RECENT JUDICIAL DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS

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The author surveys recent Canadian case law in the areas of contract, property and trust law, environmental regulation and aboriginal rights that are likely to impact on practitioners in the oil and gas industry. Although not all cases impact on oil and gas law directly, the principles are, for the most part, readily transferable.

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I. CONTRACTS

A. HUSKY OIL OPERATIONS LTD. v. FOREST OIL CORP.[1]

Forest was involved in negotiations with several parties, including Husky, to obtain a working interest in certain lands. Both Forest and Husky mistakenly believed that Husky held a right of first refusal concerning the disposition of interests. As a result of this erroneous belief, the two companies entered into a participation agreement by which Forest agreed to deliver certain well information and Husky agreed to limit its right of first refusal. It was subsequently determined that Husky did not have a right of first refusal. Husky brought this action for a declaration that the participation agreement was valid and enforceable.

The Court held that the agreement was void. As Husky had never obtained a right of first refusal,[2] the Court concluded that Husky and Forest negotiated the participa-

1. [1989] 6 W.W.R. 226, 97 A.R. 292 (Alta. Q.B.).
2. *Ibid.* 6 W.W.R. at 248.

tion agreement under a common mistake of fact.[3] The mistake was of fundamental importance, since the only reason Forest entered into the agreement was to limit Husky's perceived right of first refusal.[4] Since the parties contracted to limit a non-existent contractual right, the agreement was *void ab initio* on the basis of the mutual mistake. Alternatively, the Court found that the contract was one which should be set aside on equitable grounds because of a common fundamental misapprehension.[5]

B. SHELL CANADA LTD. v. VECTOR ENERGY INC.[6]

Shell contracted to purchase natural gas from Vector for a period of five years. The contract contained a broadly-worded arbitration provision, whereby any controversy arising out of the contract that could not be resolved by the parties could be referred to arbitration. One year into the contract, the parties amended the pricing mechanism to tie the price to a specific gas rate approved by the Public Utilities Board. The amending agreement also provided that in the event that the said rate ceased to be "determined or published", the parties would negotiate a new pricing mechanism. Vector signed the amending agreement and returned it with a letter stating that its execution was subject to certain reservations and conditions affecting the pricing mechanism. One year later, Vector became dissatisfied with the revenue it was receiving under the contract as amended and attempted to invoke the arbitration clause. Shell commenced an action for declaratory relief.

The Court had to determine whether three issues were subject to arbitration. First, did the reservations contained in Vector's letter form part of the amending agreement; second, the fairness and reasonableness of the price and the price adjustment mechanism agreed to in the amending agreement; and third, since the benchmark gas rate continued to be published, whether the price adjustment method in the contract remained applicable. The arbitration clause in question was broadly drafted so as to allow or require arbitration of "any controversy arising out of this contract".[7]

The first two issues were found not to be arbitrable.[8] However, the Court found that the third issue was. Although the arbitration clause was broadly worded, it could not be construed as an agreement to submit to arbitration the question of what documents or declarations make up the agreement of which the submission to arbitration is an integral part. The third issue, as to the continued applicability of the benchmark gas rate, was found to be a controversy arising out of the contract and *prima facie* arbitrable. It fell within the scope of the arbitration clase and should be arbitrated. This issue did not involve a pure question of law, such that it should be decided by the Court before arbitration occurred.

C. L.K. OIL & GAS LTD. v. CANALANDS ENERGY CORP.[9]

In 1981 a drilling program was proposed in Oklahoma. The program initiator, Thetis Energy Corporation published information on the project, including geological data and pro forma financial performance forecasts. L.K. agreed to participate in

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3. *Ibid.* at 252.
4. *Ibid.* at 253.
5. *Ibid.* at 255.
6. (1989), 101 A.R. 226 (Q.B.).
7. *Ibid.* at 231.
8. *Ibid.* at 233.
9. [1989] 6 W.W.R. 259, 98 A.R. 161 (Alta. C.A.).

the program and incorporated the Oklahoma project into a larger Canadian and U.S. program of its own, in which in turn L.K. intended to ask others to participate. L.K. provided the original Thetis forecasts and its own analyses, which were based upon the Thetis forecasts, to Canalands. L.K.'s program proposal contained a representation, which was based upon information received from Thetis, which stated:[10]

> There has not been an abandonment to date and results appear to be better than historical averages used on entering the program. Cash flow of $600,000.00 annually is anticipated for L.K.'s interest.

Canalands sought additional production information from L.K. but was referred to Thetis. Thetis refused to supply such information, as Canalands was not a program participant. Canalands then prepared its own analysis of the Thetis data, which showed the proposed program as modestly attractive. Canalands agreed to participate with L.K. The Thetis program proceeded, was less than successful, and was cancelled after 33 wells. Canalands attempted to withdraw from the Thetis portion of the program, but negotiations failed. Canalands quit paying and L.K. sued.

The trial judge found in favour of L.K., determining that a contract had been made and that there had been no misrepresentation constituting a fundamental breach.[11]

At the Court of Appeal, Canalands asserted that the misrepresentation was actionable, and further, that L.K. had a duty to inform Canalands when it became apparent to L.K. that anticipated cash flow would not be achieved.

There is a two-part test which must be met before relief may be obtained from a misrepresentation. First, the representation must be material and, secondly, it must induce the party to enter into the contract. The trial judge determined that there was no evidence that Canalands had relied upon the representation by L.K. or that it was induced by such misrepresentation. The Court of Appeal declined to overturn this finding.[12]

Although it was expressly *obiter*, Harradence J.A. rejected the notion that any duty should be imposed upon L.K. to inform Canalands in the absence of knowledge that information previously imparted was materially incorrect. However, he would have imposed such a duty upon L.K.'s learning of the withdrawal of Clarion, another participant in the program. Neither of the other two justices considered that any such duty arose in this instance.[13]

D. PALOUSE HOLDINGS LTD. v. CHANCELLOR ENERGY RESOURCES INC.[14]

Palouse was the holding company of Ron Carlyon, a geologist. Palouse entered into an oral geological consulting agreement with Chancellor which was later reduced to writing by a letter agreement in 1984. Under the letter agreement, Palouse would generate geological prospects, then offer all prospects generated to Chancellor, who would then elect whether or not to accept each prospect. Palouse would then receive a specified gross overriding royalty plus a cash fee in respect of each prospect so accepted. The agreement between Palouse and Chancellor was silent as to entitlement

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10. *Ibid.* 6 W.W.R. at 262.
11. *Ibid.* at 264.
12. *Ibid.* at 272.
13. *Ibid.* at 274.
14. (1990), 102 A.R. 373 (C.A.).

to "promotes" to participants with Chancellor. "Promotes" were found to be the differential between what one could sell a prospect to an investor participant for and the interest that participant would earn. A 25% working interest "sold" for 30% of the earning costs would therefore result in a 5% "promote".

Three of five prospects accepted by Chancellor from Palouse under the consulting agreement involved third party promoted interests. Chancellor "accepted" only a 25% undivided interest in each prospect, rather than committing to drill or sell the entire recommendation, and had no obligation to find participants for the other 75%. Chancellor acted as operator and administered the transactions, taking all promotions to its own benefit in each instance. Although Palouse had no objection to Chancellor promoting others on the 25% to which it had committed, it disputed Chancellor's right to any promotion on the balance of each prospect.

At trial the main issue centred on the prevailing practice in the oil industry. Three expert witnesses were called to give opinion evidence. Palouse argued that if a prospect were rejected in whole or in part, in accordance with industry practice, Palouse would then be free to offer the rejected portion of that prospect to third parties. Chancellor argued that if the "promote" did not belong to it, then the document would clearly disclose that fact. The trial judge found that it was not industry practice for a "retained" geologist to be entitled to the promotion and found for Chancellor. A "retained" geologist is one who is not an employee, but who's agreement includes certain of the indicia of employment, such as at least a partial salary, office space and parking. In return, the geologist considers that he has one primary client. The trial judge determined that the relationship arising from Palouse being so "retained" by Chancellor was the overriding consideration, such that the geologist would never be entitled to the promotions.[15]

The Court of Appeal found that the evidence upon which the trial judge made his finding could not reasonably support the conclusion. The experts who dealt with the question included as a factor in the oil company's entitlement (and therefore the geologist's disentitlement), the commitment of the oil company to the entire prospect. The Court of Appeal was unable to determine whether any one factor was paramount, declined to impose its own determination in the absence of having heard all the evidence, and returned it for a new trial.[16]

E. BUDGET CAR RENTALS TORONTO LTD. v. PETRO-CANADA INC.[17]

A lease between Budget and Gulf dated 1 June 1980 contained the following provision:[18]

> Provided that in the event that the Lessor receives a bona fide offer to purchase the lands and premises herein, which it is willing to accept, then in that event it shall so advise the Lessee, showing the Lessee the said, signed offer and giving the Lessee five (5) business days to match the offer and purchase the property, failing which, Lessor shall accept the said offer and communicate the acceptance to the purchaser and the Lessee shall thereupon vacate the lands and premises within three (3) months of the first day of the month next following the date of acceptance of the said offer by the Lessor.

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15. *Ibid.* at 378.
16. *Ibid.* at 382.
17. (1989), 69 O.R. (2d) 289 (C.A.).
18. *Ibid.* at 290.

At the expiry of the above mentioned lease, a three month lease, including the same provision, was entered into. The new lease included automatic rolling renewal provisions for successive three month periods, unless terminated by notice. The premises leased by Budget were formerly a Gulf service station, which had closed in 1978. In August of 1985, Gulf and Petro-Canada announced the acquisition by Petro-Canada of all of Gulf's marketing and refining business west of the Ontario-Quebec border for an aggregate purchase price totalling more than $600 million. Petro-Canada maintained that the purchase price covered hundreds of parcels of land but was not broken down to assign values to individual properties such as the premises leased by Budget. The property was conveyed to Petro-Canada in June, 1986.

Budget alleged that the Petro-Canada offer constituted an offer to purchase the property within the meaning of the above contractual provision in its lease, triggering Budget's right of first refusal.

At trial,[19] counsel on behalf of Budget conceded that the right of first refusal was not an option, but a mere contractual right.[20] Perhaps if he practiced in Alberta he would have been less willing to make that concession. In any event, O'Brien J. found, on the plain meaning of the provision, that the right of first refusal was not triggered by the Petro-Canada offer. That offer was for the purchase of the entire marketing business of Gulf west of Quebec.[21] There was no "*bona fide* offer" for the purchase of the Budget property to be shown to Budget.

On appeal, Finlayson J.A. concurred with the trial judge's determination that there was no *bona fide* offer for the purchase of the leased property and, therefore, no obligation on the part of Gulf to deliver anything to Budget.[22] Finalyson J.A.'s judgment also discloses a one-sided approach to rights of first refusal. He states "[m]ost cases in this area deal with the legal nature of such an option or the *bona fides* of offers that are made."[23] It is clear from this statement that he also considered a right of first refusal to be an option.

Brook J.A. accepted the argument of Gulf's counsel that the automatic right of renewal of the lease did not include automatic renewal of the right of first refusal. He therefore found it unnecessary to determine whether or not the Petro-Canada offer was a *bona fide* offer to purchase the lands in question.[24]

II. CREDITORS' RIGHTS

A. LLOYDS BANK CANADA v. INTERNATIONAL WARRANTY CO.[25]

This case involved two separate appeals which were heard together due to substantially similar fact situations. The main discussion in the judgment is with respect to the facts of the Lloyds Bank case and this discussion will take a similar tack. International Warranty ceased business operations, then paid salaries to its employees in December, 1987 out of an account at the Toronto Dominion Bank. The required

19. (1987), 45 R.P.R. 259 (Ont. H.C.).
20. *Ibid.* 261.
21. *Ibid.* 262.
22. *Supra*, note 17 at 293.
23. *Ibid.* at 293.
24. *Ibid.* at 296-297.
25. (1989), [1990] 1 W.W.R. 749 (Alta. C.A.).

withholding sum in respect of those salary payments was not forwarded to Revenue Canada. International Warranty at all relevant times owed Lloyds Bank some $1.75 million, as secuirty for which Lloyds was granted a General Assignment of Book Debts in 1986. All funds in dispute were treated as being held by the Toronto Dominion Bank. Section 224 of the *Income Tax Act*[26] allows Revenue Canada to issue a "Requirement to Pay" to a third party, requiring the third party to pay to Revenue Canada funds which would otherwise be paid to the tax debtor or to a secured creditor. The most relevant portion of this section is as follows:[27]

> 224(1.2) Notwithstanding any other provision of this Act, the Bankruptcy Act, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (a) to another person who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or
>
> (b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
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> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.

It was acknowledged that Lloyds Banks was a secured creditor and that the accounts secured by the General Assignment of Book Debts constituted a security interest within the meaning of the *Income Tax Act*. Revenue Canada served a Requirement to Pay on the Toronto Dominion Bank in connection with International Warranty's unpaid withholding amount, the funds were paid into court and an application brought to determine priorities.

At trial,[28] McDonald J. ruled that the plain meaning of Subsection 224(1.2) in applying any sums received as a result of a Requirement to Pay on account of the tax debtor's liability, gave Revenue Canada this right to the monies.[29]

The trial decision was overturned on Appeal. On behalf of the Court of Appeal, Stratton J.A. found that the operation of subsection 224(1.2) would effect a transfer of proprietary rights from Lloyds Bank to the Crown, without compensation. In order to allow this, the statutory provision must compel that interpretation. In support of this test, he quoted Robertson J.A. in *Indust. Rel. Bd.* v. *Avco Fin. Services Realty Ltd.*;[30]

> If the Legislative Assembly intends to produce by statue [sic] results that are so brutal and piratical, it has the power to do so, but the Courts will hold that [sic] was its intention only if the language of the statute compels that interpretation.[31]

The Court of Appeal found that the language of subsection 224(1.2) fell short of the test. The Crown therefore did not obtain title to the funds in question. Rather, the process of issuing a "Requirement to Pay" was characterized, at best, as a form of extra-judicial attachment.[33]

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26. S.C. 1980-81-82-83, c.140.
27. *Ibid.*
28. (1989), 64 Alta.L.R. (2d) 340 (Q.B.).
29. *Ibid.* at 353.
30. (1977), 5 B.C.L.R. 289 at 292 (C.A.).
31. *Supra*, note 17 at 753.
32. *Ibid.* at 755.

B. BANK OF NOVA SCOTIA v. HENUSET RESOURCES LTD.[33]

A receiver and manager was appointed by the Court for the assets of Henuset Resources Ltd. Bank of Nova Scotia applied for that appointment. Part of the assets of Henuset constituted certain automatic welders which were the subject of a patent infringement action. The receiver manager took a number of steps prior to entering into the agreement for sale of the assets of Henuset for which Court approval was sought, including (a) advertising the assets over a wide geographic area, which advertisements included a caution respecting the patent infringement claim, (b) negotiations with corporations controlled by Arthur Henuset, the principal shareholder of Henuset Resources Ltd., (c) negotiations with CRC-Evans Pipeline International Inc., the Appellant, which initially failed due to insufficient price, but which were renewed and successfully concluded, and (d) prior to accepting the revised offer of CRC-Evans, the receiver offered the assets to Arthur Henuset, upon certain conditions. Despite the offer being twice extended, Mr. Henuset failed to meet the conditions. Also noted by the Court of Appeal was the fact that:[34]

> The sale agreement with the appellant contains a number of clauses particularly favourable to the vendor relating to limitations on the vendor's warranties and the recovery of physical possession of all the subject assets.

The Master in Chambers approved the sale, the Court of Queen's Bench set aside that order, and the Court of Appeal reinstated the order of Master Floyd.

The Court of Appeal ruled that the proper enquiry is whether the receiver manager has made a sufficient effort to get the best price without acting inprovidently.[35] The Court should not get into each specific detail of the sale, but should concentrate on the concept of fairness. The appropriate question is whether the entire process was objectively fair to all parties having a legitimate interest in it.[36]

The actions taken by the receiver manager in this case constitute part of a listing of 12 "significant circumstances" identified by the Court of Appeal. I do not believe it sets a minimum threshold test. Rather, it is an example of the extent to which a receiver manager will sometimes go to appease all parties concerned, and still be required to go to the Court of Appeal before receiving a final approval.

Leave to appeal the decision of the Alberta Court of Appeal to the Supreme Court of Canada was denied.[37]

C. WIL-TON CONSTRUCTION LTD. v. AMERADA MINERALS CORP. OF CANADA[38]

Amerada and Westcoast Petroleum Ltd. were joint lessees under an Alberta Crown Petroleum and Natural Gas Lease. They entered into a farmout agreement under which Joffre Resources Ltd. was granted the right to earn an interest in the lease, with certain interests being retained by Amerada and Westcoast. Joffre caused a well

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33. (1989), 70 Alta L.R. (2d) 320 (C.A.).
34. *Ibid.* at 325.
35. *Ibid.* at 323.
36. *Ibid.* at 323 and 324.
37. [1990] A.W.L.D. 3, May 25, 1990.
38. (1989), 69 Alta. L.R. (2d) 285 (Alta. C.A.).

to be drilled in 1981. In December 1983, Wil-ton supplied labour and materials at Joffre's request. Joffre was placed into receivership and Wil-ton was not paid. It filed a builder's lien at the Land Titles office, in respect of the patented surface, and at Energy and Natural Resources, claiming a lien against the interest in the minerals of Joffre, "and any joint venturers or partners of Joffre".[39] This lien was filed within the statutory period. Wil-ton then proceeded to file a Statement of Claim and registered a Certificate of Lis Pendens, again within the statutory period required to preserve its rights. However, neither the lien nor the Statement of Claim made specific reference to the interests of either Amerada or Westcoast. Further, no reference was made in the Statement of Claim to the Petroleum and Natural Gas Lease. The Certificate of Lis Pendens also referenced only the surface lease. In March of 1985 Wilton amended its Statement of Claim to include certain sub-participants of Joffre. It brought a further application in July of 1986 to amend its Statement of Claim to add Amerada and Westcoast as defendants. That application was denied by the Master but allowed at the Court of Queen's Bench.

The Court of Appeal found that the work done by Wil-ton raised a lien in its favour, which attached all interests in the mines and minerals except the fee simple interest of the Crown.[40] However, O'Leary J. (sitting ad hoc) ruled that all persons potentially adversely affected must be named as defendants, if the lien is to be enforced against that person. Failure to do so will result in the lien ceasing to exist as against that estate. Thus, the owner of each and every estate against which the lien is alleged to attach must be named in the Statement of Claim, within the 180 day statutory period.[41] The Court of Appeal further found that a dead lien cannot be revived. The Alberta Rules of Court are overridden by section 50 of the *Builders' Lien Act*,[42] which states that the Rules of Court apply "except where and to the extent that they are inconsistent with this Act or the rules prescribed under this Act".

D. CANADIAN COMMERCIAL BANK v. SIMMONS DRILLING LTD.[43]

Canadian Commercial Bank ("CCB") obtained a debenture over the present and future assets of Simmons in 1980. Deloitte, Haskins & Sells Ltd. became a Court appointed receiver-manager of Simmons, at the insistence of the CCB in February, 1987. Simmons had drilling contracts with several oil and gas operators in Saskatchewan, and had completed several wells thereunder. The receiver-manager received funds under those contracts and paid those sub-contractors which had registered liens. After these payments some monies remained. There were also several sub-contractors who had not filed liens, but whose claims were not discovered until after some considerable time, due to delay by the receiver-manager in reviewing Simmon's accounts. Some nine or ten months elapsed prior to commencement of the receiver's review and another three months passed prior to this application by the receiver for direction.

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39. *Ibid.* at 288.
40. *Ibid.* at 291.
41. *Ibid.* at 295 and 296.
42. R.S.A. 1980, c. B-12.
43. (1989), 78 Sask. R. 87 (Sask. C.A.).

Section 7 of the Saskatchewan *Builders' Lien Act*[44] provides that all amounts owing to a contractor on account of the contract price constitute a trust fund for the benefit of, *inter alia*, subcontractors. Section 19 of that *Builders' Lien Act* provides that upon the expiry of one year after the contract is completed or abandoned a person who was a trustee is discharged from his obligations as trustee, in the absence of action to enforce the trust.

At issue was whether all funds received by the receiver were part of the lien fund and impressed with the trust under section 7 and, if so, whether, by operation of section 19, the funds ceased to be impressed with that trust, by virtue of the inaction of the remaining sub-contractors, in which event, CCB as secured creditor would take priority over the (now) unsecured sub-contractors.

On the first issue, the Saskatchewan Court of Appeal found that all amounts owing under the drilling contracts, whether due and payable or not, were impressed with the trust. Thus, all receivables ultimately converted into cash by the receiver-manager were part of the trust fund.[45]

As the receiver-manager was court appointed, it held these funds in two capacities (a) as receiver-manager responsible to the court and (b) as trustee under section 7 of the *Builders' Lien Act*. The Court further ruled that the receiver-manager had "effective control" of Simmons and was therefore liable for the breach of the trust imposed under section 7, by operation of section 16 of the *Builders' Lien Act*.[46]

The Court of Appeal was highly critical of the receiver-manager's course of action in this matter. It reflected on its status as an officer of the court under its appointment. It considered the failure to ascertain the unregistered claims and to then apply for direction only after some 16 months following the appointment, as a breach of the receiver's obligation to the court to act with diligence and within a reasonable time.[47] The Court found a positive obligation on the receiver to discover unpaid claims and ruled that had the receiver properly discharged its duty, the unpaid claims would have been discovered within the one year limit and would have had priority over the CCB. The receiver was reminded in no uncertain terms that when appointed by the Court, it is not the agent of the secured creditor or of anyone else. In the final analysis the Court ordered the funds to be paid to the unpaid subcontractors.

E. SALO v. ROYAL BANK OF CANADA[48]

Several loggers asserted that funds received by their logging broker were held in trust on their behalf by their logging broker. They further asserted that the Royal Bank of Canada had notice of that trust and that certain of the trust funds could be traced to an account at the bank. There was a direction by the loggers to the broker that the broker was to keep their logs separate from other logs acquired by the broker, but no further direction respecting proceeds of sale. All monies from all sales made by the broker were deposited into a general account.

At trial, the Court found the relationship between the loggers and their broker as one of debtor/creditor, finding that there was neither an implied trust nor a fiduciary

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44. R.S.S. 1978, c. B-7.1.
45. *Supra*, note 38 at 90.
46. *Ibid.* at 93.
47. *Ibid.*
48. (5 May 1988) CA005921 (B.C.C.A.).

relationship created respecting the funds in question. The key principle upon which the decision rested was the lack of requirement to keep the loggers' monies separate and apart from the general funds of the broker. The British Columbia Court of Appeal found that the trial judgment was amply supported by the evidence and dismissed the appeal.

III. ENVIRONMENTAL REGULATIONS

A. CANADIAN WILDLIFE FEDERATION INC. v. MINISTER OF THE ENVIRONMENT[49]

In February, 1986 the Premier of Saskatchewan announced that government's intention to construct the Rafferty and Alameda Dams on the Souris River System. The Souris is both an interprovincial and an international river, flowing from Saskatchewan to North Dakota, then into Manitoba. In August of 1987 the Souris Basin Development Authority, the entity incorporated to oversee the project, submitted to the Saskatchewan Minister of the Environment an environmental impact statement (the "EIS"). Saskatchewan granted approval to proceed in February, 1988.

The Saskatchewan Water Corporation applied to the federal Minister of the Environment for a licence to build the dams, in accordance with the requirements of the *International River Improvements Act*[50] (the "*IRIA*"). On several occassions, the applicant Canadian Wildlife Federation (the "CWF") requested that the federal Minister of the Environment conduct an assessment and review under the *Environmental Assessment and Review Process Guidelines Order*[51] (the "EARP Order") in considering the licence application. The federal Minister of the Environment issued the requested licence on June 17, 1988, without conducting such a review. The EIS prepared in Saskatchewan did not include any examination of downstream environmental impacts in either North Dakota or Manitoba.[52]

The CWF alleged that evaporation from the reservoirs behind the dams would result in a significant reduction in water flow downstream, which would in turn decrease the water quality and damage several wildlife refuges, a fish hatchery and riparian habitat for both flora and fauna.

The CWF argued that the federal Minister was obligated to comply with the provisions in the EARP Order, prior to granting the licence under the *IRIA*. By failing to comply with a mandatory statutory prerequisite, the Minister exceeded his jurisdiction, thereby entitling the applicant to both an order for *certiorari*, quashing and setting aside the licence issued by the Minister, and an order in the nature of *mandamus*, compelling the Minister to comply with the EARP Order.

The Minister argued that the EARP Order was only intended to apply to the federal process. In his submission it[53]

> applies to proposals undertaken by a federal agency, funded by the federal government, located on federal land or having an environmental effect on an area of federal responsibility.

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49. [1989] 4 W.W.R. 526 (F.C.T.D.).
50. R.S.C. 1985, c. I-20.
51. SOR/84-467.
52. *Supra*, note 38 at 529.
53. *Ibid.* at 531.

He argued that he was not required to comply with the EARP Order, since the Rafferty and Alameda Dams project was a provincial, rather than a federal, initiative. He further submitted that, in instances where a department has a regulatory function in respect of a proposal, the EARP Order applies only if there is no legal impediment to, or duplication resulting from, the application of the process. Since the project had already been subjected to the Saskatchewan environmental review process, a process which in principle met the EARP requirements, a federal environmental assessment would be an unwarranted duplication.

At issue was (a) whether the Minister of Environment was required to comply with the EARP Order before granting a licence under the *IRIA*, and (b) whether the Minister of the Environment, in granting a licence to the Saskatchewan Water Corporation, exceeded his jurisdiction, in view of the fact that no environmental assessment and review was carried out pursuant to the EARP Order.

The EARP Order, promulgated in 1984, sets out in detail the process which is to be followed where a federal department is the "initiating department" of any "proposal". Section 6 specifies:[54]

> 6. These Guidelines shall apply to any proposal
>
> (a) that is to be undertaken directly by an initiating department;
>
> (b) *that may have an environmental effect on an area of federal responsibility* (emphasis added).

As noted above, the EARP Order specifically provides that the guidelines shall apply to any proposal that may have *an environmental effect on an area of federal responsibility*. This includes any initiative for which the federal government has decision making authority, such as the issuing of a licence.[55] It was also clear that the Alameda and Rafferty Dams project would have an environmental impact on a number of areas of federal responsibility, namely international relations, transboundary water flows, migratory birds, inter-provincial affairs and fisheries.

While the Court agreed that unwarranted duplication should be avoided, Cullen J. ruled that, in this case, there appeared to be a number of federal concerns which were not dealt with by the provincial EIS. He found that the Minister had the discretion to issue the licence but only upon compliance with certain requirements. The Minister was required to comply with the EARP Order before granting the licence; by failing to comply with a statutory duty, he exceeded his jurisdiction. This entitled the CWF to an order for *certiorari*, quashing the licence.

Mandamus will issue for the enforcement of a statutory right only where the statute in question imposes a duty upon the authority, the performance or non-performance of which is not a matter of discretion.[56] Cullen J. stated:[57]

> [t]he EARP Guidelines Order indicates that certain procedures, namely the preparation of an environmental assessment and review, *must be carried out* when dealing with a proposal that *may* have an environmental effect on an area of federal responsibility (emphasis added).

An order for *mandamus*, compelling the Minister to comply with the environmental assessment process outlined in the EARP Order was issued.

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54. *Supra*, note 49.

55. *Supra*, note 38 at 538.

56. *Ibid.* at 541.

57. *Ibid.* at 542.

B. SASKATCHEWAN WATER CORP. v. CANADIAN WILDLIFE FEDERATION INC.[58]

The Federal Court, Appeal Division unanimously dismissed Saskatchewan Water Corporation's appeal in a three page judgment, including headnote and statutory references.

The Saskatchewan Water Corporation argued that the Minister was not bound to follow the EARP Order, because the *IRIA* and the regulations thereunder constitute a "complete code". The Court found that this argument begs the question of whether the EARP Order is mandatory, and therefore is in the same nature of any other law of general application. Nothing in the text of the EARP Order indicates that its requirements are not mandatory. The repeated use of "shall" throughout the EARP Order indicates a clear intention to bind all to whom they are addressed, including the Minister of the Environment.[59]

C. CANADIAN WILDLIFE FEDERATION INC. v. MINISTER OF THE ENVIRONMENT[60]

Once it became apparent to Saskatchewan Power Corporation that it was having difficulty with its first licence (see two immediately previous case notes), it applied for and received a second one on August 31, 1989.

On April 12, 1989, two days after Cullen J. quashed the first licence and ordered the Minister to comply with the EARP Order, the Minister announced in the House of Commons that a complete review would be conducted. A draft Initial Environmental Evaluation ("IEE") was prepared by federal Environment Department personnel and released to the public June 6, 1989. Public meetings on the IEE were held in communities in or near the Souris River Basin during the period June 22 to June 29, 1989, including one in Minot, North Dakota. These meetings were conducted by an independent moderator, Vern Millard, the former chairman of the Alberta Energy Resources Conservation Board. A four volume report issued from the moderator in draft form, was finalized and was published August 29, 1989.

The CWF initiated this action, alleging that the IEE did not fulfil the requirements of the EARP Order.

In his discussion of the findings as a result of the initial screening process which must be made by the "initiating department", Muldoon J. quoted section 12 of the EARP Order, with comments in square parentheses, at page 13 of his Reasons:

> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if
>
> (a) the proposal is of a type identified by the list described under paragraph 11(a) [no adverse environmental effects], in which case the proposal may automatically proceed;
>
> (b) the proposal is of a type identified by the list described under paragraph 11(b) [significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;
>
> (c) the potential adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

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58. [1990] 2 W.W.R. 69 (F.C.A.D.).

59. *Ibid.* at 71.

60. (28 December 1989), T-2102-89 (F.C.T.D.).

(d) the potential adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with the criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

(f) the potential adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

The "Office" referred to in subsection 12(3) is the Federal Environmental Assessment Review Office (acronym "FEARO").

In the first of a number of caustic references, Muldoon J. described the language of the IEE, when compared with the requirements of section 12:[61]

> However, the authors do not follow the terminology of 'significant adverse environmental effects' as expressed in paragraph 12(3) of the *EARP* Guidelines, or 'insignificant adverse environmental effects' as expressed in paragraph 12(c) . . . . The authors of the IEE, Volume I, p. 12-2 under 'Summary of Adverse Environmental Impacts Caused by Altered Flows and Lake Levels', for example, speak of '*Significant* Impacts' to be sure, but also of '*Moderate Impacts*'. How inattentive, or silly, of those authors. What did they expect the Minister to make of that? The *EARP* Guidelines do not refer to 'moderate' adverse environmental effects.

He then found that any effect which is not "insignificant" must be "significant". To be insignificant, an effect must be "without significance".[62] The IEE also included a listing of information deficiencies, including some which expressed unknown effects to the aquatic ecosystem. Muldoon J. commented that "[i]t must have taken a particularly nice balance of judgment to call [these] deficiencies 'moderate' rather than 'significant'.[63] If potentially adverse environmental effects are significant, the proposal would be automatically referred under paragraph 12(e) of the EARP Order to the Minister for public review by a "Panel" (a defined term under the EARP Order, being an independent panel established by the initiating department expressly for the purpose of conducting the required environmental review and issuing the public report).

Counsel on behalf of the Minister argued that the Minister must have issued the second licence by relying upon paragraph 12(c) of the EARP Order, determining that the adverse environmental effects were "mitigable with known technology". If so found, the proposal could proceed, without a full public review. Muldoon J.'s response to this argument was to point out that the Minister did not identify any *known* technology, but only vague hopes for future technology.[64] In addressing the issue of increased mercury contamination in fish, he had this to say:[65]

> This is another one of those subtle "moderate" impacts which are indistinguishable from significant adverse effects. . . . This is obviously not mitigable with known technology - unless one so poisoned the waters as to exterminate all fish.

The Court found that in these circumstances, the initial screening process provided by the IEE should have resulted in the Minister referring the question to a Panel under the EARP Order for a full public hearing. He also found irony in the circumstances,

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61. *Ibid.* at 12.
62. *Ibid.* at 12 and 13.
63. *Ibid.* at 15.
64. *Ibid.* at 16 and 17.
65. *Ibid.* at 18 and 19.

sufficient to "make a cynic cackle with glee",[66] in that if the Minister had conducted himself in accordance with the requirements of the EARP Order, he would not be bound by the recommendations of the Environmental Assessment Panel.

Perhaps foreseeing the above, Counsel for the Minister argued that the Court should exercise a discretion to excuse the lawbreaking. Muldoon J. suggested that it would be notionally easier to excuse an individual tangled in the bureaucratic web; however, if anyone should scrupulously conform to the official duties imposed upon him by the law, it should be a Minister of the Crown.[67]

Faced with the dilemma of the above and a project well under construction, Muldoon J. granted the order of *certiorari*, and interrupting construction with a sunset clause, thereby allowing the Minister time to appoint an Environmental Assessment Panel in compliance with the EARP Order.

D. FRIENDS OF THE OLDMAN RIVER SOCIETY v. MINISTER OF TRANSPORT[68]

In 1958 the Alberta government requested analysis of potential water storage sites on the Oldman River. In 1966 the report was delivered. One of the alternatives suggested by the federal Department of Agriculture, the Three Rivers site, was the one eventually chosen as a site for construction of a dam. The Alberta government initiated a technical committee in July 1974 to study water demand and potential storage sites on the Oldman and its tributaries. The Phase I reports of that committee, dealing with water demand, water supply, water quality and other environmental and social effects, were issued in July 1976 and released to the public.

Public meetings were then held and written submissions from the public accepted, leading to a second phase of planning (Phase II). This phase included recommendations regarding overall water management in the Oldman River Basin. The Phase II report was released in August, 1978. In July, 1978 the Environment Council of Alberta (the "ECA") was ordered to hold public meetings on the same issues. Some 10 informal public meetings were held and 200 presentations received from interested parties, culminating in a report submitted in August, 1979. That report recommended the Brockett site over the Three Rivers site.

In 1981 a multi-departmental committee of the federal government reviewed the Alberta proposal. Its purpose was to conduct an appropriate review of environmental implications of concern to the federal government. The project was actively followed by this committee until August, 1984, when it was determined that the dam would not be built on the Brockett Indian Reserve.[69] The Province of Alberta's planning process subsequent to August, 1984 also included numerous environmental studies.

In January, 1985 the Alberta government appointed a local advisory committee to deal with regional and municipal submissions and concerns. It also funded and supplied technical data to an independent study of the impact of the dam on the Peigan Band.

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66. *Ibid.* at 22.
67. *Ibid.*
68. (1989), (1990), 70 Alta. L.R. (2d) 289 (F.C.T.D.).
69. *Ibid.* at 294.

In March, 1986 the Alberta Government applied for approval under the *Navigable Waters Protection Act*[70] (the "*NWPA*") of the federal Minister of Transport to construct the dam at the Three Rivers site on the Oldman River. Approval was issued September 18, 1987.

In May, 1986 the federal and Alberta governments entered into an agreement concerning environmental impact assessments of projects within Alberta, such that Alberta would apply its procedures where primary responsibility for approval was within its constitutional jurisdiction.[71] A licence was issued by the Alberta Minister of the Environment under the Alberta *Water Resources Act*[72] and construction on the dam proper commenced. As of March, 1989 the dam was some 40% complete.

In August, 1987 the Southern Alberta Environmental Group wrote to the federal Minister of Fisheries and Oceans requesting an initial environmental assessment under the EARP Order. More correspondence followed. However, the federal Minister of the Environment declined, due to the indirect nature of the involvement of either Environment Canada or Fisheries and Oceans Canada. The federal government throughout considered the Oldman River dam to be a provincial initiative and not subject to federal environmental review.

The Friends of the Oldman argued that since the dam will have environmental effects in areas of federal responsibility, notably navigable waters and fisheries, the EARP Order requirements apply and should have been, but were not, complied with. Not surprisingly, they relied upon the Alameda and Rafferty Dam decision.

The federal government argued that a potential environmental impact in an area of federal responsibility is insufficient to invoke the EARP Order alone. There must also be participation in decision making in connection with the provincial project.

The Alberta government argued that, in the absence of clear language, it is not bound by the provisions of the *NWPA*, and should not be prejudiced by the fact that it had already applied for, and obtained, approval thereunder. It further argued that triplication, not duplication, of effort would result if an EARP Order review were undertaken. It also noted that most of the activity took place prior to the enactment of the EARP Order. Enforcement of the EARP Order process would therefore impose retroactive effect.[73]

At issue were the applicant's standing, whether the Ministers of Transport and of Fisheries and Oceans are bound to apply the EARP Order process, the applicability of the *Cdn. Wildlife* case and the exercise of the Court's discretion as to remedy.

Jerome J. assumed, expressly without deciding, that the applicant had status. On the second issue, the Court found that the *NWPA* imposes no requirement for environmental review of any sort. The Minister of Transport was, therefore, without authority to require environmental review.[74] To require an environmental review under the EARP Order would have exceeded the Minister's jurisdiction, the antithesis of the applicant's argument. He dismissed the applications for *certiorari* and *mandamus* against the Minister of Transport.

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70. R.S.C. 1985, c. N-22.
71. *Supra*, note 60 at 295.
72. R.S.A. 1980, c. W-5.
73. *Supra*, note 60 at 300.
74. *Ibid.* at 304.

Jerome J. determined that the Ministry of Fisheries and Oceans was not an "initiating department" within the ambit of the EARP Order. Further, it was impossible for a "proposal" to be received by that Ministry which required its approval, since the *Fisheries Act*[75] does not contemplate an approval procedure for any licence or permit. Therefore, referral for environmental review is not required.

The Court distinguished this case from the *Cdn. Wildlife* decision on the grounds that in that case, prior approval of the federal Environment Minister was required in order for the dams to be constructed in accordance with the law. No such prior approval of a federal Minister was required in respect of the Oldman River dam. The licence under the *NWPA* can be issued even after the project is commenced.[76]

Finally, Jerome J. noted the extent and comprehensive nature of the environmental review process conducted by the Province over the previous 20 years.

E. FRIENDS OF THE OLDMAN RIVER SOCIETY v. MINISTER OF TRANSPORT[77]

An additional fact noted at the Federal Court of Appeal level was that the licence issued by the Alberta Department of the Environment was twice challenged in Court. The first time successfully, resulting in the quashing of the licence. A second licence was issued and a similar application was unsuccessful.[78]

At issue before the Federal Court of Appeal were (a) whether the trial judge erred in finding that the EARP Order did not apply to either the application to the Minister of Transport or to the decision-making authority of the Minister of Fisheries and Oceans, (b) whether this was an appropriate case for the granting of *certiorari* or *mandamus*, contrary to the finding of the trial judge, and (c) whether the provincial Crown is immune from the approval requirements of the federal legislation.

The Federal Court of Appeal unanimously allowed the appeal. An order for *certiorari* was granted, quashing the approval of the Minister of Transport for the construction of the Oldman River Dam. An order for *mandamus* was granted, directing the Minister of Transport to comply with the EARP Order. A similar order for *mandamus* was issued against the Minister of Fisheries and Oceans.

The Court of Appeal disagreed with the trial judge's conclusion that the language of the *NWPA* restricted the Minister of Transport to considering matters only which affect marine navigation, to the exclusion of any authority to require environmental review. The dam project fell squarely within the far-reaching purview of subparagraph 6(b) of the EARP Order, as a "proposal . . . that *may* have an environmental effect on an area of federal responsibility"[79] (emphasis added). The EARP Order is a law of general application granting authority incremental to any other statutory power residing in the Minister of Transport. Therefore, he was not restricted by the *NWPA* to considering matters related to navigation alone and was under a positive obligation to comply with the EARP Order.

The same test is to be applied with respect to the Minister of Fisheries and Oceans. If faced with a "proposal", he too would be bound. Argument centered around the

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75. R.S.C. 1985, c. F-14.

76. *Supra*, note 60 at 307.

77. (1990), 108 N.R. 241 (F.C.A.D.).

78. *Ibid.* at 246.

79. *Ibid.* at 253.

scope of a "proposal". Stone J.A. determined that, as set forth in the EARP Order, its scope extends far beyond an undertaking of the federal government or in which the federal government takes an active role, although it clearly encompasses such a situation. Stone J.A. stated:[80]

> As I see it, applications or requests for authorization or approvals are but means of calling a Minister's attention to the existence of an "initiative, undertaking or activity" but they are not the only means. A Minister may become aware of an "initiative, undertaking or activity" in some other way, which I think would include a request on the part of an individual for specific action falling within the Minister's responsibilities under a statute which he is charged with administering on behalf of the Government of Canada. In such circumstances, if any "initiative, undertaking or activity" exists for which the Government of Canada has "a decision making responsibility" a "proposal" also exists.

The Minister of Fisheries and Oceans was found to be aware of the proposal to build the dam on the Oldman River by virtue of his decision in 1987 not to intervene to remedy downstream problems respecting fish. He had been requested to intervene to protect fishing resources on the Oldman. Protection of fish habitat and fisheries fall within the responsibilities of the Minister. Therefore, he was a "decision making authority" under the auspices of the *Fisheries Act*.[81] The Minister of Fisheries and Oceans remained responsible to comply with the EARP Order, regardless of his determination not to proceed under the *Fisheries Act*. This jurisdiction and responsibility was also triggered pursuant to sections 3, 6, 19 and 33 of the EARP Order.

> Read together, these provisions suggest that any possible adverse impacts upon the fish habitat and fish resources in the Oldman River had to be subject to the Guidelines Order procedures prior to granting the Approval.[82]

The Minister of Fisheries and Oceans was thus required to intervene.

On the issue of exercise of discretion, the Court of Appeal concluded that the trial judge erred in the manner in which he exercised his discretion and that this error was such as to justify interfering with that determination. The trial judge's decision was based at least in part upon what he considered to be a duplication of the environmental review process undertaken by the province. The Court of Appeal held that there was no duplication in at least two respects. Firstly, the provincial process placed much less emphasis on public participation in addressing the environmental implications than did the EARP Order. Secondly, nothing in the provincial regime guaranteed the independence of the review panel. The concept of an opportunity for the public to voice environmental concerns before an independent panel is central to the working of the federal scheme.[83]

Since the Province of Alberta might be adversely affected by an Order of the Federal Court of Appeal, it was held to be proper for it to be joined as a party to the proceeding, so that it might pursue a remedy by way of a further appeal. In that regard, it is the author's understanding that the Province of Alberta has indicated its intention to appeal to the Supreme Court of Canada.

Finally, a reading of the *NWPA* clearly indicates an intention to bind the Province. To hold the Province exempt from the approval requirements contained therein could result in navigable waters being rendered unsafe.

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80. *Ibid.* at 255.
81. *Supra*, note 60.
82. *Ibid.* at 27.
83. *Ibid.* at 29 and 30.

IV. GOVERNMENT REGULATION

A. MOBIL OIL CANADA LTD. v. MINISTER OF ENERGY, MINES AND RESOURCES (CANADA)[84]

The Applicants were the holders of an Exploration Agreement covering certain lands offshore Newfoundland. In 1982 the applicants drilled the Nautilus C-92 well, which encountered hydrocarbons. They made an application in 1984 for a declaration of a significant discovery pursuant to the *Canada Oil and Gas Act*.[85] The revised application requested a significant discovery area comprised of the well and 30 surrounding sections. In 1986 the Minister of Energy, Mines and Resources made a declaration of a significant discovery with respect to the Nautilus C-92 well which encompassed only the well and the surrounding eleven sections.

The Applicants sought to have the Minister's decision quashed by way of *certiorari*, alleging that the Minister had applied the wrong legal test in making his decision with respect to the extent of the land which should have been included in the declaration of significant discovery. The Applicants suggested that the Minister had applied a "preponderance test", while the statute required that he apply a "reasonable grounds" test. Section 44(1) of the *Canada Oil and Gas Act* provides:

> Where the Minister is satisfied that a significant discovery has been made on Canada lands, he may by order, make a declaration of a significant discovery in respect of those Canada lands and *any adjacent Canada lands* with respect to which he has *reasonable grounds to believe the significant discovery may extend.*

Reed J. agreed that the applicable test under subsection 44(1) requires something less than a probability or preponderance of belief. However, she concluded, based on certain documentation and affidavit evidence, that the Minister had applied the appropriate test. Moreover, she was mindful of the fact that courts are reluctant to interfere with administrative or quasi-judicial decisions unless they are "patently unreasonable". In *obiter*, Reed J. went on to state that she would reject the Minister's argument to the effect that any declaration of a significant discovery area was not reviewable by the courts, as it was legislative and not administrative in nature. She would have classified the process of decision as one which applies a general rule to a specific situation, which is administrative in nature and, therefore, subject to judicial review.

B. 294302 ALBERTA INC. v. THE HONOURABLE NEIL WEBBER, MINISTER OF ENERGY[86]

In March of 1984, 294302 Alberta Inc. expended monies in conformity with the *Petroleum Incentive Programe Act*[87] and the regulations then extant but not in conformity with regulations promulgated in July 1984. Application was made for payment of the incentive in November 1984. The Court of Appeal held that the appropriate focus was the regulations in force at the time the expenditures were incurred, not when the application was made. To rule otherwise would be to construe the statute as having retroactive effect.[88]

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84. (16 March 1990), T-460-90 (F.C.T.D.).
85. S.C. 1980-81-82-83, c. 81.
86. (19 April 1990), Calgary 900276 (Alta. C.A.).
87. S.A. 1983, c. P-4.1.
88. *Supra*, note 60 at 3.

V. FREEHOLD LEASES

A. CANADIAN SUPERIOR OIL LTD. v. JACOBSON[89]

At issue was the ownership of mines and minerals other than coal, petroleum, gold and silver. In 1950, the registered owner of the minerals sold those rights to the Plaintiff. A valid and registrable transfer was executed and delivered. Ancillary to, and contemporaneous with the transfer was a royalty agreement in favour of the transferor. Although this transfer remained unregistered, a caveat in respect of a royalty agreement was filed in 1950 which was, and remained at trial, the first notification on the relevant title. The Defendants were the heirs of the transferor, each of whom received a divided title to the minerals, following the transferor's death in 1964, as a result of a probate application which asserted title to the mines and minerals.

In 1975 the Plaintiff prepared to undertake a drilling program on the lands, as part of a unitization scheme. The Plaintiff executed a document entitled "Natural Gas Lease and Grant" between the five Defendants, as lessors, and the Plaintiff, as lessee. A standard form of lease was used but the initial consideration in respect of the lease was approximately ten percent of the going rate. The Plaintiff argued that this document was not intended to have effect as a Natural Gas Lease but was to be substituted in place of the original royalty agreement. Further, it was designed to clarify who would receive royalties in the event of production, in light of the elapsed time since the original events.

The Defendants argued that, separate and apart from the intention of the parties, the execution of the 1975 "lease" document effected a surrender by operation of law of the Plaintiff's rights as beneficial owner of the mineral rights pursuant to the transfer.

The court found that the doctrine of surrender by operation of law does not apply in this case to defeat the claim of the Plaintiff that it remained the owner of the mines and minerals. The foundation of surrender by operation of law is the doctrine of estoppel. Estoppel can only arise as a defence where the action is founded on the same transaction. No estoppel can be founded on a statement of facts agreed to in a different transaction. In this case, the action was not founded on the 1975 agreement.[90] The transaction set forth in that document was not the transaction in issue. The Court found that, at best, the 1975 agreement had some evidentiary value as an admission. However, the weight of the evidence favored the view that the Plaintiff had no intention of abandoning its interest in the minerals.[91] Estoppel being inapplicable, the Court found for the Plaintiff on the basis of the unregistered transfer.

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89. (1989), (1990), 71 Ata. L.R. (2d) 229 (Alta. Q.B.).

90. *Ibid.* at 240.

91. *Ibid.*

VI. LAND TITLES

A. GREEN DROP LTD. v. SCHWORMSTEDE[92]

Mr. Schwormstede owned a half section, title to which was represented by one certificate of title and on which the homestead was located in the north-west quarter. He agreed to sell a 9.9 acre parcel out of the north-east quarter to Green Drop. The wife refused to provide a dower consent to the sale. A contract for the sale of the parcel was entered into in 1985 and approval for subdivision of the parcel was obtained. The wife filed a caveat in respect of her dower rights. The husband applied for and obtained three separate titles for the north-west quarter, the "Green Drop" parcel, and the remainder of the north-east quarter, excluding that parcel. The transfer of the Green Drop parcel was registered some 18 months later. Upon application to the Master, the wife's caveat was ordered discharged. She appealed from that decision.

Deyell J. determined that a strict reading of the *Dower Act*[93] provides that, notwithstanding the prohibition against disposition in the Act, upon registration of a transfer the land ceases to be classified as the homestead. Although Green Drop would have taken its title subject to prior registered interests, upon the registration of the transfer, the Green Drop parcel ceased to be part of the homestead, no dower rights were thereafter applicable to that parcel and the wife therefore had no interest in the Green Drop parcel to support her caveat. It was therefore ordered removed.[94] The Court further ruled that neither the subdivision nor the separation of title can be characterized as a "disposition" within the meaning of the Act. Therefore, once the title was split, even before the registration of the transfer to Green Drop, the north-east quarter ceased to be part of the homestead, with the result that dower rights no longer accrued to any part of the north-east quarter.[95] Deyell J. noted that although this appeared to be a course of action expressly intended to circumvent the requirements of the *Dower Act*, rectification of that problem was a matter for the legislature.

B. LAC LA RONGE INDIAN BAND v. BECKMAN[96]

The Lac La Ronge Band filed two caveats in 1989 against certain lands in the Candle Lake region in the Province of Saskatchewan. The interest claimed in each caveat was "a usufructuary and possessory right to lands set apart by Her Majesty for the use and employment" of the Indian Band. The lands in question were lands on which the federal government had initiated preliminary steps to create an Indian reservation, during the 1930s. The lands in question were never occupied, nor used, by any members of the Lac La Ronge Board as a reserve.[97] The Province of Saskatchewan applied for an order requiring the applicant Indian Band to substantiate their right to maintain the first caveat and four cottage owners in the Candle Lake area requisitioned notices to lapse the second caveat. The applications were heard together.

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92. (1989), 65 Alta. L.R. (2d) 263 (Alta. Q.B.).
93. R.S.A. 1980, c. D-38.
94. *Supra*, note 60 at 269.
95. *Ibid.* at 269.
96. [1990] 3 W.W.R. 1 (Sask. Q.B.).
97. *Ibid.* at 31.

Matheson J. determined that the two caveats should be vacated because no Indian reservation in respect of these lands was ever formally established. His decision was based on the interpretation of various documents of several governmental departments in connection with the Candle Lake lands. He also decided that the Indian Band could not advance a claim that a *de facto* Indian reservation existed since the lands were never occupied, nor used, by any members of the Indian Band as a reserve.

While this case dealt with a particular set of circumstances, Matheson J.'s decision does not contain dicta respecting the broader question of Indian title and whether it is a caveatable interest. Matheson J. relied on Dickson J.'s characterization of Indian title in *Guerin* v. *R.*[98] that

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right.

The foregoing description of the nature of Indian title was also accepted in *C.P. Ltd.* v. *Paul.*[99] Matheson J. concluded that as the right of the Indians is more than a personal right, and extends to "a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown", such right *prima facie* constitutes an interest in land, of which notice may be given by registration of a caveat. The nature of the claim of the Lac La Ronge Indian Band was specific to lands which they claimed as an Indian reservation. The *Guerin* and *Paul* cases were also dealing with the question of Indian title respecting reservation lands. However, the *Guerin* case indicated that the interest of an Indian band in a reserve is the same as an unrecognized Indian interest in traditional tribal lands. Presumably, if the Lac La Ronge Indian Band had been in a position to make a claim on the basis of traditional tribal lands, the caveats would have not been vacated.

On appeal,[100] the Saskatchewan Court of Appeal found that the trial judge did not have the jurisdiction to make a final determination as to the maintainability of the caveats, as the required consent of all parties was lacking.[101] It further found that since the Band had taken the position that the *Land Titles Act* did not apply to the lands in question, it could not at the same time rely upon that Act for the authority to file the caveats. Therefore, the Band caveats could not be maintained.[102] However, this would not preclude the Band from filing a certificate of *lis pendens*, as the authority for such a certificate arises out of the *Queen's Bench Act.*[103]

C. ALBERTA AGRICULTURAL DEVELOPMENT CORP. v. MARTIN[104]

In July, 1976 Neuman granted a Surface Lease to Brascan Resources Ltd. Brascan filed a caveat July 8, 1976 to protect its interest under the lease. On October 1, 1980 Neuman assigned his interest in the Surface Lease to Walter Martin and Helen Martin

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98. [1984] 2 S.C.R. 335 at 382, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321.
99. [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487.
100. [1990] 4 W.W.R. 211 (Sask. C.A.).
101. *Ibid.* at 217.
102. *Ibid.* at 218 and 219.
103. R.S.S. 1978, c. Q-1.
104. Unreported, Alta. Q.B. Master in Chambers, 23 January 1990.

(the "Martins") and, on October 10, 1980, his fee simple title in the property to them. In October, 1981 the Martins transferred the property to Brent Martin. On the same day Brent Martin granted a mortgage to AADC, which went into default and was being foreclosed upon. No caveat was filed by the Martins as assignees of the lessor's interest in the Surface Lease.

The Martins sought an order setting aside their noting in default. This was resisted by AADC, on the grounds that the title of Brent Martin disclosed no interest of the Martins at the time of the granting of the mortgage. Master Quinn ruled that although a caveat filed by the lessee under a Surface Lease would protect the interest of an assignee of the lessee, it does not similarly protect the assignee of the lessor's interest under the same lease.[105] The motion was therefore denied, as the Martins had no defence against AADC in any event.

D. GUARANTY TRUST COMPANY OF CANADA v. CLARKE[106]

This interpleader action arose out of the *Hetherington* litigation and involved the interpretation of subsection 180(1) of the *Land Titles Act*:[107]

> 180(1) In any proceeding respecting land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the Registrar to cancel, correct, substitute or issue any duplicate certificate or make any memorandum or entry thereon or on the certificate of title and otherwise do every act necessary to give effect to the decree or order.

At issue was whether the Court may direct the Registrar to register Interpleader Orders, which in form are not final orders, against the titles to mines and minerals. The Interpleader Orders arose where royalty trust certificate holders and the owners of the mines and minerals were one and the same. Mason J. had allowed the trust companies to pay funds to these persons, which would otherwise be paid into court, on the grounds that they would be entitled to payment in one or the other capacity, regardless of the outcome of the litigation. These Interpleader Orders were to be subject to certain safeguards, including a direction to the Registrar to register the Orders against the affected mineral titles. The Orders did not specify the appropriate section of the *Land Titles Act*. The Registrar rejected one Order for registration on the ground that it did not indicate how it affects an interest in land and did not disclose the authority for the direction to the Registrar.[108]

Mason J. found express authority within section 180 granting the Court the jurisdiction to make a direction to the Registrar, as this case was one which was clearly "in respect of any proceeding relating to land".[109] The section:[110]

> authorizes the court to direct the Registrar to give effect to any decree or order of the court where the court deems it necessary for the protection of various competing interests with reference to land or any transaction or contract relating to land or any instrument, caveat, memorandum or entry affecting land.

The Court determined that one such purpose is to give notice, to any who would deal with those interests in land, of the existence of outstanding legal proceedings

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105. *Ibid.* at 4.
106. (1990), 72 Alta. L.R. (2d) 222 (Alta. Q.B.).
107. R.S.A. 1980, c. L-5.
108. *Supra*, note 100 at 225.
109. *Ibid.* at 227.
110. *Ibid.* at 227 and 228.

which could affect those interests. As a practice suggestion on a matter of form, although he ruled that it was not necessary to actually quote section 180 within any future order, Mason J. recommended that in future both counsel and the Court should specifically set out that the Order is made pursuant to section 180.

E. CANADIAN SUPERIOR OIL LTD. v. WORLD WIDE OIL & GAS (WESTERN LTD.)[111]

Canadian Superior held a lease for a quarter section of land and registered a caveat respecting the lease against the mines and minerals title to the quarter. Subsequently, one legal subdivision within the quarter section was unitized. The unit agreement was registered but the registrar's memorandum referred only to the single legal subdivision.

The determinative issue in this case was whether the unitization of the one legal subdivision, and the registrar's memorandum in respect thereof, held the freehold oil and gas lease for the entire quarter section or whether a *bona fide* purchaser for value took the other three legal subdivisions in the quarter section free and clear of the leasehold interest.

The Alberta Court of Appeal found that the caveat registered in respect of the Canadian Superior lease against the title to the entire quarter section, when coupled with the registrar's memorandum respecting the legal subdivision, would give a third party notice that at least a portion of the quarter section was unitized. Analysis of the unit agreement would then disclose that production from any part of the quarter section would continue the lease for the entire quarter.[112] World Wide therefore took its title subject to the Canadian Superior lease.

VII. SURFACE RIGHTS

A. SAWIAK v. PALOMA PETROLEUM LTD.[113]

An oil company obtained a right of entry respecting three parcels of land for use for well sites and access roads. The Surface Rights Board awarded compensation under the *Surface Rights Act*[114] for both value of land and loss of use. This decision was successfully appealed to the Court of Queen's Bench. The Queen's Bench Justice held that the owner was entitled to one or the other measurements of compensation but not both, since an award of both would result in overcompensation. The issue at the Court of Appeal was whether, on appeal from the Surface Rights Board, the Queen's Bench judge must necessarily exclude consideration of loss of use.

The Court of Appeal determined that an award of compensation may be determined with reference to more than one of the factors listed in section 25 of the *Surface Rights Act* and that the Queen's Bench judge erred in excluding loss of use. The appeal was allowed and the question of compensation was returned to the Surface Rights Board for redetermination.[115]

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111. (1990) 102 A.R. 305 (Alta. C.A.).

112. *Ibid.* at 311.

113. (1989), 101 A.R. 306, 71 Alta. L.R. (2d) 360 (Alta. C.A.).

114. S.A. 1983, c. S-27.1.

115. *Supra*, note 100 at 311.

The Court of Appeal majority's reasons for decision specified that section 25 lists factors which may be considered in setting the level of compensation. These factors are not mutually exclusive; all may be considered in determining compensation. Stevenson J.A. clearly differentiated between expropriation cases and the requirement under the *Surface Rights Act* to adequately compensate the owner for the infringement. The proper focus is on compensation, rather than on valuation.[116] However, the Court of Appeal ruled that if an award under one of the headings in section 25 would result in inadequate compensation, the Board is entitled to consider others.

In dissent, Stratton J.A. concluded that section 25 simply stated that the Board may consider all the factors set out therein. It does not say that those factors must be priced separately and totalled. Such was not the intent of the legislature. He believed that to add, as a separate factor, "loss of use" as measured by productivity would be a duplication, resulting in a "doubling up" of remuneration to the land owner.[117]

B. TRANSALTA UTILITIES CORP. v. MacTAGGART[118]

The Appellant owned an irregular parcel of land which was designed by the Province as a "Restricted Development Area" which preserved lands for use only as transportation or utility corridors. Permitted uses of the land were restricted to those which would not interfere with transportation or utility functions, thereby effectively down-zoning the land use.[119] The Respondent, TransAlta, was required to locate a proposed powerline in a corridor through the Appellant's land, thereby effecting an isolation of the parcel in question. In the absence of the Restricted Development Area designation, the land would probably have been used for residential development. The Surface Rights Board assessed some damages for injurious affection of the Appellant's lands. The Queen's Bench judge disallowed any award for injurious affection on the basis that the lands were already subject to the statutory restrictions on use.[120] The sole issue before the Court of Appeal was whether an award for injurious affection was precluded.

Stevenson J.A. found that the Queen's Bench judge erred in distinguishing the present case from one where there was some link between the taker, in this case the utility, and the party imposing the down-zoning, the government. If such a distinction were applied, a different result would follow, depending upon whether the taker was a private or provincial Crown agency.[121] In reinstating the decision of the Surface Rights Board, the Court of Appeal ruled that if the value of a parcel of land has been artificially depreciated prior to the activity under consideration, the artificiality must be ignored.[122]

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116. *Ibid.* at 308.
117. *Ibid.* at 318.
118. (1990), 71 Alta. L.R. 251 (Alta. C.A.).
119. *Ibid.* at 253.
120. *Ibid.* at 253.
121. *Ibid.* at 254.
122. *Ibid.* at 255.

VIII. TRUSTS

A. LAC MINERALS LTD. v. INTERNATIONAL CORONA RESOURCES LTD.[123]

The trial and Ontario Court of Appeal decisions have been discussed in previous presentations to this conference. This year the Supreme Court of Canada had its turn. Despite the earlier discussions, a rather extensive review of the facts is necessary, due to the nature of the case and of the Supreme Court of Canada decision.

International Corona Resources Limited was a junior mining company which owned a prospective gold property near Helmo, Ontario. LAC Minerals Ltd. was a senior mining company.

In late 1980 and early 1981 Corona retained a geologist who carried on an active exploration programme on the Corona property, including the drilling of exploratory holes. LAC learned of Corona's exploration programme and arranged a site visit on May 6, 1981 at which LAC representatives were shown cores, assay results and other results of the exploratory drilling, plus a map showing the staking in the area. The geological theory was explained and Corona identified its interpretation of the continuation of the trend onto the contiguous property, represented by eleven patented claims owned by an American named Mrs. Williams. These claims were collectively referred to by the Supreme Court as the "Williams property". Corona's theory was that there were substantial mineral deposits under the Williams property.

The trial judge found that there had been no relevant discussions of confidentiality during the site visit[124] or at any later time. Immediately following the site visit LAC personnel were instructed to gather information respecting the Helmo area and, on May 8, LAC began staking claims immediately east of the Corona property.

Further discussions between LAC and Corona representatives were held in Toronto on May 8. On May 19, LAC expressed interest in pursuing a joint venture with Corona. On June 30, 1981 a presentation of the results of Corona's exploration to date was made to LAC, after which core sections and a detailed drilling plan were left with LAC. As identified above, at no time was there ever an express indication from Corona to LAC that the information imparted was private, privileged or confidential.

On June 8, 1981 a third party representative of Corona spoke to Mrs. Williams and made an oral offer to option her property. This oral offer was followed up by a written one. On July 3, 1981 LAC telephoned Mrs. Williams and made an oral offer which was subsequently reduced to writing, at Mrs. William's request, by letter dated July 6, 1981. On learning of the existence of the LAC offer (but not the identity of the offeror), Corona made its own direct written offer to Mrs. Williams on July 23, 1981. Also on July 23 Corona first became aware of the identity of LAC as the other offeror. The LAC offer for the Williams property was accepted on July 28, 1981 and a formal agreement was entered into August 25, 1981.

Corona retained counsel. Despite efforts by LAC to resume negotiations, no agreement was reached. Corona then entered into a joint venture with Teck Corporation, one of the purposes of which was to pursue the lawsuit against LAC.

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123. (1989), 61 D.L.R. (4th) 14 (S.C.C.).

124. *Ibid.* at 55.

The Ontario High Court found no contract between Corona and LAC but found liability under the heads of breach of confidence and breach of fiduciary duty.[125] The remedy applied was the return of the Williams property to Corona, subject to a lien in favour of LAC for approximately $153 million. This represented LAC's actual exploration and development costs, discounted by $50 million for inefficient development. As a contingency against a finding by an Appeal Court of damages as the appropriate remedy, damages were assessed at $700 million, being the present value of the mine as at January 1, 1986.

The Ontario Court of Appeal affirmed the trial judgment,[126] both its finding of breach of confidence and of the imposition a constructive trust on the Williams property.

On the basis of the foregoing, the Supreme Court of Canada addressed the issues of fiduciary duty, breach of confidence, the remedy available in the event of breach of either and whether a fiduciary relationship arose between LAC and Corona. All of the judges agreed that certain information conveyed to LAC was confidential and that it was used by LAC in connection with LAC's acquisition of the Williams property. Beyond that, they differed as to the nature and scope of duty imposed upon LAC thereby and the appropriate remedy ensuing therefrom.

All Supreme Court of Canada justices agreed on the elements necessary to establish a breach of confidence, outside of contract: that the information conveyed must be of a confidential nature, that it must be communicated in confidence, and that it must be misused by the party to whom it was so communicated.

Corona communicated to LAC certain private, non-published information about the Williams property. Even though no mention of confidence was made, the parties were working toward a joint venture and the information was valuable. LAC used that information in acquiring the Williams property.

La Forest J. relied upon the trial judge's finding that "but for the actions of LAC, Corona would have acquired the Williams property and therefore LAC acted to the detriment of Corona".[127] He concluded that the relevant question is "what is the confidee entitled to do with the information?" A breach occurs whenever there is a use which is not permitted. The burden rests with the confidee.[128]

Sopinka J. concurred that LAC had committed a breach of confidence but disagreed as to the appropriate remedy.

La Forest J. concluded that the remedy generally reserved for a fiduciary breach was available for a breach of confidence in this case. He found that it was not necessary for him to address the fiduciary issue[129] but embarked upon a nineteen page dissertation of the subject, concluding that LAC owed a fiduciary duty to Corona, even though their relationship never culminated in a contract and did not fit within the traditional fiduciary categories, such as trustee, partner, director or agent.

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125. (1986), 25 D.L.R. (4th) 504 (Ont. H.C.); Referenced, *Supra*, note 123 at 59.

126. Reported at (1988), 44 D.L.R. (4th) 592 (Ont. C.A.); Referenced, *Supra*, note 123 at 59.

127. *Supra*, note 123 at 22.

128. *Ibid.* at 24 and 25.

129. *Ibid.* at 26.

He commenced this discussion with the following comment:[130]

> There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.

La Forest J. discussed three possible roots of a fiduciary duty:

1. The existence of the traditional fiduciary relationships, such as agent and principal or beneficiary and trustee; or extended categories of relationships where by statute, agreement or unilateral undertaking, one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power;

2. The fiduciary obligation may arise out of the specific circumstance of a relationship (where fiduciary obligations exist because, given the circumstances, one party has the actual expectation that his interests are being served by the other); and

3. Where there is a perception of remedial inflexibility in equity, the concept of fiduciary obligation or duty has been used by the courts to allow the application of a remedy otherwise unavailable.

La Forest J. found the third category to be an illegitimate basis for imposing a fiduciary duty. He also found the first catgegory inapplicable as Corona had not alleged the existence of a special relationship resulting from the conducting of negotiations with LAC to participate in a joint venture. He concluded that the fiduciary obligations in this case fit within the second category, as the circumstances of the case entitled Corona to expect that LAC would serve Corona's interests.

Although acknowledging an overlap between the law relating to breach of confidence and that relating to fiduciary duty, each having a common root in trust and confidence, La Forest J. distinguished them:[131]

> A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

He gave considerable weight to the evidence of mining experts appearing at the trial on behalf of Corona to the effect that a duty exists in the mining industry not to act to the detriment of the other party to serious negotiations, by misusing confidential information received from that party. He used this evidence in finding that Corona could reasonably expect that LAC would not act to Corona's detriment.[132]

Further, La Forest J. found that the ingredient of "vulnerability", which was considered to be a prerequisite to relief by Sopinka J., is not a fundamental element. Nevertheless, if essential, La Forest J. found it to be present in this case, by reason of his defining vulnerability as simply meaning the susceptibility to harm or openness to injury.[133]

In responding to the argument that recognizing fiduciary obligations in the venue of commerce will cause much turmoil, La Forest J. quoted the comment of Mason J. in *Hospital Products Ltd.* v. *United States Surgical Corp.*, (1984):[134]

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130. *Ibid.* at 36.

131. *Ibid.*

132. *Ibid.* at 38 and 39.

133. *Ibid.* at 39 and 40.

134. *Ibid.* at 43.

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

Wilson J. concurred, at page 16:

> It is my view that, while no ongoing fiduciary *relationship* arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary *duty* arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to LAC's misuse of that information.

Sopinka J. dissented from the view that a fiduciary duty exists in these circumstances. While he agreed that not all of the elements enumerated by Wilson J. must be present to found the fiduciary relationship, the one feature which he treats as indispensable is that of dependency or vulnerability. He accordingly concluded that there was nothing special in either the pre-contractual negotiations between LAC and Corona or in the circumstances in which such negotiations proceeded sufficient to raise the spectre of a fiduciary relationship. While he lauded the practice among geologists to act honourably toward each other, as both admirable and worthy of being fostered, he does not believe it should be used to create a fudiciary relationship where one does not exist.[135] Most important, in his view, the essential element of dependency or vulnerability was "virtually lacking".[136] In Sopinka J.'s opinion, when confronted by the disclosure of confidential information and its misuse, the remedy is to be found in the law of confidence but not in the law of the fiduciary.

In dissent, Sopinka J. found no support in the caselaw for the imposition of a constructive trust over property acquired as a result of the misuse of confidential information.[137] He concluded that only in a special case would the remedy of the constructive trust be available for a breach of confidence. He would have awarded damages as the appropriate remedy. La Forest J. on the other hand, concluded that in the face of the breach of confidence in this case, the remedy of the constructive trust is not only available, but appropriate. It was not necessary, in his analysis, to make a finding of a breach of any fudiciary duty, to impose a constructive trust.

Three reasons were given by La Forest J. for the need for a constructive trust in this case; the uniqueness of the Williams property, the finding that Corona would have acquried the Williams property but for the breach by and intervention of LAC, and the impossibility of accurately evaluating the property.[138]

Wilson J. concurred in the remedy given to Corona by La Forest J., regardless of its grounding in an action in breach of confidence or of fiduciary duty. In her opinion, when considering the appropriate remedy, the Court should be mindful of the following:[139]

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135. *Ibid.* at 67.
136. *Ibid.* at 68 and 69.
137. *Ibid.* at 75.
138. *Ibid.* at 52.
139. *Ibid.* at 17.

> . . . when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, *and the available remedies are different*, the court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a construction trust on LAC in favour of Corona with respect to the property. Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an *in rem* remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing.

IX. ABORIGINAL RIGHTS

A. R. v. SPARROW[140]

Sparrow was a member of the Musqueam Indian Band, which occupied a reserve on the Fraser river, in British Columbia. He was charged with fishing for salmon with a drift net in excess of the limit imposed by his band's fishing licence issued by the federal Department of Fisheries and Oceans, pursuant to regulations promulgated under the *Fisheries Act*. At no time did Sparrow deny the particulars, but raised as his defence the argument that he was exercising an existing aboriginal right to fish, and that the restriction on the length of net permissable contained in the band's fishing licence is inconsistent with section 35(1) of the *Constitution Act, 1982*. As such, the restriction would be invalid.

The provincial court judge ruled that he was bound by the pre-Charter decision in *Calder* v. *Attorney-General of British Columbia*,[141] which held that a person could not claim an aboriginal right unless that right was supported by a special treaty, proclamation, contract or other document. Such was not the case here and Sparrow was convicted.[142] His conviction was upheld at County Court.

The British Columbia Court of Appeal determined that the lower courts had erred in concluding they were bound by the *Calder* decision. It rejected the Crown's assertion that the aboriginal fishing rights had been extinguished by legislation or that section 35 of the *Constitution Act, 1982* was merely of a preambular nature. Sparrow's right to fish had existed prior to April 17, 1982 and had not been extinguished prior to that date. He was therefore entitled to constitutional protection.[143]

The Supreme Court of Canada was asked to delineate the scope of that protection. It postulated a "stepped" test to determine the issue of whether the net length restriction pursuant to the regulations under the *Fisheries Act* were inconsistent with section 35. The first issue was whether the right was an "existing aboriginal right". The Supreme Court determined that his means "unextinguished", rather than exercisable at a particular time. Progressive regulation of fishing over time did not, in and of itself, extinguish the fishing right, in the absence of expressed intention to do so.[144]

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140. [1986] B.C.W.L.D. 599 (B.C.Co.Ct.); (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577 (B.C.C.A.); [1990] 1 S.C.R. 1075, (1990), 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410 (S.C.C.).

141. (1970) 74 W.W.R. 481 (B.C.C.A.).

142. *Supra*, note 140, S.C.R. at 1084.

143. *Ibid.* at 1085.

144. *Ibid.* at 1098 and 1099.

The scope of the right to fish was the next step in the analysis. It was found to be not only for subsistence purposes but also for ceremonial and social purposes and therefore protected. The Supreme Court further ruled that where, as in the instant case, the constitutionally protected right of the aboriginal is in conflict with other user's rights, the aboriginal right will have first priority.[145]

The Supreme Court ruled that section 35 was purposive and must be interpreted in a generous, liberal manner. The federal government has both historic powers and responsibility has been assumed by the Crown for aboriginal affairs. This has created a fiduciary obligation upon the federal government which is trust-like, rather than adversarial.

The third step in the analysis concerns the justification for the limitation of the aboriginal right. In *Sparrow*, the Court ruled that interference with aboriginal rights must be justified by both explicit language and the legitimacy of the incursion.[146] To attempt to justify the latter on the vague basis of "public interest" is insufficient. However, conservation of a resource, in this instance fish, was determined to be a legitimate reason and could take priority over the aboriginal right.

Finally, the interference with the aboriginal right must be kept to a minimum.[147] The degree of infringement must not exceed that which is required to effect the legitimate purpose of the government.

Having thus set out the process of analysis, the Supreme Court returned the case to trial for resolution.

X. LEAVE TO APPEAL TO SUPREME COURT OF CANADA

A. GUARANTY TRUST CO. OF ALBERTA v. HETHERINGTON[148]

Leave to appeal to the Supreme Court of Canada was denied.[149]

B. LLOYDS BANK CANADA v. INTERNATIONAL WARRANTY CO.

Leave to appeal to the Supreme Court of Canada was denied.[150]

C. L.K. OIL & GAS LTD. v. CANALANDS ENERGY CORP.

Leave to appeal to the Supreme Court of Canada was denied.[151]

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145. *Ibid.* at 1116.
146. *Ibid.* at 1113.
147. *Ibid.* at 1119.
148. [1987] 3 W.W.R. 316 (Alta. Q.B.), aff'd (1989), 67 Alta. L.R. (2d) 290 (Alta. C.A.).
149. [1990] A.W.L.D. 8, 26 January 1990.
150. [1990] A.W.L.D. 8, 26 January 1990.
151. [1990] A.W.L.D. 5, 9 February 1990.

D. DIR. OF SOLDIER SETTLEMENT v. SNIDER ESTATE[152]

Leave to appeal to the Supreme Court of Canada was granted.[153]

E. HUSKY OIL OPERATIONS LTD. v. SHELF HOLDINGS LTD.[154]

Leave to appeal to the Supreme Court of Canada was denied.[155]

F. CABRE EXPLORATION LTD. v. ARNDT[156]

Leave to appeal to the Supreme Court of Canada was denied.[157]

152. [1985] 2 W.W.R. 149, 34 Alta. L.R. (2d) 314, 35 R.P.R. 192 (Alta. Q.B.), aff'd [1988] 6 W.W.R. 360, 61 Alta. L.R. (2d) 246, 88 A.R. 385 (Alta. C.A.).

153. [1989] A.W.L.D. 6, 28 July 1989.

154. (1989), 94 A.R. 241 (Alta. C.A.).

155. [1989] A.W.L.D. 6, 28 July 1989.

156. [1986] 4 W.W.R. 261, 28 D.L.R. (4th) 747, 44 Alta. L.R. (2d) 250 (Alta. Q.B.), aff'd [1988] 5 W.W.R. 289, 60 Alta. L.R. (2d) 172, 87 A.R. 149 (Alta. C.A.).

157. [1989] A.W.L.D. 6, 28 July 1989.