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on

Insolvency Law

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September, 2007

PRIORITY OF OPERATOR'S LIENS

A common contractual lien found in the oil and gas industry is the "Operator's Lien". Operator's Liens are explicitly created pursuant to s. 505 of the 1990 CAPL Operating Procedure (the "Operating Procedure"). The "Operator's Lien" created by the Operating Procedure provides that the operator will have "a lien and charge, which is first and prior to any other lien, charge, mortgage or other security interest, with respect to the interest of each Joint-Operator in the joint lands, the wells and equipment thereon, the petroleum substances produced therefrom and any production facilities".

Operator's Liens Charging Personal Property

As was the case in our earlier discussion respecting Processing Liens, where an Operator's Lien charges personal property, the Alberta Personal Property Security Act ("PPSA") will apply and, in order for the Operator's Lien to trump other security interests, it will have to be perfected earlier than those other interests in accordance with the PPSA. This means that the operator will have to attain perfection by registration or by possession. While perfection by registration is a straightforward matter, where a party seeks to establish perfection by possession, it will have to meet the following criteria set out in *Blue Range Resource Corp. (Re)*, [1999] A.J. No. 1665:

1. the party must hold the collateral for the purpose of securing payment; and
2. the possession must be of a nature that would indicate to third parties that the party possessed the property as security for an obligation owed.

While it has not generally been the practice in the industry to register Operator's Lien's at the Alberta Personal Property Registry, it may be a prudent step for all operators to take. Of course, rules surrounding purchase money security interests and serial number goods continue to apply and need to be addressed on a case-by-case basis.

Operator's Liens Charging Real Property

In the case of an Operator's Lien charging real property, a distinction must be drawn between real property subject to the provisions of the *Land Titles Act* (Alberta) (the "LTA") and real property subject to the *Mines and Minerals Act* (Alberta) (the "MMA").

In the case of real property subject to the provisions of the LTA, normal rules of priority will apply and priorities between creditors will be determined by the date of registration of their respective interests in land with the Land Titles Office. In the case of an Operator's Lien, the holder of the Operator's Lien will have to register its interest with the Land Titles Office in order to take priority over creditors that make subsequent registrations (or no registrations at all). The Operator's Lien holder will not be able to trump the interest of any creditor that has made a prior registration with the Land Titles Office.

In the case of real property subject to the provisions of the MMA, the MMA provides that the holder of a "security interest" may register that interest with the Department of Energy. The MMA provides that priority between holders of security interests will then be determined by date of registration of the security interests. The problem with this priority scheme is that the MMA explicitly excludes an "Operator's Lien" as a security interest - thus precluding it from being registered. This problem is compounded by the fact that the MMA does not provide any guidance with respect to the priority between a security interest registered in accordance with the MMA and an Operator's Lien, which cannot be registered. Arguments in support of both outcomes are available and, as yet, it remains to be seen how a court will resolve this issue.

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