

Court of Queen's Bench of Alberta

Citation: Hunt Oil Company of Canada, Inc. v. Galleon Energy Inc., 2010 ABQB 212

Date: 20100329
Docket: 0901 04325
Registry: Calgary

Between:

Hunt Oil Company of Canada, Inc.

Respondent
(Plaintiff)

- and -

Galleon Energy Inc.

Applicant
(Defendant)

**Reasons for Judgment
of the
Honourable Mr. Justice Ron Stevens**

I. Introduction

[1] This is an application by the Defendant, Galleon Energy Inc. (“Galleon”), under Rules 129(1)(a) and 129(1)(d) of the *Alberta Rules of Court*, to strike the Statement of Claim filed by the Plaintiff, Hunt Oil Company of Canada, Inc. (“Hunt”) on March 23, 2009, as Alberta Court of Queen’s Bench Action No. 0901 04325 (the “Claim”).

[2] In December 2007, Hunt applied to the Energy Resources Conservation Board (“ERCB” or the “Board”) to amend its enhanced recovery scheme in the Kleskun Beaverhill Lake “A” oil pool (the “Oil Pool”). Galleon, another producer from the Oil Pool, objected to Hunt’s application, arguing that Hunt’s waterflood scheme risked overall recovery. The ERCB decided to hold a full hearing on the matter. The hearing was held before Board appointed examiners, whose recommendation to approve Hunt’s application was adopted by the Board.

[3] Hunt is now suing Galleon in tort - for abuse of process, negligent misrepresentation, and intentional interference with economic relations - for objecting to Hunt's application. Hunt claims Galleon's objection to its application was improper and prolonged the approval process, and seeks damages of \$30,000,000.

II. Issues

[4] The issues are:

- (a) Should the Statement of Claim be struck pursuant to Rule 129(1)(a) on the ground that it discloses no cause of action?
- (b) Should the Statement of Claim be struck pursuant to Rule 129(1)(d) because it is an abuse of the process of the Court?

[5] A motion to strike under Rule 129(1)(a) on the basis that a claim discloses no cause of action requires that the Court presume that the facts pleaded can be proved. No evidence is admissible on this application.

[6] Evidence is admissible on a motion to strike under Rule 129(1)(d).

[7] Because of the differences in admissible evidence, the two issues are addressed separately.

III. Rule 129(1)(a): Whether the Statement of Claim Discloses a Cause of Action

A. Rule 129(1)(a) Generally

[8] Rule 129 of the *Alberta Rules of Court* states:

129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

- (a) it discloses no cause of action or defence, as the case may be, or
...
- (d) it is otherwise an abuse of process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

- (2) No evidence shall be admissible on an application under clause (a) of subrule (1).

[9] The onus on an applicant to demonstrate that a pleading should be struck under R. 129 is stringent. If any serious issue of fact or law is disclosed by the impugned pleading, the application to strike will fail. As stated by the Alberta Court of Appeal in *Decock v. Alberta* (2000), 255 A.R. 234 (C.A.) at para. 62, citing with approval *Cerny v. Canadian Industries Ltd.*, [1972] 6 W.W.R. 88 (Alta. S.C.A.D.) at 95:

It is clear from these decisions that the court should not strike out a pleading or a part thereof as disclosing no cause of action or as being frivolous or vexatious or as being an abuse of the process of the court, which in most cases would have the effect of dismissing an action or denying a party a right to defend, unless the question is beyond doubt and there is no reasonable cause of action ...

...

This power of the court certainly should not be exercised to strike out a pleading or to strike out a party from an action where there is a serious point of law to be considered which cannot be said to be clear. How can such a pleading be an abuse of the process of the court or frivolous or vexatious? [emphasis added]

[10] An action will be allowed to stand even where the pleading does not disclose a valid cause of action but is capable of being amended into a viable format. As stated by the Alberta Court of Appeal in *Decock* at para. 63, citing Stevenson and Côté, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 1998, at 85-86): “If the pleading impugned will not hold water as it is, the Court is not to discard it, if it can patch it up enough to hold some water.”

[11] A Statement of Claim should be struck under Rule 129(1)(a) where it is certain to fail. This requires the Court to consider whether, assuming the facts as pleaded by Hunt can be proved, it is plain and obvious that the Statement of Claim discloses no reasonable cause of action. The plain and obvious test to be applied was set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 33:

... [A]ssuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses a reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff’s statement of claim be struck out. ... [emphasis added]

[12] Courts will not hesitate to strike out pleadings under Rule 129(1)(a) where the pleadings attempt to broaden a narrowly defined tort: *Rocky Mountain Rail Society v. H & D Hobby Distributing Ltd.* (1995), 27 Alta. L.R. (3d) 424 at para. 24. Plaintiffs often try to avoid the application of the Rule by arguing that their claim is a “novel”, one that warrants a full trial for

its determination. However, a novel legal proposition cannot be one that is far-fetched or runs against binding legal authority: *Manulife Financial Services Ltd. v. BTK Holdings Ltd.* (1997), 56 Alta. L.R. (3d) 355 (Q.B.(M)) at para. 21.

B. Presuming the facts pleaded in the Statement of Claim can be proved

[13] The facts as set out in the Statement of Claim are presumed to be true for the purpose of a motion under Rule 129(1)(a). These facts are as follows:

- (a) There are no contractual obligations between Hunt and Galleon. Rather, both have lease rights and active wells and carry on production activities within the Oil Pool. [Statement of Claim, para. 3]
- (b) In or about December of 2007 Hunt advised Galleon that it intended to make an application to the ERCB to amend its enhanced recovery scheme at the Oil Pool and to include two wells as injectors and thereby improve pressure support and sweep efficiency (the “Hunt Application”). [Statement of Claim, para. 4]
- (c) Galleon objected to Hunt’s proposed amendments, stating that Galleon’s “geological mapping” and “seismic interpretation” showed that the proposed locations of the injectors would be inefficient and would likely have a negative impact on, among other things, overall recovery from the Oil Pool. [Statement of Claim, para. 5]
- (d) Similar assertions were raised by Galleon in its formal objection to the Board dated January 30, 2008, in which Galleon maintained that, should the Hunt Application be successful, it foresaw premature water breakthrough. Galleon further stated that its assessment was based on concrete data and evidence. [Statement of Claim, para. 6]
- (e) In the period leading up to the hearing of the Hunt Application, Galleon made further representations that it had conducted tests and undertaken analyses in formulating its position on the Hunt Application. [Statement of Claim, para. 7]
- (f) Hunt was unable to verify or assess Galleon’s alleged analyses and test results in the pre-hearing stage, as no such data was provided by Galleon, despite numerous requests by Hunt. [Statement of Claim, para. 8]
- (g) The Hunt Application would not have proceeded to a full hearing but for the objections raised and the representations made by Galleon to the Board regarding the availability of data and the corresponding results of test and analyses

undertaken by Galleon (collectively the “Misrepresentations”). [Statement of Claim, para. 10]

- (h) At the hearing of the Hunt Application in late September of 2008, Hunt conclusively learned that no credible analysis had been performed by Galleon until August of 2008, some nine months after Galleon first objected to the Hunt Application. [Statement of Claim, para. 11]
- (i) Further, in the days and weeks leading up to the hearing of the Hunt Application, Galleon continued to employ delay tactics and circumvent the proper administrative process, for its own benefit, including:
 - (i) refusing to provide requested data and analyses promptly, or at all;
 - (ii) making last minute information requests of Hunt; and
 - (iii) seeking a delay to attempt an ADR process and then failing, or refusing, to participate genuinely in such process.(collectively the “Delay Tactics”). [Statement of Claim, para. 13]
- (j) At all material times, Galleon was aware that any delay in the Hunt Application would result in Hunt suffering substantial damages from lost profits and opportunity costs, with a corresponding benefit accruing to Galleon, due to the competitive drainage situation in the Oil Pool. [Statement of Claim, para. 14]
- (k) Galleon’s objections to the Hunt Application were wholly spurious, based solely on Galleon’s Misrepresentations and designed to prolong the application process for its own benefit. [Statement of Claim, para. 15]
- (l) A decision of the Board was rendered in Hunt’s favour in late December of 2008 (Decision 2008-130). [Statement of Claim, para. 16]
- (m) Galleon’s improper objections to the Hunt Application served to prolong the approval process, without legitimate purpose, causing Hunt to suffer substantial and unwarranted economic harm. [Statement of Claim, para. 17]
- (n) Galleon’s actions, including the Delay Tactics, were intended to circumvent the proper Board process by any means possible, and were taken for the sole collateral, illicit and illegitimate purpose of attempting to gain a competitive advantage with respect to drainage at the Oil Pool. [Statement of Claim, para. 33]
- (o) Following the Board’s release of the decision in the Hunt Application, Galleon made various other applications and assertions to the Board regarding the Oil Pool, which were similarly without merit and intended to interfere with Hunt’s economic interests in the Oil Pool. [Statement of Claim, paras. 18-21]

- (p) Hunt was required to expend considerable time and effort to respond to these assertions and applications which lacked sufficient data or accurate analysis and represented a form of litigious harassment perpetuated by Galleon, contrary to the standard practice and procedure of the Board. [Statement of Claim, paras. 23 and 24]
- (q) It is the stated mission of the Board to “ensure that the discovery, development and delivery of Alberta’s energy resources take place in a manner that is fair, responsible and in the public interest”. Underlying this framing statement is a policy of openness and wide-based participation; to fulfill its public interest mandate, the Board must strive to ensure that all legitimate parties are given the opportunity to air their opinions and grievances through the hearing process. [Statement of Claim, para. 25]
- (r) The overall effectiveness of the Board’s open and inclusive administrative process hinges on the participants’ willingness to act in good faith, provide accurate information in a timely manner and refrain from misusing the process for frivolous, vexatious and self-serving means. [Statement of Claim, para. 26]
- (s) Despite the fundamental importance of the co-operation of the participants, there are no means within the Board’s procedures or otherwise under its directing legislation to provide redress against those parties that abuse the legitimate Board process to gain a competitive advantage. [Statement of Claim, para. 27]
- (t) Hunt states the appropriate venue to seek such redress and, in so doing, maintain the proper structure of the Board process, is this Honourable Court. [Statement of Claim, para. 28]

C. Does the Statement of Claim disclose a cause of action for abuse of process?

1. The Test

[14] Abuse of process is a very narrow tort: *Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd.*, [1990] O.J. No. 27 (H.C.J.) at para. 5; *Rocky Mountain* at paras. 13 and 24. The importance of construing this tort narrowly was explained by the Court in *Westjet Airlines Ltd. v. Air Canada*, [2005] O.J. No. 2310 (Sup.Ct.J.) at para. 23. To establish it, Hunt must show that:

- (a) Galleon used “the processes of law” for an improper purpose; and
- (b) Galleon made a definite act or threat in furtherance of such purpose: *Rocky Mountain* at para. 13.

2. Law and Analysis

[15] Hunt is claiming that Galleon intentionally delayed the outcome of the ERCB proceeding for the improper or collateral purpose of gaining “a competitive advantage with respect to drainage”. Specifically Hunt claims that Galleon committed the tort of abuse of process because it:

- (a) had a duty of full and frank disclosure on Board applications;
- (b) based its objections to Hunt’s application on inadequate credible evidence;
- (c) misled Hunt and the Board regarding the basis for its objections;
- (d) knew or ought to have known that Hunt and the ERCB would take Galleon’s misrepresentations to mean that:
 - (i) Galleon had undertaken sufficient testing and reviewed sufficient data;
 - (ii) the data would be provided in the pre-hearing stage;
 - (iii) the data was credible; and
 - (iv) the Board should hold a hearing due to the existence of the data and corresponding analyses and conclusions reached by Galleon;
- (e) had no legitimate basis on which to challenge Hunt’s application, apply for extensions, make a later pool delineation application, or correspond with the Board;
- (f) intended, by these actions, to circumvent the proper Board processes; and
- (g) took the actions it did for the “sole collateral, illicit and illegitimate purpose of attempting to gain a competitive advantage with respect to drainage at the Oil Pool”.

[16] Hunt pleads that, but for these actions, the Board would not have held a hearing on Hunt’s application. Hunt alleges Galleon knew that Hunt would suffer substantial losses, which indeed were a direct and foreseeable consequence of Galleon’s actions.

[17] In my view, none of these allegations constitutes an improper purpose. There is no liability if a party employs regular legal processes to their conclusion, even if the party does have bad intentions: *Westjet* at para. 12.

[18] The tort of abuse of process is designed to remedy a situation where the legal process is used “to gain an end which the legal process does not entitle the plaintiff to obtain”: *Teledata* at para. 9; *Rocky Mountain* at para. 14. Had Galleon’s objection to Hunt’s application in the ERCB proceedings been successful, Galleon would have gained the same advantage that Hunt claims in this action to be improper - it would have gained “a competitive advantage with respect to drainage at the Pool” by preventing Hunt from implementing its waterflood scheme.

[19] The Ontario Court of Appeal addressed abuse of process in an administrative law context in *Apotex v. Ontario (Minister of Health and Long-Term Care)*, [2005] O.J. No. 3848 (C.A.) at para.

27 when it considered whether a party taking advantage of its rights of review, in order to advance its own economic interests, could be found to have a collateral purpose:

Did the actions ... have a “collateral or improper purpose”? The respondents were certainly trying to advance their own economic interests at the expense of Genpharm, but that is hardly unusual in this type of litigation.

[20] This law will apply to proceedings taken before regulatory tribunals as well as courts: *Metrick v. Deeb*, [2003] O.J. No. 2221 (C.A.). I assume that Galleon’s submission to the ERCB constitutes the requisite “legal process” required to satisfy the test for abuse of process.

[21] Assuming the allegations in this Statement of Claim can be proved, and obtaining an economic advantage was Galleon’s purpose, it is not an “improper purpose”. An objective of delaying the conclusion of a matter is also not an “improper purpose”: “I cannot think that the ‘ulterior motive of prolonging an action’ comprises a wrongful purpose for which damages might be awarded.” *Pacific Aquafoods Ltd. v. C.P. Koch Ltd.*, [1988] B.C.J. No. 2607 (S.C.) at para. 8.

[22] Much stronger allegations in other cases have failed to pass the “improper purpose” part of the test. Courts have specifically held that the “improper purpose” aspect of the test is not satisfied merely because a party has brought a factually groundless action that is bound to fail, (*Teledata* at para. 9) has presented a false case for the purpose of sustaining his defence, (*Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (Sup.Ct.J.) at paras. 219-220) or where the action has the intended effect of antagonizing, impoverishing or intimidating a party (*Rocky Mountain* at para. 20).

[23] The Court in *Scintilore* considered whether a claim brought without merit constituted an abuse of process and concluded it did not:

Putting forward a false claim on false evidence does not establish liability for abuse of process. Similarly, the pursuit of tactics that prove unsuccessful in a hard fought trial will not ground an action in tort. (*Scintilore* at para. 220)

[24] There is a policy reason for this limitation:

I agree with the authors of [Halsbury’s] ... when they write:

The law allows every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings if unsuccessful.

This is the basis on which our system of litigation operates and has long operated. It is a principle which marches hand in hand with the one [...] that defamatory statements contained in a document properly used in any proceedings before a court cannot give rise to an action. These two principles are important cornerstones of the

right of full and free access to the courts for all persons who feel, even wrongly, that they have a ground of complaint against another. (*Teledata* at paras. 13-14; see also s. 37(2) of the *ERCA*.)

[25] The Statement of Claim is really about suing Galleon for allegedly overstating its case before the board with the goal of delaying the outcome of the Board's decision. A finding that this claim has any chance of success would directly contradict the authorities applicable to this narrowly defined tort. Such a finding would give effect to Fruman J.'s (as she then was) concern in *Rocky Mountain*: "At some point permitting parties to proceed with a broadly defined claim of abuse of process might become an abuse of process of the opposing side." (*Rocky Mountain* at para. 24)

[26] Hunt has made no attempt to plead the second requirement for an abuse of process claim: a definite act or threat in furtherance of the improper purpose. A claim will be struck where no overt act is pleaded, as occurred in *Westjet* at paras. 20-21:

This requirement is described in *Fleming on Torts* (9th ed., 1998) at p. 688, in the following terms:

In addition to the improper purpose, there must be some overt act or threat, distinct from the proceedings themselves, in furtherance of that purpose, such as in the abovementioned case the extortion accompanying the *capias*. Were it otherwise, any legal process could be challenged on account of its "hidden agenda".

I am unable to find in the statement of claim any such overt conducts by the defendants that would satisfy this second requirement. The acts complained of... are all acts that the defendants were entitled to engage in.

[27] Hunt submits that a claim for abuse of process absent an overt act or threat and relies upon the *obiter* of Fruman, J. (as she then was) in *Rocky Mountain*, where she stated at para. 23:

There may be cases in which a party has an improper ulterior motive for instituting proceedings, knows that there is a strong likelihood that the desired loss will be suffered but refrains from voicing a threat or acting in furtherance. In these circumstances, perhaps, an action for abuse of process might proceed without the threat or action in furtherance.

[28] Hunt also refers to the British Columbia Court of Appeal in *Stevenson v. Smith*, 2009 B.C.C.A. 96 at para. 34, where the Court expressly finds it arguable that the tort of abuse of process "does not require an overt act or threat". The Court refused the defendant's application to strike the claim in that case, despite the fact that no overt threat had been alleged in the claim.

[29] As noted previously, there is good reason to construe this tort narrowly and I do not accept a claim may proceed without an overt act or threat.

[30] Instituting proceedings is not an “overt act”. Hunt has not pleaded any overt act in furtherance of Galleon’s alleged “improper purpose”. The claim for abuse of process must be struck for this reason alone.

[31] In conclusion, the Statement of Claim neither discloses an improper or collateral purpose nor references a definite act or threat in furtherance of any such purpose. As such, it is plain and obvious that Hunt’s Statement of Claim does not disclose a reasonable cause of action for abuse of process.

D. Does the Statement of Claim disclose a cause of action for negligent misrepresentation?

1. The Test

[32] The test for negligent misrepresentation is well-established:

- (a) there must be a duty of care based on a “special relationship” between the representor and the representee;
- (b) the representation in question must be untrue, inaccurate or misleading;
- (c) the representor must have acted negligently in making the representation;
- (d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
- (e) the reliance must have been detrimental to the representee in the sense that damages resulted.

Queen v. Cognos, [1993] 1 S.C.R. 87 at para. 33, as cited in *Premakumaran v. Canada*, 2006 FCA 213 at para. 18; *S. Maclise Enterprises Inc. v. Union Securities Ltd.*, 2008 ABQB 214 at para. 45-46.

2. Law and Analysis

[33] All five of the elements of negligent misrepresentation have been specifically pleaded by Hunt.

[34] Hunt alleges that Galleon committed the tort of negligent misrepresentation when it objected to Hunt’s application because:

- (a) Galleon stated there was potential for premature water breakthrough if Hunt’s application to amend its enhanced recovery scheme was approved;
- (b) in doing so Galleon misrepresented the strength of its position and the amount of data it had collected and analyses undertaken;

- (c) these misrepresentations were relied on by Hunt in formulating its response to Galleon and by the Board in deciding to grant Galleon standing and hold a full hearing;
- (d) if Galleon had not represented to the Board that it had this evidence, Galleon would not have been granted standing; and
- (e) Hunt's application would not have gone to a full hearing, which caused the delay in the ERCB approval of Hunt's enhanced recovery scheme.

[35] The only issue raised by Galleon regarding this cause of action is whether there is a 'special relationship' that gives rise to a duty of care.

[36] In considering whether a special relationship exists that gives rise to a duty of care, the Court must consider, based on the facts pleaded, whether a relationship of sufficient proximity exists so that:

- (a) the defendant ought reasonably to have foreseen that the plaintiff will rely on the defendant's representation;
- (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable; and
- (c) no public policy considerations would negate this duty of care.
(Summarized in *Premakumaran* at paras. 19-20.)

[37] It is not clear from the Statement of Claim where the "special relationship" is said to arise. It is claimed Galleon owed a duty of care to Hunt and to the Board.

[38] No case authority was proffered to establish that a special relationship exists between participants in a regulatory process so as to place on each party a duty of care not to make inaccurate statements of its position to the other party or the tribunal.

[39] Competitors seeking to protect their own interests do not have a special relationship that would give rise to a duty of care between them. See e.g. *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 at paras. 65-68 where the Court rejects a duty of care between competitors in negotiations.

[40] In this case no provision in either the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, the *ERCA*, or the *Energy Resources Conservation Board Rules of Practice*, Alta. Reg. 252/2007, suggests that there is heightened duty between parties participating in regulatory processes.

[41] Statements of position made in proceedings are not to be relied on as being true, as the nature of such proceedings assumes a certain degree of advocacy.

[42] I find that these participants in the regulatory process before the ERCB did not have a 'special relationship' giving rise to a duty of care. Such it is "plain and obvious" that Hunt's Statement of Claim does not disclose a reasonable cause of action for negligent misrepresentation.

E. Does the Statement of Claim disclose a cause of action for intentional interference with economic interests?

1. The Test

[43] In order to found a claim for this tort, a plaintiff must plead the following three elements: (i) an intention by the defendant to injure the plaintiff's economic interests; (ii) an interference with the plaintiff's economic interests by illegal or unlawful means; (iii) resulting economic harm suffered by the plaintiff. *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2007 ABQB 717 at para. 82, aff'd 2009 ABCA 20; *Conway v. Zinkhofer*, 2008 ABCA 392 at para. 41. Other courts have recently narrowed the formulation of this test; the Ontario Court of Appeal, in *Correia v. Canac Kitchens, a division of Kohler Ltd.*, 2008 ONCA 506 at para. 100, recently adopted the House of Lords' decision in *OBG Limited v. Allan*, [2007] UKHL 21.

2. Law and Analysis

[44] Hunt has not pleaded that Galleon did anything illegal or unlawful in making its objection. Rather, Hunt pleads that Galleon intentionally interfered with Hunt's economic interests because it:

- (a) was aware of its obligations to provide frank and candid disclosure of information and refrain from using the Board's procedures for any improper or collateral purpose;
- (b) made deliberately misleading statements to the Board to interfere with Hunt's business and economic interests in the Pool;
- (c) made these statements without legal justification; and
- (d) caused Hunt considerable loss, damage and prejudice, resulting from "an unjustifiable situation of competitive drainage at the Oil Pool".

[45] The broadest interpretation given to "unlawful" is the Ontario Court of Appeal's decision in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (C.A.), which defines an unlawful act as one "the defendant is not at liberty to commit". In that case, the "unlawful" aspect was something more than Hunt has pleaded here. More recently, the Ontario Court of Appeal has "distinguished *Reach M.D.* and limited its scope". For example, failing to follow internal corporate policy and carrying out an act in bad faith will not suffice: see *Correia* at para. 104.

[46] In *Polar Ice Express*, the Alberta Court of Queen's Bench accepted this more broadly conceived notion of what constitutes "unlawful means". In holding that this element of the tort would be satisfied where a defendant committed acts it "was not at liberty to commit", the Court cited from a leading text on torts, as follows:

The definition of "unlawful means" is that applied in respect of the torts of conspiracy by unlawful means and intimidation. The case law reflects two different

views of “illegal or unlawful means”. The narrow view limits the term to conduct prohibited by law or statute. The broader view, which has generally been favoured by Canadian courts, extends illegal or unlawful means to an act the defendant “is not at liberty to commit”. The following have been held to constitute unlawful means: crimes and torts, contractual breaches, statutory breaches, and contempt of court and aiding and abetting contempt of court: *Polar Ice Express* at para. 85.

[47] In *Telus Communication Inc. v. T.W.U.*, (2005), 385 A.R. 43 (Q.B.) at paras. 42 and 72, this Honourable Court further acknowledged that tortious conduct could constitute an ‘unlawful act’, thereby satisfying this element of the test.

[48] Hunt pleads that Galleon’s actions were “taken without legal justification”. But there is no claim that Galleon was doing anything other than following the statutory processes and rules. Statements made in pleadings are protected from being the subject of later litigation - pleadings cannot be “unlawful” even if they are incorrect or exaggerated. *Can-Air Services Ltd. v. British Aviation Insurance Co.* (1988), 63 Alta. L.R. (2d) 61 (C.A.) at para. 16; *Re Transmission Administrator*, Decision 2002-099, [2002] A.E.U.B.D. No. 124 at para. 19 (the AEUB is the ERCB’s predecessor); *Dooley v. CN Weber Ltd.* (1994), 19 O.R. (3d) 779 (Gen. Div.) at para. 20. None of Galleon’s actions were “unlawful”.

[49] The only “unlawful” acts Hunt has pleaded are the torts of abuse of process and negligent misrepresentation. As I have found there is no foundation for either of these torts, a claim in unlawful interference that relies on them must also fail. As such the Applicant has demonstrated that it is “plain and obvious” that the Statement of Claim does not disclose a reasonable cause of action for intentional interference with economic relations.

IV. Rule 129(1)(d): Is the Statement of Claim an abuse of the process of the Court?

A. Rule 129(1)(d)

[50] Rule 129(1)(d) of the *Alberta Rules of Court* states:

129(1) The court may at any stage of the proceeding order to be struck out or amended any pleading in the action, on the ground that:

...
(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

[51] In this context, “abuse of process” does not equate to the tort of abuse of process outlined above. Instead, it refers to “the inherent power of the court to prevent a misuse of its procedure, in

a way that would ... bring the administration of justice into disrepute”: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at para. 37.

[52] Evidence is admissible on a motion to strike under Rule 129(1)(d). Schedule A to the Notice of Motion contains the evidence upon which Galleon relies in support of its Rule 129(1)(d) application only, namely the ERCB’s decisions and orders, certified pursuant to s. 15(2) of the *Energy Resources Conservation Act*.

B. The Evidence

[53] Hunt and Galleon operate competitive waterflood schemes in the Pool. In late 2007 Hunt wished to add water injection wells to the Pool, which would constitute an amendment to Hunt’s enhanced recovery scheme. Such amendments require ERCB approval pursuant to *OGCA*, s. 39(1)(a).

[54] The *ERCA* gives potentially affected parties a right to notice of an application, *ERCA*, s. 26(2)(a), and an opportunity to file a submission with the Board objecting to it and seeking intervener status: *ERCB Rules*, Rules 10 and 24. Galleon did so, through letters dated December 19, 2007 and January 30, 2009, objecting to Hunt’s application “on the basis of the possibility for premature water breakthrough via high permeability channels in the Beaverhill Lake sand and is concerned with the structural location of the proposed injectors in the reservoir.”

[55] The Board considered Galleon’s submission, along with “the subject application, related correspondence from Hunt ... and supporting documentation”, to determine whether Galleon should have standing on the application. Pursuant to s. 26(2) of the *ERCA*, “if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person”, that person is entitled to adduce evidence, cross-examine on evidence adduced by the applicant, and make representations to the Board at a hearing.

[56] The Alberta Court of Appeal in *Dene Tha’ First Nation v. Alberta (Energy and Utility Board)*, 2005 ABCA 68 at para. 10, leave to appeal to S.C.C. refused: [2005] S.C.C.A. No. 176, determined that the ERCB should grant a party standing, with participatory rights under s. 26(2), where a two part test is satisfied:

The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim, right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual. See e.g. *Dene Tha’ First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para. 10, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 176.

[57] On April 24, 2008 the Board determined Galleon had satisfied the s. 26(2) test and was entitled to standing. In its decision, the Board noted Galleon's interest in the Pool and the grounds on which Galleon objected.

[58] Hunt could have applied for a review of the Board's decision pursuant to s. 48 of the *ERCB Rules*. Pursuant to s. 41 of the *ERCA*, appeals to the Court of Appeal from ERCB decisions are available on questions of law or jurisdiction, with leave. It did not, but instead sent a letter to the ERCB expressing its "concerns regarding potential delay in the approval of the application if a review and variance is filed by Hunt."

[59] The Board replied on June 25, 2008, stating that Galleon had established the *prima facie* case required to obtain standing and that, if Hunt filed a review and variance application, the Board did not foresee a significant delay in processing Hunt's application:

The Court of Appeal of Alberta has described the test that must be met for a party to have standing under subsection 26(2) of the *ERCA*. Standing is determined on the basis of whether or not a party objecting to an application has made a *prima facie* case that it has legal rights that may be directly and adversely affected by a decision of the ERCB to approve an application. A grant of standing entitles a party who has objected to an application to be a participant at a hearing, and provides that party with certain participatory rights, including an opportunity to make submissions to the Board regarding the impacts of the application on it.

After considering Galleon's objection the Board determined that Galleon had met the test under S. 26(2). As a result of its determination, the ERCB is mandated by the *ERCA* to hold a hearing into Hunt's application. Furthermore, since Hunt's application has now been scheduled for a hearing, the parties must let the ERCB hearing process unfold in the normal course

As with any decision of the Board, Hunt may apply for a review and variance of the Board's decision ... A review application is generally handled separately from the processing of a Resources Application.

Therefore I do not foresee a significant delay in the processing of Hunt's application by the ERCB if Hunt were to file a review application.

[60] Hunt did not file a review and variance application or otherwise seek court review of the ERCB's decision to grant Galleon standing.

[61] The ERCB scheduled the hearing of Hunt's application (Hunt's pool delineating application was addressed at the same hearing as Hunt's application to amend its water flood scheme) for September 10, 2008 and set August deadlines for submissions. After Galleon filed its submissions, Hunt brought a motion for directions on the basis that Galleon's submissions were deficient. The

ERCB found that Galleon's submissions did not allow Hunt to know the case that Galleon expected to make at the hearing, but also required Hunt to produce the input data files contained in Hunt's submissions, so that Galleon could actually have the information necessary to complete its submissions:

The Panel has directed, by letter dated August 18, 2008 that Hunt provide the Board and Galleon with its input data files. This should enable Galleon to see the assumptions made by Hunt in its modelling and to run alternative sensibilities and scenarios to test Hunt's assertions and there by allow Galleon to complete its submission.

The Board needs the complete input data files, not just parts of them, so that it and Galleon can understand and assess Hunt's model runs. Electronic copies of these files are necessary so they can be used by any party.

[62] Hunt did not comply with this direction. Instead it applied to keep its input data files confidential. The Panel refused Hunt's application on September 2, 2008. After this decision, Hunt disclosed the information necessary for Galleon to complete its own submission to the ERCB.

[63] Given the late disclosure of Hunt's technical data, Galleon applied for an adjournment of the hearing so it would have time to address this additional information. The Board granted a two week adjournment and stated:

The Panel agrees with Galleon that a large amount of additional technical information was submitted by Hunt in its reply submission of September 3, 2008, and concludes that additional time is required by Galleon and the ERCB to properly review the additional information. The Panel also believes that having a model study from Galleon would provide for a more complete assessment of the best way to waterflood the area of the Kleskun Beaverhill Lake A Pool that is in dispute. While this would extend the commencement date of the hearing, considering Galleon's commitment to provide its model study by September 16, 2008 and the need for additional time to review Hunt's reply submissions in any case, the Panel believes a short adjournment would be reasonable.

[64] The Board hearing was from September 29 to October 2, 2008. At the hearing, Hunt and Galleon agreed that additional water injection into the Pool was required, but disagreed on where the additional injectors should be located.

[65] At the end of the hearing, Hunt could have applied for an immediate decision, granting Hunt's application with reasons to follow, so as not to delay the implementation of its waterflood scheme. Hunt did not do so.

[66] The Board issued its decision granting Hunt's application on December 23, 2008. While the Board preferred Hunt's approach to Galleon's, there is no suggestion in this decision that the Board considered Galleon's objection or any of its conduct to have been improper. In fact, the Board required Hunt to continue to monitor its waterflood scheme for premature waterflood breakthrough. Galleon's follow-up letter to the Board on this issue is also a subject of Hunt's claim.

[67] Hunt now seeks damages from Galleon for the ERCB's interlocutory decision that resulted in a full hearing on the merits of Hunt's application, rather than the immediate approval that Hunt pleads was warranted.

C. ERCB proceedings

[68] Enhanced recovery and pool delineation applications, and more broadly the powers and procedures of the ERCB, are governed by an extensive legislative and administrative regime, including:

- (a) the *OGCA*;
- (b) the *ERCA*;
- (c) the *ERCB Rules*;
- (d) ERCB Directive 065: Resources Applications for Conventional Oil and Gas Reservoirs; and
- (e) ERCB Information Letter IL 2001-1: Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy Industry Disputes.

[69] The ERCB is Alberta's specialized energy regulator and has a broad mandate over oil and gas production in Alberta. Its objectives include: effecting the conservation of, and preventing the waste of, Alberta's energy resources; and securing the observation of safe and efficient practices in developing Alberta's energy resources: *ERCA*, s. 2.

[70] In objecting to Hunt's application, Galleon was exercising the legal rights it was entitled to exercise before the ERCB. Rule 24(1) of the *ERCA Rules* provides that, where a party wishes to intervene in a proceeding, it will file a submission with the Board containing a concise statement about how it would be adversely affected, the facts it *proposes* to show in evidence, and the disposition it *advocates*.

[71] In granting Galleon standing, and in dealing with Hunt's application generally, the ERCB at all times acted within its authority and jurisdiction. The *ERCA* makes it clear that the ERCB has full control over its own proceedings: See e.g. ss. 16, 20, 25, 40, 41 and 49. The ERCB has the authority to:

- (a) grant standing and order a hearing: *ERCA*, s. 26;
- (b) grant adjournments: *ERCB Rules*, r. 28;
- (c) review and vary its decisions: *ERCA*, s. 39;
- (d) issue approvals at the end of a hearing with reasons to follow:

- (e) curtail production under the *OGCA*: *OGCA*, ss. 36-37; and
- (f) exercise other powers over operations in order to secure its conservation mandate: *OGCA*, s. 94.

D. Is the Statement of Claim is an abuse of process

[72] Courts give considerable deference to procedural rulings made by statutory tribunals and specifically to the ERCB: *Alberta (Energy Resources Conservation Board) v. Sarg Oil Ltd.*, 2002 ABCA 174 at paras. 25-32 and 37, leave to appeal denied, [2002] S.C.C.A. No. 371: where the Court of Appeal found collateral attack where the complaints could and should have been argued before the Board itself and, possibly, before the Court of Appeal pursuant to the statutory appeal procedures available. Allowing parties to ERCB proceedings to sue each other for “damages” resulting from ERCB decisions would undermine the ERCB’s authority and ability to control its process, and would be an abuse of the Court’s process.

[73] Hunt claims that “there are no means within the Board’s procedures to provide redress for those parties that misuse the legitimate Board process to gain a competitive corporate advantage.”: (Statement of Claim at para. 27; note that this argument was raised and rejected in the *Teledata* case, quoted above at paras. 13-14.) But there are. At the most basic level, where the Board is concerned that a party is seeking to intervene improperly, it refuses the request. For example, in 2008, Hunt attempted to seek a review and variance of Galleon’s own enhanced recovery scheme in the Pool. (A certified copy of this decision is included in Tab A to Galleon’s Brief.) Hunt tried to argue that Galleon’s enhanced recovery scheme impacted Hunt’s ability to produce from the Pool and should be varied, but produced no evidence in support of this request. The Board refused the request and did not order a hearing. This demonstrates that the Board exercises its jurisdiction to limit competitors’ attempts to abuse the Board’s process where warranted.

[74] Suing an opposing party in an administrative proceeding for the effect of an “incorrect” decision, especially when that decision was not challenged through the appropriate channels of review, would bring the administration of justice into disrepute.

[75] Arguably, the Statement of Claim is a collateral attack on ERCB decisions. Hunt is not seeking to overturn the ERCB decisions, but is contesting whether those decisions were correct “for the purposes of a different claim with different legal consequences”. *City of Toronto* at para. 34. The Supreme Court of Canada has held that such claims are best addressed through doctrine of abuse of process:

A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. *City of Toronto* at para. 46

[76] That is what Hunt is doing here. Hunt is claiming that, but for Galleon's overstatement of its case, the ERCB would not have decided to hold a hearing. In other words, the ERCB's decisions were wrong, and Galleon must pay.

[77] The British Columbia Court of Appeal struck a similar claim brought for the improper disclosure of information to a tribunal (as opposed to the misleading information alleged to have been provided by Galleon): *Roeder v. Lang Mitchener Lawrence & Shaw*, 2007 BCCA 152 at para. 2. In *Roeder*, the plaintiff had already attempted to use the regulatory procedures available to have the administrative order revoked, but had been unsuccessful. The plaintiff then sued the defendant for its disclosure of this information to the tribunal. The Court granted the defendant's application to strike on the basis of collateral attack and abuse of process, stating:

In effect, [the plaintiff] asks the court to retry the ... case, this time excluding the impugned improper information ... That is a classic collateral attack - [the plaintiff] wishes this court to make findings of fact inconsistent with the findings of fact that the Commission Panel legitimately made. This suit is therefore an abuse of process and for that reason the proceeding must be struck. *Roeder*, at para. 12.

[78] On appeal to the Court of Appeal, the plaintiff dropped his claim that the result before the tribunal would have been different but for the alleged conduct of the defendants. The Court of Appeal found that, had the plaintiff continued to assert that allegation, the claim would have been dismissed:

... on the basis of abuse of process by relitigation. This principle is a wider one than the rule against collateral attack, and is not subject to the complexities of that rule, or of *res judicata* or issue estoppel, although all four principles may involve many of the same policies. *Roeder* at para. 21.

[79] Essentially Hunt is bringing the same claim that was struck in *Roeder*: claiming that, but for Galleon's misrepresentations and applications, the ERCB would have made a different decision about whether a hearing was warranted on the facts.

[80] Hunt cannot claim damages arising from what it alleges to be an erroneous order of the Board. As explained by the Ontario Court of Appeal, such claims are not permitted in law:

Another hurdle faced by [the applicant] in bringing an action against the respondents is that the damages [the applicant] suffered resulted directly from the order for judicial review. We were referred to no case, apart from claims on undertakings for damages on interlocutory injunctions, standing for the proposition that an action for damages occasioned by an erroneous order of a superior court, even orders made without proper notice, can succeed. *Apotex* at para. 28

[81] As noted previously, the ERCB is Alberta's specialized energy regulator and its objectives include effecting the conservation of, and preventing the waste of, Alberta's energy resources; and securing the observation of safe and efficient practices in developing Alberta's energy resources. Energy competitors such as Galleon or parties who have a public interest perspective may seek intervenor status in applications before the Board. Hunt has generally submitted that the ERCB process needs to be protected and this litigation is that protection. I fail to understand how that process is protected if intervenors of all kinds are subjected to potential tort liability for submissions they make to the ERCB.

[82] I am sure that parties granted intervenor status by the ERCB generally add to the value of the proceedings. The potential of subsequent litigation could only detract from parties appropriately participating in the ERCB process. As a matter of policy I cannot accept Hunt's submission.

[83] Claims such as Hunt's in this case undermine the administrative law process and are an abuse of the process of this Court.

[84] In conclusion, Galleon's application to strike the Statement of Claim filed by Hunt is granted on both grounds. Counsel may speak to me about costs if they are unable to agree.

Heard on the 10th day of September, 2009.

Dated at the City of Calgary, Alberta this 29th day of March 2010.

Ron Stevens
J.C.Q.B.A.

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