

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

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[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