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Sometimes it is Completely Irrelevant Whether or not a Royalty Interest Amounts to an Interest in Land

By: Nigel Bankes

Case commented on: *Enerplus Corporation v Harvest Operations Corp*, [2021 ABQB 634 \(CanLII\)](#), appeal dismissed, [2023 ABKB 482 \(CanLII\)](#)

Harvest (70%), Orlen (15%), and Petrus (15%) are the working interest owners of certain oil and gas properties. Under the terms of a farmout agreement (in the form of the 1997 Farmout and Royalty Procedure of the Canadian Association of Petroleum Landmen (CAPL)), back in the chain of title, Enerplus holds a gross overriding royalty interest (GORR) in the 70% interest currently held by Harvest. The terms of the GORR provided that:

If [Harvest] receives funds on account of or as the proceeds of sale of the production of Petroleum Substances comprising the Overriding Royalty, [Harvest] will receive [Enerplus'] share of those funds as trustee for [Enerplus]. [Harvest] must remit to [Enerplus] all funds accruing to [Enerplus] on account of the Overriding Royalty on or before the 25th day of the month next following ... (at para 13 of Master (now Applications Judge) J. T. Prowse's judgment; emphasis in original).

Orlen, acting under the terms of the applicable operating agreement (the 1990 CAPL form of agreement) carried out an independent operation on the lands. Harvest went non-consent to the operation and was therefore in a penalty position with no right to a share of production until the penalty was discharged (see *Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd.*, [1994 ABCA 94 \(CanLII\)](#)).

On those facts, Enerplus sued Harvest, Orlen, and Petrus for unpaid royalties based on the share of production that Harvest would have received had it not gone non-consent. Enerplus applied for summary dismissal.

Enerplus resisted summary dismissal before Master Prowse on the basis that a trial would be required to determine whether or not the GORR was an interest in land. But Master Prowse dismissed that argument on the basis that the proprietary status of the royalty was irrelevant. Harvest did not deny its liability to pay the royalty on the grounds that it was not bound by the GORR created back in the chain of title, but on the basis that under the terms of the GORR there was no obligation to pay since Harvest had not received revenue from the production that accrued to Orlen under the penalty provisions of the independent operations clause. As Master Prowse noted at para 27: "Harvest is a party to the royalty agreement (via its predecessor) but it has only promised to make royalty payments on revenue received."

That was enough for Master Prowse to dismiss the claim against Harvest, but Master Prowse also made some comments that were adverse to Enerplus’s case against Orlen. In particular, he pointed out that Orlen was not a party to the farmout and royalty agreement and that Enerplus could hardly use that agreement to claim a royalty in the 15% interest held by Orlen. Furthermore, he noted that if Enerplus were still a working interest owner and had gone non-consent, Enerplus itself would have no right to production and thus it could hardly be in a better position vis-à-vis its successor in title by virtue of having entered into a GORR to which Orlen was not a party (at paras 21 & 22). That seems pretty convincing to me.

Enerplus also seems to have been worried by that chain of reasoning since it brought an appeal - but against what? Apparently Enerplus sought “to clarify that the reasons given by the Master, including *obiter* comments, are not binding for the balance of this action” and to have the “potentially prejudicial commentary” corrected (2023 KB 482 at paras 1 & 25). However, there is no right of appeal from reasons given by a court, only an appeal from the Judgment or Order granted (at paras 2 & 21 – 23). Accordingly, Justice Kevin Feth concluded that the appeal was “unnecessary” (at para 2) and must be dismissed:

The Master’s Order merely dismissed the claim by Enerplus against Harvest. The Order contains no declarations of rights or rulings engaging the concerns identified by Enerplus. Nothing is said or implied in the Order about the claims against Orlen and Petrus. No declaration is made about the nature or scope of the Enerplus Royalty, the operation of the Enerplus Royalty, whether the royalty is an interest in land, or principles of law. (at para 26)

All of these issues might be raised when Enerplus pursues its claim against the remaining parties, Orlen and Petrus. I anticipate that Enerplus will have an uphill battle: (see *Telstar Resources Ltd v Coseka Resources Limited*, [1980 ABCA 100 \(CanLII\)](#)).

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