

Court of King's Bench of Alberta



Citation: Razor Energy Corp., v Companies' Creditors Arrangement Act, 2024 ABKB 534

Date:
Docket: 2401 02680
Registry: Calgary

In the Matter of the Companies Creditors Arrangement Act, RSC 1985, c C-36

Between:

Razor Energy Corp., Razor Holdings GP Corp, Blade Energy Services Corp.

Applicants

- and -

Companies' Creditors Arrangement Act

Respondents

**Reasons for Decision
of the
Honourable Justice M.E. Burns**

[1] Razor is in the business of the development and production of oil and gas.

[2] Alberta (the "Crown") owns and holds legal title to most mines and minerals and natural resources in the province and enters into agreements under the *Mines and Minerals Act*, RSA c M-17 (the "*Act*") that grants rights in respect of minerals, which includes petroleum and oils as provided in Section 1(1)(p)(i) and section 16 of the *Act*.

[3] The *Act* provides that a royalty determined under the *Act* is reserved to the Crown on a mineral recovered pursuant to an agreement. The royalty is prescribed from time to time by the Lieutenant Governor in Council (section 34).

[4] The Alberta Petroleum Marketing Commission ("APMC") was created and appointed to act as the Crown's agent to receive and market crude oil royalty volumes and includes tasks related to crude oil royalty forecasting, deliveries, and settlement of Crown oil royalties under the *Petroleum Marketing Act* and its' regulations.

[5] Razor has entered into approximately 321 “Petroleum and Natural Gas Leases” with the Crown. Each of the agreements are substantially identical other than the location and “leased substance.” As a result, Razor is obligated to deliver to the Crown a royalty share of the leased substance produced by delivering such share to APMC.

[6] The royalty owing to the Crown in respect of the leased substance produced by Razor in January 2024 was not delivered to the APMC by Razor.

[7] On January 30, 2024, Razor commenced insolvency proceedings by filing notices of intention to make proposals to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“*BIA*”), consequently there was a stay of proceedings respecting Razor and its property.

[8] On February 28, 2024, Razor converted its proposal proceedings to proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“*CCAA*”), with an (“initial order”) being granted the same day. Amongst other things, a Monitor was appointed and the stay of proceedings under the proposal continued with respect to preventing parties from commencing or continuing proceedings or exercising any rights or remedies against Razor.

[9] On February 28th, APMC notified the Monitor and Razor Energy of the Crown’s ownership and title to royalty oil, including the January royalty deficiency volumes (estimated to be 934.8 m³ of crude oil). APMC advised Razor Energy it was in a bailment and trust relationship with respect to the Crown’s royalty share of crude oil production, and there was no right to seize and convert the Crown’s property for the use of Razor Energy and its creditors and the royalty oil could not form part of the property of Razor Energy.

[10] On March 1, 2024, the APMC directed Razor Energy (“the Direction”), pursuant to section 12(1) of the *Petroleum Marketing Regulation*, to deliver, in kind, to APMC, as part of the February 2024 royalty deliveries, crude oil of an equal quantity and like quality to the January 2024 royalty deficiency volumes that were not delivered.

[11] The Monitor’s position, as stated in its First Report, was that as the Direction from APMC was directly related to the January royalty amounts, it appeared to the Monitor that the Direction was in breach of the prohibition on the exercise of rights and remedies contained in paragraph 15 of the Initial Order.

[12] APMC, on behalf of the Crown, argues that it has a proprietary right in the oil that it reserves as royalties. This right applies to the monthly oil royalty and the oil it directs to be paid under section 12(1) of the *Act*. APMC argues that the Crown does not become a creditor when a royalty is not paid – it has a proprietary right that it may seek over subsequent oil production. APMC is not seeking the enforcement of a payment, it is seeking to have the Crown’s royalty share delivered to it.

[13] Razor, and its primary creditor, Arena Investors LP, argue that while the Crown may have a proprietary right to the oil in the month the royalties are due, if the oil is not provided, the Crown becomes a creditor with respect to the outstanding royalty deficiency volumes and the usual priorities will apply to the Crown in the context of the bankruptcy. The fact that APMC is directing Razor’s pre-filing obligations be paid in kind rather than cash is still enforcing a missed payment – an outstanding liability to a creditor.

What is the scope of the stay?

[14] The Initial Order, as amended and extended, contains provisions mandating a stay. It provides, in part, that:

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including March 8, 2024, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court (each, a “Proceeding”) shall be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court [...]

[15] Razor asserts that all financial and payment obligations relating to the pre-filing period are stayed under the *CCAA* and failure to pay a pre-filing royalty deficiency volume does not give rise to an enforceable remedy during the applicable stay period. The *CCAA* is clear that it is binding upon the Crown. It is also clear that the *CCAA* applies with respect to the debtor’s assets and does not permit a debtor to take and use that which they do not own.

Is this a deemed trust?

[16] Razor argues that while the *Mines and Minerals Act* uses language of “ownership,” APMC’s claim is akin to or in fact a statutory deemed trust. Section 37(1) of the *CCAA* provides:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[17] Razor argues that the Crown’s royalty share of the mineral produced in a given month is commingled with all the produced minerals which are property of Razor Energy. Razor asserts that section 3(b) of the *Marketing Regulation* implicitly recognizes this and states that “when crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown’s royalty share of that crude oil is deemed to be delivered first”. Presumably, Razor’s position is that the Crown’s oil, deemed to be delivered first, would then engage the protection of s 37(1) of the *CCAA*.

[18] The Crown's position is that this is different because here there is no question that the Crown holds the proprietary interest in all of the crude subject to Razor's interest. Razor's interest is governed by a contract and the provisions of the *Act*. Section 37 applies to "property of a debtor company" being held in trust for Her Majesty. The Crown's royalty share is not and never was the "property of the debtor" which was deemed by statute to be held for the Crown. It was always the property of the Crown. At most, Razor is "a trustee or agent" in respect of the Crown royalty share. This is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.

[19] The Alberta Court of Appeal considered the *Act* and the Crown's interest in the mineral production in the decision of *Excel Energy Inc v Alberta*, 1997 ABCA 24 at paragraphs 6 and 7, where the court noted:

... under Alberta law, the Crown royalty is an *in rem* right. To establish the required statutory obligation, Excel relied upon provisions in the *Mines and Minerals Act*, RSA 1980, c M-15, s 34 provides that "A royalty ... is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement." S. 35(3) provided that the royalty interest was deliverable in kind. S. 36 provides that title remains in Alberta even though the royalty is commingled during the extraction and refining process, and indeed remains until the Alberta interest is "disposed of by or on behalf of the Crown". If then, the producer ever sells the royalty it can only do so as agent for Alberta.

It first must be said that this attempt by Canada to treat an obligation as income is, of course, the creation of a fiction. Nobody but Alberta ever in fact had that royalty or received a penny by way of proceeds from it. Alberta held an *in rem* interest in the hydrocarbons as they came out of the ground, and, when they were sold, the proceeds, under the scheme of the Alberta *Act*, went straight to Alberta. The producer could never be anything more than a trustee or agent.

[20] Consequently, this is not a case such as *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, where a person collects a tax (cash or similar), and the legislation deems a trust over the tax collector's property for the amount of the tax collected.

[21] Further, in *Canada v. Canada North Group Inc.*, 2021 SCC 30, the question was whether a deemed trust created by statute had a priority over priming (administrative) charges in the context of the *CCAA*. The SCC found that the deemed trust did not create a beneficial interest that could be considered a proprietary interest and did not give the Crown a property interest as a common law trust would, reasoning that the trust lacked the quality that allowed a court to refer to a beneficiary as a beneficial owner.

[22] Here, the Court of Appeal recognized the *in rem* ownership interest in the hydrocarbons. Razor's relationship to the Crown's royalty share as a trustee or agent is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share. No deemed trust is necessary or has been created. There is already a proprietary interest. Razor does not hold the oil in a "trust" as one would find in a deemed trust. Razor is holding onto the Crown's oil. The Initial Order applies to creditors and to Razor's property, not the Crown's property.

But does the Crown become a creditor when a royalty is not delivered?

[23] Given the decision in *Excel*, it is clear that the Crown's rights to the royalty share are *in rem*. Razor never owned and was never entitled to own the Crown's royalty share of production. Neither the *BIA* nor the *CCAA* give Razor any ownership interest in the Crown's royalty share.

[24] The Crown argues that Alberta is not acting as a creditor, but the steward of natural resources owned by and for the benefit of all Albertans, which it develops in the public interest, but in the context of oil that was not provided when required, is the Crown then a creditor with respect to the non-delivered amount? And if so, is it the type of "claim" covered by the Initial Order or the statutes?

[25] Arena argues that APMC is fundamentally seeking relief in relation to a pre-filing claim which has been stayed by virtue of the Initial Order. The APMC is utilizing the enforcement mechanisms available to it under provincial legislation to seek recovery of the January 2024 royalty shares.

[26] The reality is that the royalty is a tangible, physical quantity of oil but Razor no longer possesses the January 2024 royalty shares volume because it was likely transferred to third party oil marketers back in the beginning of the year (albeit in violation of section 11 of the *Act*) and the tangible assets are unrecoverable. As a result, the APMC cannot enforce its *in rem* rights with respect to that particular oil.

Can AMPC demand the royalty under s 12?

[27] Section 12(1) of the Petroleum Marketing Regulation provides:

12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance

- (a) in the month in which the direction is given,
- (b) in a particular subsequent month, or
- (c) in instalments in 2 or more particular subsequent months,

whichever is specified in the direction (emphasis added).

[28] Section 12 is a statutory enforcement clause/remedy. Section 15 of the Initial Order is specific in providing that all rights and remedies of a government body, whether judicial or extra-judicial, statutory, or non-statutory, against or in respect of the Razor Entities, or affecting the Business or Property, are stayed.

[29] Whether APMC could exercise its rights under section 13 (seeking a monetary amount) is irrelevant to this determination.

[30] Further, there is no paramountcy issue here. There is no conflict between the Act and *Petroleum Marketing Regulation* and the *CCAA* or *BIA*. The Initial Order was made within the power, authority, and jurisdiction of the Court. The Crown is bound by it.

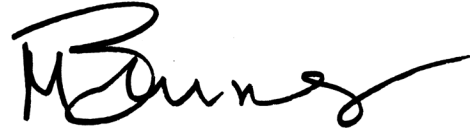
[31] At its crux, even though the oil was wrongfully taken in January, and the Crown has title to any and all subsequent oil, subject to the terms of the leases, and even though the oil was held in a

true trust, not a deemed trust, the act allows, and the Initial Order provides, that all attempts at remedying the taken oil were stayed. Using the power in Section 12 is a remedial step that is stayed.

[32] APMC's application is dismissed.

Heard on the 10th day of April, 2024.

Dated at the City of Edmonton, Alberta this 6th day of September, 2024.



M.E. Burns
J.C.K.B.A.

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