October 5, 2010

Injunction denied in oil and gas right of first refusal case

By Nigel Bankes

Cases Considered:

NAL GP Ltd. v. BP Canada Energy Company, 2010 ABQB 626

NAL was the successor in interest to an agreement between BP and Spearpoint which afforded each party mutual rights of first refusal (ROFR). The agreement (which was not a Canadian Association of Petroleum Landmen (CAPL) form) apparently covered a number of different properties. In July 2010 BP announced that it had reached an agreement with Apache to sell certain assets including the assets subject to the ROFR. There were negotiations surrounding the possible waiver of the ROFR but on September 1 NAL requested that BP prepare the ROFR notices required by the agreement. BP did so. The notices (12) were delivered September 20. The aggregate value of the 12 packages was $1.56 billion. The total sale price was $3.25 billion (US). The agreement required the ROFR to be exercised within 15 days.

In this application NAL sought a declaration that the notices were deficient or alternatively a temporary injunction. NAL also sought to examine documents relating to the sale and oral discovery of representatives of BP and Apache and sought to abridge the 15 day notice period.

The decision

Justice Hawco denied the application for injunctive relief.

Following *Chase Manhattan Bank of Canada v Sumoma Energy Corp*, 2001 ABQB 142 (aff'd 2002 ABCA 286 although not cited by Justice Hawco), a case dealing with the 1974 CAPL Operating procedure, the agreement did not require BP / Apache to set out the basis for allocating value to particular properties. There was no evidence that the proposed allocation of value was prepared in bad faith. As a result there was no serious issued to be tried (applying *RJR-MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311). That was sufficient to deny the application for an injunction, but in addition there was no irreparable harm (NAL could be compensated in damages, or, if it wished it could protect its position by exercising the ROFR and seek compensation in damages), and the balance of convenience did not favour an injunction since NAL was seeking something to which it was not entitled (discovery of the method of allocating the purchase price). To grant the injunction would make the time limits set out in the agreement for exercising the ROFR meaningless.

Comment

On the basis of what we learn from the judgement about the terms of the agreement there does not seem to be anything especially remarkable about this case. But, like *Chase Manhattan*, it confirms that the holder of the ROFR rights will always be in a difficult position in the context of a package deal in the absence of some contractual language that requires the vendor to justify the allocation of value between properties or provides for arbitration of the question (as in CAPL 1990, Article 2401, Alternate B (c)). The law seems to be that the holder of the ROFR rights must show a breach of the implied duty of good faith in order to question the allocation of value and yet, absent discovery, it is unlikely to have any solid basis on which to make such an allegation stick. This leaves the vendor in the driver's seat and meanwhile time continues to run against the holder of the ROFR rights; and if there is one rule that is clear it is that the holder of the ROFR or option rights must comply punctiliously with the terms of the option including any timelines.