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Preliminary Skirmishing in Ongoing Compulsory Unitization Hearings for the Hebron Field

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Case Commented On: *ExxonMobil Canada Properties v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2017 NLTD(G) 80 (CanLII)

In this decision Justice Burrage dismissed an application for leave to appeal an interlocutory decision of the Oil and Gas Committee established under the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987. c. 3 (the "*Federal Accord Act*") in which one of the parties responding to the application of the Chief Conservation Officer (the "CCO") of the Canada-Newfoundland and Labrador Offshore Petroleum Board (the "C-NLOPB") for a unitization order pursuant to the *Accord Acts* sought to compel production of a legal opinion prepared for one of the other parties.

The particular application to compel production is perhaps of little interest. The real purpose of this post is to draw attention to this ongoing application for compulsory unitization of various pools within the Hebron Field given the rarity (and hence importance) of an application for compulsory unitization. Compulsory unitization is one of the tools in the tool box of most oil and gas conservation authorities (with the notable exceptions of Texas and Alberta – as previously discussed in several ABlawg posts here and here) but the power is rarely exercised. Furthermore, the compulsory unitization provisions of the *Federal Accord Act* have parallels in both the *Canada Oil and Gas Operations Act*, RSC 1985, c. O-7 and in the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988 c. 28.

The Authority to Order Compulsory Unitization for Offshore Operations

Section 173(1) of the *Federal Accord Act* provides that

> **173 (1)** Notwithstanding anything in this Part, where, in the opinion of the Chief Conservation Officer, the unit operation of a pool or part thereof would prevent waste, the Chief Conservation Officer may apply to the Committee for an order requiring the working interest owners in the pool or part thereof to enter into a unit agreement and a unit operating agreement in respect of the pool or part thereof, as the case may be.

The "Committee" referred to is the Oil and Gas Committee established by s. 141 of the *Federal Accord Act*. The Committee is an expert committee charged with considering applications and appeals under several provisions of the *Federal Accord Act*. Under s. 187 of the *Federal Accord Act* a decision of the Committee may be appealed to the Trial Division of the Supreme Court of Newfoundland and Labrador on a question of law, on leave being obtained from that Court.

The Application

Justice Burrage noted that the *Federal Accord Act* provided no guidance as to when the Court should grant leave; furthermore, Rule 58.06(6) of the Rules of Court merely indicated that leave should be granted where the judge is satisfied that "the interests of justice require that leave be granted". While this too offered little in the way of guidance Justice Burrage went on to observe (at para 21) that "'interests of justice' test is informed by a substantial body of jurisprudence to the effect that the court, except in exceptional circumstances, should not interfere with the ongoing administrative process by granting leave to appeal of interlocutory rulings." Justice Burrage was able to identify a number of relevant considerations to take into account in deciding whether or not the applicant ExxonMobil, had established exceptional circumstances (at para 39, references omitted):

> Will the appeal unduly hinder the progress of the proceedings, having regard to any time sensitivities? Will irreparable harm result to the appellant should leave be denied? Will the appellant be unable to obtain a fair hearing should leave be denied? Does the interlocutory decision relate to the tribunals jurisdiction? Could the interlocutory decision affect a party's substantive rights?

Focussing on the "fair hearing" consideration, Justice Burrage acknowledged that the Committee had turned its mind to this matter and had concluded (at para 44) that ExxonMobil did not need to have access to the legal opinion in order to have a fair hearing. In the end Justice Burrrage concluded (at para 48) that: "I see nothing in the facts before me to support a claim that this case is exceptional, or that the interests of justice otherwise mandate the granting of leave to appeal." The judgement reveals that the Committee was planning to proceed with its hearing on the CCO's application during the week of 15 May 2017. So far as I can see there is no information on the Committee's hearing posted on the website of the C-NLOPB.

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