Court of King's Bench of Alberta

Citation: Enerplus Corporation v Harvest Operations Corp, 2023 ABKB 482

Date: 20230823
Docket: 2001 07798
Registry: Calgary

Between:

Enerplus Corporation

Plaintiff

- and –

Harvest Operations Corp., Orlen Upstream Canada Ltd., and Petrus Resources Corp.

Defendants

Reasons for Decision
of the
Honourable Justice Kevin Feth

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[1] Enerplus Corporation appeals from a decision of a Master (now Applications Judge) summarily dismissing its claim against Harvest Operations Corp. The appeal does not contest the summary dismissal of the claim. Instead, Enerplus seeks to clarify that the reasons given by the Master, including *obiter* comments, are not binding for the balance of this action.

[2] As will be explained, the appeal is unnecessary. The Master's Order does not include any extraneous declarations or findings. An appeal is from the Judgment or Order granted, not the reasons for it.

Background

[3] These litigants carry on business in the exploration, development and production of oil and gas in Alberta. Enerplus and Harvest are the parties to a 2005 Farmout and Option Agreement (the "Farmout Agreement") with Enerplus as farmor and Harvest as farmee.

[4] Enerplus held a 70% working interest in petroleum and natural gas leases for certain lands under a 1998 Joint Operating Agreement (the "Joint Operating Agreement"). The other parties to the Joint Operating Agreement - Orlen Upstream Canada Ltd. and Petrus Resources Corp. (as assignees) - each held a 15% working interest in the same lands.

[5] Enerplus assigned its rights and obligations under the Joint Operating Agreement to Harvest, which acquired Enerplus' working interest in the lands. Enerplus retained an overriding royalty (the "Enerplus Royalty").

[6] The extent and limits of the Enerplus Royalty are defined by the Farmout Agreement, which incorporates by reference the terms of the 1997 Canadian Association of Petroleum Landmen (CAPL) Farmout & Royalty Procedure (the "Royalty Procedure"). The Royalty Procedure characterizes the royalty as an interest in land.

[7] The Farmout Agreement did not expressly obligate Harvest to develop the working interest by producing oil and gas from petroleum substances in the lands.

[8] The Joint Operating Agreement incorporates the provisions of the 1990 CAPL Operating Procedure (the "Operating Procedure"), which state that any party to the Joint Operating Agreement may propose to develop lands by issuing an independent operations notice to the other parties. Each party receiving an independent operations notice must elect to either participate in the proposed development (as a "Participating Party") or not participate (as a "Non-Participating Party").

[9] A Participating Party is required to contribute a proportionate share of the development expenses. In return, the Participating Party is entitled to receive a share of any production or proceeds from the development.

[10] A Non-Participating Party does not bear any of the upfront development expenses and does not share in the initial production or proceeds. If a productive well is drilled, each Non-Participating Party is excluded from the benefits of the well for a penalty period during which the Participating Parties recover their capital investments and an additional return, imposing a penalty against the Non-Participating Party. Once the penalty period expires, production revenues are shared among all working interest holders.

[11] Harvest received independent operations notices from Orlen for the development of wells, but Harvest declined to participate. Petrus elected to participate. Three producing wells were then developed from which Orlen and Petrus received the production. Harvest did not receive any production from the wells nor any proceeds.

[12] Enerplus demanded that Harvest pay the Enerplus Royalty for production collected by Orlen and Petrus during the penalty period, estimated at $1,200,000. Enerplus' position is that the Enerplus Royalty constitutes an interest in land entitling the company to a residual for access to its working interest.

[13] If Harvest is not responsible for paying the royalty, Enerplus asserts that either or both of Orlen and Petrus are liable.

[14] Harvest denied that any royalty accrued during the penalty period because it elected not to participate in the development of the lands and, as a result, did not receive any production or proceeds from those lands. Harvest contended that Enerplus' interpretation of the Enerplus Royalty offended the language in the Farmout Agreement and the Royalty Procedure, as well as general principles of oil and gas law recognized by the Alberta Court of Appeal in ***Mesa Operating Ltd Partnership v Amoco Canada Resources Ltd***, 1994 ABCA 94 [***Mesa***].

[15] In response to this lawsuit, Harvest applied for summary dismissal of the claim against it.

[16] Enerplus submitted before the Master hearing the application that the Enerplus Royalty was reserved out of the production of the wells, rather than any proceeds paid to Harvest. The Enerplus Royalty therefore was earned even if Harvest did not contribute to the production costs. Such an approach to an overriding royalty finds some support in M. Thackray, *Canadian Oil and Gas, Third Edition* (LexisNexus Canada Inc, 2021) at §7.67 where an overriding royalty is described as "the right to take, in kind or money, a share of future mineral production from a well without the obligation to pay a proportionate share of drilling or producing costs."

[17] The Master summarily dismissed the claim: ***Enerplus Corporation v Harvest Operations Corp***, 2021 ABQB 634 [***Master's Decision***]. He concluded that the Enerplus Royalty did not accrue during the penalty period, relying on the language in the Farmout Agreement and the Royalty Procedure and principles expressed in ***Mesa***.

Standard of review

[18] An appeal from a Master or Applications Judge's Order is heard *de novo*. No deference is owed. The standard of review is characterized as correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

Analysis

[19] During the oral hearing before me, Enerplus conceded that the Farmout Agreement did not impose a contractual obligation on Harvest to pay the Enerplus Royalty in these circumstances. Enerplus accepts the Master's determination that the claim against Harvest should be summarily dismissed.

[20] Enerplus' concerns about the ***Master's Decision***, however, include the following conclusions reached by the Master:

- The Enerplus Royalty is not payable during the penalty period;
- Enerplus is not entitled to its royalty from the Participating Parties during the penalty period if Harvest elected not to participate in the well development;
- Certain clauses in the Operating Procedure (relevant to Enerplus' argument) do not apply to a royalty obligation involving Harvest alone;
- Orlen is not obligated to make royalty payments to Enerplus during the penalty period;
- Whether the Enerplus Royalty is an interest in land has no relevance to the scope of the royalty;
- The Alberta Court of Appeal's decision in ***Mesa*** established certain principles of general application to all overriding royalties.

[21] An appeal lies from a formal Judgment or Order, not the reasons for it: ***Re Bearcat Exploration Ltd (Bankrupt)***, 2003 ABCA 365 at para 13 [***Bearcat***].

[22] The Court does not review conclusions drawn by a judge that were not an instrumental part of the final decision and were not reflected in the final Judgment or Order. Such conclusions

are *obiter* and are not binding: ***Bearcat*** at para 13; ***Smith Estate v National Money Mart Company***, 2008 ONCA 746 at para 31.

[23] A judge's *obiter* comments may find their way into the reasons for decision, but that does not make them binding on other parties: ***J S Redpath Limited v Pricewaterhousecoopers Inc***, 2010 CanLII 42939 (NB CA) at para 5. Indeed, the other parties would be denied procedural fairness if binding conclusions could be imposed on them through a summary dismissal application that did not directly engage their interests and in which they did not participate. Here, Orlens and Petrus took no part in the summary dismissal application and this appeal.

[24] The operative provisions of the Master's Order dismissing Enerplus' claim against Harvest state:

> 1. The claims of the Plaintiff against the Defendant, Harvest, are dismissed.
>
> 2. Harvest is awarded costs of this Action against Enerplus. If the parties are unable to agree on the quantum of Harvest's costs, the parties may make further submissions on this issue.

[25] Enerplus contends that the potentially prejudicial commentary "is not neatly extricable from the ultimate order" and "requires correction on appeal." I disagree.

[26] The Master's Order merely dismissed the claim by Enerplus against Harvest. The Order contains no declarations of rights or rulings engaging the concerns identified by Enerplus. Nothing is said or implied in the Order about the claims against Orlen and Petrus. No declaration is made about the nature or scope of the Enerplus Royalty, the operation of the Enerplus Royalty, whether the royalty is an interest in land, or principles of law.

[27] To the extent Enerplus takes issue with any of the reasoning or findings in the ***Master's Decision***, those concerns may be addressed when the rights and obligations of the remaining parties are adjudicated in this action. Orlens and Petrus may engage directly at that time. Litigating the issues through this appeal serves no purpose.

Conclusion

[28] The appeal is dismissed.

[29] If the parties cannot resolve the costs of this appeal, they may contact me in writing within 30 days.

Heard on the 13th day of September, 2022 and the 3rd and 9th days of August, 2023.
Additional written submissions received August 11, 2023.

Dated at the City of Calgary, Alberta this 23rd day of August, 2023.

Kevin Feth
J.C.K.B.A.

Appearances:

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Borden Ladner Gervais LLP
for Enerplus Corporation

Michael Theroux and Paul Romaniuk
Bennett Jones LLP
for Harvest Operations Corp.