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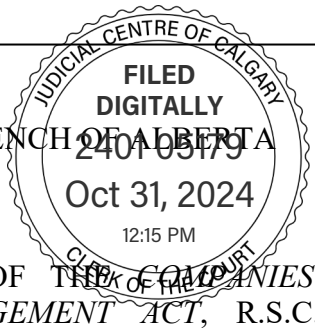

COURT FILE NUMBER	2401-05179
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF ALPHABOW ENERGY LTD.
DOCUMENT	BRIEF OF ARGUMENT OF ALPHABOW ENERGY LTD.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500, 855 – 2nd Street S.W. Calgary, Alberta T2P 4K7 Attention: Keely Cameron/Sarah Aaron Telephone No.: 403-298-3324 Fax No.: 403-265-7219 Client File No.: 88323.6

Commercial List Chambers Application
Scheduled for November 5, 2024
before The Honourable Justice Bourque

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I. INTRODUCTION

1. This Supplemental Brief of Argument is submitted on behalf of the Applicant, AlphaBow Energy Ltd. ("**AlphaBow**"), who seeks a declaration as against Advance Drilling Ltd. ("**Advance**") that certain royalty agreements with Advance did not create an interest in land, but in any event should be vested off the assets on an equitable basis to enable their sale for the benefit of all stakeholders, consistent with the goals of the CCAA of maximizing value to creditors. The authority for vesting off a royalty interest was recognized in *Dianor* Decision cited in the Brief of Argument of AlphaBow filed on October 21, 2024 (the "**Brief**").

2. Terms not otherwise defined herein, shall bear the meaning as defined in the Brief.

3. At its core, this is a dispute between a debtor and a creditor about the true terms of their agreement. It is AlphaBow's position that the Royalty Agreement was intended to replace the GORR Agreement but on substantially similar terms and be modified pursuant to the Settlement Agreement and that any royalty would be vested off once the debt was repaid. In contrast, Advance appears to view the agreements as additive, such that both the debt was to be repaid, and a royalty would be granted in perpetuity over all of AlphaBow's assets—which, if accepted, would provide Advance with an unreasonable windfall.

4. In all, it is clear that there is a lack of certainty as to the parties' intent and inadequate consideration to support the interpretation Advance puts forward.

II. FACTS

5. The facts are set out in the Affidavits of Ben Li and Quan Li filed in support of this application.

6. For convenience, below is a table summarizing the key changes to the purported royalty over time:

	GORR	Royalty Agreement and Settlement Agreement
Year	2018	2021
Royalty Rates	17.5%, later amended to 2.5%	Sliding Scale from 2% to 17.5% (Settlement Agreement at clause 14)
Subject Properties	The Impacted Areas (GORR at Schedule "A")	Not specified (Settlement Agreement at Clause 14.b; Royalty Agreement at Schedule "A")
Termination	Once cumulative fund received equals unpaid amounts (GORR at clause 5.2)	Upon completion of payments per Clause 14, or once AlphaBow otherwise paid the Indebtedness (Settlement Agreement at clause 24)
Mutual Release		Comprehensive mutual release of all claims, allegations, expenses, etc. related in any way to the 2021 Action, to be granted upon full payment of the Indebtedness (Settlement Agreement at clause 26)

III. LAW AND ARGUMENT

A. THE ROYALTY AGREEMENT FAILS FOR UNCERTAINTY

7. It is settled law that an agreement is only enforceable if the parties have agreed on core terms. The operative test asks whether it is clear to the objective reasonable bystander, in light of all the material facts, that the parties (i) intended to contract, and (ii) the essential terms of that contract can be determined with a reasonable degree of certainty.[1] Where the contract's terms are ambiguous, the courts may examine the circumstances surrounding its formation, including the parties' conduct.[2]

8. Here, the Royalty Agreement fails because there was no certainty of at least two essential terms: the agreement's term, and its scope.

9. First, the Royalty Agreement's term remains uncertain. Advance argues—without any clear supporting evidence—that it was intended to run with the land in perpetuity. AlphaBow's

[1] *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited*, 2003 ABCA 221 at para 9.
[2] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at paras 56-58.

understanding was that, because the Royalty Agreement was security for payment of amounts owed to Advance, it would expire when Advance's debt was satisfied or discharged.[3]

10. AlphaBow's understanding is evidenced by the surrounding circumstances and the parties' conduct at the time. In particular, the Royalty Agreement was executed further to the Settlement Agreement, which explicitly stated that AlphaBow's obligation would end when Advance was paid in full.

11. In contrast, Advance's former President, Jiang Fan, swears that:

a. The Royalty Agreement arose because Advance would not settle its $15 million debt claim against AlphaBow and agree to a gradual repayment plan *unless* AlphaBow provided additional consideration by executing the Royalty Agreement.[4]

b. In furtherance of settling Advance's 2021 debt claim, the parties executed the Royalty Agreement on October 28, 2021.

c. About a month later, Advance and AlphaBow executed the Settlement Agreement.

d. The Settlement Agreement released AlphaBow from the debt claim on the basis that it would make the payments as set out therein, and with reference to the Royalty Agreement (the *de facto* repayment plan).

12. Mr. Jiang also swears that, even if AlphaBow made the payments and fully repaid the underlying debt, AlphaBow would never be released from the Royalty Agreement (and its related payments).[5]

13. In support of this interpretation, Advance relies on clause 26 of the Settlement Agreement. It is a very broad mutual release clause, and its plain language does not—in any way—support Advance's contention. In fact, it appears to contemplate releasing AlphaBow from the Royalty Agreement. Clause 26 states:

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[3] Replaced Affidavit of Quan Li, sworn October 29, 2024, at para 16.
[4] Affidavit of Jiang Fan, filed October 28, 2024, at paras 10-12.
[5] Affidavit of Jiang Fan, filed October 28, 2024, at para 16(c).

> Provided AlphaBow is not in default of this Agreement, and upon full payment of the Indebtedness, AlphaBow and Advance […] remise, release and forever discharge each other […] from any and all actions, causes of action, suits, claims, damages and costs, and expenses and all allegations made, at law or in equity, which either ever had, against each other arising out of or in any way related to the amounts claimed through the Action.[6]

14. Further, Advance fails to note that clause 24 of the Settlement Agreement provides that, once AlphaBow resolved the indebtedness, Advance would discontinue the 2021 Action. Clause 24 states:

> Upon AlphaBow completing the payments described in Paragraph 14 of this Agreement, or AlphaBow otherwise having paid the Indebtedness, Advance shall instruct its counsel to file a Discontinuance of Action on a without costs basis.[7]

15. The 2021 Action sought judicial confirmation that the GORR was valid. Read together, clauses 24 and 26 of the Settlement Agreement evidence that the parties intended that the Settlement Agreement would have a similar impact on the Royalty Agreement. Namely, the Royalty Agreement would end once AlphaBow resolved Advance's underlying debt claim.

16. Put another way, Advance's sworn evidence is that, on one hand, the Royalty Agreement was intended to facilitate settlement by securing the agreed repayment plan; yet, on the other hand, Advance also swears that these payments were intended to continue in perpetuity, even after the underlying debt was satisfied.

17. Beyond being irreconcilable with a plain reading of the Settlement Agreement, this position is commercially unreasonable. There is no reasonable business case for AlphaBow to offer such a lopsided benefit in Advance's favour. Doing so would have also been contrary to AlphaBow's objective of ensuring that it preserved its ability to meet its obligations to other creditors.[8]

18. Regardless, even if this Court accepts that Advance's interpretation has remained constant since October 2021, it is evident that the necessary certainty of terms was lacking when the Royalty

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[6] Affidavit of Jiang Fan, filed October 28, 2024, at Exhibit "G", clause 26.
[7] Affidavit of Jiang Fan, filed October 28, 2024, at Exhibit "G", clause 24.
[8] Replaced Affidavit of Quan Li, sworn October 29, 2024, at para 15.

Agreement was executed. This absence of *ad idem* is evidenced not only by the lack of agreement about the period that the GORR was to last, but also about what it was to cover.

19. In particular, when the agreement was executed on October 28, 2021, it lacked a schedule outlining the assets that the agreement would attach to.[9] There were simply no Royalty Lands specified.

20. For its part, AlphaBow understood that the Royalty Agreement would follow the same core terms as the GORR executed in 2018.[10] In particular, AlphaBow understood the Royalty Agreement was a security agreement that applied to three individual areas: Chigwell, Green Glades, and Amisk (the "**Impacted Areas**").[11] These were the same areas impacted by the GORR. Further, as noted at section 6.6(f) of the Master Drilling and Completion Contract, AlphaBow understood that, upon termination of the GORR, the overriding royalty would terminate and revert to AlphaBow.

21. In contrast, Advance argues that the Royalty Agreement was always understood to apply to all of AlphaBow's assets. Documentary evidence and the parties' conduct, however, indicate otherwise. Specifically:

a. Advance's Summary Judgment Application in the 2021 Claim, which gave rise to the Royalty Agreement and Settlement Agreement, made it clear that the GORR was a security agreement, explicitly stating that it was executed "to better secure payments owing by AlphaBow";[12]

b. Mr. Fan's evidence is that he believed Mr. Ben Li "would have been aware that the Royalty Lands included lands beyond the Chigwell, Green Glades, and Amisk lands at least as of October 2022."[13] This was approximately a *year* after the Royalty Agreement was executed;

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[9] Affidavit of Ben Li, filed October 21, 2024, at para 22 [Fifth Ben Li Affidavit]
[10] Questioning on Affidavit of Quan Li, held October 21, 2021, at 28:10-16.
[11] Fifth Ben Li Affidavit at paras 25 and 26.
[12] Affidavit of Jiang Fan, filed October 28, 2024, at Exhibit "C" at para 5.
[13] Affidavit of Jiang Fan, filed October 28, 2024 at para 26.

c. AlphaBow marketed its assets in these proceedings through the SISP, advising bidders of a potential GORR (the Royalty Agreement) attaching to the Impacted Assets;[14] and,

d. AlphaBow first learned of Advance's position that the Royalty Agreement applied to all its assets during these very proceedings based on the schedule provided containing mineral property reports that postdate the agreement.[15]

22. Both parties agree that there was no schedule to the Royalty Agreement and the Settlement Agreement sets out a repayment plan which required a payment of a percentage of productionfrom oil assets, *not all* assets.

23. Advance now swears that a schedule of impacted assets was never attached to the Royalty Agreement because it was impractical to attach such a long list. If the parties had truly encountered that hurdle, they could have simply drafted a clause specifying that the agreement attached to all AlphaBow's assets, yet they chose not to.

24. Advance also swears that AlphaBow understood that all its assets were subject to the Royalty Agreement, as evidenced by the contents of an inaccessible Google Docs list embedded in an email attached as Exhibit "H" to Jiang Fan's Affidavit.[16] Yet there is no record of what that link contained as of October 28, 2021, when the Royalty Agreement was executed. Rather, the emails are dated November 8, 2024—a full two weeks after the Royalty Agreement was executed. As such, the link's contents cannot be reasonably interpreted as being part of the already-executed Royalty Agreement. Moreover, the emails do not reference the Royalty Agreement; rather, the link is merely described as enclosing "the updated Mineral Report".

25. In contrast, the evidence confirms that Mr. Fan understood the Royalty Agreement was expressly (i) intended to replace the GORR—which did not apply to all of AlphaBow's assets; (ii) intended to not have any additional impact on AlphaBow as compared to the GORR; (iii) intended to apply to only the Chigwell and Provost assets; and (iv) was expressly intended not to impact

[14] Fifth Ben Li Affidavit at para 26.
[15] Fifth Ben Li Affidavit at paras 27 and 28.
[16] Affidavit of Jiang Fan, filed October 28, 2024, at Exhibit "H".

AlphaBow's interest in any of its other assets.[17] In fact, in Mr. Fan's May 31, 2021 email to AlphaBow, which he sent in the course of negotiations that led to the Royalty Agreement, he states:

> To protect our interest in case of ABE fail to survive, we hope to sign a royalty agreement with ABE by resigning a property pledge agreement using standard Canadian royalty agreement terms.
>
> Re-signing a property pledge agreement has no extra impact on ABE, the pledge remains 17.5% of the properties. Upon full recovery of the fund, we plan to return this 17.5% to ABE. The benefit of re-signing this agreement is that Advance stands the chance of recovering at least a portion of the money owed. It should not have any negative impact on ABE.
>
> Additionally, when re-signing the pledge agreement, we can reduce the assignment of 17.5% of property pledge to Chigwell and Provost assets only. This way, ABE is free to sell any other assets.
>
> Mr. Deng, let me repeat, re-signing this agreement has no negative impact on ABE, and it can allow ABE to have rights to freely deposit other properties without the pledge. This only allow Advance to recover some of the money owed in case of ABE fails to survive as a going concern, through transfer rights or selling properties. (In case of ABE CCAA or sale, we will not receive any fund).[18] [Emphasis added]

26. Regardless, it is evident that Advance and AlphaBow were not agreed on either the term or the scope of the Royalty Agreement when it was executed. It must therefore fail for uncertainty.

27. Further, it appears from Mr. Fan's own evidence that the intent of the Royalty Agreement was to enhance its protection in the event of an insolvency. Mr. Fan states:

> Accordingly, I understood that if Advance obtained judgment against AlphaBow via the Summary Judgment Application, and proceeded to enforce that judgment against AlphaBow, Advance was likely to recover, at most, only one month's worth of production proceeds from AlphaBow before it went into receivership, after which time, Advance was unlikely to realize any additional funds from the distribution of AlphaBow's assets, given the regulator's priority in insolvency proceedings.[19]

28. At that point, Advance was well aware of AlphaBow's inability to meet its obligations to its creditors and yet, despite this and knowing that it would not be beneficial to place AlphaBow

[17] Replaced Affidavit of Quan Li, sworn October 29, 2024, at Exhibit "G".
[18] Replaced Affidavit of Quan Li, sworn October 29, 2024, at Exhibit "G".
[19] Affidavit of Jiang Fan, filed October 28, 2024, at para 10.

into insolvency, it threatened to do that in order to obtain the Royalty Agreement and Settlement.[20]

29. At the same time, Advance was telling AlphaBow that the Royalty Agreement would "have no extra impact" and that they would *reduce* the number of assets subject to the royalty, as compared to the Impacted assets.[21]

30. Setting aside the issue of unfair dealing (discussed below), it is evident that Advance was seeking to improve its status as a creditor when it pressured AlphaBow to enter into the Royalty Agreement and Settlement Agreement. This is demonstrated by:

a. Advance's threats that it would force AlphaBow to cease operations if it did not sign the agreements.[22] Advance openly admits that it knew AlphaBow had no viable alternative.[23]

b. Advance refusing AlphaBow's requests for meetings to discuss the Royalty Agreement before it was executed.[24]

c. The alleged consideration (being the value of payments contemplated under the Settlement Agreement *plus* interest, *plus* the royalties payable under the Royalty Agreement, attached to all AlphaBow's assets in perpetuity, as argued by Advance) is grossly out of proportion to the approximately $12 million AlphaBow owed Advance at the time.

d. The alleged scope of the Royalty Agreement was very general in nature, in that Advance argues it literally covers *all* AlphaBow's assets.

e. Advance's admission that the Royalty Agreement was made pending Advance's efforts to secure judgment against AlphaBow and to protect it in the case of AlphaBow's insolvency, which it acknowledged would have resulted in it receiving no recovery.[25]

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[20] Affidavit of Jiang Fan, filed October 28, 2024, at para 12; Replaced Affidavit of Quan Li, sworn October 29, 2024, at paras 14 and 17.
[21] Replaced Affidavit of Quan Li, sworn October 29, 2024, at Exhibit "G".
[22] Affidavit of Jiang Fan, filed October 28, 2024, at para 12; Replaced Affidavit of Quan Li, sworn October 29, 2024, at paras 14 and 17.
[23] Affidavit of Jiang Fan, filed October 28, 2024, at paras 8-11.
[24] Questioning on Affidavit of Quan Li, held October 21, 2021, at 40:4-9.
[25] Affidavit of Jiang Fan, filed October 28, 2024, at paras 8-11; Replaced Affidavit of Quan Li, sworn October 29, 2024, at Exhibit "G".

31. Moreover, as evidenced by the impact of the purported GORR on the present sales process, if Advance's proposed interpretation was accepted, it would have the practical effect of completing an end run around the positions of higher-priority creditors and statutory obligations, while also denuding AlphaBow's assets of most of their remaining value.

32. Simply, Advance's proposed interpretation must be rejected because failing to do so would prejudice AlphaBow's other stakeholders and will likely crater these proceedings to the detriment of all parties, including Advance.

B. THE ROYALTY AGREEMENT FAILS FOR WANT OF CONSIDERATION

33. Should this Court accept Advance's interpretation of the Royalty Agreement, the agreement is unenforceable because AlphaBow did not receive good consideration for entering into the Royalty Agreement.

34. An agreement formed under duress is unenforceable.[26] Similarly, consideration given under duress, or consideration given further to coercion, is no consideration at all. Further, in *SanLing Energy Ltd v Liu*, the Alberta Court of Kings Bench recently confirmed that the courts may consider the proportionality of consideration exchanged (in other words, whether the transaction is under value) to infer whether an agreement is improper.[27]

35. Reviewed in isolation, AlphaBow was not provided with consideration for the Royalty Agreement. To the extent that Advance argues that it gave forbearance as consideration, this is no consideration at all because it was accepted under duress and furthered Advance's intent to prime AlphaBow's other priority stakeholders.[28] Faced with the catastrophic financial and regulatory impacts if Advance pursued enforcement steps, AlphaBow had no choice but to execute the Royalty Agreement.[29]

36. In those circumstances, it cannot be reasonably understood that AlphaBow was bargaining as Advance's equal. Similarly, the consideration allegedly provided by Advance was not good

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[26] *Wetaskiwin Animal Clinic Ltd v Hartley*, 2021 ABQB 144 at para 27; *Attila Dogan Construction & Installation Co Inc v AMEC Americas Ltd*, 2014 ABCA 74 at para 18-22.
[27] *SanLing Energy Ltd v Liu*, 2022 ABQB 767 at paras 25, 73, 75, 80, 81 [*SanLing*].
[28] Replaced Affidavit of Quan Li, sworn October 29, 2024, at paras 14 and 15.
[29] Questioning on Affidavit of Quan Li, held October 21, 2021, at 41:13-27.

consideration at all. How can a true GORR over all of AlphaBow's assets, amount to good consideration for a payment plan especially when Advance was also getting a consent judgment and knew it would get nothing if it pursued more aggressive enforcement.

IV. CONCLUSION

37. A finding that the Royalty Agreement was intended to "grant a perpetual interest in land, detached completely from the debt owed by AlphaBow to Advance under the MDCC Agreements and the 2021 Action" is not supported by the evidence and would be commercially unreasonable.

38. Advance's evidence is that they intended to improve their position in the event of AlphaBow's insolvency. They should not be permitted to do so to the detriment of AlphaBow's other stakeholders. In this instance, adopting Advance's position will have the effect of allowing them to erode the value of AlphaBow's estate and rendering its assets unsaleable to the detriment of the environment and priority obligations owed to the Alberta Energy Regulator, Orphan Well Association and municipalities.

39. Rather, the Royalty Agreement should be interpreted as it was intended, being security for payment of indebtedness. The result of which would be that their claim would be vested off of the assets sold and they would participate in any distribution of proceeds to the extent there are funds available after other priority amounts have been paid.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 31st day of October, 2024.

Estimated Time for Argument: 45 minutes

BENNETT JONES LLP

Per: Keely Cameron

Keely Cameron/Sarah Aaron
Counsel for AlphaBow Energy Ltd.

V. TABLE OF AUTHORITIES

1. *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited,* 2003 ABCA 221

2. *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53

3. *Wetaskiwin Animal Clinic Ltd v Hartley,* 2021 ABQB 144

4. *Attila Dogan Construction & Installation Co Inc v AMEC Americas Ltd,* 2014 ABCA 74

5. *SanLing Energy Ltd v Liu,* 2022 ABQB 767