Court of Queen’s Bench of Alberta

Citation: Plains Midstream Canada ULC v Keyera Partnership, 2021 ABQB 871

2021 ABQB 871 (CanLII)

Date: 20211103
Docket: 2101 05001
Registry: Calgary

Between:

Plains Midstream Canada ULC

Applicant

- and -

Keyera Partnership

Respondent

Reasons for Decision
of the
Honourable Mr. Justice C. M. Jones

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[1] The Applicant, Plains Midstream Canada ULC (“Plains”), and the Respondent, Keyera Partnership (“Keyera”), are co-owners of a plant in Fort Saskatchewan, Alberta. Keyera is the majority partner and current operator of the plant. Plains seeks an injunction compelling Keyera to hold a meeting at which the owners will vote on whether to remove Keyera as operator.

[2] Plains brings this claim by originating application, but has also filed a separate statement of claim against Keyera seeking some $70,000,000 in damages (the “Main Action”). Keyera cross-applies for consolidation of this application into the Main Action.

[3] For the reasons that follow, I dismiss Plains’ injunction application, which renders Keyera’s cross-application moot.

Background

[4] An Agreement for the Construction, Ownership, and Operation of the plant ("Agreement") was signed between the four original plant owners, none of whom are related to the parties to this action, on October 23, 1972. Three of the original owners each held between 20% and 50% of the participating interests, and a fourth held 2%.

[5] In 2004, Keyera became the successor to two of the original owners, with a total interest share of approximately 76%. In 2012, Plains acquired the interest of a third original owner, roughly a 21% share. The remaining ~2% is held by Exxon, which has not participated in this application.

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The Agreement

[6] The Agreement outlines the process for appointment and removal of operators, and the particular voting thresholds in the Agreement bring this dispute before me. The relevant points from the Agreement are:

1. The operator of the plant must be one of the owners.
2. The operator is selected by a vote, with each of the owners holding voting power in proportion to their ownership interests.
3. An owner who holds at least 5% of the overall interests can compel the operator to call a meeting at which the owners will vote on whether to remove the operator.
   a. At this meeting, the current operator must abstain from voting. The operator will be removed if the other owners holding more than 90% of the ownership interests, <u>excluding the operator's interests</u>, vote for removal.
4. If the operator is removed, another meeting will be held to vote on a new operator. At this meeting, all owners vote in proportion to their ownership interests, and whoever gets more than 70% of the votes will be appointed operator.

[7] I note that Plains disputes that the operator must be one of the owners. This requirement is expressly spelled out in the Agreement, but Plains argues that it is possible for one of the owners to assign its interests to a third-party operator. This is speculative and essentially irrelevant, since Plains does not hold enough interest to appoint an operator and Keyera appears to have no interest in appointing anyone but itself. For all practical purposes, the operator must be an owner.

[8] For clarity, Plains holds more than 5% of the total ownership interest and, when Keyera's interest is excluded, Plains holds over 90% of the remaining ownership interest. Keyera holds over 70% of the total interest.

[9] The result is that Plains holds enough ownership interest to compel a vote on operatorship and remove Keyera as operator. However, Keyera holds a sufficient ownership interest to simply re-appoint itself as operator.

[10] Plains' asks to enforce its right to compel a meeting of the owners by way of injunction.

The Main Action

[11] Given the voting thresholds outlined above, one might reasonably wonder why Plains is interested in enforcing its contractual right to remove Keyera as operator, since Keyera just can

re-appoint itself. It is not clear that Plains has any hope of changing the operational status quo through this application, which begs the question as to why we are here.

[12] The answer is that this application is only part of the picture. There is an ongoing lawsuit between the parties in which Plains has made broad allegations against Keyera in its role as operator including breaches of contract, fiduciary duty, and the duty of good faith and fair dealing.

[13] Counsel for Plains was reluctant to answer my questions about the ultimate purpose of the relief sought. After some questioning, several points came to light.

[14] Plains wants to compel the meeting at least partly because removal of an operator triggers an expanded audit right. Under the Agreement, Plains has a routine audit right that it has availed itself of in 10 of the past 11 years. However, the removal of Keyera as operator would open up an expanded audit right that Plains says would yield more information on a shorter timeline. The expanded audit would also have to be conducted at the collective expense of all of the owners.

[15] Plains' position is that it seeks to enforce a contractual right for which it bargained, and no reason for doing so is needed. The expanded audit right is a collateral benefit that it is also interested in, but not the primary reason for this application.

Issue

[16] The issues before me are:

1. Should I consider the context of the Main Action in deciding this application?
2. What is the proper classification of the injunction?
3. Has Plains met the test for granting the injunction?

Analysis

Should I Consider the Main Action in this Decision?

[17] A key issue in this application is whether it should be viewed separately from the Main Action. This is relevant to classification of the injunction and to the cross-application to consolidate.

[18] The broader context, argues Plains, is irrelevant to the narrow issue before me. Plains seeks enforcement of a clear contractual right: the voting thresholds of the Agreement have been met, there is no dispute about whether Plains has the right to compel this meeting, and the wider context of the parties' dispute has no bearing on its right to enforce the Agreement.

[19] Plains' contractual right appears strong. It clearly meets the preconditions of the Agreement for compelling Keyera to hold a meeting and this has not been seriously contested by Keyera. Plains says that this is all the information I need to decide this application.

[20] Keyera argues that the context of the dispute is relevant and, in fact, suggests that this application is an improper attempt by Plains to:

> ... manufacture a clean, isolated issue to obtain extraordinary relief notwithstanding that the very basis of that extraordinary relief is all of the matters complained of in the [Main Action].

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[21] Keyera's cross-application for consolidation argues that Plains has artificially bifurcated these proceedings.

[22] Keyera points to certain contextual considerations to support its claim. It asserts that Plains is the 100% owner of a rival plant. If Plains can tie up operations and disrupt business by creating an internal struggle over operatorship, says Keyera, the rival plant could gain a competitive advantage from which Plains would benefit.

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[23] In my view, equitable remedies like injunctions are heavily context-dependent and should not be granted where they risk creating more injustice than they resolve. For example, if Keyera's contentions were true I would consider that a highly relevant factor in deciding whether to grant equitable relief.

[24] Equity exists to soften the sharp edges of the law. It cannot be said that contextual considerations are irrelevant simply because the contractual right is clear. The point of equity is that circumstances sometimes dictate that strict legal rights should not be enforced. As stated in ***Allard v Shaw Communications Inc***., 2010 ABCA 316 at para 32:

> A clear breach of a clear right is not enough to force the court to issue an injunction. The injunction would also have to be consistent with the principles on which the court grants equitable relief, e.g. relief is withheld if the relief would be oppressive, harsh, illegal, or against public policy: 21 *Hals. Laws* 380 (para. 798) (3d ed. 1957); ***Davies v. Makuna*** (1885) 54 L.J. Ch. 1148, 29 Ch. D. 596 (C.A.).

[25] On this point, Keyera invokes the maxim "equity will not act in vain". Since the equitable relief requested will have no substantial effect, Keyera argues that I should deny it.

[26] Therefore, I must consider the wider context of the dispute in my decision.

[27] In my view, this application is inextricably tied to the Main Action. Without that context, the relief requested makes no sense. The point of the injunction is essentially for disclosure of information relevant to its claims in the Main Action on an expedited basis, with costs shared among all of the owners. It would be a farce to ignore the broader context and enforce an otherwise-pointless injunction.

[28] For example, I find the history of the Agreement to be illuminating. The present situation where an owner can remove the operator which can then re-appoint itself is nonsensical. However, the voting thresholds in the Agreement are much more reasonable knowing it was originally a contract between three, more-equal owners who wanted to ensure that the votes of two out of the three would be sufficient to remove the operator. This speaks directly to the intention of the parties.

[29] This is not to say that the injunction should not be granted. But it is not proper for litigants to hive off issues when they form part of a larger dispute. The fact that it may have a strong contractual right on this specific point does not mean that Plains is entitled to separate adjudication of that issue in a vacuum.

[30] My finding on this point is relevant to several issues, as will be discussed below.

Classification of the Injunction Sought

[31] The central issue is the classification of the injunction sought by Plains, which determines the applicable test.

[32] Two axes for classifying injunctions are relevant to this decision: permanent vs interlocutory, and mandatory vs prohibitive.

[33] Plains argues that this is a permanent injunction. It originally argued that this was also a mandatory injunction, but in oral argument raised case law suggesting that it could instead be prohibitive.

[34] Keyera argues that the injunction is mandatory and, no matter which classification applies, Plains has not met the applicable test.

[35] Keyera's brief notes the difficulties in articulating a test for injunctions that lie at certain intersections of these axes. For example, the Supreme Court has explicitly laid out separate tests for prohibitive and mandatory interlocutory injunctions: ***RJR-MacDonald v Canada (Attorney General)***, [1994] 1 SCR 311; ***R v Canadian Broadcasting Corp***., [2018] 1 SCR 196. Permanent injunctions, however, all seem to be subject to a single test, despite case law suggesting that the mandatory/prohibitive dichotomy is still relevant, see ***1711811 Ontario Ltd. (AdLine) v Buckley Insurance Brokers Ltd.***, 2014 ONCA 125 at paras 58-59:

> [58] Because of their very nature, mandatory injunctions are often permanent. However, permanent injunctions are not necessarily mandatory...
>
> [59] In short, the words "mandatory" and "permanent" are not synonymous, especially in the context of injunctive relief.

[36] The reason for this is not clear, but it is slightly beyond the scope of this application and I need not address it directly. For the purposes of this decision I will address the permanent vs interlocutory axis first, then move to the prohibitive vs mandatory spectrum. I note that they are interrelated, so there will necessarily be some overlap in the analysis.

Permanent vs Interlocutory

[37] As noted above, Plains has stressed throughout its argument that this application is separate from the Main Action. Consequently, it argues that the requested injunction is permanent.

[38] Interlocutory injunctions are a form of temporary or procedural relief, granted in ongoing cases pending a final determination of the issues in dispute: ***1711811 Ontario Ltd. (AdLine) v Buckley Insurance Brokers Ltd.***, 2014 ONCA 125 ("***Buckley***") at para 56.

[39] A permanent injunction, on the other hand, is made after a full determination of the issues and is a form of final relief: ***Liu v Matrikon Inc.***, 2007 ABCA 310.

[40] Plains frames its requested relief as a permanent injunction. The test for a permanent injunction comes from ***Buckley*** at paras 74-80, summarized by the dissent in ***Google Inc. v Equustek Solutions Inc.***, 2017 SCC 34 at para 66. The applicant must establish:

1. Its legal rights
2. That damages are an inadequate remedy; and
3. That there is no impediment to the court's discretion to grant an injunction.

[41] The test for an interlocutory injunction depends on whether it is mandatory or prohibitive, which I address below. At this stage it suffices to say that the tests for interlocutory applications place less emphasis on the strength of the right asserted and more emphasis on the burden the injunction would impose.

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[42] The requested relief is a meeting. Plains raises several points to justify classifying this as a permanent injunction. As framed, it is a form of final relief, at least in the sense that once the meeting is ordered and held, it can never be undone. The Ontario Court of Appeal in ***Buckley*** noted that injunctions which compel an action are often permanent in nature: at para 58. I understand Plains and ***Buckley*** to be essentially equating "permanent" with "final", contrasted with interlocutory orders which are not intended to last beyond a certain point.

[43] Plain's proposed classification of the injunction is tied to its argument that this application is completely separate from the Main Action and therefore cannot be interlocutory. As discussed above, I find this is not the case: the requested relief is properly classified as an interlocutory injunction.

[44] Several factors are fatal to Plains' argument. First is the fact that this application is tied to the Main Action, which I have already explained. It would be routine practice for Plains, as part of the Main Action, to request an injunction to appoint a temporary operator, or to enjoin Keyera from undertaking certain actions while the litigation is ongoing. Such an application could then be assessed with reference to the strength of Plain's damages claim.

[45] Second, a critical aspect of a permanent injunction is that it is granted after a full determination of the issues: ***Buckley***. While I acknowledge the direction in ***Buckley*** that an order compelling action will often be permanent, I believe a more important aspect of the permanent/interlocutory dichotomy is whether the issues have been fully adjudicated. This bears out in the tests: the permanent injunction test from ***Buckley*** places more emphasis on whether the right has been established, whereas the tests for interlocutory injunctions are more concerned with balancing the *prima facie* strength of unproven claims against the burden placed on parties who have not had the benefit of a full trial. In the present case, a final adjudication of the dispute can only be made in the Main Action, with the benefit of relevant evidence.

[46] Third, and related to the last point, I struggle to accept that the requested injunction would create "final" relief when it would probably have no practical effect on the status quo between the parties. Even accepting that the real relief requested is the activation of Plains' expanded audit right, I find this is more properly viewed as a procedural step akin to an interim order for costs or disclosure rather than a form of "final relief". The permanent injunction in ***Buckley*** explicitly ended the litigation between the parties, which is distinguishable from this case where the injunction sought would have no bearing on the progress of the Main Action: ***Buckley*** at para 12.

[47] Finally, I am unpersuaded that an injunction is necessarily permanent simply because it cannot be undone. In so saying, I am mindful of the direction in ***Buckley*** that injunctions compelling action will often be permanent. However, I do not believe ***Buckley*** stands for the proposition that injunctions requiring a one-time action cannot be interlocutory. In my view, the primary consideration in the permanent/interlocutory distinction is whether there has been a full determination of the issues such that the judge is prepared to grant final relief, or whether the request is more accurately viewed as a step in the broader litigation. Also, it is inaccurate to say that the requested injunction cannot be undone since, in the end, it is likely nothing would change anyway even if it were granted.

[48] For these reasons, I find that Plains requests an injunction that is, in substance, interlocutory.

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Prohibitive vs Mandatory

[49] The next question is whether the requested injunction is prohibitive or mandatory. In its written submissions Plains classified it as mandatory, but in oral argument changed its tune to say that it is in fact prohibitive. I will address the rationale for this argument below.

[50] Prohibitive injunctions are subject to the test outlined in ***RJR-MacDonald v Canada (Attorney General)***, [1994] 1 SCR 311, at 334, 337, 340-342:

1. The applicant must demonstrate a serious question to be tried,
2. There must be irreparable harm to the applicant if the relief is not granted, and
3. The balance of convenience must weigh in favour of granting the injunction.

[51] Mandatory injunctions are subject to a higher standard. In the case of a mandatory interlocutory injunction, the first branch of the ***RJR – MacDonald*** test is modified by a requirement to instead show a strong *prima facie* case: ***R v Canadian Broadcasting Corp.***, 2018 SCC 5 ("***CBC***") at para 18.

[52] Some Alberta courts have held that the "irreparable harm" requirement in the second branch of the test is replaced by "a strong probability of grave damage" that damages alone cannot remedy: ***Alan Arsenault Holdings Ltd v TDL Group Corp***, 2016 ABQB 97, ***Airco Aircraft Charters Ltd. v Edmonton Regional Airports Authority***, 2010 ABCA 364. However, "grave damage" was not adopted into the modified ***RJR – MacDonald*** test articulated by the unanimous Supreme Court in ***CBC***, so it seems that language has become obsolete.

[53] The rationale behind a higher standard for mandatory injunctions is the assumption that requiring a party take positive action is more onerous than preventing a course of action: ***CBC*** at para 16 . However, the UK Privy Council has noted that this is not necessarily true; ***National Commercial Bank Jamaica Ltd v. Olint Corp Ltd***, [2009] UKPC 16 at paras 19-20:

> [19] There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. <u>But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be.</u> If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial [sic] the injunction was rightly granted."

> [20] **For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the *Films Rover* case, ibid. What matters is what the practical consequences of the actual injunction are likely to be...**
>
> [Emphasis added]

[54] In ***CBC*** at para 19, the Supreme Court cited ***National Commercial Bank*** with approval but stopped short of abandoning the prohibitive/mandatory distinction altogether. However, it is clear that the operative consideration in granting an interlocutory injunction is the burden imposed, above any formal declaration of mandatory or prohibitive nature. This finds support in ***CBC*** at para 16:

> [16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or *to refrain from doing something*.
>
> [Emphasis added]

[55] Plains says its requested injunction is prohibitive and falls under the less onerous test from ***RJR – MacDonald***. In support of this argument, Plains says the essence of its request is that it asks Keyera to cease its opposition to the meeting and refrain from further breaches of contract.

[56] I disagree. Any injunction can be reframed to essentially say "stop breaching my rights" or "stop failing to fulfill your duties", instead of "do this". ***CBC*** makes it clear that the language used is not determinative. In this case, Plains has asked Keyera to hold a meeting and Keyera has failed to do so. The injunction would compel Keyera to hold the meeting. At its heart, it is a request to move from inaction to action. I have no trouble finding that the substance of the injunction asks Keyera to do something, rather than refrain from doing something, and it is therefore a mandatory injunction.

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[57] However, this case also is illustrative of the "barren" distinction between mandatory and prohibitive injunctions, as noted in ***National Commercial Bank***. In my view, focusing on whether an order asks a party to do or refrain from doing something can cause courts to miss the underlying point of the inquiry: the burden that the injunction would impose.

[58] As noted in the above-quoted passage, the Supreme Court in ***CBC*** acknowledged that a prohibitive injunction can be "just as burdensome" as a mandatory injunction: at para 16. While there is a sort of intuitive logic to the assumption that being forced to so something will be more costly than being forced to do nothing, it is not always true.

[59] An example illustrates the magnitude of losses that can result from a prohibitive injunction. In ***Wiseau Studio, LLC et al. v Harper et al***., 2020 ONSC 2504, a documentary filmmaker was enjoined from releasing its film while an intellectual property dispute was being litigated. As a result, the filmmaker claimed that it had not only lost profits, but also lost the effect of a wave of publicity that was building at the time the injunction was granted. Schabas J held that $550,000 USD in compensatory damages had resulted from the injunction delaying the film's release.

[60] ***674834 Ontario Ltd. v Culligan of Canada Ltd.***, [2007] O.J. No. 979 (SC) (***Culligan***) further demonstrates that the essence of the inquiry should not be about the language of the injunction, but rather the costs it imposes. The court found that the injunction in question was prohibitive because it restrained the defendants from "refusing to fill orders for bottled water". The basis for this was not the language of the order but rather that the injunction related to enforcing an existing contractual right between the parties.

[61] ***Culligan*** is the basis for Plains' attempt to characterize its injunction as prohibitive. It says that it is merely seeking to enforce a contractual right for which it bargained, and therefore it should be subject to the lower standard of an prohibitive injunction.

[62] On its face, ***Culligan*** is at odds with ***CBC***, though the former was released before the latter. The order from ***Culligan*** required one of the parties to do something, namely, fill its orders. Therefore, following ***CBC***, the injunction was mandatory. If the essence of classifying an injunction as mandatory or prohibitive is determining whether the order requires the parties to do something or refrain from doing something, it would not seem to matter whether the parties had bargained for that right.

[63] In my view the court's real concern in ***Culligan*** was the costs to the respondent. If the parties have already bargained for a right, it follows that they have already considered and accepted the costs of carrying out their obligation. In that circumstance, the court can be satisfied that the burden of fulfilling that positive obligation is not unduly onerous, and therefore a higher threshold test for an injunction is unnecessary. But I disagree that the correct way to account for this lower threshold is to classify the injunction as prohibitive. Doing so distorts the inquiry in a way that confuses the analysis and, ultimately, misses the point.

[64] For these reasons, while I have classified Plains' request as a mandatory injunction following ***CBC***, in my view this classification does not accurately reflect the considerations at play in determining whether to grant the injunction. Although the requested relief is, in my view, clearly a mandatory injunction and therefore subject to the higher threshold test from ***CBC***, this is not a case where granting the injunction would place an undue burden or expense on Keyera.

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[65] Continuing along the path forged by the Supreme Court in ***CBC***, the mandatory/prohibitive dichotomy of injunctions should be abandoned. It has caused only confusion in these proceedings, and has distracted both myself and the parties from focusing on the burden that the requested injunction would impose. In my view, courts should proceed directly to an analysis of the burden imposed by the proposed injunction, irrespective of whether it is mandatory or prohibitive.

[66] Of course, it is still prudent to consider that mandating a positive action may generally impose a higher cost than prohibiting action. But this should be a question of evidence, neither presumed nor decided on the basis of how the order is worded by the applicant.

[67] In my view, the test from ***RJR – MacDonald***, rather than the modified test from ***CBC***, should apply to all interlocutory injunctions. When weighing the balance of convenience, the court should direct itself to consider the burden imposed by the injunction. A higher cost to the respondent, whether flowing from compelled action or inaction, would weigh more strongly against granting the injunction, while a lower burden would weigh less.

The Appropriate Remedy

[68] Having found that the injunction requested by Plains is interlocutory and inextricably tied to the Main Action, I am confronted by the issue of proper relief. Clearly, Plains should have brought this as an interlocutory application under the Main Action. So, should I remain seized of this application and issue a final decision, or order consolidation so that it can be decided under the Main Action?

[69] The benefit of ordering consolidation is that the trial judge may be better-situated to consider all of the evidence of the broader dispute between the parties, which I have found to be relevant and important to this application. The trial judge would have the benefit of evidence upon which to assess the merits of Plain's claim as a whole, rather than simply the contractual issue that Plains has brought before me.

[70] The test for an interlocutory injunction, from ***RJR – MacDonald***, is:

1. The applicant must demonstrate a serious issue to be tried;
2. There must be irreparable harm to the applicant if the relief is not granted; and
3. The balance of convenience must weigh in favour of granting the injunction.

[71] The strength of the Main Action is relevant to the requirement that it demonstrate a serious issue to be tried.

[72] Conversely, the benefit of me deciding this application is that it results in a decision on the merits and allows the parties to move forward. I have had the benefit of written and oral argument on the issue, and ordering that this be decided under the Main Action would result in a duplication of that effort. This would impose costs on the parties and tax the resources of the Court.

[73] The very first purpose of the *Alberta Rules of Court*, Alta Reg 124/2010, is articulated at rule 1.2(1):

> The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

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[74] In my view, any potential prejudice that could result to Plains from my deciding this application would fall under the first step of the modified ***RJR – MacDonald*** test. Both parties had the opportunity to present full arguments about irreparable harm and the balance of convenience. The only aspect of the test that the parties fully argued before me is the merits of Plains' claims in the Main Action.

[75] Mr. Scheibel, counsel for Keyera, raised a salient point in oral argument:

> "any evidentiary weaknesses or failings, those lie with Plains because of the procedure that they've chosen and because of the evidence that they've led. That's why in part Keyera asked for more details was so that there would be evidence on some of these points. Plains refuses to provide them, right."

[76] I agree. It is an applicant's responsibility to lead evidence in support of its application. If it chooses to only lead evidence that relates to its preferred injunction classification and the court rules against that classification, the consequences of that choice lie with the applicant.

[77] Remitting this application to be re-litigated in the Main Action is not a desirable result. It would add to the parties' costs and waste court resources. Therefore, if prejudice to Plains can be avoided, I prefer to decide the issue myself.

[78] As I have already stated, the strength of Plains' contractual right to compel a meeting appears, *prima facie*, to be unassailable. Keyera essentially concedes that Plains has this right.

[79] For this reason, and because the only prejudice that could result to Plains from my deciding the issue is that it lacked some evidence to make out its serious issue, any potential prejudice to Plains can be mitigated by simply assuming that it has met the first part of the ***RJR – MacDonald*** test. I do so for two reasons. First, Plains' contractual right is sufficiently clear and uncontested to indicate that it would likely make out a serious issue to be tried if this application had been brought under the Main Action. Second, the ***RJR – MacDonald*** test requires that all three elements be made out. Therefore, if it fails on either branch of irreparable harm or the balance of convenience, the injunction will be denied regardless of the *prima facie* strength of the case.

[80] To summarize, any evidentiary deficiencies lie with Plains and any potential prejudice can be mitigated. Therefore, I am satisfied that it is both just and expedient for me to dispose of the injunction application myself.

The Applicable Test

[81] Plains has demonstrated a serious issue to be tried, that its contractual right has been breached. As to whether the Main Action demonstrates a strong case generally, Plains did not bring substantial evidence on this issue due to its classification of the claim. However, I am satisfied on the basis of the contractual claim alone that Plains has cleared this hurdle.

[82] Further, if I am wrong about my application of the ***RJR – MacDonald*** test and the modified test from ***CBC*** applies instead, I would conclude on the basis of the foregoing that Plains has demonstrated a strong *prima facie* case.

[83] However, no irreparable harm to Plains will result from my refusal to grant this injunction. In fact, there will be no change to the status quo at all. I recognize that a denial of the injunction might result in some delay or additional cost, but these issues are properly addressed in the context of the Main Action and in cost submissions. I do not see how I can find irreparable

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harm when the injunction would, in all likelihood, accomplish nothing. Even if there was irreparable harm being suffered by Plains in its current position, the requested injunction does not change that position and therefore could not address that harm. I am also not persuaded that any potential harm resulting from a refusal to grant the injunction could not be remedied with damages.

[84] The balance of convenience also does not assist Plains. Whether the injunction is granted or not, the end result will be the same. The meeting would just add an additional interim step. I have little information about the cost or burden on Keyera of holding the meeting, but they do not appear to be substantial.

[85] There are also other considerations. The Fort Saskatchewan plant is regulated, and Keyera claims that removal of an operator would trigger onerous regulatory obligations. The plant deals in potentially hazardous materials, and there are health and safety considerations that require responsible operation. There is also a minority shareholder, and although Exxon was given notice of the Main Action and the dispute generally, counsel could not, to my satisfaction, confirm that they were notified about this particular application. Even if Exxon had notice and chose not to participate, I am reluctant to grant an equitable remedy where it risks a serious disruption to business that could affect a minority shareholder's interest. The balance of convenience does not weigh in favour of granting the injunction.

[86] To be granted its injunction, Plains must succeed on all three branches of the ***RJR – MacDonald*** test. It has succeeded only on one. I therefore dismiss the application.

Conclusion

[87] Having denied the injunction, I do not need to decide the issue of consolidation. However, for the same reasons that I found the injunction to be interlocutory in nature, I would be inclined to consolidate this application with the Main Action.

[88] I wish to note that the dismissal of Plains' action is not an endorsement of Keyera's conduct, nor is it a denial of Plains' rights under contract. Plains is denied the injunctive relief it sought. However, on the facts before me it appears that Keyera is indeed in at least technical breach of the Agreement. I expect this to form part of the evidentiary record in the Main Action, where it can be properly considered along with the totality of the evidence.

[89] If the parties cannot agree on costs they may provide me with written submissions within thirty days of this judgment.

Heard on the 28th day of September, 2021.
Dated at the City of Calgary, Alberta this 3rd day of November, 2021.

C. M. Jones
J.C.Q.B.A.

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Appearances:

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for the Respondent

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