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Stewart Estate: Finalizing The Judgment Roll and Costs

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Decisions Commented On: *Stewart Estate v TAQA North Ltd*, 2016 ABCA 143 and *Stewart Estate v TAQA North Ltd*, 2016 ABCA 144

The Court of Appeal handed down its main decision in *Stewart Estate v TAQA North Ltd*, 2015 ABCA 357 (hereafter the main decision) in November 2015. In my post on the main decision I suggested that "while *Stewart Estate* is certainly a significant decision (which grapples with important issues including, the standard of review applicable to lease interpretation questions, the rules surrounding the termination of oil and gas leases and the question of remedies for wrongful production), it is ultimately a disappointing decision because, in the end, with three separate judgments, this three person panel of the Court agrees on very little."

We now have two further decisions from the panel of the Court that heard the case, one decision settling the judgement roll (hereafter the judgment roll decision) and the second dealing with the costs award (the costs decision). The judgment roll decision expressly describes itself (at para 1) as providing supplementary reasons to the main decision. This post not does provide a systematic account of either of these decisions but it does aim to identify where these decisions have added to the reasoning in the main decision or have provided dicta that may be of interest beyond this case.

The Judgment Roll Decision

The first significant issue concerns the liability of a party (Esprit) who was in receipt of gross overriding royalty (GORR) payments. There are potentially two issues here. First, under what circumstances, if at all, is a payee of a GORR a tortfeasor vis-à-vis the lessor of the expired lease, and second, if the GORR payee is a tortfeasor and therefore liable, what, if any, is the liability of the payor (Bonavista in this case) to the lessors for those royalty payments. The majority in the main decision had concluded that Esprit was liable. I was critical of that decision in my post - or at least critical of how the majority reached that decision. In any event, the main outstanding issue with respect to the judgement roll was Bonavista's liability. Bonavista evidently took the positon that the lessors could have judgement against Esprit for the royalty share but that it (Bonavista) had no default liability as a joint tortfeasor in relation to that royalty gas. In its judgement roll decision the Court corrected Bonavista and ruled that Bonavista was indeed jointly and severally liable for the royalty gas (at paras 5 –15). That seems entirely appropriate: the party that engages in the wrongful severance is still a tortfeasor in relation to all of the gas that is severed even if it does pay a portion of the proceeds of sale for some of the gas to a third party.

As an aside, while it seems self-evident that Esprit's liability is liability in tort, the Court in the Costs Decision (at para 42) apparently has a different view concluding that Esprit's "liability lay in the law of personal property (a person cannot acquire a better title than that of the person from whom it received the chattel), not in the law of torts." There are two problems with this passage. First, Esprit didn't receive the chattel, it did not take in kind (but purchasers of commingled gas streams beware!) Second, there is no such thing as liability in personal property just as there is no such thing as liability in real property. The fact of the matter is that we routinely use real and personal property torts to vindicate property rights. When I sue for the return of personal property I sue in detinue, I don't bring "an action in personal property" and if I just want damages I sue in conversion but again I don't sue "in personal property" whatever that might mean. I don't think that this terminological difference makes any difference to the Court's conclusion on the costs point but it is hardly a helpful way to describe the difference in the legal positions of the lessees and Esprit.

There was actually a third issue in relation to Esprit's liability and that was the period for which it was liable. Here Esprit wanted to exploit the dissonances in the various judgements in the main decision. Esprit took the position that since it was Justice O'Ferrall (Justice McDonald concurring, and Justice Rowbotham dissenting) who established Esprit's liability then it must be Justice O'Ferrall's judgement that must also establish the duration of Esprit's liability. Justice O'Ferrall was of the view that the lessees' liability ran from the date that they were served with the Statement of Claim (Judgement Roll decision at para 18) or notice to vacate (September 2005, main judgement at para 432). However, the majority judgement on the timing\limitation issues was authored by Justice Rowbotham (Justice McDonald concurring) and that judgement established that the lessees' liability was governed only by the general limitations rules and thus extended back two years prior to the issuance of the Statement of Claim (August 2005) (i.e. a longer period of liability than that found by Justice O'Ferrall).

The Court makes surprisingly heavy weather of all of this. Again, given the premise, if the basis of Esprit's liability is that it is repeating the conversion committed by Bonavista then its liability must be coextensive with Bonavista's (unless it can take the benefit of a different limitation period and there is no suggestion of that here). Here is what the Court had to say (at paras 19 – 20):

> [19] The views of the majority with respect to the date from which the appellants are entitled to a remedy govern. Given those views, it would be illogical and unfair to require Bonavista to account for the production it received while not requiring the overriding royalty recipient (Esprit/Pengrowth) to account for the value of the production Bonavista paid to it during that same period.
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> [20] In the result, this Court orders that the commencement date for disgorgement of the value of the royalty volumes be the same for both the lessee, Bonavista, and the royalty holder, Esprit/Pengrowth.

There was one other timing\limitations issue to address and that related to the liability of Coastal. Coastal seems to have argued (at paras 23 – 26) that it could not be liable for the full 2 years allowed by the *Limitations Act*, RSA 2000, c. L-12 because it benefited from an extended leave and licence argument (see main decision per Justice Rowbotham at paras 184 – 195 but concluding that the leave and licence was revoked as of December 2005) and was not actually served with the statement of claim until June 2006.

The difficulty with this argument is that as of August or September 2005 the majority judgement on this point is no longer found as between Justices Rowbotham and McDonald but as between Justices O'Ferrall and McDonald. The Court confirms this at para 26 of the judgement roll decision where the text seems to suggest that all are now agreed that there could be no leave and licence as of September 2005 when Coastal's predecessor in title, Unocal, was served along with the other lessees. The only reason that Coastal was not served earlier was that it was not at that time on title (at para 26):

> Coastal's predecessor, Unocal, from whom it acquired its interest, was served with the Statement of Claim in the Fall of 2005. Unocal was served because Coastal failed to register its interest on title. There is simply no basis on which to suggest that the Irwin Group consented to Coastal's continued receipt of the natural gas revenues attributable to the north 43 acres of the NE 1/4 of Section 25 after Unocal was served with the Statement of Claim and Notice to Vacate. That Unocal was served in the Fall of 2005 ends the matter; but the fact that Coastal was advised by Chevron (on behalf of Unocal) of the litigation by letter dated December 19, 2005 makes the argument completely untenable.

While there might be an issue about which party had the primary liability (Unocal or Coastal) there would seem to be little doubt that this stream of gas (apportioned to the NE quarter) was being tortiously produced and without leave or licence and that Unocal or Coastal must be liable as of the fall of 2005. How that liability would be allocated as between Unocal and Coastal might turn as between them on the terms of the purchase and sale agreement. Certainly Coastal cannot have any direct tortious liability for any period prior to acquiring an interest in the property (registered or unregistered); at most it can have a liability to indemnify its vendor but that must turn on the terms of the contract between Unocal and Coastal and is really of no concern to the lessors. I would also have thought that Coastal cannot have direct joint and several liability for gas produced before it came on the scene. The Court did apply that logic to Esprit noting that it had no joint and several liability for non-royalty gas. There are suggestions (see above and in the Costs Decision (at para 22) that Coastal's knowledge is somehow relevant to its liability, or for back-dating its liability. This might be relevant if Coastal were taking over Union (see the parallel position in the Costs Decision noting that Bonavista purchased the shares of Triquest and was therefore in the same position as Triquest) but it should not be relevant to its tortious liability if Coastal is simply purchasing these particular assets.

The Costs Decision

I claim no expertise whatsoever in relation to matters of costs but the following issues in the costs decision seem to me to be of more general significance.

First, the Court of Appeal decided that this was a case in which it was appropriate for it to determine costs at both trial and on appeal even though the trial judge still had the trial costs under reserve. In other words, the Court of Appeal did not have the benefit of the trial judge's opinion\decision on costs.

Second, the Court rejected outright the respondents' argument to the effect that each side should bear its own costs given that it was a leading case that would benefit (Costs Decision at para 3) "oil industry participants". The Court gave no reason for its peremptory rejection of this

submission (at para 11) (other than it was contrary to the general rule that costs follow the cause) but obviously whatever benefit this decision might offer in terms of clarifying the law (a doubtful proposition to this point as suggested in my post on the main decision) would clearly accrue more to the repeat players (i.e. the lessees) more than the individual lessors.

Third, both parties made completely self-serving (and therefore contradictory) arguments in relation to costs at different times. Thus, the lessees post-trial sought enhanced costs and post-appeal submitted (in the alternative) that ordinary costs should prevail; the lessors presented a mirror image with the result that the Court observed (at para 15) that "Given these contradictions, we give little weight to the parties' post-trial justifications for costs."

Fourth and with respect to "multipliers of column 5 tariffs" the decision contains an appendix providing a summary statement of "multiplier cases" from the Alberta Courts which will no doubt prove useful to counsel in subsequent cases. The Court also provided this summary of relevant considerations (at paras 25 – 26).

> [25] An appendix of cases that have discussed multipliers is attached. To summarize, Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the complexity of the action warrants it, when the amount in dispute significantly exceeds the $1.5 million threshold for Column 5 or when the conduct of one of the parties warranted a multiplier. However, generally, courts also rely upon the other considerations set out in Rule 10.33 in determining whether a multiplier should be applied. There is nothing in the cases surveyed to suggest that the analysis for applying a multiplier differs in an oil and gas context.
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> [26] Since a costs award is ultimately at the discretion of the judge, there is little in the way of a uniform basis upon which a multiplier is awarded or declined. It is highly dependent on the unique facts and circumstances of each case. However, a general principle arising from the case law is that the discretion to grant costs must be exercised judicially, and in line with the factors in Rule 10.33. Additionally, in actions where the amount in dispute greatly exceeds Column 5, there is a general recognition that Schedule C is deficient, and that a multiplier may be applied. However, courts are careful to avoid awarding a multiplier that would result in the over-indemnification of a successful party.

In this case the Court awarded a two times multiplier (at para 28).

Fifth, the Court concluded that Esprit deserved special treatment in relation to its cost liability because of its position as a royalty owner rather than a working interest owner. As suggested above in the context of the judgement roll decision the reasons given are rather surprising. Here is the full text (at para 42) alluded to above in the "aside":

Esprit's situation is different from those of the other respondents in that it was merely the recipient of a portion of the value of the natural gas wrongfully

> produced by the working-interest owners. Its liability lay in the law of personal property (a person cannot acquire better title to a chattel than that of the person from whom it received the chattel), not in the law of torts. Esprit also argued that costs against it ought to be pro rated to the judgment obtained against it. On that basis, we have determined Esprit's liability for costs as follows: trial costs are $45,000 and appeal costs are $5,000. This assessment of costs also reflects a reduction in the cost we might otherwise have ordered for the fact that Esprit was successful in arguing that it was not jointly and severally liable for the wrongful production by the working-interest owners. As a consequence, Esprit's liability for costs shall be deducted from the total amount of costs awarded.

Finally, and as part of a discussion under the heading of "trial related offers" the Court had this to say about an argument from Bonavista and Coastal to the effect that absent a notice to vacate the property they were under an obligation to keep producing. The Court had no time for that argument commenting as follows (at paras 46 – & 47):

> In making that argument, Bonavista and Coastal misunderstood the effect of the pooling which was required in order to constitute a legal production spacing unit. Bonavista and Esprit, like the other lessees, had no right to produce as soon as any one of the lessors withdrew their consent to continued production. If one lease in a pooled production spacing unit is terminated, the remaining leases do not necessarily terminate; but production must cease. The remedy of owners of tracts who wish their hydrocarbons produced in the face of a tract owner who does not wish them produced is to apply to the energy regulator for a compulsory pooling order. Their remedy is not to continue producing the well.
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> [47] Bonavista and Coastal also argue the fact they were compelled to defend their leases in the absence of a Notice to Vacate by their putative lessors (there being a dispute as to who their lessors were) ought to be a factor in reducing or eliminating cost awards against them. Their argument, once again, was that they were obliged to continue producing. This argument is not persuasive. If Bonavista (through its operator, Nexen) had ceased production, its lessors could have no complaint. There is no obligation upon the lessee under a natural gas lease to produce the leased substances. Leaving the lessors' molecules in the ground is not actionable. It might cause a lessee to lose its lease. But there would be no requirement on the lessee to account to its lessor for not producing. However, producing molecules which one has no right to produce (which is the situation as soon as one owner of a tract in a pool properly withdraws his or her consent to production) triggers the obligation to account to the owner for that production.

I continue to hope that the Supreme Court of Canada will grant leave to appeal the main decision. Perhaps it will be easier for that Court to make that determination now that it has a judgment roll.