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Specific Performance of a Right of First Refusal in the Context of a Facilities Agreement

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Decision Commented On: *Canlin Resources Partnership v Husky Oil Operations Limited*, 2018 ABQB 24 (CanLII)

Canlin and Husky are successors in interest to a Construction, Ownership and Operation (CO & O) Agreement for the Erith Dehydration and Flow Splitter Facility (Facility Agreement). The agreement was based on the standard form CO & O Agreement (1999) developed by the Petroleum Joint Venture Association (PJVA). The Facility Agreement provides both parties with mutual rights of first refusal (ROFR) in the event that either decides to sell the facility but also provides a number of exceptions. In particular, the Agreement provided that the ROFR would not be triggered in the event of (at para 3) "(a) disposition made by an Owner of all or substantially all ... of its petroleum and natural gas rights in wells producing to the Facility ...". Husky was disposing of its interests in the area (the Ikkuma transaction) but the challenge was that there had been no wells producing into the facility since 2016 when Husky installed a "jumper" pipeline. This pipeline served to by-pass the Erith Facility with the result that gas previously processed at Erith was now processed at the Blackstone Facility. The question therefore was whether Husky could rely on the exception, there being no wells producing into the facility. Husky took the view that the exception was triggered since the wells in question were still associated with the Erith Facility in the sense of being tied-in to the Facility. Justice Romaine concluded that the exception was not triggered and accordingly declared that Canlin could exercise the ROFR; furthermore she concluded that Canlin was entitled to an order of specific performance.

Was the Exception Triggered?

Husky's argument with respect to associated wells was based on an annotation to an earlier version of the PJVA CO & O Agreement which annotation used the language of "associated wells". In addition, there was expert evidence to the effect that the purpose of the exception was to ensure that in case of "white mapping" (sale of all producing assets in the area) the purchaser would not find itself without access to adequate gathering and processing facilities. Justice Romaine rejected Husky's argument. She noted there were no wells dedicated to the Agreement and that even if she were to accept Husky's contention to the effect that "associated wells" means physically tied-in (and she did not accept (at para 36) that this was the term's invariable meaning), it was still (at para 37) "a leap to equate 'producing to' with 'tied into'." Indeed, in this case, the "jumper" pipeline served to ensure that the wells were producing to another facility rather than the Erith facility. To use the commentary in the way proposed by Husky would be (I paraphrase from para 40) to use surrounding circumstances "to overwhelm the words of the

contract … to deviate from the text or create a different contract". The surrounding circumstances (in this case the commentary) should be used as "an interpretive aid, not a method of changing the meaning of the words in the contract." In sum (at para 41):

> The words "wells producing to the Facility", given their ordinary and grammatical sense, mean wells that are being processed by the dehydrator and inlet separation and flow splitter units of the Facility. As no wells are producing to the Facility in that sense, the exception in section 902(d) does not apply to the Ikkuma transaction.

Husky also argued that it was important that a standard form contract such as the PJVA CO & O Agreement should be interpreted consistently (and, at least in the context of appellate review, on the basis of a standard of correctness). These arguments were not persuasive for Justice Romaine since in her view the cases that were said to conflict with Canlin's interpretation of the exception were distinguishable on the facts. Justice Romaine did however acknowledge (at para 17) that "a proper interpretation of provisions of agreements such as the CO&O Agreement that are based on a Model Agreement in wide use in the oil and gas industry in Alberta has precedential value, and that it is untenable for a section to be given an interpretation by one trial judge and another by a different one."

Specific Performance

The governing authorities on the availability of specific performance in cases involving contractual rights in relation to real property are *Semelhago v Paramadevan*, 1996 CanLII 209 (SCC), [1996] 2 SCR 415 and, in Alberta, *1244034 Alberta Ltd v Walton International Group Inc*, 2007 ABCA 372 (CanLII). These cases establish that specific performance will ordinarily not be an available remedy for breach unless the party seeking that relief can demonstrate that the property is unique from its perspective. In this case, Justice Romaine concluded that Canlin had met that test (at para 50):

> Canlin has established that the Facility is unique, in that it provides a critical link between Canlin's wells and infrastructure owned partly or wholly by Canlin, and that it is therefore of critical importance to Canlin. Canlin submits that, without being able to purchase a majority interest in the Facility through the exercise of its ROFR, it will be at the mercy of whoever acts as operator of the Facility. As evidence of this, Canlin has tendered evidence of communications between itself and Husky as operator that indicate that its pleas to recommission the Facility have fallen on deaf ears. While Husky will no longer be the operator of the Facility, there is no reason to suppose that a new operator will be any more observant of Canlin's interest. Canlin's evidence is that it must pay third-party fees for transporting its gas through the Blackstone pipeline, and processing it through the Blackstone Facility.

The fact that Canlin could still get its product to market through other means was not enough to undermine Canlin's claim. Canlin was not purchasing the property for investment purposes and

the property did (at para 52) have "distinct amenities [for Canlin] that cannot be found elsewhere, in that it provides a method for Canlin to access infrastructure that is at least partially owned by it." Damages would be difficult and expensive to assess. Finally, the fact that the parties were also in a joint interest billing dispute was not a basis for denying the remedy on the basis of unclean hands. Neither should relief be denied on the basis that specific performance would cause prejudice to the purchaser (Ikkuma) in the form of a loss of flexibility with respect to processing assets and options. Canlin had (at para 54) "asserted its right to a ROFR early and repeatedly. Ikkuma cannot be said to have been unaware of Canlin's claim before closing the balance of the transaction."

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