COURT FILE NO.	2401-05179
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD.
APPLICANT	ALPHABOW ENERGY LTD.
RESPONDENT	ADVANCE DRILLING LTD.
DOCUMENT	**BOOK OF AUTHORITIES OF THE RESPONDENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court, 15th Floor 850 – 2nd Street SW Calgary, AB T2P 0R8 Attention: Afshan Naveed / Changhai Zhu Email: afshan.naveed@dentons.com / changhai.zhu@dentons.com Ph: (403) 268-7015 / 7135 Fx: (403) 268-3100 File No.: 571893-3

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TAB 1

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Singh v. Reddy,*
2019 BCCA 79

Date: 20190306
Docket: CA45171

Between:

Priscilla Singh

Respondent
(Plaintiff)

And

Dorothy Reddy, also known as Sashi Reddy

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated February 22, 2018 (*Singh v. Reddy*, New Westminster Docket S123543).

Counsel for the Appellant:	P.L. Rubin A. Solose
Counsel for the Respondent:	D.G. Cowper, Q.C. T.A. Posyniak
Place and Date of Hearing:	Vancouver, British Columbia February 22, 2019
Place and Date of Judgment:	Vancouver, British Columbia March 6, 2019

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

Summary:

Appeal from order holding defendant liable for intentionally pushing plaintiff to floor at dance. Defendant asserted trial judge erred in declining to draw an adverse inference from plaintiff's failure to call witness who was in close proximity at time of incident. Defendant also applied for adjournment of the hearing of the appeal to obtain fresh evidence. Appeal dismissed. Standard of review is that of "palpable and overriding" error, notwithstanding this court's holding in Rimmer v. Langley (2007). Trial judge did not err in accepting plaintiff's explanation (for not calling the witness) that witness refused to "get involved" in the dispute; nor in ruling that it had been open to either party to call her at trial. Application dismissed. Evidence defendant sought to obtain was discoverable before end of trial by reasonable diligence and was not likely to have affected result.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal arises in a fact-intensive case in which the credibility of eyewitnesses to an incident that took place at a dinner-dance in November 2007 was critical to the outcome. It involves the rule of evidence that permits a court to draw an adverse inference against a party by reason of his or her failure to call a witness who could be expected to give material evidence supportive of the party's case at trial. In this case, the trial judge declined to draw such an inference against the plaintiff Ms. Singh.

[2] At trial, the plaintiff asserted that the defendant Dr. Reddy had intentionally pushed her to the ground, injuring her significantly. (Negligence was not alleged.) Dr. Reddy denied pushing the plaintiff, arguing that she had had no motive to injure her and that the better explanation was that the plaintiff had simply fallen accidentally. Ultimately, the judge found that the defendant had intended to push Ms. Singh and was therefore liable. Damages have yet to be assessed.

[3] Dr. Reddy appeals on the sole basis that the trial judge, Madam Justice Warren, erred in declining to draw an adverse inference by reason of the plaintiff's failure to call a witness, Ms. Rangaiya, who had been in close proximity to the parties at the time of the incident. Counsel for Dr. Reddy also applied for an adjournment of the appeal in order to permit the defence to gather so-called "fresh

evidence" relating to Ms. Rangaiya's availability as a witness and the evidence she would have given. We dismissed that application for reasons that appear below.

Factual Background

[4] The dinner-dance that was the scene of the incident had been organized by the then India Sanmarga Ikya Sangam Educational and Cultural Society, a cultural, educational, and religious organization. Various members of the Society and others attending the event testified at trial. The evidence of the two 'sides' was fairly evenly balanced in terms of numbers. Ms. Singh's husband, Jaykumar Sharma and Mr. Balraj Jagroop gave evidence consistent with Ms. Singh's allegations; Dr. Reddy's husband, James Reddy, and Chandra Palani gave evidence consistent, for the most part, with Dr. Reddy's. At the time of the alleged assault, Mr. Reddy had held a leadership position in the Society and Mr. Sharma had owned a store patronized by members of the Society.

[5] The central issue of the case was a factual one – which of two fundamentally irreconcilable versions of events was more probable? The trial judge gave detailed reasons explaining her assessment of the credibility of the witnesses, finding guidance in the factors outlined in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) and *Bradshaw v. Stenner* 2010 BCSC 1398. She found the testimony of Ms. Singh and her witnesses to be credible and reliable, whereas she had doubts about the credibility of the defendant's evidence. Dr. Reddy was said to have been inconsistent at times and less than forthright in her testimony. The Court pointed in particular to concerns arising from an affidavit filed in the proceedings, issues relating to the timing of when Dr. Reddy had told her husband about the plaintiff's allegations, and inconsistencies in Dr. Reddy's claimed proficiency at Indian dance. Mr. Palani's evidence was also found to be unreliable because in the Court's view, he had shaped his evidence to support the defendant and because it contradicted an earlier 'will-say' statement that had been provided to the plaintiff's then lawyer. (At para. 81.)

[6] Ms. Rangaiya and her husband had originally been listed as witnesses by the plaintiff's then counsel but had ultimately not been called to testify. Ms. Singh testified that a subpoena her lawyer had served on them prior to trial had been cancelled because they were "hostile" witnesses and would not "confirm anything". Mr. Singh testified in cross-examination that Ms. Rangaiya had previously said she would "testify and say the truth", but when the time came for signing an affidavit, she had "backed out saying that she's got a lot of pressure from the Society and the Society is a family to them and most of the members are family members and she can't go against the Society, and so she will not." This would appear to be consistent with the evidence of Mr. Jagroop, who had also had a falling-out with the Society and had been told by Mr. Rangaiya not to give evidence at trial for the plaintiff.

[7] In his closing submissions, Ms. Singh's lawyer told the court below that he had decided not to call Ms. Rangaiya as a witness because her evidence was "unknown" and she was unreliable and likely to be adverse to the plaintiff.

The Adverse Inference Principle

[8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

> §6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

> An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to

> provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v*. *Norisawa*, 2001 BCSC 1126 at para. 127*; Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]

(See also *Rohl v. British Columbia (Superintendent of Motor Vehicles)* 2018 BCCA 316 at paras. 1-5.)

[9] As noted in *Rohl*, it is now generally accepted that the court is not r*equired* as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

> A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:
>
> - There is a legitimate explanation for the failure to call the witness;
> - The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
> - The witness has material evidence to provide; and
> - The witness is the only person or the best person who can provide the evidence.
>
> Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[10] The judge in the case at bar began her analysis by stating, correctly, that the approach to drawing an adverse inference engages the court's discretion and requires the trier of fact to consider the following factors:

a) Whether there is a legitimate explanation for failing to call the witness;

b) Whether the witness is within the exclusive control of the party or is equally available to both parties; and

c) Whether the witness has key evidence to provide or is the best person to provide the evidence in question.

(At para. 55, citing *McIlvenna v. Viebig* 2012 BCSC 218 at para. 71, *aff'd on other grounds* at 2013 BCCA 411.)

[11] Applying these factors to the evidence before her, Warren J. explained why she declined to draw the requested inference:

> It is clear that Mrs. Rangaiya was not in the exclusive control of Ms. Singh. To the contrary, it is arguable that Mrs. Rangaiya was more available to Dr. Reddy given that Mr. Reddy remains in contact with Ms. Rangaiya's husband, whereas Ms. Singh testified that she and Ms. Rangaiya are no longer friends. In this regard, I note that Mr. Reddy acknowledged that Mr. Rangaiya called him recently to discuss the case.
>
> I am also satisfied that Ms. Singh has provided a legitimate explanation for not calling Mrs. Rangaiya. She and her husband both testified that, initially, Mrs. Rangaiya indicated that she would provide evidence in support of Ms. Singh's case but, when it came time for her to swear an affidavit, she told Ms. Singh she did not want to get involved. Ms. Singh and her husband both testified that their friendship with the Rangaiyas has ended as a result. Further, Mr. Jagroop testified that Mr. Rangaiya visited him at his store and attempted to dissuade him from testifying in support of Ms. Singh's case.
>
> Although Mrs. Rangaiya is likely one of the best—if not the best—witnesses to provide evidence regarding the cause of Ms. Singh's fall, it is only one factor that I am to consider. In the circumstances of this case, and in particular given that Mrs. Rangaiya was at least equally available to Dr. Reddy, it does not weigh as heavily as it might otherwise. For these reasons, I decline to exercise my discretion to draw an adverse inference against Ms. Singh as a result of her failure to call Mrs. Rangaiya. [At paras. 56-8; emphasis added.]

[12] At the end of her reasons, the trial judge stated that that she accepted the evidence of Ms. Singh and her witnesses and preferred their evidence over that of Dr. Reddy and her witnesses in all areas of conflict. The judge therefore concluded:

> ... In particular, I accept that Ms. Singh, Mr. Sharma and Mr. Jagroop all saw a woman wearing a plain dark sari intentionally push Ms. Singh to the ground at the dance on November 17, 2007, that the woman in question was the same woman who had been sitting at the table next to them during dinner, and that Dr. Reddy was that woman. I find that Ms. Singh fell as a result of being intentionally pushed by Dr. Reddy. Dr. Reddy is liable for any damages Ms. Singh suffered as a result. [At para. 82.]

On Appeal

[13] Dr. Reddy contends that the judge erred in her analysis. With respect to the applicable law, Dr. Reddy concedes that the judge identified the correct test in deciding whether to draw an adverse inference, but argues that the decision was a discretionary one, and therefore not subject to the high standard of review for *factual* findings ("palpable and overriding" error), but to the well-known test enunciated in cases such as *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3, and *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71 at para. 43 for *discretionary* decisions. In *Oldman River*, La Forest J. for the majority cited the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston* [1942] A.C. 130 (H.L.):

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [At 76-7.]

[14] Dr. Reddy submits that the trial judge misapplied the relevant factors and gave no, or insufficient, weight to considerations that are key to the adverse inference principle. In particular, she contends that the judge relied on hearsay evidence, characterized the evidence in an unreasonable manner, and failed to apply the criterion of whether a "legitimate explanation" existed "in the adverse inference context." Mr. Rubin emphasizes that the principle is premised on the likelihood that the absent witness would have given testimony adverse to the party who failed to call him or her. Since the inference to be drawn is that the witness is absent *because he or she would provide evidence harmful to the party's case,* he says the court must be satisfied that the reason for his or her absence is something *other than* simply that the 'missing' evidence would harm the party's case.

Effectively, then, he contends that the explanation given by the plaintiff for failing to provide the highly relevant testimony of Ms. Rangaiya was not a valid one and should have been rejected by the trial judge.

[15] The defendant also contends that the trial judge failed to give sufficient weight to Ms. Singh's testimony that her lawyer had cancelled the subpoena issued to Ms. Rangaiya shortly before trial because the witness and her husband "would not confirm anything" and would not "come here to tell the truth." The defence emphasizes that it was in *2007* that the witness had expressed her reluctance to "get involved." At that time, the Society was a defendant in this proceeding. Later, however, the action was discontinued as against it; thus, it is said, the reason for Ms. Rangaiya's reluctance to "get involved" was no longer valid at the time of trial.

[16] On the question of availability, it will be recalled that the trial judge found that Ms. Rangaiya was not in the "exclusive control" of the plaintiff and indeed that arguably, she was "more available" to the defendant than to the plaintiff, given that Mr. Reddy was in contact with Mr. Rangaiya shortly before trial. (At para. 56.) Mr. Rubin cited evidence to the effect that *at the time of the incident in 2007*, the Singhs and the Rangaiyas had been close friends and had had business and financial ties. In contrast, Dr. Reddy had testified that her only association with Ms. Rangaiya had been through her husband's involvement with the Society.

Standard of Review

[17] As we have seen, the trial judge had a "discretion" as to whether to draw an adverse inference, in the sense that the law does not impose a "mandatory" rule applicable whenever a party fails to call a witness. But not every situation in which a trial judge has a choice to make is a true "discretionary" decision that attracts the standard of review enunciated in cases such as *Oldman River* and *Okanagan Indian Band*, *supra*. Here, the factors to be considered by the court were limited to those listed by the trial judge (see para. 10 above), and those factors are primarily factual. One is reminded of Lord Bingham's observations in *The Business of Judging: Selected Essays and Speeches* (2000):

> According to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that embarks on the exercise of a discretion. [At 36.]

[18] Here, the decision in question may be contrasted with one that involves the consideration of a wide variety of factors that may not be the subject of evidence so much as legal or policy arguments. Dr. Reddy's submissions concerning the calling of Ms. Rangaiya rest on the appropriateness of inferences of *fact* drawn by the trial judge. Whether those inferences are correct or not, and the weight to be given to them, are generally matters for the trier of fact and thus in criminal trials, fall to the jury to decide.

[19] Mr. Cowper referred us to *Benhaim v. St. Germain* 2016 SCC 48, a medical malpractice case in which it was argued that the trial court had erred in law by failing to draw an adverse inference of causation. The majority stated:

> This was an error. This Court held in [*Snell v. Farrell* [1990] 2 S.C.R. 311] that, in such circumstances, an adverse inference of causation *may* discharge the plaintiff's burden of proving causation. Those circumstances do not *trigger* such an inference. Whether an inference of causation is warranted, and how it is to be weighed against the evidence, are matters for the trier of fact. Here, the trial judge's reasons show that she did not draw that inference, although she was aware that it was available.... That conclusion is a question of fact and deserves deference from a court of appeal. [At para. 42; emphasis added.]

and further:

> .... the question of whether an inference is warranted in a particular case falls within the discretion of the trier of fact, to be determined with reference to all of the evidence. This principle was recently reaffirmed by this Court in [*Ediger v. Johnston* 2013 SCC 18], at para. 36. It was therefore not open to the majority to substitute its own decision to draw an unfavourable inference. Rather, the majority of the Court of Appeal would have been bound to find a palpable and overriding error in the trial judge's decision *not* to draw an adverse inference. [At para. 52; emphasis added.]

[20] Recently, this court in *Insurance Corporation of British Columbia v. Mehat* 2018 BCCA 242, applied *Benhaim* in connection with the drawing of an adverse inference by reason of failing to call a witness:

> Although *Benhaim* and *Snell* dealt with the issue of an adverse inference against defendants in medical malpractice cases with respect to the issue of causation, the Court's comments about the nature and availability of adverse inferences apply "just the same as in other fact-finding situations": *Benhaim* at para. 55.
>
> The question of whether or not to draw an adverse inference is a question of fact owed deference on appeal, subject to there being a palpable and overriding error: *Benhaim* at paras. 36, 52. [At paras. 89-90; emphasis added.]

[21] To the opposite effect, I note *Rimmer (Guardian ad litem of) v. Langley (Township)* 2007 BCCA 350 at para. 30, in which this court stated:

> First, the drawing of an adverse inference constitutes an exercise of discretion on the part of a trial judge: *Helm v. Pattie* (1998), 108 B.C.A.C. 146, 52 B.C.L.R. (3d) 81 at para. [27.] An appellate court will not substitute its discretion for that of the trial judge unless the appellate court clearly concludes that the discretion has been wrongly exercised, in that no or insufficient weight has been accorded to relevant considerations: *Creasey v. Sweny* (1942), 57 B.C.R. 457 at 459, [1942] 3 W.W.R. 65 (C.A.). [At para. 30.]

[22] It does not appear that the Court's attention in *Mehat* was drawn to *Rimmer*. However, it seems to me that the Supreme Court of Canada intended its comments in *Benhaim* (decided after *Rimmer*) in favour of the "palpable and overriding error" standard to extend to the drawing of all factual inferences, as clarified in *Housen v. Nikolaisen* 2002 SCC 33 at paras. 24-5. At least in this instance, the drawing of the inference is in my respectful view simply too closely bound up with the fact-finding process itself to be reviewable on the *Oldman River* standard. I therefore conclude that *Housen* requires us to apply the "palpable and overriding error" standard of review.

[23] With this standard in mind, I turn to consider whether Dr. Reddy has demonstrated a palpable and overriding error in the trial judge's decision not to draw an adverse inference in this case.

Application to This Case

[24] With respect to the argument that the explanation offered by Ms. Singh was not a valid one, it seems to me that at least where the witness is not under the 'control' of the party against whom the inference is sought, the fact he or she was unco-operative or even "hostile" may well be an acceptable reason for electing not to call him or her. Indeed, the authorities, including the statements quoted at para. 8 above, limit the rule to cases in which the witness is one who might be expected to give important evidence *in support of* the party against whom the inference is sought to been drawn. (See also *Buksh v. Miles* 2008 BCCA 318 at para. 31, citing *Barker v. McQuahe* (1964) 49 W.W.R. 685 (B.C.C.A.) at 689; *Royal Trust Co. v. Toronto Transpt'n Commission* [1935] S.C.R. 671 at 675; and *MacMaster (Litigation Guardian Of) v. York (Regional Municipality)* (1997) 42 M.P.L.R. (2d) 90 (Ont. Gen. Div'n.), *aff'd* (2000) 132 O.A.C. 57, *lve to app ref'd* [2000] S.C.C.A. No. 305.) Obviously, the Court here had little reason to expect that Ms. Rangaiya's evidence would have been favourable to Ms. Singh's case at trial.

[25] There is no rule that a party must call a witness who is *unlikely* to help in proving one's case. The nature of an adversarial system is that every litigant is expected to put before the court only what evidence counsel believes will be probative of his or her position. There may be many reasons why counsel decides not to call a witness and it is generally not the business of the court to ascertain those reasons. As Brooke J.A. stated in a criminal case, *R. v. Zehr* (1980) 54 CCC (2d) 65 (Ont. C.A.):

> There are many reasons why counsel may choose not to call a witness, and our Courts will rarely question the decision of counsel, for the system proceeds on the basis that counsel conducts the case. Often a witness is not called, and if the reason was known it would not justify an instruction that an adverse inference might be drawn from the witness not being called. Of importance under our system, counsel is not called upon, or indeed permitted, to explain his conduct of a case. [At 68-9; emphasis added.]

Courts are therefore cautious in drawing adverse inferences, particularly in criminal cases. In *R. v. Jolivet* 2000 SCC 29, for example, Binnie J. for the majority observed:

> The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. [At para. 28.]

As long as the witness is available to be called by the other party, there can be no objection, in terms of trial fairness, to a court's declining to draw such an inference.

[26] The explanation offered by the plaintiff in the case at bar was more ambiguous and diffuse than simply that Ms. Rangaiya was not likely to give evidence helpful to her case. At the end of the day it was unclear whether the witness would, if called, have refused to appear; or would have appeared but refused to testify; or would have appeared and testified untruthfully; or would have appeared and testified truthfully. It was for the trial judge to weigh the evidence, including these possibilities, and determine whether the explanation supported the drawing of the inference. I see no reversible error in her acceptance of counsel's statement that Ms. Rangaiya was considered likely to be unco-operative and unreliable, that he had been unable to contact her and that he had no knowledge of the substance of her evidence.

[27] In any event, the trial judge's decision not to draw the inference rested more heavily on the second branch of the principle – "exclusive control" or "availability." As we have seen, an adverse inference is not to be drawn where a witness is available to both parties: *Thomasson,* at para. 35. This often becomes an issue in cases where the doctor of an injured plaintiff is not called to testify about her injuries. The plaintiff's consent to the disclosure of confidential information must be obtained. But this is not such a case: Ms. Rangaiya was known to both the plaintiff and defendant and either could have called her. Dr. Reddy had been aware for eight weeks before trial that Ms. Singh had not listed Ms. Rangaiya in her trial brief. The only evidence of any direct communication with the Rangaiyas was from Mr. Reddy, who spoke to

Mr. Rangaiya by telephone shortly before trial. Dr. Reddy made no effort to call Ms. Rangaiya as a witness, even in the course of a one-month break mid-trial.

[28] I see no error, much less a palpable and overriding one, in the trial judge's conclusion that Ms. Rangaiya was "equally available" to both parties. The judge's conclusion is supportable on the record and there is no basis for interfering with it.

Fresh Evidence Application

[29] Finally, I note that at the hearing of this appeal, Mr. Rubin on behalf of Dr. Reddy applied for an adjournment in order to obtain and apply "formally" for the introduction of fresh evidence. Mr. Rubin's firm had been retained in September 2018 (some five months before the appeal.) In support of the application to adjourn, he filed the following:

1. An affidavit of Dr. Reddy stating that since 2018, she and her husband had made "repeated and consistent" efforts to obtain sworn statements from Ms. Rangaiya. Ms. Rangaiya did not provide an affidavit until February, 2019.

2. An affidavit of Ms. Rangaiya stating in material part:

> 2. My husband Bala and I were close friends with Ms. Priscilla Singh and her husband, Mr. Jaykumar Sharma, for a long time before our friendship ended following the events discussed in this affidavit.
>
> 3. On Saturday, November 17, 2007, my husband and I attended a dinner and dance at the Espiritos Santos Portuguese Community Hall located at 12919-112 Avenue, Surrey, B.C. (the "Event").
>
> 4. During the dancing portion of the Event, I was dancing, when I saw Ms. Priscilla Singh, sitting on the dance floor. I was not dancing with Dr. Reddy or Ms. Singh and I never saw Dr. Reddy push Ms. Singh.
>
> 5. After the Event, Ms. Singh and Mr. Sharma visited our house and asked my husband and I to provide statements saying that we saw Dr. Reddy push Ms. Singh down on the dance floor at the Event. I told Ms. Singh and Mr. Sharma that I would not do that because I did not see Dr. Reddy push Ms. Singh. At no time did I ever agree to give such a statement or evidence. [Emphasis added.]

3. An affidavit of Mr. Rangaiya stating in part:

> In the weeks following the event, I was at home with Ranjana when Mr. Sharma and Ms. Singh came to our house and asked us to be witnesses in Ms. Singh's lawsuit against Dr. Reddy. They wanted us to say we saw Dr. Reddy push Ms. Singh down on the dance floor. They said that they would subpoena us if we did not provide that evidence.
>
> Ranjana and I both refused to give the evidence requested by Mr. Sharma and Ms. Singh because it was not the truth. I became upset that such good friends would pressure us to provide false evidence, and I asked them to leave. That was the last time they visited our home. We have severed all ties with them.

[30] None of this evidence is "fresh" in the sense that it was not discoverable by reasonable diligence prior to the end of the trial – the first of the four *Palmer* criteria. As Mr. Cowper pointed out, where a party is aware of the existence of a witness, his or her failure to obtain the witness's testimony or to subpoena the witness for trial is generally fatal to the due diligence requirement. As already mentioned, moreover, there was a break mid-trial for approximately one month, in which counsel could have carried out the necessary inquiries.

[31] Equally important, the proffered evidence is not likely to have affected the result, given Ms. Rangaiya's statement that she did "not see Dr. Reddy push Ms. Singh" and was not dancing with either of them. In short, Ms. Rangaiya's evidence would likely not have affected the trial judge's final conclusion.

[32] For these reasons, we dismissed the application to adjourn and would not have permitted the new evidence to be adduced had 'formal' application been made.

[33] With thanks to counsel for their submissions, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Butler"

TAB 2

Bank of Montreal *Appellant*

v.

Enchant Resources Ltd. and D. S. Willness *Respondents*

Banque de Montréal *Appelante*

c.

Enchant Resources Ltd. et D. S. Willness *Intimés*

INDEXED AS: BANK OF MONTREAL *v.* DYNEX PETROLEUM LTD.

Neutral citation: 2002 SCC 7.

File No.: 27766.

Hearing and judgment: November 9, 2001.

Reasons delivered: January 24, 2002.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.

RÉPERTORIÉ : BANQUE DE MONTRÉAL *c.* DYNEX PETROLEUM LTD.

Référence neutre : 2002 CSC 7.

N^o^ du greffe : 27766.

Audition et jugement : 9 novembre 2001.

Motifs déposés : 24 janvier 2002.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Commercial law — Oil and gas industry — Overriding royalties — Whether overriding royalties arising from working interest capable of being interest in land.

The appellant Bank was a secured creditor of D, a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of D. One issue of concern was whether any such sale would be subject to overriding royalties arising out of the working interest held by D. Also, the respondents held overriding royalties and claimed priority over the Bank, as to the assets of D, because their interests, as protected by caveats filed in a land registration office, preceded the Bank's loans to D and its predecessors. The caveats claimed an interest in D's working interest as a result of services performed for D and/or its predecessors. The chambers judge granted the Bank's application for a preliminary determination finding that an overriding royalty interest cannot be an interest in land. The Court of Appeal set aside that decision, holding that overriding royalty interests can, subject to the intention of the parties, be interests in land.

Held: The appeal should be dismissed.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit commercial — Industrie pétrolière et gazière — Redevances dérogatoires — Une redevance dérogatoire issue d'une participation directe peut-elle constituer un intérêt foncier?

La Banque appelante était un créancier garanti de D, société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de D. Se posait donc notamment la question de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par D. Par ailleurs, les intimés étaient titulaires de redevances dérogatoires et prétendaient prendre rang avant la Banque quant aux avoirs de D, parce que leurs intérêts, protégés par des oppositions déposées à un bureau d'enregistrement foncier, étaient antérieurs aux prêts consentis par la Banque à D et à ses prédécesseurs. Les oppositions faisaient valoir un intérêt dans la participation directe détenue par D par suite de la fourniture de services à D ou à ses prédécesseurs. Le juge en chambre a accueilli la demande présentée par la Banque en vue de faire statuer de façon préliminaire qu'un droit de redevance dérogatoire ne pouvait constituer un intérêt foncier. La Cour d'appel a infirmé cette décision, statuant qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

Arrêt : Le pourvoi est rejeté.

The common law prohibition against the creation of an interest in land from an incorporeal hereditament is inapplicable to the oil and gas industry given its practices and the support found in the law. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre* if that is the intention of the parties.

Cases Cited

Referred to: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703; *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321, aff'd (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac v. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193, aff'd in part [1989] 5 W.W.R. 340; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34.

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APPEAL from a judgment of the Alberta Court of Appeal (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, reversing a judgment of the Court of Queen's Bench (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Appeal dismissed.

Richard B. Jones, for the appellant.

L'interdiction reconnue en common law de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable à l'industrie gazière et pétrolière, étant donné ses pratiques et l'appui fourni par la jurisprudence. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

Jurisprudence

Arrêts mentionnés : *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703; *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321, conf. par (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac c. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193, conf. en partie par [1989] 5 W.W.R. 340; *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. c. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34.

Doctrine citée

Davies, G. J. « The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev*. 232.

Dukelow, Daphne A., and Betsy Nuse. *The Dictionary of Canadian Law*, 2nd ed. Scarborough, Ont. : Carswell, 1995, « corporeal hereditament », « incorporeal hereditament ».

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, infirmant un jugement de la Cour du Banc de la Reine (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Pourvoi rejeté.

Richard B. Jones, pour l'appelante.

James C. Crawford, *Q.C.*, *Frank R. Dearlove* and *Scott H. D. Bower*, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

1 This appeal arises from an application made by the appellant Bank of Montreal before the chambers judge in the Alberta Court of Queen's Bench for a determination that, as a matter of law, an overriding royalty is incapable of being an interest in land. The application was opposed by several defendants including the respondents in this Court, Enchant Resources Ltd. ("Enchant") and D. S. Willness ("Willness"), each holders of overriding royalties who claim their interests to be interests in land. The learned chambers judge allowed the Bank's application which the Alberta Court of Appeal reversed, holding that an overriding royalty is capable of being an interest in land. This appeal to the Supreme Court of Canada was dismissed with reasons to follow.

II. Facts

2 The material filed and submissions of counsel indicated that royalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations

James C. Crawford, *c.r.*, *Frank R. Dearlove* et *Scott H. D. Bower*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

Le présent pourvoi vise une demande que la Banque de Montréal, appelante, a présentée à un juge de la Cour du Banc de la Reine de l'Alberta siégeant en chambre afin qu'il statue, en droit, qu'une redevance dérogatoire ne peut constituer un intérêt foncier. Plusieurs défendeurs se sont opposés à la demande. Au nombre des opposants figuraient les intimés devant notre Cour, Enchant Resources Ltd. (« Enchant ») et D. S. Willness (« Willness »), titulaires de redevances dérogatoires qui prétendaient détenir un intérêt foncier. Le juge a fait droit à la demande de la Banque. La Cour d'appel de l'Alberta a infirmé cette décision, statuant qu'une redevance dérogatoire peut être un intérêt foncier. Notre Cour a rejeté le pourvoi, avec motifs à suivre.

II. Les faits

Les pièces produites et les plaidoiries des avocats révèlent que les arrangements en matière de redevances sont de pratique courante en Alberta dans le secteur de l'exploration et de la production pétrolières et gazières. D'ordinaire, le propriétaire des minéraux *in situ* donne à bail à un producteur potentiel le droit d'extraire ces minéraux. Pour désigner ce droit, on utilise l'expression « participation directe ». Une redevance est une part ou participation fractionnaire non grevée dans la production brute issue de cette participation directe. La redevance du bailleur est une redevance accordée au bailleur initial (ou qu'il se réserve). Une redevance dérogatoire ou redevance dérogatoire brute est une redevance accordée normalement par le titulaire d'une participation directe à un tiers en échange d'une contrepartie qui peut comprendre notamment une somme d'argent ou des services (par exemple, le forage ou les études géologiques) (G. J. Davies,

of the two types of royalties are identical. The only difference is to whom the royalty was initially granted.

The appellant Bank of Montreal was a secured creditor of Dynex Petroleum Ltd. ("Dynex"), a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of Dynex. One issue was whether any such sale would be subject to overriding royalties arising out of the working interest held by Dynex. Also, there were several competing claims against the appellant, which by the time of this appeal had narrowed to the overriding royalties of the respondents Enchant and Willness, who claimed a preference by way of a caveat filed in the South Alberta Land Registration District, claiming an interest in Dynex's working interest as a result of services performed for Dynex and/or its predecessors. The respondents claimed their royalty rights comprised interests in land and claimed priority over the appellant because their interests, as protected by caveats, preceded the appellant's loans to Dynex and its predecessors. The appellant submitted that at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest.

This case pits this ancient common law rule against a common practice in the oil and gas industry. The Court is asked to resolve the apparent conflict.

III. Judicial History

The appellant applied to the Court of Queen's Bench of Alberta ((1995), 39 Alta. L.R. (3d) 66) for a preliminary determination that the overriding royalty interests do not constitute interests in land. The learned chambers judge, Rooke J. in allowing the application held at para. 3 that:

« The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev.* 232, p. 233). Les mêmes droits et obligations se rattachent aux deux types de redevance. Seul les différencie le fait que la redevance n'est pas accordée initialement à la même personne.

3 La Banque de Montréal, appelante, était un créancier garanti de Dynex Petroleum Ltd. (« Dynex »), société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de Dynex. La question se posait donc de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par Dynex. De plus, l'appelante se voyait opposer plusieurs réclamations concurrentes dont ne subsistaient plus, au moment du présent pourvoi, que les redevances dérogatoires des intimés Enchant et Willness, qui revendiquaient un rang prioritaire en invoquant une opposition déposée au bureau d'enregistrement foncier du district du sud de l'Alberta, faisant valoir un intérêt dans la participation directe détenue par Dynex par suite de la fourniture de services à Dynex ou à ses prédécesseurs. Les intimés soutenaient que leurs droits de redevance comportaient des intérêts fonciers et prétendaient prendre rang avant l'appelante parce que leurs intérêts protégés par les oppositions étaient antérieurs aux prêts consentis par l'appelante à Dynex et à ses prédécesseurs. L'appelante a soutenu que, en common law, un intérêt foncier ne pouvait dériver d'un héritage incorporel et que, partant, les redevances dérogatoires des intimés (dérivées d'une participation directe et, donc, d'un héritage incorporel) ne prenaient pas rang avant la sûreté qu'elle détenait.

4 La présente affaire oppose cette ancienne règle de common law et une pratique courante du secteur pétrolier et gazier. La Cour est appelée à trancher ce conflit apparent.

III. Historique des procédures judiciaires

5 L'appelante a demandé à la Cour du Banc de la Reine de l'Alberta ((1995), 39 Alta. L.R. (3d) 66) de statuer, par une décision préliminaire, que les droits de redevance dérogatoire ne constituaient pas des intérêts fonciers. Le juge Rooke siégeant en chambre a fait droit à la demande en ces termes, au par. 3 :

. . . as a matter of law, a lessee of an oil and gas lease (which is a profit à prendre), which is in itself an interest in land, obtained from a lessor (whether the Crown or freehold), cannot in law pass on an interest in land to a third party.

He also concluded that if an interest in land could issue from a *profit à prendre*, which he held that it could not, the matter could not be determined summarily as evidence would be necessary to examine the language of the instruments and the intentions of the parties.

6 After a review of policy considerations, industry practice and Canadian and United States case law, the Alberta Court of Appeal ((1999), 74 Alta. L.R. (3d) 219) concluded that overriding royalty interests can constitute interests in land if intended by the parties. For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land.

IV. Issue

7 Can an overriding royalty issued from a working interest (an incorporeal hereditament) be an interest in land?

V. Analysis

8 At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament. "Corporeal hereditament" is defined by *The Dictionary of Canadian Law* (2nd ed. 1995) as:

1. A material object in contrast to a right. It may include land, buildings, minerals, trees or fixtures. . . .

2. Land. . . .

"Incorporeal hereditament" is defined as:

1. "(A right) . . . in land, which (includes) such things as rent charges, annuities, easements, profits à prendre, and so on.". . .

[TRADUCTION] . . . en droit, le preneur à bail d'une concession pétrolière et gazière (qui est un profit à prendre), qui est en soi un intérêt foncier, obtenue d'un bailleur (location de la Couronne ou location à bail franche), ne peut, en common law, transmettre un intérêt foncier à un tiers.

Il a également conclu que, si un intérêt foncier pouvait dériver d'un profit à prendre — solution qu'il a écartée —, la question ne pourrait être tranchée sommairement, car une preuve serait nécessaire aux fins de l'examen des termes des instruments et de l'intention des parties.

Après avoir examiné les considérations de principe, la pratique du secteur d'activité en cause et la jurisprudence canadienne et américaine, la Cour d'appel de l'Alberta ((1999), 74 Alta. L.R. (3d) 219) a conclu que les droits de redevance dérogatoire pouvaient constituer des intérêts fonciers si telle était l'intention des parties. M'appuyant essentiellement sur les mêmes motifs que la Cour d'appel, je suis d'avis que les droits de redevance dérogatoire peuvent constituer des intérêts fonciers.

IV. La question en litige

Une redevance dérogatoire issue d'une participation directe (un héritage incorporel) peut-elle constituer un intérêt foncier?

V. Analyse

En common law, un intérêt foncier pouvait être issu d'un héritage corporel, mais non d'un héritage incorporel. Dans le *Dictionary of Canadian Law* (2e éd. 1995), la notion de « *corporeal hereditament* » (héritage corporel) est définie comme suit :

[TRADUCTION]

1. Chose matérielle par contraste avec un droit. Peut s'entendre de fonds de terre, bâtiments, minéraux, arbres ou accessoires fixes. . .

2. Fonds de terre. . .

L'expression « *incorporeal hereditament* » (héritage incorporel) est définie comme suit :

[TRADUCTION]

1. « (Droit) . . . sur un fonds de terre, qui (inclut) des choses telles que les rentes-charges, annuités, servitudes, profits à prendre, etc. » . . .

2. Property which is not tangible but can be inherited. . . .

In *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, at p. 392, Rand J. held that an oil and gas lease, the interest from which an overriding royalty is created, can be a *profit à prendre*, an interest in land. A *profit à prendre* is an incorporeal hereditament. The appellant has submitted that at common law, an interest in land could not issue from an incorporeal hereditament and therefore overriding royalties cannot be interests in land.

Canadian case law suggests otherwise. In *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, the majority declined to decide whether an overriding royalty could be an interest in land. However, Laskin J. in dissent specifically addressed that issue. He did not find the distinction between corporeal and incorporeal hereditaments to be useful in this context and discussed the difficulty of conforming new commercial concepts to anachronistic categories at p. 722:

> The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases (as in *Re Dawson and Bell*, *supra*, the *Berkheiser* case, *supra*, and cf. *Attorney-General of Ontario v. Mercer*, at p. 777) but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

Laskin J. referred to *Berkheiser*, *supra*, where Rand J. held that a royalty was analogous to rent. While that case involved a lessor's royalty, Laskin J. found that although theoretically the holder of a lessor's royalty holds an interest in reversion, whereas the holder of an overriding royalty does not, since in essence the two interests are identical,

2. Bien qui n'est pas matériel, mais qui peut être transmis par voie héréditaire . . .

9 Dans *Berkheiser c. Berkheiser*, [1957] R.C.S. 387, p. 392, le juge Rand a décidé qu'une concession pétrolière et gazière, l'intérêt dont est issue une redevance dérogatoire, peut être un profit à prendre, un intérêt foncier. Un profit à prendre est un héritage incorporel. L'appelante a prétendu que, en common law, un intérêt foncier ne pouvait être issu d'un héritage incorporel et que, par conséquent, les redevances dérogatoires ne pouvaient pas constituer des intérêts fonciers.

10 La jurisprudence canadienne semble indiquer le contraire. Dans *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703, la Cour suprême à la majorité s'est abstenue de décider si une redevance dérogatoire pouvait constituer un intérêt foncier. Toutefois, le juge Laskin, dissident, s'est intéressé précisément à cette question. Il n'a pas jugé la distinction entre les héritages corporels et incorporels utile dans ce contexte et il a traité de la difficulté de concilier les concepts modernes du commerce et les catégories anachroniques à la p. 722 :

> Les expressions « corporel » et « incorporel » ne font pas ressortir la distinction entre l'intérêt en droit et l'objet auquel il se rattache. D'après cette distinction tous les intérêts en droit sont « incorporels », et c'est l'autorité jamais attaquée d'une longue évolution historique qui nous oblige ici à étudier certaines institutions de la propriété dans les provinces régies par la *common law* au moyen d'un système de classification suranné et d'une terminologie surannée. Les rentes et les redevances ont été associées dans la jurisprudence (par exemple, dans les cause *Re Dawson and Bell* et *Berkheiser*, précitées; voir aussi *Attorney General of Ontario v. Mercer*, p. 777), mais jusqu'à maintenant, cette Cour n'a jamais eu à les analyser en regard de la classification des intérêts dans un bien-fonds en *common law*, ni à déterminer si cette classification est assez générale pour englober une redevance existant par elle-même.

11 Le juge Laskin s'est reporté à la décision *Berkheiser*, précitée, où le juge Rand a décidé qu'une redevance était assimilable à une rente. Bien que cette affaire ait porté sur une redevance de bailleur, le juge Laskin a estimé que, même si en théorie le titulaire d'une redevance de bailleur détient un intérêt de réversion, ce qui n'est pas le

there should be no distinction between the two royalty interests in their treatment as interests in land. The effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests.

12 Laskin J. concluded that the overriding royalty was an interest in land, analogous to a rent-charge. It is significant that he did not find all overriding royalty interests to be interests in land. He held that the intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.

13 In *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321 (Q.B.), aff'd (1994), 157 A.R. 65 (C.A.), and in *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Q.B.), Hunt J. and Matheson J. respectively relied upon the dissent in *Keyes*, *supra*, to find that lessor royalties can be interests in land depending on the intentions of the parties and the language used to create the interest. The Court of Appeal in *Scurry-Rainbow* did not base its decision on this issue.

14 The appellant referred to cases that held royalty interests not to be interests in land. (See *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. S.C.T.D.); *Isaac v. Cook* (1982), 44 C.B.R. 39 (N.W.T.S.C.); *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Q.B.), aff'd in part [1989] 5 W.W.R. 340 (Alta. C.A.); *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Q.B.); *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (S.C.).) Although each of these cases held that the royalty therein is not an interest in land, they do not support the proposition that a royalty cannot be an interest in land. In each case the court found

cas du titulaire d'une redevance dérogatoire, il n'y avait pas lieu de faire de distinction entre ces deux redevances dans l'effet qui leur est attribué à titre d'intérêts fonciers, puisque les deux intérêts sont essentiellement identiques. Les motifs du juge Laskin ont eu pour effet de rendre inapplicable, du moins quant aux redevances dérogatoires, la règle de common law interdisant la création d'intérêts fonciers à partir d'intérêts incorporels.

Le juge Laskin a conclu que la redevance dérogatoire était un intérêt foncier, analogue à une rente-charge. Il est significatif qu'il n'ait pas jugé que toutes les redevances dérogatoires étaient des intérêts fonciers. Il a estimé que les intentions des parties révélées par les termes du contrat de redevance permettraient de décider si les parties avaient l'intention de créer un intérêt foncier ou uniquement des droits contractuels.

Dans *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321 (B.R.), conf. par (1994), 157 A.R. 65 (C.A.), et dans *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37 (B.R.), les juges Hunt et Matheson, respectivement, se sont fondés sur l'opinion dissidente exprimée dans *Keyes*, précité, pour conclure que les redevances de bailleur pouvaient être des intérêts fonciers selon les intentions des parties et les termes employés pour créer l'intérêt. La Cour d'appel dans *Scurry-Rainbow* n'a pas fondé sa décision sur cette question.

L'appelante a cité des décisions où il a été jugé que des droits de redevance n'étaient pas des intérêts fonciers. (Voir *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (C.S. 1re inst. Alb.); *Isaac c. Cook* (1982), 44 C.B.R. 39 (C.S.T.N.-O.); *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (B.R.), conf. en partie par [1989] 5 W.W.R. 340 (C.A. Alb.); *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (B.R.); *Nova Scotia Business Capital Corp. c. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (C.S.).) Bien que dans toutes ces décisions, il ait été statué que la redevance en cause n'était pas un intérêt foncier, elles ne permettent pas d'affirmer qu'une redevance ne peut

that the language used by the parties in creating the interest did not evidence the intention to create an interest in land.

That royalties can be interests in land finds support in W. H. Ellis's "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev.* 1, at p. 10:

> Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

In *Oil & Gas Agreements Update* (1989), J. F. Newman in his article "Can a Gross Overriding Royalty Be an Interest in Land?" concludes that most parties to an overriding royalty interest intend for such interest to be an interest in land. Evidence of this is the common practice of registering caveats in the Land Titles Office of Alberta seeking to protect that interest.

The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case

jamais être un intérêt foncier. Dans chacune, la cour a conclu que les termes employés par les parties pour créer l'intérêt ne révélaient pas l'intention de créer un intérêt foncier.

15 La thèse selon laquelle les redevances peuvent constituer des intérêts fonciers est étayée par l'article de W. H. Ellis, « Property Status of Royalties in Canadian Oil and Gas Law » (1984), 22 *Alta. L. Rev.* 1, p. 10 :

> [TRADUCTION] Les redevances, telles qu'utilisées dans le secteur des hydrocarbures, n'ont de sens que si elles constituent des intérêts de propriété dans les minéraux non encore produits. Les titulaires des droits miniers doivent pouvoir créer de tels intérêts, s'ils précisent clairement que telle est leur intention.

16 Dans l'article intitulé « Can a Gross Overriding Royalty Be an Interest in Land? », publié dans *Oil & Gas Agreements Update* (1989), J. F. Newman conclut que, la plupart du temps, il est de l'intention des parties à un contrat de redevance dérogatoire que le droit de redevance constitue un intérêt foncier. En fait foi la pratique courante qui consiste à enregistrer des oppositions au bureau d'enregistrement des titres fonciers de l'Alberta afin de protéger ces intérêts.

17 Le secteur des hydrocarbures, qui s'est développé en grande partie dans la seconde moitié du XX^{e} siècle et continue d'évoluer, est régi par un ensemble de lois et de règles de common law. L'application des notions de common law à une industrie nouvelle ou en évolution est utile, car elle fournit aux intervenants de l'industrie et aux tribunaux un cadre juridique à l'intérieur duquel structurer les activités de ce secteur. Il n'est guère étonnant que certaines notions de common law élaborées dans des contextes sociaux, industriels et juridiques différents soient inapplicables dans le contexte particulier de ce secteur d'activité et de ses pratiques.

18 L'appelante n'a pu invoquer aucune raison de principe convaincante justifiant le maintien de la règle de common law qui interdit la création d'un intérêt foncier à partir d'un héritage incorporel, si ce n'est la fidélité aux principes de common law. Étant donné, d'une part, la coutume dans le secteur des

law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

19 The Alberta Court of Appeal offered compelling insight into the evolution of the law at para. 52:

> The principles inherent in the above argument need not be applied to prevent an overriding royalty from being an interest in land for a number of reasons. First, royalties and ORRs need not be classified into a traditional common law property category unsuited to the realities of the oil and gas industry and need not be subject to the arcane strictures of traditional categories. Second, some authorities suggest it is possible to have an incorporeal interest (an overriding royalty) created from an incorporeal interest. Third, even if it is not possible, the rule need not be blindly adhered to because, as stated by Mr. Justice Holmes in "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 469, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," and "still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past."

20 In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 42, Bastarache J. outlined when changes to the rules of common law are necessary:

> (1) to keep the common law in step with the evolution of society,
>
> (2) to clarify a legal principle, or
>
> (3) to resolve an inconsistency.

In addition, the change should be incremental, and its consequences must be capable of assessment.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as

hydrocarbures et, d'autre part, l'appui fourni par la jurisprudence, il est opportun et raisonnable que la loi reconnaisse qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

La Cour d'appel de l'Alberta nous offre des réflexions convaincantes sur l'évolution du droit, au par. 52 :

> [TRADUCTION] Il n'est pas nécessaire d'appliquer les principes qui se dégagent de l'argument précité pour empêcher qu'une redevance dérogatoire ne constitue un intérêt foncier, et ce pour plusieurs raisons. D'abord, il n'est pas nécessaire de classer les redevances et les redevances dérogatoires dans les catégories classiques du droit des biens en common law qui ne s'accordent pas avec les réalités du secteur pétrolier et gazier, ni de les assujettir aux définitions ésotériques des catégories classiques. Ensuite, certaines sources semblent indiquer qu'il est possible qu'un intérêt incorporel (une redevance dérogatoire) soit créé à partir d'un intérêt incorporel. Enfin, même si cela n'était pas possible, nous ne serions pas tenus de suivre la règle aveuglément, puisque, pour reprendre les propos du juge Holmes dans « The Path of the Law » (1897) 10 Harv. L. Rev. 457, p. 469, il est « choquant que la valeur d'une règle de droit ne tienne qu'à son ancienneté, dût-elle remonter à Henri IV », et « encore plus choquant que son fondement ait disparu depuis longtemps, mais qu'elle subsiste en raison d'un passéisme aveugle. »

Dans *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34, par. 42, le juge Bastarache a mis en lumière les cas où une modification de la common law sera nécessaire :

> (1) pour permettre à la common law de suivre l'évolution de la société;
>
> (2) pour préciser un principe de droit;
>
> (3) pour éliminer une contradiction.

De plus, la modification doit être graduelle et ses conséquences doivent pouvoir être évaluées.

Dans le présent pourvoi, pour préciser le droit en matière de redevances dérogatoires, l'interdiction de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage

a working interest or a *profit à prendre*, if that is the intention of the parties.

Virtue J. in *Vandergrift*, *supra*, at p. 26, succinctly stated:

> . . . it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

The appeal is dismissed with costs to the respondents.

Appeal dismissed.

Solicitors for the appellant: Jones, Rogers, Toronto.

Solicitors for the respondents: McDonald Crawford; Bennett Jones, Calgary.

incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

22 Dans *Vandergrift*, précité, p. 26, le juge Virtue dit succinctement :

> [TRADUCTION] . . . il semble assez clair que, selon le droit canadien, un droit de redevance ou un droit de redevance dérogatoire peut être un intérêt foncier si les conditions suivantes sont réunies :
>
> (1) les termes employés pour décrire l'intérêt sont suffisamment précis pour démontrer l'intention des parties que la redevance constitue un intérêt foncier, plutôt qu'un droit contractuel sur une fraction des hydrocarbures extraits du sol;
>
> (2) l'intérêt dont est issue la redevance est lui-même un intérêt foncier.

VI. Conclusion

23 Le pourvoi est rejeté avec dépens en faveur des intimés.

Pourvoi rejeté.

Procureurs de l'appelante : Jones, Rogers, Toronto.

Procureurs des intimés : McDonald Crawford; Bennett Jones, Calgary.

TAB 3

Court of King's Bench of Alberta

Citation: Prairiesky Royalty Ltd v Yangarra Resources Ltd, 2023 ABKB 11

Date: 20230106
Docket:1701 08362
Registry: Calgary

Between:

Prairiesky Royalty Ltd.

Plaintiff

- and -

Yangarra Resources Ltd.

Defendant

Reasons for Judgment
of the
Honourable Justice M.H. Bourque

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I. Introduction

[1] The overarching question before me is whether the successor in interest to a Crown petroleum and natural gas lease is bound by an overriding royalty that was originally granted by a predecessor lessee as consideration for the funding for the acquisition of the lease.

[2] The Plaintiff, PrairieSky Royalty Ltd. ("PrairieSky"), is the successor to the original grantee's interest in an April 1, 2011 Royalty Agreement (the "2011 Royalty Agreement") under which an 8% overriding royalty (the "8% Royalty") was granted in respect of oil and gas recovered under Crown Petroleum and Natural Gas Lease No. 0579030039 (the "Crown Lease"). The 8% Royalty grantor's undivided interest in the underlying Crown Lease was transferred to Relentless Resources Ltd. ("Relentless") in 2013. The Defendant, Yangarra Resources Ltd. ("Yangarra"), acquired Relentless' interest in the Crown Lease in 2016.

[3] PrairieSky seeks a declaration that Yangarra is bound by the 8% Royalty and monetary judgement against Yangarra for outstanding royalty payments plus interest. In its defence, Yangarra asserts that the 8% Royalty is not an interest in land that could run with the lands subject to the Crown Lease and, therefore, could not encumber subsequent lessees. In the alternative, if the 8% Royalty *does* constitute an interest in land, Yangarra asserts it is a *bona fide* purchaser for value without notice ("BFPV") under the law of equity and, therefore, should not be bound by the 8% Royalty.

[4] This is a case where the Torrens system of land registration and transfers is not determinative of the priority of the competing interests. Certificates of title are generally not issued for Crown-owned lands. Further, caveats and other encumbrances that can otherwise be registered to provide notice to potential purchasers of an overriding royalty on freehold minerals cannot be registered against Crown-owned minerals pursuant to s 202(a) of the ***Land Titles Act***, RSA 2000, c L-4 (the "*LTA*"). Therefore, to determine whether the defence of BFPV applies here, the Court must determine the nature of the parties' interests — legal or equitable — and apply the common law rules of priority to PrairieSky's prior interest in the form of the 8% Royalty and Yangarra's subsequent interest in the Crown Lease.

[5] For the reasons that follow, I find that the 8% Royalty arising from the 2011 Royalty constitutes an interest in land. I have also found that each of the 8% Royalty and Yangarra's interest in the Crown Lease are legal interests. Given that it was first in time, the 8% Royalty has priority over Yangarra's interest in the Crown Lease.

II. Issues

[6] To determine whether Yangarra is bound by the 8% Royalty, the following issues must be resolved:

Issue 1: Does the 8% Royalty arising from the 2011 Royalty Agreement constitute an interest in land?

Issue 2: If the 8% Royalty is an interest in land, does it have priority over Yangarra's interest in the Crown Lease? To determine this issue, the following sub-issues must individually be determined:

(i) Are the parties' interests legal or equitable?

(ii) As two legal interests, does PrairieSky's 8% Royalty have priority over Yangarra's interest in the Crown Lease?

Issue 3: What remedy, if any, is appropriate?

III. Background Facts

[7] The Crown Lease conferring "the exclusive right to explore for, work, win and recover petroleum and natural gas within and under" the Southwest ¼ Section 7, Township 41, Range 5, West of the Fifth Meridian in Alberta (the "Royalty Lands") was initially granted to Westhill Resources Limited ("Westhill") and O'Sullivan Resources Ltd. ("O'Sullivan") in 1979. Upon obtaining the Crown Lease, Westhill and O'Sullivan entered into a royalty agreement (the "1979 Royalty Agreement") with Success Oil Ltd. ("Success"), under which a 2% gross overriding royalty was granted in respect of petroleum substances produced, saved, and sold after the date thereof from the Royalty Lands (the "2% GOR"). While the status of the 2% GOR in this case is not in dispute, its treatment throughout the various transfers of interest in the Crown Lease and the 1979 Royalty Agreement provide useful context for the status and treatment of the 8% Royalty in question.

[8] The Lands subject to the Crown Lease were further circumscribed by deep rights reversion in 1984, which excluded petroleum and natural gas rights below the base of the Cardium Formation. The Crown Lease thus encompasses petroleum and natural gas to the base of the Cardium Formation. As unpatented Crown lands, there is no certificate of title associated with the Lands that otherwise exists for freehold minerals pursuant to the *LTA*.

[9] By September 28, 1987, the Crown Lease had been transferred to Trarion Resources Ltd. ("Trarion"), and Solar Energy Resources Ltd. had succeeded Success in its interest in the 1979 Royalty Agreement and the underlying 2% GOR.

[10] On April 1, 2011, Home Quarter Resources Ltd. ("Home Quarter") entered into a Purchase and Sale Agreement with Trarion, through which Home Quarter acquired Trarion's 100% interest in the Crown Lease. On April 1, 2011, Trarion assigned its interest in the 1979 Royalty Agreement to Home Quarter via an assignment and novation agreement. The transfer of the Crown Lease from Trarion to Home Quarter was registered by the Minister of Energy pursuant to s 91(1) of the ***Mines and Minerals Act***, RSA 2000, c M-17 (*MMA*) on May 11, 2011.

[11] On April 1, 2011, Home Quarter also entered into the 2011 Royalty Agreement with Range Royalty Limited Partnership ("Range Royalty"). Under the 2011 Royalty Agreement, Home Quarter granted the 8% Royalty to Range Royalty pursuant to an ongoing land fund arrangement between the parties. The arrangement entailed Range Royalty funding Home

Quarter's acquisition of various lands in consideration for the reservation of a royalty (the "Land Fund Arrangement"). The nature of the Land Fund Arrangement and the standard form royalty agreement used thereunder are discussed further at paragraphs [74]–[78].

[12] On June 11, 2013, Home Quarter entered into an Asset Exchange Agreement with Relentless Resources Ltd. ("Relentless"), through which it conveyed its 100% interest in the Crown Lease to Relentless. Home Quarter also transferred its interest in the 1979 Royalty Agreement to Relentless via a June 20, 2013 Assignment and Novation Agreement, and its interest in the 2011 Royalty Agreement to Relentless pursuant to a Notice of Assignment.

[13] Effective December 19, 2014, PrairieSky acquired Range Royalty, assuming all its rights, liabilities, obligations, property, and assets by way of a plan of arrangement. As a result, PrairieSky became the successor to Range Royalty's interest in the 2011 Royalty Agreement and the underlying 8% Royalty. The same day, PrairieSky issued a "Notice to Industry" informing all of Range Royalty's contractual counterparties — including Relentless and Yangarra — of its acquisition of Range Royalty, and advising that all notices, correspondence, documentation, invoices, or payments related to contracts with Range Royalty should be directed to PrairieSky.

[14] By 2016, Yangarra held the lands adjacent to the Royalty Lands subject to the Crown Lease. Yangarra wanted to maximize the acreage across which it could drill a horizontal well in the area. Accordingly, Yangarra's Vice President of Land, Mr. Faminow, approached Relentless — the lessee at that time — about acquiring the Crown Lease. Yangarra originally offered to acquire the Crown Lease and an existing well, 102/04-07-041-05W5 (the "4-7 Well"), for $500. The purchase price was ultimately lowered to $1.00, however, after Yangarra obtained an environmental site evaluation of the 4-7 Well site, which revealed some potential environmental liabilities that Yangarra would have to assume.

[15] Following an expedited period of due diligence, on June 13, 2016, Yangarra and Relentless executed an Agreement of Purchase and Sale for the Crown Lease and the 4-7 Well. The transaction closed on June 17, 2016, at which point Relentless and Yangarra had entered into an Assignment and Novation Agreement under which Relentless assigned its interest in the 1979 Royalty Agreement to Yangarra. The 2011 Royalty Agreement, however, was missed in due diligence and was never formally assigned by Relentless to Yangarra.

[16] A horizontal well was eventually drilled into the Royalty Lands (the "4-7 Horizontal Well") after Yangarra had acquired the Crown Lease from Relentless and commenced production in October, 2016. After discovering the well and the nonpayment of the 8% Royalty, on May 11, 2017, PrairieSky sent a demand notice to Yangarra and Relentless requesting payment of the outstanding royalties attributable to the production allocated to the portion of the well producing from the Royalty Lands. In response, Yangarra asserted that it is not bound by the 8% Royalty.

IV. Issue 1: Does the 8% Royalty arising from the 2011 Royalty Agreement constitute an interest in land?

A. Legal Framework

[17] When an owner of the mines and minerals leases the rights to extract the resources from the land to a third party, they will often reserve for themselves an unencumbered share or interest in the minerals or petroleum substances produced by the lessee. This is referred to as a "royalty

interest" or a "lessor's royalty". When a lessee or holder of the working interest in the *in situ* minerals grants an unencumbered share or interest in the minerals or petroleum substances produced to a party in exchange for money or other services, that interest is called an "overriding royalty" or a "gross overriding royalty" (hereinafter referred to as "GORs"; ***Dynex***, *infra*, at para 2).

[18] The concept of a GOR is concisely described in ***Curry v Athabasca Resources Inc***, 2022 SKKB 221 at para 41, citing Michael A Thackray, *Canadian oil and gas*, loose-leaf (Rel 186, Nov 2021) 3d ed, vol 1(Vancouver: LexisNexis, 2017) [Thackray] at § 7.67:

> The overriding royalty is the right to take, in kind or money, a share of future mineral production from a well without the obligation to pay a proportionate share of drilling or producing costs. The overriding royalty is limited to an interest in the production of specified substances from the land and does not include any of the possessory rights normally associated with a working interest. This type of royalty is extremely versatile and is used as a means of raising funds, providing incentives, or spreading risk by retaining an economic interest in a mineral prospect without retaining any associated liability (such as in a farmout). This versatility has led to a great variation in the language found in royalty agreements and a royalty agreement may consist of a two or three-sentence letter or a lengthy and complex document.

[19] The present case concerns a GOR granted by the lessee of Crown-owned minerals to a royalty company as consideration for the royalty company funding the acquisition of the lease.

1. Gross overriding royalties as interests in land

[20] The contemporary test for determining whether a royalty interest is an interest in land was articulated by Virtue J of this Court in ***Vandergrift v Coseka Resources Ltd***, 1989 CanLII 3163 (ABQB) at para 29, 67 Alta LR (2d) 17 [***Vandergrift***], and was later adopted by Major J, for a unanimous Supreme Court of Canada, in ***Bank of Montreal v Dynex Petroleum Ltd***, 2002 SCC 7 [***Dynex***], aff'g ***Bank of Montreal v. Enchant Resources Ltd.***, 1999 ABCA 363 [***Dynex ABCA***][1] at para 22 (the "***Dynex*** test"):

> …under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

[21] However, the question of whether royalties carved out of oil and gas leases can constitute interests in land has been debated since the earliest days of western Canada's oil and gas industry

[1] The style of cause of the Alberta Court of Appeal decision is *Bank of Montreal v. Enchant Resources Ltd.*, whereas the style of cause *Bank of Montreal v. Dynex Petroleum Ltd.* was used for both the trial decision and the Supreme Court of Canada decision. As far as I am aware, the Supreme Court of Canada decision is always referred to as *Dynex*; however, the Court of Appeal decision is occasionally referred to as *Enchant*. To assist the reader and avoid confusion, I have defined the Court of Appeal decision as *Dynex ABCA*.

(see *e.g.*, ***Publix Oil and Gas Limited (Re)***, 1936 CanLII 422 (ABCA), [1936] 3 WWR 634). The growing pains of "trying to come to grips with some of the novel legal problems created by the industry's presence in our country" were amplified by the application of English common law concepts of property that were "developed in vastly different circumstances"(***Scurry-Rainbow Oil Limited et al v Galloway Estate et al***, 1993 CanLII 7025 (ABKB) [***Scurry-Rainbow***] at para 17, 8 Alta LR (3d) 225; aff'd, 1994 ABCA 313; leave to appeal denied, [1994] SCCA No 475). Such an approach risked outcomes that were "out of touch with the realities of the industry and that deviate[d] from the sorts of solutions needed by the affected parties" (***Scurry-Rainbow*** at para 17).

[22] Notwithstanding the practical approach of Canadian courts toward upholding the intention of industry practices over adherence to the old common law, anachronistic common law strictures of property rights continue to arise in arguments under the guise of new facts. The present case is no different. The following review of the development and current state of the law is thus intended to provide context for the arguments made on the specific facts in this case.

a) Whether the underlying interest is an interest in land

[23] With respect to the second arm of the ***Dynex*** test, the common law once held that an interest in land could only be derived from a corporeal hereditament, and not an incorporeal hereditament (see ***Berkheiser v Berkheiser and Glaister***, 1957 CanLII 56 (SCC), [1957] SCR 387 [***Berkheiser***] at 390; see also discussion of Laskin J (dissenting), in ***Saskatchewan Minerals v Keyes***, 1971 CanLII 183 (SCC), [1972] SCR 703 [***Saskatchewan Minerals***] at 721–722). The Ontario Court of Appeal recently described the difference between the two in ***Third Eye Capital Corporation v Ressources Dianor Inc***, 2018 ONCA 253 [***Dianor***] at para 31:

> A corporeal hereditament is an interest in land that is capable of being held in possession, such as a fee simple. An incorporeal hereditament is an interest in land that is non-possessory such as easements, *profits à prendre*, and rent charges. Under each type of incorporeal hereditament, the holder has an interest in land.

[24] The prohibition on the issuance of an interest in land from an incorporeal hereditament had to do in large part with the remedy of distress. Distress allows for the seizure of someone's property as security for the performance of an obligation. A royalty carved directly from a lessor's mineral rights — a corporeal hereditament — in consideration for the lessee's right to take minerals from the land — an incorporeal hereditament — has been analogized to a rent charge (***Dynex ABCA*** at para 59). Ordinarily, a lessor's right to distrain in the event of a lessee's default was a necessary incident of a rent. In the case of leases for upstream oil and gas ventures, however, the "idea that royalty owners could summarily seize drilling and producing equipment worth millions of dollars, especially in fields where drainage might be going on, is unthinkable" (***Dynex ABCA*** at para 64, citing WH Ellis, "*Property Status of Royalties in Canadian Oil and Gas Law*" (1984) 22 Alta L Rev 1 at 10). A lessor's royalty and overriding royalties are thus without the right of distrain.

[25] Absent the right of distrain, "the argument goes, a royalty cannot be treated as rent nor can an overriding royalty" (***Dynex ABCA*** at para 63). In result, royalty interests arising from a working interest in third-party mineral rights — such as oil and gas or mining leases — were not considered interests in land (see Alicia K Quesnel, "*Modernizing the Property Laws that Bind Us: Challenging Traditional Property Law Concepts Unsuited to the Realities of the Oil and Gas Industry*" (2003) 41 Alta L Rev 159, at pp 172–173).

[26] In the seminal case of ***Berkheiser***, however, the Supreme Court of Canada characterized an oil and gas lease as a *profit à prendre* (*i.e.*, the right to take something from another's land) and held that such leases *can* be interests in land (at 392). Notwithstanding the ***Berkheiser*** Court's break from the old common law, litigants continued to argue — and some judges agreed — that an interest in land could not issue from an incorporeal hereditament such as a *profit à prendre*, including oil and gas and mining leases (see ***Dynex ABCA*** at para 22 and ***Dynex*** at para 9).

[27] Upon considering overriding royalties arising from oil and gas leases in ***Dynex***, however, the Supreme Court definitively dispatched with the "common law prohibition on the creation of an interest in land from an incorporeal hereditament" (at paras 18–21). By extension, a contract conferring a royalty interest does not need to give the royalty holder an interest in the reversion or the right of distrain for the royalty to constitute an interest in land (***McDonald v Bode Estate***, 2018 BCCA 140 at paras 43, 45, citing ***Dynex*** at para 11). The Court held that, "[g]iven the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land" (***Dynex*** at para 18).

[28] The ***Dynex*** Court, at para 6, endorsed the policy reasons reviewed by the Alberta Court of Appeal as the basis for concluding that overriding royalties can be interests in land (***Dynex ABCA*** at paras 34–45). These non-exhaustive reasons can be summarized as follows:

- Royalties routinely play an integral role in financing oil and gas ventures, which often involve huge capital costs and high risk. By spreading the financial risk among different stakeholders, royalties also serve to stabilize industry volatility (***Dynex ABCA*** at para 34).
- The risked-capital of a single high-stakes oil and gas venture may be too great to justify the investment. Royalties offer an enticing alternative for the investor who "is betting that the many losses will be made up by the small fraction of successes" (***Dynex ABCA*** at para 35).
- Royalties may be "used to compensate employees whose efforts determine the success of a project", but who otherwise might lack the capital to finance the project themselves (***Dynex ABCA*** at para 34).
- The success of an upstream oil and gas venture depends, to a large degree, on the subsurface geology of a specific location. Royalties offer a means of investing in the geologic prospectivity of "a particular piece of property" instead of "a particular operator or company" for which there are other means of investing. "The investment return on a royalty results from the success of the property regardless of who owns or is working the property" (***Dynex ABCA*** at paras 35–36).
- Non-operating interests such as royalties further mitigate the high risks associated with oil and gas ventures by defining how the benefits of mineral ownership are shared, by minimizing taxes, and by delegating operatorship and allocating risks and rewards "without invoking many objectionable features associated with creating a conventional business association" (***Dynex ABCA*** at para 43).
- If royalties were not considered interests in land, they would extinguish upon the transfer of the underlying lease to a third party, rendering the lease more valuable to the successor lessee who is not obligated to pay the royalty. This may create a

perverse incentive for creditors holding their debtors' leases as security to petition them into unnecessary bankruptcies to realize the increased value of liquidated leases formerly encumbered by royalties (***Dynex ABCA*** at para 45).

b) The intention of the parties to create an interest in land

[29] Given that a *profit à prendre* can be an interest in land, the second part of the ***Dynex*** test is easily satisfied in the case of royalties carved from mineral leases that confer on the lessee the right to extract minerals or petroleum substances from the land. Disputes since ***Dynex*** have instead largely focused on the first part of the test and interpreting whether the parties intended to create an interest in land.

(1) The *Vandergrift* approach

[30] To understand the uncertainty that has continued to follow royalties as interests in land since ***Dynex***, it is useful to start with the ***Vandergrift*** decision. Though ***Vandergrift*** laid out the modern test for royalties as interests in land, it still applied antiquated common law strictures of real property to the intention-of-the-parties analysis. Notwithstanding the fact that the royalty agreement in ***Vandergrift*** provided that "[a]ll terms and conditions of this Agreement shall run with and be binding upon the lands", the trial judge held that the contract's language and the absence of traditional incidents of an interest in land defeated its characterization as an interest in land.

[31] Emphasis was placed on the fact that the recitals of the royalty agreement in question described the royalty as a "gross overriding royalty on all petroleum substances recovered from the lands" instead of "petroleum within, upon, and under the lands" (***Vandergrift*** at paras 35–26). The gross overriding royalty was subsequently defined in the body of the agreement as an interest "in all petroleum substances found within, upon or under the lands" (paras 35–36, emphasis added). This was taken to connote an interest in the petroleum after it had been "found" (presumably by the drill bit) and extracted from the subsurface, not as an interest in the petroleum substances *in situ* (at para 36).

[32] The remaining references to the gross overriding royalty in the agreement spoke of "a share in production", "petroleum substances sold", and "petroleum substances produced". Relying on previous authorities, the trial judge in ***Vandergrift*** couched the language in those references as conveying an intent to create a contractual interest in petroleum substances severed from the lands as opposed to an interest in land itself (at para 36, citing ***Vanguard Petroleums Ltd v Vermont Oil & Gas Ltd***, 1977 CanLII 648 (ABKB) at para 19, 72 DLR (3d) 734, and ***Emerald Resources Ltd v Sterling Oil Properties Mgmt Ltd***, 1969 CanLII 803 (ABCA), 3 DLR (3d) 630 at 640, aff'd 1970 CanLII 980 (SCC)).

[33] The trial judge also found that the absence of certain traditional incidents of an interest in land affirmed the royalty's mere contractual nature. If the royalty *did* create an interest in land, the trial judge reasoned that one would expect the royalty holders to have the "right to enter upon the lands to explore for and extract the minerals" (***Vandergrift*** at para 38). Further, the royalty agreement provided that "nothing herein shall be construed as requiring [the royalty grantor] to conduct exploratory operations or to drill a well on the lands" (at para 35). In other words, not only could the royalty holders not extract the minerals themselves, but they couldn't compel the grantor to do so either (at para 38). The trial judge found this fatal to the interest being

characterized as an interest in land, which harkens to the old common law requirement that the interest holder have some measure of control over the interest in question for it to be characterized as an interest in land (see, *e.g.*, ***St. Lawrence Petroleum Limited et al v Bailey Selburn Oil & Gas Ltd et al***, 1963 CanLII 76 (SCC), [1963] SCR 482 at 489–491 [***St. Lawrence Petroleum***]).

[34] While the Supreme Court adopted the two-part test articulated by Virtue J in ***Vandergrift***, it did not directly grapple with the ***Vandergrift*** decision's application of old common law concepts in the intention-of-the-parties analysis. Consequently, there has been lingering uncertainty as to whether a royalty can be an interest in land if the royalty agreement doesn't (a) describe the interest with words to the effect of "in, under, or upon the land", and (b) include a royalty holder's right to enter upon the lands and extract the resources (see *e.g.*, ***St Andrew Goldfields Ltd v Newmont Canada Limited***, 2009 CanLII 40549 at paras 102–104, [2009] OJ No 3266, aff'd 2011 ONCA 377 [***St. Andrew Goldfields***]; ***Third Eye Capital Corp v Dianor Resources Inc***, 2016 ONSC 6086 at paras 25–30; ***Bacanora Minerals Ltd v Orr-Ewing***, 2021 ABKB 670 at paras 74–80).

[35] Nevertheless, the ***Dynex*** decision upheld the underlying decision of the Alberta Court of Appeal in ***Dynex ABCA***, which addressed these issues head-on.

(2) The *Dynex ABCA* Approach

[36] The Alberta Court of Appeal stressed that the intention of the parties to establish either a contractual interest or an interest in land must be assessed "from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words" (***Dynex ABCA*** at para 73). This was based on the practical approaches of Laskin J (dissenting) in ***Saskatchewan Minerals*** (also cited approvingly in ***Dynex***, at paras 10–12); Matheson J in ***Canco Oil & Gas Ltd v Saskatchewan***, 1991 CanLII 7788 (SKQB), [1991] SJ No 22 (QL) [***Canco***]; and Hunt J in ***Scurry-Rainbow***.

[37] In ***Saskatchewan Minerals***, Laskin J held, at 725 (emphasis added):

> The words in which [a royalty] is couched may show that only a contractual right to money or other benefit is prescribed. However, if the analogy is to rent, then the fact that the royalty is fixed and calculable as a money payment based on production or as a share of production, or of production and sale, cannot alone be enough to establish it as merely a contractual interest.

[38] Matheson J held the following in ***Canco*** at para 58 (emphasis added):

> The consideration for the grant … of the 3% gross royalty was not expressed as relating to any right to enter, explore and remove petroleum substances from the designated lands. Whatever may have been the true consideration, surely the principal questions are whether [the royalty grantor] was capable of granting an interest in the lands and whether it intended to do so and whether it accomplished that intention. As owner of a designated interest in mines and minerals in fee simple [the royalty grantor] clearly possessed an interest in the lands, and the wording of the Royalty Agreement permits of no other conclusion but that [the royalty grantor] intended that the grant of the 3% gross royalty should constitute an interest in the lands. The fact that [the royalty grantor] did not utilize all of the wording, or type of wording, considered by some persons as perhaps essential,

> can surely not detract from an otherwise clearly manifested intention to create an interest in the lands.

[39] And in ***Scurry-Rainbow***, Hunt J held, at 474:

> There is in my view an unreality about placing too heavy an emphasis upon fine distinctions as the selection of words such as "in" rather than "on". Notwithstanding the significance that the courts have sometimes attached to these word choices, I doubt that parties who signed leases …should be taken to have intended to create an interest in land as opposed to a contractual right, as a result of such minuscule differences in language….Rather, it is more appropriate to consider the substance of the transaction (namely, what were the parties actually trying to achieve?) and to regard the words they have used from that perspective.

[40] After reviewing primary and secondary authorities in Canada and the US, the Court of Appeal in ***Dynex ABCA*** came up with a non-exhaustive list of indicia that can be used to identify whether a royalty was intended to be an interest in land (at para 84):

1. The underlying interest is an interest in land (corporeal or incorporeal);
2. The intentions of the parties, as evidenced by the language of the grant and any admissible evidence of the surrounding circumstances or behaviour, indicate that it was understood that an interest in land was created/conveyed;
3. The interest is capable of lasting for the duration of the underlying estate.

(3) *Dianor*'s clarification of the *Dynex* test

[41] In ***Dianor***, the Ontario Court of Appeal reconsidered the ***Dynex*** decision in light of the trial judge's application of the ***Vandergrift*** approach, which it described as "a serious misapprehension … in the application of ***Dynex***" (para 68). As I have also noted in paragraph [34], ***Dynex*** merely adopted the test laid out in ***Vandergrift*** — it did not adopt its reasoning (***Dianor*** at para 69).

[42] The Ontario Court of Appeal clarified that the old common law approach subsumed by the ***Vandergrift*** decision is no longer applicable (para 71):

> The purpose of the Supreme Court and the Court of Appeal of Alberta in *Dynex* [and *Dynex ABCA*] was to step away from the requirement that a royalty right had to have the incidents of a working interest or a *profit à prendre* in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk.

[43] In ***Dianor***, the agreements in question stated that the parties intended the gross overriding royalties to create interests in land that run with the lands, and that they were to be calculated on production as opposed to the value of the minerals *in situ* (at paras 26–27). Overruling the trial judge, the Court of Appeal held that "the fact that the GORs are calculated on production does not defeat the clear intention of the parties that the GORs constitute interests in land" (at para 77).

[44] I note also that if a GOR was defined as a reservation of the minerals or petroleum substances *in situ*, it "would necessarily detract from the title of the fee simple owner of the mines and minerals, and be tantamount to a grant of an undivided interest in the mines and

minerals, resulting in co-ownership" (***Canco*** at para 29). Defining a GOR as a share of the lessee's interest in the *in situ* minerals would essentially elevate the royalty holder's interest to a working interest, potentially exposing the royalty holder to a proportional share of abandonment costs and other environmental liabilities. These are precisely the kind of impracticalities that the ***Dynex ABCA*** and ***Dynex*** lineage of decisions have sought to avoid by holding that royalty interests need not be framed as an interest in the *in situ* minerals to constitute an interest in land.

(4) *Manitok Energy (Re)*

[45] ***Manitok Energy Inc (Re)***, 2018 ABKB 488 [***Manitok***] was the first decision of this Court following ***Dianor*** to consider whether a royalty constituted an interest in land based on the intention of the parties. ***Manitok*** involved a "Producing Royalty" granted "in respect of all Oil Volumes within, upon or under the Royalty Lands", but was calculated on volumes of oil produced at their point of sale (at para 8). The royalty holder was entitled to the first 140 barrels of oil produced per day from the subject lands for an initial period of 8 years, after which its interest would grind down by 10% per year relative to the prior (at para 10). Further, the royalty agreement explicitly stated that the "[Producing Royalty] constitutes, and is to be construed as, an interest in land and runs with the Royalty Lands and the Parties intend that the Producing Royalty shall be an interest in land" (at para 7).

[46] Relying on ***Dynex ABCA***, ***Dynex***, and ***Dianor***, Horner J held that neither the Producing Royalty's framing as "a fixed quantity of production per day", nor restrictions on the royalty holder's right of entry could defeat the characterization of the Producing Royalty as an interest in land so long as "the parties' intention to make it so is sufficiently clear" (at para 22). Similarly, the argument that the Producing Royalty should not be characterized as an interest in land because it decreased with time was rejected (at para 24). Horner J's decision on this point hinged on the fact that the decrease in the Producing Royalty was commensurate with reservoir depletion and the royalty agreement was drafted to preserve the Producing Royalty until the documents of title expired (at para 24). In other words, the Producing Royalty was capable of lasting for the duration of the underlying estate, satisfying the third indicia of an interest in land articulated in ***Dynex ABCA*** (see para [40]).

(5) *Accel Canada Holdings Limited (Re)*

[47] In ***Accel Canada Holdings Limited (Re)***, 2020 ABKB 182 [***Accel***], Horner J again had the occasion to consider whether multiple royalties constituted interests in land based on the intention of the parties to the royalty agreements (leave to appeal dismissed on the interest in land issue: 2020 ABCA 160).

[48] Accel entered into an Asset Purchase and Sale Agreement with ARC whereby Accel, as purchaser, granted ARC, as vendor, a gross overriding royalty in the underlying Petroleum and Natural Gas Rights as partial consideration for the transaction of those assets (the "ARC GOR"; at para 4). The ARC GOR would only crystallize if Accel defaulted on its obligation to pay a deferred purchase price plus interest by a specific date (at para 43). Upon triggering, the ARC GOR payments would grind down the outstanding amounts owed by Accel to ARC for six months, at which point ARC would provide Accel notice of the remaining balance and Accel would be given 10 days to pay the remaining balance in full (paras 43–47). If Accel did not pay the remaining balance within 10 days, the ARC GOR would continue in perpetuity (at para 47).

[49] Horner J opined that the ARC GOR could be interpreted as an interest in land "considering the potential for a royalty interest in perpetuity and plain wording of the provision stating that the ARC GOR creates an interest in land" (at para 41). Conversely, the ARC GOR could be construed as a contractual right to payment given that the Asset Purchase and Sale Agreement envisioned the ARC GOR "as a mechanism of ensuring payment and could be read to establish a contractual agreement to pay secured by a royalty interest" (at para 10).

[50] Given the ambiguity, Horner J considered ARC's post-contract conduct as an exception to the parol evidence rule to determine the issue. The most salient evidence was that ARC "registered a security agreement and a land charge at the Personal Property Registry…which identified ARC as the secured party, [Accel] as the Debtor and the collateral as all the Debtor's right, title, estate and interest in the Petroleum Substances produced from the Royalty Lands" (at para 61). The ***Personal Property Security Act***, RSA 2000, c P-7 ("*PPSA*") precludes the registration of interests in land [s 4(f)].

[51] Given (a) the tortuous waterfall of conditions that had to materialize for the ARC GOR to continue in perpetuity (*i.e.*, to last for the duration of the underlying estate) and (b) the surrounding circumstances, including ARC's post contract conduct consistent with the intention that the ARC GOR serve as security for payment of the deferred purchase price, Horner J found the parties intended the ARC GOR to be just that — a contractual right to security for payment, and not an interest in land (at para 63).

[52] To secure bridge financing for its capital requirements, Accel also entered into Royalty Purchase Agreements with BEST. Under those agreements, BEST provided financing and would obtain GORs as repayment if Accel didn't repay BEST the debt plus a return by a set date (at para 9). Neither repayment was met, so BEST assumed two GORs payable "until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements" (the "BEST GORs"; at para 10). "Payout" was structured such that Accel was obligated to pay BEST the greater of either the purchase price of the BEST GOR plus $1M, or the purchase price of the BEST GOR plus "interest at a rate of 59.4% per annum calculated and compounded monthly" (at para 10).

[53] The fact that the BEST GORs created "limited reversionary interests that terminate upon repayment of the [debt]" weighed in favour of their characterization as security interests for the repayment of the proceeds of the financing arrangement as opposed to interests in land (at para 89–91).

(6) *Bacanora Minerals Ltd v Orr-Ewing*

[54] Despite this Court's endorsement of ***Dianor***'s clarification of the ***Dynex*** test and the ***Dynex ABCA*** approach to the intention-of-the-parties analysis in ***Manitok*** and ***Accel***, I am aware that the Court's recent decision in ***Bacanora Minerals Ltd v Orr-Ewing***, 2021 ABKB 670 [***Bacanora***] may appear to have resurrected the ***Vandergrift*** approach of searching for certain magic words that convey an intent to establish an interest in land.

[55] ***Bacanora*** dealt with a GOR carved from the grantor's lithium mining claims and pending mining claims in Mexico. The GOR was framed as a right to 3% of the revenue from the grantor's sale of raw or processed lithium-bearing ore extracted from the lands (paras 27–28). The agreement stated that the GOR "shall constitute a covenant running with the Assets" (*i.e.*, the mining claims) demonstrating that it was an interest capable of lasting for the duration of the

underlying estate (at para 29). The trial judge nevertheless held that the GOR created a contractual right to payment as opposed to an interest in land (at paras 79–80).

[56] In coming to this conclusion, the trial judge held that "the wording of the GOR is similar to the agreements discussed in ***Vandergrift*** and ***Vanguard*** in that the royalty is based upon minerals 'obtained' (ie: 'recovered' or 'found', as per ***Vandergrift***) and, similar to ***Vanguard***, is based upon their value following their removal from the land" (para 79). With great respect, this approach to the intention-of-the-parties analysis (*i.e.*, the ***Vandergrift*** approach) is no longer applicable based on the jurisprudence outlined above. The fact that a GOR is calculated on the value or revenue from minerals or petroleum substances severed from the land cannot defeat the otherwise clear intention of the parties that it constitute an interest in land.

[57] Further, the fact that a GOR doesn't entail the royalty holder's right to enter upon the lands and extract the resources themselves (*i.e.*, it doesn't create a *profit à prendre*; see ***Bacanora*** at para 79), cannot alone preclude it from being an interest in land if the parties otherwise intended it so.

[58] This is not to say that the gross overriding royalty in ***Bacanora*** should be construed as an interest in land. That case arose in the context of a different extractive industry in another jurisdiction. I also note that McCarthy J stated, at para 81, that he "did not think that whether the underlying interest is in the land itself or is otherwise *in rem*, is determinative of the issue" before him and that he determined the issue "should it be deemed relevant upon appeal". Given this, I simply hasten to say that the trial judge's approach to interpreting whether the gross overriding royalty constituted an interest in land is not, in my view, reflective of the current state of the law and should not be read as reviving the ***Vandergrift*** approach that was disavowed by the Alberta Court of Appeal in ***Dynex ABCA***, the Ontario Court of Appeal in ***Dianor***, and by this Court in ***Manitok*** and ***Accel***.

2. Current state of the law

a) Examination of the parties' intentions from the agreement as a whole and the surrounding circumstances

[59] As the Court of Appeal stated in ***Dynex ABCA***, the approach to examining the intention of the parties to establish an interest in land must consider "the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words" (at para 73, aff'd 2002 SCC 7; see also ***Dianor*** at para 63; ***Accel*** at para 16).

[60] The role of the reviewing court is to ascertain the interpretation of the royalty agreement that promotes or advances the true intention of the parties at the time of contracting. This must be done on an objective basis, focused on what a reasonable person would infer from the ordinary grammatical meaning of the terms of the agreement, "consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at paras 47–49 [***Sattva***]; ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79, leave to appeal to SCC refused 37712 (5 April 2018) [***IFP Technologies***]). "[T]he words of one provision must not be read in isolation but should be considered in harmony with the rest of the agreement and in light of its purposes and commercial context" (***Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highways)***, 2010 SCC 4 at paras 64–65; ***IFP Technologies*** at paras 79, 81–84).

[61] With respect to the surrounding circumstances, courts must consider the facts that were known, or ought to have been known, by the parties at the time of contracting (***Sattva*** at paras 58, 60; ***IFP Technologies*** at para 83). This necessarily includes the genesis, aim, or purpose of the agreement; the nature of the relationship created by the agreement; and the nature or custom of the particular industry (***Sattva*** at para 48; ***IFP Technologies*** at para 83, ***Nexxtep Resources v Talisman Energy Inc***, 2013 ABCA 40 at para 33 [***Nexxtep Resources***]). By extension, courts must interpret royalty agreements according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry (***IFP Technologies*** at para 88; ***Nexxtep Resources*** at para 35).

[62] Subjective evidence of the parties' intentions such as post-contract conduct is presumptively inadmissible (***IFP Technologies*** at para 87; ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 44; ***Accel*** at para 28). With respect to royalty agreements pertaining to freehold minerals, this includes the practice of registering a caveat with the land titles office or a security interest with the Personal Property Registry in relation to the royalty. Such post-contract conduct is only admissible where the words of an agreement "can be reasonably interpreted to have more than one meaning", resulting in ambiguity as to whether the parties intended for the royalty to be an interest in land (***Accel*** at para 28).

b) The core indicia of an interest in land

[63] Where a royalty agreement expressly states that the royalty in question constitutes an interest in land, is to be construed as an interest in land, or runs with the lands subject to the royalty or the underlying interest in land (an "Interest in Land Clause"), I find the foregoing jurisprudence suggests that such language creates a strong, but rebuttable presumption that the royalty is indeed an interest in land. After all, it is a cardinal principle of contract interpretation that the parties intend what they have said (***Canlin Resources Partnership v Husky Oil Operations Limited***, 2018 ABQB 24 at para 38, citing ***Ventas Inc v Sunrise Senior Living Real Estate Investment Trust***, 2007 ONCA 205 at para 24).

[64] A common thread since ***Dynex ABCA*** has been an emphasis on whether the royalty interest can last for the duration of the underlying estate (***Dynex ABCA*** at para 84; ***Manitok*** at para 24; ***Accel*** at para 51). If a royalty is drafted to extinguish before the underlying interest in land out of which the royalty was carved, it may rebut a presumption that the royalty itself is an interest in land. Conversely, if the royalty is drafted to run with the underlying interest in land in perpetuity, it will reinforce the nature of the royalty as an interest in land.

[65] Therefore, where the ***Dynex*** test distinguishes an interest in land from "a contractual right to a portion of the oil and gas substances recovered from the land", the distinction is between an interest in the produced resource that continues in perpetuity versus a contractual right to a portion of the produced resource as security for payment or performance of an obligation (see ***Accel*** at para 3). Whereas the former is capable of lasting for the duration of the underlying estate, a contractual right to security for payment or performance would extinguish upon repayment of the debt or performance of the obligation. This interpretation is supported by the policy reasons for upholding GORs as interests in land articulated in ***Dynex ABCA*** (at paras 35–36): a GOR that is capable of lasting for the duration of the underlying interest in land reflects an investment in "a particular piece of property", whereas a GOR designed to extinguish upon

repayment of a debt or performance of an obligation more closely reflects an investment in "a particular operator or company".

[66] The presence of an Interest in Land Clause in an agreement that creates a royalty capable of lasting for the duration of the underlying interest in land may be sufficient to satisfy the ***Dynex*** test. Whether or not ambiguity remains, the whole of the contract and the surrounding circumstances must nevertheless be considered to determine whether the parties intended the royalty to constitute an interest in land (***IFP Technologies*** at para 82). Still, courts cannot ignore the words chosen by the parties to a royalty agreement that clearly connote an intention to create an interest in land (***IFP Technologies*** at para 89; ***Hudson King v Lightstream Resources Ltd***, 2020 ABQB 149 at para 109). To rebut the presumption of an interest in land arising from the plain wording of a royalty agreement, the remaining indicia and the surrounding circumstances would have to significantly contradict the intention of the parties to create an interest in land and the ability of the royalty to last for the duration of the underlying estate.

B. Analysis

1. Whether the Crown Lease, out of which the 8% Royalty was carved, is an interest in land

[67] PrairieSky submits that the Crown Lease out which the 8% Royalty was carved is a working interest or a *profit à prendre* and, therefore, is unquestionably an interest in land capable of satisfying the second branch of the ***Dynex*** test. I agree (see ***Dianor*** at para 60; ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 at para 11 [***Grant Thornton***]).

[68] Nevertheless, Yangarra argues that, because the rights conferred on PrairieSky through the Crown Lease are limited to the working interest in the minerals and do not entail ownership of the minerals *in situ*, PrairieSky was only able to grant an interest in the Crown Lease pursuant to the maxim "*nemo dat quad non habet*" — a seller cannot confer a greater title than that which they hold (the "*nemo dat*" principle). Respectfully, this misapprehends the nature of royalty interests, the *nemo dat* principle, and the second branch of the ***Dynex*** test.

[69] First, GORs such as the 8% Royalty granted under the 2011 Royalty Agreement are non-operating interests that do not entail an independent ownership interest in the land or the underlying lease (***Dynex ABCA*** at para 43; ***Dianor*** at paras 39, 72). GORs confer an unencumbered share or interest in the resources extracted from the lands pursuant to the underlying working interest (***Dynex*** at para 2; ***Dianor*** at para 34). Moreover, as the Ontario Court of Appeal aptly stated in ***Dianor***: "royalty rights-holders have no interest in working the land, nor do holders of the working interest or the *profit à prendre* want their operations to be subject to the working rights of a royalty rights-holder" (at para 72). The 2011 Royalty Agreement is no different — it does not purport to confer on the royalty holder an ownership interest in the *in situ* minerals or a working interest in the minerals equivalent to the lessee's interest. It confers an interest in the grantor lessee's entitlement to the substances produced from the land.

[70] Second, a GOR is not a "greater" interest than a leasehold or working interest in the *in situ* minerals, nor is it equal to a working interest. It is a distinct interest derived from a leasehold or working interest. Carving a GOR out of mineral lease does not offend the *nemo dat* principle, nor does that principle elevate a GOR to a working interest on par with the underlying leasehold interest. In the words of Laskin J in ***Saskatchewan Minerals***: "[i]n principle, a mining lessee

whose holding is an interest in land in respect of which he has a royalty obligation should be able to grant or submit to an overriding royalty in respect of that interest to take effect as itself an interest in the lessee's holding" (at 724–725, quoted approvingly in ***Dianor*** at para 76). Home Quarter, as lessee, had the right to convey a share in its own entitlement to the petroleum and natural gas recovered from the lands in accordance with the Crown Lease, and it did so when it granted Range Royalty the 8% Royalty. To find otherwise would undermine the useful role that GORs play in financing and spreading risk in upstream extractive industries.

[71] Having established that the Crown Lease is an interest in land satisfying the second branch of the ***Dynex*** test, the question is not whether Home Quarter had the capacity to grant an interest in land, but whether Home Quarter and Range Royalty *intended* the 8% Royalty carved out of the Crown Lease to be an interest in land.

[72] Finally, I reject Yangarra's argument that section 91(4) of the *MMA* applies to determine the effective date of the transfer of a Crown Lease. I agree with PrairieSky's argument in response that this provision does not govern the transfer of actual ownership of the working interest, but rather governs the transfer of the registered interest in a Crown Lease. Subsection 91(4) of the *MMA* provides that "[o]n the registration of a transfer, the transferee becomes the lessee with respect to the agreement, the undivided interest in the agreement or the part of the location so transferred". Importantly, lessee is defined in section 1 as "the holder according to the records of the Department of an agreement". Clearly, subsection 91(4) does not purport to determine the time at which ownership rights pass as between contracting parties. Those rights are determined by the contractual arrangements made by the contracting parties.

2. Whether the parties intended the 8% Royalty to constitute an interest in land

a) Interpreting the 2011 Royalty Agreement as a whole along with the surrounding circumstances

(1) The surrounding circumstances

[73] At trial, PrairieSky's witnesses gave evidence of the circumstances surrounding the formation of the 2011 Royalty Agreement. Mr. Lebbert (Range Royalty) and Mr. Purdy (Home Quarter) were experienced land professionals and vice presidents of their respective companies at the inception of the Land Fund Arrangement and the formation of the 2011 Royalty Agreement. As non-party witnesses, they were uniquely positioned to provide insight into the circumstances surrounding the formation of the 2011 Royalty Agreement. I found both witnesses were candid and credible and note that their evidence regarding the circumstances surrounding the 2011 Royalty Agreement was not challenged. As such, I accept their evidence, summarized below.

(a) The Home Quarter-Range Royalty Land Fund Arrangement

[74] Range Royalty was created in 2005 to invest in royalty interests and distribute the royalty income to it shareholders. Its limited partnership agreement prohibited Range Royalty from operating or investing in wells or facilities in order to avoid liability for abandonment and reclamation obligations. As a pure royalty company, ensuring that its royalty interests were construed as interests in land that ran with the subject lands and could not be extinguished through subsequent transactions, bankruptcies, or receivership proceedings was an important

consideration for Range Royalty. Accordingly, Range Royalty retained a lawyer to prepare a standard form royalty agreement with an "Interest in Land" clause.

[75] Home Quarter was initially set up by the principals of Range Royalty, including Mr. Lebbert, to operate a number of undeveloped Crown leases assigned to it by Range Royalty in exchange for a royalty. Thereafter, Range Royalty and Home Quarter put an undeveloped land fund arrangement in place whereby Range Royalty would fund the land acquisitions identified and secured by Home Quarter in exchange for a royalty (*i.e.*, the Land Fund Arrangement).

[76] Home Quarter's purchase of the Crown Lease from Trarion in 2011 was one such acquisition. Range Royalty elected to fund the acquisition of the Royalty Lands in exchange for the 8% Royalty and used the standard form royalty agreement its lawyer had drafted for all such transactions as the precedent for the 2011 Royalty Agreement. By design, there were no negotiations respecting the drafting of the 2011 Royalty Agreement beyond the royalty amount. Nevertheless, Home Quarter was well aware of the terms and nuances of the agreement as the standard form royalty agreement had been discussed and agreed to by Home Quarter and Range Royalty at the outset of the Land Fund Arrangement. Mr. Lebbert described this from Range Royalty's perspective in direct examination:

> Q Were there any negotiations between Home Quarter and Range Royalty with respect this royalty agreement?
> A No.
>
> Q Can you please turn to clause 9.5 which is on page 9?
> A Yes.
>
> Q It says 9.5 interest in land. What was your commercial understanding of this clause?
> A The purpose of this clause is - is to confirm that the royalty interest that was subject to the document was an interest in land running with the lands, and it was there forever.
>
> Q What do you mean it was there forever?
> A It was, long as the lands were in existence the royalty was against the lands. So, if -- royalties -- royalty pairs change hands regularly as companies swap assets, trade assets. Royalty owners tend to stay the same. So, it's just to make sure that the royalty was recognized, it's there. We - we were putting up money and - and again it was -- in those days through bankruptcy, some ba - some receivers were trying to - trying to wash caveat, wash royalty interests in bankruptcy, and we wanted to make sure that you couldn't do that.
> ...
>
> Q Was this clause 9.5 ever discussed with Home Quarter?
> A They -- it was discussed, this is our document, this is what we use.

[77] Mr. Purdy confirmed substantially the same from Home Quarter's perspective on direct examination:

> Q And you mentioned earlier that through the land fund arrangement, Range Royalty would receive a royalty. Up until the 2011 time frame, did you ever have any discussions with Range Royalty as to whether those royalties would constitute an interest in land or merely a contractual right?
> A Yeah, we had discussions via just the - the - the standard royalty agreement they gave us to review and attach to the land fund agreement. It had a specific interest in land clause within the royalty agreement that we reviewed and discussed with them.
>
> Q When did you review that and discuss it with Range Royalty?
> A Right at the start when Home Quarter was created in 2010.

[78] Mr. Purdy elaborated further on cross examination:

> Q And - and essentially, that [the 2011 Royalty Agreement] was the agreement that was provided by Range Royalty to Home Quarter. There wasn't an active negotiation regarding the agreement?
>
> A No - no negotiation but at the start of -- when we started Home Quarter and raised the original financings in 2010, we were given the opportunity to go through it in detail, and ask questions and - and -- yeah, we were comfortable with the - the format, but we were definitely able to ask questions and have discussions.

[79] Recognizing that the foregoing evidence may be construed as pre-contractual negotiations that would be inadmissible if presented as subjective evidence of the parties' intentions (see ***IFP Technologies*** at paras 84–85), it is worth reiterating that Mr. Lebbert and Mr. Purdy are non-party witnesses. As such, I find their evidence "is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations" (***IFP Technologies*** at para 85). Moreover, their discussion of the formation of the Land Fund Arrangement and the circumstances surrounding the 2011 Royalty Agreement was not contentious and is admissible evidence of the factual matrix that I am obligated to consider when interpreting the terms of the contract (***IFP Technologies*** at para 85).

(2) The granting clause

[80] Clause 2.1 of the 2011 Royalty Agreement (the "Granting Clause") reads:

> There is hereby granted to and owned by Grantee an overriding royalty of eight (8%) percent of:
>
> (a) the quantity, if Grantee elects to take the Overriding Royalty in kind pursuant to the Section of this Article entitled "Taking in Kind"; or
>
> (b) the Value, if Grantee has not elected to take the Overriding Royalty in kind pursuant to this Section of this Article entitled "Taking in Kind";

> in the Petroleum Substances within, upon, or under the Royalty Lands to the extent of the Reported Volumes attributable to Grantor's Working Interests in the Royalty Lands…[emphasis added]

[81] "Petroleum Substances" is defined in clauses 1.1 as "Crude Oil, Gas and Condensate". In turn, those substances are defined as follows:

> "Condensate" means a liquid hydrocarbon product that existed in the reservoir in a gaseous phase at original conditions and that is recovered from a gas stream…
>
> "Crude Oil" means crude petroleum oil and any other hydrocarbon, regardless of density, that is or is capable of being produced from a well in liquid form…
>
> "Gas" means natural gas, both before and after it has been subjected to absorption, purification, scrubbing or other treatment or process, and includes all liquid hydrocarbons other than Crude Oil and Condensate.

[82] "Reported Volumes" is defined as "those production volumes of Petroleum Substances…reported…from each wellhead on the Royalty Lands" (emphasis added).

[83] Yangarra submits that the Granting Clause and the foregoing definitions are indicative of a right to revenue from the working interest in the Crown Lease as opposed to an interest in land. While the granting clause uses terminology that has historically been associated with an interest in land ("within, upon, or under the Royalty Lands"), Yangarra notes that the grantee's interest is limited to a share of the volume of Petroleum Substances extracted from the land, as evidenced by the underlined words in the above clauses.

[84] Relying on ***Vandergrift***, ***St. Lawrence Petroleum***, and a strict reading of the first arm of the ***Dynex*** test (at para 22), Yangarra essentially argues that a "contractual right to a portion of the oil and gas substances recovered from the land" must be distinguished from an interest that runs with the land (emphasis added). As explained at paragraphs [64]–[65], the purpose of the first arm of the ***Dynex*** test is to distinguish an interest in the produced resource that continues in perpetuity (an interest in land) from a contractual right to the produced resource as security for payment or performance of an obligation. I do not find the fact that the 8% Royalty is framed as an interest in the Petroleum Substances produced from the Royalty Lands relevant to the intention of the parties to create an interest in land (***Canco*** at paras 29–30).

[85] Yangarra's position also betrays an assumption that only an interest in the minerals or petroleum substances *in situ* can be said to run with the land. Yet, as Yangarra points out in its related *nemo dat* argument, the Crown maintains ownership of the minerals *in situ* and, as a result, lessees of Crown minerals can't convey an interest in the ownership of the minerals *in situ*. If Yangarra's implied assumption were true, no royalty carved out of a lease of mineral rights would ever be capable of being an interest in land without the express consent of the fee simple owner of the mines and minerals. This would significantly frustrate the useful role that royalties play in upstream extractive industries.

[86] Further, the assumption that only an interest in the *in situ* minerals or petroleum substances can be an interest in land effectively seeks to restore the prohibition on the creation of an interest in land from an incorporeal hereditament. Respectfully, that is not the law nor the practice of the oil and gas industry. Yangarra's position embraces precisely the type of anachronisms the Alberta Court of Appeal in ***Dynex ABCA*** and the Supreme Court in ***Dynex*** sought to do away with (see also ***Dianor*** at para 71).

[87] The ***Dynex*** test is predicated on an understanding of the important role that royalties play in extractive industries, which would be undermined if GORs were not capable of running with the land unless they entailed an interest in the *in situ* resource. Whether a GOR is framed as an interest in the *in situ* resource or as a share of the resources extracted from the lands is not determinative of the parties' intention to convey an interest in land.

[88] The Granting Clause does not merely articulate an undertaking to pay the royalty holder a portion of the Produced Substances or proceeds from the sale thereof. The words "granted to" and "owned by" connote the conveyance of ownership in respect of the 8% Royalty as opposed to a mere contractual right to a portion of the Produced Substances as security for payment of a debt or performance of a service (***Bensette v Reece***, 1969 CanLII 550 (SKQB) at para 21, (1969) 7 WWR 705, rev'd on other grounds CanLII 975 (SKCA), [1973] 2 WWR 497; ***Scurry-Rainbow*** at para 102; ***Blue Note Mining Inc v Merlin Group Securities Ltd***, 2008 NBQB 310 at para 40, aff'd 2009 NBCA 17; ***St. Andrew Goldfields*** at paras 101–102). I find those words support the inference that the parties intended the 8% Royalty to be a proprietary interest in land.

(3) The "Interest in Land" clause

[89] Clause 9.5 (the "Interest in Land Clause) of the 2011 Royalty Agreement reads as follows:

> The Overriding Royalty constitutes an interest in land, shall be regarded as covenants running with the Royalty Lands, caveatable under the lands registration systems in the provinces where the Royalty Lands are situate and enforceable against Grantor and any successors in interest to Grantor. [emphasis added]

[90] As previously noted at paragraph [4], s 202(a) of the *LTA* prohibits the registration of caveats or other encumbrances affecting Crown-owned minerals, rendering the underlined portion of the Interest in Land clause moot. Yangarra submits that the inclusion of such language that is incongruent with the 8% Royalty undermines the surrounding plain words that otherwise demonstrate an intention to establish an interest in land. Both Mr. Lebbert and Mr. Purdy testified that to, to their knowledge, one could not register an encumbrance on Crown Lands. Mr. Lebbert in particular testified that Range Royalty did not register or caveat the 2011 Royalty Agreement because it was his understanding that this was not possible. Given that both Mr. Lebbert and Mr. Purdy knew at the time of contracting that it was not possible to register a caveat affecting Crown-owned minerals in Alberta, Yangarra submits that the inclusion of the underlined portion indicates Range Royalty and Home Quarter never turned their minds to clause 9.5 and whether the 2011 Royalty Agreement operated to create an interest in land.

[91] Yet, Mr. Lebbert testified that the Interest in Land Clause was included in the 2011 Royalty Agreement "to confirm that the royalty interest that was subject to the document was an interest in land running with the lands, and it was there forever." PrairieSky submits that Mr. Lebbert's and Mr. Purdy's testimony that they reviewed and discussed clause 9.5 in the context of the standard form agreement used for the 2011 Royalty Agreement suggests they clearly turned their minds to whether the 8% Royalty would constitute an interest in land. PrairieSky further submits that the remainder of clause 9.5 sufficiently demonstrates the parties' intention that the 8% Royalty constitute an interest in land. I agree with PrairieSky.

[92] I accept the testimony of Mr. Lebbert and Mr. Purdy that Range Royalty and Home Quarter used a standard form royalty agreement to execute transactions pursuant to their Land

Fund Arrangement, and that they did so to ensure certainty and consistency of the terms of the royalties created, regardless of the type of land subject to each royalty agreement. I find that the retention of the underlined portion of clause 9.5 in the 2011 Royalty Agreement reflects the use of the standard form agreement. I find that its inclusion does not detract from the otherwise plain wording of clause 9.5 that clearly suggests the parties intended the 8% Royalty to constitute an interest in land.

[93] Moreover, the language of the underlined portion of clause 9.5 is permissive; it does not impose on the royalty holder an obligation to register the 8% Royalty such that it would be rendered unenforceable. It merely implies that the royalty holder *may* do so. The fact that the royalty holder cannot do so in the circumstances does not detract from the surrounding portions of the Interest in Land Clause: "[t]he Overriding Royalty constitutes an interest in land, shall be regarded as covenants running with the Royalty Lands ... and enforceable against Grantor and any successors in interest to Grantor".

[94] I find that clause 9.5 strongly conveys the parties' intention that the 8% Royalty constitutes an interest in land that runs with the underlying Lands and is enforceable against Home Quarter's successors in interest to the Crown Lease.

(4) The "Term", "Surrender", and "Area of Mutual Interest" clauses

[95] Clause 9.6 of the 2011 Royalty Agreement (the "Term Clause") provides as follows:

> This Agreement shall remain in force and effect so long as Grantor or any successors in interest to Grantor retains a Working Interest in the Royalty Lands. Notwithstanding the foregoing, this Agreement shall terminate with respect to any interest assigned to Grantee pursuant to the Section of this Article entitled "Surrender".

[96] "Working Interest" is defined as "the working interests held by Grantor in respect of the Royalty Lands as set out and described in Schedule "A", and Schedule "A" describes the Crown Lease. Accordingly, the Term Clause specifies that the 8% Royalty is to last for the duration of the underlying Crown Lease, regardless of whether the Crown Lease is assigned to a third party. This further evidences an intention to create an interest in land that runs with the underlying estate in land (***Dynex ABCA*** at para 84).

[97] The Surrender clause (clause 9.1) and definition of "Title Documents" referenced thereunder stipulate that the grantor may only surrender the Crown Lease in accordance with "accepted industry practice" and must first offer to convey its interest in the Crown Lease to the royalty holder before surrendering. By extension, the grantor cannot allow the 8% Royalty to extinguish by surrendering or otherwise allowing the underlying Crown Lease to expire by failing to meet the continuation obligations required under the applicable regulations except in accordance with sound industry practices.

[98] Initially granted in 1979, the Crown Lease had been continued indefinitely beyond the primary and intermediate terms by the time Home Quarter became lessee. Therefore, when the 2011 Royalty Agreement was executed, the Crown Lease or portions thereof would only expire and revert to the Crown if the lessee could no longer demonstrate that the subject geologic zones were productive or potentially productive, and that they were not being drilled at the time of expiry (***Petroleum and Natural Gas Tenure Regulation***, Alta Reg 263/1997 ss 15–18). The

Surrender clause therefore implies that the 8% Royalty is capable of lasting for the duration of the productive life of the reservoirs subject to the Crown Lease.

[99] Finally, the Area of Mutual Interest clause (clause 8.1) stipulates that, if the Royalty Lands subject to the Crown Lease revert back to the Crown by expiry or surrender but are reacquired by the grantor within two years, the 8% Royalty shall apply to those lands reacquired by the grantor. Considering the Term and Surrender clauses alongside the Area of Mutual Interest clause, I find the 8% Royalty was an investment in the success of "a particular piece of property" (***Dynex ABCA*** at para 36), as opposed to an extinguishable mechanism for the repayment of a debt. This further reinforces the parties' intention that the 8% Royalty constitute an interest in land.

(5) The "Taking in Kind" clause

[100] Clause 2.2 of the 2011 Royalty Agreement articulates the royalty holder's "right to take in kind or separately dispose of, at its own expense, its [8% Royalty] share of the Petroleum Substances." This Court has previously held that right of royalty holders to take their royalty in kind reflects a right of personal ownership that is indicative of an interest in land (***Bank of Montreal v Dynex Petroleum Ltd***, 2003 ABQB 243 at para 40; ***James H Meek Trust v San Juan Resources Inc***, 2003 ABQB 1053; ***Accel*** at para 50). Yangarra submits that, while provisions allowing for royalty holders to "take in kind" the substances extracted from the land may weigh toward a GOR being characterized as an interest in land, they do not, in and of themselves, create an interest in land. I agree.

[101] With regards to the important role that royalties play in attracting capital for upstream oil and gas ventures, for example, certain investors may lack the operational capacity to physically take possession of and market oil, gas, or condensate, rendering a "take in kind" provision in a royalty agreement potentially irrelevant to them. The parties' intention to establish an interest in land therefore should not be dependent on the royalty holder's ability to take the royalty payment in kind. Nor should emphasis be placed on take-in-kind provisions as indicia of interests in land to the extent they demonstrate the royalty holder's measure of control over the interest. Such a control-oriented approach incorrectly seeks "to turn the royalty owner's passive [non-operating] interest into a working interest" (***Dianor*** at para 73, quoting Nigel D Bankes, "Private Royalty Issues: A Canadian Viewpoint" (2003) Private Oil & Gas Royalties, Paper No. 8, Rocky Mountain Mineral Law Foundation at 195).

[102] Moreover, a take-in-kind provision could be equally applicable as a contractual right to take the produced substances in kind as security for the payment of a debt, which would not reflect an interest in land. Absent additional context as to how take-in-kind provisions evidence the intention that the subject GOR constitute an interest in land, I find that the mere presence of such clauses does not illuminate the parties' intention. Accordingly, I find the Taking in Kind clause of the 2011 Royalty Agreement neutral with respect to whether the parties intended the 8% Royalty to constitute an interest in land.

(6) The "Pooling" and "Unitization" clauses

[103] Clause 4.1 of the 2011 Royalty Agreement (the "Pooling Clause") stipulates that the grantor has the discretion to "pool all or a part of the Royalty Lands with any other lands for the purposes of creating a Spacing Unit if such pooling becomes necessary or desirable in the opinion of the Grantor." Pooling refers to the amalgamation of contiguous tracts of land subject

to different ownership within an area of common drainage known as a drilling spacing unit. Pooling enables the drilling of one well within the drilling spacing unit to preserve optimal reservoir conditions and prevent the drainage of one tract of land by a different working interest-holder. In the event the Royalty Lands are pooled, the Pooling Clause provides for the payment of the 8% Royalty "on the basis of production deemed to be produced from or allocated to the Royalty Lands on an acreage basis".

[104] Conversely, clause 4.2 of the 2011 Royalty Agreement (the "Unitization Clause") stipulates that the grantor must obtain the royalty holder's written consent "to unitize all or a part of the Royalty Lands with any other lands if such unitization becomes necessary or desirable in the opinion of the Grantor." Such consent must not be unreasonably withheld. Unitization refers to the amalgamation of tracts of land subject to different ownership *between* drilling spacing units. The Unitization Clause similarly provides for the payment of the 8% Royalty "on the basis of production deemed to be produced from or allocated to the Royalty Lands under the plan of unitization". The policy concerns underlying the need for pooling and unitization include resource conservation, the fair allocation of the resource to the appropriate owners, and the avoidance of unnecessary drilling (***Oil and Gas Conservation Act***, RSA 2000, c O-6 s 4).

[105] Relying on ***Accel*** (at para 89), Yangarra submits that the absence of a clause requiring the royalty holder's consent for the grantor to pool the subject lands is indicative of an interest that does not run with the lands. I disagree. First, while the Pooling Clause indicates the grantor is entitled to pool the lands without the express consent of the royalty holder, the subsequent clause — the Unitization Clause — conspicuously provides for the exact opposite. If the royalty grantor's discretion with respect to such operational decisions were indicative of whether the 8% Royalty constitutes an interest in land, the effects of the Pooling and Unitization clauses would negate each other.

[106] Second, as with take-in-kind clauses, placing too heavy an emphasis on the grantor's discretion — or lack thereof — regarding operational decisions such as pooling and unitization incorrectly seeks to equate passive, non-operating royalty interests with working interests. As the ***Dianor*** Court helpfully explained at para 71, the purpose of the ***Dynex ABCA*** and ***Dynex*** decisions "was to step away from the requirement that a royalty right had to have the incidents of a working interest ... in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk."

[107] Finally, if a grantor were at all times required to obtain the consent of the royalty holder to pool or unitize the lands for a GOR to constitute an interest in land, the ability of the grantor to operate in a manner that upholds conservation and environmental principles may be frustrated. While clauses that require the express consent of the royalty holder for the grantor to pool the lands within a drilling spacing unit may be overridden by a compulsory pooling order [*OGCA* s 80(3)], the Alberta Energy Regulator presently lacks jurisdiction to compel unitization beyond a drilling spacing unit, even if it would promote conservation and environmental principles. Yangarra's implied suggestion that the consent of royalty holders for pooling and unitization should be required for GORs to constitute interests in land raises the spectre of investor holdouts on such consent. This risks unnecessarily restricting the pool of investors that operators would be willing to enter into royalty agreements with.

[108] For these reasons, I find the Pooling and Unitization clauses of the 2011 Royalty Agreement neutral with respect to whether the parties intended the 8% Royalty to constitute an interest in land.

(7) The "Assignment" clause

[109] Clause 3.1 (the "Assignment Clause") incorporates the 1993 Canadian Association of Petroleum Landmen Assignment Procedure (the "CAPL Assignment Procedure") and the related "Notice of Assignment" form by reference under the 2011 Royalty Agreement. The Assignment Clause reads as follows:

> The 1993 CAPL Assignment Procedure and the Notice of Assignment form are incorporated by reference hereto and are deemed to apply as if it had been included as a Schedule to this Agreement, with respect to any assignment of any interest in this Agreement. Notwithstanding the foregoing, Grantor shall not be entitled to assign any interest in this Agreement if Grantor is default of any provision hereof.

[110] Mr. Lebbert explained that the CAPL Assignment Procedure is incorporated into industry agreements as a means of dispensing with the need to execute assignment and novation agreements every time an interest in an oil and gas agreement or royalty agreement is transferred to a new party. Instead, by incorporating the CAPL Assignment Procedure, the streamlined Notice of Assignment form is used.

[111] Yangarra argues that the incorporation of the CAPL Assignment Procedure and Notice of Assignment form under the 2011 Royalty Agreement indicates the parties did not intend for the 8% Royalty to constitute an interest in land for the following reasons:

1. if the 8% Royalty runs with the Royalty Lands, it would always bind the working interest holder of the Crown Lease, rendering a mechanism for the assignment of the 2011 Royalty Agreement to the new owner unnecessary; and

2. if the 8% Royalty runs with the Royalty Lands, it would always bind the working interest holder of the Crown Lease, but the CAPL Assignment Procedure would create a conflicting situation in the event the royalty holder objected to the assignment of the 2011 Royalty Agreement because the new lessee's interest would be free and clear of the 8% Royalty.

[112] With respect to Yangarra's first argument, the Assignment Clause applies to "any assignment of any interest" in the 2011 Royalty Agreement. The CAPL Assignment Procedure therefore applies equally to the royalty holder's interest in the 2011 Royalty Agreement as it does to the interest of the grantor and its successors. If the CAPL Assignment Procedure were indeed unnecessary for the 8% Royalty to continue to run with the Royalty Lands, it would nevertheless be relevant to the assignment of the royalty holder's interest in the 2011 Royalty Agreement.

[113] In rebuttal to Yangarra's first argument, PrairieSky asserts that it was common for oil and gas participants to execute assignment and novation agreements in respect of royalties carved out of Crown leases, including when the royalty constituted an interest in land. PrairieSky points to the fact that, since 1979 — when the 2% GOR was carved out of the Crown Lease — each time

the Crown Lease was transferred to a new lessee, including when Yangarra acquired the Crown Lease, the 2% GOR was assigned to the new lessee by way of an assignment and novation agreement. The 1979 Royalty Agreement provides that, if the Crown Lease is assigned, the former lessee is still obligated to pay the 2% GOR until the royalty holder is provided with a written undertaking by the new lessee to perform and be bound by the terms of the 1979 Royalty Agreement.

[114] Mr. Faminow testified that he was satisfied the 2% GOR was an interest in land upon reviewing the 1979 Royalty Agreement, and that Yangarra would be responsible for paying the 2% GOR upon purchasing the Crown Lease. Accordingly, he advised Relentless that an assignment and novation agreement with respect to the 1979 Royalty Agreement would be required as part of its purchase of the Crown Lease. PrairieSky submits that this further reinforces the common industry practice of executing assignment and novation agreements to perfect the transfer of the payor's interest in royalty agreements along with the transfer of the underlying lease.

[115] The Assignment Clause must be interpreted considering the nature and custom of the industry (***IFP Technologies*** at para 83; ***Nexxtep Resources*** at para 33). Therefore, I agree with PrairieSky that the incorporation of the CAPL Assignment Procedure under the 2011 Royalty Agreement reflects the industry practice of perfecting the assignment of the payor's interest in a royalty agreement, regardless of whether the royalty would presumptively run with the subject lands.

[116] Further, I do not find that a royalty holder's objection to the assignment of the 2011 Royalty Agreement pursuant to the CAPL Assignment Procedure necessarily conflicts with the 8% Royalty running with the Crown Lease. First, clause 2.04 of the CAPL Assignment Procedure stipulates that consent to assignment cannot be unreasonably withheld. The purported conflict would thus only arise in the circumstance that consent is *reasonably* withheld.

[117] Second, and more to the point, the 8% Royalty would not simply extinguish upon the transfer of the Crown Lease to a new lessee in the face of the reasonable objection of the royalty holder to the assignment of the 2011 Royalty Agreement. If it is indeed an interest in land, the 8% Royalty would continue to encumber the Crown Lease, and the royalty holder would still be entitled to payment of the 8% Royalty. In the case of an assignment to a third party without that party being novated into the 2011 Royalty Agreement, the royalty holder would be entitled to continue to look to the previous working interest-holder for payment of the 8% Royalty pursuant to the common law of assignment in the absence of novation (***National Trust Co v Mead***, [1990] 2 SCR 410 at 426–427, 1990 CanLII 73 (SCC); ***St. Andrew Goldfields*** at paras 109-111).

[118] I do not find the fact that the payment obligation would remain with the previous working interest-holder bears on the parties' intention as to whether the 8% Royalty constitutes an interest in land. It simply provides the royalty holder with the option to reasonably withhold consent to an assignment that would transfer the payment obligations to the new owner, if, for example, the third party had any concerns about the new owner's ability to pay the 8% Royalty.

[119] Accordingly, I find the Assignment Clause and the CAPL Assignment Procedure incorporated thereunder neutral with respect to the parties' intention that the 8% Royalty constitute an interest in land.

b) Conclusion as to the parties' intention to create an interest in land

[120] I am satisfied that Range Royalty and Home Quarter intended for the 8% Royalty to constitute an interest in land that runs with and binds the Royalty Lands subject to the Crown Lease. I find so based on the plain language of the Interest in Land Clause and because the remainder of the 2011 Royalty Agreement reviewed above is drafted to ensure that the 8% Royalty will last for the duration of the underlying Crown Lease. Moreover, the factual matrix surrounding the formation of the 2011 Royalty Agreement demonstrates that the 8% Royalty was one of a series of royalties created by the parties pursuant to the Land Fund Arrangement. The Land Fund Arrangement was predicated on the parties' mutual understanding that the royalties they created would constitute interests in land, and the 8% Royalty under the 2011 Royalty Agreement reflects that understanding.

V. Issue 2: Does the 8% Royalty have priority over Yangarra's interest in the Crown Lease?

[121] Although the 8% Royalty constitutes an interest in land capable of running with the Crown Lease for the duration of the latter's existence, Yangarra asserts that it is a BPFV and should not be bound by the 8% Royalty pursuant to the law of equity.

[122] The Torrens system of land registration and transfers enables the determination of the priority of interests regarding the lands in question pursuant to the *LTA*. With some exceptions, the *LTA* provides that a purchaser is not bound by any prior unregistered interests or claims, essentially codifying the principle of BFPV to defeat all unregistered interests (ss 60–61, 203; see *e.g.*, ***Bretin v Ross***, 2019 ABQB 957 at para 29; ***Novia Development Ltd v Caleron Properties Ltd***, 2016 ABQB 406 at para 136). As previously noted at paragraph [4], however, the Torrens system does not apply here because a) certificates of title are generally not issued for unpatented Crown lands (see ***Molner v Stanolind Oil & Gas Co et al***, 1959 CanLII 73 (SCC), [1959] SCR 592 at 594) and have not been issued for the Crown Lands here; b) section 134(2) of the *LTA* prohibits the registration of caveats against lands for which a certificate of title has not been issued; and c) subsection 202(a) of the *LTA* prohibits the registration of interests against Crown-owned minerals.

[123] Yangarra nonetheless submits that section 91 of the *MMA* "creates a statutory scheme by which all interests in land derived under a Crown Lease are capable of being registered in the [Province's electronic transfer system ("ETS")]." As explained by Mr. Truscott, the Province of Alberta maintains the ETS, within which transfers of Crown lease agreements may be registered pursuant to section 91 of the *MMA*.

[124] Section 91(1) of the *MMA* provides as follows:

> A transfer with respect to an agreement that the lessee is not prohibited from transferring or agreeing to transfer by any provision of this Act or any regulation or by the terms of the agreement, may be registered by the Minister if the regulations respecting registration of the transfer are complied with and if the transfer conveys
>
> (a) the whole of the agreement
>
> (b) a specified undivided interest in the agreement, or

(c) a part of the location contained in the agreement

Further, section 91(5) of the *MMA* stipulates that, if the transfer of an interest under section 91(1) is not registered in the ETS, then any registered transfer is valid against, and prior to, the unregistered transfer.

[125] An "agreement" referenced in section 91 of the *MMA* is defined as "an instrument issued pursuant to this Act or the former Act that grants rights in respect of a mineral" [*MMA* s 1(1)(a)]. An "agreement" unquestionably includes Crown Petroleum and Natural Gas Leases such as the Crown Lease in question (***Alberta Energy Company Ltd v Goodwell Petroleum Corporation Ltd***, 2003 ABCA 277 at para 89). A "specified undivided interest in the agreement" under section 91(1)(b) therefore refers to a specified undivided interest in a Crown Petroleum and Natural Gas Lease. It does not refer to non-operating, passive interests in Crown leases, such as GORs. Support for this is found in the fact that the Memorandums of Registration and Records of Registration attached to the original copy of the Crown Lease exclusively reference transfers of either a 50% or 100% "undivided interest" in the "agreement" itself — they do not reference the 2% GOR or the 8% Royalty, notwithstanding the fact that those encumbrances run with the Crown Lease and were upheld by the lessees prior to Yangarra. Further, I accept the evidence presented at trial that that a search of the ETS does not reveal encumbrances attached to the Crown Lease.

[126] Yangarra's argument that section 91 of the *MMA* provides a complete scheme for the registration of the 8% Royalty must fail as it once again conflates a passive royalty interest with a working interest. Yangarra initially suggested that, because the 8% Royalty does not entail the incidents of a working interest, it does not constitute an interest in land (see paragraphs [68]–[70]). Yet here, Yangarra insinuates the 8% Royalty *is* a working interest by asserting it is an "undivided interest" in the Crown Lease under section 91(1)(b) of the *MMA*, which itself is a working interest (see paragraph [67]). For substantially the same reasons described at paragraphs [44] and [69]–[70], the 8% Royalty does not entail an undivided interest in the Crown Lease or — in other words — a working interest in the mines and minerals.

[127] The ETS only provides for the registration of security notices in respect of a security interest pursuant to section 95 of the *MMA*. A "security interest" is defined in section 94(1)(e) of the *MMA* as "an interest in or charge on collateral" that secures payment of a debt, bonds or debentures of a corporation, or the performance of an obligation." As determined under Issue 1, the 8% Royalty is not a contractual right to security for payment or performance of an obligation — it is an interest in land. Therefore, section 95 of the *MMA* does not provide for the registration of the 8% Royalty. Based on the same characterization, the 8% Royalty is also not qualified for registration with the Personal Property Registry [*PPSA* ss 1(1)(tt), 4(f)]. Moreover, each of Mr. Truscott, Mr. Reimer, Mr. Purdy, Mr. MacDonald, and Mr. Percy testified that a royalty cannot be registered in respect of a Crown mineral lease on the ETS or Personal Property Registry.

[128] Contrary to Yangarra's assertions, there were no public registries where Range Royalty and its successors could have registered notice of the 8% Royalty against the Crown Lands. Where, as here, the applicable land registration legislation does not apply, priority must be determined by the rules of priority of competing interests at common law and in equity (Thackray at § 7.75; AH Oosterhoff and WB Rayner, *Anger and Honsberger Law of Real Property*, 2d ed, vol 2 (Aurora: Canada Law Book Inc, 1985) at 1591 at 1592 [Oosterhoff and Rayner]). These first principles vary depending on whether the competing interests are legal or

equitable in nature. It is therefore necessary to characterize the interests held by PrairieSky and Yangarra to determine their priority and whether the equitable principle of BFPV applies.

A. Are the parties' interests legal or equitable?

[129] Four basic permutations can arise from the characterization of competing interests as legal or equitable: (i) there are two legal interests; (ii) there are two equitable interests; (iii) there is a legal interest followed by an equitable interest; and (iv) there is an equitable interest followed by a legal interest (Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2000) at 460 [Ziff]).

[130] There are two main distinctions between legal and equitable interests in the context of interests in land:

1. whereas legal interests are rights "*in rem*", which permanently bind the lands over which they are exercisable and may be enforced against the land (***Wiebe v Enns***, 1971 CarswellMan 28 [1971] 3 WWR 469 at para 14); equitable rights are "*in personam*", and may only be enforced against certain persons (Rt Hon Sir Robert Megarry, *A Manual of the Law of Real Property*, 8th ed (London: Sweet and Maxwell Limited, 2002) at 58 [Megarry]); and

2. a legal interest must be created or transferred in the manner prescribed either by the common law or by statute; an equitable interest, on the other hand, may be created or transferred informally, without perfecting the interest pursuant to the requirements of common law or statute (Megarry at 68).

[131] I now turn to characterizing the competing interests of PrairieSky and Yangarra.

1. The 8% Royalty

[132] The Court of Appeal recently defined an "interest in land" in the context of differentiating legal and equitable interests under the *LTA* and the *Law of Property Act*, RSA 2000, c L-7 in ***Morrison v Moe-villa Investments Ltd***, 2022 ABCA 159 at para 26 [***Morrison***]:

> The requirement of an "interest" in land means a legally recognized proprietary interest in that land, not a mere claim, contractual right or expectation with respect to that land. For example, an assignment of rents or a right of first refusal to purchase land create personal contractual rights, not "interests in land" that would support a caveat: ***Canada Trustco Mortgage Company v Skoretz* (1983)**, 1983 CanLII 1058 (AB QB), 26 Alta LR (2d) 60, 45 AR 18 [***Canada Trustco***], which was approved in ***Northland Bank v Van de Geer***, 1986 ABCA 252, 49 Alta LR (2d) 113, 75 AR 201. For that reason, rights of first refusal and assignments of rents had to be deemed by statute to be equitable interests in land: *Law of Property Act*, RSA 2000, c L-7, s. 63.

[133] As previously discussed, the 8% Royalty is no mere contractual, *in personam* right — it is a proprietary interest in land (see paragraph [88]) that is legally recognizable by virtue of satisfying the common law ***Dynex*** test for a royalty that constitutes an interest in land. The 8% Royalty is therefore a *legal* interest, or an *in rem* right, that runs with the lands and is enforceable against the underlying interest in land.

[134] Further, Range Royalty and Home Quarter complied with all formal common law requirements for a valid conveyance of an interest in land when they entered into the 2011 Royalty Agreement: there was an offer, acceptance, consideration, and a written agreement signed by the parties (***Statute of Frauds* 1677**, (29 Car 2) c 3 s 4; ***1353141 Alberta Ltd v Roswell Group Inc***, 2019 ABQB 559 at para 205, citing ***Austie v Aksnowicz***, 1999 ABCA 56 at para 23). Home Quarter and Range Royalty accepted the terms of the 2011 Royalty Agreement and signed it. The consideration for the agreement consisted of Range Royalty reimbursing Home Quarter for its purchase of Trarion's interest in the Crown Lease, which consideration was paid by Range Royalty and received by Home Quarter.

[135] Relying on ***Canada Trustco*** at para 17, Yangarra nonetheless argues that PrairieSky's 8% Royalty is an equitable interest because it is a contingent or future contractual right or expectation with respect to the Crown Lands. The discussion in ***Canada Trustco*** concerned the 19th century English case of ***London & South Western Ry Co v Gomm***, (1882) 20 Ch D 562, [1882] 3 WLUK 13, in which the vendor agreed to sell the purchaser certain lands on the condition that the purchaser would be obligated to reconvey the land to the vendor upon the vendor's request. The purchaser sold the land to a third party who then refused to convey the land back to the original vendor when the condition in the original agreement was called (***Canada Trustco*** at para 17). The Court of Appeal held that "[t]he right to call for a conveyance of the land is an equitable interest".

[136] Range Royalty's interest in the form of the 8% Royalty was not, however, contingent on a future event such as a request for reconveyance, a mortgager's default in the case of an assignment of rents, or a proposed sale triggering a right of first refusal. The 8% Royalty crystallized as soon as the parties closed the transaction under the 2011 Royalty Agreement. The fact that payment of the 8% Royalty only occurred when Petroleum Substances were produced from the Royalty Lands does not mean that such production was a condition precedent to the 8% Royalty vesting as an interest in land. If that were the case, it would entail tremendous risk for investor royalty holders as GORs would simply extinguish if the grantor lessee failed to establish production before transferring the lease to a third party.

[137] Even if the 8% Royalty were merely an equitable interest contingent on future production at the time the 2011 Royalty Agreement was executed, it would have crystallized as a legal interest as soon as Petroleum Substances were produced from the Royalty Lands upon Home Quarter becoming the operator. Production data in evidence shows the 102/04-07-041-05W5 well flowed oil in June and July of 2011. Yangarra's argument therefore has no merit. The 8% Royalty is a legal interest in land.

2. Yangarra's interest in the Crown Lease

[138] As previously discussed, the Crown Lease grants to the lessee a working interest in the petroleum and natural gas. A working interest is a proprietary, *in rem* right in land (***IFP Technologies***, at para 98; ***Dianor*** at para 34; ***Grant Thornton*** at para 11; Tom Cumming, Caireen E Hanert, Jeff Oliver, "The Intersection of Regulatory and Insolvency Law: Redwater's Final Chapter and the Aftermath" in Janis P Sarra, ed, *Annual Review of Regulatory and Insolvency Law 2019* (Toronto: Thomson Carswell, 2020) 127). The Crown Lease therefore conveys a legal interest.

[139] As the current lessee, Yangarra holds the rights and interests provided under the Crown Lease, which it acquired through a purchase and sale agreement with Relentless ("PSA").

However, PrairieSky submits that Yangarra did not acquire a legal interest in the Crown Lease, because Yangarra and Relentless did not comply with the formal requirements of closing under the PSA. Specifically, PrairieSky asserts that closing never occurred because Yangarra never paid Relentless the nominal purchase price of $1.00 prescribed under the PSA.

[140] The PSA incorporated the CAPL Transfer Procedure, which defines "Closing" as "the delivery of those documents and amounts described in Clause 3.03" ("Closing"). Clause 3.03 stipulates that Yangarra was to deliver to Relentless "payment of any amount owing at Closing under the Agreement", which included the "Purchase Price", defined as "cash consideration of One Dollar CDN ($1.00 CDN)". To waive payment of the Purchase Price pursuant to the CAPL Transfer Procedure, Relentless would have had to deliver written notice advising Yangarra of as much. It is not disputed that Yangarra never paid Relentless the $1.00 and Relentless never waived the payment pursuant to the CAPL Transfer Procedure.

[141] As stated by Germain J of this Court in ***641224 Alberta Ltd v 610042 Alberta Ltd***, 2005 ABQB 606 at para 80 [***641224***], "[l]awyers have, for the last 200 years, attempted to make contracts in which there is an exchange of promises, more binding by throwing in nominal consideration." Since the foundational Supreme Court decision of ***Davidson v Norstrant* (1921)**, 1921 CanLII 26 (SCC), 61 SCR 493 [***Davidson***], courts have been reluctant to find that the failure to pay such nominal or "paltry" consideration invalidates or renders a contract unenforceable when the parties did not intend for the payment to actually be a condition precedent to the transaction closing (***Kazakoff v Milosz***, 1977 CanLII 2709 (AB QB), [1977] AJ No 586 (QL) at para 24; ***641224*** at paras 86–89; ***Southam Inc v Newton Industrial Plaza Ltd***, 1992 CanLII 2197 (BC SC) at 5–7, 1992 CarswellBC 670; ***5240 Investments Ltd v Great Eagle Resources Ltd***, 2013 BCSC 35 at para 105 [***Great Eagle Resources***]). What emerges from the cases is that nominal consideration is waivable where the parties did not intend for payment of the nominal consideration to be a condition precedent to closing given that "the contract's substantive consideration lies in the benefits each party derived from its terms" (***Great Eagle Resources*** at para 112).

[142] As a threshold matter, I note that Relentless is not seeking to repudiate the PSA with Yangarra in these proceedings based on the nonpayment of the nominal $1.00 purchase price. In fact, Relentless is not even a party to these proceedings and it would be inappropriate to impute Relentless' subjective intentions regarding the PSA based on the submissions of a third party. Privity of contract also generally precludes the enforcement of the terms of a contract by third parties, which PrairieSky attempts to do here in seeking to enforce a strict reading of the provisions of the Relentless-Yangarra PSA (***London Drugs Ltd v Kuehne & Nagel International Ltd***, [1992] 3 SCR 299 at 416, 1992 CanLII 41 (SCC)).

[143] In any event, the terms of the executed Relentless-Yangarra PSA and the testimony of both Yagarra's and Relentless' representatives in the transaction objectively demonstrate that the substantive consideration lay in the benefits each party derived from the terms of the agreement as opposed to the nominal $1.00 consideration: Yangarra received an undivided interest in the Crown Lease and Relentless rid itself of the environmental liability for the 4-7 Well. This is further supported by the fact that the checklist of items in the witnessed Closing Agenda ensure the conveyance of the Crown Lease and the well license to Yangarra, but do not mention the $1.00 nominal consideration or any other monetary payment as a condition to closing. If the $1.00 was an "amount owing at Closing" requiring payment pursuant to Clause 3.03 of the

CAPL Transfer Procedure for the transaction to close, surely that amount would have been included in the Closing Agenda.

[144] To find that the Relentless and Yangarra transaction is unenforceable also risks trenching on the parties' freedom to contract. Given that Relentless has not sought to repudiate the PSA based on the non-payment of the $1.00, we can only assume that they either acquiesced to the non-payment or never intended for it to happen. A finding otherwise based on the submissions of a party that has no privity to the transaction would set a dangerous precedent for the validity of transactions that incorporate a nominal purchase price where the substance of the transaction is not actually monetary. I find the transaction under the Relentless-Yangarra PSA effected the transfer of the legal interest in the Crown lease to Yangarra. Notwithstanding that the nominal purchase price was never paid, the record demonstrates that the common law requirements for a valid arm's-length transaction were otherwise met (see paragraph [134]).

B. As two legal interests, does PrairieSky's 8% Royalty have priority over Yangarra's interest in the Crown Lease?

[145] Where, as here, there are two competing legal interests in the same property — Yangarra's interest in the Crown Lease and PrairieSky's 8% Royalty that runs with the Crown Lease — priority is determined based on chronology and the *nemo dat* maxim applies: "no one can give what they do not have" (Ziff at 460). If A conveys legal title to B, and subsequently to C, legal title will have vested in B. Since A no longer had legal title to give to C, A could not transfer title to C. Priority therefore goes to B, the first party to acquire their legal interest (***Bank of Montreal v Innovation Credit Union***, 2010 SCC 47 at para 51 [***Innovation***]). The principle also applies to prior legal interests that encumber the legal title conveyed by A. As explained by Professor Ziff (Ziff at 460):

> [A] purported sale of Blackacre by B to C, when title was properly in A, gives C nothing. Here, the *nemo dat* rule governs. The rule allows A to rest comfortably, knowing that no such transaction could destroy or affect the state of title. The doctrine shouts *caveat emptor* (buyer beware). Accordingly, C must make sure that B has some worthwhile title to give. C must also be alive to the possibility that some other legal interest affects's B's title. If prior to the sale to C, A had been granted a lease, legally perfect in all respects, that right would also bind C. Notice would be irrelevant. [emphasis added]

[146] At the time Yangarra acquired its interest in the Crown Lease, PrairieSky already held a legal interest that ran with the Crown Lease. Therefore, Yangarra could only take its interest subject to PrairieSky's prior legal interest (***Innovation*** at para 51; Ziff at 460; Thackray at § 7.75). Here, it is not the case that Relentless did not have a 100% undivided interest in the Crown Lease to transfer to Yangarra as the *nemo dat* principle classically contemplates. Rather, Relentless didn't have a lease free and clear of royalties to transfer to Yangarra — it had a lease encumbered by both the 2% GOR and the 8% Royalty. The Crown Lease would be inherently more valuable free and clear of the 8% Royalty, thus constituting a "greater" interest than Relentless had to offer.

[147] This rationale also finds support in the following passage from Thackray (at § 7.75), which contemplates the very scenario in the present case:

> Assuming a royalty agreement creates an interest in land, the royalty owner is not subject to the limitations of some of the rules of contractual privity and, subject to rules relating to the priority of competing interests, the royalty owner can enforce payment of the overriding royalty against any third party who acquired the working interest....If the working interest arises out of a Crown lease, the overriding royalty is unregistrable and the common law rules of priority apply. In general, an overriding royalty which is an interest in land will have priority over all other interests in the Crown lease which arise or are granted subsequent to the overriding royalty and will be subject to all interests which arise prior to the royalty. [Emphasis added]

[148] The rule that a royalty constituting a legally recognizable interest in land takes priority over subsequent legal interests in the underlying estate also upholds the policy reasons embraced by the ***Dynex ABCA*** and ***Dynex*** courts for finding that royalties can be interests in land in the first place. In order for royalties to play their useful role in financing and spreading risk in upstream extractive industries, investors must have some certainty of continuity regarding their royalties when the title or working interest in the property in which they've invested changes hands. If Royalties were extinguishable upon the underlying interest changing hands without the subsequent acquiror's knowledge of the royalty, there would be no point in labelling them interests in land.

C. The defence of *bona fide* purchaser for value does not apply

[149] Notwithstanding the substantial submissions by both parties as to whether Yangarra is a BFPV, the defence of BFPV does not apply in the circumstances. BFPV is an equitable defence that arises where a subsequent legal interest is acquired without notice of a prior equitable interest. The principle was described by the Supreme Court of Canada in ***i Trade Finance v Bank of Montreal***, 2011 SCC 26 at para 60, quoting Lionel D Smith, *The Law of Tracing*, (Oxford: Clarendon Press, 1997) at 386:

> The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest.' The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

[150] Here, there are two competing legal interests for which the equitable doctrine of BFPV does not apply.

D. Conclusion as to the priority of competing interests

[151] First principles regarding the priority of competing interests dictate that PrairieSky's 8% Royalty was first in time and therefore has priority over Yangarra's subsequent legal interest in the Crown Lease. The 8% Royalty is therefore binding on Yangarra.

[152] The only recourse available to Yangarra in the circumstances would be to claim fraud or negligence on the part of Relentless: "[a]s between two legal or two equitable interests the first in time will prevail unless the subsequent taker, in good faith and for valuable consideration, has been misled by the fraud or negligence of the prior taker or his representative" (Oosterhoff and Rayner at § 3202).

[153] The potential remedies available to Yangarra do not, however, concern PrairieSky. If Yangarra was indeed misled by fraud or negligence, its claim would be against Relentless. PrairieSky cannot be held responsible for transactions between third parties that result in the transfer of the underlying interests its royalties attach to. Nor should PrairieSky be forced to hunt down anyone but the current successor in interest to the Crown Lease for payment of its 8% Royalty.

E. Expert Evidence and Proposed Expert Evidence

[154] Both parties filed expert reports addressing aspects of the defence of BFPV and both parties called their experts to testify. Those reports were filed in accordance with the Rules of Court. I had no qualms or reservations about PrairieSky's proposed expert and I qualified him without reservation after hearing evidence of his qualifications. Had I been required to decide whether Yangarra had made out the defence of BFPV, PrairieSky's expert report and testimony would have been very useful to the Court in making that assessment. PrairieSky's expert was a land professional with many years' experience in conducting oil and gas transactions. His knowledge and experience were highly relevant and on point.

[155] On the other hand, having read Yangarra's proposed expert's report in advance of his testimony, I had reservations as to whether the nature of his experience in oil and gas transactions would be helpful in assessing whether Yangarra had made out the defence of BFPV. Although the proposed witness has had many years' experience in the oil and gas industry and has had a very successful career in the industry, it was not clear to me that the nature of that experience would be helpful to the court, if called upon to assessment whether Yangarra had made out the defence of BFPV. Those reservations were not allayed when Yangarra's counsel led evidence of their proposed expert's qualifications, and even less so after PrairieSky's counsel questioned him on his qualifications. Given that Yangarra's proposed expert's testimony came on the last day of trial, I reserved my decision on whether he should be qualified as an expert and heard his evidence. After having heard his evidence, and particularly after Ms. Poppel's skillful and highly effective cross-examination, even if I had qualified Yangarra's proposed witness as an expert, I do not believe that his evidence would have assisted the Court in assessing whether Yangarra had made out the defence of BFPV.

VI. Issue 3: What remedy, if any, is appropriate?

[156] PrairieSky submits that the Court has broad discretion to fashion an appropriate remedy. In that regard, PrairieSky seeks a declaration that the 8% Royalty is an interest in the Lands, which attaches to the Lands, and is binding on Yangarra and all subsequent working interest owners of the Lands. Given my reasons, I agree that such a declaration is an appropriate remedy and should be made.

[157] At trial, PrairieSky led evidence as to the amount of its damages for the period of April 1, 2017 to December 2021. This evidence was largely if not completely uncontested by Yangarra. PrairieSky provided detailed calculations fixing its damages for that period in the amount of $213,397.60. I accept those calculations reflect the accurate measure of PrairieSky's damages for that period and judgment should issue accordingly.

[158] PrairieSky also seeks an order directing Yangarra to produce to PrairieSky, within 30 days of the issuance of these reasons for judgment, and monthly thereafter, production volumes for the 4-7 Horizontal Well for crude oil, gas, methane, butane, ethane, pentane, and propane

from January 2022 onwards as well as the prices Yangarra obtained for production from the 4-7 Horizontal Well for each of crude oil, gas methane, butane, ethane, pentane, and propane from January 2022 onwards. Given my reasons and, as far as I am aware, Yangarra has continued to produce from the 4-7 Horizontal Well, the order requested is appropriate.

[159] PrairieSky is presumptively entitled to costs. If the parties are unable to agree as to costs, they may contact the judicial scheduler to arrange for a brief appearance.

[160] I thank counsel for their excellent briefs and thorough submissions.

Heard on March 28, 29, 30, and 31, April 1, and June 17, 2022.
Written Submissions filed on May 6, May 24, 2022 and June 3, 2022.

Dated at the City of Calgary, Alberta this 6th day of January, 2023.

M.H. Bourque
J.C.K.B.A.

Appearances:

Laura M. Poppel and Emma Morgan
for PrairieSky Royalty Ltd.

Warren Foley and Ram Sankaran
for Yangarra Resources Ltd.

TAB 4

Court of King's Bench of Alberta

Citation: Invico Diversified Income Limited Partnership v NewGrange Energy Inc, 2024 ABKB 214

Date: 20240412
Docket: 2301 16260
Registry: Calgary

Between:

Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc.

Applicant

- and -

Newgrange Energy Inc.

Respondent

Reasons for Decision
of the
Honourable Justice M.H. Hollins

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1. Introduction

[1] Free Rein Resources Ltd. (Free Rein) is an insolvent company in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). Invico Diversified Income Limited Partnership (Invico) has applied for approval of a Reverse Vesting Order (RVO) authorizing its purchase of the business and property of Free Rein, its debtor.

[2] The primary issue on this application was not the use of the reverse vesting mechanism itself but rather what interests could be "vested out" i.e. removed from title to the assets being purchased. Specifically, Invico seeks to remove two Gross Overriding Royalties (GORs) from title to the lands it is purchasing and to transfer, or vest out, those GORs to a residual trust as unsecured claims. It is conceded by Invico that there will not be sufficient funds paid into the residual trust to provide any payment to those royalty holders from the trust.

[3] NewGrange Energy Inc (NewGrange) objects on its own behalf and on behalf of the Shareholders (defined later), both of them holding GORs, to those GORs being vested out, arguing that they are interests in land which run with the land and which cannot or should not be stripped from title passing to Invico. Invico argues that these GORs are not interests in land and even if they are, they should be vested out in any event.

[4] For the reasons that follow, Invico's application is granted. Its credit bid and resulting acquisition of the business and assets of Free Rein is the best option available and satisfies the statutory and common law requirements for approving the sale. Further, this is an appropriate

case for employing the reverse vesting mechanism, largely because of the existing oil and gas permits and licences in place. Lastly, the NewGrange GOR and the Shareholders' GOR will be among the claims vested off into the residual trust as they do not constitute interests in land.

[5] After a brief review of the factual and procedural background, I will explain why the RVO is the appropriate mechanism in this case and then will address the request to vest out the GORs.

2. Background

[6] In June of 2018, NewGrange purchased oil and gas assets (called the Golden Spike Asset, herein the "Asset") out of the receivership of Questfire Energy Corporation. NewGrange paid $250,000 in addition to assuming some liabilities associated with the Asset. Purvida Exploration Inc (owned by Sean Addison) and 1591195 Alberta Ltd (owned by Andy Prefontaine) contributed to the purchase price. NewGrange (owned by Terry McCallum) borrowed its share of the contribution to the purchase price, which it has since repaid.

[7] NewGrange, assisted by Purvida and 1591195, then attempted to sell the Asset for $2M plus a 5% GOR but could not find any buyers at that price. With no prospective buyers, Mr. McCallum decided to raise money to produce the oil and gas himself. To do this, he purchased the majority of shares of Free Rein, a company with regulatory licences in place that made it easier for Free Rein to find investors. Free Rein ultimately purchased the Asset from NewGrange in November, 2018 for $750,000 cash plus a 5% GOR granted back to NewGrange.

[8] Another GOR was granted by Free Rein in March of 2023, this time to the Free Rein Shareholders (defined as those individuals and companies listed in Exhibit "I" to the McCallum Affidavit filed February 15, 2024) who collectively provided $150,000 that Free Rein needed to recomplete a particular well.

[9] By a loan agreement dated September 21, 2022 and amended on April 18, 2023, Invico advanced funds to Free Rein. Free Rein defaulted on those loan obligations shortly thereafter. Free Rein filed a Notice of Intention on June 12, 2023 to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3 (*BIA*). A sale and investment solicitation process (SISP) was approved on August 25, 2023 which resulted in two bids, in addition to Invico's stalking horse bid.

[10] However, before that process could be concluded, the gas plant which processes all of Free Rein's gas, Tidewater Midstream and Infrastructure Ltd, terminated its contracts with Free Rein, claiming force majeure. Because no other gas processing option is feasible for this Asset, the gas wells were shut in. Since then, the regulator has allowed only isolated production to flare off the sour gas. The oil wells continue in production but they are only approximately 1/3 of Free Rein's total production. The Tidewater termination was therefore a material adverse change which caused the prospective purchasers to withdraw their bids. The *BIA* proceeding was then converted into a proceeding under the *CCAA* and FTI Consulting Ltd. (FTI) was appointed as Monitor.

[11] As the SISP process has effectively been exhausted, ultimately resulting in no viable third party purchasers, Invico now proposes to acquire 100% of Free Rein's shares by way of credit

bid, in exchange for the forgiveness of approximately $6.5M in debt owed to Invico.[1] In addition, Invico will assume certain liabilities attached to the assets being transferred and make a cash payment of approximately $650,000 for court-ordered charges and statutory priorities.

[12] I will first address the suitability of the RVO mechanism and then address Invico's request to vest out the NewGrange and Shareholders' GORs.

3. Reverse Vesting Orders

[13] RVOs can be an appropriate vehicle for the sale of insolvent companies or their assets in *CCAA* proceedings. Because an RVO vests title to shares and/or assets directly in the purchaser, as opposed to offering them to open market, additional scrutiny is required to ensure that the sale is fair and reasonable. Further, because RVOs generally involve the creditor taking some assets and liabilities while disclaiming others, courts have a heightened role in ensuring that doing so does not work an avoidable unfairness to affected parties.

[14] Any sale in a *CCAA* proceeding, whether through an RVO or otherwise, must answer the questions in s.36(6) *CCAA* as follows (paraphrased):

(a) Was the process leading to the proposed sale reasonable?

(b) Does the Monitor approve the proposed sale?

(c) Has the Monitor opined that the proposed sale would be more beneficial to creditors than a sale under a bankruptcy?

(d) Were the creditors consulted?

(e) How will the creditors and other interested parties be affected?

(f) Is the consideration offered fair and reasonable?

[15] These factors were reviewed in *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 at para.16, in which the Ontario Court of Appeal also focussed on the efficacy, integrity and fairness of the process generally.

[16] The SISP was granted by this Court on August 25, 2023. FTI has filed its Reports outlining its compliance with the SISP Order, including going through both Phase I and Phase II of the SISP process. That resulted, as mentioned, in three bids; two independent bids and Invico's own stalking horse bid.

[17] The process was conducted fairly and over an appropriate length of time, allowing numerous potential offerors to participate. The only reason the sales process under the SISP did not proceed to conclusion was Tidewater's termination of the processing contracts, leading to the shutting in of the majority of the wells in the Asset and the existing bidders aborting their bids. The Monitor has been supportive of all the steps in the proceeding, including the conversion to a *CCAA* proceeding, the SISP and now the RVO in the form sought. I am satisfied that the relevant factors in s.36(6) *CCAA* and *Soundair* have been sufficiently and fairly addressed.

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[1] Invico's debt is quantified differently in different places in the filed material, ranging from $6.3-$6.7M. I have not attempted to discern this with certainty because the debt, at either end of that range, vastly exceeds the value of the assets which are the subject of the proposed transaction.

[18] However, as mentioned, there are additional factors to consider in granting an RVO. Neither the *BIA* nor the *CCAA* explicitly authorize an RVO, it is now accepted that ss.11 and 36(6) *CCAA* (in this case) provide the authority to grant an RVO where it is "appropriate in the circumstances"; see *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at para.11.

[19] Notwithstanding that authority, an RVO is still supposed to be an "extraordinary" measure; *Harte Gold Corp (Re)*, 2022 ONSC 653 at para.38. Presumably this is because, while it creates favourable conditions for the RVO purchaser, it has the potential of being unfair to other stakeholders. For example, an RVO circumvents the debtor making a plan or a proposal and may therefore be misused to thwart particular creditors or stakeholders who would otherwise have a right to participate in the approval or rejection of the proposal in the creditor class vote. Further, where the proposed purchase under an RVO is a credit bid, there may be a concern about fair value being paid for what is being purchased because, *inter alia*, the RVO structure affords intangible benefits to the purchaser that would not be enjoyed under the more conventional Sales and Vesting Order (SAVO).

[20] As a result, the following additional questions must be answered:

(a) Why is the RVO necessary?

(b) Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and

(d) Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

Harte Gold (Re), ibid.

[21] An RVO may be necessary where the debtor is operating in a highly regulated industry and holds regulatory permits and licences that a purchaser would, in the normal course, have to obtain in its own name, by application or assignment. This involves a great deal more time and cost than assuming the existing permits and licences, with all the attendant obligations of course.

[22] The same may be true of existing contracts to which the debtor is a party and of existing tax attributes that would be lost if the assets were simply sold to a new purchaser under a SAVO; *Just Energy Group Inc v Morgan Stanley Capital Group Inc*, 2022 ONSC 6354 at para.34.

[23] Chris Wutzke, Invico's Chief Investment Officer, has deposed that Invico is proposing to retain all oil and gas licences, all software licences, all agreements relating to specific projects and all regulatory attributes of Free Rein; Paragraphs 19, 28 of Wutzke Affidavit #3 sworn and filed February 2, 2024.

[24] Is Invico paying a fair price for the Free Rein assets? A credit bid in these circumstances can be hard to evaluate. On one hand, Invico is receiving an asset that the free market valued at something less than $2M, excluding the GOR, in exchange for the forgiveness of $6.5M in debt. But if Free Rein is put back into bankruptcy proceedings with no imminent purchaser, the remaining producing wells will likely be shut in and devolve to the Orphan Well Association, leaving Invico with no recovery at all. Accordingly, the actual value of the debt forgiveness may be something less than $6.5M, given that the only other option is for Invico to receive nothing.

[25] However, Invico would also be assuming the liabilities associated with operating these wells, hopefully allowing them to stay or come back into production. There is additional value in that, as well as in retaining the existing employees.

[26] In terms of alternative scenarios, there simply are none, which is why the Monitor is supporting the current proposal. In the proposed RVO, Invico is better off than in a bankruptcy, but so are any employees, the priority creditors and even the industry, to the extent that the Orphan Well Association's costs and liabilities are so funded.

[27] NewGrange and the Shareholders are not actually any worse off in the RVO than they would otherwise be. They will recover nothing in either the proposed RVO or in a bankruptcy. However, that is not because of the RVO structure. Whether this was a standard SAVO or an RVO, the amount of Invico's debt would always have meant that there was nothing left for subordinate creditors.

[28] In fact, neither NewGrange nor the Shareholders oppose the RVO in principle. They simply oppose their GORs being vested out to the residual trust, which is dealt with later in these Reasons.

[29] Given the foregoing, I find that the *Harte Gold* factors have been met and this is an appropriate case to employ the RVO format.

4. Gross Overriding Royalties

[30] The primary dispute in this case was whether the NewGrange and Shareholder GORs are interests in land which "run with the land". If so, then the court's ability to vest them out would be restricted and subject to further considerations. If not, those claims could be vested out as unsecured contractual claims against the residual trust and the assets would pass to Invico free and clear.

[31] There are two ways in which Invico can establish its entitlement to vest out the GORs; (1) by proving that the GORs are not an interest in land; or (2) by proving that, even if the GORs are an interest in land, it is equitable and appropriate to vest them out anyway.

[32] NewGrange and the Shareholders maintain that the language of their Royalty Agreements, defined *infra*, makes it clear that the parties intended to and did convey an interest in land. Invico says that, looking at the Royalty Agreements themselves and the circumstances of the transaction, these GORs were not treated as interests in land.

(a) GOR as an Interest in Land: The *Dynex* Test

[33] It is now settled law that a GOR can be an interest in land. Justice Bourque recently did a comprehensive review of this legal evolution, which I will not repeat here; *Prairiesky Royalty Ltd v Yangerra Resources Ltd*, 2023 ABKB 11 at paras.23-40. See also, D. LeGeyt et al "Let's Talk About Royalties: The Continued Uncertainty Surrounding the Creation and Legal Status of the Overriding Royalty", 57 Alta. Law Rev. 335 (2019).

[34] However, a GOR can also be a contractual right to receive royalty payments without constituting an interest in land. In *Vandergrift v Coseka Resources Ltd*, (1989) 95 AR 372, Virtue, J of this Court set out a two-part test for determining whether a GOR was, in fact, an interest in land. That test, set out below, was adopted by Major J of the Supreme Court of Canada and is often called the *Dynex* test:

A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

Virtue J. in *Vandergrift , supra*, at p. 26 succinctly stated:

... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

Bank of Montreal v Dynex Petroleum Ltd, 2002 SCC 7 at paras.21-22

(i) *Dynex* Part I – Contractual Interpretation

[35] To ascertain the intentions of the parties, we must employ the principles of contractual interpretation. I can do no better than the summary from Horner, J in *Accel Canada Holdings Limited (Re)*:

> When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: ***Sattva*** at para 57.
>
> It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": ***Sattva*** at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (Alta. C.A.) at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018) [2018 CarswellAlta 666 (S.C.C.)].
>
> ...
>
> The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: *Sattva* at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have

been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: *Sattva* at para 58.

Determining what constitutes surrounding circumstances is a question of fact: *IFP Technologies* at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4 (Alta. C.A.) at para 25 [*AUPE*]. Relevant background facts include those that speak to:

1) the genesis, aim or purpose of the contract;

2) the nature of the relationship created by the contract; and

3) the nature or custom of the market or industry in which the contract was executed: *IFP Technologies* at para 83.

Accel Canada Holdings Limited (Re), 2020 ABQB 182 at paras.17-18 and 20-21 (NB: leave to appeal was refused on an alleged error in applying the law of contractual interpretation; *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160).

(ii) Dynex Part II – *Nemo Dat Quad Non Habet*

[36] The second arm of the *Dynex* test for whether a GOR is an interest in land is whether the interest of the grantor, from which the GOR is carved out, is itself an interest in land. I have averted to the maxim '*nemo dat quad non habet*' which simply means that one cannot give what one does not have.

[37] While the origin of this part of the Dynex test concerned itself with the nature of what was owned in relation to what was granted, the application of this principle to the NewGrange GOR is concerned with the timing of granting something you do not own yet. This is discussed below in paras.90-105.

[38] Accordingly, I will examine the language of the Royalty Agreements, including how each GOR was treated within the contracts and within the transaction. Although the Dynex test applies equally to the NewGrange and the Shareholder GOR, the language used and the surrounding circumstances of each is different, so I will address them in turn.

(b) The NewGrange GOR

(i) The 2018 Transaction

[39] Terry McCallum is the principal actor here. He is the sole owner of NewGrange. In order to buy the Asset from the Questfire receivership in 2018 for $250,000, he got money from his associates Sean Addison of Puravida ($50,000) and Andy Prefontaine of 1591195 Alberta Ltd ($75,000). McCallum borrowed the rest of the funds himself, which he subsequently repaid.

[40] NewGrange then signed Work Agreements and Marketing Agreements with Puravida and 1591195 Alberta Ltd, promising them 20% and 30% respectively, of any financial benefit

derived by NewGrange, whether in cash or in the form of a royalty[2]. Those companies, represented at this hearing, supported NewGrange's position that the GORs were interests in land.

[41] Unable to find a buyer for the Asset on an "as is" basis for $2M plus a 5% GOR (which would have been a 700% profit less the GOR), McCallum elected to put the Asset into production to make it more attractive to prospective buyers. He did this by selling the Asset to Free Rein. Free Rein had no oil and gas assets of its own but held AER licences that NewGrange did not have. Free Rein was owned by McCallum's friend, Edward Jakubowsky, who agreed to transfer 98% of the shares of Free Rein to McCallum for $1.00, effectively making McCallum the grantor and the grantee of the GOR.

[42] Free Rein resolved to sell $1 shares. There was no evidence of what third party investments were made in 2018, if any but by the fall of 2018, McCallum was satisfied that they would eventually raise enough money to develop the Asset. NewGrange then sold the Asset to Free Rein for $750,000 plus a 5% GOR granted back to NewGrange.

[43] The Asset Purchase Agreement (APA) was signed on November 1, 2018 and closed on November 30, 2018. Schedule "C" to the APA was the Royalty Agreement between Free Rein and NewGrange, which had been signed previously, on October 30, 2018.

[44] The evidence of this background comes from the Affidavits of Terry McCallum and of Chris Wutzke. NewGrange objected to the admission of Wutzke's evidence because it was largely hearsay. This is true. The GOR was granted in the course of a 2018 transaction before Invico loaned any money to Free Rein. However, Mr. Wutzke was not purporting to give evidence about what Mr. McCallum and his associates subjectively thought or intended in 2018. He could not, firstly because he was not there but also because evidence of subjective intent is inadmissible.

[45] There is no danger to admitting Mr. Wutkze's evidence, which is either his own knowledge of the current state of the Asset and the proposed RVO or which attaches documents from the 2018 transaction between Free Rein and NewGrange. Although this would be admissible under the principled exception to hearsay anyway – being both necessary and reliable – it may be preferable to simply emphasize that the intentions of the parties must be gleaned from a review of the known and agreed facts and documents from that time, not from evidence about the parties' subjective thinking; *IFP Technololgies (Canada) Inc* v *EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 57 and 127.

(ii) The Granting Clause

[46] In this case, NewGrange relies completely on the language of Clause 2(a) of the NewGrange Royalty Agreement:

> *[NewGrange] does hereby reserve to itself and [Free Rein] does hereby grant to [NewGrange] the Overriding Royalty on the Royalty Lands as described in this Royalty Agreement and based upon the working interest of the Royalty Payor [Free Rein] as set forth in the attached Schedule "A" or Schedule "A-1". The*

[2] This arrangement is the subject of other litigation. I do not intend for my passing comments on it to indicate any opinion on the merits of any positions taken in that lawsuit.

> *Overriding Royalty is intended to be an interest in land in the Royalty Lands and to be a covenant running therewith.*

[47] The "Overriding Royalty" is defined as the percentage of Petroleum Substances produced from the Royalty Lands calculated in accordance with the provisions of the Royalty Agreement.

[48] Simply calling something an interest in land does not, by itself, make it so. However, where parties have used clear language to describe their mutual intention to create an interest in land, that can be overcome only by clear and objective evidence which indicates otherwise; what Bourque, J has characterized as a rebuttable presumption; *PrairieSky* at para.63.

[49] The granting language in the NewGrange Royalty Agreement could fairly be characterized as the "magic words" which evidence the parties' intention to create an interest in land. However, it was our Court of Appeal in *Dynex* that warned that focussing only on "magic words" without considering the substance of the transaction was an improper approach; *Bank of Montreal v Dynex Petroleum Ltd*, 1999 ABCA 363 at para.73; see also *Prism Resources Inc v Detour Gold Corporation*, 2022 ONCA 326 at paras.13-14.

[50] NewGrange objected strenuously to consideration of anything outside the granting language. Its Brief wrongly conflates surrounding circumstances with parol evidence (paras.30-31 of that Brief) and simply declares that the surrounding circumstances are "irrelevant" in the face of Clause 2(a) of the GOR. The law is clear that surrounding circumstances cannot be irrelevant. In fact, failing to consider them would be a reviewable error:

> One error of law reviewed for correctness is where the trial judge fails to consider the "surrounding circumstances" or "factual matrix" of a contract. A trial judge must consider the factual matrix in interpreting a contract regardless of whether the contract is ambiguous. Therefore, it is an error for a trial judge to discount the factual matrix on the basis that the contract itself is not ambiguous: *British Columbia (Minister of Technology, Innovation and Citizens' ervices) v. Columbus Real Estate Inc.*, 2016 BCCA 283 (B.C. C.A.) at paras 40, 51, (2016), 402 D.L.R. (4th) 117 (B.C. C.A.); *Starrcoll Inc. v. 2281927 Ontario Ltd.*, 2016 ONCA 275 (Ont. C.A.) at paras 16-17, (2016), 68 R.P.R. (5th) 173 (Ont. C.A.).
>
> *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para.58

[51] This type of clear granting language, along with evidence of registration of the GOR on title (which was done here), has generally been sufficient to declare a GOR to be an interest in land. However, in most of those cases, there was no evidence of any contrary intention.

[52] For example, In *Third Eye Capital v Dianor Resources Inc*, the challenging party relied on the outdated argument that an interest in land must be accompanied by a right of the royalty holder to enter onto the land and produce the substance themselves, an argument rejected by the Ontario Court of Appeal; 2018 ONCA 253 *(Dianor #1*) at para.56.

[53] Similarly, in *PrairieSky*, Yangerra argued that a share of substances recovered from the land was necessarily a contractual right and could not be an interest in land. Bourque J rejected that argument as well, saying "Yangerra's position embraces precisely the type of anachronisms the Alberta Court of Appeal in *Dynex ABCA* and the Supreme Court in *Dynex* sought to do away with"; *PrairieSky* at para.85.

[54] In another case before our Court, *Manitok*, the landowner and the receiver were opposed to the royalty remaining on title. They argued, *inter alia*, that because the royalty was a right to share in production which decreased on a sliding scale over time, with no right of entry onto the land, the royalty could not be an interest in land. Relying on *Dynex*, Horner J concluded that "even a "net profits interest" could be an interest in land if the parties made the intention to make it so sufficiently clear"; *Manitok Energy Inc (Re)*, 2018 ABQB 488 at paras. 19 and 22.

[55] A case finding otherwise was *Accel (Re)*, the 2020 case also before Horner J. In that case, despite clear granting language, she found that the GOR was a security interest, not an interest in land. Among other things, the GOR was only triggered by non-payment of the installment purchase price and thus was characterized as a security interest rather than an interest in land. Leave to appeal on this issue was refused; 2020 ABCA 160.

[56] Is Clause 2(a) of this Royalty Agreement contradicted by other language or aspects of the transaction to the extent that the GOR cannot be an interest in land, notwithstanding the granting language?

(iii)Inconsistencies Relied on by Invico

[57] As mentioned, Invico argues that a number of elements of the transaction, including within the Royalty Agreement itself, are inconsistent with the grant of an interest in land and are indicative of an intention to grant only a contractual right to a royalty payment. Summarized, these are:

(a) The Royalty Agreement purports to grant interests in AMI lands, not identified or owned by the grantor;

(b) The Free Rein Directors' Resolution authorizing the purchase from NewGrange and the granting of the GOR to NewGrange said the royalty would only be paid while "commercially reasonable" for Free Rein to do so; and.

(c) The assignment clause of the Royalty Agreement describes a contractual obligation that follows Free Rein, not the land.

A. The AMI Issue

[58] Free Rein granted to NewGrange "the Overriding Royalty on the Royalty Lands as described in this Royalty Agreement and based upon the working interest of the Royalty Payor as set forth in the attached Schedule "A" or Schedule "A-1"; Clause 2(a) of the Royalty Agreement.

[59] The Royalty Lands are defined as the "lands set out in Schedule "A" (or that may hereafter be made subject to a gross overriding royalty...by virtue of Area of Mutual Interest or otherwise)".

[60] Schedule "A" to the Royalty Agreement lists the five Crown leases. These leases correspond to the registrations of the GOR against four of the five leases (Exhibit "D" to Wutzke Affidavit #3). The last, NW 35-51-27 W4M, in which Free Rein holds a 5% ownership interest, was on a schedule to the APA. In any event, I understood the NewGrange GOR to be registered against all subject Crown leases.

[61] There is no Schedule A-I to the Royalty Agreement, notwithstanding that reference in Clause 2(a). There is a Schedule B titled "Mutual Interest Lands". Clause 16 of the Royalty

Agreement says that if Free Rein acquires any mutual interest lands within 2 years of the "Acquisition Date" (which purports to be set forth in Schedule "A" but is not), Free Rein must notify NewGrange of any such acquisition. Any such interest acquired is deemed to be subject to NewGrange's GOR and the parties would be obligated to amend Schedule "A-1" (non-existent) in writing.

[62] Clause 16 also provided that if further areas, outside the Mutual Interest Lands, were acquired (no time limit on this), the parties could agree in writing to amend Schedule "A" to the Royalty Agreement to incorporate such acquisition(s). If they did, they were also to amend Schedule "B" to "incorporate this [new] area of mutual interest". It was acknowledged that unless and until the parties mutually amended Schedules "A" and "B", there were no royalty obligations created in any additional, non-AMI, lands.

[63] Invico argued that this future unidentified interest in land could not give rise to an interest in land capable of being granted on October 30, 2018. Free Rein had no interest in any AMI lands on October 30, 2018, and there was no certainty as to what, if anything, it would ever acquire under Clause 16 to the Royalty Agreement.

[64] This is a variation of the application of the principle of *nemo dat quod non habet* – one cannot grant what one does not have – that is discussed in more detail later.

[65] I agree with Invico. The most that could be created with respect to future acquisitions was a contractual right of NewGrange to have the Royalty Agreement amended to include such acquisitions in the lands generating a royalty (i.e. under Schedule "A").

[66] However, once that contractual right was exercised and Schedule "A" amended, conceptually, the additional lands and the royalties derived therefrom would be treated in the same manner, legally, as the original GORs. They would either be interests in land or they would not be. In other words, if the original GOR was truly an interest in land, the Royalty Agreement envisioned that the later-acquired royalty in later-acquired land would similarly be an interest in land, once the Royalty Agreement was amended to include it.

[67] This does not necessarily assist NewGrange with the underlying issue of whether the original royalty was an interest in land to begin with. However, neither does it operate the way that Invico suggests; that any reference to the possibility of acquiring future royalty rights meant that those granted on October 30, 2018 were not true interests in land. An option on future acquisitions might not itself be an interest in land but it does not impact the proper characterization of interests existing at the time of granting. In other words, this is a neutral factor.

B. The Directors' Resolution

[68] Another of Invico's arguments was that the Free Rein Directors' Resolution authorizing the purchase of the Asset and the granting of the GOR to NewGrange did not treat the royalty as an interest running with the land.

[69] Edward Jakubosky and Terry McCallum, as the two directors of Free Rein, signed a Directors' Resolution dated December 15, 2018, resolving:

> *That [Free Rein] acquire an Asset, as of October 27, 2018, known as the Questfire Asset, being mineral rights in the Golden Spike area, from NewGrange Energy.*

> *In exchange for the Questfire Asset, the Corporation agrees to pay $750,000, grant a gross overriding royalty to Terry McCallum (or his nominee), paid* ***as long as it is commercially reasonable to do so,*** *and will assume all liabilities associated with the Questfire Asset.*
>
> *Following the acquisition of the Questfire Asset, [Free Rein] shall issue all future shares for $1.00. [emphasis added]*

[70] Invico says that Free Rein's reservation of the right to pay the royalty only "as long as it is commercially reasonable to do so" is incompatible with a true interest in land that runs with the land. It makes the payment of the royalty conditional on something discretionary and, at least potentially, extraneous to the land. This is compatible, Invico says, with a contractual right to receive the GOR but not with an interest in land because the GOR could be terminated while the underlying working interest continued uninterrupted. In other words, the working interest and the gross overriding royalty therein could run for different lengths of time.

[71] In the decision of our Court of Appeal in *Dynex*, one of the factors for determining whether an overriding royalty was an interest in land or not was whether or not the overriding royalty was capable of lasting for the duration of the underlying interest:

> As gleaned from the authorities, various indicia could be used to identify whether or not an interest in land was intended. The set of indicia, which is not exhaustive but may be relevant, is:
>
> 1. The underlying interest is an interest in land (corporeal or incorporeal);
>
> 2. The intentions of the parties, as evidenced by the language of the grant and any admissible evidence of the surrounding circumstances or behaviour, indicate that it was understood that an interest in land was created/conveyed;
>
> 3. The interest is capable of lasting for the duration of the underlying estate.
>
> *Dynex*, ABCA, 1999 ABCA 363 at para.84.

[72] The Supreme Court of Canada upheld the Court of Appeal's decision in *Dynex* but articulated its test somewhat differently, incorporating the first and second of these suggested indicia (in reverse order) but not mentioning the third at all.

[73] I therefore conclude that while it may not be a requirement that an overriding royalty be capable of lasting for the duration of the underlying estate, it is still a factor to consider in characterizing an overriding royalty as an interest in land. It has been treated thus by our Court in *PrairieSky* and in *Manitok*.

[74] In *Manitok*, it was argued that because the royalty decreased over time, it could not be an interest in land. Horner J said:

> This leaves the Respondents' arguments that the fact that the Producing Royalty decreases over time, and includes lands from which Freehold may never receive Oil Volumes, weigh against the determination that the Producing Royalty is an interest in land. With respect to the former: the Royalty Agreement is carefully drafted so as to preserve the existence of the Producing Royalty until such time as the Documents of Title expire, while recognizing the reality of reservoir

> depletion. This suggests a conscious effort and careful drafting with a view to ensuring that the Producing Royalty meets the requirements for an interest in land.
>
> *Manitok* at para.24.

[75] While this Free Rein Directors' Resolution was not particularly careful to treat the GOR as an interest in land, it should be distinguished from cases like *Manitok* where the issue around contemporaneous interests was found in the royalty agreement itself.

[76] This Directors' Resolution was a document signed by the representatives of only one party to the agreement, Free Rein. Its enforceability, at least in terms of unilateral discretion to terminate the royalty payments to NewGrange, must be questionable. Other than the fact that Terry McCallum was also the sole shareholder of NewGrange, and therefore knew that Free Rein was so resolving, there is no evidence that NewGrange formally agreed to Free Rein reserving this discretion.

[77] One might say that "commercially reasonable" in the context of this transaction must simply refer to Free Rein's discretion to shut in wells where continued production was not commercially feasible. If that were the case, one might expect "commercially reasonable" to expressly modify production as opposed to the payment of the royalty. As drafted, this could conceivably refer to Free Rein's general financial health or commodity prices or labour availability or regulatory issues. One might also expect it to have been included in the Royalty Agreement so as to indicate some acceptance by the royalty holder of this discretion reserved to the royalty payor.

[78] Further, if it only refers to feasible production on which to pay the royalty, the clause is unnecessary as NewGrange only got a percentage of what was produced. If production was less or non-existent, there would be less or no royalty by the terms of the Royalty Agreement. Free Rein did not need to incorporate that causal connection between production and royalty payments in a Directors' Resolution.

[79] However, in the available jurisprudence dealing with the phrase "commercially reasonable" in the context of royalty payments on everything from oil and gas to books to patents, it has invariably been interpreted to mean a reference to the commercial feasibility of whatever underlying activity is generating the royalty.

[80] Whatever was meant by this unilateral Directors' Resolution, even to the extent that it may be inconsistent with the granting language in Clause 2(a), it cannot overwhelm the clear language used by both parties in the actual Royalty Agreement.

C. The Assignment Clause

[81] Clause 14 of the GOR reads, in part, as follows:

> *In the absence of an assignment in accordance with the foregoing [the 1993 CAPL Assignment Procedure] or Royalty Owner's written consent, Royalty Payor shall remain liable for the payment of the Overriding Royalty notwithstanding that it may no longer have any interest in the Royalty Lands from which such Petroleum Substances are produced, or that it may not be receiving the production or proceeds of production therefrom.*

[82] This language clearly envisions an independent right for NewGrange to receive the GOR that is separate and apart from the Free Rein's working interest in the land. If Free Rein assigns any of its interests in these leases without NewGrange's consent, it is liable to continue paying a gross overriding royalty to NewGrange whether or not it has the lands or even the proceeds of production.

[83] If the GOR truly ran with the land, this protection for the royalty holder would not be necessary because the assignee of Free Rein's interest would take title to the lands subject to NewGrange's GOR. In fact, in that event, this language creates the possibility of double recovery, at least conceptually. Obviously, such a claim advanced against Free Rein when it no longer owns the interest in land itself can only be a contractual claim.

[84] The assignment provisions of the royalty agreements in *Manitok* and *PrairieSky* were also argued to be inconsistent with clear granting language. In neither case did that argument prevail.

[85] In *Manitok*, the assignment clause said that if Manitok assigned its interest, it was obligated to provide the royalty holder with a substitute property producing a comparable royalty; *Manitok* at para.11

[86] In *PrairieSky*, Bourque J had an assignment clause that expressly contemplated a subsequent obligation to execute an assignment and novation agreement (recognition of the obligation by the assignee), reflecting "the industry practice of perfecting the assignment of the payor's interest in a royalty agreement, regardless of whether the royalty would presumptively run with the lands"; *PrairieSky* at paras.109-115.

[87] The language of the assignment clause in the NewGrange Royalty Agreement does neither of these things; it does not obligate Free Rein to find substitute land nor does it contemplate a novation by a new working interest owner/assignee. It simply says that the royalty will continue to be paid by a party no longer holding an interest in land, which then also fails the second arm of the *Dynex* test.

[88] I note that NewGrange argued that its Royalty Agreement was modelled on the 2015 CAPL template and thus, a finding that it did not successfully create an interest in land would be problematic for the entire oil and gas industry. Clause 14 of the NewGrange Royalty Agreement contains some similar language to the template but the sentence reproduced above does not appear in the 2015 version.

[89] I find that this language is fundamentally inconsistent with the granting language purporting to create an interest in land. Is it sufficiently inconsistent to overwhelm the language in Clause 2(a), to rebut the presumption created by that language?

D. Nemo Dat Quad Non Habet

[90] The second arm of the *Dynex* test for whether a GOR is an interest in land is whether the interest of the grantor, from which the GOR is carved out, is itself an interest in land.

[91] The Asset Purchase Agreement by which Free Rein acquired the Asset was signed on and dated November 1, 2018 but the defined "Closing Date" was November 30, 2018. By the terms of the APA, title to the Asset did not transfer from NewGrange to Free Rein until November 30, 2018. The APA did not purport to be effective on any other or prior date.

[92] Invico argues that that Free Rein could not grant an interest in land to NewGrange on October 30, 2018 because it did not have an interest of its own to grant at that time. Although Invico concedes that Free Rein's leasehold interests are interests in land, Free Rein did not take title to those leasehold interests until November 30, 2018. Free Rein had no interest to grant on October 30, 2018.

[93] It might have been possible to consider this argument under the first arm of the *Dynex* test, where we reviewed the language and circumstances of the transaction. Had I proceeded that way, I would have found that this factor weighed heavily against the parties' objective intentions to create an interest in land in the GOR.

[94] However, on reflection, I believe that this *nemo dat* argument properly belongs in the second arm of the *Dynex* test, as proposed by Invico. While, as I will explain, it is a somewhat different application of *nemo dat* than that in *Dynex*, it falls from the same inquiry, namely what did the grantor have to give? The import to this is that the two arms of the *Dynex* test are conjunctive. Both must be satisfied. Thus, even if I had found that the parties intended to create and transfer an interest in land, that did not happen.

[95] The second part of the *Dynex* test did not originate from a party purporting to convey a part of an interest to someone else before acquiring the underlying interest itself. In *Dynex*, Major, J was speaking of the fact that the grantor's interest must itself be an interest in land. It was a comment on the *nature* of the grantor's interest; that a grantor cannot create an interest in land from something that was never an interest in land e.g. a contractual right. It was not, at least not in *Dynex*, about the *timing* of acquiring that interest.

[96] In most post-*Dynex* cases, the question posed has been only whether the grantor's interest was fairly characterized as an interest in land or not. However, Vandergrift does address a timing issue similar to the case at bar. In the 1989 case of *Vandergrift*, Virtue J said the royalty interest in that case was not an interest in land because it was expressed as an interest in petroleum substances produced from the land not within the land; *Vandergrift* at para.40. That reasoning was disavowed later by the Supreme Court of Canada in *Dynex*.

[97] However, *Vandergrift* is still worth considering for its jurisprudential value on the second arm; did the grantor have an interest in land to alienate? Virtue J also found that the grantor of the royalty had not yet earned its working interest in the leasehold at the time of granting the royalty. Under the subject farmout agreement, the grantor had to drill a well in order to earn its working interest which did not happen until two years later, as explained in these passages:

> When the royalty agreement was entered into, the grantor, Suffolk, had an interest in the farmout agreement from Imperial and it had a natural gas licence from the Crown. At that time, Suffolk, which granted the royalty, did not have a lease and it would not acquire a lease until it earned it by drilling a well.
>
> …
>
> The effect of this was that Suffolk, at the time it granted the royalty, had the right to earn an interest in land by drilling a well, but it had not yet earned it. Suffolk did not acquire the lease until 13th August 1973, that is, more than two years after the royalty agreement was executed.
>
> ….

> The result is that when Suffolk granted the royalty it did not own an interest in land and could not, therefore, "carve out" or convey an interest in land to the plaintiffs.
>
> *Vandergrift v Coseka Resources Ltd*, 1989 CarswellAlta 76 at paras.45, 46 and 49.

[98] In *Vandergrift*, this was fatal to the grantee's argument that it had received an interest in land.

[99] Similarly in *Quest University*, Quest owned lands and had partnered with Southern Star to build residences thereon. Southern Star had a ground lease under this arrangement, which it objected to having vested off in Quest's *CCAA* proceedings. Fitzpatrick J concluded that Quest was not a lessor under s.32(9) *CCCA* because the parties had intended the lease to be valid and effective between them only once construction commenced and the lease became registerable. Those conditions had not yet been satisfied so Southern Star was not a lessee and could be restrained from attempting to register any encumbrance; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras.35-40; leave refused 2020 BCCA 364. While not dealing with a GOR, it is authority for the *nemo dat* principle applied to the conveyance of an interest in real property.

[100] In responding to this argument, NewGrange's Brief says that the signing of the documents "occurred simultaneously". The practice of signing various documents related to one transaction in close succession is not only reality, but it has also been recognized at law. While the argument was not successful in *Gauvin v Irving Oil*, where Irving Oil signed two different and contradictory agreements with Ms. Gauvin and her husband, the "one transaction" principle itself was cited thus:

> Counsel for the defendant cites *Manks v. Whiteley*, [1912] 1 Ch. 735 at 754 (C.A.) (81 L.J.Ch. D. 457), where Lord Moulton held:
>
> [W]here several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed.
>
> *Gauvin v Irving Oil Co Ltd*, 1985 CarswellNB 47, 64 NBR (2d) 306 at paras.10-11.

[101] Clearly the Royalty Agreement and the APA are part of one transaction. But they were not executed contemporaneously. I agree with Myers J:

> As to the argument that "contemporaneously" can mean "in four days," I was presented with no law to suggest that the meaning of a word can be changed to fit a party's position. There is no ambiguity to the meaning of "contemporaneously". Its ordinary and grammatical meaning is "occurring at the same time."
>
> (*Reserve Properties Ltd. v. 2174689 Ontario Inc.* (2015), 43 B.L.R. (5th) 114, 56 R.P.R. (5th) 131, 2015 ONSC 3469, 2015 CarswellOnt 7890 (Ont. S.C.J.) at para. 17.

[102] The Royalty Agreement may have created a contractual right to a royalty once Free Rein was in the position to pay it but it could not create an interest in land. Nor could it create a

contractual right that could later morph into an interest in land, at least not in the absence of any language whatsoever referencing the APA or the subsequent transfer of title.

[103] In this case, the delay in Free Rein acquiring the Asset made no practical difference because the grantor and the grantee were effectively the same party. However, had they not been, the royalties due for the intervening month would have been problematic. Where the grantee has a royalty but the grantor does not have the land, is anything payable? Is the grantor obligated to pay the royalty on production from which it does not receive revenue? Is the grantor obligated to calculate and reserve royalties to pay later, when it does take title to the interest in lands or production?

[104] Parties to a transaction that purport to convey an interest in land from one to the other must be careful to treat that disposition as a disposition of an interest in land, not as a mere contractual right. That means care with the language across all aspects of the transaction, including care in the timing of execution.

[105] The granting of a royalty on October 18, 2018 in respect of an underlying interest not acquired until November 30, 2018 cannot be a true interest in land.

(iv) Conclusion on the NewGrange GOR

[106] I find that the NewGrange GOR is not an interest in land. In my opinion, the treatment of the GOR in the Royalty Agreement, specifically the assignment provision, along with discretion reserved to the royalty payor, rebuts the presumption created by the language of the granting clause (Cl.2(a) Royalty Agreement). However, even if this were not so, NewGrange's argument fails on the principle of *nemo dat quod non habet*, as captured in the second arm of the *Dynex* test. Free Rein had no interest in the subject Crown leases on October 30, 2018 so it could not grant an interest in those lands to another.

(c) Shareholders' GOR

[107] The Shareholders' GOR arose in different circumstances and uses different language. While all the principles of contractual interpretation as canvassed in the relevant jurisprudence is equally applicable to the Shareholders' GOR, the facts are different.

(i) The 2023 Transaction

[108] In early 2023, Free Rein was in financial difficulty and in default of its Invico Loan Agreement. It identified an existing well (100/06-26-051-27W4M) that could be capable of production if recompleted but it lacked the funds to do this. It collected $150,000 from a group of 19 existing shareholders listed on Exhibit "I" to the McCallum Affidavit filed February 15, 2024 and in exchange, granted the Shareholders a GOR on production from that specific well. The GOR was divided among the Shareholders according to their respective shareholdings.

(ii) The Language of the Shareholder Royalty Agreement

[109] The Shareholder GOR is dated March 8, 2023. Clause 2 of the Shareholder Royalty Agreement reads as follows:

> *(a) The Royalty Owner does hereby reserve to itself and the Royalty Payor does hereby grant to Royalty Owner the Overriding Royalty on Petroleum Substances produced from the Royalty Well as described in this Royalty Agreement and based upon the interest of the Royalty Payor as set forth in the attached Schedule "A".*

The Overriding Royalty is intended to be an interest in land in the Royalty Well and to be a covenant running therewith.

(b) The Overriding Royalty will be calculated at the Point of Measurement as follows:

(i) For all Petroleum Substances 5% of the gross monthly production for the first 36 months of production and 2.5% of the gross monthly production thereafter.

[110] The granting language is therefore not the same and not as clear as the NewGrange Royalty Agreement. The Shareholders' interest is not in land or in substances in or produced from the land but in substances produced from a particular well.

[111] The Assignment Clause (Cl.8) is identical to the Assignment Clause in the NewGrange Royalty Agreement (see paragraph 81 above). It therefore suffers from all the same issues arising from the description of a contractual right to the royalty that follows Free Rein as opposed to an obligation attached to the land and owing from whoever takes the assignment of the land/leasehold interest.

[112] In addition, Clause 6 of the Shareholders' Royalty Agreement provides that, in the event of a corporate sale of Free Rein, the overriding royalty would terminate and the Shareholders would receive a cash payment calculated according to a formula in that clause. This is indicative of an interest in the operator, not an interest in the land that would follow the land and not the working interest owner.

[113] Lastly, there was no evidence that the Shareholders' GOR was registered or was even a registerable interest.

(iii)Conclusion on the Shareholder GOR

[114] Neither the language of the Shareholder Royalty Agreement nor the surrounding circumstances of this transaction support a characterization of this as an interest in land.

(d) The "*Dianor*" Discretion

[115] Invico argued that, even if the NewGrange and Shareholders' GORs were interests in land, they could be vested out anyway by the exercise of the court's discretion under the CCAA or by virtue of its inherent discretion; *Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508 (*Dianor #2*).

[116] Given that I have found that neither GOR is a true interest in land but are rather contractual rights held by NewGrange and the Shareholders against Free Rein, there is no need to review the scope of the court's discretion to vest out an interest in land.

5. Conclusion

[117] This Court's discretion to vest out an interest in land comes from statute. In this case, Invico relies on sections 11 and 36 of the *CCAA*.

[118] Neither the NewGrange nor the Shareholders GORs are interests in land. The NewGrange GOR, notwithstanding its granting language did not treat the interest as running with

the land, particularly in view of the assignment clause in the Royalty Agreement. But more importantly, Free Rein did not have the interest from which it purported to carve out the GOR on the date on the Royalty Agreement. For the Shareholder GOR, it did not even purport to be an interest in the land nor was it treated that way in any aspect of the transaction for which evidence was available.

[119] The NewGrange and Shareholder GORs are contractual claims against the debtor. Having considered all the circumstances, including:

- the lengthy sales process which resulted in no other bidder for these assets,
- the possibility of putting these wells back into production again and avoiding a devolution thereof to the Orphan Well Association,
- the possibility of retaining employees and using existing licences,
- the fact that no stakeholders are worse off in this proposal than they would be in a bankruptcy or a non-RVO transaction; and
- the support of the Monitor;

I find that it is appropriate to issue the RVO as proposed by Invico.

Miscellaneous

[120] A stay of proceedings in this matter was extended to April 30, 2024 by consent. If that needs to be revisited, the parties may contact my office or the Commercial Coordinator. If the parties cannot agree on costs or on any ancillary issues with the RVO not addressed herein, they may contact my office.

Heard on the 28th day of February, 2024.
Dated at the City of Calgary, Alberta this 12th day of April, 2024.

M.H. Hollins
J.C.K.B.A.

Appearances:

Robyn Gurofsky and Anthony Mersich
for the Applicant, Invico Diversified Income Limited Partnership,
by its general partner, Invico Diversified Income Managing GP Inc.

Byron W. Nelson
for the Respondent, NewGrange Energy Inc.

Beth P. Younggren
for Purvida Exploration Inc. and 1591195 Alberta Ltd.

Jeffrey Oliver
for the Monitor FTI Consulting Ltd.

TAB 5

Court of Queen's Bench of Alberta

Citation: Accel Canada Holdings Limited (Re), 2020 ABQB 182

Date: 20200311
Docket: 1901 16581
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

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Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] On March 6, 2020 I delivered an Oral Decision in these Applications and noted that written Reasons would follow. These are those Reasons.

[2] In these proceedings the Applicants, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively Accel and separately Holdings and Energy) applied on November 22, 2019 to this court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] which was granted. On November 27, 2019 that Order was amended and restated with the Stay granted therein extended to January 31, 2020 and then on January 21, 2020, further extended to March 13, 2020.

[3] There are currently before this court Applications of four different stakeholders in these Arrangement proceedings, informally referred to as the Gross Overriding Royalty Applications. They involve applications for determination and if appropriate Declarations with respect to the following issues:

1. Whether the Gross Overriding Royalties ("GOR") held by ARC Resources Ltd ("ARC") and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively "BEST"):

a) Are interests in land or contractual security for payment;
b) Can be vested off title pursuant to a Sale Approval/Vesting Order;
c) Can be redeemed for a specific sum; and
d) Have priority over other security interests held by other stakeholders.

Background

[4] Pursuant to an Asset Purchase and Sale Agreement dated May 10, 2018 (the "APA") ARC as vendor sold certain assets (the "Redwater Assets") to Holdings as purchaser. The purchase price ("PP") in the APA was $154M. Holdings did not pay the whole of the PP but rather Holdings granted to ARC a GOR under a Gross Overriding Royalty Agreement ("ARC GOR"), with royalty payments by Holdings to ARC triggered by certain events to occur in the future, namely payment by Holdings to ARC of the remaining PP of $40M (the "DPP") on or before January 1, 2020 or July 1, 2020.

[5] Holdings financed that portion of the PP that ARC did receive on closing with monies borrowed from Third Eye Capital Corporation ("TEC"). The loan by TEC was secured by way of a first ranking security interest in all of Holdings' property, including those assets purchased from ARC and in particular the assets underlying the ARC GOR.

[6] TEC (which includes itself and as agent for others) is the largest secured lender of Holdings and is currently owed over $300M. TEC has made significant loans to Accel beginning in June 2017. The loans were predominantly used by Holdings to pursue acquisitions including the Redwater Assets under the APA. In return, Holdings granted to TEC a variety of security agreements including credit agreements and fixed and floating charge debentures over all present and after acquired property, security interests in all of its present and after acquired personal property and fixed charges over certain lands, leases and/or agreements.

[7] TEC made numerous registrations of its security beginning in 2017, as will be discussed further in the consideration of the priorities issues. As at September, 2019 it also held first ranking security on Energy, which security is itself the subject of a further validity court challenge, but which may have $12.5M outstanding to TEC.

[8] The APA contains a clause whereby ARC acknowledged the first ranking security of TEC in the underlying ARC GOR assets. All three parties, namely Holdings, TEC and ARC also entered into an Acknowledgement Agreement ("Acknowledgement") that was supposed to record this understanding, but the effect of which is itself a component of this dispute.

[9] On August 29, 2018 and October 12, 2018, BEST entered into Royalty Purchase Agreements ("RPA") and GOR Agreements with Energy and Holdings respectively. These are referred to as GOR#1 and GOR#2 (collectively the "BEST GORs"). The purchase price for GOR#1 was $3M and for GOR#2 was $5M. Both sets of agreements were structured in an identical manner. Should either Energy or Holdings repurchase the Royalty by a set date for a stated amount, November 1, 2018 and $3.5M for GOR#1 or December 1, 2018 and $6M for GOR#2, the GOR would terminate. The stated amounts were not paid by either Holdings or Energy on the set dates contracted for.

[10] If the stated amount was not paid by the respective Accel entity by the set date, then the BEST GORs were payable by the respective Accel entity until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements. In

the case of GOR#1, the Payout was the greater of $4M or an amount equal to $3M and interest at a rate of 59.4% per annum calculated and compounded monthly. In the case of GOR#2, the Payout was the greater of $6M or an amount equal to $5M and interest at a rate of 59.4% per annum calculated and compounded monthly. The term of each BEST GOR continues until the date that BEST has received sufficient royalty payments to reach Payout.

[11] The Monitor applied for and was granted an Order Approving Sale and Investment Solicitation Process ("SISP") over all or nearly all of the Assets of Accel on December 13, 2019. Phase one of the SISP has ended. The Monitor and Accel have therefore requested that this court accelerate its determination of the issues in these Applications in order to assist it and the potential purchasers and/or investors with certainty surrounding the nature of the assets offered for sale and this court's jurisdiction to vest off interests.

[12] I will address each issue in turn and will deal with additional facts as they are relevant to the discussion and determination.

1. Interest in land or contract for payment

[13] The current leading decision in this area in Canada remains the Supreme Court decision in ***Bank of Montreal v Dynex Petroleum Ltd***., 2002 SCC 7. That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in ***Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc***, 2018 ONCA 253 [***Dianor 2018***]. The ***Dianor 2018*** decision was itself the subject of discussion and application by this court in ***Manitok Energy Inc (Re)***, 2018 ABQB 488.

[14] These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:

1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
2. the interest, out of which the royalty is carved, is itself an interest in land.

[15] These facts do not engage part 2 of the test. All parties are agreed that Accel's interests underlying the royalties in issue are themselves interests in land.

[16] Part 1 of the test, however, requires that the court determine the parties' intention in making the contracts that are outlined above. Our court of Appeal in ***Bank of Montreal v Dynex Petroleum Ltd***, 1999 ABCA 363 at para 73, aff'd 2002 SCC 7, quoted with approval in ***Dianor 2018*** at para 63, set out the approach of a court in determining the parties' intention in these circumstances which is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

[17] When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: ***Sattva*** at para 57.

[18] It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": Sattva at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018).

[19] The parole evidence rule, which prevents the admission of outside evidence that alters the words of a contract, does not apply when considering the surrounding circumstances as to the intent of parties to an agreement. The primary concern of the parole evidence rule is to ensure certainty and finality in contractual arrangements by precluding evidence beyond the contract itself; however, because evidence of surrounding circumstances must necessarily be within the knowledge of both parties at or before the time of agreement, those concerns of improperly varying or contradicting the agreement do not apply: ***Sattva*** at para 59.

[20] The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: ***Sattva*** at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: ***Sattva*** at para 58.

[21] Determining what constitutes surrounding circumstances is a question of fact: ***IFP Technologies*** at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 25 [***AUPE***]. Relevant background facts include those that speak to:

1) the genesis, aim or purpose of the contract;
2) the nature of the relationship created by the contract; and
3) the nature or custom of the market or industry in which the contract was executed: ***IFP Technologies*** at para 83.

[22] The type of evidence that can be used is broad, and can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva*** at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

[23] In a commercial contract, the Court should know the commercial purpose of the contract, which assumes knowledge of the genesis of the transaction and the background, context, and market in which the parties are operating: ***AUPE*** at para 24. Contractual interpretation is "an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context": ***IFP Technologies*** at para 89.

[24] In ***IFP Technologies***, the Court considered an antecedent agreement and written evidence of negotiations proceeding the agreement: at paras 84, 85. As further discussed below, negotiations preceding a contractual agreement are often not permissible evidence of surrounding circumstances. However, where written evidence of negotiations can provide a

relatively objective indication of relevant background facts, such as the genesis and aim of the contract, it may be permissible: ***IFP Technologies*** at para 85.

[25] Overall, the evidence that can be used to show the surrounding circumstances of an agreement is largely left to the Court's discretion, considering the circumstances of the case. The key requirements are that the evidence speaks to objective intentions relating to the background of the agreement that was known to all parties at the time of agreement.

[26] Conversely, evidence that is not objective or known to the parties at the time of the agreement is not permissible evidence of surrounding circumstances. Therefore, evidence of subjective intentions is always inadmissible: ***AUPE*** at para 27; ***Sattva*** at para 58.

[27] Evidence of pre-contract negotiations, including prior drafts, is generally inadmissible as subjective evidence about what the parties intended: ***AUPE*** at para 27. However, the issue of whether all pre-contract negotiations are admissible is unclear. The Alberta Court of Appeal stated in ***AUPE*** at para 32 that ***Sattva*** should not be interpreted broadly so as to define surrounding circumstances to include all pre-contract negotiations as long as they do not include subjective intentions. The Court of Appeal determined that where evidence of pre-contract negotiations overlaps with evidence of surrounding circumstances, it may provide an objective interpretive aid where not speaking to subjective intentions and as long as it doesn't overwhelm the meaning of the written contract: ***AUPE*** at para 3; ***IFP Technologies*** at paras 85–87.

[28] Post-contract conduct is not admissible in regard to determining the intentions of the parties. The only instance where evidence of post-contract conduct is admissible is where it is permitted as an exception to the parole evidence rule because of an ambiguity in the contract. A contract is only ambiguous where the words can be reasonably interpreted to have more than one meaning: ***IFP Technologies*** at para 87; ***AUPE*** at para 44.

[29] In summary, the central feature of evidence that is not proper to consider as an aspect of the surrounding circumstances is that which only proves the subjective intentions of the parties. Clear examples of evidence based on subjective intentions include a bald statement by one party as to their interpretation of the agreement or pre-contract negotiations that speak only to the subjective intent of a party and/or overwhelm the resulting written agreement. Post-contract conduct is also inadmissible for the purpose of proving the surrounding circumstances at the time of the agreement.

[30] In the context of the present proceedings, any evidence in the affidavits that speaks to the circumstances leading to the agreements at issue is admissible. If the Court is satisfied that the information was known to both parties at the time of the agreements and is evidence of an objective intent, rather than mere statements about an individual's subjective beliefs, then that evidence can be considered. Considering the interrelated nature of some of the entities in this proceeding and the commercial reality of these types of agreements, evidence of interrelated occurrences and negotiations may be relevant as long as all the parties to the specific agreements were aware of it.

[31] This court's review of the permissible surrounding circumstances then will be directed at determining the genesis, aim and purpose of the contract, the nature of the relationship created by the contract and the custom of the market in which the contract was executed.

[32] As our Court of Appeal put it so succinctly in ***AUPE*** at para 30; "Obviously there would be no dispute if there was consensus on the intent, so the lack of consensus does not assist in interpretation."

[33] With these principles in mind, I then turn to a consideration of the wording of the ARC GOR and the BEST GORs together with the circumstances surrounding each transaction.

[34] Accel has filed an Application asking this court to find that the interests granted in each case are not interests in land but rather security for payment or performance and, as such, are contracts that do not run with the land.

[35] TEC similarly submits that the respective GORs are personal in nature and not interests in land.

[36] Each of the GOR holders, ARC and BEST, urge the court to find that the parties used clear language in the appropriate respective contracts to vest interests in land.

[37] What is really at stake now that the grantor or debtor, Holdings and Energy, have entered insolvency proceedings is priority concerns with all stakeholders taking positions most advantageous to their interests and, in particular, in sharing in any sale proceeds that may be realized by the SISP. It is from this perspective that the court reviews the evidence and arguments put forward.

ARC GOR

[38] ARC makes several arguments in favour of this court determining that its GOR is an interest in land. They are, in summary:

1. ARC was the owner of the Redwater Assets prior to the transfer to Holdings and, as owner, reserved the GOR share out of the of the Redwater Assets that were transferred, such that ARC remains both the owner of the assets subject to the ARC GOR and the payee under the ARC GOR;
2. The APA and the ARC GOR manifest by their language a clear intention of the parties that ARC be the owner of the ARC GOR at the conclusion of the transaction; and
3. The parties intended the ARC GOR to be an interest in land as evidenced by the wording of the APA and the ARC GOR.

[39] TEC and Accel submit that the ARC GOR, when read in conjunction with the APA and the Acknowledgment, clearly contemplate that the GOR is itself a security interest, albeit one that is a charge on land within the definition of same provided by the *Law of Property Act*, RSA 2000, c L-7 [*LPA*]. Section 64(1) of the *LPA* defines a charge on land as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or the performance of an obligation.

[40] Although the APA and ARC GOR do not in the language of either couch the grant as a security interest, TEC and Accel submit that when the entirety of the documents and the transaction is viewed as a whole it is clear that the ARC GOR is security for the payment of the DPP. It is the mechanism used by ARC to secure its right to payment under the APA.

[41] When considering the intention of the APA and ARC GOR, I find that the agreements are capable of more than one meaning. On one hand, the ARC GOR could be interpreted as creating an interest in land, considering the potential for a royalty interest in perpetuity and plain wording of the provision stating that the ARC GOR creates an interest in land. On the other hand, the APA envisions the GOR as a mechanism of ensuring payment and could be read to establish a contractual agreement to pay secured by a royalty interest. Accordingly, I am permitted to consider some evidence of post-contract conduct in order to address that ambiguity.

[42] I will begin by considering the words of the ARC GOR and the APA, and then address the surrounding circumstances.

[43] Several components of the APA are particularly relevant to determining the intention of the parties in creating the ARC GOR. The Deferred Purchase Price Amount ("DPP") of $40M outlined in the ARC APA is to bear interest at the rate of 6% per annum calculated daily. The DPP and combined interest are the Deferred Obligations ("DO"). Pursuant to para 2.4 of the APA, the DO is due and payable by Holdings on January 2, 2020 (the "Maturity Date").

[44] As per para 2.8(c) of the APA, Holdings was also to make monthly payments of interest to ARC following closing. As per para 2.8(g) of the APA, Holdings agreed to provide a GOR to ARC which would be triggered only if the DO were not paid by January 2,2020 and would only bind the Petroleum and Natural Gas Rights as defined in the APA from and after that date.

[45] As per para 2.8(g)(i) of the APA, the DO that remain outstanding after January 2,2020 comprise the Unpaid Amount ("UP"). If the UP is paid after January 2, 2020 but before July 2, 2020 the GOR will terminate as per para 2.8(g)(iii).

[46] If the DO are not paid on January 2, 2020 and the GOR is triggered and enforceable, then six months after that date (July 2020) ARC must calculate the GOR Elimination Amount ("GEA") as per para 2.8(g)(v) and Schedule "S" of the APA and then give notice to Holdings of the GEA (para 1.1(cccc) "Payout Amount"; para 2.8(g)(v)(A) and Schedule "S").

[47] The GEA is calculated by taking the UP and deducting any payments received by ARC under the GOR as per para 2.8(g)(v)(A) and Schedule S. If Holdings pays the GEA within ten business days of receiving Notice of the GEA, the GOR terminates. If the GEA is not paid within the ten days period then the GOR is to continue in perpetuity as per para 2.8(g)(v)(B) of the APA. As per para 2.8(g)(vi) of the APA, ARC agreed to grant Holdings a Right of First Refusal in respect of a disposition by ARC of the ARC GOR.

[48] The ARC GOR was executed on the closing of the sale of the Redwater Assets under the APA dated August 15, 2018. Holdings has made no payments to ARC either of interest, the DO or the UP.

[49] The provisions that ARC submits support its position are:

1. The ARC GOR is to exist in perpetuity if Holdings does not pay the GEA within the time contracted for (yet to occur);

2. Para 2.2 of the ARC GOR Agreement uses the following language that makes it clear the parties intended the ARC GOR to be an interest in land:

> "....Shall constitute, and is to be construed as, an interest in land .....All terms, covenants, provisions and conditions of this Agreement shall run with and

> be binding upon the Royalty Lands and Title Documents, and the estates affected thereby for the duration of this Agreement.";

3. Para 2.3(c) of the GOR appoints Holdings as the agent and trustee of ARC with respect to proceeds;

4. Para 2.3(g)(i – iii) provide that ARC's prior written consent is to be obtained by Holdings prior to Holdings entering into a pooling unitization or other combination. Further para 3.1 provides that Holdings may not convert a well covered by the ARC GOR to another type of well. Para 3.4(c) requires Holdings to obtain ARC's consent to the surrender of title documents for the abandonment of a well covered by the ARC GOR;

5. Para 2.5(a) and para 4 provides ARC, upon the default of Holdings, with the right to take in kind its GOR, which ARC submits illustrates a strong badge of ownership as it means ARC may exert the right to take possession of its property;

6. Para 6.2 restricts Holdings from proceeding with certain types of transactions without ARC's consent; and

7. None of the language in the APA or the ARC GOR creates or talks of a security interest, charge or mortgage.

[50] Certain aspects of these provisions weigh toward the ARC GOR creating an interest in land, such as provisions that: refer to the creation of an interest in land; provide ARC with a right to take in kind the Petroleum Substances comprising the GOR, including upon default of payment by Accel; create the potential for an interest in perpetuity; and prevent Accel from proceeding with certain transactions that would affect the ARC GOR, such as particular assignments of interest.

[51] However, other aspects of the APA and ARC GOR point toward the ARC GOR being a security interest, including that the ARC GOR: predominantly ensures payment of the PP under the APA, plus interest; terminates upon full payment of the DO; does not exist in perpetuity unless Accel fails to meet its payment obligations, in which case only then additional funds would be paid to ARC by virtue of a continuing royalty interest; and is provided to ARC in exchange for payment of the APA's DO, and not in exchange for consideration from ARC beyond permitting Accel more time to meet its payment obligations.

[52] Accel points out that various cases in Alberta that have held that a significant feature of a security interest as opposed to an absolute transfer of an interest in land is whether the debtor or grantor retains a right of redemption: ***Alberta (Treasury Branches) v M.N.R; Toronto-Dominion Bank v MNR***, [1996] 1 SCR 963, ***Sharma v 643454 Alberta Ltd***, 2006 ABQB 119 and ***Equitable Trust Company v 604 1st Street SW Inc***, 2014 ABCA 427, rev'd on other grounds 2016 SCC 19.

[53] As Accel points out, the APA provides that the ARC GOR can be redeemed prior to January 2, 2020 as well as at any time after that to the expiration of the Notice of the GEA.

[54] Additionally, evidence of the surrounding circumstances at the time of the agreements also indicates that the ARC GOR was intended to be a security interest and not an interest in land.

[55] ARC was aware at all times that TEC was providing the financing to Holdings for the acquisition of the Redwater Assets in the APA. At the request of Holdings' counsel and 2 days prior to the closing of the scheduled APA the parties, TEC, ARC and Holdings entered into the Acknowledgment dated August 15, 2018.

[56] While it suffers from some ambiguous wording, reading the Acknowledgment in conjunction with correspondence between counsel during the drafting of and the drafts of the document themselves as well as considering the surrounding circumstances and giving the document commercial sense, it is clear that it subordinates the priority of whatever security interests ARC has that secure the payment by Holdings of the DPP and interest accruing due thereunder to the payment by Holdings to TEC of whatever security interests TEC has.

[57] It makes no commercial sense in the circumstances that were present when the APA and the TEC financing were negotiated that a lender in TEC's position would agree to subordinate its security to ARC for the DPP, as ARC would have the court read the Acknowledgement.

[58] Further, the second paragraph of the Acknowledgment, again given the circumstances surrounding the drafting and execution of it, make it clear that the subordination of ARC's security interests include the ARC GOR and that Holdings would not grant to ARC any "other" security interest as security for the DPP and accruing interest.

[59] The Acknowledgement therefore provides that the ARC GOR is subordinated to the TEC security interests. Priorities between the stakeholders to these Applications will be dealt with later in these reasons.

[60] After the APA, ARC GOR, and Acknowledgement were entered into, ARC continued to treat the ARC GOR as a security interest obtained to secure payment for the Redwater Assets under the APA.

[61] On May 6, 2019 ARC registered a security agreement and a land charge at the Personal Property Registry ("PPR") which identified ARC as the secured party, Holdings as the Debtor and the collateral as all the Debtor's right, title, estate and interest in the Petroleum Substances produced from the Royalty Lands as defined in the Royalty Agreement dated August 15, 2018 between the Debtor and the Secured Party.

[62] ARC also prepared and released public disclosure documents following the closing of the APA, in which the sale of the Redwater Assets was described as a disposition with the ARC GOR as security for the deferred portion of the PP.

[63] The evidence as a whole speaks to the objective intention of the parties that the ARC GOR provide a security interest for payment of the DO to ARC by Accel. Considering all of the evidence and submissions this Court is of the view that the ARC GOR is not an interest in land but rather is a security interest that does not run with the land.

[64] ARC applies in the alternative for this court to lift the Stay, currently set to expire March 13, 2020, and allow it to enforce the ARC GOR by invoking the take in kind provisions.

[65] TEC submits and this court agrees that the DPP, the UP and the GEA were all future debts to which Holdings was subject to on the initial filing date in October 2019 under both the *CCAA* and the *BIA*.

[66] In considering an application for the lifting of a Stay under the CCAA, the court is to consider the balance of convenience, the relative prejudice to the parties, the merits of the proposed action, the prejudice to the applicant of the continuation of the Stay and whether lifting the Stay is in the interests of justice.

[67] Beginning in at least March 2019, Accel began experiencing what would become sustained liquidity issues culminating in each entity filing a Notice of Intention to Make a Proposal under the *BIA* on October 21, 2019, resulting in a Stay of stakeholder's rights for a 10-day period, later extended.

[68] To allow ARC to proceed with its intended enforcement actions would have the effect of reversing the purpose of the Acknowledgement by allowing ARC to receive payments when Holdings' obligations to TEC are stayed.

[69] More importantly, the interests of justice are not served by allowing one of the stake holders to enforce its security interest and not the others. Lifting the stay would have the effect of draining finances from Holdings at a time when the status quo is the priority while it attempts to proceed with an orderly distribution of its assets. It would in effect prefer ARC over all the other Holdings stakeholders without equitable reason.

[70] ARC provides no evidence of prejudice other than the same prejudice that all stakeholders with security interests have and will suffer.

[71] The application to lift the Stay by ARC is accordingly denied.

[72] In the further alternative, ARC claims that para 2.3(c) of the GOR creates an express trust in its favour and asks this court to direct that Holdings or the Monitor hold the proceeds attributable to the Redwater lands that underlie its ARC GOR in trust for it.

[73] While para 2.3(c)(i) uses trust language, the ARC GOR as a whole must be reviewed to determine if the parties intended to great a true trust relationship.

[74] TEC submits that when the ARC GOR is considered on all of its terms it establishes a debtor-creditor relationship rather than a trustee-beneficiary relationship. TEC points to three indicia to support its interpretation:

1. The ARC GOR supports payments of interest to ARC;
2. The ARC GOR is silent on co-mingling of proceeds attributable to the ARC GOR with Holdings' own funds; and
3. The GOR does not restrict Holdings' use of the those proceeds between the periodic payments due to ARC.

[75] Again, in examining the true nature of the ARC GOR in light of the provisions of the APA and the surrounding circumstances present at the time of the execution of the agreements, it is clear that the ARC GOR is a security interest which secures the payment by Holdings to ARC of the DPP and does not give rise to a trustee beneficiary relationship.

[76] The application to hold the proceeds in trust is accordingly denied.

BEST GORs

[77] BEST relies predominantly on the language of the respective RPAs and BEST GORs to establish that Energy and Holdings granted to it interests in land and not security interests.

[78] As has already been reviewed in these reasons, the language used in the agreement is but one factor that the court considers in determining the intention of the parties to it.

[79] In August 2018, Accel sought short-term financing from BEST in order to bridge their capital requirements and to close a loan agreement with J.P. Morgan. Pursuant to a term sheet formalized on August 29, 2018, the parties entered into the RPA, whereby BEST agreed to purchase GOR#1 on Energy's lands for a purchase price of $3M, although Energy could repurchase GOR#1 at any time before November 1, 2018 for a purchase price of $3.5M. If GOR#1 was not repurchased by Energy before Nov 1, 2018, then GOR#1 was to remain effective until it expired. The Expiration Date is defined as the earlier of (i) the demand for payment by BEST, (ii) BEST receiving the greater of $4M OR the sum of $3M and an amount equal to interest of 59.4% per annum calculated and compounded monthly (the Aggregate Proceeds) and (iii) December 31, 2018.

[80] Payments under the RPA and GOR#1 were to commence November 1, 2018 if the repurchase option for $3.5M had not been exercised by Energy before that date.

[81] Pursuant to GOR#1, the payments to be made by Energy were to be that portion of the production equal to the Aggregate Proceeds amount and were to continue until the Aggregate Proceeds was paid. In other words, $3M plus interest at the rate of 59.4% until paid.

[82] BEST was entitled to demand payment at any time for any reason. The term of GOR#1 was until BEST received payment of the Aggregate Proceeds in full. If Energy defaulted in payment, then BEST was entitled to be reimbursed all out-of-pocket expenses incurred to enforce its rights under the RPA and GOR#1, which included professional fees of a certain stated kind.

[83] As security for the term sheet, Energy was to provide BEST with GOR#1.

[84] On October 12, 2018, BEST entered into a further RPA and GOR#2 whereby BEST purchased GOR#2 for $5M from Holdings. BEST was advised that the purpose of the advance was to complete an acquisition of strategic value. The terms of the RPA and GOR#2 are identical in all material respects to the RPA and GOR#1 entered into between the parties in August, 2018.

[85] No monies have been paid by Energy or Holdings to BEST under either transaction.

[86] As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.

[87] BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

[88] However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

[89] Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

[90] With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

[91] The BEST GORs are therefore determined to be security interests and not interests in land.

[92] BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

[93] As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See ***Third Eye Capital Corporation v Ressources Dianor Inc/ Dianor Resources Inc***, 2019 ONCA 508.

[94] Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

[95] The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

[96] TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST GORs. The TEC Financing Agreements provided funding to ACCEL for the purchase of various petroleum and natural gas assets, including the Redwater Assets.

[97] TEC first registered security interests at the Personal Property Registry (PPR) on June 29, 2017, against Holdings in relation to the TEC Financing Agreements. TEC made other related registrations in the PPR against Holdings on October 31, 2017, June 27, 2018, August 15, 2018, and November 12, 2018. TEC registered each of those interests as both a land charge and as a security interest against all present and after acquired personal property of Holdings. TEC also registered interests in the PPR against Energy on September 20, 2019, including an interest against all present and after acquired property of ACCEL Energy and a land charge, which relates to a subsequent application in these proceedings.

[98] TEC registered security notices at Alberta Energy against Holdings on January 24, 2019, in relation to the financing of Accel's purchase of the Redwater Assets.

[99] BEST registered security interests through the PPR on October 18, 2018 as a land charge and a security interest against all of Holdings' right, title, estate and interest in the petroleum substances produced from the lands defined in the GOR#2 Agreement.

[100] BEST also registered a security notice against Holdings on November 15, 2018, at Alberta Energy with respect to multiple Crown mineral leases. BEST subsequently registered another security notice at Alberta Energy on January 9, 2019, against Energy.

[101] ARC registered a land charge and security agreement against Holdings' right, title, estate and interest in the Petroleum Substances produced from the royalty lands in the PPR on May 6, 2019. ARC also registered caveats against title to Holding's freehold oil and gas leases.

[102] In summary, TEC and BEST both hold multiple first in time registrations at Alberta Energy regarding Holdings' Crown mineral leases, while TEC has first in time registrations at the PPR against Holdings for land charges relative to both ARC and BEST.

[103] There are two key statutory regimes governing the security interests at issue in this circumstance: the *LPA* and the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*].

[104] The *LPA* section 64(2) governs priority for registration through the PPR of charges on land and any right to payment arising in connection with an interest in land.

[105] Section 64(1)(b) of the *LPA* defines "charge on land" as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or performance of an obligation". Real property is defined in section 64(1)(c) of the *LPA* to mean land, an interest in land, and a right to payment arising in connection with an interest in land but not a right to payment evidenced by a security or an instrument to which the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies. The *PPSA* does not apply to the creation of an interest in a right to payment that arises in connection with an interest in land: *PPSA* s 4(g).

[106] Under the *LPA*, priority of successive charges on land affecting the same interest are determined under section 64(2) as follows:

> **(2)** Subject to subsections (8) and (12), except in the case of fraud, priority among successive charges on land affecting the same interest shall be determined as follows:
>
> (a) priority between registered charges on land shall be determined by the order of registration without regard to the order of creation of the charges or execution of the agreements providing for the charges;

(b) a registered charge on land has priority over an unregistered charge on land;

(c) priority between unregistered charges on land shall be determined by the order of execution of the agreements providing for the charges.

[107] Registering under the *LPA* means, for the purposes of section 64, "registered by means of a financing statement in the Personal Property Registry in accordance with *the Personal Property Security Act* and the regulations made under that *Act*.": *LPA*, s 64(1)(d).

[108] Since 64(2) of the *LPA* is subject to subsections 10 and 12, it is necessary to consider those provisions as well. Subsection (12) relates to interests registered between 1990 and 1992, which is not relevant in this case.

[109] Subsection (8) states that:

> **(8)** This section is subject in all respects to the *Land Titles Act* and the *Mines and Minerals Act*, and the priority of any interest registered or filed under either Act shall be determined pursuant to that Act.

[110] Therefore, *LPA* registrations are subject to registrations undertaken pursuant to the *MMA*. The MMA permits secured parties to register a security notice in relation to security interests in a lease of Crown minerals: *MMA*, ss 2(a), 95. Section 95(4) establishes priorities under the *MMA* such that:

> **(4)** A security interest in respect of which a security notice is registered has priority
>
> (a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first mentioned security notice, ... and
>
> (b) (d) over any interest, right or charge acquired after the registration of that security notice.

[111] "Registered" in section 95 is defined as "registered under Division 2 of Part 6, in relation to a security notice or any other document registrable under that Division": *MMA* s 1(1)(ii). Registration under the *MMA* occurs through the registry operated by Alberta Energy.

[112] Under section 94(1) of the *MMA*, the following definitions apply to the registration of a Crown mineral lease:

> (e) "security interest" means an interest in or charge on collateral if the interest or charge secures
>
> (i) the payment of an indebtedness arising from an existing or future loan or advance, …
>
> and
>
> (a) "collateral" means
>
> (i) the interest of the lessee or of any of the lessees in an agreement, or

> (ii) an interest in an agreement derived directly or indirectly from the lessee or any of the lessees of the agreement or from a former lessee or any of the former lessees of the agreement;

[113] In summary, the *LPA* and the *MMA* govern registration of security interests in land or payment arising in land. The *LPA* provides for a registration-based priority system through the PPR, while the *MMA* provides a registration-based priority system through the Alberta Energy registry system for security interests relating to Crown mineral leases. PPR registrations in accordance with the *LPA* are subject to registrations that relate to Crown mineral leases under the *MMA*.

ARC GOR

[114] ARC argues that the ARC GOR is an interest in land, and that there is no registration system or statutory requirement for royalty holdings to register interests in land or interests against crown oil and gas leases.

[115] As previously discussed, the ARC GOR created a security interest, which is connected with the land making up the Redwater Assets. That security interest falls within the definition of "charge on land" within the meaning of the *LPA*, and also affects certain Crown mineral leases that fall within the meaning of the *MMA*. As such, it is governed by the statutory registration schemes under the *LPA* and *MMA*.

[116] TEC submits that it has first priority security interests based on registration under the *LPA* with respect to the Redwater Assets that are subject to the ARC GOR. Further, TEC submits that it also has priority over the land through its registration in accordance with the *MMA*.

[117] TEC registered security interests in Holdings present and after-acquired personal property and land charges in respect of its real property in the PPR on June 29, 2017. ARC did not register its security interest and land charge in the same property until May 6, 2019. TEC also registered security interests with Alberta Energy in accordance with the *MMA*. ARC did not register its security interest with Alberta Energy.

[118] TEC and Accel also argue that TEC's security interest ranks above the ARC GOR by virtue of the Acknowledgement. Conversely, ARC argues that that the Acknowledgement subordinates TEC's interest behind ARC's right to payment for the GOR.

[119] As previously discussed, applying the necessary principles of interpretation to the Acknowledgement indicates that the parties intended it to be interpreted as a full subordination of the ARC GOR, except for payments made in the ordinary course, which are currently stayed by the Orders in these proceedings.

[120] Therefore, priority is governed by date of registration for the security interests at issue. Accordingly, I find that TEC holds first in time registration in the Redwater Assets with respect to the ARC GOR pursuant to both the *PPSA*, in accordance with the *LPA*, and under the *MMA* with respect to the Crown mineral leases.

BEST GORs

[121] TEC and BEST are largely in agreement as to the state of registration regarding the Crown mineral leases related to the BEST GORs, but they disagree as to the effect of those registrations.

[122] BEST says that it holds first in time registrations with Alberta Energy against 88% of the Crown Mineral Leases subject to GOR#1 Agreement, and 43.6% of the Crown Mineral Leases subject to GOR#2.

[123] However, TEC submits that it has prior security interests over all of Accel's personal real property in the PPR, despite not having total first in time registrations under both the *LPA* and the *MMA* as compared to the BEST security interests. TEC therefore argues that BEST knew, or ought to have known, about TEC's security interests in the mineral leases, as registered first in time in the PPR prior to the BEST GORs, and that BEST's security interests should therefore be subordinated to TEC's security interests on the basis of that knowledge.

[124] Specifically, TEC argues that the *MMA* has a gap in its priority scheme that is not present in other property registries in Alberta. TEC says that the *MMA* is silent as to the effect of actual or constructive knowledge of a pre-existing interest on a secured party's right to rely on the priority rules set out in the *MMA* or as to the principles of the common law or equity.

[125] By way of contrast, TEC notes that the priorities in section 64(2) of the *LPA* are only effective "except in the case of fraud", and that section 64(9) further elaborates that:

> **(9)** For the purposes of subsection (2) and the *Land Titles Act*, a person does not act fraudulently merely because the person acts with knowledge of a charge on land, regardless of whether it has been registered under this section or not. [emphasis added]

[126] Similarly, the *PPSA* states that a "person does not act in bad faith merely because the person acts with knowledge of the interest of some other person": *PPSA* s 66(2). Further, the *PPSA* section 66(3) states that the "principles of common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply".

[127] TEC suggests that the Court must look to the common law to address the legislative gap, being the *MMA*'s failure to explicitly address knowledge. TEC claims that BEST was, or should have been, aware of its pre-existing security interests in the property and therefore should be subject to its interest despite the fact that TEC did not register its entire interest under the *MMA* prior to BEST. To that end, TEC relies on pre-PPSA case law to support the premise that actual knowledge of a prior unregistered interest can defeat a subsequent claim to title.

[128] BEST disagrees that there is a legislative gap. BEST submits that the *MMA* establishes a priority system based on registration, and that knowledge is not mentioned because knowledge is not relevant.

[129] As the Supreme Court of Canada stated in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4 at para 51, a court must determine and apply the intention of the legislation "without crossing the line between judicial interpretation and legislative drafting". A court's role in filling in legislative gaps is described in Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 301 as follows:

> ...the courts have a jurisdiction to cure drafter's errors. However, gaps in the legislative scheme are attributed to the legislature. Gaps may be the result of a considered decision or the result of an oversight or mistake, but in either case the court normally claims that it has no jurisdiction to cure the problem. The

> technique required to remedy it, namely, reading in, is generally perceived as going beyond interpretation and impinging on the legislative role.

[130] It is for the legislature to address the statutory scheme for registration, not for this Court. The *MMA* establishes a clear priority ranking scheme in section 95(4), based on registration with Alberta Energy. If the Legislature was concerned with knowledge in creating a registration scheme under the *MMA*, it would have said so. Accordingly, I find that the *MMA* priority system is based solely upon registration as specified in section 95(4), without regard to knowledge.

[131] TEC and Accel also both argue that the principle of *nemo dat quod non habet* (*nemo dat*) should apply. *Nemo dat* is the principle that, as between legal interests in property, the first party to take a legal interest in a property takes priority: ***Innovation Credit Union v Bank of Montreal***, 2010 SCC 47 at para 51 [***Innovation***]. TEC suggests that Accel could not grant priority interests to BEST because it was prohibited from doing so under the Credit Agreement with Accel, which requires Accel to gain consent from TEC before incurring, among other things, new debts or liens against the land. TEC says that for this reason, Accel did not have the authority to grant a subsequent security interest to BEST.

[132] BEST argues that *nemo dat* doesn't apply to the *LTA* or the *MMA*.

[133] The Supreme Court's discussion of *nemo dat* in ***Innovation*** is indicative of the type of circumstances where the *nemo dat* principle may apply in relation to security interests. Those circumstances are distinguishable from the present circumstances. In Innovation, the Supreme Court of Canada applied the principle of *nemo dat* when considering two competing security interests. The competing interests were between an unperfected security interest subject to the *PPSA* and a subsequently acquired *Bank Act* security interest. *Nemo dat* was necessarily invoked in Innovation because the *Bank Act* gave priority over security interests acquired after the *Bank Act* security interest, without addressing whether or not a prior unperfected interest took priority. The Court noted that because the *Bank Act* establishes that a *Bank Act* security interest is subject to prior acquired interests, the Bank can receive no greater interest in the property than the debtor has, similar to the principle of *nemo dat*: ***Innovation*** at para 51. The Bank in ***Innovation*** asked the Court to adopt a rule that would give priority based on registration rather than relying on principles of *nemo dat*, and the Court recognized that it would be open to Parliament, rather than the Court, to do so: at paras 52, 53.

[134] The circumstances in ***Innovation*** are distinguishable from the present circumstances, where the statutory schemes of the *LPA* and *MMA* both establish priority schemes based on registration. Here, the Legislature has created priority schemes under the *MMA* and the *LPA*, and therefore the principles of *nemo dat* are not applicable as to determining priority between security interests in the same property.

[135] Registration systems provide commercial certainty. The registration schemes in the *LPA* and *MMA* establish priority for security interests based on registration. It is neither necessary nor would it provide certainty to commercial parties to create additional obligations beyond those contemplated within the statutory regimes, such as by limiting that priority system based on knowledge or preventing a party from providing funding in exchange for a security interest based on *nemo dat*.

[136] Accordingly, the statutory registration schemes, as established in the *LPA* with regard to the freehold leases and the *MMA* with regard to the Crown mineral leases, apply to determine

which interests are first in time as between TEC and the BEST GORs. Therefore, priority with respect to the BEST and TEC interests is also governed by date of registration for the security interests at issue. The Crown mineral leases have priority based on date of registration under the *MMA*, and any remaining leases have priority based on registration under the *PPR*.

[137] Should the parties wish to address costs of these applications, their respective right to do is reserved.

Heard on the 20th and 21st days of February, 2020. Oral Reasons given on the 6th day of March, 2020.
Dated at the City of Calgary, Alberta this 11th day of March, 2020.

K.M. Horner
J.C.Q.B.A.

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TAB 6

Third Eye Capital Corporation v. Dianor Resources Inc.
[Indexed as: Third Eye Capital Corp. v. Dianor Resources Inc.]

Ontario Reports

Court of Appeal for Ontario,
Pepall, Lauwers and Huscroft JJ.A.
March 15, 2018

141 O.R. (3d) 192 | 2018 ONCA 253

Case Summary

Mining law — Royalties — Respondent's mineral claims subject to gross overriding royalty ("GORs") — Respondent and grantor of mineral claims clearly intending that GORs would create interest in land and run with land — GORs registered on title — Motion judge erring in finding that GORs did not constitute interest in land and that claims did not continue to be subject to GORs after they were transferred to appellant.

Dianor was an insolvent company in respect of which the court had appointed a receiver under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). Dianor's main asset was a group of mining claims which it obtained under a Crown land agreement and a patented land agreement made with 381 Inc. The claims were subject to a "gross overriding royalty" ("GORs") in favour of 381 Inc. Both agreements stated that the parties intended the GORs to create an interest in and to run with the land. Notices of the GORs were registered on title. The GORs were subsequently transferred to 235. The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. Third Eye was the successful bidder. At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235 asked that the property vested in Third Eye be subject to the GORs. The motion judge held that the GORs did not run with the land or grant 235 an interest in the lands over which Dianor held the mineral rights. He held that ss. 11(2), 100 and 101 of the *CJA* gave him the jurisdiction to grant a vesting order in the assets to be sold to Third Eye on such terms as were just, including the authority to dispense with the royalty rights. 235 appealed, seeking to set aside the motion judge's order [page193] and to obtain an order that the GORs constituted an interest in land, along with consequential relief. 235 did not seek a stay of the vesting order pending appeal, and the vesting order was registered on title.

Held, the GORs constituted an interest in land.

A royalty interest can be an interest in land if (1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the resources recovered from the land; and (2) the interest out of which the royalty is carved is itself an interest in land. Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably

recognizes as interests in land. The GORs were carved out of Dianor's interests. The Crown land agreement and the patented land agreement expressly stated that the parties intended the GORs to create an interest in and to run with the land. The motion judge erred in finding that the GORs did not constitute interests in land that ran with the land. He made three legal errors in his analysis. The first error was that he did not examine the parties' intentions from the royalty agreements as a whole, along with the surrounding circumstances. The second error was in holding that in order to qualify as an interest in land, the royalty agreements had to give 235 the right to enter the property and explore and extract minerals. The third error was in holding that the interest out of which the royalty was carved was not an interest in land because it was expressed in the agreements as only a right to share in revenues produced from minerals extracted from the lands.

If the motion judge had jurisdiction to vest out the GORs, then 235 was not entitled to a remedy. But if he lacked that jurisdiction, then remedies might be available to 235, including rectification of the register under ss. 159 and 160 of the *Land Titles Act*, R.S.O. 1990, c. L.5. Because the issues of jurisdiction and remedy were not adequately argued by the parties, additional submissions on those issues were required. In particular, further submissions were requested on whether and under what circumstances a Superior Court judge, acting under s. 100 of the *CJA* and s. 243 of the *BIA*, has jurisdiction to extinguish a third party's interest in land using a vesting order.

Bank of Montreal v. Dynex Petroleum Ltd., [2002] 1 S.C.R. 146, [2001] S.C.J. No. 70, 2002 SCC 7, 208 D.L.R. (4th) 155, 281 N.R. 113, J.E. 2002-230, 299 A.R. 1, 19 B.L.R. (3d) 159, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, 111 A.C.W.S. (3d) 156, affg [1999] A.J. No. 1463, 1999 ABCA 363, 182 D.L.R. (4th) 640, [2000] 2 W.W.R. 693, 74 Alta. L.R. (3d) 219, 255 A.R. 116, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, 93 A.C.W.S. (3d) 950, **apld**

1565397 Ontario Inc. (Re), [2009] O.J. No. 2596, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214, 178 A.C.W.S. (3d) 124 (S.C.J.); *Anglo Pacific Group PLC c. Ernst & Young Inc*., [2013] Q.J. No. 9084, 2013 QCCA 1323, 2013EXP-2717, J.E. 2013-1467, [2013] R.J.Q. 1264, EYB 2013-225348; *Bank of Montreal v. Dynex Petroleum Ltd*., [2003] A.J. No. 349, 2003 ABQB 243, 1 C.B.R. (5th) 188, 121 A.C.W.S. (3d) 1160 (Q.B.); *Blue Note Caribou Mines Inc. (Re)*, [2010] N.B.J. No. 252, 2010 NBQB 91, 91 R.P.R. (4th) 86, 356 N.B.R. (2d) 236, 186 A.C.W.S. (3d) 594 [Leave to appeal to N.B.C.A. refused [2010] N.B.J. No. 267, 360 N.B.R. (2d) 67, 69 C.B.R. (5th) 298, 191 A.C.W.S. (3d) 376 (C.A.)]; *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355, [2004] O.J. No. 2744, 242 D.L.R. (4th) 689, 188 O.A.C. 97, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 23 R.P.R. (4th) 64, 132 A.C.W.S. (3d) 215 (C.A.); *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1971] S.C.J. No. 136, 23 D.L.R. (3d) 573, [1972] 2 W.W.R. 108; *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd*., [2011] O.J. No. 2147, 2011 ONCA 377, 201 A.C.W.S. (3d) 691, 282 O.A.C. 106, affg [2009] O.J. No. 3266, 179 A.C.W.S. (3d) 826 (S.C.J.); [page194] *Vandergrift v. Coseka Resources Ltd*., [1989] A.J. No. 255, 67 Alta. L.R. (2d) 17, 95 A.R. 372, 15 A.C.W.S. (3d) 36 (Q.B.), **consd**

Other cases referred to

2022177 Ontario Inc. v. Toronto Hanna Properties Ltd., [2005] O.J. No. 4527, 203 O.A.C. 220, 17 C.B.R. (5th) 12, 37 R.P.R. (4th) 1, 143 A.C.W.S. (3d) 580 (C.A.); *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, [2009] N.B.J. No. 75, 2009 NBCA 17, 342 N.B.R. (2d) 151, 176 A.C.W.S. (3d) 1017, affg [2008] N.B.J. No. 360, 2008 NBQB 310, 337 N.B.R. (2d) 116, 169 A.C.W.S. (3d) 764; *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, [2012] O.J. No. 1530, 2012 ONSC 1868 (S.C.J.); *Canco Oil and Gas Ltd. v. Saskatchewan*, [1991] S.J. No. 22, [1991] 4 W.W.R. 316, 89 Sask. R. 37, 24 A.C.W.S. (3d) 1311 (Q.B.); *Clarkson Co. v. Credit Foncier Franco Canadien*, [1985] S.J. No. 502, 44 Sask. R. 151, 57 C.B.R. (N.S.) 283 (C.A.); *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd*., [2012] O.J. No. 4095, 2012 ONSC 4816, 99 C.B.R. (5th) 120, 222 A.C.W.S. (3d) 938 (S.C.J.); *Friedmann Equity Developments Inc. v. Final Note Ltd*., [2000] 1 S.C.R. 842, [2000] S.C.J. No. 37, 2000 SCC 34, 188 D.L.R. (4th) 269, 255 N.R. 80, J.E. 2000-1445, 134 O.A.C. 280, 7 B.L.R. (3d) 153, 34 R.P.R. (3d) 159, 98 A.C.W.S. (3d) 85; *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, [2017] A.J. No. 666, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, [2017] 12 W.W.R. 261, 70 B.L.R. (5th) 173, 280 A.C.W.S. (3d) 752 [Leave to appeal to S.C.C. filed [2017] S.C.C.A. No. 303]; *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.), revg [2005] O.J. No. 3707 (S.C.J.); *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 3169, 150 A.C.W.S. (3d) 622 (S.C.J.); *Romspen Investment Corp. v. Woods Property Development Inc*., [2011] O.J. No. 5871, 2011 ONCA 817, 286 O.A.C. 189, 85 C.B.R. (5th) 21, 346 D.L.R. (4th) 273, 210 A.C.W.S. (3d) 302, 14 R.P.R. (5th) 1, revg [2011] O.J. No. 1163, 2011 ONSC 3648, 4 R.P.R. (5th) 53, 75 C.B.R. (5th) 109, 200 A.C.W.S. (3d) 118 (S.C.J.); *Sattva Capital Corp. v. Creston Moly Corp*., [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53, 2014EXP-2369, J.E. 2014-1345, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 59 B.C.L.R. (5th) 1, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, 242 A.C.W.S. (3d) 266; *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1994] A.J. No. 669, 1994 ABCA 313, [1995] 1 W.W.R. 316, 23 Alta. L.R. (3d) 193, 157 A.R. 65, 50 A.C.W.S. (3d) 148, affg [1993] A.J. No. 227, [1993] 4 W.W.R. 454, 8 Alta. L.R. (3d) 225, 138 A.R. 321, 39 A.C.W.S. (3d) 373 (Q.B.) [Leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 475]; *Sheard v. Peacock*, [2012] O.J. No. 4304, 2012 ONSC 4237 (S.C.J.); *Trick v. Trick* (2006), 81 O.R. (3d) 241, [2006] O.J. No. 2737, 271 D.L.R. (4th) 700, 213 O.A.C. 105, 54 C.C.P.B. 242, 31 R.F.L. (6th) 237, 149 A.C.W.S. (3d) 843 (C.A.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 388]

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Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 11(2) [as am.], 100, 101 [as am.], 134 [as am.]

Land Titles Act, R.S.O. 1990, c. L.5, ss. 71, 159, 160

Mining Act, R.S.O. 1990, c. M.14

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APPEAL from the order of Newbould J., [2016] O.J. No. 5200, 2016 ONSC 6086 (S.C.J.).

Daniel J. Matson and *Roderick W. Johansen*, for appellant 2350614 Ontario Inc.

Shara N. Roy, for respondent Third Eye Capital Corporation.

Dylan Chochla, for receiver of Dianor Resources Inc., Richter Advisory Group Inc.

Delna Contractor, for monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

The judgment of the court was delivered by
LAUWERS J.A.: —

A. *The Context of the Appeal*

[1] Dianor Resources Inc. was insolvent. At the request of the respondent, Third Eye Capital Corporation ("Third Eye"), as a lender, the court appointed a receiver under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and s. 101 of the *Courts of Justice*

Act, R.S.O. 1990, c. C.43 ("*CJA*"), over the assets, undertakings and property of the debtor, Dianor.[1]

[2] Dianor's main asset was a group of mining claims. The claims with which this appeal is concerned were subject to, among other things, a "gross overriding royalty" ("GOR") in favour of a company from which the appellant, 2350614 Ontario Inc. ("235Co"), had acquired the royalty rights. Notices of the agreements granting the GORs were registered on title to the surface rights and the mining rights. [page196]

[3] The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. It generated two bids, both containing a condition that the GORs be terminated or significantly reduced. Third Eye was the successful bidder.

[4] At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235Co did not oppose the sale but asked that the property vested in Third Eye be subject to the GORs.

[5] The motion judge rejected the appellant's argument that the claims would continue to be subject to the GORs after their transfer to Third Eye. He held, at para. 30, "that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights". The motion judge also held, at para. 38, that ss. 11(2), 100 and 101 of the *CJA* gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including the authority to dispense with the royalty rights. He found the expert's valuation of the royalty rights to be fair and added, at para. 39:

> In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that $250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

[6] The receiver paid this amount to 235Co. The funds are being held in trust pending the outcome of this appeal.

[7] 235Co also brought a cross-motion claiming payment for a debt owing under the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25. The motion judge dismissed the cross-motion.

[8] In this appeal, 235Co seeks to set aside the order of the motion judge and to obtain an order that 235Co's GORs constitute interests in land, along with consequential relief. Third Eye moved for an order quashing 235Co's notice of appeal on the basis that the appeal is moot because 235Co did not seek a stay of the vesting order, which operated to extinguish the GORs when it was registered on title. Furthermore, the variation 235Co seeks to the vesting order is unavailable as the subject transaction was predicated on the elimination of the GORs.

[9] For the reasons that follow, it would be premature to quash the appeal. I would hold that 235Co's GORs constitute an interest in land, but I would require additional submissions on whether the motion judge had jurisdiction to vest out 235Co's GORs in the sale to Third Eye, and if not, whether 235Co is entitled to a remedy. I would dismiss 235Co's appeal with respect to the lien claim. [page197]

B. *Overview of these Reasons*

[10] The preliminary issue raised by Third Eye is whether registration of the vesting order on title had the legal effect of rendering the appeal moot.

[11] The central issue in this case is whether the GORs constitute interests in land within the meaning of the law outlined by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] 1 S.C.R. 146, [2002] S.C.J. No. 70, 2002 SCC 7. I conclude that the GORs are interests in land, contrary to the holding of the motion judge.

[12] This gives rise to the related issue: if the claims are subject to the GORs, did the motion judge have jurisdiction to vest out the GORs?

[13] If the motion judge had jurisdiction to vest out the GORs, then 235Co is not entitled to a remedy. But if he lacked this jurisdiction, then 235Co might be entitled to a remedy, including a possible remedy under the *Land Titles Act*, R.S.O. 1990, c. L.5 ("*LTA*"). Because neither the issue of jurisdiction nor of remedy was adequately argued by the parties in their factums or in oral argument, I would require additional submissions on the issues specified below, especially since they are of considerable importance to the insolvency practice.

[14] Finally, I conclude that 235Co, as the purported owner of the surface rights, is not entitled to a storer's lien in respect of Dianor's surface works. I would dismiss the appeal on the lien claim for the reasons given by the motion judge and will not address it further.

[15] I address, first, Third Eye's motion to quash the appeal and then address the remaining issues in sequence.

C. *The First Issue: Is the Appeal Moot?*

[16] The appellant did not seek a stay of the vesting order pending appeal before the vesting order was registered on title, although it could have done so on a timely basis. Generally, a vesting order cannot be attacked on appeal unless a stay order has been obtained: Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Carswell, 2009), at Part XI, L21.

[17] Third Eye submits that the appeal is moot because the vesting order was "spent" when it was registered, relying in part on *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355, [2004] O.J. No. 2744 (C.A.). In that case, a hotel was placed into receivership. The receiver found a purchaser. [page198] The court approved the sale and granted a vesting order in favour of the purchaser. A few days later, the sole shareholder of the company that operated the hotel discovered information about the identity of the group behind the purchaser. This was relevant because the group had previously entered into agreements to purchase the hotel for more money, but the transactions had failed to close. The sole shareholder sought to set aside the vesting order on the basis that the receiver had failed to disclose the identity of the group behind the purchaser.

[18] This court quashed the appeal in *Regal Constellation* as moot. The conditions attached to the vesting order had been met and the vesting order (and the bank's mortgage) had been registered on title. Justice Blair stated, at para. 39:

> Once a vesting order that has not been stayed is registered on title . . . , it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its

> characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

[19] Where no stay is obtained and the order has been registered, "innocent third parties are entitled to rely upon that change [in title]", as Blair J.A. noted, at para. 45 of *Regal Constellation*. Accordingly, the respondent argues that this appeal is moot.

[20] It cannot be said that the appeal is moot in the particular circumstances of this case. The order is spent, but the remedy for rectification under the *LTA*, left open by Blair J.A. in *Regal Constellation*, may be available to the appellant, provided that several conditions are met: (1) the motion judge had no jurisdiction to vest out the GORs; (2) no innocent third party has relied on the title to its detriment; and (3) the appellant is otherwise entitled to the remedy.

[21] Additional submissions are required. In particular, because I conclude the GORs are interests in land, does the fact that Third Eye had notice of 235Co's claim affect the application of *Regal Constellation*? Third Eye was aware that 235Co was considering an appeal on the day of (but prior to) the closing of the transaction.

[22] Blair J.A.'s observation in *Regal Constellation*, at para. 49, was: "These matters ought not to be determined on the basis that aethe race is to the swiftest'." Was it appropriate for the court-appointed receiver to close the transaction before the expiry of [page199] the appeal period, having been advised that an appeal could be launched, and how does this affect the availability of a remedy?

[23] As Blair J.A. recognized, vesting orders have a dual character as both a court order and a conveyance. Once an order is registered on title, it is effective as a registered instrument and has lost its character as an order. However, in my view, this does not mean that 235Co is necessarily without a remedy, if the GORs constitute interests in land. As Blair J.A. noted in *Regal Constellation*, the vesting order "cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system": at para. 39. If the GORs are interests in land, then the appellant's remedy is to be found under the *LTA.* In these circumstances, it would be premature to quash the appeal. It is to the issue of the nature of the interest that I now turn.

D. *The Second Issue: Are the GORs Interests in Land?*

[24] As noted, I conclude that the GORs are interests in land, contrary to the holding of the motion judge. In this section of the reasons, I first set out the facts relevant to the issue, then discuss the governing legal principles, the motion judge's reasons, and finally, the proper application of the governing principles.

(1) *The facts relevant to the GORs*

[25] The facts relevant to this issue are set out in the motion judge's decision, at paras. 4, 5 and 17-22, which I paraphrase. Dianor's assets consisted mainly of certain mining claims in Ontario and Quebec, both patented and unpatented. The asset sale to Third Eye covered only the Ontario assets.

[26] Dianor obtained the mining rights under a Crown land agreement and a patented land agreement made with 3814793 Ontario Inc., a company controlled by Mr. Leadbetter and his wife Paulette A. Mousseau-Leadbetter. The terms of the Crown land agreement and the patented land agreement, both dated August 25, 2008, govern. The relevant terms in each are virtually identical:

> Once the Optionee [Dianor] becomes the owner of a one hundred percent (100%) undivided interest in the Mining Claims, the Optionors [now 235Co] shall retain a twenty percent (20%) Gross Overriding Royalty ("GOR") for diamonds and a one and a half percent (1.5%) gross overriding royalty (GOR) for all other metals and minerals as calculated in accordance with Schedule "A". The Optionee shall have the right of first refusal to purchase the Optionors' GOR.

[27] The Crown land agreement and the patented land agreement state that the parties intend the GORs to create an interest in and to run with the land: [page200]

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

[28] Notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*, R.S.O. 1990, c. M.14. The parties did not treat the fact that 235Co came to hold the GORs as a live issue.

[29] I turn now to the governing legal principles.

(2) *The governing principles*

[30] The ruling precedent is the decision of the Supreme Court of Canada in *Dynex*, which changed the common law to permit a GOR to achieve status as an interest in land. I begin with a review of the common law before *Dynex* and the challenges it posed to mining in Canada, then consider how the court responded to the commercial realities of the mining industry in *Dynex*.

(a) *The common law before Dynex*

[31] At common law, rights in relation to land are divided into corporeal and incorporeal hereditaments: Bruce H. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014), at p. 76. A corporeal hereditament is an interest in land that is capable of being held in possession, such as a fee simple. An incorporeal hereditament is an interest in land that is non-possessory such as easements, *profits à prendre*, and rent charges. Under each type of incorporeal hereditament, the holder has an interest in land.

[32] Mining rights derived from the owner of the mineral estate are generally treated by the common law as *profits à prendre*, depending on the words of grant. A *profit à prendre* is "a real property interest entitling the holder to acquire some natural resource on land belonging to another": Ziff, at p. 321. More specifically, it is "a right to take something from the land of another. And it must be literally aefrom' the land. The right must be to take . . . part of the land itself, e.g., minerals": Andrew Burrows, ed., *English Private Law*, 3rd ed. (Oxford: Oxford University Press, 2013), at s. 4.96.

[33] To constitute a *profit à prendre*, a party must be granted the right to enter the lands of another and to exploit a natural resource: Ziff, at p. 399. See, also, Alicia K. Quesnel, "Modernizing the Property Laws that Bind Us: Challenging Traditional Property [page201] Law Concepts Unsuited to the Realities of the Oil and Gas Industry" (2003), 41 Alta. L. Rev. 159, at pp. 172-73.

[34] The Supreme Court stated in *Dynex*, at para. 21: "A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre . . . .*" A working interest is a *profit à prendre* and is a right given by the fee owner (often the Crown) to a miner to enter the owner's land and extract minerals or resources from the property. The Court of Appeal of Alberta has stated [*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, [2017] A.J. No. 666, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 98, leave to appeal to S.C.C. filed [2017] S.C.C.A. No. 303]:

> [T]he law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* (the Crown in this case) leases the right to extract these minerals . . . , the right to extract is known as a "working interest" . . . . This particular kind of interest in land is also commonly called a "*profit à prendre*", which allows a party to enter land and take a resource for profit.

[Citations omitted]

[35] At common law prior to *Dynex*, if a party did not have the right to enter and to extract a resource from the land, then it did not have a *profit à prendre* and did not have an interest in land -- regardless of the parties' intentions. Moreover, as the Supreme Court noted in *Dynex*, at para. 8: "At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament." On this logic, the right to a payment or to profits was not itself a *profit à prendre*, and a royalty right contractually carved out of a working interest could not confer an interest in land. Further, as Quesnel observed, once "the subject-matter of the grant [*e.g.*, minerals]" is extracted from the ground and in possession, it becomes personal property. "The right . . . does not aerun' with the subject-matter of the grant after it has been [extracted] and reduced to possession": at p. 173.

[36] To sum up the common law, the right to take resources from another person's land is a *profit à prendre* and is recognized as an interest in land. However, the right to a payment or to profits alone is not a *profit à prendre* and was not historically recognized as an interest in land.

[37] Because an interest in land could not be granted out of an incorporeal hereditament, the common law posed commercial challenges to holders of working interests who needed to secure financing sources to allow for the exploitation of mining rights: Quesnel, at pp. 173-75.

[page202]

(b) *The practice in mining before Dynex*

[38] Working interests are common in the mining, oil and gas industries of Canada and play an important role in the Canadian economy. Resource extraction is a risky business; ventures in resource extraction "require huge amounts of capital but only a small fraction are successful", as the Court of Appeal of Alberta observed in *Bank of Montreal v. Dynex Petroleum Ltd.*, [1999] A.J. No. 1463, 1999 ABCA 363, [2000] 2 W.W.R. 693, at para. 35.

[39] Royalty agreements are one method used in the industry to provide incentives to key participants such as geological surveyors or drilling companies, or to those selling the claims, as in this case. In granting a GOR, the working interest holder grants royalty rights to a third party. These royalty rights are generally granted out of the lessee's working interest. The royalty amount is not tied to the profitability of the mine. Third parties who obtain royalty rights do not own the working interest or *profit à prendre* and have no independent ownership interest in the land.

[40] As the Court of Appeal of Alberta noted in *Dynex*, it became industry practice to draft contracts with the intention of granting royalty holders an interest in land because it was commercially and practically expedient to do so. Key participants often prefer an interest in land rather than a contractual right against the lessee because this allows "investments in a particular piece of property, not in a particular operator or company. . . . The investment return on a royalty results from the success of the property regardless of who owns or is working the property", as the Court of Appeal of Alberta explained in *Dynex* (at para. 36).

[41] Interests in land provide incentives to key participants, mitigate financial risks and provide better financing terms. As the Alberta Court of Appeal observed in *Dynex*, interests in land provide key participants with exposure to a potentially significant upside if the venture is successful. Granting such an interest as a form of compensation reduces the amount of initial capital necessary to fund a new venture. This allows the working interest holder to reduce its own exposure to loss and thereby spreads risk among key participants. Providing lenders with real property interests protects them in the event of an insolvency and leads to better financing terms for borrowers. The court, endorsing an industry commentator's view, explained, at para. 43:

> [T]he law should provide a framework within which unnecessary risks for those who invest or participate in oil and gas operations are removed. The oil and gas industry has created new devices to meet the high risks of the enterprise. Included among the new devices are non-operating interests [page203] which are used to make the sharing of the benefits of mineral ownership definite and certain, minimize taxes, make clear delegation of operating rights and make proper allocation of the risks and rewards of an operation without invoking many objectionable features associated with creating a conventional business association. Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests.

[42] Consequently, for practical and commercial reasons, even before *Dynex*, parties often drafted royalty agreements with the intention of granting the royalty holder an interest in land

rather than a contractual right against the lessee. See Nigel Bankes, "Private Royalty Issues: A Canadian Viewpoint", Private Oil & Gas Royalties, Rocky Mountain Mineral Law Foundation, February 2003, at p. 21.[2]

[43] In *Dynex*, the Supreme Court quite deliberately changed the common law in response to these commercial realities.

(c) *Dynex and changes to the common law*

[44] In a nutshell, as I will explain more fully below, the Supreme Court in *Dynex* changed the common law of Canada for express policy reasons in order to permit a royalty interest, including a GOR, to become an interest in land, consistent with the industry practice. In this section of the reasons, I set out the facts in *Dynex*, and then review the reasons of the Court of Appeal of Alberta and the Supreme Court.

(i) *The facts in Dynex*

[45] Dynex Petroleum had granted an overriding royalty on the net profit interests from its oil and gas properties to Enchant Resources Ltd. and an individual. The royalty interests were recorded on the title to the oil and gas properties by means of caveat. The Bank of Montreal was a secured creditor and wanted to sell the oil and gas properties free of the royalty interests of Enchant Resources and the individual. The motion judge ruled that the bank could sell the properties free of the royalty interests.

(ii) *The ruling of the Court of Appeal of Alberta in Dynex*

[46] The Court of Appeal of Alberta decided that the royalty interest could be an interest in land despite the common law rule that an incorporeal hereditament could not give rise to an interest [page204] in land.[3] The court adopted the dissenting reasons of Laskin J. (as he then was) in *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, [1971] S.C.J. No. 136, at p. 725 S.C.R., who held that a royalty interest could be an interest in land if the parties so intended. The parties' intent could be inferred from a number of factors, which the court addressed at paras. 84 and 85.

[47] I make two observations. First, the Court of Appeal of Alberta took a practical view, approving the approach taken in two lower court decisions: *Canco Oil and Gas Ltd. v. Saskatchewan*, [1991] S.J. No. 22, 89 Sask. R. 37 (Q.B.); and *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] A.J. No. 227, [1993] 4 W.W.R. 454 (Q.B.), affd [1994] A.J. No. 669, 1994 ABCA 313, [1995] 1 W.W.R. 316; leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 475. The court [in *Dynex*] noted, at para. 73:

> The approach of both Matheson J. in *Canco* and Hunt J. in *Scurry-Rainbow* was to *examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words*. Matheson J. stated at p. 47:
>
> > ... The fact that Farmers Mutual did not utilize all of the wording, or type of wording considered by some persons as perhaps essential, can surely not detract from an otherwise clearly manifested intention to create an interest in the lands.

And according to Hunt J. in *Scurry-Rainbow*, *supra*, at p. 474:

> There is in my view an unreality about placing too heavy an emphasis upon fine distinctions as the selection of words such as "in" rather than "on". Notwithstanding the significance that the courts have sometimes attached to these word choices, I doubt that parties who signed leases ... should be taken to have intended to create an interest in land as opposed to a contractual right, as a result of such minuscule differences in language. ... *Rather, it is more appropriate to consider the substance of the transaction (namely, what were the parties actually trying to achieve?) and to regard the words they have used from that perspective*.

(Emphasis added)

[48] Second, the Court of Appeal rooted its reasons in the practices and the exigencies of the oil and gas industry, as outlined above. At para. 29, the court specifically endorsed the view of Hunt J. (as she then was), in *Scurry-Rainbow*, that "too rigid a reliance on common law principles that have developed in vastly different circumstances can lead to results that are out of touch [page205] with the realities of the industry and that deviate from the sorts of solutions needed by the affected parties".

(iii) *The Supreme Court's ruling in Dynex*

[49] The Supreme Court recognized it was required to resolve a controversy that pitted an "ancient common law rule against a common practice in the oil and gas industry", in the words of Major J., at para. 4.

[50] Justice Major summarized the court's decision, at para. 21:

> In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

[51] He adopted the view, at para. 22, that Canadian common law should recognize that a "royalty interest" or an "overriding royalty interest" can be an interest in land if

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
2) the interest, out of which the royalty is carved, is itself an interest in land.

[52] The Supreme Court knew that its ruling changed the common law and cited, at para. 20, the principles for doing so, expressed in *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, [2000] S.C.J. No. 37, 2000 SCC 34, at para. 42: to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency.

[53] Consistent with these principles, Major J. stated, at para. 18: "Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties,

be an interest in land." He noted that the appellant "could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles".

[54] Several points in the decision are of continuing importance. Justice Major noted, at para. 6: "For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land." He added, at para. 19, that he much preferred that court's "compelling insight into the evolution of the law". In my view, this language gives continuing relevance to the approach and the ruling of the Court of Appeal of [page206] Alberta, especially its statement, at para. 73, that a court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words".

[55] I also note that Major J. approved the holding of Laskin J. in dissent in *Saskatchewan Minerals*. He noted, at para. 11, that "[t]he effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests." He described Laskin J.'s holding, at para. 12: "[T]he intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only." This was the Supreme Court's ultimate holding in *Dynex*.

(3) *The motion judge's reasons*

[56] The motion judge stated, at para. 30: "I conclude and find that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights." He determined that neither the expression of the parties' intent to do so, expressed in s. 4.1 of the Crown land agreement and the patented land agreement that the GORs would run with the land, nor the registration of the GORs, was sufficient to convey any interest in land. The motion judge stated, at para. 26:

> In my view, the situation with 235Co. is exactly described by Roberts J. [in *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd*., [2009] O.J. No. 3266, aff'd 2011 ONCA 377, 282 O.A.C. 106.] 235Co. has no right to enter the property to explore and extract diamonds or other minerals. That right belongs to Dianor. The only right 235Co. . . . obtained under the agreements was to share in revenues produced from diamonds or other minerals extracted from the lands. It is clear from the agreements that the royalties were to be a percentage of the value of the diamonds or other metals and minerals. The interest, out of which the royalty is carved, is not [an] interest in land.

[57] The motion judge also referred, at para. 24, to the decision of the Court of Appeal of Quebec in *Anglo Pacific Group PLC c. Ernst & Young Inc.*, [2013] Q.J. No. 9084, 2013 QCCA 1323, [2013] R.J.Q. 1264.

(4) *The principles applied*

[58] In this section of the reasons, I apply the *Dynex* test and then consider the errors made by the motion judge in his reasoning. It is important to note that the legal documents on which

the appellant relies were prepared after *Dynex*. [page207]

(a) *The Dynex test*

[59] I repeat for convenience the test prescribed in *Dynex*, at para. 22, for determining whether a royalty right is an interest in land:

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2) the interest, out of which the royalty is carved, is itself an interest in land.

[60] Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably recognizes as interests in land. The GORs were carved out of Dianor's interests. The second element in the *Dynex* test is plainly met in this case.

[61] In my view, the first element is also met. The Crown land agreement and the patented land agreement expressly state that the parties intend the GOR to create an interest in and to run with the land. To repeat for convenience, s. 4.1 of each of the agreements states:

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

[62] Apart from the plain language of the agreements, in considering the surrounding context, the original GOR-holder took steps to register its royalty rights: notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*.

[63] I agree with the Court of Appeal of Alberta in *Dynex*, at para. 73, that the court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances". Doing so in this instance makes plain their mutual intention to constitute the GORs as interests in land. It is express in the agreements (based on the general principles of contractual interpretation), and the royalty rights-holder took care to register the interests on title.

[64] I observe that the same result was reached with less supporting evidence in *Blue Note Mining Inc. v. Fern Trust (Trustee of)*, [2008] N.B.J. No. 360, 2008 NBQB 310, 337 N.B.R. (2d) 116, affd [2009] N.B.J. No. 75, 2009 NBCA 17, 342 N.B.R. (2d) 151. One issue was whether a net profit interest constituted a continuing interest in land that bound the purchaser. The motion judge [page208] determined that the agreement creating the interest did not contain the typical words "found in a conveyance of an interest in land": at para. 34. The only relevant words were "grant" and "in the mine". However, the motion judge held (and the Court of Appeal affirmed) that this was sufficient to grant an interest in land.

[65] The contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention. However, these words were present in the agreements. In my view, the appellant's GORs

constitute interests in land that run with the land and are capable of binding the claims in the hands of a purchaser.

(b) *The motion judge's errors*

[66] The motion judge made three legal errors in his analysis. The first error was that he did not examine the parties' intentions from the royalty agreements as a whole, along with the surrounding circumstances; this was the burden of the previous section of these reasons.

[67] The motion judge's second error was in holding that in order to qualify as an interest in land, the royalty agreements had to give the appellant the right "to enter the property to explore and extract diamonds or other minerals": at para. 26. The third error is in holding that "[t]he interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the agreements as only a right "to share in revenues produced from diamonds or other minerals extracted from the lands". The latter two errors come from a misapprehension of the *Dynex* test. I will address them in turn.

(i) *Dynex does not require a royalty rights-holder to have the right to enter the property to explore and extract resources in order to qualify as an interest in land*

[68] In my view, a serious misapprehension has arisen in the application of *Dynex* in some cases, including some of those relied on by the motion judge.

[69] In *Dynex*, Major J. used some precise language from the trial decision of Virtue J. in *Vandergrift v. Coseka Resources Ltd*., [1989] A.J. No. 255, 67 Alta. L.R. (2d) 17 (Q.B.), at p. 26 Alta. L.R., to specify the test as to when a royalty interest can be an interest in land. However, the Supreme Court did not adopt the [page209] reasoning in *Vandergrift*. There is good reason for this, because *Vandergrift* is inconsistent with *Dynex* in a critical way.

[70] In *Vandergrift*, the court did not conclude that the royalty right ran with the land but instead concluded that it was a purely contractual right, taking precisely the approach to the analysis that both the Court of Appeal of Alberta and the Supreme Court expressly disavowed in *Dynex*. Justice Virtue stated, at p. 28 Alta. L.R.:

> One of the incidents of an interest in land one would expect to find in a royalty agreement intended to create an interest in land would be the right to the royalty holder to enter upon the lands to explore for and extract the minerals. A mere entitlement to an overriding royalty, without more, does not, in my view, carry with it the right to explore for oil and gas.

[71] The purpose of the Supreme Court and the Court of Appeal of Alberta in *Dynex* was to step away from the requirement that a royalty right had to have the incidents of a working interest or a *profit à prendre* in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk.

[72] Moreover, royalty rights-holders have no interest in working the land, nor do holders of the working interest or the *profit à prendre* want their operations to be subject to the working rights of a royalty rights-holder. This is precisely why the Alberta Court noted, at para. 43, that the royalty right was to be "non-operating", adding: "Non-operating interests include royalty

interests, overriding royalty interests, production payments, net profit interests and carried interests."

[73] I agree with Professor Bankes, who observed, at p. 23 of his article: "I do not think that the Court should be taken to have endorsed either the particular approach taken by Justice Virtue or the actual result that he arrived at in that case." This built on his earlier comment criticizing *Vandergrift*, at p. 18, on the basis that it "seems to want to turn the royalty owner's passive interest into a working interest".

[74] I turn now to the motion judge's second error respecting the application of *Dynex*.

(ii) *The language in which the calculation of the royalty right is expressed does not affect its characterization as an interest in land*

[75] As noted, the motion judge held, at para. 26, that "[t] he interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the agreements as only a right "to share in revenues produced from diamonds or other minerals [page210] extracted from the lands". This takes the mistaken approach of the court in *Vandergrift*, which was rejected in *Dynex*.

[76] In my view, the motion judge's approach does not give due weight to the Supreme Court's approval, in *Dynex*, of the reasoning in the dissent of Laskin J. in *Saskatchewan Minerals*. Justice Laskin was a long-time property law professor before his judicial career. It is worth attending to his reasoning in *Saskatchewan Minerals*, where he made these observations, at pp. 724-25 S.C.R.:

> In principle, a mining lessee whose holding is an interest in land in respect of which he has a royalty obligation should be able to grant or submit to an overriding royalty in respect of that interest to take effect as itself an interest in the lessee's holding.
>
> . . . . .
>
> This is not to say that every reservation or grant of a royalty creates an interest in land. The words in which it is couched may show that only a contractual right to money or other benefit is prescribed. However, if the analogy is to rent, then *the fact that the royalty is fixed and calculable as a money payment based on production or as a share of production, or of production and sale, cannot alone be enough to establish it as merely a contractual interest*.

(Emphasis added)

[77] In my view, the fact that the GORs are calculated on production does not defeat the clear intention of the parties that the GORs constitute interests in land.

The cases referred to by the motion judge

[78] I now turn to consider the cases on which the motion judge relied.

St. Andrew Goldfields

[79] The first is *St. Andrew Goldfields* [*St. Andrew Goldfields Ltd. v. Newmont Canada Ltd*., [2011] O.J. No. 2147, 2011 ONCA 377, affg [2009] O.J. No. 3266, 179 A.C.W.S. (3d) 826 (S.C.J.)]. Barrick Gold Corp. sold a mine to Newmont Canada Ltd. Part of the consideration was a net smelter return royalty agreement in Barrick's favour. Newmont was also required to obtain Barrick's consent to transfer any interest in the mine, failing which it would continue to be responsible for the royalty. Newmont later sold the mine to St. Andrew Goldfields Ltd. without first seeking Barrick's consent.

[80] The situation was explained by Rouleau J.A. (C.A.), at para. 4:

> As found by the trial judge, Newmont Canada had misread the provisions in the Barrick royalty agreement, erroneously believing that the royalty was an insignificant flat rate of 0.013% NSR. In fact, it was a sliding scale royalty [page211] obligation that increased substantially as the price of gold increased. Believing that the low 0.013% NSR was an error on Barrick's part, Newmont Canada did not question Barrick on the provision nor did it seek to modify or change the clause.

[81] The agreement between Newmont and St. Andrew Goldfields reflected the flat royalty rate but did not contain the multiplier.

[82] Because Newmont did not get Barrick's approval for the transfer to St. Andrew Goldfields, it continued to remain liable to Barrick under the original agreement. It appeared that Newmont had made a unilateral error in its interpretation of the royalty provision in its agreement with Barrick and omitted the escalator in its agreement with St. Andrew Goldfields. The issue was whether St. Andrew Goldfields was nonetheless required to pay the higher royalty rate because the royalty interest ran with the land.

> [83] The trial judge's ruling was set out at para. 11:
> . . . I hold that the Barrick royalty agreement is clear and unambiguous, that Newmont alone is responsible under the Barrick royalty agreement for payment of the royalties on net smelter returns for gold, silver and other minerals to [Barrick's assignee of the royalty rights] Royal Gold, and that St. Andrew is required to indemnify Newmont up to the flat rate of .013% of the net smelter returns for gold, silver and other minerals.

[84] Newmont argued that St. Andrew Goldfields was obliged to pay the higher royalty rate because the royalty agreement constituted an interest in land. The trial judge followed the *Vandergrift* approach. She observed, at para. 104, that under the Barrick royalty agreement: "[T]he royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out . . . ".

[85] Further, although there was a provision that notice of the agreement could be registered, she held, at para. 105, that this was "not sufficient by itself to demonstrate that the parties intended to create an interest in land". Although the royalty agreement permitted Barrick to register the agreement on title, it had not done so.

[86] However, the case did not turn on whether the royalty agreement created an interest in land that bound St. Andrew Goldfields, nor was that holding appealed. The appeal turned on the legal interpretation of the transactional documents and the effect of Newmont's failure to secure

Barrick's consent to the sale of the mine. In this court, Rouleau J.A. noted, at para. 31:

> Faced with two contractual interpretations, the trial judge carefully considered the facts and the agreements and concluded that, correctly interpreted, the agreements provided that St. Andrew agreed to an indemnity of a royalty [page212] obligation stated to be 0.013% NSR [the lower royalty rate]. This is consistent with the many references in both the Newmont Canada-Holloway and Newmont Canada-Holloway-St. Andrew agreements to the amount of the Barrick royalty obligation being 0.013% NSR.

[87] In the result, St. Andrew Goldfields was obliged to indemnify Newmont for the lower net smelter return, while Newmont was obliged to pay the net smelter return at the higher rate to Royal Gold, Barrick's assignee of the royalty rights. In my view, the decision in *St. Andrew Goldfields* has no application to this appeal.

Anglo Pacific

[88] Nor does the Court of Appeal of Quebec's decision in *Anglo Pacific* assist the respondent. In *Anglo Pacific*, the court looked at the royalty agreement to determine whether it assigned the attributes of ownership to the royalty holder. The agreement did not assign the attributes of ownership but only the right of the royalty holder to receive payment. The court held that, because the royalty agreement did not give the royalty holder the right to enter, enjoy or dispose of the property, the holder did not have a real right in land: at paras. 63, 77-81.

[89] Although the facts in *Anglo Pacific* are similar to this case, the court did not apply the common law framework from *Dynex* but relied exclusively on the civil law of Quebec. A description of the civil law concepts applied by the court shows they have no application in common law jurisdictions.

[90] The Quebec Court held that to have a "real right" in land pursuant to the *Civil Code of Quebec*, one must have ownership: at paras. 53, 60. Ownership includes corporeal or incorporeal property: at para. 53. Thus, the owner of a mining claim is the owner of a "real right" in land: at paras. 70-71. However, in order to have ownership, one must have the attributes of ownership: at para. 53. The attributes of ownership under civil law include the right of use (*usus*), of enjoyment (*fructus*), of free disposition (*abusus*), and "the ability to make one's own that which the property generates and that which is attached to it" (*accessio* -- for example, buildings on the land or deposits in the land): at paras. 43, 53-54.

[91] The owner of land can "dismember" his or her ownership by dividing the attributes of ownership with one or more third parties, who then acquire an interest in land: at paras. 54-55. For example, the holder may have the right to temporarily use and enjoy the property that belongs to another (*usufruct*). This transmits to the holder of the dismemberment the right of use (*usus*) and enjoyment (*fructus*) for a certain time, and the true [page213] owner retains the right to dispose of the land (*abusus*) and the *accessio*: at para. 55.

[92] The party to whom a dismemberment is granted will have a real right in land if he or she has the right to share in one of the above-noted attributes of ownership. Without such a right, the party has no "direct right on property": at para. 60. For example, the state "dismembers" its

ownership rights in favour of a party when it assigns a mining claim to that party: at para. 70. The holder of a mining claim is the holder of a dismemberment and has a real right in land.

[93] Although there are similarities between the civil law concepts and the *profit à prendre* under the common law, there are differences. Most importantly, the Court of Appeal of Quebec did not apply the common law framework from *Dynex* but relied exclusively on the civil law. *Dynex* is the governing law in Ontario; the decision of the Court of Appeal of Quebec in *Anglo Pacific* has no bearing on this case.

Conclusion on the issue of whether the GORs constitute interests in land

[94] I began my analysis by noting that the central issue in this case is whether the GORs constitute interests in land within the meaning of the law outlined by the Supreme Court in *Dynex*. For the reasons set out above, I conclude that the GORs are interests in land, contrary to the holding of the motion judge. In my view, the deferential approach called for by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53 has no application to this case in view of the motion judge's legal errors.

[95] While the motion judge did purport to adjudicate the appellant's GOR claims, his erroneous determination that it was not an interest in land raises potential issues respecting the vesting order.

E. *The Third Issue: Did the Motion Judge have Jursidiction to Issue a Vesting Order that Extinguished the Gors?*

[96] In this section of the reasons, I consider, first, the motion judge's reasons in order to set the context and then describe the positions of the parties regarding his jurisdiction to vest out the GORs. I next turn to the governing principles and then to their application.

[97] The context for this issue is set by the conclusions I reached on the earlier issue of mootness. Because the GORs are interests in land, the appeal is not necessarily moot, particularly if the Superior Court did not have jurisdiction to issue the vesting [page214] order in these circumstances. The determination of this issue in 235Co's favour could entitle it to a remedy.

(1) *The motion judge's decision*

[98] The motion judge held, at para. 37, that,

> In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[99] He added, at para. 38: "I conclude that I do have the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just." Pursuant to the order, the receiver allocated $400,000 in cash as compensation for the extinguishment of Ontario royalties in favour of the appellant and Essar Steel Algoma Inc. The appellant was paid $250,000 for its GORs, and the court-appointed monitor of Essar was paid $150,000 for its royalty. The motion

judge made the payment to 235Co a term of the order, explaining, at para. 39:

> In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that $250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

[100] The motion judge expressed his opinion, at para. 40, that the court would have been authorized to make the vesting order disposing of the royalty rights of 235Co "whether the royalty rights were or were not an interest in land".

(2) *The positions of the parties*

[101] The appellant argued that if the royalty rights run with the land, then the motion judge had no authority under s. 243 of the *BIA* or s. 100 of the *CJA* to vest the mining claims in Third Eye pursuant to the sale process without leaving the royalty rights in place.

[102] The respondent supported the motion judge's view that he had authority to make the vesting order, free of the royalty rights.

(3) *The issue*

[103] The issue is whether the motion judge, in the circumstances of this case -- acting under s. 100 of the *CJA* and s. 243 of the *BIA*, its inherent jurisdiction, or the wording of the vesting order -- had jurisdiction to approve a sale that vested out 235Co's proprietary interest. [page215]

(a) *The context*

[104] The motion judge noted that the sale of the mining claims was carried out in accordance with a court-approved bid process under ss. 100 and 101 of the *CJA* and s. 243 of the *BIA*, working together. It is important to reiterate that the motion judge was not acting under s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA*. Neither the provisions of the *CCAA* nor the proposal provisions of the *BIA* apply to this case.

[105] Sections 100 and 101 of the *CJA* provide:

> 100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.
>
> 101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

[106] Section 243(1) of the *BIA* provides:

> 243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

[107] These provisions do not expressly authorize a court to take real property out of the hands of a third party.

(b) *Does the Superior Court's inherent jurisdiction give jurisdiction to grant a vesting order in these circumstances?*

[108] The Superior Court of Justice has all of the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario, as provided in s. 11(2) of the *CJA*. This power includes making vesting orders: *CJA*, at s. 100. However, this court has interpreted these provisions as conferring no greater authority on the Superior Court than was previously recognized at equity. [page216]

[109] The leading text -- Houlden, *Bankruptcy and Insolvency Law of Canada*, at Part XI, L21 -- notes:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process.

(Citations omitted)

[110] The leading judicial authority in Ontario is *Trick v. Trick* (2006), 81 O.R. (3d) 241, [2006] O.J. No. 2737 (C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 388. In that case, Lang J.A. stated, at para. 19, that s. 100 of the *CJA*

> provides a court with jurisdiction to vest property in a person but only if the court also possesses the "authority to order [that the property] be disposed of, encumbered or conveyed". Thus, s. 100 only provides a mechanism to give the applicant the ownership or possession of property to which he or she is *otherwise entitled*; it does *not provide a free standing right to property simply because the court considers that result equitable.*

(Footnote omitted; emphasis added)

[111] At equity and common law, a party must have a valid and independent entitlement to possession or ownership in order for a court to issue a vesting order that extinguishes a third

party's real property interest. Several cases have held that the inherent jurisdiction of the Superior Courts does not confer the power to take real property from third parties simply because the court considers it equitable to other stakeholders. Rather, it gives courts authority to bring about a transfer of title to a party who is otherwise or independently entitled to it. See, also, *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.*, [2005] O.J. No. 4527, 203 O.A.C. 220 (C.A.), at para 49. See, also, *Clarkson Co. v. Credit Foncier Franco Canadien*, [1985] S.J. No. 502, 57 C.B.R. (N.S.) 283 (C.A.), at p. 284 C.B.R.

[112] Although this court has referred obliquely to this issue in several cases, we have never faced it squarely.

(c) *The policy context*

[113] The policy context is well set out by Wilton-Siegel J. in *1565397 Ontario Inc. (Re)*, [2009] O.J. No. 2596, 54 C.B.R. (5th) 262 (S.C.J.). In that case, a numbered company delivered an undertaking at closing to later transfer part of the real property to two parties. The company became insolvent, and a receiver was [page217] appointed. Although the undertakings were not registered on title until after the appointment of the receiver, the relevant parties had actual notice of them. The receiver attempted to sell the property free of the undertakings. The court refused to permit the sale. Justice Wilton-Siegel stated, at para. 60:

> I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment . . . amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors[.]

[114] He added, at para. 67: "I do not think the Court has the authority to order a sale" of the third party's proprietary interests "on the basis proposed" by the receiver. Among the reasons he gave for refusing a vesting order, at para. 68, was that the third party's interest was not subject to the receivership:

> Such interests in the Property reside in the respondents whose property is not subject to the receivership. . . . [The receiver] cannot have taken possession of, or otherwise have any interest in, the respondents' interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of [the debtor]. As such, the [receiver] has no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

[115] See, also, *Blue Note Caribou Mines Inc. (Re)*, [2010] N.B.J. No. 252, 2010 NBQB 91, 356 N.B.R. (2d) 236, leave to appeal to N.B.C.A. refused [2010] N.B.J. No. 267 (C.A.).

(4) *The context for further submissions*

[116] There are several situations in which courts have considered vesting orders that vest out a third party's proprietary interest. I address several, and there may be others.

(a) *The "narrow circumstances" exception*

[117] Several cases have held that in some narrow circumstances, courts may issue a vesting order that extinguishes third party interests. Such circumstances appear to include situations where doing so would provide added certainty, and there is no evidence of competing proprietary interests: *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, [2012] O.J. No. 1530, 2012 ONSC 1868 (S.C.J.), at paras. 5, 18, 20-21.

[118] What are the narrow circumstances in which a Superior Court judge may issue a vesting order under s. 100 of the *CJA* that vests out a third party's proprietary interest, when s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA* do not apply? [page218]

(b) *The equities*

[119] Courts have also considered the "equities" in determining whether to issue a vesting order. Although the term, "equities", is an ambiguous word, the vesting order cases have tended to use it to describe their work in establishing priorities among interests. See, for example, *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (S.C.J.), revd [2006] O.J. No. 1726 (C.A.) and [2006] O.J. No. 3169, 150 A.C.W.S. (3d) 622 (S.C.J.). See, also, *Romspen Investment Corp. v. Woods Property Development Inc*., [2011] O.J. No. 1163, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (S.C.J.), revd [2011] O.J. No. 5871, 2011 ONCA 817, 286 O.A.C. 189; and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012] O.J. No. 4095, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (S.C.J.).

(c) *Have commercial practices expanded the court's jurisdiction?*

[120] Finally, under the rubric of "equitable considerations", s. 100 of the *CJA*, and the Superior Court's inherent jurisdiction, has the permissible reach of the vesting order grown to permit a court to vest out virtually any interests in an asset? See, for example, David Bish and Lee Cassey, "Vesting Orders Part 1: The Origin and Development" (2015), 32(4) Nat. Insol. Rev. 41; and "Vesting Orders Part 2: The Scope of Vesting Orders" (2015), 32(5) Nat. Insol. Rev. 53.

(5) *The question requiring additional argument*

[121] To summarize the discussion, the question to be addressed in additional argument before this panel is: Whether and under what circumstances and limitations (including the ones enumerated above) a Superior Court judge has jurisdiction to extinguish a third party's interest in land using a vesting order, under s. 100 of the *CJA* and s. 243 of the *BIA*, where s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA* do not apply?

[122] I turn now to the issue of remedy.

F. *The Fourth Issue: Remedy*

[123] Regrettably, the parties did not fully address what this court should do by way of remedy if it were to allow the appeal.

[124] The appellant effectively seeks rectification of the register to reflect the GORs. I note that in *Sheard v. Peacock*, [2012] O.J. No. 4304, 2012 ONSC 4237 (S.C.J.), the motion judge treated [page219] the application to set aside the vesting order as an application for rectification.

[125] As noted earlier, even though registration of the vesting order has effected a conveyance of the mining claims, the appellant is not necessarily without a remedy. As Blair J.A. observed in *Regal Constellation*, an aggrieved party like the appellant may seek a remedy under the regime established by the *LTA*.

[126] Because this court has found that 235Co has an interest in land, it could be entitled to rectification of the register under ss. 159 and 160 of the *LTA*, which provide:

> 159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of [the] opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.
> 160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

[127] However, providing a remedy gives rise to several difficulties. First, there is no information before the court on whether an innocent third party acquired an interest from Third Eye after the vesting order was registered, which would debar a remedy.

[128] Second, in its notice of appeal, the appellant requested this court to vary the vesting order to remove the appellant's interest from the schedule of claims to be discharged from title of the property and to add its interests to the schedule of permitted encumbrances. The respondent submitted that this is not possible because its accepted offer to purchase was "predicated on the elimination of the GORs". The respondent argued that "[i]t was not open to the Motions Judge to impose additional terms on the Transaction that were not agreed to by the parties, and 235Co cannot ask for those terms to be imposed on appeal". I do not know whether the respondent would want to press this position in an argument about the appropriate remedy.

[129] In the circumstances, it would not be prudent to exercise authority under s. 134 of the *CJA* and ss. 159 and 160 of the *LTA* to rectify title without hearing argument from the parties on whether additional evidence is necessary, how it should be received and on any other remedial issues arising from this decision. [page220]

G. *Disposition*

[130] The next phase of the appeal, assuming the parties choose to pursue it, requires case management to coordinate written submissions on the issues raised in these reasons and to

consider the necessity of oral submissions, and I would refer the parties to the registrar to make the necessary arrangements.

Order accordingly.

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1 The motion judge was not acting under s. 65.13(7) of the *BIA*; s. 36(6) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"); ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA*.

2 Online: http:// la.ucalgary.ca/files/law/rmli-royalty-paper-feb-2003-final.pdf.

3 The Court of Appeal of Alberta did not decide the factual issue but sent it to trial, an outcome affirmed by the Supreme Court. The trial judge held that the documents in *Dynex* did not grant any interest in the land: [2003] A.J. No. 349, 2003 ABQB 243, 1 C.B.R (5th) 188.

TAB 7

Court of Queen's Bench of Alberta

Citation: Manitok Energy Inc (Re), 2018 ABQB 488

Date: 20180622
Docket: B201 332583, B201 332610, B201 335351
Registry: Calgary

In the Matter of the Bankruptcy and Insolvency of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Between:

Freehold Royalties Partnership

Applicant

- and -

Alvarez & Marsal Canada Inc., in its capacity as Receiver and Manager of Manitok Energy Inc., Raimount Energy Corp. and Corinthian Oil Corp.

Respondents

Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] This is an Application by Freehold Royalties Partnership ("Freehold") for an order declaring, among other things, that:

(a) the Producing Royalty is an interest in land and is the property of Freehold; and

(b) Freehold is entitled to take-in-kind all Oil Volumes associated with a Producing Royalty and retroactive to March 27, 2018.

[2] The Application is opposed by Alvarez & Marsal Canada Inc. ("the Receiver"), in its capacity as receiver and manager of Manitok Energy Inc. ("Manitok") and Stream Asset Financial Manitok LP ("Stream Financial"), which is the beneficial owner of certain facilities related to lands impacted by the Producing Royalty at issue.

Background

[3] Freehold is in the business of acquiring and managing royalties purchased from exploration companies. On June 11, 2015, Freehold and Manitok entered into a Production Volume Acquisition Agreement ("the Acquisition Agreement") and a Production Volume Royalty Agreement ("the Royalty Agreement"), pursuant to which Freehold provided $25,000,000 in cash consideration to Manitok for the grant of a producing royalty ("the Producing Royalty") in certain oil and gas properties ("the Stolberg Royalty Lands", "the Wayne Royalty Lands" and "the Carseland Royalty Lands", and collectively: "the Royalty Lands"). An Interest Clarification and Acknowledgment Agreement ("the Clarification Agreement") was entered into concurrently by Manitok, Freehold, and the National Bank of Canada ("NBC"), wherein NBC confirmed that it did not have a security interest in the Producing Royalty.

[4] The Producing Royalty was paid by Manitok in money through to the end of August, 2017. Freehold served Manitok with a notice to take the Producing Royalty in kind on August 30, 2017, the Producing Royalty was taken in kind by Freehold until the date of Manitok's bankruptcy and the appointment of the Receiver on February 20, 2018. After Manitok's former management advised the Receiver that it doubted whether the Producing Royalty was truly an interest in land, the Receiver undertook a review of the Agreements, and eventually took the position that the Producing Royalty is not an interest in land.

The Agreements

[5] It seems clear from both the Acquisition Agreement and the Royalty Agreement that Freehold and Manitok *intended* the Producing Royalty to be an interest in land. Specifically, Article 1.1(gg) of the Acquisition Agreement provides:

> 1.1(gg) "Producing Royalty" means the non-convertible production volume royalty, being an interest in land, granted by the Vendor to the Purchaser in accordance with clause 2.1, and as set out and described in schedule "B" of the Production Volume Royalty Agreement;

[6] Similarly, Article 1.1(ddd) of the Royalty Agreement provides:

> 1.1(ddd) "Producing Royalty" means the non-convertible production volume royalty, being an interest in land, granted by the Grantor to the Grantee in

> accordance with Clause 2.1 of this Agreement and as set out and described in Schedule "B" of this Agreement;

[7] Schedule "B", attached to and forming part of the Royalty Agreement, states under the heading "Producing Royalty":

> Grant: In accordance with Section 2.1 and this Schedule "B", the Producing Royalty is granted by Grantor to Grantee in respect of all Oil Volumes within, upon or under the Royalty Lands. It is the express intention of the Parties that the Producing Royalty therein granted by Grantor to Grantee constitutes, and is to be construed as, an interest in land and runs with the Royalty Lands and the Parties intend that the Producing Royalty shall be an interest in land...
>
> Amendment: The Producing Royalty shall continue for so long as all or any portion of the Royalty Lands remain subject to the Documents of Title existing on the date hereof, as may be amended, renewed, extended or replaced, provided that if any Documents of Title expire or terminate, the Producing Royalty shall no longer apply to those of the Royalty Lands previously the subject of such expired or terminated Document of Title...
>
> No Objection: Grantee on behalf of itself and its Affiliates, acknowledges and agrees that it is forever estopped from taking any action whatsoever to dispute, challenge, contest or contend in any manner whatsoever that the Producing Royalty is an interest in land in the Royalty Lands.
>
> Calculation of Producing Royalty: Grantee shall receive, on a first-priority basis, the Producing Royalty on production of Oil Volumes from the Royalty Lands...

[8] Though Schedule "B" to the Royalty Agreement states that the Producing Royalty is granted "in respect of all Oil Volumes within, upon or under the Royalty Lands", it is clear from a review of the whole of the Royalty Agreement that the Producing Royalty is actually calculated using a specific volume of oil produced from the Royalty Lands, and, per Article 1.1(fff) of the Royalty Agreement, at the "Royalty Determination Point", which is the "point of measurement of the Oil Volumes produced, marketed and sold from the Royalty Lands, which is located at the point of sale from Grantor to any Third Party". Though it is not expressly stated in the Agreements, Articles 5.5 and 5.7 of the Royalty Agreement appear to assume that Freehold has the right to elect to take the Producing Royalty in kind. Stream Financial argues that it is difficult to envisage how Freehold could elect to do so if the Producing Royalty is only calculated at the point of sale by Manitok to a third party, but the First Receiver's Report makes it clear that Freehold in fact elected to take the Producing Royalty in kind in August, 2017, and did so until Manitok went bankrupt in February 2018.

[9] In short, the contractual scheme of the PVRA consistently defines the Producing Royalty in terms of production, not in terms of oil or minerals *in situ*. The Producing Royalty is an interest in crude oil and condensate that have been recovered from the Royalty Lands and are ready to be sold.

[10] There are other provisions in the Royalty Agreement and the Acquisition Agreement that bear on the issue of whether the Producing Royalty is an interest in land. The grant in Schedule "B" is made "in respect of" oil volumes, rather than "in" the minerals themselves. The Producing Royalty is never expressed as a percentage or share of petroleum substances, but instead it is

expressed as the first 140 barrels per day produced from the Royalty Lands. The Producing Royalty is subject to an Initial Term of 8 years, followed by a wind-down period during which the volumes of the Producing Royalty decrease by 10% per year, relative to the prior year, even if production from the Royalty Lands remains steady or increases. Moreover, the Producing Royalty may originate in oil volumes produced from other areas operated by Manitok: as long as the daily production from the Stolberg Royalty Lands remains at least 140 barrels, there may never be a Producing Royalty from either the Wayne or the Carseland Royalty Lands.

[11] Article 9 of the Royalty Agreement, entitled "Assignments and Dispositions" provides that Manitok is allowed to assign its entire interest in the Royalty Agreement without Freehold's consent, but only upon substantial notice to Freehold, and only if Manitok includes in such notice a substitute property which would provide Freehold with a comparable Producing Royalty.

[12] Article 4 of the Royalty Agreement provides that Freehold is authorized to enter the Royalty Lands to remedy any default in Manitok's compliance with the Committed Capital Program, and would then entitle itself to Manitok's "working interest share of production of Oil Volumes from the Royalty Lands until the proceeds from the sale of that production equals three hundred percent (300%) of all amounts expended by Freehold in the conduct of such operations.

Analysis

[13] There are no facts in dispute, and the parties agree that the test for determining whether a royalty is an interest in land was set out by Major J. in ***Bank of Montreal v Dynex Petroleum Ltd.***, 2002 SCC 7, at para.22, citing the decision of Virtue J. in ***Vandergrift v. Coseka Resources Ltd.*** (1989), 67 Alta LR (2d) 193 (QB):

> Virtue J. in *Vandergrift*, supra, at p. 26, succinctly stated:
>
> ...it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

[14] The Supreme Court in ***Dynex*** settled the question of whether a royalty interest *can be* an interest in land. The Respondents argue that, notwithstanding some clear contractual language to the contrary, the Producing Royalty is not an interest in land because a number of the essential components of an interest in land do not arise out of the Royalty Agreement. Specifically, they contend that the Producing Royalty is not an interest in land because:

(a) the Producing Royalty is in respect of produced substances, regardless of whether Freehold takes the royalty in cash or in kind;

(b) the Producing Royalty represents a fixed quantity of production per day, not a share of in situ minerals or production;

(c) the Producing Royalty continually decreases after 8 years, eventually becoming a negligible amount;

(d) the Producing Royalty is not tied to any specific area of land;

(e) the obligations respecting the Producing Royalty cannot be imposed upon Manitok's assignee by Freehold in the event of a disposition of the lands relating to the Producing Royalty; and

(f) Freehold has no right of entry into the lands other than upon a default by Manitok in performing certain short-term capital commitment covenants.

[15] Having regard to these arguments, it is helpful to consider both the approach to the interpretation of royalty agreements described in ***Dynex***, and the nature of the royalty agreements at issue in that case.

[16] In ***Dynex***, both the Court of Appeal and the Supreme Court of Canada made it clear that practicalities and industry custom mandate a flexible approach to the application of some common law concepts, in particular the concept of an interest in land, to the royalty agreements that have developed in the oil and gas industry in Alberta. The Court of Appeal cited with approval the decision of Hunt J., as she then was, in ***Scurry-Rainbow Oil Ltd. v Galloway Estate***, (1993) 8 Alta LR 3d 225 (QB). At para.50, Hunt J. wrote:

> ...[T]oo heavy a reliance upon traditional legal concepts, crafted for another time and other circumstances, can prove unhelpful in resolving contemporary problems. The law must be shaped and adapted to meet modern challenges, such as those presented by the petroleum industry. In contemplating the essential nature of the oil and gas lease transaction, it seems to me sensible to think about what the parties are actually doing.

[17] The Court of Appeal in ***Dynex*** wrote, at paras.43 – 45:

> Eugene Kuntz, in a discussion paper entitled "Classifying Non-Operating Interests in Oil and Gas," (Calgary: Canadian Institute of Resources Law, 1988), argued that the law should provide a framework within which unnecessary risks for those who invest or participate in oil and gas operations are removed. The oil and gas industry has created new devices to meet the high risks of the enterprise. Included among the new devices are non-operating interests which are used to make the sharing of the benefits of mineral ownership definite and certain, minimize taxes, make clear delegation of operating rights and make proper allocation of the risks and rewards of an operation without invoking many objectionable features associated with creating a conventional business association. Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests.
>
> He pointed out that it is of great importance to the party acquiring a non-operating interest that such an interest be classified as a property interest and not a mere contractual right in order to guard against the consequences of possible financial difficulties of the granting party and to protect the interests against the rights of third persons generally.

> There are other practical arguments that can be marshalled to support overriding royalties as interests in land. First, certainty and stability are desirable qualities and the industry expects or assumes that overriding royalties can be interests in land. It should be noted, however, that for some time this assumption has been known to be somewhat tenuous - the body of literature on royalties as interests in land attests to this fact. Second, one consequence of the ruling below, that overriding royalties are not interests in land, is that some oil and gas companies with leases encumbered by overriding royalties may be worth more to a bank holding those leases as security if the company is petitioned into bankruptcy and the leases sold free of the ORRs, than if allowed to continue operating and paying the ORRs. This could create problems if it leads to otherwise unnecessary bankruptcies. Third, as Ellis argued, supra, at p. 4, royalties and overriding royalties as real property interests protect owners and purchasers against double conveyancing, innocent or otherwise.

[18] Major J. wrote, in ***Dynex*** (SCC), at paras. 17-18

> The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.
>
> The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

[19] The royalty at issue in ***Dynex*** was a Gross Overriding Royalty, described in the decision of the Court of Appeal, at para.31: "An overriding royalty or a gross overriding royalty is an unencumbered share or fractional interest in the gross production granted to a third party...". The royalty in question in ***Dynex*** does not appear to have been framed as a share of minerals *in situ*. In any event, the issue of whether the royalty grants a share of minerals *in situ* or a share of production does not appear to be determinative, because the Court of Appeal noted, at para.32, that even a "net profits interest" could be an interest in land, if the parties made the intention to make it so sufficiently clear:

> A net profits interest includes, at least, the right to receive a portion of the proceeds from the sale of petroleum and natural gas. Whether it is an interest in land was determined by Martland J. in *St Lawrence Petroleum v Bailey Selburn Oil & Gas Ltd.*, [1963] SCR 482 (SCC), by ascertaining the intention of the parties pursuant to two farmout agreements. He looked at both the wording and the context of the agreements in issue. They assigned "such an undivided interest in the petroleum and natural gas and related hydrocarbons... as well" after

> production was obtained and sold. In the opinion of Martland J., the interest was only an equitable interest because the interest was held in trust for the purposes of the agreement and the beneficiaries would receive the money equivalent or their share of the proceeds of production. He could not find that the parties contemplated or agreed to convey an interest in the lands capable of assignment or registration. He agreed with the trial judge at p.490, "Had it been intended to convey such an interest it would have been a very simple thing to do in plain and unmistakable words."
>
> Martland J. left open the possibility that a net profits agreement can convey an interest in land where the parties intended to convey such an interest. Here, unlike *St. Lawrence Petroleum v. Bailey Selburn Oil & Gas Ltd.*, the agreement stated that the interest was an interest in land. But in each particular case, the interest conveyed is to be found by interpreting the agreement as a whole and within its context. A net profits interest, in many cases, can function in much the same manner as a royalty or other non-working interests where the interest is a right to a share of production as opposed to a right to a certain amount of money out of a certain described portion of production. The analysis which follows discusses royalties and overriding royalties, but where the intention of the parties to the net profits agreement was to create an interest analogous to that of a royalty or overriding royalty, we are of the opinion that the result should be the same.

[20] ***Dynex*** was recently applied in Ontario in ***Third Eye Capital Corporation v Resources Dianor Inc.***, 2016 ONCA 253. The different approaches taken in that case by the trial judge and the Ontario Court of Appeal are instructive. Dianor was insolvent, and its main asset was a group of mining claims subject to gross overriding royalties ("GORs"), which were registered on title to the surface and mining rights. The Receiver made an application for an order approving a bid process for the sale of Dianor's mining claims. There were two bids, both containing provisions that the GORs be terminated or significantly reduced. The trial judge, in a decision reported at 2016 ONSC 6086, noted that the Crown Land Agreement and the Patented Land Agreement both stated that the parties had intended the GORs to run with the land, but held, at para.23, "However, this clause does not convey any interest in land but only states the intent of the parties. The issue is whether that intent was carried out in the agreements." The trial judge concluded that despite the clearly expressed intention of the parties, no interest in land was conveyed because (a) the holder of the GOR had no right to enter the property to explore and extract diamonds or other minerals; and (b) the GORs were to be a percentage of the appraised value or revenue actually received from sale of the diamond or other metal and minerals, not a percentage of the minerals themselves.

[21] The Ontario Court of Appeal disagreed. At paras. 66 - 67, Lauwers JA held that the trial judge had erred (a) in failing to examine the parties' intentions from the royalty agreements as a whole, as well as the surrounding circumstances; (b) in holding that the royalty agreements had to give the holder of the GORs the right to enter the property in order to constitute interests in land; and (c) in holding that the interest out of which the royalty was carved was not an interest in land because it was expressed in the Agreements as only a right to share in revenues produced from the diamonds or other minerals extracted from the lands. With respect to a consideration of the surrounding circumstances, Lauwers JA held that, beyond the intention clearly expressed in the agreements themselves, it was significant that the royalty holder had taken steps to register its

royalty rights on title to the lands. He rejected the proposition that a royalty holder must have the right to enter the property to explore and extract resources in order to qualify as an interest in land, pointing out that this proposition had been expressly rejected by the Alberta Court of Appeal and the Supreme Court of Canada in ***Dynex***. He also rejected the proposition that the language in which the calculation of the royalty right is expressed affects its characterization as an interest in land, holding, at para.77, "In my view, the fact that the GORs are calculated on production does not defeat the clear intention of the parties that the GORs constitute interests in land".

[22] I am satisfied, therefore, that a royalty in respect of produced substances, representing a fixed quantity of production per day, may constitute an interest in land if the parties' intention to make it so is sufficiently clear. I am also satisfied that a royalty may constitute an interest in land despite the absence of, or significant limitations on, a right of entry.

[23] The other factors cited by Stream and the Receiver are also not sufficient to defeat what appears to have been the clear intention of Freehold and Manitok to create an interest in land. To say that the obligations respecting the Producing Royalty cannot be imposed upon Manitok's assignee by Freehold in the event of a disposition of the Royalty Lands misunderstands the nature of Article 9 of the Royalty Agreement, which would only allow Manitok to dispose of its *own interest* in the Royalty Lands. Moreover, Article 9 requires Manitok to obtain Freehold's consent to any transfer of the Royalty Lands to any party free and clear of the Producing Royalty, and then only upon providing Freehold with reasonable prior notice and a description of lands of reasonably similar productive capacity offered as a substitute. Nothing in this arrangement is inconsistent with the grant of an interest in land.

[24] That leaves the Respondents' arguments that the fact that the Producing Royalty decreases over time, and includes lands from which Freehold may never receive Oil Volumes, weigh against the determination that the Producing Royalty is an interest in land. With respect to the former: the Royalty Agreement is carefully crafted so as to preserve the existence of the Producing Royalty until such time as the Documents of Title expire, while recognizing the reality of reservoir depletion. This suggests a conscious effort and careful drafting with a view to ensuring that the Producing Royalty meets the requirements for an interest in land. With respect to the latter, I see no reason why the Producing Royalty should be precluded from attaching to Royalty Lands from which Oil Volumes were not produced in the period before Manitok went bankrupt. Manitok was at all times free to elect to produce the 140 barrels from the Stolberg Royalty Lands, the Carseland Royalty Lands, or the Wayne Royalty Lands.

[25] The Acquisition Agreement and Royalty Agreement are sufficiently clear to show that Manitok and Freehold intended to create an interest in land, satisfying the first part of the test set out in ***Dynex***. The Receiver and Stream Financial disagree with respect to the second element of that test. The Receiver says Manitok holds an interest in the Royalty Lands in the form of a *profit a prendre*, and therefore concedes that the interest out of which the royalty is carved is an interest in land. Stream Financial argues that the Producing Royalty is not carved out of an interest in land because it is granted in crude oil and condensate that have already been produced, and are therefore severed from the land. They are, in Stream Financial's submission, personal and not real property. This misconceives the second part of the test in ***Dynex***, which is intended to ensure that the party granting the interest in land is able to do so because it holds an interest in land. Moreover and in any event, a full answer to this proposition has been provided by the

Alberta Court of Appeal in ***Dynex*** and by the Ontario Court of Appeal in ***Dianor***. I agree with the Receiver, and with Freehold, that this part of the test has been met.

Conclusion

[26] Freehold's application for a declaration is granted. The Producing Royalty is an interest in land and is the property of Freehold. It follows that Freehold properly exercised a right to take the Producing Royalty in kind effective August 30, 2017.

[27] I agree with the Receiver that as court officer it will act in accordance with this decision and no mandatory direction to it to do so is required.

[28] I further agree that this is not a case where an award of costs or enhanced costs is warranted. There is no basis to deviate from the established practice in insolvency cases of having the parties bear their own costs.

Heard on the 4th day of May, 2018.
Dated at Calgary, Alberta this 22nd day of June, 2018.

K.M. Horner
J.C.Q.B.A.

Appearances:

Ryan Zahara and Chris Nyberg
Blake Cassels & Graydon LLP
for the Applicant

Howard Gorman and D. Aaron Stephenson
Norton Rose Fulbright Canada LLP
for the Receiver

David M. Price
Stikeman Elliott LLP
For Stream Asset Financial Manitok LP

Sean F. Collins
McCarthy Tetrault LLP
For National Bank of Canada

TAB 8

In the Court of Appeal of Alberta

Citation: NewGrange Energy Inc v Invico Diversified Income Limited Partnership, 2024 ABCA 244

Date: 20240705
Docket: 2401-0122AC
Registry: Calgary

Between:

NewGrange Energy Inc.

Applicant

- and -

Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc.

Respondent

Reasons for Decision of
The Honourable Justice Alice Woolley

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice Alice Woolley

[1] The applicant NewGrange Energy Inc seeks leave to appeal the decision of the chambers judge that its gross overriding royalty (GOR) does not constitute an interest in land, and thus should be removed from title to lands being acquired by the respondent Invico Diversified Income Limited Partnership: *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 [*Chambers Decision*].

[2] The chambers judge also granted the respondent's application for approval of a reverse vesting order with respect to an insolvent company, Free Rein Resources Ltd, through which it would acquire the lands; subject to the determination regarding its GOR, the applicant does not challenge the approval of the reverse vesting order. It also does not challenge the finding of the chambers judge that a second GOR, the shareholders' GOR, was not an interest in land.

[3] To assess whether the NewGrange GOR created an interest in land, the chambers judge applied the test from *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at paras 21-22 [*Dynex*], which says that a GOR can be an interest in land if:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

[4] The chambers judge found that the GOR did not satisfy either branch of the *Dynex* test. The royalty agreement specifically stated, "The Overriding Royalty is intended to be an interest in land in the Royalty Lands and to be a covenant running therewith", and the GOR was registered on title: *Chambers Decision* at paras 46, 51. However, the chambers judge found that the terms of the assignment clause in the royalty agreement revealed the parties' intention for the GOR to exist "separate and apart from the … working interest in the land": *Chambers Decision* at para 82. The assignment clause provided:

> In the absence of an assignment in accordance with the foregoing [the 1993 CAPL Assignment Procedure] or Royalty Owner's written consent, Royalty Payor shall remain liable for the payment of the Overriding Royalty notwithstanding that it may no longer have any interest in the Royalty Lands from which such Petroleum Substances are produced, or that it may not be receiving the production or proceeds of production therefrom: *Chambers Decision* at para 81.

[5] The chambers judge said that this protection would not be necessary if the GOR ran with the land, "because the assignee of Free Rein's interest would take title to the lands subject to NewGrange's GOR". She noted that the clause created the potential for double recovery if the GOR ran with the land and bound the assignee, and also bound Free Rein: *Chambers Decision* at para 83.

[6] The chambers judge distinguished prior decisions in *Manitok Energy Inc (Re)*, 2018 ABQB 488 [*Manitok*] and *Prairiesky Royalty Ltd v Yangarra Resources Ltd*, 2023 ABKB 11 [*Prairiesky*] that did not find assignment provisions to be inconsistent with clear granting language. She noted that in *Manitok* the assignment clause required the assignor to provide the royalty holder a "substitute property producing a comparable royalty", and that in *Prairiesky* the assignment clause "expressly contemplated a subsequent obligation to execute an assignment and novation agreement": *Chambers Decision* at paras 85-86. The language of the assignment clause in the NewGrange GOR did neither of those things.

[7] The chambers judge further found that the NewGrange GOR did not satisfy the second part of the *Dynex* test. She relied in particular on the fact that the royalty agreement was entered into on October 30, 2018, and the petroleum and natural gas leases were not acquired by Free Rein until November 30, 2018, on the closing of the asset purchase agreement signed on November 1, 2018. While she acknowledged the royalty agreement and asset purchase agreement were part of a single transaction, they were not executed contemporaneously. The royalty agreement could not create an interest in land that the grantor did not yet possess:

> Parties to a transaction that purport to convey an interest in land from one to the other must be careful to treat that disposition as a disposition of an interest in land, not as a mere contractual right. That means care with the language across all aspects of the transaction, including care in the timing of execution.
>
> The granting of a royalty on October [30], 2018 in respect of an underlying interest not acquired until November 30, 2018 cannot be a true interest in land.
>
> *Chambers Decision* at paras 104-105.

[8] The applicant seeks leave to appeal the chambers judge's determination that its GOR is not an interest in land.

[9] The applicant relies in part on the inconsistency between the chambers judge's view of the assignment clause in its royalty agreement and the following discussion of the assignment clause that was at issue in *Prairiesky*:

> **I do not find the fact that the payment obligation would remain with the previous working interest-holder bears on the parties' intention as to whether the 8% Royalty constitutes an interest in land**. It simply provides the royalty

> holder with the option to reasonably withhold consent to an assignment that would transfer the payment obligations to the new owner, if, for example, the third party had any concerns about the new owner's ability to pay the 8% Royalty: *Prairiesky* at para 118.
>
> [Emphasis added]

[10] The applicant also submits that the chambers judge committed a reviewable error in relying on the execution and closing dates of the royalty agreement and the asset purchase agreement; the applicant submits that this was a single transaction, and the timing of the execution and closing of the two agreements was not material.

[11] To obtain leave to appeal pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], the applicant must demonstrate "serious and arguable grounds that are of real and significant interest to the parties" considering:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action:

BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd, 2020 ABCA 264 at para 7 [*BMO Nesbitt Burns*]; *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at paras 15-16.

[12] The respondent concedes that the applicant satisfies parts two and four of this test (i.e., the points raised are of significance to the action, and the appeal will not unduly hinder the progress of the action) but argues that the points on appeal identified by the applicant do not have significance to the practice and are not sufficiently meritorious to warrant leave being granted. It relies on the unique and specific circumstances of these agreements, submitting that the decision interpreting them has no broader significance, and that the decision turns on questions of fact and of mixed fact and law that warrant deference from this Court. It points out that the chambers judge identified and applied the correct legal test to determine whether the NewGrange GOR was an interest in land, and submits that she made no reviewable error in her application of that test to the facts before her.

[13] Generally speaking, an appellate court should be cautious in granting leave to appeal in *CCAA* proceedings and must afford "considerable deference" to decisions of a supervising chambers judge. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *BMO Nesbitt Burns* at para 8.

[14] The applicant must show that its appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401 at para 51.

[15] In my view the issues identified by the applicant have sufficient merit to warrant review by this Court. In particular, this Court should review the question of whether an assignment clause which requires the assignor to remain liable for payment of a royalty in certain circumstances rebuts an expressly stated intention that the GOR is an interest in land. It should also review whether a single transaction in which a royalty agreement is executed prior to the execution and closing of the associated asset purchase agreement fails to satisfy the second part of the *Dynex* test.

[16] Further, because of the regular use of GORs in the oil and gas industry, I am satisfied that these questions have sufficient importance to the practice to warrant review by this Court.

[17] The application for leave to appeal is accordingly granted with respect to the question of whether the chambers judge erred in concluding that the NewGrange GOR was not an interest in land. This question encompasses the two substantive issues discussed above.

Application heard on June 27, 2024

Reasons filed at Calgary, Alberta
this 5th day of July, 2024

Woolley J.A.

Appearances:

B.W. Nelson
for the Applicant

R. Gurofsky
for the Respondent

TAB 9

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

[2] The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

> purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)***,** 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

> inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

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[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under
> >
> > > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
> > >
> > > (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh***,** *Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

> insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: “Vesting Orders Part 2”, at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

> A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order or decision" (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

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[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”