

# END OF THE BELLATRIX GASEDI SAGA MARKS BEGINNING OF MARKET FALLOUT

Posted on May 5, 2021

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The Alberta Court of Appeal recently released a decision in Bellatrix Exploration Ltd.'s ("**Bellatrix**") proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**"), in which the Court dismissed Bellatrix's appeal of the lower court's decision that certain agreements (the "**Contract**") between Bellatrix and BP Canada Energy Group ULC ("**BP**") constituted an eligible financial contract ("**EFC**"). The Court dismissed the appeal on the grounds that it was moot, as Bellatrix's assets had been sold to a third party and the priority to the funds held back from that transaction had already been decided by another judge in the CCAA proceedings, leaving no funds for any potential distribution to BP.<sup>[1]</sup>

EFCs are a class of financial agreements that represent one of the most substantial carve-outs from the relief available to debtors under the CCAA and the *Bankruptcy and Insolvency Act*. For example, the solvent counterparty to an EFC is not stayed from terminating the agreement in order to net or set off the obligations between the parties. Debtors are also unable to disclaim agreements that constitute EFCs. These protections were implemented in response to the equivalent safe harbour provisions under the U.S. Bankruptcy Code for financial agreements such as derivatives, brokerage agreements, securities loans and repurchase agreements and are intended to provide the necessary certainty for Canada's capital markets as well as maintain Canada's financial and risk management industries' competitiveness.<sup>[2]</sup> Although the definition of what constitutes an EFC is set out in the regulations under the CCAA, the Courts have been clear that there is no "bright-line" definition and that certain agreements may require deeper analysis given the complexity of the derivatives market and its participants.<sup>[3]</sup>

The lower court's decision in *Bellatrix* was the first since recent amendments to the EFC provisions. For further analysis of the EFC regime under the CCAA and BIA please click [here](#).

In *Bellatrix*, the Contract was comprised of a (i) GasEDI Base Contract for Short-Term Sale and Purchase of Natural Gas and Special Provisions for GasEDI Base Contract (collectively, the "**GasEDI Agreement**"), and (ii) several Transaction Confirmations for Immediate Delivery (the "**Transaction Confirmations**"). Pursuant to the GasEDI Agreement, Bellatrix was obliged to deliver natural gas to an agreed delivery point in Alberta, which BP would purchase. Pursuant to the Transaction Confirmations, BP would pay for the natural gas pursuant to a

pricing formula based on posted index prices at certain downstream pricing hubs in the U.S. and Ontario on a monthly basis.

This arrangement effectively allowed Bellatrix to obtain price diversification through BP, who charged Bellatrix a transportation fee for its services. While this was beneficial to Bellatrix at the outset, a rebound in Alberta spot pricing narrowed the pricing gap, making the transportation fee uneconomical. Accordingly, shortly after the commencement of the CCAA proceedings, Bellatrix purported to disclaim the Contract pursuant to s. 32 of the CCAA.

BP opposed the disclaimer, asserting that the Contract was an EFC and the notice of disclaimer was therefore ineffective. The Court agreed with BP, holding that the Contract was an EFC because (i) it served an important financial purpose (in this case, price diversification for Bellatrix), and (ii) the reference to spot pricing constituted a “defined price” or “pricing mechanism” within the meaning of the Court’s reasoning in *Blue Range*. Bellatrix asserted that even if the Contract constituted an EFC, the Court had the discretion to decline to characterize the Contract as an EFC if it would be unfair to do so. The Court rejected this interpretation and reaffirmed that the notion of fairness only enters the analysis at the time the Court is considering if an agreement in question meets the definition of an EFC, emphasizing that exceptions to EFCs are to be narrowly construed and that the Court does not have the authority to rewrite agreements.

Although the lower court in *Bellatrix* mostly reaffirmed the reasoning and principles outlined in the pre-amendment decisions, the particular facts of the case have raised interesting issues with broader implications for the natural gas market and all derivatives counterparties, which will be the subject of a forthcoming more detailed bulletin.

[1] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809, leave to appeal denied: *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85.

[2] See, e.g., *Blue Range Resource Corp., Re*, 2000 ABCA 239 at para 30.

[3] *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153 at para 24.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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