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Pushing Back, Lock[e], Stock and Barrel on the Availability of Summary Judgment in Oil and Gas Lease Cases

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Case commented on: *P. Burns Resources Limited v Locke, Stock and Barrel Company Ltd*., 2014 ABCA 40

This decision of the Court of Appeal confirms that it will be a rare case in which the lessor of an oil and gas lease will be able to obtain summary judgment on the validity of the lease during its secondary term, especially where the third proviso offers a number of circumstances in which "time shall not be counted" against the lessee. In this case the third proviso read as follows:

> [I]f at any time after the expiration of the said term production of the leased substances has ceased and the Lessee shall have commenced further drilling or working operations within ninety (90) days after the cessation of said production, then this Lease shall remain in force so long as any drilling or working operations are prosecuted with no cessation of more than ninety (90) consecutive days, and if such drilling or working operations result in the production of the leased substances or any of them, so long thereafter as the leased substances or any of them are produced from the said lands, provided further that notwithstanding anything hereinbefore contained or implied to the contrary, if drilling or working operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's reasonable control or if any well on the said lands or on any spacing unit of which the said lands or any portion thereof form a part, is shut-in, suspended or otherwise not produced for any cause whatsoever which is in accordance with good oil field practice, the time of such interruption or suspension or non-production shall not be counted against the Lessee.

This case involved a low productivity well which failed to produce for extended periods. The lessor sought summary judgment seeking an order that the lease had terminated. In order to defeat that application the lessee would need to provide some evidence: (1) that there had been

drilling or working operations on the lands within 90 days of the cessation of production, (2) that any drilling or working operations if interrupted were interrupted for reasons beyond the lessee's reasonable control, or (3) if a well on the land was not being produced it was not being produced for a reason in accordance with good oilfield practice. These options are alternatives. The availability of some evidence in relation to any one of these headings should be enough to require a trial.

In this case the lessor succeeded before the master and before Justice Bensler. However, on the appeal de novo before Justice Bensler the lessee had filed additional expert evidence which tended to show that the lessee was acting in accordance with good oilfield practice in trying to obtain production from a well of this type. Counsel for the lessee argued that Justice Bensler gave this expert evidence little if any weight and in doing so effectively made findings on the ultimate issue and therefore failed to assess whether the lessor had proven that there were no genuine issues to be tried. The Court of Appeal agreed with those contentions and set aside the summary judgment terminating the oil and gas lease.

I commented on Justice Bensler's judgment here. On the basis of her account of the available evidence I found her conclusion reasonable. But that just goes to show that one really cannot assess whether a decision to grant summary judgment is appropriate unless one is able to assess the totality of the evidence. And for related posts on the appropriateness of summary judgment in an oil and gas lease case see here and here.

My colleague Professor Jonnette Watson Hamilton has drawn my attention to two recent Supreme Court of Canada decisions on the subject of summary judgment in Ontario: *Hryniak v Mauldin*, 2014 SCC 7 and *Bruno Appliances and Furniture, Inc v Hryniak*, 2014 SCC 8 in which the Court examines the role of summary judgment in ensuring access to justice at a reasonable cost. These cases both deal with the amended (2010) Rule 20 of the Ontario Rules of Civil Procedure. The Court, per Justice Karakatsanis, in the *Mauldin* decision describes the effect of the new rules as follows:

> [43] The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.
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> [45] These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). *Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.*
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> (Emphasis added)

I will leave it to others to comment on how relevant and applicable these comments are to the new Alberta Rules.