so that the payments reflected 3% on 100% of production. For the period between July 2004 and June 2006 Lyatsky was paid the gross overriding royalty payments of 3% on 100% of production.



The *Lyatsky* case is somewhat problematic as it demonstrates that in some circumstances a court may choose to place a greater emphasis on the actions of the parties involved, both prior and subsequent to the execution of a gross overriding royalty agreement.

Upon Geocan Energy Inc. (“Geocan”) acquiring Westerra as a wholly-owned subsidiary, both Lloyd and Lyatsky received a letter stating that an accounting error had been made and that Lyatsky was overpaid pursuant to the Farmout Agreement. The letter explained that payments made pursuant to the GORR Agreement should have been calculated as 3% on 7.5% of production and not 3% on 100% of production. As a result of these alleged overpayments, Geocan demanded repayment of \$19,974. Lloyd and Lyatsky disagreed and alleged that since Westerra was acquired by Geocan, they were underpaid by \$17,772.

As a result of this disagreement, Lyatsky filed a claim for alleged underpayment of the Lyatsky GORR Agreement and Geocan filed a counter claim for the alleged overpayments of the same.

Issues

The Court held that there were two issues to be decided in the Lyatsky case:

1. Was Geocan responsible for the GORR Agreement payments?
2. If Geocan was responsible, at what rate?

The Court’s Analysis

a. Responsibility for GORR Payments

Geocan asserted two reasons that it was not responsible for the GORR Agreement payments. First, it argued there was no written assignment of the GORR Agreement and secondly that the GORR Agreement, and its obligations, did not run with the land.

The Court eventually rejected Geocan’s arguments on three different grounds. First, the Court held that the GORR Agreement and its related obligations ran with the land because of the clear and plain wording to that extent within the GORR Agreement.² Unfortunately, the decision does not provide the specific wording on which the Court relied to come to this conclusion.

Secondly, the Court discussed the possibility of novation into the GORR Agreement. Judge McCarthy found that there was novation by course of conduct on behalf of the parties involved. In support of this conclusion, the Court commented that Westerra assigned its interest in the GORR Agreement to Husky Oil Operations and would not have done so if it did not hold itself out as being a party to the GORR Agreement.

Lastly, the Court felt that the fact that Westerra had asked for a copy of the GORR Agreement before signing the Farmout Agreement, and maintained a copy on its records was additional evidence in support of finding that Westerra, and later Geocan, was aware of its obligations in relation to the Lyatsky GORR Agreement. The Court explained that this behaviour should be interpreted as Westerra attempting to understand “.. what burdens it was going to assume if it entered into the [Farmout Agreement], which it then did.”³

b. Calculation of Payments pursuant to the GORR Agreement

While it was argued on behalf of Geocan that the proper interpretation of the payment pursuant to the GORR Agreement was 3% of 7.5% of production and not 3% of 100% of production, the Court held otherwise. Judge McCarthy relied heavily upon the subsequent conduct of the parties to the GORR Agreement, namely the correction made by Westerra as a result of the complaint lodged by Lloyd and Lyatsky. The Court further found support in the wording of the GORR Agreement which described the grant as a “. . .3% GORR on 100% of production to be paid from the Grantor’s working interest in the lands. . .”⁴

Points of Discussion from the Lyatsky Case

Nigel Bankes, University of Calgary Law Professor (“Bankes”) has commented⁵ on the reasoning and outcome of the Lyatsky case. Bankes is critical of the decision for a couple of reasons as follows:

- Bankes questions the Court’s conclusion that there was novation of the GORR Agreement. There were little facts in the judgement which Bankes acknowledges makes an analysis difficult, but he points out that earlier judicial authority has indicated it is very difficult to establish a novation by course of conduct. Bankes contends that the conduct of the parties, with Lloyd contacting Westerra and Geocan on behalf of Lyatsky, actually suggests the opposite—that there was not a novation.
- Bankes is of the view that the interpretation of the GORR calculation adopted by the Court is unconvincing. He believes that it is somewhat unbelievable that Lloyd intended to grant an interest out of the total working interest in the land as opposed to an interest in his working interest in the land.

Conclusion

The *Lyatsky* case is somewhat problematic as it demonstrates that in some circumstances a court may choose to place a greater emphasis on the actions of the parties involved, both prior and subsequent to the execution of a gross overriding royalty agreement. This emphasis may result in these actions outweighing the intentions of one, if not both parties to the agreement. In any event, care should be taken in drafting both a gross overriding royalty agreement and any related agreement to ensure that there is no ambiguity which can result in a court imposing its interpretation of the agreement upon the parties.

Footnotes

¹ [2009] A.J. No. 1441

² *Supra*, Note 1, at para.11

³ *Ibid*

⁴ *Supra*, Note 1, at para. 4

⁵ <http://ablawg.ca/2010/01/11/provincial-court-royalty-calculation-decision/>



Insolvency Issues:

Introduction

Debtor companies often enter into insolvency and restructuring proceedings because they hope to free themselves of all of their present and future obligations. However, the recent case of *677960 Alberta Ltd. v. Petrokazakhstan Inc.*¹ (“*Petrokazakhstan*”) illustrates that some claims survive restructuring proceedings even after the plan of arrangement or proposal receives all of the creditors’ approval and the blessing of the Court.

What happened in *677960 Alberta Ltd. v. Petrokazakhstan Inc.*?

a. The Facts

As the case name suggests, *Petrokazakhstan* arose out of a joint venture for the exploration and development of four oil fields in Kazakhstan. *677960 Alberta Ltd.* (“*677*”) held rights pursuant

to a guarantee granted by Petrokazakhstan Inc. (“*PKI*”). This guarantee secured the obligations of a working interest owner to *677* in the joint venture under two agreements—a Net Profits Interest Agreement and a Success Fee Agreement.

The two agreements required the working interest owner to pay a percentage of its profits and a fee to *677* based on the amount of oil production from the joint venture. In early 1999, *PKI* sought protection from its creditors and initiated proceedings under the *Companies Creditors Arrangement Act*² (the “*CCAA*”).

On May 14, 1999, the Court stayed all proceedings against *PKI*. At the time, there had not been sufficient production of oil or gas at sufficiently high prices from the four fields to require the working interest owner or *PKI* to make any payments to *677*. *677* therefore did

not receive notice of the *CCAA* proceedings, was not listed as a creditor of *PKI*, and did not file a proof of claim or otherwise participate in the *CCAA* proceedings.

The Court and all of the creditors involved in the proceedings approved *PKI*’s plan of arrangement (the “*Plan*”) in February 28, 2000. As of March 31, 2000, the *Plan* became “effective” and extinguished the claims of all of the creditors who were contemplated in the *Plan*.

In the present action, *677* asserted a claim against *PKI* under its guarantee. In turn, *PKI* applied for summary judgment (a pre-trial application where the defendant argues that there are no material issues to be tried and therefore there is no need of a trial), arguing that the *Plan* extinguished *677*’s claim.

Does My Claim Survive the Plan?

by Simina Ionescu-Mocanu

b. Was 677 a “Creditor” With a “Claim” under the Plan?

Hoping to reject 677’s claim, PKI argued that the claim was barred pursuant to the Plan. The Plan effectively extinguished the claims of “all creditors” in existence on the Plan’s effective date. To be caught by this section, 677 therefore had to be a “creditor” in the CCAA proceedings. The Plan defined the term “creditor” as any “person having a claim”.

In turn, a “claim” was very broadly defined to include any person’s right against PKI, whether “direct, indirect, reduced to judgment (or not), liquidated, unliquidated, fixed, contingent, ... legal, equitable, secured, unsecured, present, future, known, unknown, by guarantee, by surety or otherwise ...”³.

677 argued that it was not a “creditor” with a “claim” because, *at the time of the Plan*, it did not believe that it had any legal basis upon which it could assert a claim against PKI. 677 took the position that the working interest owner did not owe 677 any payments pursuant to the agreements when the Court approved the Plan. 677 therefore had no reason to believe that PKI breached the agreements in question. 677 claimed that it did not know that it had a potential claim until after PKI emerged from the proceedings.

The Court recognized that the definitions of “claim” under the CCAA and under the Court-approved Plan were extremely broad. Even though the Court admitted that the CCAA is remedial legislation, which should be liberally construed, it also noted that the term “claim”

ought not include “speculative claims” or claims that are “too remote”. The term should be only as inclusive as reasonably practical.

Although contingent unliquidated liabilities may be the subject matter of a claim under the CCAA, the Court agreed with 677. In the Court’s view, it was possible that 677 “reasonably believed” that it was not in a position to participate as a claimant under the Plan because it did not “reasonably believe” that it had a claim under the agreements at the time of the CCAA proceedings. The Court also focused on the fact that 677 did not receive notice of the proceedings.

c. The Court’s View

Mr. Justice Macleod of the Alberta Court of Queen’s Bench concluded that it was at least possible that 677 was not a “creditor” holding a “claim” in the CCAA proceedings when the Plan received the Court’s sanction. PKI’s application for summary judgment was therefore dismissed.

Food for Thought & Practice Points

Although this decision was rendered in the context of a summary judgment application, which means that the Court did not definitively answer whether the Plan extinguished 677’s claim, it is possible that the principles outlined in *Petrokazakhstan* are binding on Alberta courts.

Debtor companies wishing to restructure under the CCAA or its *Bankruptcy and Insolvency Act* counterpart should not be quick to assume that the plan or proposal will extinguish all potential, unliquidated or contingent claims, even when such plan or proposal has been approved by all of the participating creditors and received the Court’s sanction.

Further, given the decision in *Petrokazakhstan*, creditors who fail to submit proofs of claim during a restructuring may be presented with a second chance at recovery. In any event, to avoid the risk of having one’s claim extinguished or barred by the claims bar process, creditors ought to closely monitor their debtors. This is especially so if the debtors are likely to initiate restructuring proceedings under the *BIA* or the *CCAA*.

Footnotes

¹ (2009), 4 Alta. L.R. (5th) 253

² R.S.C. 1985, c. C-36

³ *Supra*, Note 1 at para. 14



Put the Boots to Hunger

PUT THE BOOTS TO HUNGER is a campaign partnership between BD&P and the Calgary Inter-Faith Food Bank to raise funds and to encourage the donation of food with the hope that all Calgarians who need to rely on the Calgary Food Bank can do so. In 2009, the Food Bank experienced its largest need for emergency food hampers in nearly 10 years, with the majority of people relying on the Food Bank for emergency food hampers continuing to be the working poor.

BD&P feels that corporate responsibility during these times is to not only maintain our support for our community but, where possible, to increase our commitment. For that reason, BD&P is advising clients and friends that we are increasing our support from \$150,000 in 2009 to \$200,000 in 2010 for this Stampede-themed fund and food raising campaign.

We thank all of our community partners, clients and friends who made the 2009 campaign a success, collectively raising \$350,000 in food and cash donations for the Calgary Food Bank. Our 2010 goal is \$500,000.

BD&P is very excited by this continued opportunity the PUT THE BOOTS TO HUNGER campaign affords us to recognize the true "Stampede Spirit" of community support. The proposed elements of the PUT THE BOOTS TO HUNGER initiative offers the Calgary Food Bank a unique and valuable opportunity to raise awareness in our community and to inspire individuals, community groups and corporations to support BD&P in achieving this goal — "to provide quality, emergency food to those in need".

Please join us in making a donation to the Calgary Inter-Faith Food Bank during the PUT THE BOOTS TO HUNGER campaign and help raise awareness and funds for a critical organization upon which far too many Calgarians have to rely. Donations can be made by cheque to the Calgary Inter-Faith Food Bank, noting our Put the Boots to Hunger campaign, and sent either directly to the Food Bank or to BD&P or can be made online by visiting www.putthebootstohunger.com where you will find more information about the campaign.

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