RECENT DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS[1]

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This article is a compilation of recent Canadian decisions of interest to oil and gas lawyers. The authors discuss a variety of cases in areas such as lands, leases and titles, administrative law, contracts, torts, the environment, tax and royalties.

Le présent article est une compilation des décisions canadiennes récentes destinée aux avocats oeuvrant dans les secteurs pétrolier et gazier. Les auteurs examinent divers cas dans des différents domaines — baux et titres, droit administratif, contrats, délits, environnement, taxes et redevances.

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[1] The following cases have been decided since the original date of publication: *NESI Energy Marketing Canada Ltd. (Trustee of)* v. *NGL Supply (Gas) Co.*, [2001] A.J. No. 822 (C.A.); *Giant Grosmont Petroleums Ltd.* v. *Gulf Canada Resources Ltd.*, [2001] A.J. No. 864 (C.A.); *Legal Oil and Gas Ltd.* v. *Alberta (Surface Rights Board)*, [2001] A.J. No. 817 (C.A.); *Strange* v. *Binq Industries Inc.*, [2001] A.J. No. 735 (Q.B.); *Union of Nova Scotia Indians* v. *Nova Scotia (A.G.)*, [2001] N.S.J. No. 264 (C.A.).

I. SURFACE RIGHTS

A. *SHEPSTONE V. ALBERTA (SURFACE RIGHTS BOARD)*[2]

1. FACTS

This case dealt with the issue of whether parties to a surface rights agreement could enter an amending agreement that did not comply with the review requirements of s. 27 of the *Surface Rights Act*[3] (the process whereby compensation to be paid for surface leases is reviewed) and if so, whether the operator or the lessor were then precluded from applying to the Surface Rights Board ("SRB") to review compensation to be paid. Of particular note was the Court's finding that parties who entered into agreements that did not comply with s. 27 of the *SRA* were precluded from relying on that section for the purposes of denying a hearing before the SRB.

On October 6, 1997, Clifford Shepstone and Pia Schenk ("Lessor") entered into an agreement to purchase certain lands, upon which a compressor station was located pursuant to a 25-year surface lease granted to EnerMark Resources Inc. ("Operator") on May 3, 1988. An amendment to the surface lease had been entered into May 9, 1996, between the prior owners of the property and EnerMark Resources Inc. Between October 7, 1997, and the closing date on the land purchase, January 20, 1998, the Lessor was informed that on March 25, 1996, the surface lease had been amended to provide for an increase in surface rental from $1,700 to $2,100 per year commencing May 3, 1997, with the next rental review date to be five years in the future.

The purchase was completed January 20, 1998. Subsequent to the purchase, the Lessor entered into negotiations with the Operator to try to renegotiate the surface rental for the period May 1, 1998, to May 1, 2003. The negotiations were unsuccessful, however, and the Lessor sought a hearing with the SRB to review the existing surface rental of $2,100. The Lessor suggested that as of May 3, 1998, the surface rental be increased to $4,200 per year.

2. DECISION

The SRB declined the request to hold a review hearing on the basis that a settlement had been negotiated and, according to the terms of the settlement, the surface rental was not scheduled to be reviewed sooner than May 3, 2002.

On application for judicial review, the Court stated that if the parties followed the review process as set forth in ss. 27(4)-(15) of the *SRA* and reached an agreement concerning the rental to be paid for the surface lease for the relevant five-year term, they

2 (2000), 279 A.R. 387, [2000] A.J. No. 1449 (Q.B.), online: QL (AJ).

3 S.A. 1983, c. S-27.1 [hereinafter *SRA*]. The statute breaks all surface leases into five-year time periods and sets out a requirement that the operator notify the lessor of the review process approximately one year prior to the end of each five-year time period. If the parties are unable to agree on the rental, they apply to the SRB for a hearing.

were then precluded from making an application to the SRB for a hearing to determine the applicable statutory compensation.

Although s. 27 of the *SRA* provides that the Operator and the Lessor could review the rental to be paid on a periodic basis, if the Lessor and the Operator were satisfied with the rental set forth in the long-term lease, it was not unforeseeable that the surface lease rental might stay the same for the entire period. The Court further noted that if the Operator or the Lessor wished to renegotiate the lease midway through the term, there was nothing in the statute that required compliance with s. 27 of the *SRA* to reach a new negotiated settlement. Therefore, the parties were entitled to negotiate amending agreements concerning compensation amounts throughout the term of the lease agreement without following the process as established in s. 27 of the *SRA*. However, if the parties did reach an agreement concerning compensation outside the terms of s. 27 of the *SRA*, the parties were not then precluded from applying to the SRB to review surface rental.

The Court in this case held that because the parties had entered an agreement that did not comply with s. 27 of the *SRA*, they could not then attempt to bring themselves within said section for the purpose of *denying* either party a hearing before the SRB. If the parties had brought themselves within the process set forth in s. 27 of the *SRA* for the term of the lease, the parties were not entitled to amend the "review date," "effective date," or "date the lease commenced." This was important so that the parties, any successors, and the SRB were clear as to the date calculations when reviews were to take place as to whether the parties were complying with the process as outlined in s. 27 of the *SRA*. The Court allowed the Lessor's request for a hearing with the SRB to determine the appropriate surface rental but held that the lease was otherwise in full force and effect (*i.e.*, "review date," "effective date," and the "date the lease commenced").

3. SUPPLEMENTAL COMMENTARY

This case is the authority for the proposition that parties are advised to follow the process as established in s. 27 of the *SRA*, particularly if they wish to avoid the possibility of a hearing before the SRB.

B. *ZARGON OIL & GAS LTD. v. ALBERTA*[4]

1. FACTS

The facts of this appeal dated back to 1958, when the SRB granted a right of entry to the lands in question for the purpose of laying a pipeline, well sites, a battery site, roadways, tanks, stations and structures incidental to those uses ("Right-of-Entry"). Part of the lands had been deeded to Ms. Sherman's husband ("Deeded Lands"), and another part of the lands were held by Ms. Sherman's husband under a grazing permit from the Crown ("Grazing Lease Lands"). Yet another part of the lands were described as Crown lands. The lands adjoined a small lake, and by 1958, when the Right-of-Entry was granted, the water levels in the lake had receded enough to expose certain lands

[4] [2000] A.J. No. 133 (Q.B.), online: QL (AJ).

permanently ("Accreted Lands"). The Crown claimed the Accreted Lands without apparent consideration of riparian owner rights. In 1974 Ms. Sherman (who had acquired the lands on her husband's death) sold the Deeded Lands to Ogonoski. The contract of purchase and sale ("Sale Agreement") referred only to the Deeded Lands and provided that the vendor, Ms. Sherman, should receive all payments to be made on all surface rights for oil wells, battery sites and access roads for the surface leases in existence as of April 30, 1974, and for the lifetime of the wells. It was also understood and agreed that in the event of the lands being foreclosed upon, the Alberta Grazing Lease would be assigned to Ms. Sherman. In 1981, the Ogonoskis applied for and received title to the Accreted Lands. As a result of the change in title, the SRB contacted Mr. Ogonoski in 1982 and advised him that he was now the owner of the Accreted Lands and was entitled to receive annual compensation payable under the Right-of-Entry. The SRB, in further correspondence, indicated that it could be prepared to amend the Right-of-Entry order in Ogonoski's favour if he would assure the SRB in writing that there was no reservation of the annual compensation to Ms. Sherman at the time of purchase of the land. In response, Mr. Ogonoski stated:

> According to my agreement with the previous owner, Mrs. Sherman, she retained surface revenues. However, ... if Mrs. Sherman has been receiving ... this compensation previously, then she is entitled to continue receiving it for the rest of her natural life.[5]

He further provided that if the annual payment had come about as a result of his exercising of riparian rights on the said land, then he would be entitled to payment. In late 1984 and early 1985, Ogonoski attempted unsuccessfully to obtain from the SRB a larger share of the annual compensation payable.

Ogonoski appealed the decision of the SRB not to reapportion in his favour the compensation payable in respect of the maintenance of the Right-of-Entry on the Grazing Lands so as to give him, rather than Ms. Sherman, the compensation payable in relation to the Grazing Lands.

2. DECISION

In a previous Alberta Queen's Bench action in 1993, Ms. Sherman applied to the Court for an order declaring that the provisions of the Sale Agreement relating to receipt of payment under surface agreements and orders continued in full force and effect, and she requested either an order declaring that she was to receive all payments on the Grazing Lease Lands for the lifetime of the wells or an order to rectify the Sale Agreement to reflect the true agreement between the parties. In a defence and counterclaim, Mr. Ogonoski argued that he was entitled to the Right-of-Entry payments on the Grazing Lease Lands and on the Accreted Land. The Court held that it did not have requisite jurisdiction in that action to vary or amend any SRB order. Notwithstanding the fact that the Court did not have jurisdiction, the Court held that if it had, it would decline to order the relief as it was satisfied that the plaintiff was the party legally entitled to receive such compensation. Neither party appealed that judgment.

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5 *Ibid.* at para. 17.

In the present action, the Alberta Court of Queen's Bench reversed the SRB decision with respect to compensation payable in relation to the Grazing Lease Lands (the maintenance of Right-of-Entry on it). The Court was forced to address whether the principle of *res judicata* prevented it from hearing the appeal owing to the previous Queen's Bench action. In disposing of this argument, the Court held that the issues in the action were distinct from those in 1993 and *res judicata*, therefore, did not apply. Moreover, the aforementioned comments of the trial judge had not determined the issue but rather were "musings." The Court noted that musings were not binding on parties until they formed part of the decision, as the parties did not have the opportunity to test through the appeal process the legal validity of the musings.

Having found that the Court was entitled to hear the appeal, the Court then concluded that the SRB had erred in law and the Court was entitled to make the order the SRB should have made. Specifically, the Court held that the SRB erred in concluding that there was a lack of evidence concerning any agreement between the parties regarding loss of use and adverse affect. The Court noted that the parties had been entitled to come to an agreement on the issue, they had come to an agreement, and the SRB erred in failing to recognize that agreement. The Court further held that the SRB was incorrect in its finding that Ogonoski had failed to lead evidence of the loss of use and adverse effect. If that was true, the Court held that the Shermans had also then failed to show loss of use and adverse effect. The Court further commented on the SRB's conflicting decision with respect to the Accreted Lands, as the SRB could not recognize the appellant's rights to the Accreted Land on the one hand and on the other purport to recognize that the Crown also had a legitimate claim to the Accreted Lands. The Court then addressed the SRB's interpretation of the Sale Agreement. The SRB exceeded its jurisdiction in this regard as the interpretation clearly conflicted with the decision of the Court in 1993, which held that the Sale Agreement did not include the Crown lands. As a result, the SRB had no jurisdiction to revisit the issue.

The final point that the Court considered was whether Mr. Ogonoski was estopped from any right to claim the lands in question pursuant to his letter. The Court held that the SRB erred in concluding that Ogonoski was estopped from asserting his claim because he had not knowingly made an admission against his interest. The letter included a reservation on the Accreted Lands and referred to one agreement, which did not include reference to the Grazing Lease Lands. Finally, the SRB erred in its final conclusion and should have determined how to proportion the annual Right-of-Entry fee to compensate for loss of use and adverse affects to these lands between the parties. The Court substituted its decision for that of the SRB and apportioned the annual payment of the Right-of-Entry in the parties proportionate interest in the total acreage of the lands such that Ogonoski was entitled to payment in respect of both the Accreted Lands and the Grazing Lands and Sherman was entitled to payment in respect of the Deeded Lands.

3. SUPPLEMENTAL COMMENTARY

Apart from the Court's discussion surrounding the doctrine of *res judicata*, which may be seized upon by litigators of all stripes, this decision provides some useful insight into the manner in which courts may be inclined to view SRB decisions rendered in the face of private contracts between parties receiving payments pursuant to Right-of-Entry orders. This case demonstrates that the SRB is in a position and has jurisdiction to consider private arrangements between landowners in rendering its decisions. The case also serves as a useful example of some alternative grounds upon which the Court may be willing to overturn a decision of the SRB. Specifically, the Court found the SRB was incorrect in finding that

- there was a lack of evidence concerning the loss of adverse effect;
- Ms. Sherman had acquired an interest in the Accreted Lands which was inconsistent with its decision regarding the Grazing Lands; and
- the estoppel argument advanced by Ms. Sherman respecting Ogonoski's letter was determinative.

C. *BEST PACIFIC RESOURCES LTD. v. WHEATLAND FARMING AND RANCHING LTD.*[6]

1. FACTS

Best Pacific Resources ("Best Pacific") and Wheatland Farming and Ranching ("Wheatland") entered into two leases for the purposes of allowing Best Pacific:

- to drill a conventional oil and gas well within the boundaries of each of the two defined well sites;
- to produce oil and gas from the wells; and
- to construct, on defined rights-of-way, a power line and a roadway.

After the two wells were in production, the company decided to construct a "flowline" between the two well sites and a battery site located elsewhere on the land. Wheatland feared the construction would result in excessive damage to the land and, therefore, declined the company's request. Best Pacific then applied to the Saskatchewan Surface Rights Board of Arbitration ("SSRB") for the right to proceed. The SSRB granted Best Pacific the requisite rights subject to Best Pacific compensating Wheatland; however, the parties could not agree on the compensation, so they again turned to the SSRB.

The SSRB made two compensation orders. The first order dealt with the part of the flowline that fell outside of the boundaries of the two well sites covered by the leases. The second order dealt with those portions of the flowline that fell within the boundaries of the existing leases.

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6 (2000), 199 Sask. R. 212, [2000] S.J. No. 546 (C.A.), online: QL (SJ).

Best Pacific accepted the first order, but it objected to the second order on the basis that it had already acquired the surface rights to the well sites pursuant to the original leases and that no further compensation was payable to Wheatland.

The SSRB had made the order on the purported authority of Part IV of the *Surface Rights Acquisition and Compensation Act*.[7] Part IV empowers the SSRB to compensate landowners in relation to well sites, roadways, battery sites and power lines as distinct from flowlines. Flowlines are covered by Part V of the *SRAC*. It is this distinction that gave rise to the question of whether the SSRB had jurisdiction to make the second order. The SSRB had apparently made its order under Part IV rather than Part V because of previous court decisions restricting Part V to the compensation for, and acquisition of, surface rights to the surface of land situated *outside* well sites, battery sites and roadways. The SSRB, therefore, relied on Part V in the first order (to compensate Wheatland for the surface rights between the existing leases) but relied on Part IV in the second order to compensate Wheatland for the surface rights pertaining to those portions of the flowline located inside the existing lease area.

2. DECISION

The Saskatchewan Court of Appeal held that Part IV of the *SRAC*, including the compensation provisions of s. 29 (in Part IV), applied only to the acquisition of surface rights for the purpose of establishing well sites, roadways, battery sites, and powerlines. Consequently, s. 29 could not be seen to empower the SSRB to compensate an owner in relation to the construction of flowlines and service lines, which must be dealt with under Part V. The SSRB, therefore, did not have jurisdiction or power under Part IV to compensate Wheatland for surface rights related to flowlines within the existing leases. The Court found that Best Pacific already had the right to construct the flowlines located within the well sites and that the SSRB erred in providing additional compensation respecting those lines under Part IV of *SRAC*.

While the decision of the Court was technically based on relatively simple statutory interpretation, the importance of the case may be gleaned by the policy comments made by the Court, specifically where Cameron J.A. states:

> Compensation, it must be remembered, is a function of loss. It is meant to compensate the owner for the loss of surface rights acquired by an operator, and for the loss associated with that acquisition, including the resulting severance, nuisance, and so on. This is so, whether such rights be acquired for a well site, a roadway, or a flowline.[8]

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7 R.S.S. 1978, c. S-65 [hereinafter *SRAC*].

8 *Supra* note 6 at para. 20.

D. *TULLIBY LAKE STOCKMAN'S ASSN. V. IMPERIAL OIL RESOURCES LTD.*[9]

1. FACTS

This decision resulted from an appeal from a decision of the SRB launched pursuant to s. 26(1) of the *Surface Rights Act*[10] by the Tulliby Lake Stockman's Assn. ("Association"), the party to whom compensation was payable by Imperial Oil Resources Ltd. ("Imperial") under the leases and entry rights the latter held. The Association was the occupant of the Crown land in question by virtue of Crown leases it held for stock grazing purposes. The land in question was in eastern Alberta and comprised a large grazing lease line located roughly between Frog Lake and the Alberta-Saskatchewan border. The appeal was with respect to the compensation for the LS 14-29 site lease, acquired by Imperial by surface lease in November 1987. At that time, the agreed annual compensation was $1,425. Pursuant to the *SRA*, Imperial was required to notify the Association on or before December 15, 1990, of the right to have the rate of compensation reviewed. From the evidence before the Court as well as the SRB's decision, it appeared that no notice had been given by Imperial. While the Association made inquiries of Imperial to have the compensation reviewed, it was not successful, and, in the result, the application to the SRB was launched.

2. DECISION

The position of the Association before the SRB with respect to the lease of LS 14-29 was that compensation should be increased to allow a greater value per acre to compensate the Association for Imperial's activities on the lease and to make the award to the Association on the increased basis retroactive to 1991 and 1992 (the time when the Association said that the adjustment should have been made if Imperial had given notice to the Association). The Court found as a fact that the operator had not sent the notice[11] with respect to the lease and that there was a delay in the contact between the Association and Imperial following what should have been the time for delivery of that notice. While the Court found that the Association had contacted the operator and asked for information and common documents in negotiations, there were delays, but not all delays were attributable to the conduct of the Association. In interpreting the decision of the SRB, the Court held that the section in the *SRA* dealing with the process of review used mandatory expressions such as "shall" in connection with notices, not discretionary language such as "should." The SRB was presumably of the opinion that the request was not reasonable as the Association had not pursued its rights as soon as it could. The SRB said nothing about the delay of Imperial, who, on the analysis of the SRB, bore no burden for their failure to comply with the *SRA*.

The issues the Court had to deal with were twofold: first, did the SRB err in awarding $26,000 annually for compensation for the site in question; and second, did the SRB err

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9 (2000), 278 A.R. 112, [2000] A.J. No. 97 (Q.B.), online: QL (AJ).

10 *Supra* note 3.

11 Pursuant to the *SRA*, the operator should give notice, and if it does not, the occupant should call on the operator to review, failing which one of the parties should have applied to the SRB.

in denying the Association's request to make the order retroactive by an additional five years to November 1991. The Court also dealt with the amount of interest payable.

An appeal pursuant to the *SRA* is to be in the form of a new hearing. Under the *SRA*, the Court has the power and jurisdiction of the SRB in determining the amount of compensation payable, and it is to confirm the order of the SRB or vary it in accordance with the judgment of the Court. In this appeal, new evidence may be called, and the Court may hear new evidence from witnesses who testified at the original hearing before the SRB.[12]

In the Court's opinion, the appellant Association was correct in its submission that the decision in this case was not entitled to deference because of the nature of the reasons provided by the SRB. In the Court's opinion, there were indications in the reasoning that the SRB misapprehended the evidence and, further, that the evidence was not properly applied in the case. The Court pointed to the SRB's decision to deny the request of the Association for retroactive payment. In the Court's opinion, this request was not unreasonable, and the SRB's decision was not supported by any reasoning, nor was it clear why the retroactive request was simply denied. It was apparent from the decision that the SRB did not make extensive findings of fact and that the SRB failed to advance any reasons for its choice of adverse effect rate or the interest rate that they found to be applicable. From the aforementioned reasons, the Court found that it should not give judicial deference to the SRB's decision.

The Court next dealt with the issue of adverse effect. Section 25 of the *SRA* provides:

> 25(1) The Board, in determining the amount of compensation payable, may consider ...
>
> (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused or arise from or in connection with the operations of the operator.

The Court heard a host of evidence on this subject with respect to loss of buildings through arson, loss of equipment through theft, and loss of time due to the fact that Range Riders could not leave their saddles on the reserve for fear of theft. Moreover, there was loss of cattle through vandalism, shooting, road accidents, possible theft, and disease principally due to the increased dust generated in the reserve by traffic that was there before the access was granted. Imperial did not offer evidence to the contrary. Instead, it attacked this evidence and argument on two grounds; first, there was no proof of loss in

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12 See *Lamb* v. *Canadian Reserve Oil and Gas Ltd.*, [1976] 4 W.W.R. 79 (S.C.C.) [hereinafter *Lamb*]. This case is also authority for the proposition that the court is entitled to consider and that it is right to consider the findings of the SRB as having substantial evidentiary value and in giving them the weight to which the judgment and the case said that they were entitled. See also *Caswell* v. *Alexander Petroleums Ltd.*, [1972] 3 W.W.R. 706 (Alta. C.A.) [hereinafter *Caswell*]. The Court made some general remarks about these appeals and the deference that is owed to the SRB. The point was made that when the SRB makes detailed findings of facts, as they did in the *Caswell* case, after viewing the area and hearing representations from both sides and renders a written decision with reasons as extensive as they did in this case, their findings should not be lightly disturbed.

dollars for these items, and there was no proof that more employees time and effort was related to the open access; and second, the complaints raised now related more to third party vandalism and criminal acts and could not be claimed against Imperial.

The Court held that given the wording of the *SRA*, it need not show that the damage complained of, for which compensation was sought, was the direct responsibility of the operator. Rather, in the Court's view, it was sufficient to demonstrate, on the balance of probabilities, that the access taken by the operator made possible the adverse effect that the owner showed. In this case, the Court was satisfied that the owner had shown an increase in adverse effect as time went by, through increased access to the heart of the grazing reserve. The Court did not apportion compensation as it was only asked to assess compensation.

The Court disposed of the question regarding making the order retroactive by finding that each party had been responsible for the delays in negotiations and retrodating the order to the date on which the negotiations between the parties commenced, which was later than the initial time when the matter ought to have been submitted to the SRB.

E. *IMPERIAL OIL RESOURCES LTD. v. TULLIBY LAKE STOCKMAN'S ASSN.*[13]

1. FACTS

In this appeal, the Court considered Imperial Oil Resources Limited's ("Imperial") application for leave to appeal the decision of the trial judge determining compensation and interest payable under a surface lease pursuant to s. 26 of the *SRA* (see the summary above). The aforementioned application was based on an alleged misapprehension of Imperial's offer. While the trial judge stated in his judgment that he was unaware of the basis for Imperial's figures for its offer, he later corrected himself in supplementary reasons. For this reason, the Court held his original mistake had no effect on the calculation of compensation for adverse effect and leave was not granted.

In this appeal Imperial raised two grounds: first, the trial judge erred in law in rejecting evidence of comparables; and second, the trial judge misapprehended evidence as to the Amoco comparable. Although it was standard practice for the SRB to look at comparables, the SRB noted that nothing in the *SRA* mandated the use of comparables to determine compensation.[14] The real issue in this case was whether the trial judge erred in failing to give weight to the evidence of comparables. The Court held that the trial judge had ultimately decided not to rely on the evidence because it lacked the detail necessary to make a proper comparison. In particular, the evidence on comparables did not indicate when the lease agreements were made or if the compensation figures had been reviewed. The Court held that while it was possible that some of the trial judge's causes for rejecting the comparables were reasonable, in light of legal authorities, the Court

13 [2000] A.J. No. 1138 (C.A.), online: QL (AJ).

14 Jurisprudence from the Supreme Court of Canada and this court suggested that comparables should be departed from only in the most cogent of circumstances.

believed that the appeal could have a reasonable chance of success and, accordingly, granted leave on this ground.

The Court further held that the trial judge had incorrectly referred to the Amoco comparable in discussing other evidence. This was not misapprehension of the evidence but a clear misstatement, which amounted to a palpable and overriding error. While Imperial argued that the trial judge misunderstood the SRB's decision concerning the Amoco comparables, it was difficult to point to a critical error made by the trial judge. For the aforementioned reasons, leave was not granted.

The Association maintained that the failure to award compensation for use of the land was the result of an oversight and that success on appeal would have a significant impact since it would provide its members with increased compensation. The Court held that, while s. 25(1)(c) of the *SRA* states that when determining compensation the SRB may consider "the loss of use by the owner or occupant of the area granted to the operator,"[15] it was not mandatory that an award be made for loss of use. Although the trial judge referred to the loss of grazing, it was not entirely clear whether the trial judge was aware that compensation could address more than adverse effect. As the Court stated, if the purpose of the *SRA* was to compensate farmers for losses caused by the resource company sites on their lands, then it would seem that the Association had a reasonable chance of success on appeal. Accordingly, leave to appeal was granted on this ground.

Counsel for Imperial argued that the trial judge may have misapprehended the SRB's evidence, leading him to find errors in the SRB's decision where there were none. If this argument was correct, then the trial judge may have erred in giving the SRB such little deference. Nonetheless, the Court was satisfied that the second test for granting leave was met because the issue was of sufficient importance to the operation of the *SRA*. Notwithstanding the principle enunciated in *Caswell* and *Lamb*, "our courts have found it relatively easy to overturn decisions of the [SRB]. It is not difficult for a court to characterize the [SRB]'s decision as demonstratively wrong."[16]

The issue with respect to retroactive awards was contemplated in the *SRA* by providing for periodic reviews of surface rentals at five-year intervals. Section 27(4) of the *SRA* requires notice at the beginning of the year of the five-year cycle. The fact that Imperial had not provided notice may not have had any effect as the parties had commenced negotiations in 1991. In 1994, the Association retained counsel and brought an application to the SRB in 1998 for a review of the compensation. The SRB declined to make compensation retroactive to 1991 as the result of an unreasonable delay in the negotiations, so the only other option was to make compensation retroactive to 1996. Imperial maintained that in picking an arbitrary date, the trial judge failed to understand the importance of preserving an element of certainty regarding periodic reviews. The Association submitted that it would be inequitable to interpret s. 27(15)(b) so narrowly, since the result was to allow Imperial to profit from its own delay. Instead, it was argued, any order must provide fair compensation for the period that the notice was intended to

15 *Supra* note 13 at para. 14.

16 *Ibid.* at para. 17.

address, which, in this case, would have been from 1991 to 1996. The Association further asserted that neither the SRB nor the trial judge were restricted from taking into account any factors that might make full compensation inequitable. Therefore, in this case, the trial judge was correct to take into account the extent to which the Association contributed to the delay in restricting the compensation for that period from 1994 to 1996. If the SRB was entitled to greater deference, this ground may have a reasonable chance of success, since the SRB determined that the retroactive award sought by the Association was not reasonable. Therefore, leave to appeal was granted on this ground.

With respect to the interest award, the trial judge had relied on his authority to exercise the power and jurisdiction of the board under s. 27 of the *SRA*. Although the SRB used the Bank of Canada interest rate without giving reasons, it concluded that the rate prescribed under the *Judgment Interest Act*[17] was more appropriate. Section 25(9) of the *SRA* provided the SRB with the discretion to apply the Bank of Canada interest rate to any compensation order. However, it did express a limited interest to the Bank of Canada rate. Arguably, if the trial judge was not required to defer to the SRB on matters of this nature, it may have been within his discretion to award interest at the rate he considered fit. The likelihood of success on this ground may depend on the degree of deference to be afforded. However, even if the Bank of Canada interest rate was applied, the difference between the two rates was negligible; thus, there was no significant impact on the parties, and leave was denied.

In summary, the Court granted leave to appeal on the following questions: did the trial judge err in rejecting evidence of comparables; did the trial judge give sufficient weight to the findings of the SRB; did the trial judge err in awarding compensation retroactive to March of 1994; and did the trial judge err in not awarding compensation for loss of use of land occupied by the access road?

F. *FLETCHER CHALLENGE ENERGY CANADA INC. V. SULZ*[18]

1. FACTS

This decision resulted from an appeal brought under s. 71 of the *Surface Rights Acquisition and Compensation Act*[19] arising out of a decision of the Saskatchewan Board of Arbitration ("SBA"), which awarded an increase in the compensation payable to the respondent owner under his surface lease with the appellant company.

In 1985, the respondent, Sulz, entered into a twenty-one year surface lease as owner with Ocelot Industries Ltd. ("Ocelot") relating to a well site on his land. The appellant, Fletcher Challenge Energy Canada Inc. ("Fletcher"), was successor to Ocelot. The lease provided for, *inter alia,* the payment to the owner of $1,600 annually for the duration of the term. The parties to the lease agreed on these terms without a breakdown of their components, having regard for s. 29 of the *SRAC*.

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17 S.A. 1984, c. J-0.5.

18 (2001), 203 Sask. R. 115, [2001] S.J. No. 86 (C.A.), online: QL (SJ).

19 *Supra* note 7.

In June of 1997, Sulz applied to the SBA for a review of the compensation payable under the surface lease. On March 23, 1998, the SBA held a hearing at which Fletcher appeared with counsel. Although Mr. Sulz received proper notice of the hearing, he elected not to appear even though it was he who had made the application. Instead, he filed, through his solicitor, a brief submission in support of his claim. Although his claim included certain factual submissions, it was primarily an argument complaining about the failure of the appellant to increase the annual rent. The factual assertions and submissions were not verified by supporting documentation, nor were the criteria for fixing compensation under s. 29 of the *SRAC* addressed in a factual context.

On August 18, 1998, the SBA issued an order, subsequently amended on August 24, 1998, increasing the annual compensation from $1,600 to $1,740. It was against this order that Fletcher brought its appeal.[20]

The Court of Appeal summarized the grounds of appeal as the following:

- The SBA based its award on outside information, rather than on the evidence before it, without giving the company an opportunity to respond to that information.

- The SBA misconstrued the provisions of the *SRAC* governing compensation.

- The SBA expressly disregarded relevant evidence.

- The SBA failed to provide adequate reasons for its award.[21]

2. DECISION

Fletcher alleged that the SBA "erred in law or exceeded its jurisdiction by basing its award, in whole or in part, on information it had acquired from sources other than Hearing No. 2090, and by so doing prevented the Appellant from having an opportunity to contradict or respond to such information."[22]

At the hearing, Fletcher called evidence by way of an expert witness in matters of compensation in the oil and gas industry. Among other things, the expert testified to what he said was a pattern of dealings between owners and operators evidenced by a host of other surface leases, showing that the compensation payable under Fletcher's surface lease was in line with what was payable under similar leases in the area. The SBA, however, declined to utilize private arrangements in determining site-specific compensation because private arrangements between petroleum operators and farmers typically involved negotiations with unknown issues and parameters, the details of which were not provided

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20 Under s. 71 of the *SRAC* a party must obtain leave to appeal from a judge of the Court of Appeal. The right is to appeal to the Court against the order, decision, determination or award on a question of law or on a question of jurisdiction of the SBA.

21 *Supra* note 18 at para. 1.

22 *Ibid.* at para. 48.

to the SBA. The SBA emphasized the importance of a "site specific," "owner specific" and "operator specific" determination of compensation.

The owner's failure to properly present his case, however, placed the SBA in an awkward position. In its reasons, the SBA determined the case essentially on the basis of its own "expertise, experience and abilities." In its reasons, the SBA frequently indicated that it was relying on its collective expertise in the agricultural and petroleum industries to quantify issues.

Fletcher alleged that it was never afforded an opportunity to meet the "evidence" of the SBA in determining these issues, and that given the nature and course of the proceedings, natural justice mandated a fair opportunity to respond to the information used by the SBA and its assumptions based on its own knowledge, experience and expertise.

The Court followed the decisions in *Leach* v. *Saskatchewan Oil and Gas Corporation*[23] and *Kannata Highlands Limited* v. *Kannata Valley (Village)*.[24] In *Leach*, it was determined that the SBA's use of outside information without one of the parties being aware that they were doing so was a breach of the rules of natural justice. The Court then stated:

> We are not to be taken as precluding [SBA] members from using their general knowledge, experience and expertise in assessing evidence, but the primary facts to which this general knowledge, experience and expertise can be applied must first be established. The use of such knowledge, experience and expertise does not permit the [SBA] members to fill in gaps in the evidence without having regard for the principles articulated in *Leach*.[25]

The Court found that the SBA did not clearly articulate or disclose the approach taken by it in matters of this kind. Fletcher was left with the impression that significant weight might be attached to its evidence, and there was no suggestion that gaps in the owner's evidence would be filled by applying collective knowledge of the SBA.

The Court found that the SBA's failure to afford Fletcher the opportunity to respond to the "evidence" that the SBA used to determine the issue was a breach of the rules of natural justice. The appeal was, therefore, allowed on this basis alone.

a. Alternative Grounds of Appeal

Although the Court did not need to consider the remaining grounds of appeal, it did choose to provide some guidance regarding the provisions of s. 29(1) of the *SRAC*. The Court provided these general guidelines when dealing with the compensation provisions of the *SRAC*.[26]

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23 (1981), 6 Sask. R. 4 (C.A.) [hereinafter *Leach*].
24 (1987), 61 Sask. R. 292 (C.A.).
25 *Supra* note 18 at para. 59.
26 The Court also dealt specifically with individual subsections of s. 29 based on these general guidelines.

The Court indicated:

> One of the central purposes of the [SRAC], according to ss. 3(b), is "to provide for payment of just and equitable compensation for the acquisition of surface rights." In furtherance of this purpose, s. 28 requires an operator to pay compensation "for any of the rights mentioned in s. 23 and acquired by him, in accordance with s. 29."
>
> There are five rights mentioned in s. 23:
>
> (a) the right to enter upon land for the purpose of drilling for a mineral;
>
> (b) land for a well site and roadway;
>
> (b.1) the right to establish, install or operate on a well site any machinery, equipment or apparatus that is specified in the regulations for use exclusively for or in connection with the drilling, completion or producing operations of a well on a well site;
>
> (c) the right to enter upon, use, occupy or take land for the purpose of constructing a power line; and
>
> (d) land for a battery site.
>
> These are discrete rights, and an operator who acquires one or more of them must pay compensation for each.[27]

The Court further indicated:

> The scope of the notion [of] just and equitable compensation determined in accordance with s. 29, and hence the object of ss. 29(1), is informed by several contextual considerations of a general nature when it comes to the acquisition of surface rights for oil and gas development:
>
> 1. landowners are expected by the [SRAC] to surrender, under threat of compulsion, possession and use of part or parts of their lands for the purpose of drilling for and producing oil or gas, an essentially private, commercial purpose, as distinct from a public, non-profit purpose;
>
> 2. they are expected to do so for a term lasting anywhere from weeks, in a case of a well site established for the purpose of drilling a well, to years in the case of a well site established for the purpose of producing oil or gas from the well; and
>
> 3. in doing so they are subjected to various form of loss, and potential damage or harm, caused by both the partition of their land and by the operations conducted on the part surrendered.[28]

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27 *Ibid.* at paras. 66-68.

28 *Ibid.* at para. 70.

The Court indicated that the elements of compulsion served in general to broaden the scope of just and equitable compensation beyond the recovery of mere loss and potential damage and harm to the recovery of a measure of added financial incentive to induce land owners, as though they were willing participants, to give up their s. 23 surface rights and surrender parts of their land for the purposes mentioned in s. 23.

The essential point of the second proposition contemplates a one-time compensation in respect of the surface rights associated with the drilling and completing of an oil or gas well, and ongoing compensation in relation to the surface rights associated with producing oil or gas from a well.

The third general contextual consideration contemplates compensation not only for the rights themselves, but also for the loss, damage, and harm that accompanies their acquisition and exercise, including that caused by the partition of the land and that caused by the conduct of the operations on the part surrendered.

II. CREDITORS RIGHTS

A. *RE RIO NEVADA ENERGY INC.*[29]

1. FACTS

This case dealt with the burden a secured creditor must meet in seeking an order to terminate a stay of proceedings granted pursuant to the *Companies' Creditors Arrangement Act*.[30] The facts of this case briefly stated were as follows: Rio Nevada Energy Inc. ("Rio Nevada"), a publicly listed oil and gas company incorporated pursuant to the laws of Canada, entered into a prepaid gas purchase contract with Westcoast Energy Inc. ("Westcoast") in September 1999. According to the contract, Rio Nevada was to deliver certain volumes of natural gas commencing in September 1999 and ending October 31, 2004. In accordance with the terms of the contract, Westcoast prepaid to Rio Nevada $3,118,000 plus GST. As security, Rio Nevada granted Westcoast a first-ranking security interest and charge over all of its assets. Upon default, Westcoast was able to appoint, or apply to the courts to appoint, a receiver. Rio Nevada was having some difficulty with two newly drilled wells, specifically, with meeting the gas production requirements and subsequent gas production shortfalls. Consequently, on October 23, 2000, Westcoast terminated the gas purchase contract and claimed liquidated damages.

On October 31, 2000, Rio Nevada sought and obtained protection under the *CCAA*. At that time its principal creditor was Westcoast, which declared its intention to bring an application for an order terminating the stay. The basis for the application was that the plan of arrangement as proposed by Rio Nevada was doomed to failure. The stay was extended to November 17, 2000, when Westcoast applied for a further order terminating

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29 (2000), 283 A.R. 146, [2000] A.J. No. 1596 (Q.B.), online: QL (AJ) [hereinafter *Rio*].

30 R.S.C. 1985, c. C-36 [hereinafter *CCAA*]. Under the *CCAA*, a court of competent jurisdiction may terminate a stay of proceedings if the creditors can show that a proposed plan of arrangement is "doomed to failure."

the stay and appointing a receiver-manager of the assets of Rio Nevada. Westcoast's application was dismissed and the stay was extended as per Rio Nevada's application to December 15, 2000.

2. DECISION

Westcoast claimed that its security position was being eroded on a daily basis and that there was a real risk that the creditor's loan would become unsecured during the *CCAA* stay. In concluding that there was insufficient evidence to find that there was no reasonable chance that a plan of arrangement would be accepted, the Court considered the relatively short time period the stay had been in place (seventeen days) and the fact that at least two other secured creditors supported the application of a stay. The Court noted that it was important to consider all affected parties in an application of this kind, including other secured and unsecured creditors. Finally, in response to Westcoast's submission that it had lost confidence in the management of Rio Nevada and would be unable to support any plan of arrangement put forward by it, the Court distinguished *First Treasury Financial Inc.* v. *Cango Petroleums Inc.*[31] where all the creditors, secured and unsecured, had lost confidence in the current management, or where it was highly probable that any plan put forward would be defeated by all the creditors. The Court concluded that Westcoast had failed to satisfy its burden under the *CCAA*; it had not shown that there was no reasonable chance that a plan of arrangement would be accepted.

3. SUPPLEMENTAL COMMENTARY

There appears to be at least two standards applied by courts in previous cases when deciding whether a stay under the *CCAA* should be set aside on a "doomed to failure" application. The Court did not apply the standard adopted in British Columbia, namely, that the creditor must show that the debtor's attempt at a plan of arrangement is indeed *doomed to fail* as this standard was extremely difficult for a creditor to satisfy, particularly in the early stages of *CCAA* proceedings. Rather, the Court opted for the less stringent test requiring the creditor to show that there is *no reasonable chance* that any plan would be accepted.

It is not entirely clear from the decision whether the Court placed more emphasis on the relatively short time frame or the fact that not all the creditors were on the side of Westcoast in this "doomed to failure" application. However, by opting for the apparently less stringent test of reasonableness, the Court may have made it somewhat easier for secured creditors to challenge a stay under the *CCAA*.

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31 (1991), 78 D.L.R. (4th) 585, [1991] O.J. No. 429 (Gen. Div.), online: QL (OJ).

B. *RE BLUE RANGE RESOURCE CORP.*[32]

In this much anticipated decision of the Alberta Court of Appeal, the Court addressed the question of whether forward gas contracts fell under the "eligible financial contracts" exclusion in the *Companies' Creditors Arrangement Act*.[33] In 1997 Parliament amended the *CCAA* to provide for an exemption for "eligible financial contracts," which are described in a comprehensive list of the types of transactions as "eligible financial contracts" (s. 11.1(1)).[34]

1. FACTS

Blue Range Resource Corporation ("Blue Range") and its wholly owned subsidiary, Humble Petroleum Marketing Ltd. ("Humble"), produced natural gas. As part of their operation, they entered into long- term contracts ("Forward Sale Contracts") to sell natural gas to the appellants Enron North America Corp. and its wholly-owned subsidiary Enron Canada, Duke Energy Limited Partnership, and Engage Energy Canada L.P. ("Appellants"). It is important to note that the Appellants were risk management gas marketing companies and not end-users of the natural gas they purchased.

In early 1999 Blue Range and Humble were facing possible insolvency. Accordingly, they made an *ex parte* application under the *CCAA* asking the Court to stay all proceedings pending against them. The subsequent order granting the stay was broad in scope in that it stayed not only the action, but also the contractual obligations restraining creditors from accelerating, terminating, suspending, modifying or cancelling any such agreement, or exercising any rights of distress, recission or set-off or consolidation of accounts in relation to any indebtedness or obligation. The order also provided an exception for "eligible financial contracts" as defined in the *CCAA*:

> 11.1(1) In this section,
> "eligible financial contract" means
> (a) a currency or interest rate swap agreement,
> (b) a basis swap agreement,
> (c) a spot, future, forward or other foreign exchange agreement,
> (d) a cap, collar or floor transaction,
> (e) a commodity swap,
> (f) a forward rate agreement,
> (g) a repurchase or reverse repurchase agreement,
> (h) a spot, future, forward or other commodity contract,
> (i) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,
> (j) any derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in paragraphs (a) to (i),

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[32] (2000), 192 D.L.R. (4th) 281, [2000] A.J. No. 1032 (C.A.), online QL (AJ) [hereinafter *Blue Range*].

[33] *Supra* note 30.

[34] Under s. 11.1(1) an "eligible financial contract" means a forward commodity contract and would include any master agreements and guarantee of liabilities.

(k) any master agreement in respect of any agreement or contract referred to in paragraphs (a) to (j),
(l) any master agreement in respect of a master agreement referred to in paragraph (k),
(m) a guarantee of the liabilities under an agreement or contract referred to in paragraphs (a) to (l), or
(n) any agreement of a kind prescribed;

As a result, a creditor was not prohibited from terminating, amending or claiming an accelerated payment and setting off obligations between Blue Range and such other parties in accordance with the eligible financial contract's provisions. On March 19, 1999, the Appellants applied to have their long-term gas supply contracts declared eligible financial contracts.

2. DECISION

The Alberta Court of Appeal reversed LoVecchio J.'s chambers decision and concluded that the Forward Sale Contracts were "forward commodity agreements" and fell within the definition of "eligible financial contracts." Fruman, J.A. on behalf of the Court, provided a review of the derivatives markets and the types of transactions in such markets, and held that although "forward commodity contracts" were not defined in the *CCAA*, they were merely contracts to buy or sell an asset at a certain price on a future date. The Court found that the Forward Sales Contracts fit within the aforementioned description as they were simply privately negotiated contracts between certain parties to buy and sell a specified quantity of gas at a certain or determinable price at a future date. The Court examined LoVecchio J.'s analysis in which he reasoned that natural gas contracts could be classified into two types of transactions: first, those that were physically settled by the delivery of gas; and second, those that were financially settled by cash payment. The Court noted that restricting forward commodity contracts to cash-settled contracts would be contrary to the plain meaning of the *CCAA* and inconsistent with Parliament's objective of protecting the risk management structure within the derivatives market. The Court further reasoned that such a restriction would not be necessary because while forward commodity contracts may be physically settled by the delivery of the product, they must be restricted to contracts for fungible commodities which trade in a liquid and volatile market.

Lastly, the Court concluded that the natural gas being bought and sold under the Forward Sales Contracts was a "commodity" and, therefore, exempt from the *CCAA* proceedings.[35] In reaching this conclusion, the Court considered the common features of the definitions provided under the *Securities Act*[36] and the *Commodity Futures Act*,[37] and it held that the gas in the Forward Sales Contracts was a commodity as it was "interchangeable, and readily identifiable as fungible commodities capable of being traded

[35] Commodity is not defined in the *CCAA*.
[36] R.S.A. 1980, c. S-6.1.
[37] R.S.O. 1990, c. C-20.

on a futures exchange or as the underlying asset of an over-the-counter derivative transaction."[38]

3. SUPPLEMENTAL COMMENTARY

LoVecchio, J. as part of his decision, found that:

> [s]imply put, if the purpose of the contract is to lead to the actual delivery of the commodity then you do not have a contract, which is financial in nature, but which is physical and it should not be found to be an "eligible financial contract."[39]

LoVecchio J. found that the Forward Sales Contracts were ordinary supply of goods contracts that were physical and not financial in nature; this finding, as discussed above, was expressly overturned by the Court of Appeal.

It has been argued from a policy basis that the *CCAA* should not extend to these broad contracts because if all oil and gas purchase contracts are considered to be eligible financial contracts, the *CCAA* could not prevent their termination, leaving the producer with no cash flow and no hope of completing a successful restructure.

There is no doubt that the result of this case will curtail the ability of some producers to avail themselves of the broad protection afforded to them pursuant to the *CCAA* in respect of derivative gas purchase arrangements. However, it is arguable that the effects of such a restriction will not necessarily thrust all *CCAA* protected producers into a zero cash flow position. The essence of the decision in *Blue Range* revolves around the characterization of natural gas as "interchangeable, and readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the-counter derivative transaction." If one accepts such a characterization of natural gas, one must also concede that natural gas can be sold on the spot market, and producers are able to generate cash flow from the sale of natural gas through that means.

In the event that a purchaser under a forward commodity contract terminates the contract of a *CCAA* protected producer, it is submitted that the producer would be in a position to rededicate its gas to the spot market and realize cash flow. While the producer may no longer be in a position to realize the same cash flows it would if it had the benefit of all of its "in the money" contracts, it will nonetheless be capable of generating at least some cash flow from sales on the spot market. It remains to be seen how the *Blue Range* decision will be used by gas marketers in future *CCAA* proceedings. However, the decision itself arguably does not create vast inequalities for the reasons outlined above and by the Court. Moreover, the decision appears to be in line with the intention of Parliament, which chose not to restrict the exemption in s. 11.1 to gas marketers as is the case in the United States.

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38 *Supra* note 32 at para. 45.

39 (1999), 245 A.R. 172, [1999] A.J. No. 830 (Q.B.) at para. 30, online: QL (AJ).

Blue Range has been cited with approval as the test for the distinction between a financial versus a physical gas supply contract in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, in the case of *Williams* v. *Morgan Stanley Capital Group (In Re Olympic Natural Gas Co.)*.[40]

III. ADMINISTRATIVE

A. *NYCAN ENERGY CORP.* V. *ALBERTA (E.U.B.)*[41]

1. FACTS

Nycan Energy Corp. ("Nycan") applied for leave to appeal a decision of the Alberta Energy and Utilities Board ("AEUB"). The AEUB ruled that Nycan's off-target gas well, Nycan Forty Mile 02/03-23-007-10 ("Well") was not the "first well" in a new pool and was, therefore, subject to an off-target penalty pursuant to the *Oil and Gas Conservation Regulations* ("Regulations") passed under the *Energy Resources Conservation Act*.[42] The AEUB directed that the Well be shut in effective December 15, 2000, until such time as overproduction prior to that date was retired. Nycan sought leave to appeal and, if granted, Nycan further sought a stay of the decision of the AEUB pursuant to r. 508 of the *Alberta Rules of Court* ("*Rules*").

The application was opposed by Sphere Energy Corp. ("Sphere") and by the AEUB. Counsel for Sphere submitted that the provisions of the *Alberta Energy and Utilities Board Act*[43] and the *ERCA* authorized the AEUB to suspend operation of its own orders which are under appeal and are therefore exhaustive and show a legislative intent to exclude the application of r. 508.

2. DECISION

Prior to addressing whether a stay should be granted, the Court addressed a preliminary issue raised by Nycan's counsel, specifically, what was the role of the AEUB in the hearing of applications for leave to appeal its decisions. O'Leary J.A. held that the role of the AEUB on applications for leave should necessarily correspond to its role on an appeal where leave has been granted. Although neither the *AEUBA* nor the *ERCA* expressly provided for the participation of the AEUB on leave applications, both allowed the AEUB to be heard through counsel or otherwise on the argument of the appeal. Counsel for Nycan submitted that the AEUB was not entitled to take an adversarial position on the application for leave. The Court disagreed, and it found that the AEUB could not properly discharge its responsibilities to the public interest unless it was permitted to participate in leave applications on an adversarial basis. O'Leary J.A.also indicated, however, that it would be appropriate for the AEUB to adjust its approach to suit the circumstances. If the application was otherwise opposed and the parties thoroughly

[40] (2001) 258 B.R. 161 (Bankr. Ct.).
[41] (2001), 277 A.R. 391, [2001] A.J. No. 140 (C.A.), online: QL (AJ).
[42] R.S.A. 1980, c. E-11 [hereinafter the *ERCA*].
[43] S.A. 1994, c. A-19.5 [hereinafter the *AEUBA*].

canvassed all of the relevant arguments, it would be fitting for the AEUB to adopt a more passive and advisory position; however, if the application was not opposed or only partly opposed, the AEUB would be justified in taking a more aggressive approach. The Court found that, in this case, the AEUB's argument did not add materially to the submissions made by counsel for Sphere, and, therefore, it did not consider the AEUB's participation to exceed what was proper in the circumstances.

a. Standard for Leave

A decision of the AEUB may be appealed to the Court of Appeal on a question of jurisdiction or on a question of law with leave of a judge of the Court.[44] It has been established that leave will be granted in respect of a question of law if the proposed appeal presents a "serious arguable point."[45] In light of the circumstances of this case, the evidence before the AEUB and the AEUB's previous written policy concerning the interpretation of the regulations, the interpretation of the off target penalty provisions (in particular the characterization of "first well" and "new pool") raised a seriously arguable issue of interest not only to the immediate parties but to the industry in general.

b. The Stay

O'Leary J.A. followed the decision in *Armstrong* v. *Athabasca No. 1 (County)*,[46] where Côté J.A. held that the Court had jurisdiction under r. 508 to stay orders or directions of administrative tribunals pending the outcome of appeals to the Court. This jurisdiction is conferred by the *Judicature Act*[47] and the *Court of Appeal Act*.[48] The Court held that it would require direct and precise statutory language to limit the jurisdiction of the Court of Appeal to stay the operation of orders of administrative tribunals pending determination of appeals from their decisions. No intention to this effect was expressed or could be implied in either the *AEUBA* or the *ERCA*.

Having decided that it had the jurisdiction to grant the stay, the Court then returned to the question of whether the stay should, in fact, be granted. The Court found that if the appeal were to succeed, the loss to Nycan from shutting in the well would not be recoverable during the anticipated life of the pool. There was also evidence, however, that if unsuccessful on appeal, Nycan may not have been able to retire the overproduction for the period prior to December 15, 2000, before the pool was depleted, and it would almost certainly be unable to retire any additional overproduction resulting from suspension of the AEUB's direction pending appeal. This would result in irreparable harm to Sphere and the other producers from the pool. Without giving specific reasons, the Court held that in these circumstances the risk of harm should lie with the applicant and that the balance of convenience, therefore, favoured a denial of the stay.

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44 *Ibid.*, ss. 20(1), 20(2).

45 *Calgary (City of)* v. *Alberta (E.U.B.)*, [1999] A.J. No. 780 at para. 20 (C.A.), online: QL (AJ).

46 (1990), 120 A.R. 285 (C.A.).

47 R.S.A. 1980, c. J-1.

48 R.S.A. 1980, c. C-28.

It is interesting to note that there was a suggestion that the stay be granted on the condition that all production revenue from the Well be held in trust until the conclusion of the appeal. The Court did not accept this proposal as other operators producing from the pool also had an interest. The Court, however, did indicate that the decision did not foreclose a further application for a stay, subject to the conditions that there would be a formula settled in advance for distribution of the revenue should the appeal fail, and that all parties with an interest would receive notice.

IV. ENVIRONMENTAL

A. *LEGAL OIL & GAS LTD. v. ALBERTA (MINISTER OF ENVIRONMENT)*[49]

1. FACTS

This case may be of importance for counsel appealing an environmental protection order pursuant to s. 102 of the *Environmental Protection and Enhancement Act.*[50] This was an application by Legal Oil and Gas Ltd. ("Legal") and its director, Charles W. Forster ("Forster"), for judicial review of an order issued by the Minister ("Order"). The Order adopted the recommendations of the Environmental Appeal Board ("EAB") that an environmental protection order issued by the Director of the Land Reclamation Division under the *EPEA* be confirmed. Legal also sought judicial review of the report and recommendations of the EAB.

Legal had acquired its interest in the subject lands from Sinclair Canada Oil Company ("Sinclair") by virtue of purchasing its interest in a petroleum and natural gas lease upon which there was located an oil well ("Well"). During the operation of the Well, two open pits were excavated. One of the pits held brine extracted from the Well and portions of the land were contaminated by the brine and hydrocarbons. As a result, in 1998, the Director ordered Legal and Forster to clean up the contamination on the subject lands. The dispute centred on whether the brine pit was located on the well site or in the off-site area of the subject lands; whether Legal actually caused any additional release of brine and hydrocarbons; and whether any brine or hydrocarbons released by Sinclair or Legal within the well had migrated to off-site areas of the land during Legal's ownership of the well. Legal and Forster submitted that the EAB had erred in

- concluding that Legal was a "person responsible" as defined in s. 1(ss) of the *EPEA*;
- concluding that Forster was a "principal" or "agent" of Legal and, therefore, a "person responsible" as defined in s. 1(ss) of the *EPEA*; and
- concluding that s. 102 of the *EPEA* was intended to have retrospective application.

[49] (2000), 265 A.R. 341, [2000] A.J. No. 684 (Q.B.), online: QL (AJ).

[50] S.A. 1992, c. E-13.3 [hereinafter *EPEA*].

2. DECISION

The Court dismissed the appeal and held that the EAB and the Minister did have a rational basis for concluding that Legal was a "person responsible" for the purposes of the *EPEA*. The EAB in making that determination relied on the original petroleum and natural gas lease pursuant to which Sinclair was granted the right to enter upon, use and occupy the subject lands. The Court further held that the AEUB was not patently unreasonable in interpreting the term "principal" to mean the chief or head of a company or other organization, which itself qualified as a responsible person. As s. 102 fell under the protection of the public category, and the recognized exception to the presumption against retrospective application, the conclusion of the EAB with respect to retrospective application was not patently unreasonable.

3. SUPPLEMENTAL COMMENTARY

The result in this case is not necessarily surprising, nor does it deviate significantly from past applications of this particular provision of *EPEA*. The case confirms the "patently unreasonably" standard for judicial review of decisions of the EAB and also confirms the sweeping nature of potential liability to oil and gas producers and their directing minds that is created under the *EPEA*.

V. TAXATION

A. *AMOCO CANADA PETROLEUM CO. V. SASKATCHEWAN ASSESSMENT MANAGEMENT AGENCY*[51]

1. FACTS

Amoco owned two pipelines in Saskatchewan that were subject to assessment for municipal tax purposes. During the assessment process, the Saskatchewan Assessment Management Agency ("SAMA") relied on a manual prepared under the authority of the *Assessment Management Agency Act*.[52] SAMA made an order under s. 12 of the *AMAA*, which contained definitions of "oil pipeline" and "gas pipeline." The application of these definitions to Amoco's pipelines resulted in an increased assessment value.

The appellant Amoco brought an application to the Saskatchewan Court of Queen's Bench under s. 16.1 (1) of the *Municipal Board Act*,[53] which provides for an appeal if the applicant believes that an order is inconsistent with the *Act*.

Following the dismissal of its application in Queen's Bench, Amoco brought an appeal to the Saskatchewan Court of Appeal. Amoco argued that the definitions used in the SAMA manual were taken from the *National Energy Board Act*,[54] which has purposes

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51 (2000), 199 Sask. R. 111, [2000] S.J. No. 450 (C.A), online: QL (SJ).
52 S.S. 1986, c. A-28.1 [hereinafter *AMAA*].
53 S.S. 1988-89, c. M-23.2.
54 R.S.C. 1985, c. N-7. [hereinafter *NEBA*].

and objects totally unrelated to municipal assessment and which is, therefore, inconsistent with the *Rural Municipality Act.*[55]

The question before the Court was whether the SAMA was empowered to make an order to classify pipelines according to the definitions from the *NEBA* although the *NEBA* is unrelated to municipal taxation assessment.

2. DECISION

In dismissing the appeal, the Court found that there was no impediment to the SAMA taking into account petroleum industry definitions to determine a value, even if taken from legislation unrelated to municipal taxation. Further, the Court held that whether the ultimate assessed values resulted in artificial, as to opposed to actual, values was irrelevant, as stated in *Regina (City of)* v. *Laing Property Corp.*,[56] as long as they were applied uniformly. The objective of equity was met if the appellant's pipeline assessment bore a just proportion to the value of other similar pipeline assessments.

B. *WESTCOAST TRANSMISSION LTD.* v. *BRITISH COLUMBIA (ASSESSOR OF AREA NO. 15-LANGLEY/ABBOTSFORD)*[57]

1. FACTS

Westcoast Energy Inc. and Westcoast Transmission Ltd. ("Westcoast") owned and operated a system of pipelines and plants that treated sour gas for third party producers and distributors. This decision was an application for leave to appeal to the British Columbia Court of Appeal from a decision of the Supreme Court of British Columbia concerning a decision made by the Assessment Appeal Board ("AAB") in which the AAB found, among other things, that certain land and improvements by Westcoast were not entitled to an exemption from taxation under the relevant legislation.

The main issues of the AAB's decision that were put before Supreme Court were:

- whether tank berms, sulfur storage and removal facilities, and cryogenic lines were entitled to an exemption from taxation pursuant to s. 339(1)(q) of the *Municipal Act*[58] or s. 15 of the *Taxation (Rural Area) Act*;[59]

- whether land under minor improvements adjacent to a right-of-way should be included in the right-of-way and assessed using the commissioner's rates pursuant to s. 21 of the *Assessment Act*;[60] and

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55 S.S. 1989-90, c. R-26.1.

56 (2001), 150 B.C.A.C. 181, 128 Sask. R. 29, [1994] S.J. No. 698 (C.A.), online: QL (SJ).

57 [2001] B.C.J. No. 432 (C.A.), online: QL (BCJ).

58 R.S.B.C. 1979, c. 290.

59 R.S.B.C. 1996, c. 448, as. am. by *Assessment and Property Taxation Amendment Act*, S.B.C. 1987, c. 2, s. 3.

60 R.S.B.C. 1996, c. 20.

- whether minor pipeline improvements consisting of metering stations, valve covers, analyzing facilities, communication towers, monitoring stations, Kontol Stations, and flare stacks and pits should be assessed using commissioner's rates pursuant to s. 21 of the *Assessment Act*.

The Supreme Court had concluded that the AAB had erred in law:

- in finding that tank berms, the sulfur line and storage and handling facilities, and the cryogenic line, low temperature flare and pit were not entitled to a pollution abatement exemption;

- in its interpretation of the term "right-of-way" in s. 21 of the *Assessment Act*;

- in its interpretation of the term "pipelines of a pipeline corporation" in s. 21(1)(c) of the *Assessment Act*; and

- in its interpretation of the term "appurtenances" in s. 21(1)(c) of the *Assessment Act*.

In the application for leave, the assessors contended the AAB did not err and sought leave to appeal the decision on each of those issues.

2. DECISION

Under the *Assessment Act*, an appeal on a question of law lies from a decision of the Supreme Court to the Court of Appeal with leave of a justice of the Court of Appeal. Rowles J.A. relied on *Royal Bank Realty Inc.* v. *British Columbia (Assessor of Area No. 10 – Burnaby/New Westminster)*,[61] where Wallace J.A. states:

> The Court of Appeal has held that leave in assessment appeals should only be granted where the question of law:
>
> (a) has not been previously addressed by the court or there is a conflict of lower court decision [*sic*];
>
> (b) affects a substantial number of assessments, and therefore the taxable base is a question of general importance;
>
> (c) can be said to admit rationally of an answer different from that given below; and
>
> (d) there is some prospect of the appeal succeeding on its merits.[62]

61 [1991] B.C.J. No. 4014 (C.A.), online: QL (BCJ).
62 *Ibid.* at para. 7.

Rowles J.A. refused to grant leave on the first issue of the pollution exemptions as the issue had already arisen in previous cases.[63] He further held that an appeal had no prospect of success, nor was he persuaded that the issue could be regarded as being one of general importance.

Regarding the interpretation of the term "right-of-way" in s. 21 of the *Assessment Act*, Rowles J.A. agreed with the respondent Westcoast that there was no prospect of the applicant overturning the conclusion of the chambers judge that the AAB had erred with regard to its interpretation. Rowles J.A. was, however, willing to grant leave as the issue was one of statutory interpretation and was of general importance.

On the issue of whether the AAB adopted an improper definition of the term "pipelines of a pipeline corporation," and in its interpretation of the term "appurtenance" in s. 21(1)(c) of the *Assessment Act*, Rowles J.A. was inclined to view that the chambers judge was correct in her response to the issue relating to interpreting s. 21(1), but granted leave as the issue of the proper interpretation to be given to s. 21(1) remained and was one of general importance.

C. *WESTCOAST ENERGY* V. *BRITISH COLUMBIA (ASSESSOR OF AREA NO. 27-PEACE RIVER)*[64]

1. FACTS

This decision resulted from an appeal from the decision of the Assessment Appeal Board ("AAB") with respect to the characterization and valuation for assessment purposes of certain pipes and pipelines associated with Westcoast Energy's ("Westcoast") natural gas processing facilities. Section 21(1) of the *Assessment Act*[65] provides for lower valuations for transportation pipelines, while s. 20 provides for higher valuations for other industrial piping.

The *Assessment Act Improvements Exclusion (1991) Regulation*[66] deals with piping at industrial plants. Section 1(p) provides for the exclusion from assessment of

> piping in a plant that is within property classified for assessment purposes as Class 4 or 5, *other* than that portion of the piping, which supplies or moves
>
> (i) water that is used for drinking, cooking or personal hygiene,
>
> (ii) water to the beginning of a plant process for use in that process,

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63 The issue had been dealt with in *Westcoast Transmission Company Limited and Assessor of Area No. 27 – Peace River (25 September 1985) Assessment Appeal Board*; and *Taylor (District)* v. *British Columbia (Assessor of Area No. 27 – Peace River)*, [1991] B.C.J. No. 3768 (S.C.), online: QL (BCJ); *Assessor of Area No. 10 – Burnaby/New Westminister* v. *Scott Paper Limited* (1994), Stated Case No. 350.

64 [2000] B.C.J. No. 865 (B.C. S.C.), online: QL (BCJ) [hereinafter *Westcoast Energy* v. *B.C.*].

65 *Supra* note 60.

66 B.C. Reg. 69/91 [hereinafter *Regulation*].

(iii) materials that are used for fire protection,

(iv) fuel or steam that is used for heating or power production,

(v) materials to the point where major processing of the materials begins,

(vi) industrial or non-industrial waste, or

(vii) materials that gave been refined, manufactured or otherwise processed in the plant and which are not subject to any further refinement, manufacturing or other processing in that plant;[67]

The first issue concerned gas lines into and out of the gas plant. The AAB concluded that since these pipelines were not caught by one of the categories in s. 1(p) of the *Regulation*, they must be valued in accordance with provisions of s. 20 of the *Assessment Act* as part of plant piping. The AAB, however, did not make a determination as to whether or not the lines were transportation pipelines or industrial piping.

The AAB also had made two rulings regarding the flared gas lines and cryogenic lines respectively. The AAB found that the cryogenic lines, which prevented explosive conditions in the pipelines carrying natural gas, were exempt from assessment as they did not fit in under any heading under s. 1(p) of the *Regulation*. The AAB, however, found that the flare lines, which were used for emergency venting, were not exempt from assessment as they fell under s. 1(p)(vii) or, in the alternative, s. 1(p)(vi) of the *Regulation*.

2. DECISION

The Court found that the AAB erred in law by not considering whether the gas lines into and out of the plants were transportation lines for the purposes of s. 21 of the *Assessment Act*. The Court found that the AAB's process of valuing all pipe that was not exempt under the *Regulation*, in accordance with the provisions of s. 20 of the *Assessment Act*, would lead to the result that s. 21(1)(c) of the *Assessment Act* would never be applicable. In order to give effect to s. 21(1)(c) of the *Assessment Act* it was necessary for the AAB to determine the character of the pipe in question. The failure to do so amounted to an error of law.

With regard to the flare gas lines and the cryogenic lines, the Court found that the AAB had not considered that the cryogenic lines, like the natural gas flowlines, might also be part of the production process providing a safety valve to allow the plant to continue to operate safely.

The Court found that the inconsistency in the decisions respecting the cryogenic lines and the natural gas flowlines led to the conclusion that one of those decisions must be wrong. In addition, the Court considered the AAB's findings that the flare lines were assessable pursuant to two different sections (*i.e.*, ss. 1(p)(vii) and (vi)), which sections

[67] *Ibid.*, s. 1(p) [emphasis added]; as quoted in *Westcoast Energy* v. *B.C.*, *supra* note 64.

appeared to be mutually exclusive. Based on this finding, the Court found that the AAB erred in law and directed that the questions as to whether the cryogenic lines and the flare gas lines were or were not exempt from taxation be remitted back to the AAB for reconsideration.

D. *RESMAN HOLDINGS LIMITED* V. *CANADA*[68]

1. FACTS

This decision of the Federal Court of Appeal is of importance to oil and gas practitioners, specifically with respect to the issue of what, for the purposes of the *Income Tax Act*,[69] is a Canadian exploration expense ("CEE"). In this appeal, the Court was concerned with whether the expenses incurred by the respondents in drilling thirty step-out wells in Alberta were "Canadian exploration expenses" as defined by s. 66.1(6) of the *ITA*. The significance of the classification to Resman Holdings Limited ("Taxpayer") related to the fact that if the expenses constituted a CEE, they were fully deductible. Otherwise, they would be classified as Canadian development expenses ("CDE"), which are included in a cumulative account that is deductible on a declining basis at the rate of 30 percent per year.

The difficulty faced by the Court was to determine whether or not expenses incurred in the drilling of step-out wells (*i.e.*, delineation wells drilled at the edge of a known pool of oil or gas to further explore that pool) could be considered an exploration well and thus qualify as a CEE.

Expenses originally classified as CDE may be reclassified as CEE. This reclassification can occur if the subject well results in the discovery of a natural accumulation of petroleum or natural gas, does not produce within twenty-four months of the completion of drilling, or is abandoned without having produced.

The methodology proposed by Mr. Gray, an expert who testified on behalf of the Taxpayer, was based on the assumption that the classification of the expense must be based on an assessment of the risk of drilling success when the decision is made to drill. On this point, the Court agreed with the Crown's position that this assumption was not consistent with the language of the definition, which required the classification of the drilling expenses to be made retrospectively based on the results of the drilling.

This point was further emphasized by the definition of CEE under the *ITA*: specifically, the key questions asked for expenses incurred before April 1987 and after March 1987:

> For expenses incurred before April 1987, the two key questions are:

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[68] (2000), 256 N.R. 376, [2000] F.C.J. No. 755 (F.C.A.), online: QL (FCJ) [hereinafter *Resman*].

[69] R.S.C. 1985 (5th Supp.), c. 1 [hereinafter *ITA*].

- Within six months after the end of the year, has it been determined that the well is capable of production in reasonable commercial quantities from an accumulation of petroleum or natural gas not previously known to exist?

- If not, is it reasonable to expect that the well will not come into production in commercial quantities within twelve months of its completion?

For expenses incurred after March 1987, two key questions are:

- Did the well result in the discovery, at any time before six months after the end of the year, of a natural accumulation of petroleum or natural gas?

- If not, was the well abandoned in the year or within six months after the end of the year without ever having produced, otherwise than for specified purposes?[70]

2. DECISION

In examining the context of the above questions, the Court accepted the Crown's interpretation of the definition. It was obvious that a classification could not have intended to elicit information about the state of knowledge prior to drilling. In fact, they could not be answered until the results of the drilling were known.

The Taxpayer's submissions appeared to centre on the proposition that the Crown's interpretation frustrated rather than furthered the purpose of the statutory scheme. They argued from a purposive context that the statute was designed to provide an incentive to taxpayers to invest in resource exploration and development and that the incentives were more generous for exploration than development to reflect the relative risks. In addressing this submission, Sharlow J. focused on two facts: first, he did not accept that the incentive feature of the regime would be frustrated merely because the most generous tax relief was denied for expenditures that were established to be exploiting a known resource; and second, the statutory language could not reasonably bear the Taxpayer's interpretation. The Court held that it was obvious that the questions were not intended to elicit information about the state of knowledge prior to drilling and, therefore, agreed with the Crown's interpretation of the statutory definition.

While the Court agreed that predictability was critical in fiscal matters and that the statutory provisions in question were part of a legislative scheme that was intended to provide an incentive to exploration and development of natural resources, these considerations, nonetheless, could not justify the interpretation of the definition of CEE as proposed by the Taxpayer.

With respect to Parliament's intention, the Taxpayer argued that if Parliament had meant to exclude the cost of delineation of step-out wells from the definition of CEE, it could have done so intentionally. In support of this argument, the Taxpayer cited a 1980 amendment to the *ITA*, which excluded from the definition of CEE any expense incurred

70 *Supra* note 68 at paras. 12-13.

in drilling a well for the purpose of delineating or determining the extent or quality of an accumulation of petroleum or natural gas if the drilling commenced after any production in commercial quantities from that accumulation. The amendment, however, was never proclaimed into force and was repealed in 1987. The Taxpayer's position was that the 1987 repeal signalled an intention by Parliament that the cost of delineation wells were not to be excluded from the definition of CEE and cited the implied exclusion principle as authority for their position.[71] In the Court's view, the definitions were not so ambiguous as to merit the application of the implied exclusion principle. The Court further held that the initial classification of the well as a step-out well had no impact on the tax treatment of the drilling expenses, nor did the likelihood that the drilling would be successful.

The Court went on to consider the results of the drilling of the thirty wells as it necessarily impacted on the classification of the expense. The Court noted that of the thirty wells, twenty-eight were successful, in that they encountered petroleum or natural gas. Of the twenty-eight successful wells, two were drilled before April 1987 and sixteen were drilled after March 1987. It was undisputed that an accumulation of petroleum or natural gas was the same thing as a natural accumulation of oil or gas. It was also agreed that there could only be one discovery of an accumulation, although the parties disagreed on the meaning of accumulation.

The Crown's argument was based on the defining characteristic of a pool, namely, the pressure regime which is the same as a pool of oil or gas as defined in the *Oil and Gas Conservation Act*.[72]

In response, the Taxpayer argued that while the word "pool" had an accepted meaning in the oil and gas industry, the word "accumulation" did not, and it should, therefore, be given its ordinary contextual meaning as any collection or volume of oil or gas in host rock found by a particular well bore.

The Court, however, agreed with the Crown and held that the word "accumulation" was intended to be read in the sense that it was understood in the industry. Of particular note was the Court's acceptance of the submission that the words "accumulation" and "gisement," as used in the English and French definitions of CEE, were intended to convey a meaning synonymous with the word "pool" in the geological dictionary definition presented to the Court and that it had the same meaning as "pool" in the *OGCA*.

The Court stated that the arguments of the parties could not be assessed without understanding how the Alberta Energy and Utilties Board ("AEUB") derived its determination of the existence of pools of oil or gas. For the AEUB's purpose, the word pool had the meaning stated in s. 1.1(q) of the *OGCA*:

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71 An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.

72 R.S.A. 1980, c. O-5 [hereinafter *OGCA*].

(q) "pool" means a natural underground reservoir[73] containing or appearing to contain an accumulation of oil or gas or both separated or appearing to be separated from any other such accumulation.[74]

The Court concluded that, given that the correctness of the AEUB pooling determination in this case was not disputed, the respondent's twenty-eight successful wells must have been taken to have encountered previously known accumulations. For that reason, the Court concluded that the expenses incurred in drilling those wells were not CEE.

The remaining issue was the classification of the expenses incurred after March of 1987 in drilling the two wells that did not encounter oil or gas. The issue was whether the unsuccessful wells were abandoned within the meaning of "abandoned" in the *ITA*.

The Court could not accept that a well was abandoned if it was still capable of being used in connection with the exploitation of the resource or if the contractual obligations relating to the well were assumed by someone else. The evidence in this case fell short of establishing that the wells were abandoned in fact. It followed that the expenses incurred in drilling those wells were not CEE.

VI. BUILDERS' LIENS

A. *PTI GROUP INC. V. ANG GATHERING & PROCESSING LIMITED (C.O.B. TRANSCANADA MIDSTREAM)*[75]

1. FACTS

ANG Gathering & Processing Ltd. ("ANG") entered into a letter agreement with Serval Enterprises Inc. ("Serval") to construct a 48-kilometre gas pipeline. PTI Group Inc. ("PTI") provided a camp and related services for Serval workers constructing the pipeline. The pipeline was being constructed on an 18-metre wide right-of-way granted to ANG; however, the camp was located just off of the right-of-way. PTI registered a builder's lien under the *Builders' Lien Act*[76] against the sections of land on which the right-of-way was located. PTI then took proceedings to enforce the lien before Master Floyd, who refused to enforce the lien on the grounds that in order to register a valid lien, the service had to have been supplied on the site of the liened lands.

The relevant portions of the *BLA* are as follows:

1 In this Act,

...

[73] The "reservoir" referred to in this definition is an area of porous rock in which oil or gas is trapped.

[74] As quoted in *Resman*, *supra* note 68 at para. 25.

[75] (2000), 265 A.R. 309, [2000] A.J. No. 572 (Q.B.), online: QL (AJ) [hereinafter *PTI*].

[76] R.S.A. 1980, c. B-12 [hereinafter *BLA*].

(l) "work" includes the performance of services on the improvement.

...

4(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to him, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

The issue before the Court was whether PTI's builder's lien against the right-of-way lands was valid, given that PTI did not locate its camp and services directly on the right-of-way that it liened. The issued hinged on whether PTI's services constituted "services on the improvement" as used in the definition of "work" in the *BLA*.

2. DECISION

The Court held that the approach to be taken to the interpretation of the *BLA* was the one set out in *Clarkson Co. Ltd.* v. *Ace Lumber*,[77] cited by Leiberman J.A. in *Hett* v. *Samoth Realty Projects Ltd.*,[78] which states:

> [W]hile the statute may permit liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it.

This area of builder's liens is uncertain. After an extensive review of the cases dealing with liens registered by cooks, caterers, architects, and other contractors against lands on or about construction sites and mines, the Court found it difficult to formulate any general principles out of the reported cases. Gallant J. concluded by saying:

> Establishing principles in law sometimes requires the drawing of lines. The line was drawn by Lieberman J.A. in *Hett* and followed by our Courts since then. The drawn line is that work does not include secondary services not performed on the improvement unless the services are directly related to the process of construction of the improvement.[79]

The Court found that had the services been conducted on the right-of-way, they would have constituted "services on the improvement," but since they were not performed on any portion of right-of-way the lien registered against the right-of-way was invalid.

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77 [1963] S.C.R. 110 [hereinafter *Clarkson*].

78 (1977), 3 Alta. L.R. (2d) 97 at 101 (C.A.) [hereinafter *Hett*].

79 *Supra* note 75 at para. 56. Note that architectural services performed off site may be lienable, but the architect cases have been dealt with by the courts as a separate category.

B. *SCHLUMBERGER HOLDINGS (BERMUDA) LTD. V. MERIT ENERGY LTD.*[80]

1. FACTS

This was an application by Schlumberger Holdings (Bermuda) Ltd. and Schlumberger Canada Ltd. (jointly "Schlumberger") to have certain liens they filed against Merit Energy Ltd. ("Merit") declared valid. As Merit was under the protection of the *Companies' Creditors Arrangement Act*,[81] the declaration of a valid lien necessarily dictates that Schlumberger would be treated as a secured creditor under the *CCAA*. If Schlumberger did not have a valid lien, it would rank as an unsecured creditor.

Schlumberger caused several liens to be filed in Alberta with respect to services provided by Schlumberger to Merit. The services provided came as a result of a combination of a request for bids by Merit and two letter agreements between the parties. The receiver appointed under the *CCAA* argued that in all but two instances, the lien claims filed by Schlumberger were invalid as they were not filed within the statutory time period required by s. 30 of the *Builders' Lien Act*.[82] While the receiver did not contest the validity of the two liens filed on time, he did dispute the value of the liens, arguing that the amount claimed for transportation costs should not be protected.

Schlumberger claimed that the request for bids and the two letters comprised a general contract between Schlumberger and Merit. As a result, the time period for filing the liens would not start to run until the expiry of the period during which work could be performed under the proposal, that being December 31, 1999. In the alternative, it argued that the request for bids and two letters resulted in a prevenient arrangement existing between the parties such that the liens filed out of time would still be valid.

2. DECISION

a. The General Contract

The Court examined the request for bids and letter and determined, *inter alia*, that:

- The request for bids was very general and only provided an estimated number of oil wells that required services. There was not a guaranteed amount of work for the successful bidder.

- The response from Schlumberger was equally general. The parties only agreed to a framework for pricing and clearly intended to agree to the price at some later date.

- Each time Merit required services, the program prepared by Schlumberger had to first be accepted by Merit on a well-by-well basis.

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80 [2001] 5 W.W.R. 560, [2001] A.J. No. 45 (Q.B.), online: QL (AJ) [hereinafter *Schlumberger*].

81 *Supra* note 30.

82 *Supra* note 76.

- Schlumberger's invoicing for services rendered also evidenced that the parties intended to contract on a well-by-well basis.

- In addition to the price, there were other terms of the arrangement that were equally uncertain.

- There was no minimum or maximum number of wells specified from which to determine the amount of guaranteed work.

Although the understanding between Schlumberger and Merit amounted to more than a casual business relationship, it was substantially open ended with several essential terms left to be agreed upon at some future date. Thus, the Court could not conclude that the parties had one continuing general contract.

b. Prevenient Arrangement

The Court then turned to the question of whether a prevenient arrangement existed between Schlumberger and Merit such that the liens, otherwise filed out of time, would be valid. The Court cited the decision of *Re Blue Range Resource Corp.*[83] where Romaine J. provided a thorough review of the jurisprudence relating to prevenient arrangements. In that decision, Romaine J. stated:

> A prevenient arrangement is said to exist where there is a preliminary understanding between parties that they are entering into an ongoing relationship. This preliminary understanding does not have to be a binding contract or contain all the terms upon which materials or services are to be supplied, but it serves to link together what would otherwise appear to be a series of contracts into one continuing contract or open account.[84]

Romaine J. also stated:

> [T]he scope and extent of the work to be done further to the preliminary understanding must be determinable with a sufficient degree of certainty to constitute the "thread" that serves to link the subsequent supply of goods or services together.[85]

Romaine J. then provided a number of factors to help assess whether the preliminary understanding of the parities may be ascertained with sufficient degree of certainty. Such factors include a limited time frame, a designated area of service, a guarantee of a specific amount of work or sales, and exclusivity between the parties or advanced discussions of specific requirements. No one factor is conclusive.[86]

The Court then added:

83 (1999), 254 A.R. 103, [1999] A.J. No. 1337 (Q.B.) [hereinafter *Re Blue Range*].
84 *Ibid.* at 105.
85 *Ibid.* at 106.
86 *Ibid.* at 107.

The burden of proving this preliminary understanding lies with the lien-claimant and the Court must be cautious to ensure the lien-claimant produces sufficient evidence to establish the "necessary thread," being mindful of the consequences of finding a prevenient arrangement. The most significant consequence is that an otherwise unsecured creditor would become a secured creditor.[87]

In applying these factors, the Court found:

- Schlumberger was not the exclusive supplier of services to Merit, nor were they given the right of first refusal.
- There was no guarantee of minimum or maximum services to be provided that could be determined with sufficient certainty.
- There was no designation of specific services at the time of the bid proposal and subsequent letters.
- Schlumberger would submit a proposal each time Merit requested services.
- Although Schlumberger may have kept a crew available, there was no evidence that this crew was engaged from the outside of the preliminary understanding or that the work was guaranteed.
- As in *Re Blue Range*, there was no additional evidence showing that the wells were linked in any way beyond the fact that Merit owned and/or operated many of them.

Accordingly, the Court held there was no prevenient arrangement between the parties.

The final question for the Court was whether the amounts claimed for transporting materials and equipment were entitled to the protection of any valid lien claim. Section 4 of the *BLA* provides as follows:

4(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used on or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to him, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

Section 1(1) provides the definition for "work," specifically including "the performance of services on the improvement."

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87 *Supra* note 80 at para. 40.

The Court then had to determine whether these transportation costs constituted "work on or in respect of an improvement" or whether they constituted "furnish[ing] material to be used on or in respect of an improvement."

LoVecchio J. stated:

> In interpreting the scope of the Builders' Lien Act, the Court must keep in mind that builders' liens are created by statute and are extraordinary as they create a charge on land thereby granting one class of creditors a priority which may not be enjoyed by others. Accordingly, the Supreme Court in *Ace Lumber Ltd.* v. *Clarkson* stated that the statute "must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it." In Alberta, a Court must also consider whether the work or furnishing of materials are "directly related" to the improvement.[88]

The Court looked at the transportation costs for materials and equipment as separate issues.

c. Transportation Costs for Materials

The Court looked at the question of whether the transportation costs for materials constituted "work on or in respect of an improvement" as per s. 4(1)(a) of the *BLA*. After a review of the decisions in *PTI*[89] and *Hett*,[90] it found that in order to be included under the lien, the portion of the off-site transportation services provided by Schlumberger must have been directly related to the process of construction of the improvement. It was a question of fact whether the transportation costs were directly related to the process of construction and, having regard to principles in the reviewed cases, the Court found that the cost of transporting materials was a secondary cost and not directly related to the improvement.

The Court also held that s. 4(1)(b) of the *BLA* limited the lien to the price of the material only and did not include the price of transporting the materials.

d. Costs of Transporting Equipment

The Court again turned to the interpretation of "services on an improvement" in the definition of "work" in the *BLA*. It adopted the interpretation given to performing a "service" in *Clarkson* as "connoting some active participation in the performance of the

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88 *Ibid.* LoVecchio J. was quoting from *Clarkson* (*supra* note 77) where Ritchie J. at 114 quotes the dissenting opinion of Kelly J.A. of the Court of Appeal of Ontario ([1962] 33 D.L.R. (2d) 701 at 711).

89 *Supra* note 75.

90 *Supra* note 78.

service on the part of the lien claimant."[91] As a result, the transportation costs for equipment used were not held to be valid claims under the lien.[92]

VII. ROYALTIES

A. *STONEY TRIBAL COUNCIL* v. *PANCANADIAN PETROLEUM LTD.*[93]

1. FACTS

This dispute involved the determination of royalties to be paid by the appellant PanCanadian Petroleum Ltd. ("PanCanadian") to the Stoney Tribal Council ("Band") pursuant to four mineral leases. PanCanadian had been deducting "TOPGAS" financing charges as well as operating, marketing and administration charges ("OMAC") when determining the selling price of the gas. This selling price was the price which PanCanadian then used to calculate royalties payable to the Band.

The applicable regulations, the *Indian Oil and Gas Regulations*,[94] were originally made in 1977 and amended in 1981 pursuant to the *Indian Oil and Gas Act*[95] and its predecessors. Those regulations establish how the royalty is to be calculated.

Section 21(1) of the *IOGR* provides:

> 21(1) Except as otherwise provided in a special agreement under subsection 5(2) of the Act the royalty on oil and gas obtained from or attributable to a contract area shall be the royalty computed in accordance with Schedule I, as amended from time to time, and shall be paid to Her Majesty in Right of Canada in trust for the Indian Band concerned.

Schedule I of the *IOGR* provides:

> ...
>
> 2(2) The royalty to be computed, levied and collected on gas obtained from or attributable to a contract area shall comprise the basic royalty of 25% of the gas obtained or attributable to the contract area plus the applicable supplementary royalty determined in accordance with subsection (3), all quantities to be calculated at the time and place of production free and clear of any deduction whatever except as provided under subsection (4).
>
> ...

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91 *Supra* note 77 at 115.

92 Since the original date of publication, the Alberta Court of Appeal allowed the appeal on the issue of transportation costs. The Court of Appeal held that the transportation of equipment essential to the performance of the work was an "integral and necessary part of the actual physical construction of the project." *Schlumberger Holdings (Bermuda) Ltd.* v. *Merit Energy Ltd.*, [2001], 10 W.W.R. 631, [2001] A.J. No. 899 (C.A.), online: QL (AJ).

93 (2000), 261 A.R. 289, [2000] A.J. No. 870 (C.A.), online: QL (AJ).

94 C.R.C. (1978), c. 963 and S.O.R./81-340 [hereinafter *IOGR*].

95 R.S.C. 1985, c. I-7.

2(4) Where gas is processed by a method other than gravity, the royalty on the gas obtained therefrom shall be calculated on the actual selling price of that gas, but such costs of processing as the Manager may from time to time consider fair and reasonable, calculated on the total of the basic and the supplementary royalty portion of production, shall be allowed.

2(5) For the purposes of this section, "actual selling price" means the price at which gas is sold or the price specified pursuant to subsection 21(7) of these Regulations, whichever is greater.

The Band brought their claim on the ground that the TOPGAS financing charges and the OMAC charges did not apply to the calculation of the royalties on Indian lands, thus entitling them to an accounting and judgment for the amount of the unauthorized deductions.

The Court of Queen's Bench decision of McIntyre J., dated April 9, 1998,[96] found that the Band was entitled to a recalculation of royalties without deduction of OMAC and TOPGAS financing charges and repayment from May 3, 1983.

The issues on appeal were:

- Is the applicable limitation six years or ten years?
- Were the TOPGAS and OMAC charges properly considered in computing the royalties?

2. DECISION

a. Limitation Period

Section 1(e) of the then *Limitation of Actions Act*[97] defines "land" as including an interest in land. The trial judge had held that a royalty was an interest in land and, as such, it was subject to s. 18(a) of the *LAA*, which sets ten years as the limitation for "proceedings to recover land."

It is important to note that the Court of Appeal chose not to deal specifically with the question of whether a royalty was an interest in land. The Court looked at the amended statement of claim of the Band and determined that the relief claimed by the Band was for an accounting and judgment in the sum of all royalty monies due to the Band by reason of unauthorized deductions or, alternatively, an accounting for all part payments received by the Band from the gas buyers relating to contracts to market or sell gas obtained from the reserved lands and judgment for the royalty portion of such part payments. The Court held that the first basis for the claim was in contract, not a claim seeking to recover the royalty itself (and thus was not a claim to recover an interest in land). The other causes pleaded in the claim were breach of trust, breach of fiduciary duty

96 (1998), 218 A.R. 201, [1998] A.J. No. 381 (Q.B.), online: QL (AJ).

97 R.S.A. 1980, c. L-15 [hereinafter *LAA*]. This Act has been repealed.

and unjust enrichment. None of these could be regarded as an action to recover an interest in land.

In this case, the natural gas to which the royalty interest attached was lawfully severed and sold in accordance with oil and gas leases. The Band was not seeking to recover their royalty interest in kind. Any property interest had been alienated and what remained was not an action for the gas, but for the correct sum of money owing under contract. The limitation period, therefore, was found to be six years.

b. Deduction of Charges

The question on this issue was whether the *Take-or-pay Costs Sharing Act*,[98] and the deductions it permits, apply when calculating the royalties on gas produced from reserve lands. PanCanadian argued that the royalty was calculated in accordance with the *IOGR* because it was based on the sale price. It argued that the sale price was the actual price at which the gas was sold. The Court of Appeal, however, found that the *TPCSA* describes the charge as a "levy" that is payable on delivery of gas and that the person liable for the payment is the seller. The *TPCSA* does not purport to be setting the selling price or to be part of the calculation of the selling price of gas. By the terms employed in *TPCSA* the levy is an added charge on the seller. In practice the buyer would pay PanCanadian after deducting the TOPGAS and the OMAC charges; however, technically these charges were a separate obligation, not part of the selling price of gas. The Court found that such charges were not permitted under the legislation regulating oil and gas production on reserve lands and they should not have been deducted before calculating the royalties owed to the Band.

The Court of Appeal found that the Band was entitled to a recalculation of its royalties without the TOPGAS and OMAC charges; however, their claim was limited to six years.

B. *EDBE CONSULTING LTD. V. UNION GAS LTD.*[99]

1. FACTS

The decision in this appeal serves as an important reminder to those who draft geological or other consulting agreements that convey a royalty to the consultant after termination. In this appeal, the Court was concerned with the interpretation of two agreements between a consulting company, Edbe Consulting Ltd. ("Edbe"), and an oil company, Union Gas Ltd. ("Union"). The first agreement ("Consulting Agreement") outlined the consulting services that would be provided by Edbe for a period of three years in return for overriding royalties. The Consulting Agreement provided that a royalty of 2 percent would be paid to Edbe in respect of the proceeds derived from the sale of oil and gas produced from any real property in which Union had acquired an interest as a result of a reference or recommendation by Edbe. The second agreement ("Termination Agreement") terminated most of the provisions of the first agreement in return for a cash

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98 S.A. 1986, c. T-0.1 [hereinafter *TPCSA*].

99 [2001] A.J. No. 10 (C.A.), online: QL (AJ).

payment to Edbe, but it provided that the 2 percent overriding royalty arrangement would continue in effect for certain lands delineated on an appended Schedule "A." This Schedule listed a number of lands with an indication of Union's percentage working interest. Two of the scheduled lands were Saskatchewan oil and gas leases in which Union itself owned an overriding royalty interest. The originally scheduled interests were conveyed to PreCambrian Shield Resources Limited ("PreCambrian"), which subsequently acquired further working interests in the lands on Schedule "A" to the Termination Agreement. PreCambrian then conveyed its interest in the land on Schedule "A" to the Termination Agreement to Enron Oil Canada Ltd. ("Enron"), which agreed to be bound by the Consulting Agreement. Enron subsequently acquired additional working interests in the lands on Schedule "A" to the Termination Agreement. The Court referred to the additional interests acquired by PreCambrian and Enron subsequent to the Termination Agreement as the "Additional Interests."

At issue was whether Edbe's royalties should be limited to the interests specified in Schedule "A" or whether they should also be found to apply to the Additional Interests.

2. DECISION

The trial judge concluded that Edbe's royalty rights extended to the Additional Interests. She held that such a ruling did not lead to a commercial absurdity in that it would make liable for the overriding royalties subsequent interest holders who had never dealt with Edbe or received the benefit of his advice. Rather, the trial judge found that the Consulting Agreement distinguished between "Union acquiring an interest which triggers the entitlement to the overriding royalty, and the real property from which the net proceeds of sale of oil and gas produced were used to calculate the amount of the overriding royalty payable."[100]

In reversing the decision of the trial judge, the Court of Appeal pointed out the significance of the fact that the agreement originally was intended to run for three years. First, the Court found that that fact explained the language used in the Consulting Agreement, which stated that the 2 percent royalty was payable on lands "in which Union had acquired an interest," suggesting that there was a certain date by which Union was to have acquired its interests. Second, the Court observed that the three-year term provided some context to the condition in the granting provision in the Consulting Agreement that stated that the 2 percent royalty would only be payable in respect of land acquired by Union arising out of a reference or recommendation by Edbe. The Court found that, taken together, these factors suggested that the parties had intended the 2 percent royalty to be payable "only as to lands acquired by Union during the term of the Consulting Agreement" (*i.e.*, did not include the "Additional Interests"). The Court also pointed out that a different result would lead to contractual uncertainty in that it would be difficult to ascertain which Additional Interests were acquired as a result of a referral or recommendation of Edbe.

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100 *Ibid.* at para. 11.

VIII. INDUSTRY AGREEMENTS

A. *HENNESSEY CUP DEVELOPMENTS LTD. v. WESTERN CONCORD MANUFACTURING LTD.*[101]

The issue in this case was whether the defendant, Hennessey Cup Developments Ltd. ("Hennessey"), was liable to the plaintiff by counterclaim, Western Concord Manufacturing Ltd. ("Western"), as a result of Hennessey filing a caveat against the title to certain disputed lands. The Court had to determine on what basis, if any, a party filing a caveat that did not disclose an interest in the subject lands was liable for damages.

1. FACTS

On March 3, 1997, the City of Edmonton ("City") entered into a lease agreement with Western for a portion of lands ("Lease"). The Lease included a right of first refusal provision, which stated that if the City received an acceptable offer for the land, it was to give Western the right to match that offer and purchase the leased lands. If Western elected to match the offer, Western would be required to buy the land, and the City would be required to sell it. If Western did not match the offer, then the City was permitted to sell to the third party who had made the offer.

On September 2, 1997, Hennessey made an offer to purchase the land for $75,000; the offer was not accepted by the City. Hennessey then made a second offer for $85,000 and was told by the City's agent that the offer had been accepted but was subject to the approval of another department. At this point Hennessey was aware of the lease with Western but not of the terms of the lease or of the right of first refusal. On September 11, 1997, the City's agent told Hennessey of the right of first refusal and told Hennessey that if it wanted the land, it would have to increase its bid. Because of this information, Hennessey submitted two subsequent offers ($90,000 and $100,000), both of which were matched by Western, the last on October 22, 1997. On October 23, 1997, the City provided Hennessey with a copy of the Lease but did not inform Hennessey that Western had matched the latest offer until November 13, 1997. On November 15, 1997, Hennessey filed the caveat in an effort to protect the $85,000 offer of September 2, 1997. It is key to note that the Court found as a fact that the City had not accepted any of the offers until the final $100,000 offer by Hennessey of October 22, 1997, but both Hennessey and Western believed that the City had in fact accepted the $85,000 offer of September 2, 1997.

Section 142 of the *Land Titles Act*[102] states:

> Any person, filing ... a caveat without reasonable cause is liable to any person who may have sustained damage thereby.

[101] (2000), 273 A.R. 380, [2000] A.J. No. 1185 (Q.B.), online: QL (AJ).

[102] R.S.A. 1980, c. L-5 [hereinafter *LTA*].

The question to be determined was whether Hennessey had reasonable cause when it filed its caveat.

2. DECISION

The Court held that s. 142 of the *LTA* contained both a subjective and an objective element. First, the person filing the caveat must itself believe it has reasonable cause for doing so. Second, that cause must, in fact, be reasonable. The question of malice can go to the first element. If the sole reason a person files a caveat is out of malice or any other patently improper reason advanced by the caveator, then it is likely that their belief in the reasonableness of the cause they allege will be called into question.

During discoveries, Hennessey admitted that one of the purposes of filing the caveat was to force Western to the bargaining table. Western claimed this was an improper purpose for filing a caveat. Looking at the subjective element, the Court considered whether an attempt to force negotiations was an improper reason for filing a caveat, and it found that this did not in and of itself automatically establish the absence of reasonable cause.

The Court then turned to the question of whether Hennessey did have, in fact, reasonable cause when it filed the caveat. Although Hennessey conceded *at trial* that the caveat did not disclose an interest in the subject lands, the inquiry is to be made as to the understanding of the party filing the caveat at the time it filed the caveat. In other words, what did Hennessey know or ought to have known when it filed the caveat?

Western supported its claim that Hennessey knew the $85,000 offer had not been accepted by the fact Hennessey made two subsequent offers. Western alleged that Hennessey would not have made subsequent offers if it felt it had a caveatable interest in the land based on the $85,000 offer of September 2, 1997. The Court, however, held that it was the misinformation given by the City's agent that lead Hennessey to engage in the bidding process that lead to a total of four offers being made. It was not until October 23, 1997, when the City provided Hennessey with a copy of the lease, that Hennessey became aware that the process as explained to it by the agent was not what was contemplated by the right of first refusal, and that no sale to Western was completed arising from the $85,000 offer.

The Court found that it was reasonable for Hennessey to have arrived at the conclusion that the $85,000 offer had been accepted by the City and never matched by Western to the point of completion of a sale. Based on that conclusion, it was not unreasonable for Hennessey to have filed the caveat.

B. *VECTOR ENERGY INC. v. PACIFIC GAS & ELECTRIC CO.*[103]

1. FACTS

This case is a contract interpretation case arising from a gas purchase and sales contract between Vector Energy Inc. ("Vector") as seller and Pacific Gas & Electric Co. ("PGE") as buyer. Two issues of interpretation arose with respect to the contract, both of which centred on the transportation component of the contract price. The first issue was whether the gas purchase and sales contract contemplated a volume weighted average or a simple arithmetic average of certain firm interstate pipeline transportation rates for natural gas from designated US natural gas basins to the California border. The second issue was whether or not these specified firm interstate transportation rates were to include or exclude rates for firm capacity which had been contractually released from an incumbent holder to a new holder, subject to recall by the releasing party.

2. DECISION

While the Court was satisfied from the evidence that the basic pricing concept was well known to both parties from the commencement of negotiations (the gas was to be sold and delivered by Vector and priced at the California border competitively with gas available to PGE from US suppliers), the transportation component of the price was at issue.

a. The Averaging Issue

Article 6.3 of the gas purchase and sales contract and, in particular, the words "discounted arithmetic percentage of the 100 percent As-Billed Rate"[104] was the relevant portion of the gas purchase and sales contract at issue. Specifically, the Court addressed whether this language reflected a mutual intention to do a simple average of the rates or a volume weighted average.

The evidence was clear and uncontradicted that both the commodity prices and the three producing basins themselves were volume weighted. The Court held that the parties agreed to volume weighted transportation rights consistent with their fundamental pricing concept and the whole of their agreement.

b. The Recallable Firm Issue

The Court held that the distinction between firm and interruptible service was clearly embedded in the tariffs and that recallable firm was a variety of firm service or capacity. The Court further held that the phrase "firm interstate transportation capacity" as used in Article 6.3 was to include all varieties of firm capacity, including those subject to recall.

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[103] [2000] A.J. No. 326 (Q.B.), online: QL (AJ) [hereinafter *Vector Energy*].
[104] *Ibid.* at para. 16.

c. Waiver/Estoppel Issue

As the parties had agreed to a volume weighted averaging of transportation rates and to the inclusion of recallable firm transactions in the determination of the contract price, the Court had to consider whether in the circumstances this was a case of estoppel.

The test for estoppel was established in the case of *C.I.T. Corporation* v. *Hawley*:

> The circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence.[105]

The Court held that as a reasonable probability of prejudice was not demonstrated, this was not an appropriate case of estoppel.

C. *H&R DRILLING INC.* v. *AQUILO ENERGY INC.*[106]

1. FACTS

In March of 1997, Rick Rutherford and John Hokanson incorporated H&R Drilling Inc. ("H&R"). H&R constructed a number of drilling rigs of varying sizes. Drilling Rig No. 2 ("Rig No. 2") was the rig at the centre of the dispute. H&R wanted to secure long-term commitments from certain oil companies that would be using the newly constructed drilling rigs before actually constructing the rigs. At the centre of the dispute was a standard day work contract widely in use in the industry entered into by H&R with the defendant Aquilo Energy Inc. ("Aquilo") in relation to Rig No. 2.

The defendants (Aquilo, Chauvco Resources Ltd., and Newquest Energy Inc.) each entered into separate day work contracts with H&R ("Contracts"). Aquilo contracted to use Rig No. 2 for 125 days a year for two years, Chauvco contracted to use Rig No. 2 for 50 days a year for two years, and Newquest contracted to use Rig No. 2 for 75 days a year for two years. This ultimately meant that Rig No. 2 would be used for a total of 250 days a year for the period covered by the Contracts. The Contract with Aquilo was executed in April of 1997, and construction of Rig No. 2 commenced shortly thereafter.

The parties originally contemplated that Rig No. 2 would be completed in and around July 15, 1997. However, a fire on June 29, 1997, ultimately set back completion of the rig until September 9, 1997.

Aquilo had arranged to drill a well in July of 1997 as it had expected Rig No. 2 would be available. As a result of the fire, Aquilo got an extension on its obligation to drill but ultimately hired Champion Drilling to complete the well. H&R commenced this action for the balance it claimed to be owed under the Contract, which Aquilo refused to pay.

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105 34 Cal.App.2d 66 at 72, as cited in *Vector Energy*, *ibid.* at para. 42.

106 (2000), 265 A.R. 141, [2000] A.J. No. 718 (Q.B.), online: QL (AJ).

The Court referred to the Contract, which consisted of a main contractual document and an exhibit described as Exhibit "A." The Contract provisions with respect to the issue were:

Clause 2 of Exhibit "A" which provides:

2. Commencement Date:

Contractor ["Defendant"] agrees to use best efforts to commence operations for the drilling of the well by the 15th day of July 1997, or as mutually agreed.

2. Clause 11.2 of Exhibit "A" which provides;

... estimated availability of rig July 15, 1997.

3. Paragraph 15 of the main contract, which provides;

15. Force Majeure:

15.1 Neither operator nor contractor shall be liable to perform its obligations under this agreement when performance is hindered or prevented by strikes, lockouts, riots, war, acts of God, insurrection, fire, storm, tornado, orders or regulations of any government authority, delays in transportation, inability to obtain the necessary materials and supplies on the open market or any other cause, whether similar or dissimilar to those specifically enumerated, beyond the reasonable control of the responsible party. The performance of any suspended obligation shall be resumed as soon as reasonably possible after such cause ceases to exist. Nothing in this subclause 15.1 shall relieve operator of its obligations under this agreement to pay the appropriate day rate(s) or either party of its respective indemnification covenants specified in this agreement.[107]

The Contract did not specifically stipulate when the rig was to be completed or what was to happen if the rig was not completed by the estimated date. However, the parties had agreed that the Contract related to both Aquilo's use of the completed rig and H&R's obligation to construct and make the rig available. In short, the parties had agreed that this contractual dispute turned and remained upon a determination of whether H&R used best efforts to get the rig ready. The argument focused on the period after the fire occurred until the rig was actually completed.

Aquilo's position was that H&R should have simply replaced damaged parts and completed the rig without regard to insurance or warranty. It was the position of H&R that had it proceeded in this fashion, the rig would have been available in August.

[107] *Ibid.* at para. 14.

2. DECISION

The Court concluded that it was clear that H&R did everything it should have to get the rig ready. Some of these steps included: (a) hiring additional men to assist in construction; (b) working 15-hour shifts to get the rig done; (c) working under tarps in the manufacturer's yard as the manufacturer's building was compromised by fire damage; and (d) pushing the manufacturer constantly to complete the project.

In the Court's view, it was both prudent and reasonable to take the few days necessary for the insurance adjuster to review the damage and agree upon parts and needs of replacement. As well, it was prudent and reasonable to have the major components inspected by the original manufacturers to ensure that those parts had not been damaged by the fire and thus preserve the warranty of these components. In the Court's view, best efforts could not mean simply as fast as possible but must mean as fast as reasonably and prudently possible.[108]

In any event, the Court held that the *force majeure* clause in the Contract afforded a complete answer to the argument of the defendant. It was clear that the fire on June 29 prevented or hindered the completion of the rig. It was further clear that construction on the rig resumed as soon as reasonably possible, and in the circumstances the rig was constructed on a best efforts basis.

The next issue the Court had to consider was whether the defendant was entitled to any portion of the benefits of H&R's business interruption insurance settlement as a set-off against any debt owing to H&R. The Court held that clearly the insurance was obtained by H&R for its benefit and at its expense. The Court further held that if H&R had wanted to protect itself against any fire, one would presume that it had the necessary insurable interest to do so. Finally, the claim was representative of the position that Aquilo took at trial where Aquilo still could not quantify its damages, but rather took the position that there had to be some adjustment made for the fact that it had suffered. In summary, the Court stated that it appeared as though the defendant was asking the Court to be sympathetic and to address the plaintiff's claim on the basis of that sympathy. The Court held that this novel defence strategy was doomed to failure.

The final issue the Court had to determine was what credit should be allowed to Aquilo for the use of Rig No. 2 during the contract period. In calculating the defendant's debt, H&R had allocated the non-contractual use of Rig No. 2 as a credit to each of Aquilo, Chauvco, and Newquest on the basis of their proportionate share of the day's usage for which each had contracted. In the result, as the defendant had contracted for 125 days per year of the 250 day total, it received half of such credit. In addition, H&R calculated the credit to Aquilo based on the day rate actually paid by non-contracting oil companies as opposed to Aquilo's contracted day rate of $9,558. The essence of this aspect of the decision was that Aquilo stated it should have been credited with its contracted day rate and not a portion of the actual day rate received by the plaintiff from the non-contracting oil companies. The Court found that this argument failed to recognize that there was no

108 *Ibid.* at para. 22.

contractual basis for any such credit. In effect, the defendant received those credits as a gift, and it was certainly in no position to complain and had no legal basis to argue for any additional credit.

D. *DUCE OIL LIMITED* v. *COACHLIGHT RESOURCES LTD.*[109]

1. FACTS

Coachlight Resources Ltd. ("Coachlight"), as operator, and Duce Oil Limited ("Duce"), as joint operator, agreed to construct a horizontal re-entry from a vertical well. The costs were to be shared proportionately in accordance with their interests in the well. Duce declined Coachlight's request to pay its full share of the costs on the ground that they were not properly authorized under the operating procedure. Coachlight sued for recovery of the costs. Duce further contended that the work undertaken by Coachlight was negligently performed and caused damage to the vertical wellbore. Coachlight brought this action against Duce to recover expenditures incurred for operating, drilling and reworking operations under the terms and conditions of an operating agreement with respect to certain oil wells jointly owned by the parties in southeastern Saskatchewan. Duce defended the claim and resisted payment on the principal ground that the work in question was not properly authorized under the terms of the operating agreement. Duce also counterclaimed, arguing that the work was negligently performed, resulting in damage to the vertical well.

The trial judge allowed Coachlight's claim except for certain battery fees and dismissed the counterclaim.

In dismissing the appeal, the Court reviewed the findings of fact, which provided the necessary context for the Court's decision. Prior to the drilling of the horizontal well, the parties were joint operators of the vertical well ("Vertical Well") and another vertical well approximately one-half mile away. The parties agreed to attempt an enhancement of their oil recoveries by drilling a horizontal re-entry well from the Vertical Well. The purpose of the horizontal well was to traverse the oil producing formation line between LSD 3 of 33 and LSD 1 of 33. Pursuant to the operating agreement, Coachlight would be the operator and Duce the joint operator. On August 31, 1993, Coachlight prepared an AFE for the project and submitted it to Duce for approval ("Original AFE"). The total drilling and completion costs as provided for in the Original AFE were estimated at $406,850, consisting of approximately $378,400 for drilling costs and approximately $28,450 for completion costs. Sixty-five percent of those total costs ($264,452.50) were to be paid by Coachlight and 35 percent ($142,397.50) by Duce. On September 24, 1993, the Original AFE was approved by Duce and returned to Coachlight via fax.

On September 25, 1993, the preparations for the drilling operation began, including the plugging back of the Vertical Well and removal of the existing well equipment at LSD 3. The initial drilling of the well did not go as planned, and over seven incidents of lost time and resulting additional costs were reported. One of the more significant delays

[109] (2000), 199 Sask. R. 24, [2000] S.J. No. 352 (C.A.), online: QL (SJ).

resulted from poor core sampling procedures followed by the contractor crew. Drilling on the second leg had not commenced until late October 10, 1993. This delay was largely because of problems involved in plugging back the first leg of the well. It soon became clear that as a result of the problems and delays, the well had no pressure draw down and the water was falling into the well bore as fast as the well was being pumped out. Therefore, a decision had to be made as to what steps could be taken to make it a producing well.

In order to isolate the lower part of the well bore from the water, Coachlight proposed a workover program. On October 25 Mr. Maguire of Coachlight and Mr. Duce discussed the proposal. Mr. Duce did not object to the proposal, nor did he suggest any alternate means of attempting to deal with the excessive waterflow. As this proposal was not contemplated in the Original AFE, Maguire asked Mr. Duce whether he required a new AFE for this expenditure. It was agreed, as they still did not have a producing well, that the charges would simply be added to the Original AFE. Subsequent to this meeting, problems related to the installation of certain packers were encountered. At roughly the same time, Duce advised Coachlight that it was not willing to pay immediately its share of the cost overruns. In response, Coachlight issued a supplemental AFE in the amount of $139,522.50 with Duce's share amounting to $75,127.50. Coachlight then issued default notice under the governing operating procedure.

Subsequent to the default notice, a problem with the screwpump developed at the well site. The trial judge's finding of facts with respect to this incident include:

> In October of 1994, a screwpump was installed on the Well. Although a new AFE was prepared for the installation, it was never forwarded to Duce. Coachlight took the position that since it had received no response to the Default Notice, Duce was no longer entitled to information concerning the Well. The screw pump wore out in three months due to a breakdown of the rubber compound. Another temporary pump was placed on the Well in February of 1995 and a new screw pump and top drive assembly was installed in June of 1995. The total of all of these costs was $99,906.10. Duce was charged its proportionate share being $34,967.14.[110]

2. DECISION

The Court assessed all the evidence and, on the whole, found that a palpable and overriding error in the assessment of the evidence had not been demonstrated. The trial judge had been faced with conflicting testimony and resolved the controversy by accepting the testimony of Maguire. The Court of Appeal found ample support for the trial judge's conclusion, which was consistent with the evidence as a whole.

The Court considered whether Duce was liable to Coachlight for 35 percent of the costs referred to in the supplemental AFE.

The Court observed that Duce had approved the various legs of the operation taken by Coachlight and knew that it was responsible for its share of the additional expenditures.

[110] *Ibid.* at para. 14.

The Court found that, when confronted with unexpected difficulties in the horizontal drilling operation, Duce could not claim that it did not approve the steps taken by Coachlight as operator.

Although 1981 Canadian Association of Petroleum Landmen Operating Procedure ("CAPL 1981") requires an operator to issue a supplemental AFE for joint operator approval, if the joint operators have pre-approved the work with the knowledge that cost overruns may occur, they are contractually obliged to approve the supplementary AFE, and they cannot refuse to approve the supplemental AFE in an attempt to shield themselves from additional expenses.

The next issue the Court considered was whether Duce was liable to Coachlight for 35 percent of the screwpump costs incurred after the default notice.

The Court was satisfied that Coachlight was entitled to install the screwpipe without consulting with a defaulting joint operator. Therefore, Duce, as a defaulting joint operator, was liable for 35 percent of the screwpump costs. The Court based its decision on clause 505(b)(i) of CAPL 1981, which provides that once the time limit to respond to a default notice has expired, an operator is subsequently entitled to withhold from the defaulting joint operator all further information and privileges with respect to the operations.

Next, the Court considered whether Coachlight was negligent in conducting the drilling operations or whether it otherwise breached its obligations pursuant to CAPL 1981.

This issue raised a primary question of fact — did Coachlight as an experienced operator, having regard for the interests of both parties, use reasonable care and prudence in this operation? The trial judge rejected Duce's allegations of negligence, and the Court of Appeal found that her conclusion was fully supported by the evidence.

Finally, the Court examined whether Duce was liable for the full operating losses of the joint interest wells, including battery costs, as charged by Coachlight.

Duce sought to avoid liability for these costs on the footing that Coachlight continued production of the well in order to benefit as an operator without regard for the rights and economic interests of its joint operator, Duce. The trial judge had addressed the issue in the following passage:

> Duce argues that the Horizontal Well is not a commercially economic Well. It contends that Coachlight continues to produce the Well solely for the battery revenues that it generates to Coachlight's benefit as Operator but to the financial detriment of its Joint-Operator. Coachlight counters that it must continue to produce the Well or the parties would risk losing the petroleum and natural gas leases of the lands upon which the Well is drilled. Mr. Maguire testified that Coachlight believes that there is more value in the SW-33-6-9-W2. He provided the court with two possible scenarios for future recovery under the lease but indicated that neither of these options could be pursued while the parties were engaged in a dispute over the Horizontal Well.[111]

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[111] *Ibid.* at 28.

The trial judge also found that by continuing to produce the horizontal well, Coachlight was preserving the underlying lease for the benefit of both parties. For the time being, the trial judge accepted Coachlight's position that the well must be produced to protect further value in the underlying lease. However, the trial judge further held that if, at sometime in the future, no steps were taken to exploit the further value in the lease, Coachlight may be in breach of its fiduciary relationship to Duce by continuing to produce the horizontal well in circumstances that earn it a significant profit at the battery sight at the expense of Duce.

After June 30, 1995, Coachlight voluntarily stopped charging any fees at the battery site as "it was too expensive to determine how much Duce Oil wasn't going to pay that month."[112] The trial judge determined that it would be inequitable to permit Coachlight to now charge Duce Oil for amounts that Coachlight had in fact abandoned. Accordingly, Coachlight was prohibited from charging Duce for unbilled battery fees for the period June 30, 1995, up to and including March 31, 1999.

3. SUPPLEMENTAL COMMENTARY

Although the decision in this case is largely fact specific and may not be informative to oil and gas lawyers concerned with day-to-day operational disputes, it does provide some insight into the willingness of the Court to make use of parole evidence in rendering decisions regarding disputes centred on CAPL operating procedures. The Court in this case relied upon numerous telephone discussions between Messrs. Maguire and Duce in order to render the finding that Duce had in fact approved the cost overruns encountered on the operation. Practitioners, to the extent they already do not do so, should encourage their clients to take detailed notes of all telephone conversations and to seek advice of counsel as early as possible where potential disputes arise in respect to drilling or other operations.

E. *EAGLE RESOURCES LTD.* V. *MACDONALD*[113]

1. FACTS

This case involved the purchase by the plaintiff of shares in an oil and gas company previously owned by the defendant. The defendant, Mr. Gordon MacDonald, wholly owned Eagle Resources Ltd. ("Eagle"). In April of 1991, the plaintiff, Mr. Paul Romanchuk, approached Mr. MacDonald about the possibility of purchasing Eagle. After signing a confidentiality agreement, Mr. Romanchuk received a copy of an evaluation of the proven and probable reserves of the major properties owned by Eagle ("Sproule 90 Report"), prepared with an effective date of June 1, 1990. Eagle's major asset was known as the Dina ZZ pool ("Dina").

On July 5, 1991, Mr. Romanchuk, through his company Sabre Capital Corporation ("Sabre"), submitted an offer to purchase all of the outstanding shares of Eagle. The offer

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112 *Ibid.*

113 (2000), 84 Alta. L.R. (3d) 108, [2000] A.J. No. 1026 (Q.B.), online: QL (AJ).

was subject to the preparation of a definitive agreement and was also subject to certain conditions. One of the conditions was that no change had occurred since June 30, 1991, in the property, operations, affairs or prospects of Eagle other than in the ordinary course of business.

On or about July 5, 1991, Mr. MacDonald received a second report ("Sproule 91 Report"), which reduced the value of the Dina reserves by about 36 percent relative to the Sproule 90 Report. Although unfavourable, the Sproule 91 Report corresponded to an earlier report commissioned by Eagle ("SSI Report"). While a copy of the Sproule 91 Report was not sent to Mr. Romanchuk, he did receive a copy of the SSI Report on July 12, 1991.

The Court accepted as fact that during the continued negotiations for the sale of Eagle, Mr. Romanchuk was made aware of the decline in the Dina values by Mr. MacDonald and other officers of Eagle.

During the period from July 1991 to October 1991, Mr. Romanchuk was also attempting to secure a subsequent purchaser for Eagle. On July 30, 1991, Mr. Romanchuk entered into negotiations with Erin Mills Capital Corporation ("Erin Mills"). Because of some concerns about the valuation of the Eagle property, Erin Mills had Mr. Richard Osler of Aequanimitas prepare a "letter of comfort" ("Osler Report"), which was essentially due diligence on the part of Erin Mills. Mr. Osler based this letter on meetings between himself and representatives of Eagle, as well as the Sproule 90 Report, the SSI Report, and the production records of Dina from May 1988 to September 1991. The Osler Report clearly indicated that the Sproule 90 Report was severely outdated and that it was not able to be relied upon.

Despite these reports, Mr. Romanchuk continued with his plan to broker the sale of Eagle to Erin Mills, and the agreement was signed on October 10, 1991.

Mr. Romanchuk alleged that Mr. MacDonald deliberately misled him with respect to the value of the major asset of the company by holding out the Sproule 90 Report as representing the value of Eagle's assets. It was further alleged that Mr. MacDonald failed to disclose a subsequent report ("Sproule 91 Report") that showed the asset was worth substantially less than the earlier evaluation.

2. DECISION

The issue, which will be of interest to oil and gas practitioners, is the Court's discussion respecting fraudulent misrepresentation, specifically the valuation of reserves. The Court was asked to consider whether Mr. MacDonald had fraudulently misrepresented the value of the assets to the purchasers of his shares. Mr. Romanchuk's submissions centred around the allegation that Mr. MacDonald represented Eagle's most substantial asset, Dina, to be of a certain value, as set out in the Sproule 90 Report. Of particular significance to the Court's analysis was the fact that the author of the Osler Report indicated that the Sproule 90 Report was severely outdated and could not be relied upon, that no current representations had been given with respect to that evaluation, and that there was now a greater risk with respect to the ultimate recovery of estimates for Dina.

In his decision, Hawco J. held that the Osler Report could not have been clearer on what value or weight to place upon the Sproule 90 Report. In fact, in his words, he referred to the report as an "unequivocal caveat."[114] He further held that it could not have been any clearer that the value of the shares was not in the asset base, but rather in future exploration and development activities. Notwithstanding this unequivocal caveat, the Court examined the evidence of Mr. Romanchuk and the Osler Report and held that Mr. MacDonald did not at any time at or before closing represent that the assets of Eagle were worth any particular amount of money, nor did he make any verbal representations as to the accuracy of the report. Furthermore, at no time did he attempt to influence any of his officers or employees to make any representations. In fact, evidence was led that suggested information detrimental to the sale of the company was shared by the parties. This evidence, in and of itself, was not indicative of a company attempting to conceal information.

The Court then went on to discuss whether the failure to disclose the Sproule 91 Report as well as other documents should be taken as a representation that Sproule 90 Report was accurate and could be relied upon. While the Court was satisfied that the documents were not disclosed, the question then was whether this amounted to a representation that the Sproule 90 Report was accurate. In the Court's view, it was not.

In addition to the Sproule 90 Report, the Court addressed the effect of the SSI Report. The plaintiff argued that the SSI Report would not have meant anything to anyone outside the oil and gas industry. In fact, evidence was lead to suggest that the SSI Report was not an economic evaluation of the reserves, but rather a tool to assess certain alternatives with respect to how productivity could be increased. The SSI Report did not relate to proven or probable reserves nor to the value to be assigned to them. The Court held that, notwithstanding the above, a purchaser could not be wilfully blind to the fact that the Sproule 90 Report could not be relied upon. As the Court noted, "[r]ed flags were everywhere proclaiming loudly, if not screaming, that the value in Dina upon which the plaintiff said it relied was simply not there."[115]

The Court was satisfied that Mr. MacDonald did not misrepresent the value of the major asset to Mr. Romanchuk and that Mr. Romanchuk did not rely upon the earlier evaluation.

Mr. Romanchuk also argued that Mr. MacDonald was in breach of certain warranties in the share purchase agreement. The most notable clause (and one the Court found Mr. MacDonald had breached) was that "to the best of the Vendor's knowledge, information and belief, there is no fact currently known to the Vendor which materially and adversely affects the business, prospects or financial condition"[116] of Eagle. Although the Court

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[114] *Ibid.* at para. 74.

[115] *Ibid.* at para 93.

[116] *Ibid.* at para. 110.

found that the failure to disclose the Sproule 91 Report was a breach of this warranty in the agreement, it found that a key element was missing in the action of misrepresentation. The Court simply refused to accept the testimony of Mr. Romanchuk that he had been induced to enter into the contract by virtue of these misrepresentations. The Court found that Mr. Romanchuk knew that the Sproule 90 Report was unreliable and that he did not rely upon it. Even though Mr. MacDonald did not disclose the Sproule 91 Report, Mr, Romanchuk could not claim that he would not have relied upon the Sproule 90 Report (which the Court found he had not done at any rate) had he known of the Sproule 91 Report.

Mr. Romanchuk also claimed that had he known of the Sproule 91 Report, he would not have conducted himself the way he did. The Court found, however, that Mr. Romanchuk was never actually interested in the Eagle assets for the strict value of the Dina reserves, but for the ability to create subsequent business deals based on the land potential of the Eagle properties. Mr. Romanchuk bargained for a company with a number of assets that were attractive to him, and regardless of the actual valuation of the Dina reserves, Mr. Romanchuk got essentially what he bargained for.

Eagle appealed Hawco J.'s decision to the Alberta Court of Appeal on the issue of liability for breach of warranty.[117] The Court allowed the appeal and ordered that a new trial be held with respect to the valuation question.

F. *MARSHALL V. BERNARD PLACE CORP.*[118]

1. FACTS

The issues in this case were related to the interpretation and legal meaning of a "sole discretion" condition clause in an agreement of purchase and sale. The first draft of the condition clause read as follows:

> This Agreement is conditional upon the inspection of the Property by a home inspector of the Purchaser's choice and at the Purchaser's own expense, and receipt of a report satisfactory to him in his *sole and absolute discretion.*[119]

In this case, the Marshalls entered into an agreement of purchase and sale with the defendant, Bernard Place Corp. ("BPC") to purchase a renovated house in midtown Toronto for the amount of $1,510,000. The Marshalls had paid a deposit of $150,000 to the listing broker, Chestnut Park Real Estate Limited ("Chestnut Park"). The agreement, however, was conditional upon the Marshalls obtaining a home inspection and a report on the condition of the property "satisfactory to him in his sole and absolute discretion." The agreement provided that the condition be fulfilled or waived on or before 3:00 p.m. on Wednesday, August 19, 1998. On Monday, August 17, the Marshalls advised their broker that they had received the inspection report and that they would not waive the

117 [2001] A.J. No. 1339 (C.A.), online: QL (AJ).
118 (2000), 36 R.P.R. (3d) 153, [2000] O.J. No. 3321 (S.C.J.), online: QL (OJ).
119 *Ibid.* at para. 10 [emphasis added].

condition. They subsequently asked their broker to advise the listing broker and to arrange for the return of their deposit.

2. DECISION

The primary issue in this case was whether the Marshalls had acted properly and in accordance with the law in exercising their rights granted under the condition clause. The Court held the condition that the inspection report be "satisfactory to him" was an intention to create an option. It was, therefore, subject only to the provision that it be exercised honestly. The Court would not go so far as to call the condition clause an option, as there remained a requirement of reasonableness, honesty and good faith. However, the broadly worded discretion did impute a broad subjective element and came close to an option.

The leading Ontario case referred to was the Court of Appeal judgment in *Greenburg* v. *Meffert*.[120] The judgment held that a "sole discretion" clause:

> did not give an unbridled discretion and that the exercise of such discretion whether measured by subjective or objective standards must be reasonable and with honesty and good faith.[121]

The governing principle in *Greenburg* stated:

> Provisions in agreements making payment or performance to "the discretion", "the opinion", or "the satisfaction" of a party to the agreement or a third party, broadly speaking, fall into two general categories. In contracts in which the matter to be decided or approved is not readily susceptible of objective measurement — matters involving taste, sensibility, personal compatibility or judgment of the party for whose benefit the authority was given — such provisions are more likely construed as imposing only a subjective standard. On the other hand, contracts relating to such matters as operative fitness, structural completion, mechanical utility or marketability, these provisions are generally construed as imposing an objective standard of reasonableness.[122]

In the instant case, the condition clause agreed to by the parties contained clear words that gave the Marshalls the opportunity to engage a building inspector of their own choice and their own expense and to receive a report satisfactory to them in their sole and absolute discretion. The parties further agreed that the condition was included in the agreement for the sole benefit of the purchaser and may be waived at the purchaser's option. The wording clearly excluded any participation by the vendor in the property inspection or the decision, and it was not open for the vendor to say that the purchaser ought to have been satisfied.

The test for reasonableness, as the Court pointed out, was a combined subjective and objective standard. With respect to the objective component, the Court would investigate the evidence to determine whether it disclosed the purchasers acted reasonably, honestly

120 (1985), 50 O.R. (2d) 755 (C.A.) [hereinafter *Greenburg*].

121 *Supra* note 118 at para. 22.

122 *Ibid.* at para. 22 citing *Greenburg* at 761.

and in good faith in reaching the subjective determination of reasonableness. In this case, Marshalls were entitled to the relief sought and were entitled to the return of their deposit.

G. *PROGAS LTD.* v. *AEC WEST LTD.*[123]

1. FACTS

In this case, the Court dealt with an application for an interlocutory injunction in the nature of an order of specific performance of a contract.

Progas Ltd. ("Progas"), an aggregator of natural gas, purchased natural gas from a number of producers, pooled the gas, and then marketed it. AEC West Ltd. ("AEC West") was a producer and seller of natural gas. The parties entered into a contract on November 1, 1994, which provided that Progas would purchase volumes of natural gas from AEC West's interests in a gas field located at Sexsmith, Alberta. The dispute that had arisen was whether AEC West was delivering required quantities of natural gas in accordance with the terms of the contract.

2. DECISION

The Court analyzed the case in order to make a determination as to whether or not Progas was entitled to an injunction. It noted that in Alberta, a party seeking an injunction must meet a tripart sequential test. Specifically, the Alberta Court of Appeal, in the cases of *Black & Company* v. *Law Society of Alberta*[124] and *Ominayak* v. *Norcen Energy Resources*,[125] made it clear that in Alberta an applicant seeking an interim injunction must establish: first, that a serious issue has been raised; second, that the applicant will suffer irreparable harm if no injunction is granted; and third, that the balance of convenience between the parties favours relief to the applicant. This tripart sequential test was derived from the decision of *American Cyanamid Company* v. *Ethicon*.[126]

AEC West conceded that there was a serious issue to be tried and, therefore, the Court did not consider this part of the test. With respect to irreparable harm, Progas argued that irreparable harm would arise in the following ways:

- a reduction of net back to producers;
- a difficulty in assessing damages;
- the status of progress to advance claims on behalf of producers;
- a difficulty in accounting to producers; and

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123 (2000), 263 A.R. 179, [2000] A.J. No. 191 (Q.B.), online: QL (AJ).
124 (1983), 69 A.R. 322 (C.A.).
125 (1985), 58 A.R. 161 (C.A.).
126 [1975] A.C. 396, 1 All E.R. 504 (H.L.).

- a depletion of reserves.

With respect to the reduction of net back, Progas argued that because AEC West was allegedly underdelivering natural gas, Progas had lost the ability to sell excess gas on the Alberta spot market. In the result, the profits were no longer being placed into the revenue pool, and the the net back to each producer was being adversely affected. The Court, however, held that this was a speculative possibility and could not support an argument of irreparable harm.

With respect to the issue of difficulty in assessing damages, Progas argued that if it were to succeed, calculation of damages would be difficult bearing in mind contractual arrangements with various producers. In response, AEC West argued that the calculation of damages would not be complicated as shortfalls in delivery can be precisely calculated, as can a price per unit of natural gas because spot market prices are easily calculable. The Court held that although courts of law are often called upon to make difficult damage assessments, a difficult damage assessment is not equated with an impossibility of assessment.

With respect to the status of Progas to advance claims on behalf of producers, counsel for AEC West argued that there was no legal authority that would allow a court to find irreparable harm to a party on the basis of an alleged harm to others who are not party to the action. The Court agreed with AEC West and found that the producers had no legal right to claim against AEC West and that this situation could not be cured by way of an injunction. The Court stated:

> It is not the court's function, by way of injunctive relief in a specified action, to protect others, particularly in a situation wherein the statement of claim does not purport to be a representative action or an action filed on behalf of a purported trustee.[127]

With respect to the difficulty in accounting to producers, the Court found that there was no authority to substantiate this argument. The Court further noted that it had been provided with no evidence that the producers, if faced with a distribution of funds, could not agree on such a distribution.

With respect to the depletion of reserves, Progas argued that if the injunction was not granted, AEC West could deplete reserves from the Sexsmith area. In response, AEC West argued that the submission could not stand because if Progas was successful, it would be entitled to damages from AEC West regardless of whether the reserves were left in the Sexsmith area. In the Court's view, AEC West had provided a complete answer to this application.

In summary, the Court found that with cases of injunction, a particularly clear case must be demonstrated where specific performance is sought. This case was not particularly clear; therefore, the applicant's application was dismissed with costs.

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127 *Supra* note 123 at para. 28.

H. *RE RIO NEVADA ENERGY INC.*[128]

1. FACTS[129]

The essence of this application was the ability of Engage Energy Canada L.P. ("Engage") to set off damages Engage alleged were owed to it by Rio Nevada Energy Inc. ("Rio Nevada") arising from the termination of an Energy Management Services ("EMS") agreement between the parties dated September 1, 1999, and from the anticipated early termination of gas sales from Rio Nevada to Engage under a Gas Transaction Agreement and Confirmation ("GTA") dated June 1, 1999, and September 9, 1999, against amounts Engage owed to Rio Nevada for the purchase of gas pursuant to the GTA.

Under the EMS agreement, Engage provided gas balancing and management services to Rio Nevada with respect to its production from the Nixon area for a stipulated fee. Under the GTA, Rio Nevada was required to deliver its production in excess of that required to be delivered to Westcoast Energy Inc. ("Westcoast") under a different arrangement ("Prepaid Gas Purchase Contract"). Rio Nevada became entitled to protection under the *CCAA*[130] shortly after Westcoast terminated the Prepaid Gas Purchase Contract. Rio Nevada then advised Engage that it was of the view that with the termination of the Prepaid Gas Purchase Contract, all obligations of Engage under the EMS agreement were terminated. The EMS agreement provided that if the Westcoast arrangement was terminated, Engage was required to assign to Rio Nevada the NOVA firm transportation service contract held by Engage for the purpose of the Prepaid Gas Purchase Contract. Engage assigned the NOVA transportation agreement and characterized Rio Nevada's position as an early termination of the EMS agreement. Despite such early termination, Engage continued to provide the services previously provided under the agreement to Rio Nevada under the same fee charged under the EMS agreement. Engage had become indebted to Rio Nevada under the GTA, but withheld some $47,526.54 as a set-off against damages suffered by Engage owing to the early termination of the EMS agreement.

2. DECISION

The Court held that Engage was not entitled to set-off of damages pursuant to the EMS agreement against amounts owing to Rio Nevada under the GTA, as its claim for damages was barred by the express language of the agreement. The Court held that Engage's claim for damages was premature and that Engage was contractually liable to pay interest on amounts withheld to the date of payment in accordance with the provisions set out under the GTA.

Engage alleged it had a claim for damages for lost fees pursuant to the EMS agreement and anticipated lost fees under the GTA. Engage took the position that the EMS agreement entitled it to a secure revenue stream for five years. The difficulty with this

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128 [2001] A.J. No. 227 (Q.B.), online: QL (AJ).

129 For additional facts see *Rio*, *supra* note 29 and accompanying text in section II(A) of this article.

130 *Supra* note 30.

position, in the Court's view, was that the amounts were calculated based on what Engage would have been entitled to had production estimates from the Nixon lands proven to be accurate. The Court held that, as this provision was not expressly provided for in the EMS agreement and Engage conceded that actual production from these lands was substantially less than the projected amount, there was no claim that could be supported.

Rio Nevada submitted that Engage had no claim for damages for two reasons: first, the express language of the EMS agreement barred a damage claim; and second, Engage had suffered no loss or damage.

The EMS agreement contained the following clause:

> 11. Damages Limitations
>
> Neither party is liable to the other in contract or negligence for any economic loss or other indirect, consequential or special damages of any nature.[131]

At issue was the meaning to be attributed to the words "any economic loss" in this clause. Engage submitted that the economic loss referred to must be a kind of indirect, consequential or special damage before it is prohibited by the EMS agreement and that the loss of fees of which it complained were direct damages that were not prohibited by clause 11.

Although the Court agreed that there was an element of ambiguity in the wording, it did not accept that clause 11 was limited to this extent. The heading of the clause was not "Indirect Damages Limitation" but rather "Damages Limitation." The Court held that the plain language of the clause precluded liability for economic loss, and economic loss was not restricted to indirect or consequential loss. The future loss of fees fell within the plain meaning of "any economic loss." In the Court's view, the clause listed a litany of prohibited damages and was intended to be a broad prohibition. This interpretation was consistent with the EMS agreement in that the agreement did not guarantee Engage a minimum level of compensation or a guaranteed stream of income, but only that it would be paid for services, if and when performed, at the rate as established in the agreement.

The Court held that the aforementioned finding precluded a claim of set-off for damages, but, nonetheless, the Court considered whether Engage had shown that it had suffered damages. Engage conceded that despite the early termination of the EMS agreement, it had fully mitigated any damages it may have suffered to date by performing services for Rio Nevada with respect to the Nixon lands on the same terms as set out in the EMS agreement. Engage agreed that its right to set-off would be for damages of future lost fees. The Court held that notwithstanding the five-year term of the EMS agreement, Engage was only entitled to be compensated for the services it performed. Of particular note was the Court's finding that no adverse inference should be drawn against Rio Nevada for failing to speculate as to future production in order to aid Engage in establishing a claim for damages.

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131 *Supra* note 128 at para. 18.

The Court was not satisfied that Engage had communicated to Rio Nevada an intention to terminate the agreement in the future. As such, the Court held that there was no right to set-off with respect to the GTA. The Court also found that Rio Nevada was entitled to interest on the withheld gas purchase payments.

IX. TRUSTS

A. *SORREL 1985 LIMITED PARTNERSHIP* V. *SORREL RESOURCES LTD.*[132]

1. FACTS

This case raised the issue of when a stranger to a trust would be held liable for the breach of that trust.

In this case, Speirs, the President, and Mix, the Treasurer, of Sorrel Resources Ltd. ("Sorrel"), an oil and gas exploration company, set up a partnership ("Partnership") for the express purpose "that Sorrel would have funds to pursue the goal of making money from the acquisition, exploration, development and operation of oil and gas properties to the benefit of both."[133] The limited partnership agreement ("LPA") under which the Partnership operated was largely drafted by Speirs and executed by Speirs and Mix on Sorrel's behalf. Sorrel was the general partner in the Partnership. Sorrel then entered into a joint venture agreement ("JVA") with the Partnership, under which Sorrel was appointed as manager or operator of the joint venture. Speirs and Mix executed the JVA on behalf of Sorrel itself and also, in Sorrel's capacity as general partner, on behalf of the Partnership. The JVA allowed for the drawing of funds from the Partnership as required to pay its share of the expenses of the oil and gas exploration. Under that system an AFE, along with a detailed statement of costs and expenses, was prepared by Sorrel and then could, following approval, be used to draw funds from the Partnership. The JVA provided that the Partnership would be responsible for 80 percent of the costs incurred by the joint venture, while Sorrel would be responsible for 20 percent. In addition to the JVA and LPA, the relationship between Sorrel and the Partnership was regulated in part by the provisions of the CAPL 1981. A number of investors subscribed for and were granted partnership interests in the Partnership.

The joint venture entered into a farmout arrangement with Shell Canada Resources Ltd. pursuant to which it commenced operations on two wells with a view to earning a working interest in the farmout lands. Shortly after entering into the farmout arrangement, Sorrel made two cash calls on the Partnership funds totalling $760,000. Some $349,200 in additional cash call amounts were also withdrawn from the Partnership funds. A total of over $1 million was deposited into Sorrel's general account. Those funds were commingled with Sorrel's funds and were used for a wide array of Sorrel's other expenses (*i.e.*, other than directly for operations on the farmout operations). Only $32,845.44 of the Partnership funds were used to pay the drilling costs incurred in drilling the two wells out of a total of $569,219.22 owed to third parties.

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132 (2000), 277 A.R. 1, [2000] A.J. No. 1140 (C.A.), online: QJ (AJ).

133 *Ibid.* at para. 4.

Sorrel was then placed into receivership by its bank. As a result, the monies received from the Partnership came under the bankruptcy proceedings. In a previous decision, the funds remaining in the Partnership were to be held in trust for the partners. In that decision, the Court found that notwithstanding the combining of funds, a trust relationship existed between Sorrel and the Partnership, that Sorrel was in a fiduciary relationship with the Partnership and that it was not permitted to make use of the Partnership funds for its own purposes.

2. DECISION

At issue was whether Sorrel had committed a breach of trust by using Partnership funds for its own purposes.

Both Speirs and Mix had acknowledged that Sorrel used Partnership funds for its own benefit, for all manner of expenses including payroll, rent, and even to pay revenue to other joint venture partners and for expenses on other wells. There were two aspects of the way in which Sorrel dealt with Partnership funds that were addressed:

- first, that of commingling; and
- second, the issue of timing with respect to the draws or cash calls.

Both the LPA (7.11) and the JVA (13.3) stated that funds of the Partnership should not be commingled with Sorrel's funds. Owing to the fact that commingling was industry practice, the trial judge had found that simply commingling Partnership funds with those of Sorrel after a cash call was not a breach of trust by Sorrel and, therefore, did not form a basis for personal liability.

The Court of Appeal also found that industry practice could not override or destroy fiduciary duties and that Speirs and Mix were in breach of their duties by commingling funds in breach of the LPA. Colouring the Court of Appeal's decision in this respect was the fact that a portion of the Partnership funds were used, inappropriately, to pay their own salaries.

The second issue, however, with respect to cash calls and timing was central to the breach by the trustee and the subsequent liability of Speirs and Mix, as it was the means by which funds came into the general account and were then made available for its own benefit and at risk to the action of creditors. The Court found that the trial judge made a number of errors of fact and law in not finding Speirs and Mix personally liable, notwithstanding that they were strangers to the trust between Sorrel and the Partnership. The Court found that Speirs and Mix "knowingly assisted" in the "dishonest and fraudulent" design; namely, by taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take," which was the correct application of the decision in *Air Canada* v. *M&L Travel Ltd.*[134]

[134] (1993), 108 D.L.R. (4th) 592 (S.C.C.).

In the result, Speirs and Mix were found to be personally liable to the Partnership for Sorrel's breach of trust, with the exception of Mix and the final cash call, where he was not involved.

An issue of interest to oil and gas lawyers may be the aspect of the decision that addressed assessment of damages. In a supplementary judgment, the trial judge held that had he found a breach of fiduciary duty, he would have set the quantum of damages in the amount of $1,000,076, from which he would have deducted amounts received by the Partnership (*i.e.*, $250,000), which was received from monies paid into Court through the bankruptcy proceedings, and the amount of $191,000 received by the Partnership as a petroleum incentive payment ("PIP"). The Partnership appealed the ruling on the PIP, arguing that they were entitled to receive the amount of the funds improperly handled, which would include the $191,000.

The argument for crediting the PIP was grounded in the nature of the Partnership as an investment. Therefore, the funds appropriated by Sorrel would have been spent on the wells, and the PIP was part of the money that would have come back from those wells. According to that argument, the Partnership could not have its funds and the PIP that those funds created. This argument contradicts the basic restitutionary approach already outlined. Furthermore, the relevant causal link must be between the misappropriation of the joint venture funds and the PIP. The Court found that the PIP did not amount to repayment of the misused funds. It was an incentive paid by the government, and qualification for the incentive was based on the activities of the joint venture and would, in the Court's view, have been received whether or not a breach of fiduciary duty was found.

X. REGULATORY

A. *GULF CANADA* V. *ALBERTA (LIEUTENANT GOVERNOR IN COUNCIL)*[135]

1. FACTS

In this case the applicants sought a judicial review of Order in Council 196/2000 ("OIC 196/2000"), which directed the Alberta Energy and Utilities Board ("AEUB") to devise a compensation scheme under s. 91 of the *OGCA*[136] in which the Crown was ordered to be neither a recipient nor a payor of compensation. The applicant sought an order or declaration that OIC 196/2000 was *ultra vires* the powers of the Lieutenant Governor in Council under the *OGCA* and was therefore of no force and effect.

The application involved an area of the oilsands known as the Surmont area. Her Majesty the Queen in Right of Alberta ("Crown") was the owner of all hydrocarbon resources at Surmont, including bitumen and natural gas. The mineral table for the area

[135] (2001), 285 A.R. 307, [2001] A.J. No. 387 (Q.B.), online: QL (AJ) [hereinafter *Gulf*].

[136] *Supra* note 72.

was split into two distinct titles for the natural gas and bitumen,[137] which created separate, independent interests in those resources. The Crown was entitled to receive royalties from both natural gas and bitumen production.

Gulf was the holder of Crown oilsands leases, which covered approximately 210 sections in the Surmont area. At Surmont the oilsands were reservoired in the Wabiskaw-McMurray formation and, due to the depth of the formation, were not mineable.

Natural gas was also predominantly reservoired in the Wabiskaw-McMurray formation at Surmont. With the exception of four sections at the Surmont pilot, Gulf did not hold natural gas rights at Surmont. Rather, various companies ("Applicants") had leased the natural gas rights from the Crown and had produced significant quantities of natural gas at Surmont.

2. DECISION

As a consequence of the effect of associated natural gas production on the recovery of bitumen, Gulf filed an application on November 12, 1996, before the AEUB requesting the shut-in of production of associated natural gas at Surmont. The AEUB held a general public inquiry into gas and bitumen production in oilsands areas.

Section 91 of the *OGCA* reads as follows:

> 91(1) At any time on the direction of the Lieutenant Governor in Council the Board shall proceed to prepare a scheme or schemes for the provision of compensation for persons who are injured or suffer a loss by reason of any orders made pursuant to this Act.
>
> (2) On receipt of the direction of the Lieutenant Governor in Council, the Board shall hold a public hearing on not less than 30 days' notice to hear representations of interested persons regarding the proposed scheme.
>
> (3) After the public hearing
>
> (a) the Board shall send the scheme prepared by it and a transcript of the evidence given at the hearing to the Lieutenant Governor in Council, and
>
> (b) the Lieutenant Governor in Council, on the recommendation of the Board, may order the scheme to be established.
>
> (4) A scheme established under this section has the same force and effect as if it had been enacted as part of this Act.

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137 To recover the bitumen, an *in situ* recovery process known as "steam assisted gravity drainage" ("SAGD") is used. The pressure of the gas formations is a critical factor in the successful recovery of bitumen through the SAGD process. As the associated natural gas production occurs, reservoir pressure is decreased. The continued production gas from Surmont could result in long-term waste of bitumen resources in the area.

(5) The Lieutenant Governor in Council, on the recommendation submitted by the Board after a public hearing, may vary, amend or revoke any scheme previously established.

(6) The Lieutenant Governor in Council may confer on and vest in the Board any power that is considered necessary or advisable to enable the Board to carry out the provisions of any scheme.

(7) A scheme may be general in its application, or may be restricted to those wells or the classification of wells in the part or parts of Alberta that are designated by the scheme.

(8) In any scheme, provision may be made for all or any of the following matters:

(a) the circumstances and conditions under which any person is entitled to receive compensation under the scheme;

(b) the matters in respect of which any compensation is payable and the method by which the amount of any compensation is to be ascertained;

(c) the manner in which the compensation is to be payable;

(d) the persons to whom compensation is to be payable;

(e) the apportionment of liability between all the persons by whom compensation is payable, which liability shall be several;

(f) any other matters or things that are necessary for carrying out the scheme.

(9) For the purpose of raising any money required for the payment of compensation under a scheme, the Board may, if in its opinion it would facilitate the payment or collection of compensation, levy the amount of that money by means of a uniform rate on the dollar on the assessed value of all oil and gas property to which the scheme applies of the persons who are liable under the scheme for the payment of compensation, and all the provisions of Part 11 relating to the levying and collection of any tax imposed pursuant to Part 11 apply to any levy made pursuant to this section insofar as they are applicable.

(10) If a levy under subsection (9) is not made, the amount of compensation payable by any person under a scheme is a debt due and owing and is recoverable by the person entitled to receive the compensation under the provisions of the scheme, by action.

The AEUB made several findings, including that Steam Assisted Gravity Drainage ("SAGD") has the greatest potential for the development of the *in situ* bitumen resources, and that reservoir pressure is critical for the successful application of a recovery process. The AEUB accepted that associated gas production would have a detrimental effect on SAGD and that the effect on bitumen recovery would be significant. As a result of the findings in the report, Gulf subsequently amended its application to the AEUB and sought the immediate shut-in of associated gas production at Surmont. A hearing took place from April 24 to September 24, 1999. On March 30, 2000, the AEUB issued Decision 2000-22, which ultimately ordered the shut-in of 146 producing associated gas wells at Surmont, effective May 1, 2000. As a result of the order, the AEUB acknowledged that shutting in the gas production would have a significant impact on the area gas producers. Section 91 of the *OGCA* provides that the Lieutenant Governor in Council may direct the AEUB to prepare a scheme to compensate persons who are injured by reason of any orders made pursuant to the *OGCA*.

On May 24, 2000, the Lieutenant Governor in Council issued Order in Council 196/2000. The critical part of the order was:

> THEREFORE the Lieutenant Governor in Council hereby directs the EUB as follows:
>
> 1. The EUB shall prepare a scheme or schemes for the provision of compensation for persons, not including the Crown, having an interest in the petroleum and natural gas rights affected by the Order and who are injured or suffer a loss as a result of the Order, by those persons, not including Crown, the EUB determines should pay such compensation.[138]

The Court addressed the submission that OIC196/2000 was *ultra vires* s. 91 of the *OGCA* and of no force or effect by reason of it purporting to direct the AEUB to exclude the Crown as either a recipient or a payor of compensation in any scheme prepared by the AEUB.

The essence of the Applicants' submissions was that s. 91 of the *OGCA* did not give the Lieutenant Governor in Council the authority to precondition the AEUB's preparation of a compensation scheme by inserting the words "not including the Crown." Essentially, they argued the Lieutenant Governor in Council lacked the jurisdiction to include terms and conditions in its direction to the AEUB under s. 91(1). The Applicants further submitted that OIC196/2000 fettered the discretion of the AEUB and was inconsistent with the object and purpose of the *OGCA*.

The respondents argued that the OIC 196/2000 was only reviewable in "egregious" cases involving jurisdictional or other compelling grounds. Even if there was to be an alleged jurisdictional error, the respondents argued that the jurisdictional error itself must be egregious before the Court can exercise its judicial review function. They further argued that there was no compelling evidence that there was an egregious jurisdictional error, and, therefore, the order could not be reviewed.

The respondents asked the Court to determine that the Lieutenant Governor in Council was engaged in a policy-based function. To support their argument they relied on the case of *Thorne's Hardware Ltd.* v. *The Queen.*[139]

The Court held that it was entitled to review the allegation that the Lieutenant Governor in Council had exceeded its jurisdiction.

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138 *Supra* note 135 at para. 11.

139 [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577. In this case, the Court held that decisions made by Cabinet on matter of public communions in general policy were not reviewable by the Court.

In determining whether s. 91 authorized the impugned conditions in OIC196/2000, the Court considered the following rules of statutory interpretation: first, the presumption of validity that essentially provides that subordinate legislation is presumed to be *intra vires* and should, if possible, be interpreted that way;[140] second, the Court considered that a statute should be interpreted to give effect to its ordinary meaning, in the absence of a reason to reject that ordinary meaning; and third, the Court should always employ a purposive analysis that considers the purpose and scheme of the legislation and the consequences of adopting the ordinary meaning.

The Court laid out two distinct roles contemplated by s. 91. The role of the Lieutenant Governor in Council was to trigger the process via a direction to the AEUB and to make the ultimate decision with respect to whether the scheme should be established. The Court held that all matters relating to the substance of the scheme were, on an ordinary meaning construction of s. 91, within the discretion of the AEUB. The Court held that the construction of s. 91 as a whole did not support the ability of the Lieutenant Governor in Council to predetermine a significant substantive aspect of the compensation scheme. The responsibility for the preparation of a compensation scheme was given by the legislature to the AEUB. The Court found that this finding was consistent with the role and purpose of the AEUB.[141] The nature and character of the AEUB was recognized by the Alberta Court of Appeal in *Coalition of Citizens Impacted by the Caroline Shell Plant* v. *Alberta (E.U.B.)*:

> The board is a specialized and expert tribunal charged with the administration of a comprehensive set of legislation regulating all aspects of the energy industry in the Province of Alberta. It is empowered to determine issues ranging from those which are narrow and highly technical to those having broad and general implications not only for the industry but for the public.[142]

The Court went on to consider whether s. 8 of the *OGCA* provided the requisite authority. Section 8 provides:

> 8(1) Any order of the Lieutenant Governor in Council under this Act may be made subject to any terms or conditions that the Lieutenant Governor in Council prescribes.
>
> (2) An order of the Lieutenant Governor in Council granting any approval or authorization under this Act and made before June 2, 1972 is not invalid by reason only of the fact that the order was made subject to any terms or conditions.
>
> (3) If the holder of an approval contravenes or fails to comply with any term or condition contained in an order of the Lieutenant Governor in Council approving or authorizing the Board's approval,

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140 *James Doyle (Senior) and Sons Ltd.* v. *Canada (Minister of Fisheries and Oceans)* (1992), 92 D.L.R. (4th) 520 (F.C.T.D.) at 529.

141 The AEUB is a specialized and expert tribunal that is given broad authority to manage Alberta's energy sector.

142 (1996), 41 Alta. L.R. (3d) 374 at 380.

(a) the Board may cancel an approval granted by it under this Act or may take any other remedial measures that it considers suitable in the circumstances, or

(b) the Lieutenant Governor in Council may amend, vary, add to or replace any terms or conditions contained in the order.

The Applicants submitted that it was significant that the term "direction" was used in s. 91(1) while the term "order" was used in s. 91(3)(b). The significance was that s. 91 on its face distinguished between "directions" and "orders," and s. 8 only applied to the latter. In response, the respondent suggested that the Lieutenant Governor in Council normally acts through orders in council and, therefore, any order in council under the *OGCA* would fall within the ambit of s. 8. They further suggested that the Applicants' interpretation would render s. 8 largely nugatory since throughout the *OGCA* the Lieutenant Governor in Council does not "order" but "approves," "directs" and "authorizes."

The Court reviewed the presumption of consistent expression. This principle is outlined in *Driedger on the Construction of Statutes* at 163:

> Once a particular way of expressing the meaning has been adopted, it is used each time that meaning is intended.[143]

In applying this canon of construction, the Court was led to the conclusion that the use of the word "direction" in s. 91(1) and the use of "order" in s. 91(3)(b) was deliberate. In summary, it is a direction from the Lieutenant Governor in Council that will trigger the preparation of a compensation scheme by the AEUB, and it is an order of the Lieutenant Governor in Council that will later establish the recommended scheme.

The Court granted the Applicants' request for a declaration that the condition contained in OIC 196/2000 was *ultra vires* the Lieutenant Governor in Council and ruled that the offending provision could not be severed and that OIC 196/2000 was, therefore, of no force and effect.

XI. RIGHTS OF FIRST REFUSAL

A. *CHASE MANHATTAN BANK OF CANADA* v. *SUNOMA ENERGY CORP.*[144]

1. FACTS

In this case, Best Pacific Resources Ltd. ("Best Pacific") claimed a right of first refusal ("ROFR") over certain assets sold by PriceWaterhouseCoopers, the receiver of Sunoma Energy Corp. ("Receiver"), to the respondent Eravista Energy Corp. ("Eravista").

For the most part, the facts in this case were not in dispute.

143 As cited in *Gulf*, *supra* note 135 at para. 34.

144 (2001), 283 A.R. 260, [2001] A.J. No. 245 (Q.B.), online: QL (AJ) [hereinafter *Chase*].

Sunoma and Best Pacific were successors in interest to a farmout agreement, dated August 1978. In April of 2000, Sunoma went into receivership and PriceWaterhouse Coopers was appointed as receiver. The Receiver divided all of Sunoma's assets into ten parcels and offered them for sale. Eravista offered to purchase several of the properties for a total of $4.35 million. Part of that offer related to Sunoma's assets near Hillsdown, Alberta, including petroleum and natural gas interests and other interests covered in the 1978 farmout agreement.

On November 14, 2000, the Receiver sent a ROFR notice to Best Pacific inviting it to exercise or waive its rights with respect to the proposed sale of the Hillsdown assets to Eravista. The Receiver, in accordance with the operating procedure, gave Best Pacific twenty days from the date of the notice to exercise its ROFR. According to the sale agreement, the purchase price for the Hillsdown assets was set at $1.015 million plus interest and GST and scheduled to close on December 14, 2000. The notice included the following: "failure to respond to this notice within the time provided shall be deemed an election not to exercise your preferential right of purchase." On November 29, 2000, Best Pacific's solicitors sent a letter to the Receiver that essentially stated that the purchase price as stated in the notice was grossly inflated. On December 4, 2000, the notice expired and the court granted an order approving the Receiver's sale to Eravista. On December 11, 2000, Best Pacific filed a notice of motion with the Court applying for an injunction preventing the Receiver from selling the Hillsdown assets. McCallum J. granted an order adjourning the injunction and directing the balance of the issues to the Chambers application on December 19, 2000.

2. DECISION

The Court was asked to address the following issues:

- Was Best Pacific entitled to a right of first refusal notice at all?
- If the answer to issue 1 is yes, was the notice valid?
- If the answer to issue 2 is yes, did Best Pacific take the required steps on or before the 4th of December 2000 to exercise or maintain its rights of first refusal?

The Court, in concluding that Best Pacific was entitled to a right of first refusal, discussed the following:

> The relevant portions of Clauses 2401 and 2402 of the Operating Procedure read as follows:
>
> [Clause] 2401: Subject to Clause 2402, a party hereto shall not assign, sell or dispose of any interest in the joint lands...without first complying with the provisions in paragraph (B) below...
>
> [paragraph] (B) If a party wishes...to assign, sell or dispose of, or has received an offer which it is willing to accept for the assignment, sale or disposition of, all or part of its interest in all or part of the joint lands ... the selling party shall give notice thereof to the other parties...The offerees shall have the

right for a period of 20 days after receipt of the notice from the selling party...to elect in writing to acquire the subject interest from the selling party on the terms and conditions contained in the notice...If all the offerees decline or fail to elect within the notice period to acquire the subject interest, the selling party shall be free for a period of 60 days next following the expiry of the notice period, to assign, sell or dispose of the subject interest on the terms and conditions and to the offering party...stipulated in its offer...

[Clause] 2402: Clause 2401 shall not apply in the following instances, namely:

...(c) An assignment, sale or disposition made by the assignor of all, or substantially all, or of an undivided interest in all, or substantially all of its petroleum and natural gas rights in the province...where the joint lands are situated.[145]

The Court considered whether the exception in clause 2402(c) applied to the future sale of all of Sunoma's Alberta assets by the Receiver. If the exception applied, the Receiver did not have to issue the notice at all.

The Court found that it should look to the substance, not the form, of the transaction that is alleged to give rise to the ROFR.[146]

In the Court's opinion, clause 2402(c) contemplated a single purchase of most or all of the parties' assets in the province. Further, it found that if the parties intended for the exception to apply, the language in clause 2402(c) would have been different. Accordingly, the Court found that the exception in clause 2402(c) did not apply to the sale of substantially all of Sunoma's Alberta assets. Best Pacific was thus entitled to receive a ROFR notice when Eravista offered to purchase the Hillsdown assets from the Receiver. The next issue the Court determined was whether the notice was valid. The Court noted that standard clauses creating ROFRs usually provide that the right comes into effect upon the selling party receiving a "bona fide offer ... which it is willing to accept."[147] The Court further noted that despite the absence of privity of contract, the purchaser has a duty to the ROFR holder to ensure that the ROFR is dealt with appropriately.

The ROFR holder clearly has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In Johnson & Stanford the authors wrote (at para. 61):

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145 *Ibid.* at para. 14.

146 This approach has been endorsed in the context of share transactions by the Ontario Court, General Division in *GATX Corp.* v. *Hawker Siddeley Canada Inc.*, (1996), 27 B.L.R. (2d) 251, [1996] O.J. No. 1462 (Gen. Div.), online: QL (OJ), and in *Nuance Global Traders (U.K.) Ltd.* v. *Agra Inc.*, [1998] O.J. No. 462 (Gen. Div.), online: QL (OJ); see also C. Johnson & D. Stanford, "Rights of First Refusal in Oil and Gas Transactions: A Progressive Analysis" (1999) 37 Alta. L. Rev. 316 at para. 27.

147 *Supra* note 144 at para. 23. See also *Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division)* (1974), 50 D.L.R. (3d) 265 (S.C.C.); *Budget Car Rentals Toronto Ltd.* v. *Petro-Canada Inc.* (1989), 60 D.L.R. (4th) 751 (Ont. C.A.); and *Hawker Siddeley, ibid.*

From the perspective of the ROFR holder, it will not suffice to simply argue that the allocated price does not in its view represent fair market value. While that may provide an indication that the allocation has been unfairly made or "loaded up", that alone will certainly not be conclusive. The ROFR holder will have to demonstrate on the evidence that the allocation principles applied by the purchaser and accepted by the vendor were unreasonable in the circumstances, or in other words that a duty of good faith had been breached.[148]

Best Pacific presented to the Court two evaluations of the Hillsdown assets that differed from that provided by Eravista. The Court found that these different valuations were not, in themselves, proof of bad faith. In the final analysis, the Court determined that it would need to see more evidence of a breach of the duty of good faith, beyond evidence showing that Best Pacific would have assigned a different value to the Hillsdown assets. It was simply not enough for the ROFR holder to present a different valuation from that provided in the ROFR notice. Accordingly, the notice given to Best Pacific was found to be valid.

Next, the Court considered whether Best Pacific failed to take the required steps to exercise or maintain its ROFR before December 4, 2000.

Once a proper ROFR notice has been given, the ROFR holder must comply strictly with it terms and conditions if it wishes to exercise its right.[149] The COurt applied *Pierce* v. *Empey*[150] and Court stated:

The owner incurs no obligation to sell [to the ROFR holder] unless the conditions precedent [in the notice] are fulfilled or as a result of his conduct the holder of the option is on some equitable ground relieved from the strict fulfilment of them.... On a plain reading of the clause in the present case, the ROFR holder loses its right if it declines the offer in the notice or if it fails to elect within the 20 day stated period.[151]

The Court held that, while Best Pacific's solicitors sent a letter to the Receiver within the notice period stating that the notice was invalid, it did not take any action before the expiry of the notice period. The expiry operates like a limitation, and at a minimum Best Pacific should have filed a notice of motion before that time. The Receiver had sold the Hillsdown assets to Eravista within a period of sixty days following the expiry of the notice, and the Court would not interfere with that sale.

The second paragraph of clause 2401(b) provided the Court with some guidance. For ease of reference, the relevant parts of the paragraph read as follows:

If the consideration stipulated in the offer for the subject interest is one that cannot be matched in kind by the offerees, the selling party may set out in its notice its bona fide estimate of the value in cash of the said consideration.... *In case of dispute as to the reasonableness of the estimate, the matter shall be*

148 As cited in *Chase*, *supra* note 144 at para. 34.
149 *Supra* note 146 at para. 40.
150 [1939] 4 D.L.R. 672 (S.C.C.).
151 *Supra* note 144 at paras. 40-41.

> *referred to arbitration ... but the notice period shall not be extended by such referral of the dispute to arbitration.*[152]

In the present case it was clear that the parties intended that the sale of a ROFR encumbered party would not be held up merely because the ROFR holder contested the value of that property. The Court held that Best Pacific should have taken appropriate action to contest the valuation of the Hillsdown assets within the twenty-day notice period. As it did not, it effectively failed to maintain or exercise its rights before the notice expired.

XII. LAND TITLES

A. *MANOR INVESTMENTS LTD. v. ROSS*[153]

1. FACTS

In this case, the Court dealt with an application to set aside a consent to file an order for foreclosure granted by the Master in Chambers. The property in question was a residential property that had several encumbrances on title, including three mortgages and a builder's lien. A lien was registered on the property on April 19, 1999. A complicating factor, however, was that the abstract of title provided by the South Alberta Land Registration District incorrectly indicated that the second mortgage had been discharged. Therefore, at the time of registration of the builder's lien, the contractor had formed an impression as to its priority position based on the instrument number it was assigned.

The priority between registered instruments is determined by the serial number assigned to the instrument. Pursuant to s. 177(4) of the *LTA*[154] the Registrar has the authority to correct the register. This section essentially allows the Registrar to correct errors "so far as practicable without prejudicing rights conferred for value." This power, however, cannot be exercised to defeat a right that has been made indefeasible under other sections of the *LTA*.[155] The correction of a Registrar's error has the validity and effect as though the error had not been made. Section 178 provides as follows:

> 178(1) In the correction of any error or in the making of any cancellation, correction, or completion or in the making of any entry or addition, the Registrar shall keep a record of the original words and he shall mark the date on which the cancellation, correction, completion, entry or addition was made or supplied.
>
> (2) Every cancellation, correction or completion of the register and every instrument or entry cancelled, corrected, completed or added to has the like validity and effect as if the error had not been or as if the entry or addition had not been omitted.

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152 *Ibid.* at para. 44 [emphasis in original].

153 (2000), 50 C.L.R. (2d) 193, [2000] A.J. No. 248 (Q.B.), online: QL (AJ).

154 *Supra* note 102.

155 *Ferguson* v. *Saskatchewan (Registrar of Land Titles)*, [1953] 1 D.L.R. 36 (Sask. C.A.).

The relevant instrument numbers in the register at the time the consent final order for foreclosure was granted were as follows:

- 991 103 291, the plaintiff's mortgage;
- 991 039 314, the mortgage that was re-entered on October 18, 1999 (registered the second time as 991 303 041);
- the contractor's builders' lien (991 103 291); and
- the correction of the mortgage (991 303 041).

2. DECISION

The Court determined that the instrument number for the re-entered mortgage of October 18, 1999, was operative. The Court determined that although s. 178(2) of the *LTA* provided that a correction has the effect as if the error had not been made, this section would not permit the correction to defeat a properly registered interest that arose in the interim. The Court held that to hold otherwise would be contrary to the purpose of the Torrens system and to the principle approved by the Supreme Court of Canada in *Boulter Waugh & Co. Ltd.* v. *Union Bank of Canada*[156] that in the absence of fraud, registration gives an indefeasible title to the interest. The Court held that priority was determined by reference to the serial number attached to the instrument. It further held that in this case, the contractor's builders' lien (registered as No. 991 103 291) had priority over the plaintiff's second mortgage (registered as No. 991 303 041).

B. *HOLMES* V. *NIL-RAY FARMS LTD.*[157]

1. FACTS

The importance of this case to oil and gas practitioners is limited to the fact that the case upheld the law pursuant to s. 195(2)(b) of the *LTA*[158] and the judgments that have consistently interpreted its effect, that absent fraud, a purchaser of land is not affected by any notice (direct, implied or constructive) of any interest in land that is not registered by instrument or caveat. In this case, the respondent took title to the lands in January of 1999. The title included the lands over which the appellant claimed an unregistered interest by adverse possession.

2. DECISION

In this appeal, Costigan J.A., speaking for the Alberta Court of Appeal, held that as there was no evidence of fraud when the respondent took title to their lands in January

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156 (1919), 58 S.C.R. 385.
157 (2000), 271 A.R. 387, [2000] A.J. No. 1448 (C.A.), online: QL (AJ).
158 *Supra* note 102.

of 1999, title included the lands over which the appellant claimed an unregistered interest by adverse possession.

C. *GOLDEN VIEW INVESTMENTS LTD.* V. *CENTRECORP MANAGEMENT SERVICE LTD.*[159]

1. FACTS

Central to this case was an application brought by Golden View Investments Ltd. ("Golden View") for a determination that the unsigned copy of a retail lease ("Lease") between Columbus Investment Corporation Ltd. ("Columbus") and Ginger's Dining and Lounge Ltd. ("Ginger's") was the lease referred to in an assignment agreement of April 13, 1994. Golden View asserted that it was the assignee of the Lease and that Investors Trust Co. Ltd. ("Investors"), as successor in interest to Columbus, must respect the Lease. The application raised two issues: first, whether the unsigned Lease was the actual lease and whether the Court should admit it into evidence; and second, whether the caveat filed by Golden View after it obtained Ginger's interest was valid to protect the interests of Golden View. For the purposes of the its discussion, the Court operated under the assumption that Golden View did have an interest as assignee of the Lease. A caveat on the Lease had not been filed until after it had been assigned to Golden View.

2. DECISION

The Court was concerned with the fact that a caveat had not been filed to protect the Lease upon which Golden View's interest was based. This omission was a concern as it may have affected the validity of the caveat filed by Golden View. The issue of validity, although important, was not the sole consideration. The Court also considered whether Golden View's caveat was adequate to protect its right to a renewal option for ten years as set out in the Lease.

The Court pointed out that the requirements of a caveat were clearly established in s. 131 of the *LTA*.[160] Specifically, the *LTA* requires, among other things the name, nature of the interest claimed, and the grounds on which the claim is founded.[161]

The respondent's argument was that Golden View had not properly defined the nature of the interest or the grounds on which the interest was founded. Support for this submission was grounded in the fact that the lease was not appended to the caveat nor was any other listed agreement. The respondent further claimed that the caveat did not set out the terms or conditions of any of the agreements and that simply listing documents was not an adequate description of the nature of the interest claimed.

The Court held that the caveat filed by Golden View met the requirements of s. 131 of the *LTA*. The caveat set out the name of the caveator and the address for notices to be

[159] (2000), 279 A.R. 377, [2000] A.J. No. 1500 (Q.B.), online: QL (AJ).

[160] *Supra* note 102.

[161] *Union Bank of Canada* v. *Phillips* (1919), 58 S.C.R. 385.

served. Furthermore, the caveat stated the nature of the interest as a lease and referred to the lease as well as subsequent assignments. It is well-settled law that there is no requirement that the actual document be attached and filed with the caveat.[162]

The law with respect to caveats was discussed at some length. The Court noted that while the purpose of the caveat was to warn of an interest being claimed, the caveat did not need to outline all the details as established in the actual agreement. The purpose of the caveat was to provide notice and indicate that interested parties may wish to acquire further information.

The fact that the Lease was not protected by caveat was of no significance, as Investors had purchased the property after Golden View had filed the caveat. The Court held that the interest was adequately claimed and that the question with respect to whether the Lease existed and whether it could be proven would be left for another time. The Court also found that the renewal provision of the Lease was protected by the caveat as filed.

D. *ROBERTSON* v. *ALBERTA (SOUTH ALBERTA LAND REGISTRATION DISTRICT)*[163]

1. FACTS

The west bank of the Highwood River was surveyed in 1890. The results of that survey were incorporated into the Township Plan of 1893, and the west bank was used as the natural boundary to divide land owned by the Wallace family to the northwest and the Robertson family to the southeast. A dispute arose as a result of a change in the river's course. Specifically, the Court was in a position to address whether the true boundary between the lands had been altered. Over a hundred years after the initial survey, Mr. Mintz surveyed the boundaries of the Wallace lands. The results of his survey were filed with the Registrar, and the Registrar issued a new title to Mrs. Wallace, which on its face increased the area of the land by over twenty acres and created overlapping titles. Mrs. Wallace later sold her interest in some of the land to the Matwychuk-Goodmans, who later challenged her interest in the land. As a result, Mrs. Wallace commenced legal proceedings to deal with the issues of accretion, avulsion, riparian rights, and the true boundary between the lands. The lawsuit further dealt with the alleged negligence of Mr. Mintz in registering his plan as well as the liability of the Registrar of the land titles office.

2. DECISION

The Court addressed a host of issues; namely, whether the conventional line boundary was agreed to by the Robertsons and Wallaces, and, if so, could such an agreement stand in the face of a bona fide third party purchaser; whether the description of the Robertson and Wallace lands meant the boundary was frozen as of 1893, or did it change with the course of the river; whether riparian rights apply to the boundary, and where the boundary

[162] *Prudential Insurance Co. of America* v. *Junak*, [1975] 4 W.W.R. 522 (Alta. S.C. (T.D.)); *Bank of Nova Scotia* v. *Davis (Trustee of)* (1988), 60 Alta. L.R. (2d) 223 (Q.B.).

[163] (2000), 276 A.R. 201, [2000] A.J. No. 551 (Q.B.), online: QL (AJ) [hereinafter *Robertson*].

lies at present; whether Mr. Mintz was negligent and further to that, whether the Registrar was negligent; what was the position of the Matwychuk-Goodmans, as potential third party purchasers; and lastly, the issue of trespass.

With respect to the issue of conventional line boundaries, the Court asserted that it is trite law that

> where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of two lots, and, upon the strength of that agreement and determination, and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that is the true dividing line between the two properties.[164]

The principles set out in these cases illustrate the necessary elements to prove a conventional boundary, namely: there must be adjoining land owners; they must have a dispute or uncertainty about the location of the dividing line between the properties; they must agree on a division line; and they must recognize it as a common boundary. Furthermore, the recognition of the line can be oral, in writing or by conduct, but the evidence to support the conventional line must be clear and definite, and the onus of proof is on the party claiming ownership by virtue of the conventional line.

Although the Court found that there was sufficient evidence to substantiate a disagreement about the boundary, there was no direct evidence of an express agreement as to the nature of the boundary. If an agreement was reached, it was not written, and oral evidence to prove the existence of said agreement was not available. Although the conduct of the parties may infer an earlier agreement, the conduct must be clear to demonstrate that the parties intended and implicitly agreed the fence should be the boundary. Although there was in this case evidence of an uneasy truce about the use of the lands, the evidence did not prove on a balance of probabilities that there was an agreement to the boundary of ownership of lands.

Additionally, the Court had to address whether the conventional line theory applied to the Alberta Torrens-based system. As the basic tenet of the Alberta system is that the title, as registered, is absolute, a third party purchaser for value should be entitled to rely on the title. The Court held that a conventional line agreement can be established in Alberta between two land holders currently holding title, but if that interest is unregistered, it cannot be enforced against a third party purchaser for value. The Court further held that if it was incorrect in determining that there was not sufficient evidence to support a conventional line boundary agreement, it would hold that the claim of Mrs. Robertson would fail; an unregistered claim to title by a conventional line agreement would be lost to the Matwychuk-Goodmans as bona fide purchasers for value.

Having found that there was a conventional line boundary, the Court went on to address whether the description as established in 1893 remained frozen as of that date. The Court was persuaded by the authority of the Supreme Court of Canada, which has held that in

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164 *Grasett* v. *Carter* (1883), 10 S.C.R. 105 at 110, as cited in *Robertson*, *ibid.*, at para. 4.

reading these titles the law to apply is that the bank of the river is the boundary and subject to the laws of accretion, which means the boundary may change as the river changes over time. As a result, the Court then addressed what the present boundary was between the Robertson and Wallace lands.

As between the parties, there was no issue with the southwest part of the river as they had agreed that the bank as surveyed to date was the appropriate boundary. The contention arose in an area where there clearly was an oxbow, as well as an area where there was a large island with a west and east channel flowing around it.

While the plaintiff argued that the proper way to determine the boundary was to refer to the survey of 1890 and consider the principles of avulsion and accretion from that time to arrive at the boundary today, the defendant submitted that the relevant time to decide the state of the river was the time at which the parties took title. Of the expert witnesses who testified on this issue, the Court adopted the evidence of Mr. Osbourne, who testified that the oxbow visible on the aerial photo would have been cut off by an avulsive process prior to 1890. With respect to the island area, he testified that at some point between 1890 and 1917 the west channel of the river became inactive, and the channel on the east side became the only channel. He also pointed to several floods as a reasonable trigger for enlarging the east channel in the survey of 1890. The Court accepted the aforementioned evidence and held that the oxbow was cut off before 1890 and that an avulsive neck cut-off later occurred to move a part of the land from the east to the west side of the river. The Court held that on a balance of probabilities, the west channel around the island in the Highwood area dried up as a result of flooding, not erosion. The Court did not discuss the timing of the events because in law of riparian rights the exact timing is not relevant. The Court found it trite law that when the river of a bank is a boundary, the boundary changes with the river as it relates to accretion, but remains static if an avulsive force is at work. It was not necessary to determine the exact situation of the river when the titles were issued, as the law determines the changes of the boundary as the river moves; those changes apply to successive landholders.

The Court's decision with respect to whether Mr. Mintz was negligent is instructive for its discussion addressing the duty of care owed to third party purchasers. While it was conceded by his counsel that Mr. Mintz owed a duty of care to Mrs. Wallace, the issue was whether the same duty was owed to the third party purchasers. While the Court understood counsel's concern in extending the duty owed by a surveyor to include an unknown member of the public who may obtain a plan from the land titles office, the Court did not classify the third party purchasers in this class. Specifically, the Court held that although Mr. Mintz did not physically meet the third party purchasers, he was aware that the survey may be used for the purpose of a sale and it would be relied upon. The Court further held that Mr. Mintz was negligent in failing to inform Mrs. Wallace adequately that he could provide his opinion about the boundary, but that an official determination may require some other intervention. He proceeded to register the plan, and he had her sign the letter for amended title without advising her that consent was also needed from Mrs. Robertson. As soon as he took steps to submit the title for registration, he stepped beyond the actions of a reasonable public servant not to decide boundary issues unilaterally. He knew the title would be subject to challenge, and he broke a duty to those purchasers in obtaining a certificate that he knew would be vulnerable to challenge.

The issue of negligence was further discussed with the Court's analysis of the Registrar's liability. At issue was the filing of the registration without obtaining Mrs. Robertson's consent. The Court held that liability was clearly shared between Mr. Mintz and the Registrar. As a result, even where loss or damage can be proven, if it is loss or damage jointly caused by Mr. Mintz, recovery will be against the Registrar only if Mr. Mintz or his employer cannot satisfy the judgment.

The Court held that the boundary between lands owned by Mrs. Robertson and those owned by the Matwychuk-Goodmans in the quarter was the river itself. The Registrar was directed to amend the certificate of title of the Matwychuk-Goodmans and Mrs. Robertson to reflect the boundary of their property as per the judgment.

The Court's discussion would not be complete without an analysis as to whether the Matwychuk-Goodmans were bona fide third party purchasers for value. The Court accepted their evidence that had they known of the boundary issue or that notice had not been given to the Robertsons and that this may have involved them in litigation, they would never have put so much capital into the land.

The two titles issued each purport to include some of the lands in the quarter. The Court held that in light of the clear terms of the *LTA*,[165] and specifically ss. 66 and 173,[166] Mrs. Robertson was the legal owner of the chute cut-off and island areas currently on the west side of the Highwood River, notwithstanding that the title of the Matwychuk-Goodmans purports to have those portions presently registered in their name.

XIII. MISCELLANEOUS

A. *EXPRESS ENERGY CORP. V. CASE CANADA CORP.*[167]

This case was an action brought by the plaintiff, Express Energy Corp. ("Express"), for damages for breach of contract alleged against the defendant, Case Canada Corp. ("Case"), who in turn sought indemnification against the third party, Union Gas Limited ("Union"), in respect of such damages.

In order to provide the natural gas required to operate its Hamilton plant, Case entered into an agreement with Union. Union provided a distribution system for natural gas where gas is stored and delivered to its customers in its franchise area. This particular type of contract is called a bundled transportation contract, more commonly referred to as a "Bundled T" contract. Under the contract, Case was required to estimate its annual natural

165 *Supra* note 102.

166 These two sections make it clear that a certificate of title granted to the Matwychuk-Goodmans was not conclusive proof that they were entitled to the disputed land, as Mrs. Robertson was a person claiming under a prior certificate of title.

167 [2000] O.J. No. 3736 (Sup. Ct.), online: QL (OJ).

gas needs. It was then obligated, in accordance with that estimate, to deliver into the Union gas system a quantity of gas referred as the "daily contract quantity." The contract also required Case to balance its consumption against its deliveries into the franchise by the end of the contract. Case had to have either consumed or otherwise disposed of a sufficient amount of the gas that it had delivered into Union's system so that it had no more than 4 percent of its original forecasted needs on hand. Failure to balance its gas account resulted in a financial penalty under the terms of the contract.

In order to assist Bundled T customers in balancing their gas accounts, Union permitted customers, within certain parameters, to sell some of their gas or assign their pipeline transportation rights to other parties. The most common way of satisfying this requirement is one in which Union allowed its customers to balance their accounts by permitting an in-balance trade wherein the Bundled T customer sells a quantity of its gas to another customer of Union.

A more restricted method of assisting the customer to balance its account is called ex-franchise diversion, which is a transaction wherein a Bundled T customer within the Union franchise assigns its pipeline capacity to a party who is not within the Union franchise. The effect of permitting an ex-franchise diversion is that the customer, during the period of the diversion, is relieved of its contractual obligation to deliver its daily contract quantity into the Union system. In order to effect an ex-franchise transaction, the transaction must be specifically authorized by Union. Union did not typically allow ex-franchise transactions to occur during specified winter months, and even when such transactions were authorized, Union specifically reserved the right to restrict transfers in order to maintain the integrity of its distribution system. In this way, Union assured that it maintained a sufficient supply of gas within its distribution system to supply all of its customers within its franchise area.

In October 1998, being heavily overdelivered on its gas account, Case wanted to shed its capacity in an attempt to bring its gas account into balance by the end its contract year. Case entered into a transaction with Comsatec Inc. ("Comsatec") where it assigned its capacity to Comsatec. This assignment was an ex-franchise diversion. The diversion was to take place within Union's winter season during which ex-franchise diversions would not normally have been approved.

Through employee error and contrary to Union's policy of not permitting ex-franchise diversions during the winter, an agent of Union executed the assignment documents allowing the diversion. On the same date, this error was discovered and Comsatec and Case were advised that permission would not be given for this ex-franchise diversion.

In order to maintain its relationship with Case, Union decided that the diversion would be approved on a one-time basis. On October 28, 1998, Union sent the following letter to Case:

> Tim, further to your request for a Ex-Francise Diversion Out of the Union Gas franchise area 67.7 (2551 GJ) per day, Union Gas will allow this ex-franchise diversion to proceed.

> This should not be taken as a precedent setting decision, as Union's policy remains that Obligated. [*sic*]
>
> Capacity within a Bundled Contract remain Obligated and as such, shall be delivered. It is expected that Bundled Customers will manage their capacity through In-franchise Assignment primarily, and in some cases, where approved, Ex-franchise Diversions through the summer months.
>
> As with all Ex-franchise diversions, this capacity is Interruptible should Union require your DCQ be delivered.
>
> As DCQ will be reduced to 25.0 (942 GJ) per day beginning February 1, 1999, the balancing difficulties you've experienced in the past will quite likely become more manageable.
>
> Hoping this is satisfactory.[168]

Notwithstanding that letter, the transaction between Case and Comsatec did not proceed. Case, however, construed the October 28 letter as permission to execute an ex-franchise diversion of Case's capacity to anyone at anytime.

Case subsequently entered into a contract with the plaintiff, Express, whereby Case's capacity would be diverted to Express. Express was essentially a broker, and based on the contract with Case, had entered into subsequent agreements with other purchasers. Union, however, refused to authorize the ex-franchise diversion between Case and Express. This refusal resulted in Case being unable to fulfill its contractual obligations with Express. The extension of this was that Express was unable to fill its own contract requirements with its subsequent purchasers.

1. DECISION

At the trial, Case was held liable for breach of contract with Express. Case argued that Express had failed to properly mitigate its losses; however, after an extensive review of the complicated transactions taken by Case, Express and other parties, the Court determined that Express had in fact fulfilled its obligations to mitigate in a reasonable manner.

Case subsequently sought to be indemnified by Union for any damages awarded against it with respect to the Express' claim. It based its claim against Union on two grounds: (a) contract and (b) promissory estoppel. It claimed that its breach in respect of Express was caused by Union breaching the contract with Case that existed between it and Union based on the October 28 letter. Case argued that the letter was a consent or undertaking given by Union to permit Case to exercise an ex-franchise diversion of its capacity at any time to any purchaser of its choosing. Case argued, alternatively, that Union should be held liable to indemnify it on the basis of promissory estoppel. It said that Union should be estopped from denying what it had stated in its October 28 letter.

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168 *Ibid.* at para. 22.

Although both parties presented arguments on both of these issues, based on the view it took of the October 28 letter and circumstances surrounding it, the Court found it unnecessary to consider whether Case's third party claim was supportable either in contract or estoppel.

Although Case interpreted the October 28 letter as a consent or undertaking by Union to permit them to exercise an ex-franchise diversion at any time to anyone, the Court found that the letter was a gratuitous concession made to Case to allow the Comsatec deal to proceed. In doing so, Union was prepared to waive the obligation that Case had to deliver its daily contract quantity. The Court found that consent or waiver was not absolute, but limited by the terms of the October 28 letter to the Comsatec transaction, and that it was not open to Case to extend unilaterally the authorization to other diversions. The promise made by Union was only to allow the Comsatec deal to proceed, and Union did not breach any promise or commitment it had given in this respect.

The Court found that Case had not established a claim entitling it to indemnification from Union and accordingly dismissed the third party action.

B. *VISAGIE* V. *TVX GOLD INC.*[169]

1. FACTS

This decision resulted from an appeal and a cross-appeal in an action for breach of a confidentiality agreement, breach of confidence, and breach of fiduciary duty arising out of a joint venture between the parties. In October 1993 the respondents ("Alpha") approached the appellant TVX Gold Inc. ("TVX") to propose that it become Alpha's joint venture partner for the purpose of acquiring certain mines in Greece known as the Kassandra Mines ("Kassandra").

Alpha had gained much of its knowledge of Kassandra through the employment of two of its members, specifically Visagie with Curragh Resources Inc. ("Curragh"). During the course of his employment with Curragh, Visagie had signed two agreements concerning the general protection of confidential information gained while in the employ of Curragh. Curragh eventually went into receivership after failing to acquire Kassandra.

In the summer of 1993, Alpha was actively seeking financing, which it needed to acquire the mines. Alpha took the position that Curragh's interest in acquiring Kassandra had ceased by the end of July 1993 and, therefore, took the position that it was entitled to pursue the matter on its account.[170] After approaching TVX, but before revealing any information, Alpha insisted that TVX sign a confidentiality agreement. The two parties then entered into a joint venture funding agreement on November 25, 1993, which provided, *inter alia*, that Alpha was to receive a 12 percent carried interest and the option

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169 (2000), 49 O.R. (3d) 198, [2000] O.J. No. 1992 (C.A.), online: QL (OJ).

170 TVX also presented a motion to introduce fresh evidence to establish that, contrary to Alpha's position, Curragh was still interested in Kassandra in August 1993. This motion was dismissed by the Court.

to take-up a further 12 percent participating interest in the operation once acquired by TVX.

During negotiations with the Greek government it became apparent that the government was not prepared to allow the mines to be sold privately unless through a public tender process. On July 22, 1994, under the terms of the agreement, TVX terminated its obligations under the joint venture funding agreement with Alpha. TVX bid for the mines on its own in the tender process and was ultimately successful in acquiring Kassandra.

Upon learning that TVX was the successful bidder, Alpha attempted to claim its interest under the joint venture agreement. TVX denied that Alpha had any interest in the mines, and Alpha brought an action for a declaration that TVX held the whole of Kassandra in trust for Alpha as a result of breach of fiduciary duty and misuse of confidential information, or alternatively, as a result of the right to its interest under the joint venture agreement and damages.

The trial judge held that notwithstanding the fact that TVX was entitled to terminate the joint venture, TVX owed a fiduciary duty to Alpha not to acquire Kassandra except for their joint benefit and that this duty survived the termination of the joint venture funding agreement. The trial judge also found that TVX had used confidential information provided to it by Alpha in acquiring Kassandra in breach of the terms of the confidentially agreement and in breach of its common law duty of confidence.

The trial judge held that Alpha was not entitled to a constructive trust over all of Kassandra but was entitled to the 12 percent carried interest and, having purported to exercise its option to purchase, a further 12 percent participating interest in Kassandra upon payment of the cost associated with that interest.

2. DECISION

While there were other findings at the trial level and other grounds of appeal, the most interesting and relevant issue raised was whether the trial judge was correct in holding that TVX owed a fiduciary duty to Alpha that survived the termination of the joint venture agreement. The Court of Appeal held that the trial judge erred in concluding that there was fiduciary relationship between the parties. The duties owed by each party arose from the terms of the agreement itself rather than from any fiduciary obligation imposed by law. The Supreme Court of Canada made it clear in *Cadbury Schweppes Inc.* v. *FBI Foods Ltd.*[171] that fiduciary obligations are seldom present in a commercial context between parties acting at arm's-length. Binnie J. stated, however, that "where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context."[172]

The trial judge held that the dependency or vulnerability that is required in a fiduciary relationship existed between the parties; however, the Court of Appeal found that the

171 [1999] 1 S.C.R. 142 [hereinafter *Cadbury Schweppes*].

172 *Ibid.* at 164.

vulnerability described by the trial judge simply flowed from the terms of the agreement freely entered into by the parties. The Court held that this type of vulnerability was not the kind of vulnerability that served to elevate the relationship between the parties to one that was fiduciary in nature. There was no suggestion that Alpha was not in an equal bargaining position vis-à-vis TVX. Alpha could have negotiated greater or different protection for itself than provided by the confidentiality agreement and the common law duty of confidence. It did not do so and was presumably content to give its confidential information to TVX under the protection of the confidentiality agreement. As found in *Cadbury Schweppes*, any resulting vulnerability, if exploited by TVX, could be remedied in the action for breach of confidence or for breach of the confidentiality agreement.

The trial judge also supported her conclusion that TVX owed a fiduciary duty not to acquire Kassandra on evidence of industry practice that after a senior mining company terminates a funding arrangement with a junior, the senior mining company does not compete with the junior for the property. The Court, however, found that there was a serious question whether the practice in question was sufficiently certain and notorious to be recognized by the Court as having a binding effect on the parties.

The Court of Appeal found that TVX remained bound, however, by the terms of the confidentiality agreement and by its common law duty of confidence not to use confidential information obtained from Alpha except for the joint benefit of the parties. The Court of Appeal found that the trial judge's findings in this regard were based on correct legal principles and supported by the evidence. The Court of Appeal, therefore, upheld the trial judge's conclusion that TVX breached the terms of the confidentiality agreement and its common law duty of confidence.