

February 18, 2020

AER Commissioners Grant Summary Dismissal of Applications for Common Carrier and Rateable Take Orders

By: Nigel Bankes

Decisions Commented On: (1) [2020 ABAER 002](#), Bears paw Petroleum Ltd. Common Carrier and Rateable Take Order Applications, Applications 1877294 and 1878333, and (2) Re: Proceeding 360 Harvest Operations Ltd., [Decision on Motion to Dismiss](#), Bears paw Petroleum Ltd. Applications 1877294 and 1878333, January 24, 2020

In January 2017 Bears paw filed applications with the Alberta Energy Regulator (AER) seeking common carrier and rateable take orders against Harvest Operations Ltd with respect to gas produced from the Crossfield Basal Quartz C Pool (BQC pool). The matter was originally set down for hearing in September 2018 but was adjourned pending other legal proceedings in which Bears paw had to establish its rights to produce from its 02/11 well in the BQC pool (so far as I am aware those proceedings are not reported). The current hearing was scheduled to begin January 13, 2020, but on November 14, 2019 Harvest filed a motion asking the AER to dismiss Bears paw's applications or adjourn the proceedings. On January 24, 2020 the Commission hearing panel chaired by Cecilia Low granted Harvest's motion and dismissed the applications. On January 30, 2020 the Commissioners issued a decision cancelling the scheduled hearing; the cancellation decision contains a hyperlink to the Commissioners' decision on the motion.

The rationale behind Harvest's motion was that Bears paw's application could no longer satisfy the requirements for either of a common carrier or a rateable take application. It could not satisfy the common carrier rules because Harvest was in the course of abandoning some of the very facilities (pipeline and a compressor) that were the subject of the common carrier application; and it could not satisfy the rateable take rules because nobody was producing from the BQC field and so there was nothing for a rateable take order to apply to.

The Commissioners treated Harvest's motion as the equivalent of an application for summary judgment. The Commissioners acknowledged that the AER's Rules did not make express provision for summary determination but considered that there was sufficiently flexibility to proceed without an oral hearing on the merits and that guidance could be drawn from key court decisions including *Hryniak v Mauldin*, [2014 SCC 7 \(CanLII\)](#) and *Weir-Jones Technical Services Incorporated v Purolator*, [2019 ABCA 49 \(CanLII\)](#). The record before the Commissioners included an affidavit filed by Harvest updated to January 2, 2020 detailing Harvest's actual abandonment operations.

In order to assess the adequacy of the record for granting summary judgment the Commissioners began by assessing the legal requirements that Bears paw would need to establish in order to

obtain the orders, beginning with the common carrier application. Section 48(1) of the *Oil and Gas Conservation Act*, [RSA 2000, c O-6](#) (*OGCA*) provides that:

48(1) On application the Regulator may from time to time declare each proprietor of a pipeline in any designated part of Alberta or the proprietor of any designated pipeline to be a common carrier as and from a date fixed by the order for that purpose, and on the making of the approved declaration the proprietor is a common carrier of in accordance with the declaration.

Bearspaw took the position that while the relevant facilities were not being used and were in the process of being abandoned, Harvest was still the proprietor and the AER had the authority to require a proprietor to recommence operations in order to avoid discrimination and to avoid stranding resources. The Commissioners however sided with Harvest and concluded that:

... there is no clear, explicit and unambiguous statutory authority for the Regulator to compel the proprietor of a pipeline to recommence operating a pipeline it has discontinued. In particular, the panel affirms that the purposes provision of the *OGCA* does not give the Regulator jurisdiction or authority to compel the proprietor of a pipeline to recommence operating a pipeline it has discontinued in the context of a common carrier application. (at 10)

The Commissioners also noted that a pipeline license does not oblige the holder to operate the pipeline it authorizes nor can the AER so order. A common carrier order restricts the discretion of an owner with respect to “who may be granted access to the pipeline, where they are to be granted physical access, and the allocation of capacity among the producers and owners offering production for the service” (at 10) but it does not require the operation of the pipeline. Furthermore, Bearspaw could not somehow rely on the duty not to discriminate as a means of ordering Harvest to operate all of its facilities rather than just the facilities that it was continuing to use. The duty not to discriminate in section 46(2) of the *OGCA* is only triggered when the AER has made a common carrier order. In sum, a common carrier order requires a proprietor to share capacity on its facility or facilities; it does not require a proprietor to continue to operate a facility or facilities that it is no longer using for the sole benefit of another party.

With this understanding of the relevant law pertaining to a common carrier application, the Commissioners were then able to apply the criteria from the summary judgment cases and conclude as follows:

The panel finds the evidence on the record to be clear. It has been tested through questioning by Bearspaw’s counsel. Harvest is no longer operating a pipeline that provides service, of any kind, to anyone for gas produced from the BQC Pool. There are no uncertainties or gaps in the facts, record, or law on this point. The panel concludes that it is fair and just for the parties, as well as a more efficient use of the parties’ and the Regulator’s resources to decide the common carrier application on a summary basis now. (at 13)

With that, the Commissioners granted Harvest’s application and dismissed the common carrier application.

The Commissioners took a similar approach to the rateable take application. Section 36 of the *OGCA* provides that

36(1) The Regulator may, by order, restrict

(a) the amount of gas, or

...

that may be produced during a period defined in the order from a pool in Alberta.

(2) The restriction referred to in subsection (1) may be imposed by either or both of the following means:

(a) by limiting, if the limitation appears to be necessary, the total amount of gas that may be produced from the pool or part of the pool, having regard to the demand for gas from the pool or to the efficient use of gas for the production of oil, or to both of those considerations;

(b) by distributing the amount of gas that may be produced from the pool or part of the pool in an equitable manner among the wells or groups of wells in the pool for the purpose of giving each well owner the opportunity of receiving the well owner’s share of gas in the pool.

[AER Directive 65, Resources Applications for Oil and Gas Reservoirs](#), provides further guidance on how the AER approaches both common carrier and rateable take applications. In this case the Commissioners drew particular attention to the following passage (at s 1.1.3 of the Directive and at 14 – 15 of the decision):

The AER considers the issuance of a rateable take order to be a very significant action because it has the potential to override contractual arrangements put in place through normal business practices. Consequently, before approving an application, the AER requires an applicant to demonstrate that it is being deprived of the opportunity to obtain its share of production from the pool. The applicant must show that drainage has occurred and continues to occur or that it can be expected to occur with a very high degree of certainty. (emphasis added by the Commissioners)

The emphasis on the risk of drainage (i.e. a producing well on one tract draining resources from underneath another tract) was obviously problematic since the evidence before the panel was that “there were no wells producing from the BQC Pool, so there can be no drainage from Bearspaw’s lands to those wells as a result of production.” (at 14) Hence the Commissioners also granted Harvest’s motion to dismiss Bearspaw’s rateable take application.

This is a sound decision based on the facts and the law as currently stated in the *OGCA*. Whether there *should* be provisions in the *OGCA* to address what might be a premature abandonment (seen through a lens that seeks to avoid stranding resources) is a different question. Many

jurisdictions, especially high cost offshore jurisdictions, do have such provisions – but then such jurisdictions would also typically have compulsory unitization provisions to optimize production and contain costs. Alberta, as I have said on ABlawg with reference to unitization on several previous occasions (see [here](#) and [here](#)), has neither.

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