RECENT DEVELOPMENTS IN THE LAW OF INTEREST TO OIL AND GAS LAWYERS

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The purpose of this paper is to discuss recent developments in the law which are of interest to lawyers whose practices relate to the oil and gas industry. This paper deals with both judicial decisions and statutory developments during the last year. Some of the cases discussed do not pertain directly to the oil industry, but have been included either because they involve situations analogous to those which occur in the oil and gas business or because they concern principles of law which are applicable to that industry. In order to place some limit on the scope of this paper, only federal and Alberta legislative developments are reported. In addition, federal income tax is not discussed. The review of legislation is effective as of June 1, 1988.

I. CREDITORS RIGHTS

A. *BANK OF NOVA SCOTIA* v. *SOCIETE GENERAL (CANADA)*[1]

Sorrel and the other respondents (the "non-operators") had participating interests in certain oil and gas properties. Sorrel was the operator of the properties. Sorrel owed Société Général (Canada) in excess of $4,000,000. Société Général held a general assignment of book debts from Sorrel pursuant to which it purported to attach funds in Sorrel's account at Bank of Nova Scotia. The non-operators challenged this action and the Bank of Nova Scotia interpleaded.

Sorrel was the operator of oil and gas properties in which it and the non-operators held interests.

It had apparently been established, although the reasons for judgment do not indicate how, that the money in the Bank of Nova Scotia account consisted of: (1) funds advanced to Sorrel by the non-operators on account of costs relating to the properties which were in excess of the actual costs, and (2) revenues from the sale of production from the properties.

The relationship between Sorrel and the non-operators was governed by a 1981 CAPL Operating Procedure.

The non-operators contended that the funds were trust funds held for their benefit.

The Court of Appeal stated that the existence of a trust requires three elements, certainty of intention, certainty of subject matter and certainty of object. There was no question about the latter two certainties in this case. The funds were the subject matter and the non-operators were the object or beneficiaries. The issue was whether there was an intention to create a trust.

The Court of Appeal quoted Waters in *Law of Trusts in Canada* (2nd Ed.) at p. 31 that "the whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment". The Court stated that the creation of a trust does not require express words but may be inferred.

The Court reviewed the operating procedure and found that it reflected the confidence of the non-operators in Sorrel as operator and required Sorrel to keep them informed, account to them and generally act for their benefit. The Court noted that Sorrel was given wide powers to act for the non-operators in the control and management of the exploration, development and operation of the properties. The

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1. [1988] W.W.R. 232, 58 Alta. L.R. (2d) 193, 87 A.R. 133 (C.A.).

Court found that there was a fiduciary relationship between Sorrel and the non-operators.

The principal argument advanced by the appellant against the inference of a trust was based on clause 507 of the operating procedure, which expressly allows the commingling of funds received by the operator through the sale of the non-operators' share of production. However, counsel for the appellant was apparently unable to produce any authority for the proposition that the right to commingle conclusively negates a trust. The Court stated that the right to commingle is one feature which a court must consider in determining the true relationship between the parties but interpreted the commingling clause to be an administrative aid to the smooth implementation of the operating procedure and, when viewed in context, not to negative a trust relationship.

The Court distinguished the case from *M. A. Hanna & Co.* v. *Provincial Bank of Canada*[2] and *Henry* v. *Hammond*[3] because in each of those cases the holder of the funds was entitled to use funds for its own use which created a debtor-creditor relationship rather than a trust relationship. Sorrel's authority over the funds was restricted to the purposes of the operating procedure which, in general terms, were to act for the benefit of the non-operators.

The Court also held that clause 1501 of the operating procedure, which provides that the rights and obligations of the parties are several and not joint or collective, does not preclude the existence of a fiduciary relationship.

Société Général submitted that clause 605 of the CAPL Agreement, which provides for the payment of interest by the operator at the option of the non-operator if the operator fails to distribute revenue within ten (10) days of receipt, creates a debtor-creditor relationship and therefore precludes the existence of a trust. The Court did not accept that argument. It said that clause 605 is intended to cause revenues to be distributed forthwith so that no interest will be payable. This is, in fact, inconsistent with a debtor-creditor relationship which is designed to provide the opportunity for the creditor to earn interest.

The Court distinguished the Court of Queen's Bench decision in *Re Petroleum Royalties Ltd.*[4] on the basis that the CAPL agreement there under consideration (1974 version) did not include clause 605 and that what was being considered in that case was not the ownership of a fund of money but rather the ownership of the substances remaining in the ground. The Court also stated that the decision is open to question, in that the judge improperly relied on the decision in *Henry* v. *Hammond*.[5]

The Court concluded that Sorrel was at all material times in a fiduciary relationship with the non-operators and that the funds held by it were held in trust for the non-operators.

The Court rejected the argument that tracing was not available if there is an express right to commingle. The Court held that if a fiduciary obligation exists, the right to trace exists. Nothing is said as to any difficulties faced by the non-operators in this regard.

We understand that leave to appeal the decision to the Supreme Court of Canada is being sought.

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2. [1935] 1 D.L.R. 545 (S.C.C.).
3. [1913] 2 K.B. 515.
4. (1986) 45 Alta. L.R. (2d) 273 (Q.B.).
5. *Supra* n. 3.

B. *CANADIAN PACIFIC AIRLINES* v. *CANADIAN IMPERIAL BANK OF COMMERCE* [6]

This case is similar to the *Sorrel* case.[7] It involved funds received by travel agents upon sales of airline tickets. The agreements between the airline and the travel agents provided that the funds would be held in trust for the airline. However, in practice, the travel agents did not keep the funds in separate trust accounts but deposited them in their general operating accounts. The bank subsequently appropriated the funds in the operating accounts to settle debts of the travel agents.

The airline had to satisfy two requirements in order to recover the funds from the bank. First, the airline had to establish that the funds in the operating account constituted trust funds for the airline's benefit. Secondly, the airline had to show that such funds had been held by the bank as a constructive trustee.

The Court found that the three characteristics of a trust, certainty of intent, subject matter and object, existed. The intent was clear from the agreement which required funds to be held in trust. The subject matter was the funds. The object, or beneficiary, was the airline. The Court rejected the argument put forth by the bank that there was no certainty of subject matter because the travel agents were required to pay for the tickets regardless of whether their clients paid them. Further, that fact did not make the relationship between the travel agents and the airline a debtor-creditor relationship as opposed to a fiduciary relationship.

The Court found that the bank was a constructive trustee since it was aware of its customers' business and knew that most of the funds held in the operating account derived from sales of airline tickets in which the travel agents acted as agents for airline companies.

The Court allowed the airline to trace the funds because the bank knew that its customers' funds were derived from the sale of airline tickets as agents. Even though the funds were mixed with other funds legitimately belonging to the travel agents, the airline was entitled to trace them. The Court did say, however, that it reached that conclusion only after lengthy deliberation since the bank cannot be expected to be cognizant of the nature and source of all its customers' funds.

C. *MAUBACH* v. *BANK OF NOVA SCOTIA*;[8] *EDMONTON MOTORS LIMITED* v. *EDMONTON SAVINGS & CREDIT UNION LTD.*[9]

These two cases deal with the nature of a cheque which has been certified at the request of the drawer. It is commonly thought that such a certified cheque can be countermanded by the drawer and that the payee has no claim against the bank if the bank does not honour the cheque. There had previously been no Canadian decisions dealing with the point.

In *Maubach*,[10] a cheque which had been certified at the request of the drawer was lost by a courier. The Bank insisted that the drawer provide an indemnity before the Bank would issue a replacement cheque. The drawer contended that the indemnity

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6. (1987) 61 O.R. (2d) 233 (H.C.J.).
7. *Supra* n. 1.
8. (1987) 60 O.R. (2d) 189 (H.C.J.); 62 O.R. (2d) 220 (C.A.).
9. (1988) 58 Alta. L.R. (2d) 370 (Q.B.).
10. *Supra* n. 8.

was not necessary since the Bank could always refuse to honour the lost cheque if it was presented for payment. It was held by the Ontario High Court of Justice that certification of the cheque at the drawer's request does not constitute acceptance since acceptance can only occur after the cheque has been delivered to the payee. However, certification is similar to acceptance with the result that the drawee bank is liable to the payee. Once the cheque is certified, the drawee bank cannot honour the drawer's countermand. The decision was upheld on appeal to the Ontario Court of Appeal. The Court of Appeal stated that certification of a cheque by a bank is equivalent to acceptance.

In *Edmonton Motors*,[11] a cheque certified at the request of the drawer was delivered by the drawer to the plaintiff as payment for a truck. At the time of certification, there were insufficient funds in the drawer's bank account. However, at the time of certification, the drawer deposited in his account a cheque drawn on a South Carolina bank and payable to him in an amount sufficient to cover the certified cheque. The drawee bank had telephoned the South Carolina bank who confirmed that there were sufficient funds in the account upon which the South Carolina cheque was drawn to cover that cheque. Subsequently, the South Carolina cheque was dishonoured following which the certified cheque was presented by the plaintiff to the drawee bank for payment which was refused. The Master in Chambers found that the plaintiff would not have delivered possession of the truck to the drawer if the cheque had not been certified. The plaintiff had altered its position in reliance upon the certification. The Master referred to the trial decision in *Maubach* [12] (but not the decision of the Court of Appeal) and agreed that certification at the request of the drawer does not constitute acceptance. The Master stated, however, that by certifying the cheque, the drawee bank lends its credit to that of the drawer so that the drawee should not, without more, be able to unilaterally withdraw its credit. Accordingly, the bank was required to honour the cheque.

D. *HALLIBURTON SERVICES LTD.* v. *SNOWHAWK ENERGY INC.*;[13] *ALBERTA GOLD WELL SERVICING CORP.* v. *SNOWHAWK ENERGY INC.*[14]

Both of these cases deal with builders' liens filed against interests in mines and minerals and both arise out of the bankruptcy of Snowhawk Energy Inc.. The *Alberta Gold Well*[15] case involved a builders' lien filed pursuant to the Alberta Builders' Lien Act[16] against interests in a provincial crown lease of unpatented mineral rights. There were various co-owners of the lessee's interest in the lease, including Snowhawk. Snowhawk had been the operator of the well and Snowhawk had contracted Alberta Gold Well to provide services in connection with a well located on the lease. Alberta Gold Well had not been paid for such services as a result of which it had filed the builders' lien. One of the co-owners of the lessee's interest in the lease had made a settlement with Alberta Gold Well. Thereafter, Snowhawk became bankrupt. The trustee in bankruptcy obtained an order allowing it to operate the well, with net production sales proceeds to be held by the trustee pending determination of the plaintiff's lien claim. The Master found that the plaintiff had a valid lien on all oil

11. *Supra* n. 9.
12. *Supra* n. 8.
13. (1988) 57 Alta L.R. (2d) 258 (Q.B.).
14. (1987) 53 Alta L.R. (2d) 333 (Q.B.).
15. *Id.*
16. R.S.A. 1980, c. B-12, as am.

and gas within the ground and that which had been severed, except for the interest of the Crown. He found that the lien extended to the net sale proceeds held by the trustee. He ruled that the lessee's interest in the lease, excluding the interest of the co-owner who had settled, should be sold with the proceeds from such sale being applied to payment of the amount owing to Alberta Gold Well. Although it is not so stated, it would seem that the main issue in the case is whether the builders' lien covered the entire lessees' interest in the Crown lease or only the interest of Snowhawk.

In the *Halliburton* case, [17] the Court held that Halliburton's builders lien did not extend to proceeds from the sale of the severed production. The Alberta Builders' Lien Act[18] expressly covers interests in estates in mines and minerals and interests in minerals after severance from the land. However, the Act is silent with respect to revenues from the sale of severed minerals. The Act does, however, permit the lien holder to apply to the court for the appointment of a receiver of the rents and profits from the liened property. No such application had been made in the *Halliburton* case. The Court distinguished the *Alberta Gold Well* case on the grounds that in that case the sale proceeds had been acquired by the trustee in bankruptcy pending determination of the validity of the lien, whereas in the *Halliburton* case the proceeds had been paid into court pursuant to a garnishee summons prior to Snowhawk's assignment into bankruptcy.

E. *MOOSEJAW* v. *PULSAR VENTURES INC.*;[19] *BANK OF NOVA SCOTIA* v. *INTERNATIONAL HARVESTER CREDIT CORP. OF CANADA*;[20] *LEBLANC ESTATE* v. *BANK OF MONTREAL* [21]

These three cases deal with security granted pursuant to Section 178 of the Bank Act.[22] That section is very similar to Section 177 of the Bank Act[23] which permits a bank to take security over interests in oil and gas. These cases all deal with the effect of provincial legislation on Section 178 security.

In the *LeBlanc* case,[24] a farmer claimed that Saskatchewan provincial legislation protected his grain and machinery from being seized by a bank pursuant to Section 178 security. In the case of *Bank of Montreal* v. *Hall*, [25] the Saskatchewan Court of Appeal had ruled that the Saskatchewan Limitation of Civil Rights Act[26] was applicable to Section 178 security. The *Hall* case [27] was distinguished in *LeBlanc* [28] because the provincial legislation under consideration in *Hall* [29] only delayed the bank in realizing but did not deny the bank its remedy. In the *Leblanc* case [30] it was held that the Saskatchewan Exemptions Act[31] and Section 178 of the Bank Act[32] are expressly contradictory because the provisions of the Exemptions Act[33] would deny

17. *Supra* n. 13.
18. *Supra* n. 16.
19. 42 D.L.R. (4th) 385, [1988] 1 W.W.R. 250, 58 Sask. R. 224 (C.A.).
20. (1987) 35 B.L.R. 299 (Ont. H.C.J.).
21. [1988] 2 W.W.R. 147 (Sask. Q.B.).
22. S.C. 1980-81-82-83, c. 40, as am.
23. *Id.*
24. *Supra* n. 21.
25. 36 D.L.R. (4th) 523, [1987] 3 W.W.R. 525 (Sask. C.A.).
26. R.S.S. 1978, c. L-16, as am.
27. *Supra* n. 25.
28. *Supra* n. 21.
29. *Supra* n. 25.
30. *Supra* n. 21.
31. R.S.S. 1978 c. E.-14, as am.
32. *Supra* n. 22.
33. *Supra* n. 31.

the bank the right to enforce its security. The federal legislation is validly enacted since it relates to banking which is within federal jurisdiction. By virtue of the doctrine of paramountcy, the federal legislation must prevail. It was also argued by the farmer that the bank had expressly adopted the provincial legislation by virtue of having registered its Section 178 assignment pursuant to the Saskatchewan Personal Property Security Act.[34] The Court found no grounds or precedent for a determination that such registration constitutes an election by the bank to forego the protection of the Bank Act.[35]

The *International Harvester* case[36] involved a dispute between two creditors of a farmer as to the priority of their security. International Harvester claimed priority under a conditional sales contract and the Bank of Nova Scotia claimed priority under a Section 178 assignment. The conditional sales contract came into existence prior to the Section 178 assignment. Both the conditional sales contract and the Section 178 assignment were registered in accordance with the Ontario Personal Property Security Act,[37] the conditional sales contract having been registered before the Section 178 assignment. However, the registration by International Harvester omitted the middle initial of the individual who granted the conditional sales contract.

The Bank claimed that it was entitled to priority over International Harvester by virtue of the provisions of the Ontario Personal Property Security Act[38]. International Harvester argued that the Bank could not claim priority under the Personal Property Security Act[39] but was restricted to remedies available in the Bank Act[40]. The Ontario High Court of Justice found that the Ontario Personal Property Act[41] was not inconsistent with the Bank Act[42] nor did it render the provisions of the Bank Act[43] inoperative. Section 178 security is a "security interest" as defined in the Personal Property Security Act.[44] There is nothing in the Bank Act,[45] the Personal Property Security Act[46] or elsewhere which forecloses the Bank from seeking to perfect its security interest under provincial law and thereafter calling in aid the priority scheme and enforcement provisions thereof. However, in doing so, the Bank would stand in no different nor better position than would any other creditor with equivalent priority of claim. Both claimants had registered under the provincial chattel security law and it should be under that law that their claims to priority should be resolved. International Harvester's security interest was not perfected because the failure to include the middle initial of an individual grantor of security in the filing renders the filing void. Accordingly, the Bank had priority.

It is submitted that the *International Harvester* case[47] is incorrectly decided. The bank can take security under Section 178 only to the extent permitted by the Bank Act.[48] Section 178 of the Bank Act[49] provides that the bank takes security over

34. S.S. 1979-80, c. P.-6.1, as am.
35. *Supra* n. 22.
36. *Supra* n. 20.
37. R.S.O. 1980, c. 375, as am.
38. *Id.*
39. *Id.*
40. *Supra* n. 22.
41. *Supra* n. 37.
42. *Supra* n. 22.
43. *Id.*
44. *Supra* n. 37.
45. *Supra* n. 22.
46. *Supra* n. 37.
47. *Supra* n. 20.
48. *Supra* n. 22.
49. *Id.*

property that is owned by the grantor of the security at the time that the Section 178 assignment is made. In the *International Harvester* case, at the time that the Section 178 assignment was made, the grantor's interest was subject to the security interest of International Harvester.

The *Pulsar Ventures* case[50] also involved a competition between Section 178 security and a conventional security interest. The borrower had made a Section 178 assignment in January 1984 and a second assignment in January 1985, both of which secured a line of credit. Both assignments were registered pursuant to the Saskatchewan Personal Property Security Act.[51] After the first Section 178 assignment was registered and prior to the second Section 178 assignment being made, the borrower granted a security interest to Campro. Campro contended that the second Section 178 assignment voided the first one. The Saskatchewan Court of Appeal stated that although a Section 178 assignment was a "security interest" for purposes of the Saskatchewan Personal Property Security Act,[52] the provisions of the Bank Act govern disputes between Bank Act security and other security interests.[53] If the Bank Act[54] provides for priority, directly or by implication, then that provision will govern notwithstanding that it is in conflict with the provincial scheme of priorities. The Court of Appeal stated that there was no basis for deciding that by registering a Section 178 security interest under the provincial legislation, the bank should be deemed to have elected to proceed under that regime and to have given up its rights under the Bank Act.[55] In any event, the amount owing to the bank arose from the line of credit secured by the first Section 178 assignment. There was no evidence that further advances had been made after the second Section 178 assignment. Since the first Section 178 assignment was prior in time and in registration to the Campro interest, the first Section 178 assignment had priority.

F. *BANK OF MONTREAL* v. *DOME PETROLEUM LTD.*[56]

Dome and Amoco had entered into an arrangement agreement which provided for the acquisition by Amoco of all of the shares of Dome pursuant to an arrangement under the Canada Business Corporations Act.[57] The implementation of the arrangement was conditional upon the consent of all secured creditors of Dome, including Bank of Montreal. It was a term of the arrangement agreement that Dome would not seek or encourage other offers to purchase its shares for a period of time. The arrangement agreement also provided that if the arrangement was not implemented, Amoco would have an option to purchase certain properties from Dome for a price which was stated to be the fair market value of such properties.

Prior to entering into the arrangement agreement, Dome had discussions with two other parties concerning their possible acquisition of Dome. In connection with such discussions, such parties entered into confidentiality agreements with Dome.

Bank of Montreal applied under section 234 of the Canada Business Corporations Act[58] to set aside the "no shop" and option provisions of the arrangement agreement

50. *Supra* n. 19.
51. *Supra* n. 34.
52. *Id.*
53. *Supra* n. 22.
54. *Id.*
55. *Id.*
56. (1987) 54 Alta. L.R. (2d) 289 (Q.B.).
57. S.C. 1974-75 c. 33, as am.
58. *Id.*

and to vary or set aside the confidentiality agreements. The bank's application was dismissed.

The Court ruled that, as a creditor, the bank was entitled to bring the application. However, the bank was required to establish that the acts of Dome were oppressive, or unfairly prejudicial to, or unfairly disregarded the interests of the bank.

The Court found that there was no evidence of any *mala fides* or lack of probity on the part of Dome management in entering into the arrangement agreement. The bank had not been deprived of any remedies which it had prior to the arrangement agreement. It was premature to consider the bank's contentions that the purchase price payable upon exercise of the option by Amoco was less than the fair value or that such sale required the bank's consent. Those issues could be considered if and when the option was exercised.

II. CONTRACTS

A. *PETROGAS PROCESSING LTD.* v. *WESTCOAST TRANSMISSION COMPANY LIMITED* [59]

In this case, it was held that the imposition of regulated prices paid for natural gas resulted in the termination of a gas purchase contract by virtue of the application of the doctrine of frustration.

The gas purchase contract was entered into in 1959. The contract contained a schedule of prices payable for gas delivered during the term thereof and also provided for redetermination of such prices by negotiation or arbitration. Between 1971 and 1975, the price was redetermined by arbitration once and by agreement twice. The gas purchase contract contained a take-or-pay provision whereby the purchaser was required to pay for a minimum volume of gas each year. In the 1970's, Canadian federal legislation[60] and Alberta provincial legislation[61] was enacted which had the effect of prescribing the price payable for natural gas sold pursuant to the gas purchase contract after 1975. Such price was substantially in excess of the price stipulated in the contract.

Petrogas brought the present action claiming that the volumes of gas purchased by Westcoast during 1978 and subsequent years was substantially below the minimum volumes prescribed by the contract and requesting an order that Westcoast make take-or-pay payments equal to the price payable for the deficiency volumes for such years. Westcoast contended that the contract had been frustrated by the legislative imposition of prices and that it was relieved of all of its obligations under the contract upon the imposition of the pricing regulations, including the obligation to pay for minimum annual volumes. Westcoast also raised other defences but these were not dealt with in the judgment.

The Trial Judge reviewed the law relating to frustration of contracts. Frustration of a contract arises when an event occurs, without the default of either party to the contract and for which the contract makes no provision, which so significantly changes the nature, although not merely the expense or onerousness, of the outstanding contractual rights and/or obligations from that which the parties could reasonably

59. [1988] 4 W.W.R. 699, 59 Alta. L.R. (2d) 118 (Q.B.).
60. Petroleum Administration Act, S.C. 1974-75-76, c. 47 (now the Energy Administration Act).
61. Natural Gas Pricing Agreement Act, S.A. 1975 c. 38 and Natural Gas Price Administration Act, S.A. 1975 c. 70.

have contemplated when the contract was executed that it would be unjust to hold them to the contract. It is not merely hardship or inconvenience or material loss which gives rise to the application of the doctrine. There must be such a change that the obligation would, if performed, be a different thing from that which was contracted for.

The Courts have recognized that supervening illegality or a change in law will frustrate a contract. The change must not be temporary or trifling and must not have been foreseen or provided for in the contract.

The imposition of price regulation rendered a material term of the gas purchase contract, namely the price to be paid for the gas sold pursuant thereto, illegal. The change was not temporary or trifling. The change had not been foreseen by the parties since, when the contract was entered into, price regulation was not contemplated. Petrogas argued that the hazard of government interference was accepted by Westcoast by virtue of a clause in the contract which provided as follows:

> This contract, and the respective obligations of the parties hereunder, are subject to present and future valid laws and valid orders, rules and regulations of duly constituted authorities having jurisdiction.

That clause was held to be merely an acknowledgement by the parties that they would discharge their obligations in a lawful manner. It could not be interpreted as a promise to fulfill obligations other than those spelled out in the contract. It could not be invoked to compel a contracting party to carry out a contract which it did not make.

The Court also rejected the argument that the contract was not rendered illegal because the legislation did not prevent the sale and purchase of gas but merely regulated the price to be paid. The Trial Judge held that it is not necessary that every term of the contract be rendered illegal, it is sufficient if a material term cannot be performed.

Frustration is also applicable when an event occurs which makes the performance of a contract a thing radically different than that which was contemplated by the parties when the contract was made. The Trial Judge found that such circumstance also occurred in the present case. Substantially all of the gas purchased pursuant to the contract was exported by Westcoast to the Pacific Northwest region of the United States. The Trial Judge found that such market is particularly sensitive to price and that the artificially high export price which Westcoast was required to charge by virtue of the pricing regulations was a direct and primary cause of a loss of markets for Canadian gas in that area. Westcoast's inability to take minimum volumes under the gas purchase contract was directly caused by the impairment of such markets. The price regulations were imposed in 1975. In 1978, for the first time since the contract was made in 1959, Westcoast failed to take delivery of the minimum annual volume required under the contract. As a result, the imposition of price regulations made performance of the contract radically different than that which the parties had originally undertaken. It destroyed the commercial basis upon which the contract was founded and it would be unjust to hold Westcoast to its take-or-pay obligations in circumstances where the complimentary provisions of the contract relating to price had been rendered inoperative. Westcoast was unable to place itself in the position of satisfying its minimum obligations which it could have done had it been able to resell the gas at lower prices, which had been contemplated by the parties when the contract was made.

Petrogas argued that Westcoast was estopped from claiming that the contract had been frustrated since Westcoast continued to purchase gas pursuant to the contract until 1986 and did not allege that the take-or-pay provisions had been frustrated until 1982, even though the frustrating event occurred in 1975. Deliverability tests were initiated by Westcoast pursuant to the contract in 1983 and 1985 and Westcoast delivered *force majeure* notices pursuant to the contract in 1981 and 1982. The Trial Judge stated that the conduct of a party to a contract which has been discharged by frustration cannot be raised to estop him asserting that it was discharged. That would, in effect, revive a dead contract by estoppel. The operation of the doctrine of frustration does not depend upon the conduct of the parties or their intentions. In any event, Petrogas had not changed its position in reliance upon the conduct of Westcoast, so estoppel did not apply.

B. *TRIMAC LTD* v. *C-I-L. INC.*[62]

C-I-L and Trimac each owned 50% of the shares of Tricil Limited. They had entered into a shareholder agreement which contained a right of first refusal clause and a shotgun buy-sell clause. The shotgun buy-sell clause provided that one party could offer to purchase all the shares of the other party, in which event the other party was required to either accept the offer or purchase the offeror's shares on the same terms.

Trimac entered into discussions with a third party concerning the possible sale of Trimac's shares, as a result of which the third party made a written offer to both C-I-L and Trimac to purchase all of their shares for $122,500,000 . C-I-L took the position that the written offer triggered the right of first refusal clause in the shareholder agreement with the result that C-I-L had the right to purchase Trimac's shares for $61,250,000.

Thereafter, Trimac made an offer, pursuant to the shotgun buy-sell clause, to purchase C-I-L's shares for $91,000,000 . C-I-L responded with a written notice to Trimac that, pursuant to the buy-sell clause, C-I-L "will purchase all of Trimac's shares ... C-I-L believes that it is entitled to purchase all of Trimac's shares for less than $91,000,000 and has accordingly brought a motion for summary judgment and other relief ... on closing C-I-L will therefore pay to Trimac $91,000,000, in return for the Trimac shares in Tricil, or such other sum as, by that time, has been determined by the Supreme Court of Ontario to be the amount payable for such shares".

C-I-L sought a declaration that it had validly exercised its rights under the buy-sell clause to purchase Trimac's shares.

The Chambers Judge held that the notice from C-I-L was not unconditional. The test to be applied in determining whether an acceptance is unconditional is whether a reasonable person in the position of the offeror would regard the purported acceptance as introducing a new term into the bargain and not as clear acceptance of the offer. He was satisfied that a reasonable person in Trimac's position would properly regard C-I-L's purported acceptance as introducing a new term into the bargain.

The Court of Appeal sustained the decision of the Chambers Judge. The Court of Appeal stated that C-I-L attempted to take two different positions in its written notice; first that it accepted the offer and secondly, that it did not need to accept the offer. The Court of Appeal noted that if C-I-L had said in its notice that it reserved the right to

62. [1987] 4 W.W.R. 719, 52 Alta. L.R. (2d) 263, 79 A.R. 378 (Q.B.); [1987] 6 W.W.R. 66, 53 Alta. L.R. (2d) 97 (C.A.).

claim a set-off of the purchase price against pending damage claims, C-I-L might have properly exercised its right under the shotgun clause to purchase the shares. The Court of Appeal amended the judgment of the Court of Queen's Bench to provide that the entitlement of Trimac to the C-I-L shares was subject to any further order about other issues pending between the parties in the suit. Thus, C-I-L preserved its right to pursue its claim that Trimac breached the right of first refusal clause contained in the shareholder agreement.

C. *PASSBURG PETROLEUMS* v. *SAN ANTONIO EXPLORATIONS LTD.*[63]

The plaintiff and the defendants were parties to a 1981 CAPL Operating Procedure governing operations in respect of an oil and gas lease jointly owned by them. The plaintiff was the operator. The plaintiff had proposed the drilling of a well. The defendants executed an authority for expenditure in respect of the well. The well was directionally drilled, although the plaintiff had not indicated, in the authority for expenditure or otherwise, that such would be the case. The well was dry and abandoned. The directional drilling resulted in the costs of the well being in excess of what such costs would have been if the well had not been directionally drilled. The defendants denied liability for the additional costs and the Court ruled in their favour. There was no evidence that directional drilling occurred so frequently that the defendants should have expected same. In fact, evidence suggested the contrary. By accepting the authority for expenditure, the defendants had agreed to pay the costs of a conventionally drilled well, even if such costs exceeded the estimates contained in the authority for expenditure. However, they did not agree to pay the costs of the directionally drilled well and therefore had no obligation to pay the additional costs.

D. *HAMILTON BROS. CORP.* v. *ROYAL TRUST CORP. OF CANADA*[64]

The plaintiff had sold oil and gas properties to the defendant reserving a royalty. The royalty terminated when the total royalty payments equaled a specified sum. The royalty entitled the plaintiff to a percentage of gross revenues from the sale of production after deduction of "burdens". The issue in the case was the effect of certain credits and deductions permitted in the calculation of petroleum and gas revenue tax ("PGRT").

The term "burdens" was defined in the Royalty Agreement as follows:

> "burdens" means all deductions, taxes (excluding income taxes), charges and payments payable to the Crown in the right of Canada or any of its provinces in respect of the ownership, production or sale of petroleum substances ...

The royalty was created in 1979. In 1980, PGRT was introduced. The royalty owner agreed that PGRT was a burden for purposes of the Royalty Agreement and the royalty was calculated on that basis.

The PGRT legislation permitted the defendants to deduct, in computation of their PGRT liability, an amount on account of their general and administrative expenses in relation to the production in respect of which the PGRT was payable. Further, commencing in 1982, the defendants were permitted a credit against the PGRT otherwise payable by them. Neither such deduction nor such credit had been taken into account in determining the amount of PGRT for purposes of calculating royalty payments.

63. [1988] 2 W.W.R. 645, 57 Alta L.R. (2d) 57 (Q.B.).
64. (1987) 54 Alta. L.R. (2d) 330 (Q.B.).

It was held that both the deduction and the credit should be taken into account. The defendants argued that the deduction and credit were matters extrinsic to the properties and therefore not accountable on the calculation of the royalty. That argument was rejected. It was held that the taxes to be considered in calculating burdens are those taxes actually payable to the Crown.

The defence that the plaintiff's action was for recovery of money paid under a mistake of law was also rejected. It was held to be an action to recover the balance owing on the royalty. In any event, the legislation relating to the credits was not enacted until 1984, although it was announced in 1982 and applied thereafter. The plaintiff could not have made a mistake in law when it did not take the credit into account in computing the royalty since it could not know the terms of the law. The plaintiff did not take into account the deduction when computing the PGRT because the plaintiff had thought that the deduction would have a negligible impact on the royalty payment. Thus, the plaintiff had not made a mistake in law as to its entitlement to take the deduction into account.

The defendants had also argued that the plaintiff was estopped from raising its claims because the plaintiff had prepared the royalty statements. That contention was rejected because the preparation of the statements was a joint obligation of the plaintiff and the defendants. Further, it was not reasonable for the defendants to rely on the statements. In any event, the defendants had not suffered a detriment by relying on the statement.

E. *GULF CANADA LTD* v. *WRM RESOURCES LTD.*[65]

The parties entered into three agreements whereby Gulf agreed to transport, process and treat WRM's gas in Gulf's facilities. The plaintiff claimed fees were owing under the agreements. The defendant counterclaimed for amounts alleged to have been overpaid and for damages arising out of the plaintiff having refused to accept the defendant's gas thus, effectively, shutting-in the defendant's well.

The fees payable under the agreements were calculated by reference to actual operating costs, the ratio of the volume of the defendant's gas to all gas handled in the facilities and other factors.

The agreements provided for the payment of interim fees based on estimated volumes and operating costs. The agreements further provided that Gulf would re-calculate the fees when the actual volumes and costs were known and an adjustment would be made to reflect the difference between the interim fees and the actual fees.

The actual fees greatly exceeded the interim fees. The factor cited as the cause for these increases was the dramatic reduction in demand for natural gas in 1982 and thereafter, which caused a substantial decline in throughput.

The first defence raised by the defendant was that the agreements were so uncertain as to be unenforceable and that the parties lacked consensus in respect of the fees to be paid.

The Court held that the agreements were sufficiently certain and did not demonstrate any lack of consensus concerning the method for fixing fees. The agreements clearly stated that the fees referred to therein were interim and that they were to be adjusted. In each case, the agreements provided machinery for determining actual fees. It was not necessary that the actual fees be specified.

65. (1987) 54 Alta. L.R. (2d) 360 (Q.B.).

The Court noted that there was no incentive for Gulf to fix an interim fee which was unreasonably low. The Court also noted that ,while the defendant had no influence in setting the interim fees, it did not seek any information from Gulf as to the basis upon which they were set when the agreements were signed.

The defendant apparently entered into the agreements in the belief that the interim fees were realistic and that adjustments would be within a reasonable, *i.e.* 10% to 20%, range. The defendant alleged that both parties made a mistake. The Court found that there was no mistake as to the terms of the agreements at the times they were executed. An incorrect assumption as to future events is not a mistake of the nature which can invalidate an otherwise valid agreement.

The Court dismissed the defendant's counterclaim for damages against the plaintiff for shutting-in the well. The agreements gave Gulf the right to discontinue handling the defendant's gas in the event of non-payment of fees. The Court rejected the defendant's argument that the right to shut-in the well amounted to a penalty. Gulf should be entitled to withhold its services if the defendant refuses to pay for them.

Gulf's claim for interest on the unpaid fees points out the difficulties in calculating interest in circumstances where interim fees and retroactive adjustments are billed and made. The Court awarded Gulf interest pursuant to the Judgment Interest Act from January 1, 1986.

F. *L.K. OIL & GAS LTD.* v. *CANALANDS ENERGY CORPORATION* [66]

Commencing in May, 1981, L.K. Oil & Gas Ltd. ("LKOG") and Canalands had discussions about Canalands' possible participation in LKOG's 1981 exploration programs including the Sooner Trend in Oklahoma. In July, LKOG made a letter offer to Canalands. This letter contained an estimate of costs and revenues of the Sooner Trend project and a report as to the status of drilling activities of the project.

In July and August, Canalands and its consultants reviewed the programs with assistance from LKOG. LKOG referred Canalands to the operator of the Sooner Trend project for current production specifics. The operator refused to provide any information to Canalands.

In late August and early September, additional discussions took place between LKOG and Canalands and on September 10, Canalands advised LKOG that it agreed to the final oral proposal. On September 15, LKOG sent an agreement to Canalands. A meeting was held on September 22 at which a full report on the projects was submitted to Canalands.

In early October, the Sooner Trend project was reduced from 44 wells to 33 wells because one of the participants in the project wished to withdraw. In connection therewith, the operator of the project prepared an updated report which was received by LKOG on October 9.

The agreement between LKOG and Canalands was executed on October 23. LKOG brought this action for payment of Canalands' share of outstanding costs. Canalands counterclaimed claiming misrepresentations about the Sooner Trend project in the July 14 letter and in the failure of LKOG to advise Canalands of the reduction in the program prior to execution of the agreement or, alternatively, a breach of an express or implied term of the agreement that LKOG manage the program, including the Sooner Trend project, properly.

66. (1987) 52 Alta. L.R. (2d) 407 (Q.B.).

There was no misrepresentation in the July 14 letter. LKOG had relied on forecasts made by the operator of the Sooner Trend project which it accepted because it knew of the operator's track record and his experience. Further, the statements were accurate estimates when made.

In any event, Canalands did not rely on the statements in the July 14 letter. It knew that LKOG had not done its own analysis. It did not pursue more data when the operator refused to disclose information to it. It is self-evident that the status report would be outdated by September. It did not require up-to-date information in September.

There was no misrepresentation about the reduction in the Sooner Trend project. The request by one of the participants in the project to withdraw was disclosed in the September 22 meeting. The reduction in the program and receipt of the updated report did not occur until after the agreement was entered into, which was held to be at the September 22 meeting and not on October 23 when the agreement was executed.

LKOG was not guilty of mismanagement. It was not the operator of the project and it discharged its obligations as well as it could.

The Court noted that Canalands did not raise any objections to LKOG's conduct until LKOG sued it to recover the outstanding costs.

The plaintiff's claim was upheld and the defendant's counterclaim dismissed.

G. *PALOUSE HOLDINGS LTD.* v. *CHANCELLOR ENERGY RESOURCES INC.*[67]

The plaintiff claimed to be entitled to an option to purchase shares of the defendant and to a "promoted interest" in prospects brought to the defendant by the plaintiff. The promoted interests were the promotions which the defendant obtained in farmouts to other parties.

There was a consulting agreement between the parties which called for the defendant to pay a fixed monthly fee to the plaintiff and to provide the plaintiff with office space and facilities. The plaintiff was obliged to offer all prospects which it generated during the term of the agreement to the defendant. If the defendant participated in a prospect it would have the right to acquire a working interest in the prospect in exchange for a gross overriding royalty and a cash payment. The agreement made no reference to promoted interests or to an option to purchase shares.

A resolution of the directors of Chancellor appeared to provide the only written evidence of the share option. The resolution appointed Palouse's principal as vice-president of Chancellor and stated that, as such, he qualified for share options as previously approved by the board.

The Court concluded that a share option had been granted to the principal of the plaintiff as agent for the plaintiff and that it had been repudiated by the defendant. The plaintiff's damages were equal to the difference between the trading high of the shares and the option price, multiplied by the number of shares covered by the option.

Since the promoted interest was not dealt with in the written agreement, it fell to the plaintiff to establish that there is an industry practice in these circumstances that "promotes" always belong to the consulting geologist. The Court held that this was not the industry practice when the geologist is receiving monthly compensation,

67. Unreported, 2 March 1988, J.D. of Calgary, No. 8601-13918 (Alta. Q.B.).

parking, overhead plus an override and other fees on a prospect by prospect basis. Evidence of custom and usage is admissible to annex incidents to an agreement or to imply terms which the parties omitted but which because of the particular industrial custom or usage they mutually understood to be applicable. Such evidence is not admissible if it varies or contradicts the term of the document and it will not be considered as an aid to construing the agreement unless the custom or usage is "notorious, certain and reasonable".

H. *PECUNEX OIL & GAS PARTNERSHIP* v. *PETRO-INFO LTD.*[68]

The defendant agreed to perform "prospect analysis" for the plaintiff in respect of oil and gas prospects in the U.S.. The defendant was to recommend drilling prospects if estimated future revenues equalled three times estimated capital requirements and would allow for payback in not longer than five years.

The plaintiff argued that the defendant recommended drilling prospects which did not meet the established criteria and that it ought to have recommended other prospects which were more profitable than some of the recommended prospects. Experts testified on behalf of both parties. The Court found, on the basis of the expert evidence called by the defendant, that the investment criteria had been met.

The Court concluded that the defendant had exercised the same degree of skill and care as other reasonably competent prospect evaluators would have exercised in similar circumstances. The Court noted that the mere existence of opinion to the contrary does not, in and of itself, mean that the defendant was negligent, and that an error in judgment would not constitute evidence of negligence.

I. *MONASHEE PETROLEUMS LTD.* v. *PAN CANA RESOURCES LTD.*[69]

Twelve issues were raised in this appeal, of which only two merit discussion in this paper.

Among other things, the plaintiff sought damages arising from the defendant's failure to provide regular accounting statements of its operations as required by the terms of the contract between them. The missing statements were eventually supplied to the plaintiff. The Court of Appeal sustained a ruling of the trial judge that the damages arising from this breach of contract were nominal. The breach did not go to the root of the contract and thus did not disentitle the defendant to the benefits of the contract but merely gave rise to action in damages, which were nominal.

The plaintiff had been granted an option to purchase an interest in certain oil and gas leases when the following event had occurred:

> recovery by it [the defendant] from production from the demised rights of its cost of acquisition ... and all subsequent drilling, completing and operating costs ... together with interest on the declining balance on such costs (costs being actual costs from time to time incurred, less revenue as it is received)...

The defendant contended that interest was not to accrue on acquisition costs. The option was triggered when all costs had been recovered, including acquisition costs, so that it was likely that interest was to accrue on all costs. Further, there was no reason why interest should not accrue on acquisition costs but should accrue on other costs. Accordingly, the Court of Appeal found in favour of the plaintiff with respect to the interest issue.

68. (1987) 52 Alta. L.R. 422 (Q.B.).
69. (1988) 85 A.R. 183 (C.A.).

III. FIDUCIARY DUTIES - PARTNERSHIPS

A. *INTERNATIONAL CORONA RESOURCES LTD.* v. *LAC MINERALS LTD.*[70]

Corona began exploring for gold in the Hemlo area of Ontario in the early 1980's. Lac approached Corona with a view to participating in Corona's activities. Lac subsequently acquired mining claims, known as the Williams' claims, that adjoined Corona's claims; Corona sued Lac in connection therewith.

The trial decision[71] held that the discussions between Lac and Corona did not result in the formation of a joint venture or a partnership or the creation of a contract. However, they created a fiduciary relationship and an obligation of confidence, both of which were breached by Lac. Lac was ordered to convey the Williams' claims to Corona upon payment by Corona equal to the expenditures by Lac in acquiring and developing the Williams' claims.

The Ontario Court of Appeal upheld the trial judgment.

The decision turns on activities which occurred in the spring and summer of 1981. Gold had been discovered in Hemlo in 1929. Although there had been sporadic activities prior to 1981, there was not much interest in the area when Corona acquired 14 claims in September, 1980. Between that time and February, 1981, Corona conducted preliminary exploratory drilling on its property and developed a new geological theory about the gold deposits in the area. Corona publicized its activities, including assay results in the spring of 1981. It also made efforts to secure a partner to finance development of the prospect. Having learned of Corona's activities, Lac contacted Corona with a view to participating in the play in some fashion. Discussions between Corona and Lac took place in the spring and summer of 1981. Corona provided Lac with information concerning the prospect and permitted Lac to examine Corona's claims. During this time, Corona made efforts to acquire the Williams claims which efforts were disclosed to Lac. After learning of such efforts, Lac, without talking to Corona, made a competing offer to purchase the Williams' claims, which was accepted.

Following commencement of the lawsuit, Corona sold one-half of its interest in the litigation to Teck Corporation.

There are three elements to a breach of confidence action:

1. Confidential information must have been communicated by the plaintiff to the defendant.
2. The information must have been communicated in circumstances in which an obligation of confidence existed.
3. There must have been unauthorized use of the information by the defendant to the detriment of the plaintiff.

Much of the information about Hemlo was in the public domain. It had long been known that there was gold in the Hemlo area. Corona, itself, had published information concerning the results of its activities in compliance with rules of the Vancouver Stock Exchange and in efforts to obtain financing for future development. Corona did not expressly advise Lac that the information which it provided to Lac was confidential. Lac did not execute a confidentiality agreement.

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70. (1987) 62 O.R. (2d) 1 (C.A.).
71. (1986) 25 D.L.R. (4th) 504, 9 C.P.R. (3d) 7, 32 B.L.R. 15, 39 R.P.R. 113, 53 O.R. (2d) 737 (H.C.J.).

Corona provided Lac with some information which had been not made public and which was confidential. The confidential information consisted of core samples, logs, the explanation of Corona's geological theory and, most important, information that Corona was pursuing the Williams' property. There was expert evidence that an experienced geologist would not confirm the potential of a mining claim without examining core samples. Even to the extent that the information provided to Lac only confirmed public knowledge, it was valuable because it was new. Even though it was obvious that the Williams' claims should be acquired and was recommended in a report which Corona had made public, the fact that Corona was endeavouring to acquire the Williams' claims was not known and was valuable. Even though some of the information was public in differing forms, the total package was not in the public domain.

The information was transmitted to Lac during negotiations towards a joint venture or similar arrangement. Such negotiations give rise to an obligation of confidence, even though the parties did not reach agreement and no joint venture was ever formed.

Corona did not authorize Lac to pursue the Williams' claims. The confidential information was useful to Lac in acquiring the Williams' property and, but for Lac, Corona would have acquired the property.

Accordingly, the elements of a breach of confidence action were established.

The Court of Appeal also agreed with the Trial Judge that Lac owed a fiduciary duty to Corona, which had been breached. Fiduciary relationships arise in a variety of circumstances, such as a trustee-beneficiary relationship or where one person reposes trust in another. Examples of the latter are partnerships and joint ventures. The Courts have found that a fiduciary relationship may exist between intended partners or joint venturers before the partnership or joint venture has been created, even though the intended partnership or joint venture never comes into existence. The Court found that in the mining industry, there is a practice that imposes an obligation on parties who are seriously negotiating a joint venture not to act to the detriment of each other. A fiduciary relationship may not arise in all cases where persons are negotiating with respect to an intended partnership or joint venture, but it would seem that it will usually arise in the mining business. There is judicial precedent for special treatment of persons engaged in negotiation or participation in mining partnerships. The joint geochemical program indicated that the parties considered themselves involved in a joint undertaking. There was a fiduciary duty owed by Lac to Corona not to act to Corona's detriment and Lac had breached that duty.

The Court of Appeal stated that a variety of remedies may be awarded for a breach of a fiduciary duty. Once it is established that a fiduciary relationship existed and that the fiduciary obtained property as a result of a breach of such fiduciary obligation to the detriment of the other party, then the fiduciary becomes a constructive trustee of the property for the benefit of the other party.

The measure of damages for a breach of a fiduciary duty is not necessarily the same as in cases of tort or breach of contract. The Court does not necessarily seek to assess the loss suffered by the plaintiff but compels the fiduciary to account to the plaintiff for the benefit which the fiduciary has obtained through the breach of its duties. Lac had obtained ownership of the Williams' claims through breach of its fiduciary duty. The most effective way of making Lac account for that gain was to impose a constructive trust over the claims in favour of Corona.

The Court of Appeal noted that it would be very difficult to determine the monetary damages which had been suffered by Corona, having regard to fluctuations in the price of gold, exchange rates and other matters. Although mere difficulty in assessing damages is not grounds upon which a Court will refuse to do so, in this case it was a reason for imposing a different remedy.

The Court of Appeal also found that there was no unreasonable delay by Corona which would bar its entitlement to relief. The action was commenced shortly after Corona learned of the acquisition of the Williams' claims by Lac. It is not surprising that the litigation was lengthy, having regard to the complexity of the issues and the value of the property involved. Corona did not wait until Lac had developed the property before it commenced its action. Lac was aware of Corona's claim before establishing a mine on the Williams' property.

Lac submitted that, in any event, Lac and Corona should share the Williams' claims since Corona also had a fiduciary duty to Lac. The Court of Appeal found that Corona's fiduciary obligations were discharged by Lac's breach.

The fact that Lac owed no duty to Teck and that Teck would obtain a substantial benefit from the judgment is irrelevant.

The Court of Appeal ruled that the obligation to retain a confidence is an equitable obligation. Imposition of constructive trust is a remedy available in the event of a breach of an equitable obligation. It was an appropriate remedy for wrongful use of confidential information in this case since Corona would have acquired the Williams' claims but for the breach of confidence. It is not necessary that the confidential information be the sole reason for the acquisition of the property. If the confidential information was material in the sense that it is not likely that the defendant would have acquired the property without it, a constructive trust may be imposed.

Corona was required to reimburse Lac for the value of the improvements made by Lac to the Williams' claims. Section 37(1) of the Conveyancing and Law of Property Act[72] provides, in part, as follows:

> Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements...

The Court of Appeal disagreed with the factual findings of the Trial Judge and found that Lac did not honestly believe that it was the true owner of the property at the time the improvements were made because it had knowledge of Corona's claim. However, the liability of Lac to transfer the property to Corona arises out of a constructive trust to effect restitution. The Court can refuse full restitution where it would be inequitable. The principles of equity should not be employed to create an unjust enrichment. As a result, Corona was required to reimburse Lac for the costs incurred by Lac in developing the Williams claims.

B. *AYDELOTTE* v. *SECURITY PACIFIC NATIONAL BANK*[73]

The plaintiffs were limited partners in limited partnerships established in 1971 and 1972, promoted by Great Basins Petroleum Co. The defendant bank was the trustee of a liquidating trust established upon the commencement of the liquidation of Great Basins.

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72. R.S.O. 1980, c. 90, as am.
73. (1987) 55 Alta. L.R. (2d) 248, 82 A.R. 241 (Q.B.).

In 1981, after having caused a subsidiary to be substituted as general partner of the partnerships, Great Basins sold all of its Canadian assets, including the shares of the Canadian general partner, to United Canso Oil & Gas Ltd.

One of the provisions of the agreement between Great Basins and United Canso provided as follows:

> 8.01 The Purchaser hereby covenants and agrees with the Vendor that it shall, within one (1) year from the date of closing of the within transaction, make an offer to purchase for cash all or any of the interests of the Limited Partners in those two Limited Partnerships, 1971 Great Basins Exploration and Development Program and 1972 Great Basins Exploration and Development Program. The price to be offered by the Purchaser for the interests of the Limited Partners shall be comparable, subject to adjustment for production from the lands in question, to the price used to determine the value of the shares of [Great Basins] Minerals Ltd. in the within transaction.

The plaintiffs argued that Great Basins was obliged to ensure that an equivalent offer was made to the plaintiffs for their units in the limited partnerships. The plaintiffs alleged that by taking the benefit of the sale agreement without having made this opportunity available to the limited partners, Great Basins breached its fiduciary duty to them. More specifically, they alleged that Great Basins had a conflict of interest and that by entering into the sale agreement it acted only in its own interest, appropriating the opportunity to make the sale without ensuring equivalent provision for the limited partners.

The defendant Bank, as trustee of the liquidating trust, had commenced a separate action in 1983 against Canso seeking specific performance of Section 8.01 of the Sale Agreement.

The defendant Bank conceded that Great Basins Petroleum Co. owed a fiduciary duty to the limited partners. The real issue was the scope of those duties.

The Court reviewed the partnership agreements. The general partner had the obligation to utilize the funds raised in the public offering in accordance with the provisions of the agreements, to develop reserves for the common benefit of the partners, to market those reserves and to account for revenue and to ensure that the partnership's assets were properly maintained and managed. There was no suggestion that any of those duties were not properly discharged.

The partnership agreements did not impose a duty on the general partner to obtain an equivalent opportunity to that obtained under the agreement with Canso.

The Court concluded that Great Basins had acted properly throughout. The defendant's fiduciary duties were defined and limited by the terms of the partnership agreements, which did not require the general partner to provide the limited partners with an equal opportunity to sell their partnership units.

C. *MOLCHAN* v. *OMEGA OIL & GAS LTD.*[74]

This was an appeal from a decision of the Alberta Court of Appeal[75] that a general partner of a limited partnership had the authority to sell all of the non-producing lands of the partnership to the general partner's parent.

The limited partnership had capital consisting of 60 units. Pursuant to an offer to all limited partners, the general partner's parent acquired all of the limited partnership units except Molchan's unit. Thereafter, the general partner caused the limited partnership to sell all of its non-producing lands to the parent for cash.

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74. [1988] 3 W.W.R. 1; 83 N.R. 25 (S.C.C.).
75. (1985) 21 D.L.R. (4th) 253, [1986] 1 W.W.R. 398, 40 Alta. L.R. (2d) 251, 63 A.R. 369 (C.A.).

The partnership agreement provided that the general partner had the power, *inter alia*, to sell the partnership's properties upon such terms as it deemed advisable. It also provided that the general partner had the power to terminate the partnership and that it was to be in charge of dissolution, which entitled it to sell the partnership's properties to third parties on terms it deemed advisable.

The first issue considered in the reasons for judgment was subsection 55(b) of the Partnership Act (Alberta)[76] which provides as follows:

> 55. A general partner in a limited partnership has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners except that, without the written consent to or ratification of the specific act by all of the limited partners, a general partner has no authority to
>
> ...
>
> (b) do any act which makes it impossible to carry on the ordinary business of the limited partnership.

As a result of the sale, the partnership's debt was repaid and all drilling operations ceased. The partnership agreement described the purpose of the limited partnership to be the acquisition, development and operation of oil and gas properties and the purchase, sale and exploration of those properties. At the time of the Supreme Court of Canada hearing, the partnership continued to receive revenue from its producing properties.

The Court interpreted the phrase "makes it impossible to carry on" to mean that it is not possible to carry on the ordinary business, and concluded that no significant part of the partnership's ordinary business had become impossible on the sale of the non-producing assets. It noted that the sale of the producing assets of the partnership would have been more likely to have contributed to a breach of subsection 55(b).

The Court notes that the Trial Judge focused on the cessation of drilling activity and the prediction of the general partner that the partnership would never again participate in the drilling of a well after the disposition of the non-producing properties. The Supreme Court's reasons for judgment state that this reasoning overlooks all of the other continuing activities of the partnership. The onus of establishing the impossibility is upon the person alleging it to exist.

The Court points out that the appellant would have been free to apply under section 38 or subsection 57(c) of the Partnership Act[77], or otherwise, for termination of the partnership and for an accounting and distribution, and that the appellant had not chosen to do so.

The Court then considered whether the general partner had the power to sell the assets of the partnership, in effect, to itself, given its fiduciary duty. In this context, the Court also considered whether judicial approval of the sale can be granted after it has been completed.

The Court referred to provisions of the partnership agreement permitting the sale of assets by the general partner, but did not make any comment as to whether there had been a breach of the agreement in connection with the sale in issue.

While the partnership agreement contained a power of sale, it did not expressly permit the general partner to sell assets to itself. However, it is stated in the partnership agreement that the general partner is engaged in the oil and gas business and intends to continue in that pursuit. The Court assumed, for the purposes of its decision, that the duty of a general partner to a limited partnership is that of a trustee

76. R.S.A. 1980, c. P-2, as am.
77. *Id.*

holding properties on behalf of the members of the partnership. It cites the general rule that a trustee may not purchase trust properties, whether or not the sale is made at a fair price and in good faith, but points out that the rule really makes a purchase of trust property by a trustee voidable within a reasonable time at the request of any beneficiary. As applied to corporate fiduciaries, there is a further exception that if the persons to whom the duty is owed have consented to the sale with full knowledge, the sale is not voidable.

The Court referred to the decision of the Alberta Court of Appeal in *Act Oils Ltd.* v. *Pacific Petroleums Ltd.*[78] wherein it was stated that a trustee must not sell property to himself, regardless of where he makes a profit, except under the most stringent conditions.

The Court also concluded that it may retroactively approve a sale of trust property to a trustee, but only in circumstances where the sale is provident at the time of approval. Thus, if the value of the property has increased after the sale, the Court may refuse to approve the sale. It is obviously preferable, however, that the application to approve should be made at a time when the Court is in a position to refuse to approve. In the present circumstances, of course, the sale by the general partner to its parent was not irrevocable.

The Court also refers to an English Court of Appeal decision, *Holder* v. *Holder*.[79] In that case, the Court refused to set aside a purchase by a beneficiary who was also an executor and trustee of the estate, but who had renounced his position, where setting aside would have caused hardship to him and the price paid was a good price at the time of the sale.

In the present case, the Supreme Court held that the general partner owed a fiduciary duty to the appellant but had not breached it by selling the non-producing lands to itself because there was no evidence of bad faith on the part of the general partner and there had been no attempt made by the appellant to demonstrate that inadequate consideration had been paid. There was evidence at trial showing the financial difficulties of the partnership and the absence of a market for the non-producing lands. This supported the general partner's assertion that the sale was in the best interests of the Partnership. In addition, the terms of the partnership agreement, of which the limited partner was fully aware, permitted the general partner to dispose of the properties at its discretion.

IV. FREEHOLD LEASES

A. *DURISH* v. *WHITE RESOURCE MANAGEMENT LTD.*[80]

Durish was the holder of the lessor's interest under a freehold petroleum and natural gas lease and White was the holder of the lessee's interest. The lease was for a primary term of five years and "so long thereafter as the leased substances or any of them are produced from the said lands". There was a proviso to the *habendum* clause in the lease which provided, in part, as follows:

> If any well on the said lands ... is shut in, suspended or otherwise not produced for any cause whatsoever which is in accordance with good oilfield practice, the time of such interruption or suspension or non-production shall not be counted against the Lessee.

78. (1975) 60 D.L.R. (3d) 658 (Alta. C.A.) [leave to appeal to S.C.C. refused].
79. [1968] Ch. 353, [1968] 2 W.L.R. 237, [1968] 1 All E.R. 665 (C.A.).
80. (1987) 55 Alta. L.R. (2d) 47, 82 A.R. 66 (Q.B.).

The lease also contained a shut-in well clause which provided, in part, as follows:

> If all wells on the said land as (sic) shut-in ... during any year ending on an anniversary date, the Lessee shall pay to the Lessor at the expiration of each such year, a sum equal to the delay rental hereinbefore set forth and each such well shall be deemed to be a producing well hereunder ...

A well was drilled on the leased lands and placed on production during the primary term. In November, 1985, after the end of the primary term, Gulf Resources shut in the well as a result of a dispute between Gulf and White over transmission and processing fees. In January, 1987, White purported to make a shut-in royalty payment. The anniversary date of the lease was May 26.

It was held that the lease had terminated. The Court found that the contract dispute with Gulf did not come within the ambit of "good oilfield practice". Thus, White could not rely on the proviso to the *habendum* clause quoted above. There was no evidence to suggest that Gulf's revised fees made continued production impossible or unprofitable.

The lease was not saved by the shut-in royalty clause. The shut-in royalty clause did not impose an obligation on the lessee but rather gave it the option to continue the lease by paying the shut-in royalty. The shut-in royalty payment did not have to be made on or before the anniversary date of the lease but must be made within a reasonable time following the anniversary date. The Court found that payment eight months following the anniversary date did not constitute payment within a reasonable period of time. The Court rejected White's argument that because it had credited the royalty account maintained in its internal records with a shut-in royalty payment on April 30, 1986, the 1986 shut-in royalty payment should be considered to have been made.

The Court ruled that the default clause in the lease did not require the lessor to give notice of a breach to the lessee and refused to grant relief from foreiture on that ground. Presumably, the lessee was not in breach in any event because it had an option, rather than an obligation to pay the shut-in royalty.

B. *GREAT AMERICAN ENERGY INC* v. *CANADA PERMANENT TRUST COMPANY* [81]

In 1952, Stead acquired fee title to a 1/4 interest in certain mines and minerals. A certificate of title covering the interest was issued in his name. He sold all but an undivided 1/32 interest in the mines and minerals to seven individuals. The individuals could not register transfers of their interests because they were too small. Therefore, the individuals registered caveats whereby they claimed an equitable estate or an interest in fee simple in possession in the mines and minerals.

Stead established a royalty trust with Canada Permanent as trustee in 1954, pursuant to which the title to the 1/4 interest was transferred to Canada Permanent. Canada Permanent believed that the trust covered the entire 1/4 interest. In 1977, the trust company granted a lease to Troy Oils which purported to cover the entire 1/4 interest. The lease contained an express negation of title warranties. Troy assigned the lease to Omega. The assignment also contained an express negation of title warrranties. In correspondence, Canada Permanent indicated to Omega that the trust covered the entire 1/4 interest. Some time later, Great American Energy realized that the individuals' interests might not be leased and took leases from them.

81. (1986) 44 Man. R. (2d) 170 (Q.B.).

The first issue decided by the Court was that Canada Permanent did not have the authority to lease the individuals' interest because there was no express authorization for the inclusion of their interests in the trust established by Stead. The Court rejected the trust company's argument that even if Stead did not have the authority to place the individuals' interests in the trust, the individuals had knowledge that Stead had purported to do so, and their silence amounted to ratification or acquiescence. There was no evidence that the individuals authorized Stead's actions or that some of the individuals were not aware of them.

The second issue went to the validity of the individuals' caveats. The Court agreed with Omega that the caveats did not evidence ownership of mines and minerals. However, their registration caused the title to be subject to the claims raised in them. Omega accepted its lease subject to such claims. The claims had not been proven to be invalid. The Court concluded that Omega's lease only covered a 1/32 interest.

Omega and Canada Permanent argued that the Great American leases were void because Great American was not registered as a mineral interest broker under the Manitoba Securities Act.[82] The Court held that a breach of the registration requirements of that Act does not give a stranger to the contract the right to set it aside.

Canada Permanent had received royalties from Omega which it had not passed on to the individuals. Canada Permanent was ordered to pay interest on these amounts and to reimburse the individuals for additional Canadian income tax liability, if any, resulting from failure of Canada Permanent to promptly pay such royalties to them. Actions by the individuals and Great American against Troy were dismissed.

Great American had claimed damages from Omega for lost profits. Omega argued that equitable estoppel applied because Great American engaged in delay, acquiescence, misrepresentation and wrongful acts which constituted constructive fraud. The Court found that three of the five requirements of equitable estoppel were not present. The first element which must be present in order for equitable estoppel to apply is that Omega must have made a mistake as to its legal rights. This element was not present. Omega knew its lease was subject to the caveats registered by the individuals. Omega did not conduct title searches prior to commencing its drilling operations. Such searches would have disclosed Great American's caveats. The judge found that the failure of Omega to conduct a title search flew in the face of industry practice and confirmed his view that Omega was careless and reckless when it embarked on its drilling program. Equitable estoppel is an equitable remedy. In order to rely upon it, Omega must have clean hands. Because of its carelessness, Omega could not rely on equitable doctrines.

A second element of equitable estoppel is that the party claiming estoppel must have acted on the faith of a mistaken belief. The Court stated that Omega probably would have drilled the wells even if it had known that it did not have the individuals' interests under lease, since Omega held the remaining 3/4 interest in the lands.

A third requirement of equitable estoppel which Omega failed to establish was that Omega was encouraged in its expenditure of money by Great American not directly asserting its legal rights.

The Court, however, did find some fault with Great American's conduct in that it did not appear to make satisfactory efforts to ensure that Omega was aware of its position. Notwithstanding that Great American's leases were taken in 1979, Omega was ordered to pay great American 7/32 of revenues (less 7/32 of development and

82. C.C.S.M., c. 550.

production costs and royalties) which accrued after May 12, 1982, which is the date upon which Omega became aware of Great American's interest.

The Court dismissed Omega's claim against Canada Permanent for damages. A clause in the lease from Canada Permanent stated that the lessee accepted the lessor's title to the leased substances and acknowledged that there had been no warranties as to title. Omega argued that the disclaimer clause was not sufficient to protect Canada Permanent because it lacked authority rather than title and the *contra proferentem* rule also was applicable. The Court construed the disclaimer clause narrowly and found that it did not cover liability for lack of authority. However, Omega had not suffered any loss as a result of the breach. The share of development and production costs attributable to the Great American interest will be recoverable by Omega. Since Omega would have drilled the wells even if it had known that it lacked complete title, it is not entitled to lost revenues.

The Court dismissed the claims by Omega and Canada Permanent against Stead. Stead owed no duty of care to Omega and, even if he had, Omega's loss was caused by its own carelessness. Canada Permanent's problems were also of its own making.

C. *BLAIR ESTATE LTD.* v. *ALTANA EXPLORATION CO.*[83]

This was apparently an application by the appellant to have the respondent's caveat supporting a freehold oil and gas lease discharged. The respondent argued that the primary term of the lease was extended because of the lack of a market, or an intermittent market, or for some other cause beyond the lessee's control.

It appears that the lessee had a gas contract with TransCanada PipeLines Limited ("TCPL") under which the takes were intermittent. There was also evidence of a second market described as a "discount commercial market". The Court concluded that all of the evidence before it did not demonstrate a lack of a market. It concluded that the Chambers Judge erred in his conclusion in the absence of evidence relating to the alternate market.

The brevity of the reasons make this case difficult to interpret. It may be that it is of little value as a precedent because of the absence of evidence on the nature of the TCPL contract and the discount market. It does raise the question of the lengths to which a lessee must go in finding an alternate market when the takes under his primary gas contract are intermittent, as appears to have been the case here. The case does not deal with the issue that could arise when reserves are exclusively dedicated to the performance of a gas contract so that the seller is unable to sell gas to another buyer when takes under the gas contract become intermittent.

V. TAXATION

A. *CANPAR HOLDINGS LTD.* v. *SASKATCHEWAN (MINISTER OF ENERGY & MINES)*[84]

This case deals with a tax on freehold oil well income imposed pursuant to the Saskatchewan Oil Well Income Tax Act.[85] In computing his oil well income for purposes of the Act, the taxpayer is entitled to deduct payments in the nature of royalties. Canpar owned interests in freehold oil wells, the revenue from which was subject to

83. (1987) 53 Alta. L.R. (2d) 419 (C.A.).
84. 60 Sask. R. 128 (C.A.).
85. R.S.S. 1978 (Supp.) c. O-3.1, as am.

the tax. Canpar's interests were managed by Dome Petroleum Limited. Canpar paid a management fee to Dome equal to a percentage of the revenue from the managed properties. In addition, Canpar had sold a net profits interest to Provo Gas Producers Limited pursuant to which Canpar was obligated to pay a percentage of the net profits from certain properties, including the oil wells, to Provo. Canpar contended that it was only liable to pay tax on the net amount of revenue from the oil wells, after deducting the amounts payable to Dome and Provo. Dome and Provo had included the payments made to them by Canpar in their oil well incomes. Canpar was unsuccessful at the trial. The Saskatchewan Court of Appeal overruled the trial decision[86] and found in favour of Canpar.

Canpar raised two issues. First, Canpar argued that it was not entitled to the production revenue paid to Dome and Provo and therefore should not be required to pay tax thereon. Section 4 of the Act provided that the tax was payable on "all amounts received ... as ... revenue derived from the production of freehold oil ...". The Court of Appeal rejected Canpar's argument. It found that Canpar had a right to the revenues which it was required to pay over to Dome and Provo. The agreements with Dome and Provo provided that the payments to them were to be calculated by reference to amounts "received" by Canpar.

Secondly, Canpar argued that the payments to Dome and Provo were in the nature of a royalty and therefore deductible in determining Canpar's oil well income. The Court of Appeal agreed. The payments did not have to have all the characteristics of royalties, they needed only to be "in the nature of" royalties. The Court of Appeal concluded that the payments were in the nature of royalties because they were periodic payments dependent on production, calculated after deducting expenses and operating costs and related to the exploitation of mineral resources. Royalties are not limited to payments made to the owners of the fee simple mineral rights as consideration for the privilege of exploring same. Royalties can be net as well as gross.

B. *HUSKY OIL OPERATIONS LTD.* v. *SASKATCHEWAN (MINISTER OF ENERGY & MINES)*[87]

In computing oilwell income for purposes of the Saskatchewan Oil Well Income Tax Act,[88] a taxpayer is entitled to deduct costs of certain oil well assets and certain development expenses. Such costs and expenses are to be reduced by the amount of government incentives in respect thereof "credited" to the taxpayer. Husky argued that incentives applied for in one year but not received until the next year should reduce the deductions in the year received. The minister argued that Husky became entitled to the incentives upon application under the terms of the incentive legislation (there being no discretion to refuse to pay the incentives) so that the deductions should be reduced in the year the incentives are applied for. The Court of Queen's Bench relied on section 1004 of the Oil Well Income Tax Regulations[89] which provide that a taxpayer cannot claim a deduction to the extent it is entitled to reimbursement from another person. Husky was entitled to reimbursement upon application for the incentives and must reduce the deductions upon becoming entitled to the incentives which occur in the year in which it applies for them.

86. (1985) 39 Sask. R. 12 (Q.B.).
87. 54 Sask. R. 263 (Q.B.).
88. *Supra* n. 85.
89. Oil Well Income Tax Regulations 1981, Sask. Reg. 14/82, as am.

C. *DELUCA* v. *MINISTER OF NATIONAL REVENUE* [90]

In 1969, Deluca transferred his interest in certain coal licences to a corporation in consideration of a cash payment and a right to receive an additional sum out of the first revenues from the sale of coal produced from the licences or the sale of the licences themselves. In 1976, the corporation transferred the licences to a wholly-owned subsidiary. The following year, Deluca sold all of his interest in the 1969 agreement to the subsidiary. Under the law in effect in 1969, the proceeds of the transfers of the coal licences to the corporation were tax free. However, under the law in effect when the 1969 agreement was assigned to the subsidiary, the proceeds of dispositions of interest in coal licences were taxable.

The Court held that in the 1969 transaction, the plaintiff had retained an interest in the licences, namely the right to receive proceeds and that there was a sale of that right in 1977 and not a settlement of a debt or a final payment of the 1969 purchase price. The proceeds from the assignment in 1977 were taxable.

D. *SIMPLOT CHEMICAL COMPANY LTD.* v. *MANITOBA* [91]

Simplot used natural gas in the manufacture of ammonia and nitric acid in Manitoba. Simplot sought a declaration that the gas was exempt from taxation under the Manitoba Retail Sales Tax Act[92] and the Manitoba Revenue Act.[93]

Natural gas was used in production of ammonia for two purposes. Some of the gas was mixed with steam and subjected to heat and pressure as a result of which it was converted, chemically, into ammonia. The balance of the gas was used to provide the heat necessary for the chemical reaction. The Revenue Act[94] imposed a tax upon natural gas used as fuel. There was no dispute that the natural gas which was converted into ammonia was not subject to the tax. The Court found that the natural gas which was used to provide heat was used as fuel and was subject to the tax.

Simplot produced noxious nitrous oxides as by-products in the manufacture of nitric acid. Simplot converted them into nitrogen in a process involving natural gas. Simplot contended that the natural gas used in the conversion of the waste products into nitrogen was not subject to tax under the Sales Tax Act.[95] Under that Act, the natural gas would be taxable if it was acquired for the purpose of consumption and not resale. The Court found that the natural gas was not acquired with a view to resale. The natural gas was used to dispose of waste products which were not resold. The gas was not used in the manufacture of nitric acid which was resold. The gas was subject to the tax.

Simplot also argued that the two taxes were *ultra vires* the Province of Saskatchewan because they were indirect taxes. The Court defined indirect taxes as being taxes for which the taxpayer is expected to obtain indemnification from another person. In the present case, Simplot was the final user of the products to which the taxes related. Although Simplot might attempt to recover the taxes through an increase in the price of its products, the recovery would be so circuitous and diffuse that it would not amount to a passing on of the tax in any recognizable form. The taxes were not *ultra vires*.

90. (1987) 10 F.T.R. 43 (F.C.T.D.).
91. (1987) 47 Man. R. (2d) 167 (Q.B.).
92. C.C.S.M., c. R-130.
93. C.C.S.M., c. R-150.
94. *Id.*
95. *Supra* n. 92.

E. *NOVA, AN ALBERTA CORPORATION* v. *MINISTER OF NATIONAL REVENUE* [96]

This case concerns the classification, for capital cost allowance purposes, of pipes and valves located between the outlet connection of Nova's main pipeline and its compressor and meter stations. The Minister of National Revenue contended that the pipes and valves fell under class 2. Class 2 is defined, in part, as follows:

> Property that is ... (b) a pipeline, ... (d) manufacturing and distribution equipment and plant (including structures) acquired primarily for the production or distribution of gas.

The Court distinguished between a "pipeline" and a "pipeline system". The pipeline is one component of a pipeline system, albeit the most significant component, being the pipe in which gas is carried across the country. The pipeline does not include compressors and meter stations, although the pipeline system might. The pipes and valves in question serve the compressors and meter stations. They are isolated from the main pipeline by isolating valves. The design factors, life expectancy, security requirements and efficiency standards for the main line are different from those for the pipes associated with the compressor and meter stations. Accordingly, the pipes and valves are not part of the pipeline.

The Court also found that the pipes and valves were not acquired for production or distribution. The Court distinguished four segments of the natural gas industry: exploration, production, transmission and distribution. Transmission (or transportation) starts at a point commonly known as the field gate located near the processing plant and ends when the gas enters a distribution system at a point commonly called the city gate. Nova was not involved in production or distribution but only in transmission.

F. *WRM RESOURCES LTD.* v. *DURISH* [97]

WRM was the operator of a freehold oil and gas lease. Durish was the registered owner of the fee simple mineral interest. WRM had paid Alberta freehold mineral taxes in respect of the mineral interest following which it initiated a reassessment of the taxes as a result of which a refund became payable.

The Court was called upon to determine if the taxing authority was entitled to make the refund to WRM and concluded that it was.

Neither the Alberta Freehold Mineral Rights Tax Act[98] nor the Regulations[99] thereunder expressly specified who was entitled to refunds. The Regulations had, at one time, provided that interest on refunds was to be paid to the owner. The Regulations were amended in 1987 to provide that interest was to be paid to the person who had paid the taxes. The Trial Judge found that the scheme of the Act recognizes persons other than owners and contemplates that such persons may pay the tax. Although assessment notices are sent to the owner, default notices are sent to all persons with a claim registered against the title. The owner has no personal liability for payment of the tax. A lessee of the mineral rights and non-owners who have paid the tax may appeal the tax assessment. Since the Act and the Regulations recognize persons other than owners, the Minister should be entitled to refund

96. (1987) 9 F.T.R. 277 (F.C.T.D.).
97. (1988) 86 A.R. 114 (Q.B.).
98. S.A. 1983, c. F-19.1, as am.
99. Alta. Reg. 12/84, as am.

overpayments of the tax to such persons if they paid the tax. However, in accordance with the Regulations as they existed prior to amendment, the owner was entitled to interest on the refunds which pertained to years prior to the amendment.

VI. REGULATIONS

A. *SIGNALTA RESOURCES LTD.* v. *THE PUBLIC UTILITIES BOARD (ALBERTA)*[100]

Between 1975 and 1986 the price of gas produced in Alberta and intended to be removed from Alberta was, by law,[101] the Alberta Border Price minus the Alberta Cost of Service. The Cost of Service includes costs incurred between the wellhead and the Alberta border and is established for a particular gas buyer by the Alberta Petroleum Marketing Commission ("AMPC").

During this period, most of TransCanada PipeLines Limited's gas contracts provided that TransCanada PipeLines Limited ("TCPL") would pay for a quantity of gas each year, although it might not take delivery of some of the gas until later years. Payments for gas not delivered until later years are called prepayments.

Commencing in 1978, natural gas markets diminished considerably with the result that TCPL did not have markets for all the gas it was required to pay for and faced huge prepayment obligations. As a result, many producers agreed to modify their contracts with TCPL. As well, provision was made whereby the costs of financing the prepayments (including interest costs) were included in TCPL's Cost of Service by amending the Regulations[102] under the Natural Gas Pricing Agreement Act[103] to provide for an additional component of the Cost of Service described as follows:

> amounts considered just and reasonable by the Commission in respect of costs incurred ... to finance payment, to or for the benefit of, a producer in respect of gas not taken by the original buyer under a gas sales contract and for which the producer was nevertheless entitled to be paid.

Some producers repaid their prepayments and, at the request of TCPL, a special category ("Category D") of TCPL's Cost of Service which did not include financing costs of prepayments was established by the APMC. Apparently the APMC considered that each of TCPL's producers benefited from prepayments regardless of whether it received them, because if it did not receive prepayments it had sold more gas than the other producers. It seems that, for this reason, the APMC viewed Category D as being solely to induce producers to repay their prepayments so that producers, such as Signalta, who had previously repaid their prepayments, would not qualify for Category D.

Signalta, Cabre Explorations Ltd. and Petromark Minerals were excluded from the new category by the APMC and they appealed that decision to the Public Utilities Board ("PUB"). The PUB held that if a producer has done everything within its power to minimize the prepayments, it should be in the new category. Generally a producer will satisfy that test if it has agreed to modify its contracts so that TCPL's minimum obligation under the producers' contracts becomes an obligation to purchase a *pro rata* share of all gas purchased by TCPL and if the producer has repaid its prepayments and waived entitlement to prepayments for the then current year.

100. [1987] 6 W.W.R. 757, 54 Alta. L.R. (2d) 371, 79 A.R. 290 (C.A.).
101. *Supra* n. 60 and n. 61.
102. Alta. Reg. 127/77, as am.
103. R.S.A. 1980, c. N-4, as am.

Cabre and Petromark had agreed to the modification and waived prepayments for the year but had not repaid any repayments because they had never received any. The PUB ruled that Cabre and Petromark qualified for Category D.

Although Signalta satisfied the two general rules established by the PUB, the PUB ruled that Signalta did not qualify for Category D because it had drilled many new wells which increased TCPL's minimum obligations under the terms of Signalta's gas contract which increased TCPL's obligations to make prepayments to Signalta. The Board quoted the maxim that he who seeks equity must do equity.

The Court of Appeal agreed with the PUB that the APMC's reasoning was wrong. The Court of Appeal however held that the PUB's ruling with respect to Signalta was also wrong. The equitable maxims that he who seeks equity must do equity and he who comes to equity must come with clean hands, apply to the applicant's conduct in connection with the matter at hand. Signalta had merely carried on its business in full accord with Alberta law and its contract. It had done nothing wrong. The APMC is given power to do that which is just and reasonable. The exercise of discretion by the APMC should not be interfered with lightly. However, in this case, the APMC exceeded the bounds of the power delegated to it by the legislation because its ruling was not just and reasonable. The APMC's ruling penalized oil and gas drilling which was contrary to government policy as evidenced by massive government incentive programs.

B. *DOME PETROLEUM LIMITED* v. *ENERGY RESOURCES CONSERVATION BOARD*[104]

This case deals with a gas block formed pursuant to the Alberta Oil and Gas Conservation Act.[105] The gas block was created by an order of the Energy Resources Conservation Board in 1978. In 1985, Dome asked the Board to review and rescind the order.

Dome contended that the block in question did not meet the requirements of the definition of "block" contained in the Act. The Board had ruled that gas blocks were not "blocks" as defined in the Act and, therefore, did have to meet the requirements of that definition.

The term "block" is defined in the Act as follows:

> An area or part of a pool consisting of production spacing units grouped for the purpose of obtaining a common aggregate production allowable.

The Board had ruled that the defined term applied only to oil for two reasons. Firstly, the definition was inserted in the Act in 1967 but the Regulations[106] did not permit the formation of blocks in gas pools until 1974. Secondly, the concept of allowables applies almost exclusively to oil wells.

On appeal, the Board relied on section 1(2) of the Act which provides that a decision of the Board is final "as to whether a definition in subsection 1 is applicable in a particular case". The Court of Appeal ruled that subsection 1(2) was not applicable, since the issue was not whether a definition applied in a particular circumstance but whether the definition applied to gas blocks in general.

The Court of Appeal rejected the Board's first reason for its decision, because Regulations made under an Act cannot be used to interpret provisions of the Act in

104. (1987) 55 Alta. L.R. (2d) 416 (C.A.).
105. R.S.A. 1980, c. O-5, as am.
106. Alta. Reg. 151/71, as am.

existence when the Regulations were made. The Court of Appeal found that the defined term applies to gas as well as oil because there was nothing in the definition to indicate that it applied only to oil.

Since the block under consideration did not consist of production spacing units grouped for the purpose of obtaining a common aggregate production allowable, the Board had exceeded its jurisdiction in establishing the block in 1978.

The Court of Appeal would not declare the 1978 order to be void *ab initio*. The Act provided a mechanism by which Dome could have appealed the original order.

As a result, the Court of Appeal ordered the Board to reconsider Dome's application.

VII. MINES AND MINERALS

A. *RE REGISTRAR'S CAVEAT 752 031 464*[107]

An error by the Registrar of Land Titles for the North Alberta Land Registration District resulted in a dispute over the ownership of mines and minerals underlying a railway right-of-way. Schueler owned all of Section 3. In 1913, he transferred approximately 13 acres out of Section 3 to a railway for a right-of-way. The transfer was silent as to the mines and minerals underlying the right-of-way. Schueler's title was cancelled as to both surface and mines and minerals underlying the right-of-way. At the time, the Railway Act[108] provided that a railway could not take title to mines and minerals with the result that Schueler's title should not have been cancelled as to mines and minerals underlying the right-of-way. In 1917, before the error had been discovered, Schueler transferred all of Section 3 except the right-of-way to Gent. In 1913 the Registrar reinstated Schueler's certificate of title as to mines and minerals underlying the right-of-way. In 1975, the Registrar registered caveats against Section 3 detailing the errors. There were no *bona fide* purchasers for value between 1917 and 1975.

The Court of Appeal ruled that Schueler's beneficiaries were entitled to the mines and minerals. The Court of Appeal agreed that Schueler would not likely have retained title to the mines and minerals underlying the right-of-way if he had been aware that he was the owner of them since the right-of-way was small, mineral rights did not have much value in 1917 and Schueler lived in New York. However, the transfer from Schueler to Gent, by its express terms, only transferred title to 626.55 acres, being all of Section 3, except the right-of-way. The transfer excepted the right-of-way by specific reference to the railway's title. At the time of the transfer, that title included mines and minerals underlying the right-of-way. The Court of Appeal recited several previous decisions which followed the same reasoning.

B. *ALLARCO GROUP LTD.* v. *SUNCOR INC. RESOURCES GROUP, OIL SANDS DIV.*[109]

Chartered Investments Ltd. was the registered holder of a parcel of land on which a shopping centre was located. It entered into an oral lease with Suncor. Subsequently, the shareholders of Chartered parted ways under an agreement whereby Chartered's interest in the shopping centre was transferred to one of the shareholders,

107. [1988] 1 W.W.R. 344, 55 Alta. L.R. (2d) 185 (C.A.).
108. Railway Act S.A. 1907, c. 8, s. 80 (c) [am. 1912, c. 15, s. 6] and Railway Act R.S.C. 1906, c. 37.
109. [1987] 5 W.W.R. 159, 53 Alta. L.R. (2d) 107 (C.A.).

Paris Investments Ltd.. Paris subsequently took the position that its interest was free of Suncor's lease because Suncor had not filed a caveat prior to a certificate of title being issued to Paris. The Alberta Court of Appeal found in favour of Suncor. Pursuant to section 195 of the Alberta Land Titles Act,[110] a registered interest defeats an unregistered interest except in the case of fraud. Knowledge of a prior unregistered interest is not, by itself, fraud. However, Paris had acquired the land pursuant to an agreement which specified that Paris would purchase "the assets and liabilities of Chartered in Fort McMurray". Since the sale to Paris included liabilities, Paris acquired Chartered's interest subject to the unregistered lease. Because of that agreement, Paris was guilty of fraud when it sought to defeat Suncor's interest.

VIII. SURFACE RIGHTS

A. *VOERMANS* v. *SURFACE RIGHTS BOARD*[111]

Alberta Power Ltd. was to construct a transmission line which would cross Voermans' land. There was an airstrip on Voermans' land which was used in connection with his crop spraying business. Alberta Power's operations on Voermans' lands would not affect the airstrip. However, the transmission lines were also to cross on his neighbour's land which would interfere with the airstrip. The Surface Rights Board ruled that it did not have the authority to grant compensation to a surface owner on account of damage resulting from operations on other lands. Following that ruling, the hearing before the Surface Rights Board was adjourned and the owner brought the present application for *certiorari* to quash the Board's decision. *Certiorari* is available where a refusal to admit evidence is an error apparent on the record or where such a refusal amounts to a refusal of jurisdiction by the Board. The Board in this case made a determination as to its jurisdiction and its ability to hear and consider certain evidence. The Court of Queen's Bench held that the Board's ruling constituted a decision to which *certiorari* may issue.

Section 25 of the Surface Rights Act[112] sets forth the factors which must be considered by the Board when making a compensation award. One of the factors is the damage caused to land of the owner which is not granted under the right of entry order by operations on the land granted under the right of entry order. In this case, the damage was not caused by operations on the lands to which the right of entry order related but by operations on the neighbour's land. The Court of Queen's Bench upheld the ruling made by the Board.

B. *JORSVICK* v. *PENNZOIL PETROLEUMS LTD.*[113]

The Alberta Surface Rights Act[114] provides that the compensation payable to a surface owner may be reviewed every five years. The Court of Appeal held that such a review is a new hearing and there is no requirement to prove that the previous award is no longer adequate. There is no presumption for or against the previous award. The Court of Appeal also stated that deference should be given to the views of the Surface Rights Board with respect to specialized issues such as the future international price of grain.

110. R.S.A. 1980, c. L-5, as am.
111. [1984] 4 W.W.R. 547, 58 Alta. L.R. (2d) 277, 87 A.R. 58 (Q.B.).
112. S.A. 1983, c. S-27.1, as am.
113. (1988) 59 Alta. L.R. (2d) 27 (C.A.).
114. *Supra* n. 112.

C. *JONES* v. *BANKENO RESOURCES LTD.*[115]

The issue in this case was whether compensation for land taken for a pipeline should be based on area agreements, a pattern of agreements or the market value of the land. There is ample authority for the principle that a pattern of agreements freely negotiated between willing parties in comparable circumstances should be given great weight when determining surface rights compensation. Area agreements pursuant to which a number of surface owners negotiate collectively are also quite common and have been given considerable weight. However, care must be exercised when using area agreements to make sure there is evidence as to their basis and comparability to the situation under consideration. In the present case, the Board's compensation award was based upon a pattern of agreements. The Court did not believe that the Board was demonstrably wrong in coming to the decision that it did and denied the appeal by the surface owner.

D. *HUHN* v. *DOME PETROLEUM LIMITED*[116]

Dome obtained a right of entry order pursuant to the Alberta Surface Rights Act[117] to use a portion of Huhn's land for a well site and an access roadway. The land was mostly bush and was used for recreational purposes. Huhn argued that his compensation should have been the same as the compensation paid to other surface owners in the area. The Court of Queen's Bench upheld the Board's ruling that the other arrangements were not comparable because they related to agricultural land. The Court stated that if a pattern of comparable agreements was not to be followed, then each of the factors set forth in Section 25 of the Surface Rights Act[118] should be considered. As the Board made a global award without considering each factor, its decision was wrong. The first factor in Section 25 is the value of the land. That can be determined on the basis of the fair market value of the land actually taken or on the basis of the per acre value of all of the owner's land. The latter was appropriate in this case because it would be virtually impossible to sell the parcel of land which was subject to the right of entry order by itself. The second factor is loss of use of the land. There was no loss of income since the land was recreational. In any event, it is not appropriate to make an allowance for loss of use if the owner is being compensated for the full value of the land. The third factor is the adverse effect of the operator's operations on the owner's other lands. There was no evidence of any adverse effect. The final factor was the actual permanent damage to the parcel of land taken by the operator. The Court held that the owner was entitled to compensation for trees which had been removed and for damage to the soil caused by compaction and grading of the access roadway and well site.

E. *SANDBOE* v. *COSEKA RESOURCES LTD.*[119]

A compensation award made by the Alberta Surface Rights Board in respect of a well site was varied on appeal by the Court of Queen's Bench. The Board had rejected the surface owner's contention that global awards made under area agreements

115. (1987) 51 Alta. L.R. (2d) 237, 77 A.R. 170 (Q.B.).
116. (1988) 87 A.R. 45 (Q.B.).
117. *Supra* n. 112.
118. *Id.*
119. (1987) 53 Alta. L.R. (2d) 25, 79 A.R. 386 (Q.B.).

should be followed. The Court of Queen's Bench agreed with that finding. The Court stated that if there are area agreements between willing sellers and willing buyers, with circumstances which are comparable, considerable weight should be given to the values established by those agreements. However, there is an element of protectionism and coercion in area agreements negotiated by associations of surface owners who band together. As a result, the global awards under such area agreements are not truly comparable.

The Court of Queen's Bench criticized the Board for tending to make awards which were higher than the offer made by the operator, no matter how reasonable that offer may have been.

In the present case, after the Board made its award and before the appeal was heard, the well was abandoned and the well site restored. The Court took that fact into account in reducing the compensation considerably.

The Board's award included $200.00 per year on account of weed control, notwithstanding that Coseka had contracted to look after weed control. The Court set that portion of the award aside since it was arbitrary and wrong to presume that Coseka would breach its contract.

The Court reduced the award by the value of the owner's reversionary interest. Since the land reverted to the owner in less than two years, the reversionary interest was deemed to have a value equal to 90% of the value of the land.

The Court held that there would be double compensation if the owner was awarded damages for the loss of the use of the land as well as for the value of the land and accordingly, did not award damages for loss of use.

F. *SHELL CANADA RESOURCES LTD* v. *LOZERON*[120]

This case was heard immediately after the *Sandboe* case[121] and is a decision of the same judge, Mr. Justice Cavanagh. As in the *Sandboe* case,[122] area agreements were not followed because they were considered to be coercive and therefore not comparable. As in the *Sandboe* case,[123] the award for the value of the land taken was reduced by its reversionary value to the owner. The Court noted that it was difficult to understand how the Alberta Surface Rights Board could calculate the value of land without reference to productivity and return.

G. *TEXACO CANADA RESOURCES LTD.* v. *ALBERTA ASSESSMENT APPEAL BOARD*[124]

Texaco contended that the rates of assessment of municipal taxes on three parcels of land used in its oilfield operations should be determined pursuant to subsection 15(1) of the Alberta Municipal Taxation Act.[125] The parcels were occupied by pumps, metering instruments, a battery, pipelines and a gas processing facility.

Subsection 15(1) limits the rate of assessment of land occupied for the following purposes: (1) working mines and minerals in or under such land or land in the vicinity

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120. (1987) 37 L.C.R. 298, 54 Alta L.R. (2d) 411 (Q.B.).
121. *Supra* n. 119.
122. *Id.*
123. *Id.*
124. (1987) 53 Alta. L.R. (2d) 369 (Q.B.).
125. R.S.A. 1980, c. M-31, as am.

of such land, (2) drilling for oil, salt or natural gas or (3) operating a well for oil, salt or natural gas.

The Court held that since oil and natural gas were specifically mentioned in the second and third categories, they were excluded from the first category. Therefore, in order to fall within the second or third category, the parcel in question must actually be the sight of the drilling or operation of a well and not merely in the vicinity of same.

As a result, the parcels did not qualify for the limitation provided for in section 15.

H. *CENTRAL WESTERN RAILWAY CORPORATION* v. *SURFACE RIGHTS BOARD (ALBERTA)*[126]

Signalta obtained a Right of Entry Order in respect of a pipeline connecting its well to a gathering line and passing under approximately 60 metres of the Applicant's property. The issues before the Court were whether the Surface Rights Board had the jurisdiction to grant the Order, whether it had acted in accordance with the principles of natural justice and whether it had given proper consideration to the constitutional aspect of its jurisdiction.

The Court held that the Board had jurisdiction to grant the Right of Entry Order under the Surface Rights Act[127] and the Pipeline Act[128] notwithstanding that it was the subsurface and not the surface that was required by Signalta.

On the second issue, the Court held the Board to be under a common law duty to act in accordance with the principles of natural justice and subject to the Administrative Procedures Act.[129]

In granting the Order without giving the Applicant the right to be heard, the Board was acting precipitously and unfairly. The Applicant had notified the Board that it questioned the Board's jurisdiction. The Board failed to comply with section 7 of the Administrative Procedures Act,[130] which required it to give a written decision setting out its findings of fact and its reasons when it makes a decision adversely affecting the rights of a party.

Furthermore, to the extent that reasons were given for the failure of the Board to hold a hearing, they were given in a letter from the Board's solicitor to the Applicant. Nothing in the record showed that the Board's solicitor had any authority to give reasons.

On the third issue, the Court held that the Board had committed a jurisdictional error in denying the right of a party to challenge its jurisdiction. The Board's response had been that it did not believe it had the authority to adjudicate a constitutional issue raised by the Applicant.

I. *LOMOND GRAZING ASSOCIATION* v. *SIGNALTA RESOURCES LIMITED*[131]

This is an appeal from a compensation award of the Alberta Surface Rights Board. The Court of Appeal held that compensation presented by the Grazing Association

126. (1987) 56 Alta. L.R. (2d) 115 (Q.B.).
127. *Supra* n. 112.
128. R.S.A. 1980, c. P-8, as am.
129. R.S.A. 1980, c. A-2.
130. *Id.*
131. Unreported, 25 November 1987, Appeal No. 18445 (Alta C.A.).

on a "take it or leave it" basis did not constitute arm's length negotiation which established land values.

J. *CARD* v. *TRANSALTA UTILITIES CORPORATION*[132]

The Court held that an easement granted in 1949 to the defendant's predecessor for the construction and maintenance of a powerline and which was expressed to be a covenant running with the land, was an easement falling within the exception to indefeasibility in paragraph 65(1)(g) of the Land Titles Act,[133] such that the plaintiffs, being *bona fide* successors to the grantor of the easement, were subject to the easement notwithstanding that it was never registered on the certificate of title of their predecessor. The plaintiffs argued that the agreement could not create an easement, because the power poles were a corporeal hereditament by virtue of the sinking of the power poles into the plaintiffs' land, thus creating an exclusive and permanent occupation of the land, and being an interest which could not be created by an easement. The Court rejected that argument.

IX. ADMINISTRATIVE LAW

A. *REFERENCE RE NATIONAL ENERGY BOARD ACT* [134]

This case was a reference by the National Energy Board ("NEB") to the Federal Court of Appeal of the decision of the Board that it had jurisdiction over a bypass pipeline in Ontario proposed by Cyanamid Canada Pipeline Inc. ("CCPI").[135] The Ontario Energy Board had ruled that it had jurisdiction over such lines[136] and was supported by the Ontario Divisional Court.[137] CCPI therefore applied to the NEB for a review of its approval of the line in order to prompt a reference of the jurisdictional question to a higher court. The Federal Court of Appeal, however, held that the proposed line is within the exclusive jurisdiction of the province.

The combined effect of sections 91(29) and 92(1)(a) of the Constitution Act, 1867[138] is that interprovincial works and undertakings are within the exclusive jurisdiction of Parliament. The Court held that the bypass line would not be an interprovincial work because it would exist only in Ontario and the fact of its mere physical connection to the interprovincial pipeline of TransCanada PipeLines Limited ("TCPL") was insufficient to support federal jurisdiction. As for whether there would be an interprovincial undertaking, the Court was of the view that it would be TCPL rather than CCPI that would carry on the interprovincial undertaking, and that, in any event, CCPI's commercial arrangements could not constitute an interprovincial transportation or communications undertaking as required by section 92 (1) (a).

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132. (1987) 57 Alta. L.R. 155 (Q.B.).
133. *Supra* n. 110.
134. [1987] F.C.A.D. 280-03, (No. A-472-87).
135. GH-3-86: National Energy Board, "Reasons for Decision, In the Matter of an Application under Section 49 and Subsection 59(3) of the National Energy Board Act of Cyanamid Canada Pipeline Inc." December 1986, published by the Minister of Supply and Services Canada, 1986, as Cat. No. NE22-1/1986-14E.
136. Ontario Energy Board, "Reasons for Decision, In the Matter of the Ontario Energy Board Act and In the Matter of Potential Bypass of Local Gas Distribution Systems: E.B.R.O. 410-I, 411-I, and 412- I" 12 December 1986.
137. *Ontario Energy Board* v. *Consumers' Gas Co.* (1987) 22 O.A.C. 142.
138. Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.) c. 11.

The Court concluded that the NEB had been wrong in failing to apply the necessary nexus test, which the CCPI line could not meet, in that it would be unnecessary and redundant to TCPL's line. CCPI has obtained leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada.

B. *ONTARIO ENERGY BOARD* v. *CONSUMERS' GAS COMPANY*[139]

The Ontario Divisional Court decision confirming the jurisdiction of the Ontario Energy Board over bypass was referred to the Ontario Court of Appeal in April of 1987. The Ontario Court of Appeal agreed with the Federal Court of Appeal that bypass pipelines within a province are within the exclusive jurisdiction of the province and adopted the reasons of that Court.

X. REGULATORY BOARD DECISIONS

A. NATIONAL ENERGY BOARD

1. RH-3-86: TCPL Tolls[140]

TCPL's 1987 tolls were marginally lowered by this decision. The Board allowed the pipeline 1987 revenues of $1.154 billion compared to revenues of $1.166 billion in 1986. TCPL's rate of return on equity was reduced from 14.5% to 13.25%.

TCPL had proposed that the commodity toll in its two-part toll be split in two. One part would recover variable costs associated with the purchase price of gas at the Alberta border while the other would recover all other costs. TCPL also proposed that costs or credits related to linepack be recovered or credited in the subsequent month. The Board denied TCPL's three-part toll proposal, describing it as too complex and cumbersome.

Although for toll purposes the Board accepted TCPL's estimate of $2.20/GJ to price all gas-related costs, TCPL was required to allow shippers to provide their own transmission fuel in order to reduce transportation costs.

Dealing with the concern of TCPL that the under-utilization of the system's western section was allowing shippers which otherwise would require firm service to use the lower cost interruptible service, the Board decided that interruptible tolls should be raised enough to discourage the use of interruptible service to meet firm service needs but low enough to promote the legitimate use of interruptible service. Accordingly, TCPL was directed to offer two tiers of interruptible service effective November 1, 1987. The toll for IS-1 is equal to the CD-80 toll, and the toll for IS-2 is equal to the CD-90 toll, being the tolls for firm supplies with 80 and 90% load factors, respectively.

On the issue of whether distributors should be allowed automatically to increase their operating demand when they obtain new or pre-existing contracts, the Board ruled that automatic reversion of pipeline capacity to distributors would be inappropriate in that it would give them rights not available to them under TCPL's CD

139. Oral decision rendered February 15, 1988.

140. National Energy Board, "Reasons for Decision, TransCanada PipeLines Limited Application dated 14 July, 1986 for New Tolls effective 1 January 1987" (May, 1987), published by the Minister of Supply and Services Canada, 1987, as Cat. No. NE22-1/1987-5E.

contracts and would obligate TCPL's suppliers to warehouse gas without being compensated for lost marketing opportunities.

The Board encouraged TCPL to develop its concept of umbrella T-service as a solution to the problem of short term shippers being bumped to make room for new long term firm service shippers. Under umbrella T-service, the utility serving the consumer takes out long term firm service on TCPL sufficient for the needs of any and all direct purchase consumers interested in having their direct purchase gas shipped under the "umbrella" of their utility's TCPL firm service. Although utilities have been interested in the concept, little progress has been made.

The Board decided that operating demand relief for distributors should be prorated amongst all long term firm sales and transportation services purchased by the distributor.

2. Review of Natural Gas Surplus Determination Procedures[141]

This decision establishes a "Market-Based Procedure" for reviewing gas exports without any regulated amount of surplus. It replaces the test established in GH-2-85[142] which required a reserves to production ratio of 15. That test itself replaced the previous $25A_1$ test which required reserves equal to 25 times the current year's Canadian requirements. The Board's Market-Based Procedure relies on public hearings and ongoing monitoring to ensure that exports are in Canada's best interests.

An important part of the public hearing process is the complaints procedure. The Board may deny an application or defer issuing a final decision if it sees merit in any complaint that Canadian users cannot obtain additional supplies of gas under contract on terms and conditions similar to those in the export proposal.

Exporters are required to file an impact assessment which will enable the Board to determine whether a proposed export is likely to prevent Canadians from meeting their energy requirements at fair market prices.

The Board decided that it will continue to have regard for all other factors it considers in determining whether proposed export licences are in the national interest, including evidence of producer support for the export as well as contracts and removal permits. The Board will also require evidence that the revenues from the export will fully recover the cost to Canada of making the export, that pipeline space is available, that gas will be taken and whether any new facilities are needed. The use of cost-benefit analysis to assess the trade-off of security of supply and the benefits from the export is to continue.

The decision of the Board came after intense pressure from producer interests in the West who argued that the regulated surplus artificially exerted a downward pressure on gas prices and was inconsistent with the deregulated gas market. To the extent that the regulated surplus allowed consumers to disregard long term security in their gas supply contracts, it is anticipated that this decision will encourage longer term contracts.

141. National Energy Board, "Reasons for Decision, In the Matter of Review of Natural Gas Surplus Determination Procedures" (July, 1987), published by the Minister of Supply and Services Canada, (1987), as Cat. No. NE22-1/1987-8E.

142. National Energy Board, "Reasons for Decision, In the Matter of Phase 1 of the Surplus Determination Procedures Phase of the Gas Export Omnibus Hearing, 1985" (April, 1986), published by the Minister of Supply and Services Canada, (1986), as Cat. No. NE22-1/1986-6E.

3. MH-1-87: Manitoba Oil and Gas Corporation Section 59 (2) Application[143]

In this decision the Board refused to issue an order compelling TCPL to transport gas for the Manitoba Oil and Gas Corporation ("MOGC").

The Manitoba government had become increasingly frustrated with the inability of core and marginal non-core consumers to access competitively priced gas. Following a hearing in which the Manitoba Public Utilities Board concluded that the prices being charged to the Manitoba utilities were not competitive,[144] the government established MOGC to arrange for direct purchases of gas to meet the needs of all Manitoba gas consumers who had not otherwise secured their own supply. Although successful in contracting for gas supply, MOGC was unable to obtain transportation from TCPL and therefore sought relief from the NEB by seeking an order compelling TCPL to provide service.

In refusing MOGC's application, the Board noted that section 59(2) of the National Energy Board Act[145] prescribes no criteria for a decision. In the view of the Board, the primary consideration should be whether the order sought is in the public interest. Furthermore, any decision should be consistent with the Board's earlier rulings respecting self-displacement. Finally, the Board stated that due consideration should be given to the disposition of previous 59(2) applications as well as the October 31, 1985 Agreement on Natural Gas Markets and Prices[146] (the "Agreement").

The Board distinguished the application of MOGC from all other 59(2) applications it had approved on the basis that MOGC's application, if granted, would result in the total displacement of the utilities' market and supply arrangements. Relying instead on the public interest, the Board's previous rulings regarding self-displacement and the interpretation of the Agreement, the Board decided that MOGC's proposal would constitute self-displacement, that self-displacement was contrary to the intent of the Agreement and therefore not in the public interest. Essentially, the Board equated the public interest with the intent of the Agreement.

The final issue was whether the denial of MOGC's application would result in unjust discrimination in terms of access to the transportation services of TCPL. The Board made no attempt to say that the denial of service to MOGC was not discriminatory but relied instead on its ruling that the approval of the application would not be in the public interest, so that to the extent that there was discrimination, it was sanctioned by the Agreement and therefore not unjust.

Shortly after this decision, the Manitoba utilities and Western Gas Marketing Ltd. ("WGML") renegotiated the prices under their long term contracts to keep them in line with the prices negotiated by the Ontario utilities. Dissatisfied with this concession by WGML, MOGC applied to the Federal Court of Appeal for leave to appeal the Board's decision.[147] Leave to appeal was denied.

143. National Energy Board, "Reasons for Decision, Manitoba Oil and Gas Corporation Application dated (25 May, 1987), as Amended, for Orders Directing TransCanada PipeLines Limited to Receive, Transport and Deliver Natural Gas and Fixing Tolls", September 1987, published by the Minister of Supply and Services Canada, (1987) as Cat. No. NE22-1/1987-10E.

144. Manitoba Public Utilities Board, "Report on the Impact on Manitoba Consumers of Deregulation of Natural Gas Pricing in Canada", April 1987; and "Order No. 89/87: Public Hearing to Inquire into the Applications of Greater Winnipeg Gas Company and ICG Utilities (Manitoba) Ltd. for an Order Approving a Change in Rates and Other Matters", 13 May 1987.

145. R.S.C. 1970, c. N-6, as am.

146. "Agreement Among the Governments of Canada, Alberta, British Columbia and Saskatchewan on Natural Gas Markets and Prices" 31 October 1985.

147. No. 87-A-402. (F.C.A.).

4. RH-2-87: Westcoast Transmission Company Limited Tolls[148]

The issue of the appropriate *force majeure* and demand charge credit provisions to be included in the general terms and conditions of service for Westcoast Transmission Company Limited ("Westcoast") was one of the most controversial aspects of this hearing.

Westcoast was concerned that under the then existing provisions it was exposed to unlimited liability because it could be required to grant a demand charge credit where a *force majeure* arose upstream or downstream of its pipeline system. Westcoast initially proposed a clause which would limit the circumstances in which the company would have to grant a demand charge credit to events of *force majeure* occurring on its system, but later amended its proposal to grant relief to sales customers in the event of an upstream occurrence of *force majeure*.

The Board was not satisfied with the proposal of Westcoast but did recognize the need for a change to the existing provisions. The Board decided to amend the provisions to provide that no demand charge credit would be given to service customers because of a failure of the shipper to deliver gas into the Westcoast system, but a demand charge credit would be given for an event of *force majeure* occurring on the Westcoast system and any downstream pipeline facilities connected directly to the Westcoast system, or where such an event renders Westcoast unable to obtain adequate gas supplies from its gas producers or suppliers.

5. RH-5-87: Foothills Pipe Lines (Yukon) Ltd. Interruptible Service Application[149]

This was an application by Foothills Pipe Lines (Yukon) Ltd. ("Foothills") for approval of the institution of interruptible services on Zones 8 and 9 of its pipeline system. Although not applied for, the matter of interruptible service on Foothills' other two operating zones, 6 and 7, were made an issue at the hearing.

The Board decided that there was no present need for interruptible services on Zones 6 and 7 and that, with respect to Zone 8, there was little unused capacity available and no demonstrated interest in the service. The Board did, however, approve the institution of interruptible service on Zone 9.

The central issue of the hearing was the appropriate level for the interruptible toll. Foothills applied for an interruptible toll based on a forecast of the zone cost of service at 100% load factor, which it argued would provide a reasonable contribution to the fixed costs and a fair value for interruptible service. The company opposed any discount from this rate. A number of intervenors supported some form of discount below the firm service rate at 100% load factor.

The Board's decision was that in view of the reliability of service that interruptible shippers could expect to receive on Foothills' Zone 9, the Board was not prepared to approve an interruptible toll below the firm service rate at 100% load factor. Since the Board had also decided to discontinue overrun service on Zone 9, the Board or-

148. National Energy Board, "Reasons for Decision, Westcoast Transmission Company Limited Application dated 19 December 1986 for New Tolls effective 1 January 1987 and 1 January 1988" November 1987, published by the Minister of Supply and Services Canada, 1987, as Cat. No. NE22- 1/1987-10F.

149. National Energy Board, "Reasons for Decision, Foothills Pipe Lines (Yukon) Ltd. Application dated 15 June 1987 for Approval of the Institution of Interruptible Service" (December 1987), published by the Minister of Supply and Services Canada, (1987), as Cat. No. NE22-1/1987-13E.

dered that two tiers of interruptible service be instituted, the first tier at 90% load factor (IT-1) and the second at 100% load factor (IT-2) so that a shipper desiring priority could obtain it.

6. GH-2-87: TCPL Facilities (Partial Decision)[150]

This hearing considered two applications made by TCPL to expand its pipeline system in Manitoba, Ontario and Quebec to meet forecasted deliveries in the existing domestic and export markets as well as to deliver incremental export volumes to the United States. These incremental volumes include licensed exports by Alberta Northeast Gas Ltd. at Niagara Falls and Iroquois, Ontario and by ProGas Limited, KannGaz Producers Ltd. and WGML at Niagara Falls, Ontario.

The Board approved part of the proposal of TCPL, specifically the construction of three sections of pipeline adjacent to the existing pipeline, totaling 49 kilometres, near Sarnia and Niagara Falls, Ontario and St. Jean-Sur-Richelieu, Quebec, the installation of new aftercoolers, and the upgrading and relocation of a number of compressor units. The Board deferred its consideration of a proposed fourth section of parallel pipeline some 19 kilometres long near Cornwall, Ontario until it receives evidence from TCPL that the affected land owners have been notified.

The Board chose a "rolled-in" tolling methodology for the new facilities, as requested by TCPL, so that the cost would be borne by all shippers on TCPL's system. The Board also called for an additional toll to be collected from shippers requiring a delivery pressure over 4,000 kilopascals.

This partial decision was issued ahead of its reasons in order that needed construction could begin.

B. PUBLIC UTILITIES BOARD (ALBERTA) AND ENERGY RESOURCES CONSERVATION BOARD

1. PUB/ERCB Report No. E87128/87-C: Gas Supply and Transportation Service Inquiry[151]

This joint inquiry by the Public Utilities Board and the Energy Resources Conservation Board ("ERCB") was called by the government to consider the question of what access core market customers should have to competitively priced gas.

The Report recommends that core market consumers be entitled to purchase their gas directly provided they do so under long term, 10 to 15 year contracts. The Report recommends the protection of long term contracts, whether through utilities or direct sales, because of the dependence of the core market on natural gas.

The Report supports access to transportation service by core market consumers who have contracted on the appropriate long term basis provided that they absorb all costs associated with their decision, including take-or-pay liabilities and load balancing costs caused by their departure from the system.

150. Orders No. XG-6-88, XG-7-88, XG-8-88, XG-0-88, XG-10-88.

151. December 29, 1987.

2. Alberta Ethane Policy: Report on Implementation[152]

This report of the ERCB deals with the right to extract ethane from gas produced in Alberta.

Alberta's ethane-based petrochemical industry relies upon straddle plants, located on the gas pipelines, that strip the ethane from the gas stream, to obtain their ethane feedstock. For some time a number of processing plants located in the field have been allowed to extract ethane to use as a miscible flood solvent in enhanced oil recovery. This practice has been opposed by petrochemical producers because it reduces the concentration of ethane available at the straddle plants for petrochemical use and increases the ethane's cost.

In August of 1987 the Alberta government had issued an ethane policy statement ordering a threshold volume of ethane to be maintained in straddle plants and asked the ERCB for its recommendations as to the level of that threshold. In its report, the Board recommends that the threshold be set at 19,600 m^3 a day of pure ethane at the straddle plants' inlet facilities. That volume represents the approximate capacity of Alberta Gas Ethylene's existing plants that convert ethane into ethylene plus the ethane required as a buffer to move ethylene batches through the Cochin pipeline to Sarnia. No threshold or protection was set for any future straddle plant-based ethylene plants.

According to the Board, the recommended threshold should only exist for the 20 year life of the plants' original industrial development permits. The Board also urged the government to reconsider its position on the price for ethane re-injected into the gas stream by field plant operators when the level of ethane in straddle plants streams falls below the threshold. In place of the government endorsed price equal to the incremental cost of extracting the ethane at the straddle plants the Board suggested that the price be negotiated between buyer and seller.

C. ONTARIO ENERGY BOARD

1. 134: Expansion of the Natural Gas System[153]

This report was the result of a review by the Board of the criteria used by the utilities to evaluate system expansion which was initiated after six applications by The Consumers' Gas Company Ltd. ("Consumers") for leave to construct were denied on the grounds that they failed to meet the rate of return feasibility test.

The report examines and evaluates the relative merits of the various economic feasibility tests used or proposed by the utilities. The Board emphasized, however, that economic feasibility has not been nor would be the sole criterion for determining whether or not a project is in the public interest.

One of the major reasons for conducting the review was that much of the area remaining for system expansion would be found to be uneconomic under the existing feasibility tests. On this issue, the Board stated that it would be appropriate for existing customers to be charged higher rates to subsidize financially non-sustaining extensions if such extensions would be in the overall public interest and the subsidy would not impose an undue burden. Contributions in aid of construction and government subsidies were considered as alternatives where higher rates would impose an undue burden.

152. ERCB D 88-D, April 1988.

153. June 1, 1987.

2. E.B.R.O. 430 (Second Segment): Application by ICG Utilities (Ontario) Ltd. for Rates[154]

ICG Utilities (Ontario) Ltd. ("ICG") 1987 test year rate hearing had concluded when the Board learned that two Alberta marketers were selling gas within the Province of Ontario without Certificates of Public Convenience and Necessity and municipal by-laws approved by the Board and that the contracts governing the distribution of that gas to the direct purchase customer had not been filed by ICG for approval with the Board. The Board re-opened the hearing to consider the issue of regulatory non-compliance by ICG.

Prior to the hearing both marketers involved had been forced to restructure their arrangements to move the point of sale to the Alberta border. These marketers were called to give evidence, in the re-opened hearing, on ICG's failure to file the distribution contracts. An attempt was made at that time to challenge the validity of the Board's allegedly discriminatory application of the law governing the sale of gas within Ontario. It was argued that the sale of gas in Ontario by the marketers was indistinguishable from the sale of gas by TCPL/WGML to the utilities, insofar as the need for a certificate of public convenience and necessity and municipal by-laws is concerned. In the hearing and in its decision, the Board refused to deal with this issue and confined itself to a strong condemnation of ICG for its administrative shortcomings.

3. E.B.R.O. 410-III, 414-II; E.B.R.O. 411-III, 430-II, 411-I, 430-2B, 415; E.B.R.O. 412-III (cont.); Applications by Consumers', ICG and Union Gas Limited for Rates (Re: Gas Costs)[155]

In these decisions the Board "reluctantly" approved new natural gas supply contracts, between WGML and the three utilities, that continued the streaming of gas under Competitive Marketing Programs ("CMP') notwithstanding the fact that the Board recognized them to be inconsistent with an open competitive market system as well as contrary to the specific prohibition of such arrangements last year.[156]

The Board found that the contracts, nevertheless, are in the public interest because they do provide lower gas costs for most, if not all, utility customers.

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154. Ontario Energy Board, "Reasons for Decision, In the Matter of the Ontario Energy Board Act and In the Matter of an Application by ICG Utilities (Ontario) Ltd. for Rates: E.B.R.O. 430", (July 15, 1987).

155. Ontario Energy Board, "Decision with Reasons, In the Matter of the Ontario Energy Board Act and In the Matter of an Application by Union Gas Limited for Rates (Re: Gas Costs)", (January 22, 1988).

156. Ontario Energy Board, "Partial Reasons for Decisions, In the Matter of an Application by The Consumers' Gas Company Ltd. for Orders Approving Rates to be Charged for the Sale of Gas:E.B.R.O. 414-I", dated November 28, 1986, and *see also* "Amendment to Partial Reasons for Decision E.B.R.O. 414-I dated November 28, 1986" 11 December 1986 and "Further Reasons for Decision" (9 January 1987); "Partial Reasons for Decision, In the Matter of an Application by Union Gas Limited to the Ontario Energy Board for an Order or Orders Approving or Fixing Just and Reasonable Rates and Other Charges for the Sale, Transmission, Distribution or Storage of Gas: E.B.R.O. 429", (28 November 1986), and *see also* "Amendment to Partial Reasons for Decision E.B.R.O. 429" (November 1987); "Partial Reasons for Decision respecting an Application by ICG Utilities (Ontario) Ltd. for an Order or Orders to Reflect Reductions and ICG's Cost of Gas Resulting from a Memorandum of Agreement dated September 5, 1986 between ICG and TransCanada Pipelines Limited; E.B.R.O. 430-I" 28 November 1986, and see also "Amendment to Partial Reasons for Decision E.B.R.O. 430-I dated November 28, 1986" (11 December 1986) and "Interim Decision: E.B.R.O. 430-2" (14 May 1987).

The hearings began with motions by the Special Counsels to dismiss the applications of the utilities without hearing their evidence on the grounds that, given the Board's jurisdiction and previous rulings, the Board could make no decision except to dismiss the applications regardless of what evidence was put forward in a hearing. These motions were supported by a group of Calgary-based marketers. Without commenting on the merits of the applications, the Board dismissed the motions and proceeded to hear the applications.

The evidence of WGML was remarkable in that their witnesses made no attempt to hide the fact that WGML never had any intention of ending the streaming of gas in its contracts, notwithstanding representations to the Board to the contrary.

Although the Board acknowledged that many of the factors preventing competition in the marketplace were beyond its control, the Board did take a stand against WGML's continued hold on the captive core market. The Board recommended that the next agreements between the utilities and WGML contain a partial "decontracting" provision and, more importantly, stated that it would not allow the continuation of CMPs beyond October 31, 1988. Discounting by the utilities is also to be eliminated in the next contracts with WGML.

The elimination of CMPs after October 31, 1988 is somewhat academic now given their replacement in the marketplace by the more insidious System Gas Resale ("SGR") arrangements of TCPL/WGML.

4. E.B.C. 177, 178, 179, 180: Sale of Gas in Ontario by Brokers[157]

In this long overdue decision, the Board committed to issue each of Northridge Petroleum Marketing, Inc., ATCOR Ltd., Brenda Marketing Inc. and Enron Canada Ltd. a province-wide Certificate of Public Convenience and Necessity enabling them to sell gas within the Province of Ontario. These are the first such certificates issued to marketers. TCPL/WGML does not have a Certificate of Public Convenience and Necessity from the Board but nevertheless sells gas within Ontario.

Before the marketers can actually exercise the right to sell gas within the Province of Ontario under their Certificates, they will need a by-law from each municipality in which their sales occur, which by-laws must have the prior approval of the Board.

Each of the Certificates issued will be subject to three conditions:

(a) the Certificate relates only to the sale of gas and the holder may not own or operate pipeline facilities;

(b) the holder must provide to existing and prospective customers on request its most recent audited financial statements and a description of its current gas supply; and

(c) prospective customers must be advised in writing that the Board does not make or imply any guarantee of gas supplied by reason of the certification. The holder is also to advise the customer that the utility does not guarantee backstop supply.

In its decision, the Board also recommends changes to legislation which would distinguish marketers from utilities, streamline the certification procedure and exempt brokers from the need for municipal by-laws. This legislation has been

157. Ontario Energy Board, "Decision with Reasons, In the Matter of a Hearing Respecting the Sale of Gas in Ontario by Brokers; Northridge Petroleum Marketing Inc., ATCOR Ltd., Brenda Marketing Inc., Enron Canada Ltd.: E.B.C. 177, 178, 179, 180", (May 9, 1988).

discussed with the government for some time now, therefore the prospects of such legislation being enacted may be poor.

The decision probably is the most sweeping endorsement of gas brokers by any regulatory board in Canada. It would appear to be the intention of the Board to enable brokers with the Certificates to operate on the system of the utilities in Ontario with as much flexibility as possible.

5. E.B.R.O. 410-III, 414-II; E.B.R.O. 411-III, 430-II, 411-I, 430-2B, 415, 404; Applications by Consumers' and ICG for Rates (Re: Rate Design)[158]

These decisions finally implement the contract carriage arrangements called for in the contract carriage decision of 1986.[159]

A number of the issues decided have important implications for the competitive gas market in Ontario.

It had been argued by certain intervenors that the Alberta border buy/sell arrangements were anti-competitive in that they could, in the long run, allow the utility to monopolize the transportation system from the Alberta border to the customer's plant gate. The Board did not accept this argument and permitted Alberta border buy/sell to continue, though it did stop Consumers' from overpaying buy/sell arrangements customers by requiring it to pay the weighted average cost of gas ("WACOG") instead of the CD-100 price.

Notwithstanding statements in its Gas Costs decisions that it would insist on a separation of marketing and transportation, the Board accepted the dubious argument of the utilities that there was no longer any need for the separation of marketing and transportation because of the utilities' allegedly "neutral" position in the market as facilitators instead of competitors of other sellers.

In ordering unbundled rates, the Board was critical of the proposals of Consumers' and their apparent attempt to overprice unbundled services and therefore deter their usage. The Board rolled back Consumers' proposed load balancing rate by 10% and its proposed unbundled T-service rate by 7%.

In the Consumers' case, the Board rejected Consumers' proposed "seasonalization" of rates and directed Consumers' to prepare future cost allocation studies based on a two season rate suggested by the Board's own witnesses.

As a part of the move to competitive pricing, the Board had encouraged rate rebalancing to minimize under and over-contributions by different classes of customers. The proposals of the utilities in this regard were endorsed by the Board.

In the case of both Consumers' and ICG the Board ordered that diversion rights be included in the rate schedules.

D. MANITOBA PUBLIC UTILITIES BOARD

1. Public Hearing to Establish Buy/Sell Criteria for Direct Sale of Natural Gas to Consumers in Manitoba[160]

158. Ontario Energy Board, "Decision with Reasons, In the Matter of the Ontario Energy Board Act and In the Matter of an Application by The Consumers' Gas Company Ltd. for Rates (Re: Rate Design)", (May 18, 1988); "Decision with Reasons in the Matter of the Ontario Energy Board Act and In the Matter of Applications by ICG Utilities (Ontario) Ltd. and Nitrochem Inc. for Rates (Re: Rate Design)", (May 20, 1988).

159. *Supra* n. 136.

160. Manitoba Public Utilities Board "Order No. 119/87" (July 21, 1987).

After rejecting T-service in favour of buy/sell arrangements,[161] the Board called a hearing to establish buy/sell criteria. The interesting point in this hearing was that, after having convinced the Board the year before that direct sales could only be implemented by way of buy/sell arrangements rather than T-service because of the utilities' inability to load balance otherwise, the utilities sought to demonstrate in this hearing that they could not load balance under buy/sell arrangements either. On this basis arguments were made by certain intervenors that the Board should reconsider its decision against T-service. Although T-service again was rejected in this decision, the Board subsequently called another hearing to specifically reconsider T-service.[162]

In the hearing, the utilities had presented evidence and argument that telemetering equipment was required for each and every buy/sell customer and that such customers should bear the associated costs. The Board was not convinced of the need for telemetering and did not order it.

2. Applications of Greater Winnipeg Gas and ICG Utilities (Manitoba) Re: Gas Costs

The Board issued interim orders approving applications by the utilities to lower their natural gas rates following agreements with WGML and the removal of the Manitoba motive fuel tax that lowered the cost of gas to the utilities.

The Board permitted, on a short term basis only, the discounting of gas through the utilities by WGML and insisted that discounts, in the future, come directly from TCPL/WGML. In its decision the Board also directed the utilities to prepare and submit a tendering strategy for their gas supply requirements, together with tendering documents.

E. QUEBEC RÉGIE DE L'ÉLECTRICITE ET DU GAZ

1. Gaz Métropolitain, inc.'s Phase II 1987 Rate Hearing (Partial Decision)

This is a partial Phase II decision on Gaz Métropolitain, inc.'s ("GMi") rate hearing for the year ended September 30, 1987. In its report, the Régie criticized certain factors it felt were detrimental to a free market system, especially the artificial distinctions being made by GMi between core and non-core market consumers. The Régie was also critical of GMi's gas supply agreement with WGML whose producers it described as a "*de facto* cartel". Although the Régie did not prohibit the use of CMPs by WGML, it did state that GMi should encourage activity by independent producers or brokers who, unlike WGML's contract producers, compete with one another.

For all its criticism of WGML, the Régie did not unbundle rates so that non-system gas suppliers could more effectivly compete with WGML. It would appear that the Régie accepted the argument of GMi that unbundling would be administratively too difficult.

161. Manitoba Public Utilities Board, "Order No. 158/86" (December 18, 1986).
162. Manitoba Public Utilities Baord, Notice of Hearing dated March 29, 1988.

XI. GOVERNMENT AGREEMENTS

A. THE FREE TRADE AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF AMERICA[163]

The Free Trade Agreement is a sweeping, bilateral extension of the General Agreement on Tariffs and Trade intended to free trade between Canada and the United States from a variety of tariffs and other barriers.

Insofar as natural resources are concerned, the Free Trade Agreement is a logical extension of the market oriented energy pricing policy implemented in Canada over the last few years.

Subject to conservation, price stabilization and national security, export restrictions are prohibited. Discriminatory taxes, duties or other charges on exports also are prohibited.

Discriminatory regulatory actions by federal agencies are subject to a formal consultation procedure.

The provinces' legislative authority over their resources is unaffected by the Free Trade Agreement. However, to the extent that a province implements a constitutionally questionable export or pricing policy, such as Alberta's "ghost floor price" for ex-Alberta direct sales, a third party may now be the one to force a constitutional challenge.

B. AGREEMENT FOR LLOYDMINSTER BI-PROVINCIAL UPGRADER

This agreement between the governments of Alberta, Saskatchewan and Canada and Husky Oil Ltd. provides the basis for construction of the Lloydminster Bi-Provincial Upgrader, which will convert 46,000 barrels per day of heavy crude from Alberta and Saskatchewan into a high quality synthetic crude oil.

The $1.27 billion project is to be financed on the basis of 50% equity and 50% debt, with the $635 million debt shared by the governments of Alberta, Saskatchewan and Canada according to a 30/30/40 split. Depending upon the profitability of the project, there are provisions for accelerated debt repayment and upside sharing in net profits by the governments.

XII. FEDERAL LEGISLATION

A. STATUTES

1. An Act to amend the Canada Shipping Act and to amend the Arctic Waters Pollution Prevention Act, the Maritime Code Act and the Oil and Gas Production and Conservation Act in consequence thereof, S.C. 1987, c. 7.

These amendments relate, *inter alia*, to liability and compensation for maritime oil or gas spills.

163. December 10, 1987.

2. Canadian Exploration and Development Incentive Program Act, S.C. 1987, c. 18

This Act is intended to encourage oil and gas exploration and development activity through cash incentives. These incentives reimburse applicants for one-third of their eligible expenses (including expenses for data gathering, drilling, completing and abandoning wells) for activity commenced in the twelve month period beginning April 1, 1987. The anticipated annual cost of the program is $350 million and it is expected to generate up to $1 billion in investment activity in Western Canada.

3. Canadian Environmental Protection Act, Bill C-74

This Bill is both a consolidation of existing environmental legislation and new law. It replaces the nutrients regulation part of the Canada Water Act,[164] and the international air pollution and fuels regulation elements of the Clean Air Act,[165] and the Environmental Contaminants Act[166] and the Ocean Dumping Control Act.[167] The Minister of the Environment is given various powers and duties to monitor, conduct research, consult, plan and report on the environment. The Governor in Council is empowered to make regulations controlling all aspects of the development, manufacture, import and export, sale, use, transport and disposal of certain toxic substances, including petroleum.

4. Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, Bill C-75

This Bill implements the Canada-Nova Scotia Offshore Petroleum Resources Accord.[168] The Bill establishes the Canada-Nova Scotia Offshore Petroleum Board for the joint management of offshore resources. It also addresses measures to meet shortfalls of petroleum supplies for the province, the issuance by the Board of "interests" for petroleum exploration and production, Canadian ownership requirements, reservation of Crown royalties, transfer, assignment and registration of interests, regulation of production, conservation measures, voluntary pooling arrangements, voluntary and mandatory "unitization", revenue sharing, taxation, fiscal equalization offset payments and the Canada-Nova Scotia Development Fund.

5. An Act to amend the Indian Act and another Act in consequence thereof, Bill C-115

This Bill amends the Indian Act[169] by including in the definition of "reserve", "designated" lands, such that lands qualified by surrender under the present Act will form part of a reserve, and by allowing the sale of only lands that have been absolutely surrendered to the Crown, while permitting transactions short of sale without an absolute surrender where bands designate reserve lands for the purpose of carrying out those transactions.

164. R.S.C. 1970, c.5, (1st. Supp.), as am.
165. S.C. 1970-71-72, c. 47, as am.
166. S.C. 1974-75-76, c. 72, as am.
167. S.C. 1974-75-76, c. 55.
168. Governments of Canada and of Nova Scotia, "Offshore Petroleum Resources Accord", (26 August 1986).
169. R.S.C. 1970, c. I-6, as am.

6. An Act to Implement the Free Trade Agreement Between Canada and the United States of America, Bill C-130

This Bill implements the Free Trade Agreement.[170]

B. REGULATIONS

1. Arctic Shipping Pollution Prevention Regulations, Amendment SOR/87-377

The late operating season for an Arctic Class 3 vessel carrying a threshold quantity of oil into Shipping Safety Control Zone 1 was extended by these regulations by 10 days during 1987 and the continued operation of some vessels during dates that were previously restricted was permitted. These changes give effect to the intent of the Arctic Waters Pollution Prevention Act[171] by reducing some of the restrictive conditions which originally were applied.

2. Oil and Gas Occupational Safety and Health Regulations, SOR/87-612

These regulations are designed to extend certain protections enjoyed by employees to whom the Canada Labour Code[172] applies to employees involved in the exploration of oil and gas on certain federal Crown lands. In particular, the regulations give the employees the right to know of dangerous situations, the right to refuse to work in such situations and the right to participate in maintaining a safe workplace. The regulations prescribe minimum standards for safety in a broad range of areas such as building safety, electrical safety, lighting and sound levels, sanitation and others. It is expected that these regulations will not impose additional requirements to the very high standards currently practised in the industry.

3. Environmental Studies Research and Fund Regions Regulations, SOR/87-641

These regulations divide Canada's frontier lands into thirty one regions for the purpose of assessing levies on oil and gas interest holders to be used to support environmental and social studies. The studies are to facilitate decision-making regarding oil and gas development on frontier lands. The regulations are enacted under the Canada Petroleum Resources Act[173] and simply replace substantially similar regulations enacted under the repealed Canada Oil and Gas Act.[174]

4. Oil Carriage Limitation Regulations Revocation, SOR/87-268

This regulation revokes the Oil Carriage Limitation Regulations.[175] The revocation resulted from concerns that the regulations lacked enabling legislation and were therefore *ultra vires*. In any event, the abandonment of plans to build a large refinery in Maine obviated the need for the regulations. The Canada Shipping Act[176] has been amended to allow for the re-introduction of the regulations should this prove necessary.

170. *Supra* n. 163.
171. R.S.C. 1970, c. 2 (1st Supp.), as am.
172. R.S.C. 1970, c. L-1, as am.
173. S.C. 1986, c. 45.
174. S.C. 1980-81-82-83, c. 81 (repealed by S.C. 1986, c. 45, s. 130).
175. SOR/82-244.
176. R.S.C. 1970, c. S-9, as am.

5. Oil Pollution Prevention Regulations Amendment, SOR/87-231

These amendments effect editorial changes to the existing regulations[177] by amending certain sections to create consistency between the French and English versions. No substantive changes were made.

6. Canadian Exploration and Development Incentive Program Regulations, SOR/87-514

These regulations implement the Canadian Exploration and Development Incentives Program Act.[178]

7. Notifiable Transactions Regulations, SOR/87-348

These regulations specify the method of calculating the aggregate values of assets and gross revenues to determine whether the Competition Act[179] applies to certain merger transactions. The regulations are designed to remove any uncertainty over whether a merger transaction is of such a value that notification under the Act is required.

8. Exemption from Petroleum Compensation Charge (Ultramar - Imported Cargos) Order, SOR/87-523

Ultramar Canada, Inc. imported crude oil at a time when crude oil was regulated without paying oil import compensation. The practice at the time was to exempt the Petroleum Compensation Charge under section 65.12 of the Energy Administration Act[180] on the same volume. This regulation effects that result. The exemption affects only one company.

9. Reduction of Charge (Sunoco - Detroit Edison, January, 1983 to April, 1983) Order, SOR/87-289

These regulations give effect to a NEB decision to reduce the export charges payable by Sunoco Inc. under heavy oil licence numbers ERF-071-82 and ERF-014-83.

10. Sun-Canadian Pipeline (Motor Gasoline) Order Amendment, SOR/87-288

Sunoco received an exemption on export charges for gasoline used as buffer stock in its pipeline provided a like amount of gasoline was returned to Canada within twelve months. The regulation effectively waives export charges over a certain volume of gasoline which was returned to Canada ten days late due to an error by Sunoco Inc. in interpreting the regulations.

11. Energy Monitoring Act Regulations Amendment, SOR/87-462

This regulation changes the forms used in the Petroleum Monitoring Survey Questionnaire to increase the detail required under the heading "Summary of Uses

177. C.R.C. 1978, c. 1454, as am.
178. S.C. 1987, c. 18. *See* prior text.
179. R.S.C. 1970, c. C-23, as am.
180. S.C. 1974-75-76, c. 47, as am.

of Funds - Other Capital Expenditures" and changes the format of the "Balance Sheet". The changes distinguish between capital expenditures for new assets which generate wealth and purchases of used assets representing merely a redistribution of assets. The changes are intended to increase the precision of analysis of capital expenditures.

12. Energy Supplies Allocation Board Exemption Order No. 10, SOR/87-702

This regulation exempts twenty-one companies, who participate on a committee to respond to a national petroleum emergency, from the provisions of the Competition Act.[181] While no committee work has yet lessened competition, the regulation is designed to protect the listed companies should a national petroleum emergency arise.

13. Miscellaneous Crude Oil Exports Exemption or Reduction Order Amendment, SOR/88-155

This regulation reduces export charges on certain surplus crude oil which was economically unattractive to purchasers in foreign markets. By reducing these charges, more oil could be produced and sold and government and industry revenues were higher than they would otherwise have been.

14. Oil and Gas Spills and Debris Liability Regulations, SOR/87-331

These regulations establish the limits on the absolute liability of an operator for actual damages caused by spills or debris in frontier lands. Limits of absolute liability are $10 million for land-based damage, $25 million per incident near major waterways, $30 million for offshore damage (excluding the Arctic) and $40 million for damage to Arctic waters. These new limits are consistent with an earlier Ministerial directive which was available to the petroleum industry.

15. Petroleum and Gas Revenue Tax Regulations Amendments, SOR/87-473, SOR/87-665

These amendments to the PGRT Regulations[182] implement certain provisions of the April 1983 budget and the 1982 NEP update. The measures are necessary despite the repeal of the PGRT Act[183] for the period of time subsequent to their date of application. The changes reduce the tax burden on enhanced oil recovery projects by permitting the deduction of certain capital expenditures against income from the project. The estimated cost in 1983 was $45 million over the first two fiscal periods to which these relations applied.

16. Petroleum Incentives Program Regulations Amendment, SOR/87-534

The Petroleum Incentives Program ("PIP") provided cash incentives for oil and gas exploration. PIP was discontinued on April 1, 1987, but the Government undertook to maintain the incentives until December 31, 1987 where they were

181. *Supra* n. 179.
182. SOR/82-503, as am.
183. S.C. 1986, c. 58.

legally committed to as of March 28, 1985. These regulations give effect to this undertaking to "grandfather" existing frontier well commitments under the PIP regime.

17. Oil and Gas Occupational Safety and Health Regulations, Amendment, SOR/88-199

This amendment completes the implementation in the oil and gas sector of the Workplace Hazardous Material Information System, a national system to provide information on hazardous materials used in the workplace, by specifying employer requirements relating to the conditions of use and worker education.

18. Oil Product Designation Regulations, SOR/88-216

Trans Mountain Pipe Line Company Ltd., Neste Oy, Celanese Canada Inc. and Hoechst Celanese Corporation are considering the construction of a methyl tertiary butyl ether ("MTBE") production facility in Edmonton provided the product can be transported by pipeline to the westcoast and thereby access the markets. These regulations enable the transport of methanol and MTBE by pipeline.

19. Frontier Lands Registration Regulations, SOR/88-230

These regulations detail the public register of oil and gas exploration and production interests and instruments established by the recently proclaimed[184] Part VIII of the Canada Petroleum Resources Act.[185] The registration system is designed to reflect the ownership of various types of licences and other rights and to provide a formal means of giving notice to the public of dispositions and certain types of encumbrances. An important feature of the registration process is the approval and recording of inter-corporate transfers of ownership of oil and gas rights and related conditions affecting those rights.

20. Canada-Newfoundland Oil and Gas Spills and Debris Liability Regulations, SOR/88-262

These regulations prescribe the applicable limits to the otherwise absolute liability of an operator imposed by The Canada-Newfoundland Atlantic Accord Implementation Act[186] for actual damages incurred as a result of a spill or debris in the area in which operations are being conducted.

21. Newfoundland Offshore Area Registration Regulations, SOR/88-263

These regulations detail the public register of oil and gas exploratory and production interests and instruments established under Division VIII of Part II of the Canada-Newfoundland Atlantic Accord Implementation Act.[187]

22. Arctic Shipping Pollution Prevention Regulations, Amendment, SOR/88-282

This amendment defines situations where an environmental emergency condition exists and empowers pollution prevention officers to permit vessels carrying a

184. SI/88-86.
185. *Supra* n. 173.
186. S.C. 1987, c. 3.
187. *Id.*

threshold quantity of oil, which previously could not navigate outside specified dates in a Shipping Safety Control Zone, to navigate during such a condition in support of measures to minimize environmental damage.

XIII. ALBERTA LEGISLATION

A. STATUTES

1. NOVA, AN ALBERTA CORPORATION Amendment Act, 1987, S.A. 1987, c. 30

This bill provides for the continuance of NOVA, AN ALBERTA CORPORATION under the Business Corporations Act with the new name "NOVA Corporation of Alberta" and a reorganization of the share capital of the original corporation by the board of directors.

2. Pollutant Spills Act, Bill 231

This bill, reported in last year's paper, was not proceeded with.

3. Energy Resources Conservation Amendment Act, 1988, Bill 4

The act[188] has been amended by changing the second instalment date for advances of funds to cover the Board's estimated expenditures from January to July, repealing sections 24 and 26, dealing with the keeping of accounts and records and the microfilming of records, respectively, to avoid conflict with other legislation and providing for the enforcement of intervenor cost awards.

4. Oil Sands Technology and Research Authority Amendment Act, 1988, Bill 5

Certain provisions of the act[189] dealing with the appropriation of monies for expenditures of the Alberta Oil Sands Technology and Research Authority and for the Oil Sands Technology and Research Fund are amended.

5. Alberta Plus Corporation Act; Bill 207

This bill creates a Crown corporation called the "Alberta Plus Corporation", the objects of which are to coordinate and manage the implementation of projects to develop oil sands and heavy oil deposits in Alberta and to participate in any stage of such projects.

6. Gas Resources Preservation Amendment Act, 1988, Bill 41

This bill clarifies who can be fined for moving gas without the required gas removal permit and increases the fine from between $100 and $2,000 for the first day and $50 to $1,000 for each subsequent day, up to $100,000 for the first day and $25,000 for each day thereafter. In addition, the amendment enables the Minister to cut the gas supply of an individual who contravenes the act.

188. R.S.A. 1980, c. E-11, as am.
189. R.S.A. 1980, c. O-6, as am.

7. Oil and Gas Conservation Amendment Act, 1988, Bill 20

This amendment enables the Board to vary the method of allocating the provincial allowable in an integrated scheme without a mandatory public hearing. The statutory requirement for a mandatory public hearing also is dispensed with for Board declarations of common carrier, common purchaser or common processor or relief of unreasonable duties on the obligation to purchase or process inferior gas. The power to make regulations requiring deposits to guarantee well operation and abandonment is repealed.

8. Energy Statues Amendment Act 1988, Bill 42

This bill effects miscellaneous amendments to the Mines and Minerals Act,[190] the Natural Gas Marketing Act,[191] the Natural Gas Pricing Agreement Act,[192] the Petroleum Marketing Act[193] and the Take-or-Pay Costs Sharing Act.[194]

9. Free Trade Transition Commission Act, Bill 256

This bill establishes the Free Trade Transition Commission to study the anticipated effects of free trade on Alberta industry and labour and to submit recommendations to the Minister of Economic Development and Trade for programs which will provide the necessary transitional assistance to those sectors of industry and labour that may be adversely affected by free trade.

B. REGULATIONS

1. Take-Or-Pay Costs Sharing Act Levy Orders, Alta. Reg. 231/87, 285/87, 317/87, 357/87, 394/87, 436/87, 467/87, 526/87, 403/87, 230/87, 286/87, 318/87, 358/87, 395/87, 437/87, 468/87, 527/87, 18/88, 52/88, 92/88, 17/88, 53/88, 93/88, 119/88, 120/88

These orders prescribe the rates of the levy payable under the Take-Or-Pay Costs Sharing Act.[195] Notwithstanding the recommendation of the NEB to reduce, this year, to 9 cents/GJ the original 10 cents/GJ levy for non-system gas,[196] the levy for the 12 month period commencing November, 1987 remains at 10 cents/GJ.

2. Crude Oil Par Price and Royalty Factor (No. 4) AmendmentRegulations, Alta. Reg. 244/87, 287/87, 349/87, 359/87, 469/87, 529/87, 25/88, 58/88, 126/88

These regulations prescribe the royalty factors and par price used in calculating the royalty for old and new oil.

190. R.S.A. 1980, c. M-15, as am.
191. S.A. 1986, c. N-2-8.
192. R.S.A. 1980, c. N-4, as am.
193. R.S.A. 1980, c. P-5, as am.
194. S.A. 1986, c. T-O.1.
195. *Id.*
196. National Energy Board, "Reasons for Decisions, In the Matter of TransCanada PipeLines Limited, Availability of Services" May 1986, published by the Minister of Supply and Services Canada, 1986, as Cat. No. NE22-1/1986-7E.

3. Alberta Average Market Price Regulation (No. 1) Alta. Reg. 530/87

The regulation sets the Alberta Average Market Price ("AMP") for the production month of January, 1988 for the purposes of the Natural Gas Royalty Regulations.[197]

4. Alberta Average Market Price (No. 1) Amendment Regulations, Alta. Reg. 26/88, 57/88, 97/88, 125/88

These amendments set the Alberta AMP for the production months of February, March, April and May, 1988.

5. Pipe Line Assessment Standards Amendment Regulation, Alta. Reg. 523/87

This regulation amends section 5(a)(iv) of Schedule B by striking out "or (b)".

6. Permit Conditions Regulation, Alta. Reg. 271/87

This retroactive regulation under the Gas Resources Preservation Act[198] was intended to subject holders of short-term "blanket" removal permits to the same strict terms and conditions to which permits then being issued were subject to. Holders of short-term permits granted before June 25, 1987 were required to file with the Minister information respecting all downstream arrangements. If there are no downstream arrangements in existence or gas was not being removed from Alberta before June 25, 1987, gas cannot be removed without filing adequate information respecting downstream arrangements and obtaining the written consent of the Minister. The Minister must be advised of any changes to downstream arrangements and consent to the removal of gas under such changed arrangements. New applicants for permits are subject to full information filing requirements. This regulation also subjects all short-term permits to a self-displacement and a surplus test condition.

7. Permit Conditions Amendment Regulation, Alta. Reg. 370/87, 380/87

These amendments change the effective date for the surplus test condition for short-term removal permits from September 1,1987 to October 1, 1987 and clarify certain of the definitions and information requirement provisions.

8. Crown Land Registration Amendment Regulation, Alta. Reg. 430/87

This amendment amends the definition of "prescribed fee" and repeals section 6.1 and Schedule 2.

9. Mines and Minerals Act Forms Regulation, Alta. Reg. 241/87

This regulation prescribes new forms for Department of Energy Notification for Issue of Certificate of Title, Notice of Change of Official Address for Service, Transfer of Agreement(s), Transfer of a Specified Undivided Interest in Agreement(s) and Transfer of Part of the Location Contained in an Agreement.

197. Alta. Reg. 16/74, as am.
198. R.S.A. 1980, c. G-3.1, as am.

10. General Amendment Regulation, Alta. Reg. 429/87

This amendment establishes a new Schedule for the Tariff of Fees under the Mines and Minerals Act.[199]

11. Incentive Credit Regulation, Alta. Reg. 237/87

This regulation governs the application of credits held under the Exploratory Drilling Incentive Regulations, the Geophysical Incentive Program Regulations, and the Exploratory Drilling Assistance, Development Drilling Assistance and Geophysical Assistance Regulations.[200]

12. Natural Gas Royalty Amendment Regulation, Alta. Reg. 513/87

This amendment implements two basic changes to the gas royalty system aimed at stalling falling gas prices and the Crown royalty income thereon. Firstly, effective January 1, 1988, the Crown determines its royalty share of gas volumes at the time of production, instead of the time of sale, by using an Alberta AMP. Secondly, producers who sell their gas below 80% of the AMP are deemed to have sold it at 80% of AMP for the purposes of valuing the Crown's royalty share.

13. Oil Sands, 1978 Amendment Regulation, Alta. Reg. 432/87

This amendment concerns the fee prescribed.

14. Petroleum and Natural Gas Agreements Amendment Regulation, Alta. Reg. 433/87

This amendment concerns the fee prescribed.

15. Agreement to Amend the Memorandum of Agreement Between the Government of Canada and the Government of Alberta Respecting Gas Pricing and Market Development Incentive Payments, Alta. Reg. 371/87

This regulation sets out the text of the captioned Agreement which is the seventh amendment to the 1981 Gas Pricing Agreement between the parties.

16. Cochin Pipeline Amendment Regulation, Alta. Reg. 440/87.

This amendment changes references to "The Alberta Gas Trunk Line Company" to "NOVA Corporation of Alberta", as well as references to "Company" to "Nova".

17. Foothills Pipeline Amendment Regulation, Alta. Reg. 441/87

This amendment changes references to "NOVA, An Alberta Corporation" to "NOVA Corporation of Alberta", as well as references to "Company" to "Nova".

199. *Supra*. n. 190.

200. Alta. Reg. 378/72, 18/74, 27/78, 212/81, 210/83, 137/84, 35/75, 171/78, 148/80, 213/81, 209/83, 138/84, 156/86, 244/86, 246/86, as am.

18. NOVA, An Alberta Corporation Amendment Regulation, Alta. Reg. 439/87

This amendment changes references to "NOVA, An Alberta Corporation" to "NOVA Corporation of Alberta", as well as references to "Corporation" to "Nova".

19. TQM Pipeline Amendment Regulation, Alta. Reg. 443/87

This amendment changes references to "NOVA, An Alberta Corporation" to "NOVA Corporation of Alberta", as well as references to "Company" to "Nova".

20. Oil and Gas Conservation Amendment Regulations, Alta. Reg. 283/87, 350/87, 485/87, 70/88

Various amendments.

21. Pipeline Amendment Regulations, Alta. Reg. 316/87, 484/87, 534/87

Various amendments, the latter two regulations relating to fees.

22. Public Lands PipeLine Amendment Regulation, Alta. Reg. 289/87

This amendment changes the fee to accompany an application to enter into an agreement.

23. Turner Valley Unit Operations Orders, Alta. Reg. 219/87

These Orders amend the Tract Agents and Working Interest Holders Schedules for Turner Valley Unit Nos. 3, 4, 5 and 6 as well as the Unit Tract Description and Participations Schedule for Turner Valley Unit No. 7.

24. Freehold Mineral Rights Tax Amendment Regulation, Alta. Reg. 67/88

Various amendments.

25. Period Extension Regulation, Alta. Reg. 97/88

This regulation extends the period under the Natural Gas Marketing Act[201] for giving notice of arbitration in respect of the gas contracts entered into by Progas Limited from January 15, 1988 to April 15, 1988.

26. Petroleum Incentives Program Amendment Regulations, Alta. Reg. 75/88, 122/88

These amendments extend the date for persons who have received less of an incentive than they are entitled to notify the Minister, as well as the date for applying for an incentive in respect of an eligible cost or expense, from December 31, 1987 to March 31, 1988.

27. Oil Sands Conservation Regulation, Alta. Reg. 76/88

This comprehensive regulation replaces Alberta Regulation120/84.

201. *Supra* n. 191.