

Court of King's Bench of Alberta

Citation: 1849598 Alberta Ltd v Suncor Energy Inc, 2024 ABKB 235

Date: 20240424
Docket: 1601 16705
Registry: Calgary

Between:

1849598 Alberta Ltd. and Delmac Home Heat Inc.

Plaintiffs

- and -

**Suncor Energy Inc., Suncor Energy Products Partnership Produits Suncor Energie,
S.E.N.C., Suncor Energy Services Inc., Suncor Energy Products Inc., Tom Lawson
and Greg Ferguson**

Defendants

Reasons for Decision of the Honourable Applications Judge J.T. Prowse

[1] The plaintiffs/applicants 1849598 Alberta Ltd and Delmac Home Heat Inc. will be referred to collectively as “Delmac” which will mean either one or both of the plaintiffs. I will only differentiate between the two plaintiffs if necessary.

[2] The defendants/respondents Suncor Energy Inc. (formerly Petro-Canada), Suncor Energy Products Partnership/Produits Suncor Energie, S.E.N.C., Suncor Energy Services Inc., and Suncor Energy Products Inc. will be referred to collectively as “Suncor”. Again, I will only differentiate between the corporate defendants if necessary.

The current litigation

[3] For a number of years Delmac carried on business in Yellowknife (via the corporate entity Matonabee Petroleum Ltd.) as a wholesale marketer of petroleum products for Suncor. When that relationship came to an end Suncor took the position that it was entitled to a profit sharing payment from Delmac of approximately \$212,000. The sharing of profits with Suncor was referred to as “positive sharing”.

[4] Delmac denies that Suncor is entitled to this “positive sharing” payment.

[5] After Delmac was no longer a wholesale marketer in Yellowknife, it became a wholesale marketer for Suncor in Medicine Hat (via the corporate entity Agcom Petroleum Sales Ltd). This lasted less than two years. When that relationship came to an end, Delmac took the position that it was entitled to a substantial payment from Suncor amounting to 90% of Delmac’s losses. Suncor’s obligation to re-imburse a portion of losses of a wholesale marketer was referred to as “negative sharing”.

[6] Suncor denies that Delmac is entitled to this “negative sharing” payment.

[7] Merely as an illustration of the system, it appears that every year except one when Delmac operated the Yellowknife business, it made “positive sharing” payments to Suncor. The one exception was in 2006 when Suncor made a “negative sharing” payment to Delmac i.e. it reimbursed Delmac for some of Delmac’s losses.

[8] The final issue in this litigation relates to Medicine Hat. Delmac asserts that, for its final year of operation in Medicine Hat, Suncor neglected to negotiate a projected (target) pre-tax profit – which is the target from which it would be determined whether this was an occasion for positive sharing or for negative sharing (depending on whether the target was exceeded or, alternatively, not met).

[9] Delmac intends to adduce evidence at trial as to what this targeted pre-tax profit should have been, so that the Court can then evaluate the (negative) loss that occurred and order Suncor to reimburse 90% of that loss.

[10] Suncor disputes the assertion that it failed to set a targeted pre-tax profit. It says that, since Delmac was in the process of selling Medicine Hat, it and Delmac agreed to carry forward the pre-tax profit target that had been in place from October 1, 2014 to March 31, 2015 into the upcoming year.

Delmac’s reason for seeking further documentation involving other wholesale marketers

[11] The main disagreement over Suncor’s document production is Suncor’s refusal to produce profit sharing financial documentation between Suncor and other Alberta based wholesaler marketers of Suncor.

[12] Delmac intends to use those documents to show how ‘positive sharing’ and ‘negative sharing’ had been handled with those other marketers in order to establish the nature of the profit sharing arrangement it had with Suncor.

[13] Delmac says that documentation is required because there is no written document which sets out the profit and loss sharing arrangement between it and Suncor (or between Suncor and any of its wholesale marketers).

[14] Suncor disputes this and maintains that, although not expressly mentioned in the contract, positive sharing and negative sharing are governed by the following provision (dealing with license fees) in its contract with Delmac:

The marketer shall pay to [Suncor] in advance on the date hereof and on the first day of each month during the term of this agreement the amount of the monthly license fee calculated as set out in schedule G hereto [schedule G just sets out the license fee for the first year of the contract – it does not set out a formula as to how to deal with subsequent years] ... provided that such amount maybe adjusted by [Suncor] in its sole discretion from time to time by giving notice of such adjustment to the marketer at least 30 days prior to the effective date of such adjustment [emphasis added]

[15] The problem with Suncor's position (that this contractual provision governs positive and negative sharing) is that license fees were set at the beginning of the year, based on target profits, to establish monthly license payments for the upcoming year.

[16] On the other hand, positive and negative sharing adjustments were made at the end of the year based on actual financial results. The words underlined in the above quoted contractual provision (dealing with license fees) do not contemplate retroactive adjustments. In my view this contractual provision does not deal with positive and negative sharing.

[17] Remarkably Suncor does not have any written guidance or protocol dealing with positive and negative sharing, either with Delmac or with any of its other wholesale marketers.

[18] This is why Delmac wants to delve into financial documentation showing what adjustments were historically made for positive and negative sharing, not only regarding the Yellowknife and Medicine Hat operations conducted by Delmac, but also regarding other Alberta based marketers of Suncor.

Progress of Delmac's application for further production

[19] I first began hearing Delmac's application for further production on March 3, 2022.

[20] During that hearing Delmac expressed concern that Suncor would not produce documents regarding other Alberta wholesalers in its affidavit of records, but at trial would directly or indirectly rely on its dealings (involving 'positive sharing' and 'negative sharing') with those other wholesalers in order to bolster its arguments against Delmac's claims.

[21] It is significant that Suncor is not disavowing the existence of an arrangement for positive sharing and negative sharing between itself and Delmac.

[22] Nor is Suncor disavowing that one consideration used in determining positive and negative sharing is whether a 10% to 15% return on equity was being achieved by the marketer.

[23] What Suncor says is that, given the historical financial patterns in Yellowknife and Medicine Hat, the position it took on positive and negative sharing, on the termination of the relationship with Delmac, was (i) arrived at by an exercise of its discretion, honestly made or (ii) alternatively, is objectively reasonable.

[24] Suncor says it does not intend, at trial, to justify the reasonableness of its position with Delmac based on historical financial conduct between Suncor and other marketers. This is because, Suncor says, each marketer is operating in a unique marketplace.

[25] For example, Suncor points to Delmac's request for negative sharing, which includes (as part of the expenses leading to a loss) the expenses incurred to fund Delmac's Christmas party in Medicine Hat.

[26] Suncor says that, in the context which existed in Medicine Hat (which lost approximately \$1 million in a year) incurring a Christmas party expense was not a reasonable expenditure, whereas it might well be a reasonable expenditure in a profitable operation.

[27] Presumably a trial judge will ultimately decide on positive sharing and negative sharing, including the reasonableness of expenses (including this particular expense).

[28] The question is whether that evaluation at trial should be made based on the historical pattern between Delmac and Suncor in Yellowknife and Medicine Hat (including earlier years experience in Medicine Hat), or whether the historical financial conduct between Suncor and other marketers would be relevant and material to the enquiry.

Using expert evidence to assist in determining what documents are relevant and material

[29] In my experience in cases such as this (where expert evidence is going to be used at trial) it is helpful to obtain a preliminary report from the plaintiff's expert as to what documents it says it requires to complete a final report and, if this proves controversial, then to obtain a preliminary responsive report from the defendant's expert as to why it says such documents are not needed.

[30] It is important to make clear that these are only interim and preliminary reports because the plaintiff's expert should not be held in the future to interim observations when, at this stage of the litigation, that expert has not seen all the documents that it says it needs to finalize its opinion.

[31] Accordingly I adjourned Delmac's application for further production and made the following order on March 3, 2022:

[Delmac] is to serve a preliminary expert report on the defendants within times agreed to by the parties. Such preliminary expert report may be relied upon in relation to [Delmac's application for further production] only. [Suncor] shall have no right of cross-examination on such expert report, and shall make no reference to the existence of such report at a trial of this Action or in any other step associated with this litigation except in relation to determining issues in [Delmac's application for further production], and/or through without prejudice and/or otherwise privileged communications.

Upon receipt of [Delmac's] preliminary expert report, Suncor shall have the right to, within times agreed to by the parties, serve a rebuttal preliminary expert report. Such rebuttal preliminary expert report may be relied upon in relation to [Delmac's application for further production] only. [Delmac] shall have no right of cross-examination on such expert report, and shall make no reference to the existence of such report at a trial of this Action or in any other step associated with this litigation except in relation to determining issues in [Delmac's

application for further production] and/or through without prejudice and/or otherwise privileged communications.

The interim expert reports provided pursuant to the order of March 3, 2022

[32] Pursuant to this order Delmac provided a preliminary expert report dated December 6, 2022 from Dean Das of MDD Forensic Accountants Ltd. I summarize the MDD report as follows:

- He had been asked for a preliminary report on the topic of what the wholesale marketer's profit sharing threshold (for Medicine Hat) ought to have been set for the 12 month period April 1, 2015 to March 31, 2016.
- He was requested to provide a list of additional documents which would assist in establishing that profit sharing threshold.
- He looked for a pattern arising from the setting of profit sharing threshold's in the Yellowknife operation so he could then apply that pattern to Medicine Hat.
- He did not have access to all the source documents/information that were used to calculate the historical profit sharing thresholds in Yellowknife. He made estimates for the missing Yellowknife inputs in order to advance his analysis.
- He understood that each year's threshold was determined based on a 'return on equity' concept i.e. the threshold would be established to reflect a monetary return on the equity which the wholesaler had invested in the operation. The 'return on equity' would be based on a percentage of funds (equity) invested by the wholesaler in the operation.
- The wholesaler's equity would be the lesser of actual equity and a calculated 'ideal' equity, and the return on equity would fall between 10% to 15% per annum.
- The wholesale marketer's year-end return on equity percentage appears to have been calculated by taking actual earnings divided by the equity value (the lesser of 'actual' or 'ideal' equity)
- The return on equity target was the same/similar to the profit sharing threshold.
- He created a table calculating Yellowknife 'return on equity' utilizing three possible returns 10%, 12.5% and 15% for the years 2010 through 2015. Then he compared the dollar figure resulting from those calculations to the dollar amount of the actual wholesale marketer's profit sharing threshold which had been established for each of those years. There was a significant variance between the two figures. It was his expectation that the figures would not have varied to the degree that they did vary.
- His observation arising from the foregoing was that:

-The profit sharing thresholds were not set by a formula

-The method used to set the profit sharing thresholds was not consistently applied – in practice a consistent formula did not exist

-The profit sharing thresholds considered additional/other information that he had not seen and/or

-The profit sharing thresholds considered factors that he was unaware of.

[33] Delmac’s MDD report requests further documents in order to advance its analysis, as follows:

- (a) annual business plan calculations (including source documents) for Medicine Hat for the five years prior to Delmac acquiring the Medicine Hat operation i.e. the five years ending in 2014.[these have subsequently provided for three years, not five years]
- (b) annual business plan calculations (including source documents) for Yellowknife for five years ending in 2014. [these have subsequently been provided]
- (c) similar documents for each wholesale marketer operating in Alberta. The MMD report says these documents are required to expand the sample size (beyond Yellowknife and Medicine Hat) which can be used to search for a pattern to show how wholesale marketers’ profit sharing thresholds were determined.

[34] Suncor provided an informal responsive report (pursuant to the terms of the Order described above) from Trevor Philippon of Pennock Acheson Nielsen Devany LLP, which I summarize as follows:

- Neither a review of the written agreements nor discussions with senior Suncor personnel indicate any express or implied level of guaranteed profit for wholesale marketers.
- Suncor charges a license fee based on the difference between projected pre-tax earnings and a target return of equity (Target ROE). So if the projected pre-tax earnings are \$500,000 and the target return of equity is \$300,000, the license fee for the next year will be \$200,000 (payable in monthly installments).
- The Target ROE is typically calculated on the ‘equity’ of the wholesaler (which is the lesser of actual equity and “ideal” equity). Although Target ROE is usually set at 10% it may be increased to 12.5% or 15% where the marketer significantly exceeds its projected earnings in the prior year.
- Profit sharing (positive sharing) typically occurs where the wholesale marketer earns pre-tax profits in excess of 15% return on ‘ideal’ equity.

While the profit sharing threshold is typically based on 15% of ‘ideal’ equity, this calculation is adjusted to 10% of ideal equity where actual equity is less than ideal equity.

- Suncor’s general practice is to cover 90% of ‘acceptable losses’ (negative sharing). Acceptable losses would exclude any expenses incurred by the wholesale marketer which Suncor considers to be discretionary, inappropriate or resulting from poor management decisions.
- Suncor’s position is that the projected pre-tax earnings and Target ROE for any particular wholesale marketer are based on the risks, opportunities, available revenue streams, customer base and cost structures that are unique to the particular contract territory. Accordingly Suncor asserts that it would be irrelevant to attempt to compare license fees and profit sharing thresholds between various wholesale marketers operating in different markets.
- With regards to using Medicine Hat historical financial history, Suncor asserts that the license fee charged to Delmac was lower than charged to the previous Medicine Hat owner (\$265,000 vs \$360,000) and that the threshold at which positive sharing to Suncor began was increased to \$438,119 from \$426,318. Both these changes are said to favour Delmac compared to the previous Medicine Hat owner.

Discussion

[35] As stated earlier in these reasons, the question is whether the evaluation of profit and loss sharing, at trial, should be made based on the historical pattern between Delmac and Suncor in Yellowknife and Medicine Hat, or whether the historical financial conduct between Suncor and other marketers would be relevant and material to the enquiry.

[36] In my view the financial records of Suncor’s dealings with other marketers are not relevant and material (i.e. could not be reasonably expected to significantly help determine one or more issues raised in the pleadings or to ascertain evidence that could be reasonably expected to significantly help determine one or more of the issues raised in the pleadings – see rule 5.2)

[37] I agree with the analogy which Suncor draws to the circumstances reflected in the decision of Slatter J. in *Robertson v Edmonton (City) Police Service*, 2004 ABQB 243, 2004 CarswellAlta 511.

[38] In *Robertson* a police officer sought to quash disciplinary proceedings brought against him on the basis that there was bias. One aspect of the alleged bias was that he was disciplined for matters which were overlooked in other instances involving other police officers.

[39] The applicant in *Robertson* sought to pursue evidence showing how discipline decisions involving other police officers compared with how he was treated. This is analogous to Delmac wanting to see how Suncor treated other marketers compared to how Delmac was treated (for example, with respect to Christmas party expenses).

[40] As Slatter J observed in *Robertson*:

19 But the biggest problem with this line of attack is that it is so collateral to the real issues that it has no probative value. It would be almost impossible to prove bias by "differential treatment" unless it could be shown that the circumstances of the offence and the offender were exactly the same in both situations. For example, if two detectives were involved to exactly the same extent in exactly the same incident, and one was charged and one was not, that might call for an explanation. However, when two detectives are, on separate occasions, in separate places, involved in completely and factually different separate incidents, it is very difficult to even make a comparison. There are many reasons why charges might not be laid in one case, including the quality of the evidence, value judgments by those in authority, the service record of the officers involved, and the seriousness of the conduct alleged.

20 It must be obvious that this type of "differential treatment" evidence would require the Court to embark on a separate inquiry into the merits and demerits of all the other allegedly disreputable conduct, and the way it was handled, to see if there really was any differential treatment ...

[41] By analogy, if production of documents from the seven other Alberta wholesale marketers seemed to indicate a decision different than Suncor's decision with respect to Delmac, Suncor would then be required to call evidence as to how the circumstances of that marketer were different from the circumstances in Yellowknife or Medicine Hat.

[42] Instead of an analysis of positive and negative sharing based on two operations (Yellowknife and Medicine Hat) this Court would be drawn into an analysis of positive and negative sharing in nine operations (including the seven other Alberta marketers). This would involve production of documents relating to the seven other marketers, possible examinations under oath of people familiar with those other operations and potential numerous witnesses at trial regarding those other seven operations.

[43] It seems to me that the time and expense in such an undertaking are disproportionately large compared to the possible benefit.

[44] As the Court stated in *Robertson*, it is necessary to consider:

the amount of time that will be required to prove the facts from which the inference is to be drawn, whether a definitive answer is likely to come from that evidence, whether the opposing party should in fairness be allowed to rebut that evidence, and whether the entire exercise in pursuing the collateral fact is justified by the potential value of the evidence that will result.

[45] As stated earlier in these reasons, the question is whether that evaluation at trial should be made based on the historical pattern between Delmac and Suncor in Yellowknife and Medicine Hat, or whether the historical financial conduct between Suncor and other marketers would be of help.

[46] It is noteworthy that Delmac's expert, MMD, looked at numerous Yellowknife financial documents to see if they disclosed a pattern showing that the sharing was conducted with a view to achieve a return on equity of 10%, 12.5% or 15%, but MMD could not find a pattern.

[47] Delmac now wants its expert MMD to look at numerous financial documents involved with seven other wholesalers because it is possible that a pattern may emerge from dealings with or more of those seven.

[48] If a pattern emerged from one or more of those wholesalers' dealings with Suncor then the Court would be drawn into a collateral issue i.e. how similar were those wholesalers' territories to Yellowknife or Medicine Hat.

[49] The lack of a pattern after a review of Yellowknife documents is supportive of Suncor's position that factors in addition to 'return on equity' were considered in Yellowknife.

[50] As Delmac's expert himself stated (and already noted above) one of the possible reasons for a lack of a pattern in Yellowknife based on 'return on equity' alone is that "the profit thresholds considered factors that we are unaware of".

[51] Suncor says that other factors were considered, including risks, opportunities, available revenue streams, customer base and cost structures.

[52] The financial records of Yellowknife and Medicine Hat need to be analyzed to shed light on what other factors were historically considered, but it is not necessary or helpful to extend that analysis to the financial history of the seven other Alberta wholesalers.

[53] The problem with Delmac's approach is that, while I can understand how the (contractual) reasonable expectations of Delmac and Suncor are informed by their financial dealings in Yellowknife over many years, how are Delmac's reasonable expectations ascertained by bringing forward evidence of what financial adjustments Suncor made with other wholesale marketers, which adjustments were unknown to Delmac at the time?

Conclusion

[54] My conclusion is that ordering Suncor to produce documents from seven other Alberta wholesalers will not result in relevant and material evidence, and I decline to order such production.

Costs

[55] If the parties cannot agree on costs of this application they may make written submissions to me.

Heard on the 16th day of April, 2024.

Dated at the City of Calgary, Alberta this 24th day of April, 2024.

J.T. Prowse
A.J.C.K.B.A.

Appearances:

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