November 15, 2011

Is this the end of an "endless repetition of failed litigation" – at least in Alberta?

By Jonnette Watson Hamilton

Cases Considered:

Karaha Bodas Company, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2011 ABCA 291

The Court of Appeal waxes eloquent in this short judgment that considers the latest episode in what the Court characterized (at para 8) as an "endless repetition of failed litigation." The Court of Appeal — composed of Mr. Justice Jean Côté, Madam Justice Elizabeth McFadyen and Mr. Justice Clifton O'Brien — heard an appeal from an April 1, 2010 order by Mr. Justice T.D. Clackson (*Karaha Bodas Company, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2010 ABQB 172), an order that I commented on in "Arbitration for the Quick and Final Resolution of Disputes? Hardly." The subject matter of that order is a procedural morass, the details of which are rather mind-numbing. What is interesting about the latest decision is the Court of Appeal's characterization of Pertamina's continuing world-wide litigation as "vexatious". Will that characterization finally bring a halt to these proceedings, at least in this province?

A brief recounting of the facts is necessary in order to make sense of the Court of Appeal's colourful description of the appeal before them and its underlying motion as "an attempt to have the tail wag an elderly elephant" (para 11). A more complete summary of *Karaha Bodas Company, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* is available in outline form in the five-page Schedule A to Justice Terrance D. Clackson's decision and in my first post about this case, "Moot Case Continues to Wind its Way Through Alberta Courts," commenting on Mr. Justice Robert A. Graesser's decision in *Karaha Bodas Company, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616.

The case began with a December 2000 ICC arbitral award under the UNCITRAL Arbitration Rules. That award found that Pertamina (an oil and gas company owned and controlled by the Republic of Indonesia) and PLN (the Indonesian state electric utility) had breached their agreements with KBC (a Cayman Islands limited liability company owned by American power companies and other investors) to explore and develop certain Indonesian geothermal energy sites. The two state companies were required to pay more than US$261 million to KBC. KBC sought to enforce the award in the United States, Hong Kong, Singapore, and Alberta and, as Justice Clackson put it (at para 2), "the parties have been battling around the world" ever since.

Master Breitkreuz granted summary judgment for the recognition and enforcement of the arbitral award in Alberta in December 2004. Pertamina appealed that judgment but the appeal lay dormant. By December 2006, Pertamina and PLN, who had tried in Switzerland (the proper

jurisdiction) to upset the arbitral award on the basis of fraud, had exhausted all their avenues of appeal against enforcement of the award in the United States and the award was paid in full by money seized from U.S. bank accounts.

After the arbitral award was paid in full, KBC applied to have the appeal of Master Breitkreuz's 2004 judgment by Pertamina and PLN dismissed on the basis of moot-ness. However, Pertamina and PLN wanted to proceed with that appeal and posted approximately $70,000 as security for costs. In January 2007, then Chief Justice Allan Wachowich directed that the issue of whether Pertamina's appeal was moot should be heard first, before the merits of the case were argued. The resulting October 2007 decision by Justice Graesser made it clear that all issues between the parties were moot except for the issue of costs in the proceedings in Alberta. Nevertheless, he decided the costs issue was significant and that the appeal should proceed because success by Pertamina and PLN on the appeal would reverse the orders for costs made in the courts below.

KBC then filed a discontinuance of action and a satisfaction piece in Alberta in July 2008, undoubtedly hoping to put an end to things by giving up their claim for costs here. However, Justice Clackson noted that a discontinuance after judgment is inappropriate and the unilateral filing of a satisfaction piece could not directly and automatically undo the order of Justice Graesser allowing Pertamina and PLN to proceed with their appeal. Nevertheless, KBC's abandonment of its claims for costs removed the only live issue between the parties. Justice Clackson therefore declined to exercise his discretion to allow the appeal by Pertamina and PLN to proceed.

As the Court of Appeal states (at para 1) in its October 2011 decision dismissing the appeal from Justice Clackson's order, "[t]he straightforward issue in this appeal is whether the appellants are entitled to continue with their appeal of the order made by Master Breitkreuz of December 8, 2004." They decided, of course, that Pertamina and PLN were not so entitled: KBC's abandonment of its claim for costs removed the only live issue between the parties. While a satisfaction piece may not have been exactly the right document, a motion by KBC to abandon its costs in Alberta would have been "irresistible": "a rule that a partly-paid creditor cannot abandon the rest of the debt and file a satisfaction piece or some other abandonment, would be mischievous" (para 5).

That took care of the subject-matter of the appeal in a short six paragraphs. The Court of Appeal continued on, however. Noting that Pertamina and PLN's whole point was to pursue an appeal from Master Breitkreuz's 2004 order allowing enforcement of the arbitral award, the court also noted that many courts around the world had already refused to upset the arbitral award. It is Pertamina and PLN's attempts to pursue the alleged fraud issue and upset the arbitral award in Alberta and elsewhere that are what the Court of Appeal characterized (at para 8) as an "endless repetition of failed litigation." They went on (at para 9) in even stronger language:

> The word "relitigation" is quite inadequate to describe what has gone on for over 11 years. Vexatious proceedings like those are usually only encountered among recreational litigants.

"Recreational litigants" is a term used to describe one type of self-represented litigants who do not want to be represented by lawyers. Madame Justice Gloria Epstein of the Ontario Court of Appeal recently described this type as "people that put a lot of time and work into the case [and they] present special challenges to adjudicators because they are often unwilling to negotiate and they consume a lot of resources"; see "Closing Plenary: Self-Represented Litigants – From

Challenges to Solutions" (June 2011) at 1. Pertamina and PLN were not litigating for fun, but they seem to have become as obsessed with their court case as many recreational litigants.

It is the Court of Appeal's description of Pertamina and PLN's proceedings around the world, including in Alberta, as "vexatious" that is the most interesting, even if not the most colourful aspect of this decision. The Court of Appeal backs up this characterization by noting (at para 11) that:

> Alberta is very plainly not the appropriate forum for any attempt to upset the arbitral award for fraud. … Getting a judgment in an inappropriate forum in the hopes of influencing a court elsewhere is (and will always be) a novel idea, tending to destroy all conflict of laws rules on jurisdiction and recognition. This appeal and its underlying motion are an attempt to have the tail wag an elderly elephant (emphasis added).

Perhaps the characterization as "vexatious" of Pertamina and PLN's attempt to upset the arbitral award by attacking Master Breitkreuz's 2004 order for its enforcement in Alberta on the basis of fraud will put an end to proceedings in Alberta. Section 23(2) of the *Judicature Act*, RSA 2000, c J-2, defines "conducting a proceeding in a vexatious manner" to include:

> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief; …
> (f) persistently taking unsuccessful appeals from judicial decisions;

— all of which seem to apply to these proceedings, given the Court of Appeal's comments. A lawyer considering continuing such proceedings should take note of Rule 1 in Chapter Ten of the current Alberta Code of Professional Conduct, which provides that "[a] lawyer must not take any step in the representation of a client that is clearly without merit." The New Alberta Code of Conduct will soon provide in 4.01 that "[i]n civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side."

Costs were awarded against for Pertamina and PLN on the loss of their appeal, but cost awards, no matter how large, have not discouraged those parties in the past. KBC's entitlement to their costs was not an issue on the appeal; the only question was how much those costs should be. Counsel for KBC estimated that, with interest, the arbitral award amounted to about $315,000,000 Canadian, an estimate the Court of Appeal concluded (at para 5) was modest. In addition to the amount at stake — which determines which column in Schedule C is appropriate — the Court of Appeal noted what they called (at para 18) "obvious subterfuge" on the part of counsel for Pertamina and PLN to avoid a 30-page limit on factums. The factum for Pertamina and PLN, filed without leave, contained appendices of extra argument totalling 50 more pages, a total of about 69 pages. In the end, KBC was awarded five times column 5 of Schedule C, a factum fee multiplied by 1.5 and a second counsel fee.

In my previous post on this case — my second one — I had doubted that Justice Clackson's order would be the last the Alberta courts will hear of this moot case. In this post, I have predicted that the Court of Appeal decision will be the end of this "endless repetition of failed litigation." I hope I am right this time too.