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What's the next step when shallow rights become deep rights?

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Cases Considered:

Talisman Energy Inc. v Energy Resources Conservation Board, 2010 ABCA 258; ERCB Decision 2009-050, Nexxtep Resources Ltd., Pool Delineation Application: Redesignation of the Lower Mannville C Pool to Rock Creek, Wilson Creek Field, August 7, 2009; ERCB letter decision, June 23, 2010, unpublished, available here.

The purpose of this note is to update readers on the developments in a set of facts that first came before the courts in 2007 and on which I blogged in July 2008.

The facts

The facts, as outlined in my earlier blog, were as follows:

"Nexxtep purchased certain petroleum and natural gas rights under Crown oil and gas leases from the base of the Mannville through the Rock Creek formation to the base of the Pekisko pursuant to a purchase and sale agreement (PSA) of March 2004 with Talisman. The assets included a horizontal well but not a more prolific vertical well which, at the time of the PSA, both parties assumed to be producing from above the base of the Mannville. Subsequent investigations by Nexxtep established that the vertical well was producing from the Rock Creek formation below the Mannville. When Nexxtep's requests that Talisman shut in the vertical were unsuccessful, Nexxtep commenced an action [the QB action] and brought an application for an injunction requiring Talisman to shut in the vertical well below the Mannville. Talisman in turn sought an order for summary judgment and in the alternative security for costs."

That earlier blog commented on the decisions of both the Court of Queen's Bench and the Alberta Court of Appeal. In those decisions the two courts denied both the application for interlocutory injunctive relief and the motion for summary judgement. The substance of that action is still ongoing. Indeed, in the Court of Appeal decision under review in this comment Justice Bruce McDonald noted that:

> Counsel advised this Court that a Court of Queen's Bench Justice has granted an Order in the QB action to bifurcate the trial. As a result, the issue of the ownership of the 00/2-16 well will be tried initially and depending upon the result, the trial will then proceed to deal with other issues. It is anticipated that the first portion of the trial will take the better part of two weeks … (at para. 5)

In addition to the QB action, Nexxtep also brought an application under s.33 of the *Oil and Gas Conservation Act*, RSA 2000, c. O-6 (*OGCA*) to have the Board redesignate the Wilson Creek

Lower Mannville C pool (the C pool) as the Jurassic Rock Creek Formation and also to provide certain consequential relief under ss. 16 and 25 of the *OGCA*. Section 33 provides in part that:

> 33(1) The Board may, by order ….
>
> (d) designate any stratum or sequence of strata as a zone, either generally or in respect of any designated area or any specified well or wells.
>
> (2) If a dispute arises in the application of a pool or zone designation made by the Board, the dispute shall be referred to the Board and its decision on it is final.

At the time of the Nexxtep's application to the Board there were two wells producing from the C pool, the 00/2-16 well (producing from the A interval) and the 00/6-21 well. A third well, the horizontal 02/2-16 well that Nexxtep had purchased from Talisman, produced from the B interval.

In August 2009 Nexxtep obtained a majority decision from the ERCB (Decision 2009-050) agreeing to the redesignation. Much of that lengthy decision (48pp) is concerned with a detailed technical assessment of the evidence. From a legal perspective perhaps the key findings were these:

(1) The onus of proof in such an application is proof on the balance of probabilities. The evidence must show that "the conclusion that the applicant seeks to establish is substantially the most probable of the possible views of the facts presented to the Board." (at 6) The Board rejected the argument that in a redesignation application a higher onus should be imposed on the applicant (on the grounds that settled expectations that had been built up around the existing designation and those expectations should not lightly be disturbed).

(2) The 00/2-16 well and the 00/6-21 well were not in communication. The 00/2-16 well should be removed from the C pool and placed in a separate single well pool and designated as a Rock Creek well.

(3) Redesignation did not itself resolve the question of whether the 00/2-16 well and production from the well was owned by Talisman or by Nexxtep. That would have to be resolved in the QB action. Given that conclusion the Board rejected Nexxtep's argument that Talisman's licence should be cancelled (on the basis that Talisman could no longer establish its entitlement to produce the well as required by s.16 of the *OGCA*) but it did suspend Talisman's licence pending resolution of the QB action.

Talisman applied under s.39 of the *Energy Resources Conservation Act*, RSA 2000, c. E- 10 to have the Board review its decision - both the decision to suspend and the decision to redesignate. In a letter decision dated June 23, 2010 the Board rejected that application concluding that Talisman had not demonstrated that the hearing panel made an error. The Review panel also refused to lift the licence suspension decision noting that "until the ownership of the Rock Creek in section 16 is resolved, whether by agreement or via litigation, Talisman does not meet the applicable requirements to produce the Rock Creek from the 00/2-16 well." (at p. 4).

And that takes us to the most recent development which is Justice Bruce McDonald's decision of September 9, 2010 to deny Talisman's application for leave to appeal the Board's decisions to

the Court of Appeal. There is nothing particularly unusual about this decision. In large part, Talisman seems to have been trying to persuade the Court that the ERCB made the wrong decision - but that hardly raises a question of law or jurisdiction despite counsel's creative attempts to convince Justice McDonald otherwise.

So, as I said over two years ago, we wait with bated breath for the QB decision on the merits! And since the well continues to be suspended perhaps there is actually some incentive for the parties to get on with this matter and get it resolved.