Date of Release - September 6, 1996 No. C962977
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	REASONS FOR JUDGMENT
ENCAL ENERGY LTD.	)	
PLAINTIFF	)	OF THE HONOURABLE
AND:	)	
NUMAC ENERGY, CANADIAN ROXY PETROLEUM LTD. and NUMAC ENERGY INC.	)	MADAM JUSTICE
DEFENDANTS	)	SINCLAIR PROWSE

Counsel for the Plaintiff	Frank Potts
Counsel for the Defendants	Roger D. Lee
Date and Place of Hearing	July 26, 1996 Vancouver, B.C.

I) Nature of Application and Relief Sought

1 The defendant Numac Energy (a partnership of the defendant Canadian Roxy Petroleum Ltd. and the defendant Numac Energy Inc.) operates two petroleum and natural gas fields located in British Columbia. Numac Energy (Numac) and the plaintiff Encal Energy Ltd. each own an interest in these gas fields.

2 Pursuant to the Agreements (there is one for each gas field) Encal was given the option (on an annual basis) to take its interest in the gas production from that field in kind or to appoint Numac to market it for them.

3 For a number of years, Encal appointed Numac to market the natural gas for them. In the fall of 1995 however, Encal notified Numac that it was electing "to take in kind its working interest shares of the natural gas production" of the two gas fields.

4 Although Numac did not oppose this election, it did take the position that the exercise of this election had to be done subject to the ongoing transportation contracts. That is, Numac had contracted with a third party until the fall of 1996 that it (the third party) was to transport the natural gas from the wellhead to meter stations - a distance of 2.7 kilometres and 4.0 kilometres respectively. Encal was not prepared to assume this contract with the third party. Consequently, it (Encal) did not take in kind its working interest shares of the natural gas production.

5 In this action, Encal has claimed that as the result of its position on the transportation contracts, Numac has breached the terms of the Agreements and has converted Encal's interest in this property to its (Numac's) own use. Encal has further claimed that as a result of this conduct it has suffered significant losses of approximately $80,000.00 per month.

6 In this application made pursuant to Rule 14(6)(c), Numac is seeking a declaration that on the basis of non forum conveniens (the more convenient forum being Alberta) the court decline jurisdiction to hear this action and enter a stay of proceedings.

II) Issue

7 There is no dispute that as the gas fields are located in British Columbia and as the cause of action arose here, this court has jurisdiction to hear this matter.

8 Rather the dispute in this hearing pertains to whether Encal has established that British Columbia (rather than Alberta) is the most convenient forum and that this action should be tried here - in spite of the fact that both of the Agreements set out that Alberta shall have exclusive jurisdiction (See: The Eleftheria, [1969] 2 All E.R. 641 (Probate, Divorce and Admiralty Division) and Pirrana Small Car Centres Ltd. v. Rumm et al (1981), 27 B.C.L.R. 292 (S.C.)). Both of the Agreements provide that:

> The Agreement and the relationship between the parties shall be construed and determined according to the laws of the Province of Alberta and the courts of the Province of Alberta have exclusive jurisdiction with respect to any matters or things arising directly or indirectly related to this Agreement.

III) Discussion

9 Although Numac concedes that an exclusive jurisdiction clause is not determinative but rather just a factor to be considered (The Eleftheria, supra, and Pirrana Small Car Centres Ltd. v. Rumm et al, supra), it contends that Alberta has "the most real and substantial connection" to this case and therefore is the most appropriate forum (Amchem Products Inc. v. British Columbia (Workers' Compensation Board) 1993, 77 B.C.L.R. (2d) 62 (S.C.C.)). Specifically, Numac argued that the Agreements were made in Alberta; all of the parties and most (if not all) of the witnesses are in Alberta; the relevant documentation is in Alberta; and the law to be applied is that of Alberta.

10 Encal, on the other hand, has argued that British Columbia is the more appropriate forum as the courts of Alberta do not have jurisdiction to grant the relief sought. (Encal is seeking specific performance of the terms of the Agreements - the resolution of this issue requiring a determination of rights to real property.) (See: Duke v. Andler, [1932] S.C.R. 734).

11 Moreover, Encal submitted that as one of the primary claims is a tort committed in British Columbia (namely, that Numac has converted Encal's property to its own use), the law to be applied is that of British Columbia (Tolofson v. Jensen, [1994] 3 S.C.R. 1022) - exclusive jurisdiction clauses not necessarily being binding on tort claims (Sarabia v. Oceanic Mindoro (The) (1995), 9 B.C.L.R. (3d) 348 (S.C.)).

12 In addition, Encal contended that it would be significantly prejudiced if this action was stayed as it intended to apply for final judgment in this action pursuant to Rule 18A in the fall. This procedure is not available in Alberta. Rather, in Alberta the matter would have to proceed to trial - the earliest trial date being at least two years away.

IV) Decision

13 The most convenient forum is Alberta. There will be a declaration to that effect and a stay of proceedings will be entered in this action.

14 In my view, the rights to be determined are not rights pertaining to an interest in land (that is, the gas field) but rather pertain to the "production" from that field. As "production", this interest in the natural gas field has been severed from the land thereby becoming personalty - an interest in personam (Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd. (1969), 3 D.L.R. (3d) 630 (Alberta C.A.)). Having been severed, this production is not an interest in land - not being a fee simple interest or a profit … prendre interest (British Columbia v. Tener et al (1985), 36 R.P.R. 291 (S.C.C.)).

15 This action does not involve the determination of rights to an interest in land but rather to the fulfillment of obligations under the Agreements. Given this situation, the Alberta courts have jurisdiction to hear the matter. (See: Pioneer Metals Corp. v.

Pegasus Gold Inc. (1990), 44 B.C.L.R. (2d) 79 (S.C.)).

16 If the above analysis is wrong in law, Encal is not prejudiced if this matter is heard in Alberta in any event. More particularly, as Numac confirmed during the course of these proceedings, the transportation contracts will expire this fall. As of early November 1996 Encal will be able to take its working interest shares of the natural gas production free and clear of any ongoing contractual transportation obligation to a third party. That is, Encal will be receiving the specific performance relief that it is seeking regardless of the outcome of this action. Consequently, as of early November 1996 the claim for specific performance will be abandoned and damages alone will be sought.

17 As the court cannot realistically hear and determine this action prior to early November 1996 (even under Rule 18A in British Columbia), Encal will not be significantly adversely affected by having this matter heard in Alberta. Although it is true that Encal will suffer some prejudice as the Rule 18A procedure will not be available in Alberta and therefore the matter will have to proceed to trial, upon weighing this factor with the other factors (namely, that all of the parties and most (if not all) of the witnesses are in Alberta; that the documents are in Alberta; and that it is Alberta law that is to be used to interpret the Agreements, Alberta has the most real and substantial connection to this action (Marchand (Guardian Ad Litem of) v. Alberta Motor Assn. Insurance Co. (1994), 89 B.C.L.R. (2d) 293 (C.A.)).

18 With respect to the fact that one of the claims is in tort, as was acknowledged by Encal, this claim is founded in contract. That is, Encal alleges that the interest that it acquired through its Agreements with Numac, has been converted to the use of Numac. Fundamental to the resolution of that tort claim will be a determination of the obligations of the parties under the Agreements. Again as was set out, the most real and substantial connection to the Agreements is Alberta - these Agreements were made there; the parties and most (if not all) of the witnesses are there; and the applicable law is that of Alberta.

19 For all of these reasons, this court declines jurisdiction to hear this matter. A stay of proceedings will be entered.

V) Costs

20 As the successful party, Numac is awarded its costs at Scale 3.

"Sinclair Prowse, J."

Sinclair Prowse, J.

Vancouver, B.C.
September 6, 1996

AUTHORITIES CONSIDERED

In making this decision, I have considered the following authorities:

1. Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 77 B.C.L.R. (2d) 62

2. Amerada Minerals Corporation of Canada Ltd. v. Mesa Petroleum (N.A.) Co. Ltd. (1985), 37 Alta. L.R. (2d) 363 (Q.B.)

3. Amerada Minerals Corporation of Canada Ltd. v. Mesa Petroleum (N.A.) Co. et al (1986), 47 Alta. L.R. (2d) 289 (C.A.)

4. Avenue Properties Ltd. v. First City Development Corp. (1985), 7 B.C.L.R. (2d) 45

5. Black's Law Dictionary, 6th edition at 751

6. Black's Law Dictionary, 6th edition at 793-794

7. Br. South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602 (H.L.)

8. British Columbia v. Tener et al (1985), 36 R.P.R. 291

9. CLE Materials, Conflict of Laws: Recent Developments October 1992 at 1.1.01

10. Canadian International Marketing Distributing Ltd. v. Nitsuko Ltd. et al (1990), 68 D.L.R. (4th) 318

11. Castel, J.-G., Canadian Conflict of Laws, 3rd edition (Toronto:Butterworths, 1994) at 281

12. Castel, J.-G., Canadian Conflict of Laws, 3rd edition (Toronto:Butterworths, 1994) at 428

13. Court Order Enforcement Act, R.S.B.C. 1979, c. 75 s. 30(1)

14. Duke v. Andler, [1932] S.C.R. 734

15. Ecco Heating Products Ltd. v. J.K. Campbell & Associates Limited et al (1990), 48 B.C.L.R. (2d) 36

16. The Eleftheria, [1969] 2 All E.R. 641

17. Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd. (1969), 3 D.L.R. (3d) 630

18. Kung v. Kung et al (July 7, 1989), Vancouver C890941 (B.C.S.C.)

19. Kung v. Kung et al (1990), 42 B.C.L.R. (2d) 145 (C.A.)

20. Lord Hailsham of St. Marylebone, Halsbury's Laws of England, 4th ed. (London:Butterworths, 1995) at 473

21. Marchand (Guardian ad litem of) v. Alberta Motor Assn. Insurance Co. (1994), 89 B.C.L.R. (2d) 293

22. McNabb v. Smith et al (1981), 30 B.C.L.R. 37

23. Northern Sales v. Saskatchewan Wheat Pool, [1991] M.J. No. 461

24. Pioneer Metals Corporation et al v. Pegasus Gold Inc. (1990), 44 B.C.L.R. (2d) 79

25. Pirrana Small Car Centres Ltd. v. Rumm, Measures and Kathcare Enterprises (1981), 27 B.C.L.R. 292 (S.C.)

26. Sarabia v. Oceanic Mindoro (1995), 9 B.C.L.R. (3d) 348 (S.C.)

27. Stern v. Dove Audio, Inc. (April 15, 1994), Vancouver C930935 (B.C.S.C.)

28. Tezcan v. Tezcan (1987), 20 B.C.L.R. (2d) 253

29. Tolofson v. Jensen (1994), [1994] 3 S.C.R. 1022, 100 B.C.L.R. (2d) 1