May 2, 2012

More grist for the mill, another case of gross negligence under CAPL 1990

By Nigel Bankes

Case commented on:

Trident Exploration Corp. (Re), 2012 ABQB 242

An operator under a pooling agreement who agrees to take charge of responding to a Crown offset notice and who fails to do so and fails to inform tract owners that it is no longer intending to respond, is grossly negligent within the meaning of Article 4 of the 1990 CAPL Operating Procedure.

The facts

The ownership position in relation to the subject lands was as follows: north half, Crown lease, registered in the name of Blaze (the Blaze lease), but with a number of parties (the Mutiny interests) holding beneficial interests in the lease; south half, two tracts, Trident was the lessee of tract 1 and Bearspaw and Kaplan were the lessees of tract 2. Both of these south half leases appear to be Crown leases. The lands were subject to a non-cross-conveyed pooling agreement, to which was attached a CAPL 1990 Operating procedure. Trident was appointed as operator.

On June 7, 2005 Alberta Energy issued an offset notice to Blaze in relation to Blaze lease. It would appear that similar notices were sent to Trident and Bearspaw in relation to the south half leases. Blaze provided Trident with a copy of the notice in a timely way. The notice informed each lessee of its options under s 20 of the *Petroleum and Natural Gas Tenure Regulation*, Alta. Reg. 263\97 one of which is to pay a compensatory royalty. A well was spudded in on the pooled lands but by November it became clear to Trident that it would not be put on production by December 7, the end of the notice period contained in the offset notice. Accordingly, Trident sent a letter to Mutiny, Bearspaw and Kaplan (November 10) advising of the delay and recommending as operator that, the meantime and pending attaining production, the offset obligation

> …. be satisfied by paying the offset compensation to the Crown. Trident will make the payment to the Crown and invoice the partners at their pooled interest share.
>
> Please provide your approval/non-approval of this recommendation in the space below and return it to the undersigned. As we wish to satisfy this obligation as soon as possible, your prompt response will be appreciated.

Prior to that, the landpersons for Mutiny and Trident had spoken and Mutiny had advised that it was agreeing to Trident's proposal. Given that conversation, Mutiny felt no need to respond in writing. Bearspaw however did respond in writing indicating that Trident should not reply to the Crown on behalf of all the tracts and that Bearspaw would send its own response. Trident did not copy Mutiny on this reply and took no further steps to respond to the Crown offset notice (at least in relation to the Blaze lease). As a result the lease lapsed. All parties acknowledged that Trident would only be able to respond to the notice as it applied to the Blaze lease through Blaze as the designated representative or with Blaze's consent. Mutiny only learned that the lands had lapsed some months later when reviewing some public documents - well after the 60 day period within which a lessee may request reinstatement. The lands were subsequently reposted. Trident put in a bid on the lands but the lands were acquired by Bearspaw.

Trident applied for protection under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 and subsequently a matter was set down for the Court in relation to the above facts and raising the following question: does Trident have any liability to the Mutiny interests?

The decision

Justice Kent held that Trident was in breach of its obligations as operator under Article 401 of the operating procedure and that Trident's behaviour amounted to gross negligence. The proper interpretation of the letter and the earlier conversation was that Trident was going to take on the responsibility of informing the Crown of the election under the offset notice (at para 22). The distinction that Trident sought to draw between: (1) responding to the notice, and (2) agreeing to assume responsibility for making any offset payment was not reasonable. Trident could not hide behind the fact that Blaze was the designated representative. Having initially assumed responsibility, "Trident's failure to advise the parties that each was responsible for responding to the offset notice once Bearspaw took the position that it did was negligent." (at para 22)

Trident's failure was not just negligent, it was grossly negligent. After referring to the Court of Appeal's decision in *Adeco Exploration Company Ltd v Hunt Oil Company of Canada Inc*, 2008 ABCA 214 (see post here) Justice Kent concluded (at para 24)

> What Trident did was not a momentary lapse. It wrote a letter that can reasonably be interpreted as meaning that Trident would respond to the offset notice on behalf of all the partners. It received word from Bearspaw that it did not want Trident to respond on its behalf and that each partner should look after its own lease. Trident's failure to advise Mutiny that the plan had changed was something that could have been easily accomplished. Moreover, it was not a mistake which happened in a few seconds or a few minutes after which nothing could be done. The responses had to be to the Crown by December 7. Bearspaw gave its reply to Trident on November 15. There was plenty of time for Trident to ensure that all partners understood what their obligations were, given Bearspaw's response. That is gross negligence.

That was enough to be able to respond to the question posed. Justice Kent did not go on to consider the question of remedies.