

2002 CarswellAlta 23, 2002 ABCA 5, [2002] A.W.L.D. 70, [2002] 3 W.W.R. 215, 96 Alta. L.R. (3d) 1, 299 A.R. 200, 266 W.A.C. 200



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National Bank of Canada v. **Merit Energy** Ltd.

IN THE MATTER OF THE BANKRUPTCY OF **MERIT ENERGY**; LARRY DELF, ON BEHALF OF HIMSELF, AND ALL OTHER MEMBERS OF A CLASS HAVING A CLAIM AGAINST THE DEFENDANTS, **MERIT ENERGY LTD.**, DUNCAN A. CHISHOLM, KENT J. EDINGA, JOHN W. FERGUSON, DAVID D. JOHNSON, JOHN P. KAUMEYER, LAWRENCE F. WALTER, FIRST **ENERGY** CAPITAL CORP., DUNDEE SECURITIES CORPORATION, PETERS & CO. LIMITED, NESBITT BURNS INC., NEWCREST CAPITAL INC., RBC DOMINION SECURITIES INC., BUNTING WARBURG DILLON READ INC., PRICE WATERHOUSE COOPERS LLP (Appellants / Plaintiffs) and **MERIT ENERGY LTD.** (Respondent / Defendant)

Alberta Court of Appeal

Côté, McFadyen, Costigan JJ.A.

Heard: January 7, 2002

Judgment: January 7, 2002

Oral reasons: January 7, 2002

Docket: Calgary Appeal 01-00332

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[Proceedings: affirming \[2001\] 10 W.W.R. 305](#) (Alta. Q.B.)

Counsel: *W. E. McNally*, for Appellants

F. R. Dearlove, C.D. Simard, for Respondent

Subject: Insolvency

Bankruptcy --- Priorities of claims — Unsecured claims — Priority with respect to other unsecured creditors

Underwriters participated in distribution of several flow-through shares of exploration company, marketed on strength of exploration company's tax benefits — Exploration company's accumulated expenses and tax benefits were far below amounts projected — Exploration company became insolvent and entered receivership — Exploration company's shareholders brought several actions against exploration company, exploration company's directors, officers and auditor, alleging misrepresentations in exploration company's prospectus — Underwriters, directors and officers of exploration company were denied status as equitable lien holders — Trustee of exploration company brought application for determination of status of shareholders, directors, owners, auditor and underwriters — Chambers judge found that directors, officers, auditor and underwriters were unsecured creditors of exploration

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company — Chambers judge found that flow-through shareholders were not creditors of exploration company — Chambers judge held that substance of shareholders' claims was for return of invested **equity** — Chambers judge held that substance of underwriters' claim was for relief based on contractual, legal and equitable duties — Chambers judge found that underwriters' claim was not too contingent, as was not too remote or speculative in nature — Chambers judge concluded that underwriters' claim for costs and disbursements incurred defending shareholders' claims was not contingent and was independent grounds for claim — Unsecured creditors appealed — Appeal dismissed — Tests used by chambers judge to characterize were appropriate — As question applied established legal test to novel fact situation, chambers judge was owed considerable deference — Characterization flowed from underlying right not from mechanism for its enforcement or from its non-performance.

APPEAL by shareholders, directors, owners, auditor and underwriters from judgment reported at [2001 ABQB 583](#), [2001 CarswellAlta 913](#), [\[2001\] 10 W.W.R. 305](#), [28 C.B.R. \(4th\) 228](#), [95 Alta. L.R. \(3d\) 166](#) (Alta. Q.B.), regarding application for determination of their status as creditors of company.

Côté J.A. (orally):

1 The very full reasons of the chambers judge are found at [2001 ABQB 583](#), and set out the facts and issues sufficiently.

2 In our view, the tests used by the chambers judge to characterize were the appropriate ones. And reinforcing that view is the applicable standard of review. Since the question is applying an established legal test to a novel fact situation, we owe considerable deference to the chambers judge.

3 Counsel for the appellant stresses the express indemnity covenant here, but in our view, it is ancillary to the underlying right, as found by the chambers judge. Characterization flows from the underlying right, not from the mechanism for its enforcement, nor from its non-performance.

4 The appeal is dismissed.

Appeal dismissed.

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