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The rule of capture is not the only no liability rule in the oil and gas business

By Nigel Bankes

Cases Considered:

Hunt Oil Company of Canada Inc v. Galleon Energy Inc, 2010 ABQB 212

This decision confirms that where B intervenes in an ERCB (Energy Resources Conservation Board) application commenced by C and the result of that intervention is that C incurs delays in being able to achieve increased levels of oil or natural gas production, C has no cause of action against B for damages that C suffers as a result of the delay. Furthermore, any effort by C to use the courts to effect a recovery from B may be an abuse of process.

Introduction

The rule of capture remains the default rule governing the oil and gas industry in western Canada. The rule has been modified as a result of legislative intervention but it has not been abolished. The rule is a no liability rule meaning that if B drains oil or gas from under C's lands B incurs no liability. The rule encourages competitive drilling but the rule also encourages a party in B's position to engage in all sorts of efforts to delay attempts by C to get its share of production. In particular, B will have an economic incentive to use a range of tactics to try to block any approvals that C requires from an oil and gas conservation authority (the ERCB in Alberta) to maximize its share of production from a shared pool.

Most applications (even complex applications) to the ERCB are dealt with administratively and expeditiously on the basis of the written material. Applicants must notify affected parties and the Board will only schedule a hearing if a party with standing continues to voice objections to the proposal. A hearing will always entail significant delay for an applicant. In some cases where drainage is an important issue the Board has the authority to make its final order effective as of the date of application. This removes some of the incentive for B to game the system. This is the case, for example, in common order applications where an applicant needs access to facilities (common carrier, common processor) or a market (common purchaser) in order to be able to produce its well (see s.56 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (*OGCA*)). But where the Board lacks the jurisdiction to back date an order to the date of application the incentive to engage in delaying tactics will arise.

The facts

Hunt clearly thought that this was such a case. In this case Hunt and Galleon had competing waterflood operations in the same pool. Hunt wanted to drill additional wells and as a result had to make an application under s.39 of the *OGCA* to amend its scheme approval order. Galleon objected and maintained its objections. As a result the Board called a public hearing before ultimately granting Hunt's application (ERCB Decision 2008 – 130). I blogged the ERCB decision (see here) suggesting that the very idea of competing EOR applications in a single pool should lead us to question whether or not it is now time to introduce (or proclaim existing) compulsory unitization legislation.

But that was not Hunt's take on the matter. Hunt simply pointed to the fact that it made its application in December 2007 and the ERCB did not hand down its decision until December 23, 2008. Hence a decision that "should" have taken only taken a few weeks took a year.

Hunt commenced this action against Galleon seeking damages of $30 million based on the delay occasioned by Galleon's intervention. Hunt alleged abuse of process, negligent misrepresentation and intentional interference with economic relations. Galleon brought a motion to strike on the twin bases that the statement of claim disclosed no cause of action and that it was itself an abuse of the process of the Court.

The decision

Justice Ron Stevens granted the motion to strike on both grounds. The tort of abuse of process should be narrowly confined and there was here neither an improper purpose nor some overt act or threat. The elements of negligent misrepresentation could not be established since there was no "special relationship" between an applicant to the ERCB and an intervener and no duty of care; furthermore, statements of position by a party before the Board contain elements of advocacy and are not to be relied upon as being true. Since Galleon had not acted unlawfully there could be no intentional interference with economic relations.

The statement of claim was an abuse of the process of the Court. Hunt failed to seek review and variance of the ERCB's decision to give Galleon standing (here Justice Stevens alludes to the idea of collateral attack on the decisions of administrative tribunals; see *ERCB v. Sarg Oil Ltd.*, 2002 ABCA 174). Allowing parties to sue each other for damages resulting from ERCB decisions would undermine the Board's authority to control its own process and would serve to make parties more reluctant to participate in the ERCB process. In objecting to Hunt's application Galleon was doing nothing more than exercising the legal rights that it was entitled to exercise.

Commentary

This decision has to be correct. One has only to imagine the situation of a public interest intervenor (should such a party be fortunate enough to gain standing) seeking to address the

values referred to in s.3 of the *Energy Resources Conservation Act* (R.S.A. 2000, c. E-10) to appreciate that the threat of litigation should not be allowed to muzzle legitimate public debate about the merits of a particular energy project – be that a waterflood or a new pipeline project. Here Galleon was protecting a private interest but the message must still be the same; a party is entitled to "use the system" to protect its own interests. Why? Partly because it is too difficult to draw the line after the event between the lawful and unlawful use of the hearing process. And partly also because there must be better and less blunt ways to address the specific issue of concern. As Justice Stevens suggests, the Board does not need the Court to protect it from abuse of the Board's own process (at para. 81) – that is a job for the Board itself. The Board and its predecessor may not always have excelled at this (see Alice Woolley, "Enemies of the State? - The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters" (2008), 26 Journal of Energy and Natural Resources Law 234) but that is not a good enough reason for recognizing what would be effectively be a new tort, the tort of administrative delay causing economic loss – a tort in which the tortfeasor is the intevenor in the administrative decision, not the decision-maker. It may be that the Board has to think of creative ways to control its process where a party (B in the examples above) has an incentive to engage in delaying tactics; and it is possible that the Board may need the legislature's help to do this (e.g. s.56 *OGCA*, above) but better that it be done this way than by way of a new tort. In sum, the delay suffered by an applicant in an administrative proceeding must be *damnum absque injuria* (i.e. loss or damage without legally cognizable harm); it is simply one of the prices that we pay for living in a democracy that values public and private participation in administrative decision making and rule making.

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