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

ROBERT P. DESBARATS, DONALD E. GREENFIELD AND MICHAEL J. HOPKINS*

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. The 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 and gas 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 the paper, only federal and Alberta legislative developments are reported. In addition, we have not discussed federal income tax legislation. The review of legislation is effective as of June 1, 1987.

I. BUSINESS CORPORATIONS

A. *RE. SEABOARD LIFE INSURANCE CO. AND ATTORNEY-GENERAL OF BRITISH COLUMBIA* [1]

The issue before the Court was whether the merger of Seaboard Life Insurance Company and Fidelity Life Assurance Company constituted "an amalgamation of 2 or more corporations, however effected", in accordance with subsection 187(4) of the Land Title Act (British Columbia).[2] The merger was effected by the purchase, by Seaboard, of virtually all of the issued shares of Fidelity, and the subsequent winding-up of Fidelity under an agreement whereby Seaboard acquired its business and assumed all of its duties and liabilities. The business operations and employees of the two companies were moved to a single new office and all business previously solicited by Fidelity or Seaboard was solicited in the name of Seaboard. The Court held that this constituted an amalgamation, on the basis that the businesses of Seaboard and Fidelity had been "rolled into one legally, physically and factually".[3]

B. *85956 HOLDINGS LTD.* v. *FAYERMAN BROTHERS LTD.*[4]

The issue before the Court was whether a resolution before the annual meeting of the shareholders of a wholesale-retail merchant that its business continue to be carried on but that no further inventory be purchased (except for special orders) to replace inventory sold in the ordinary course, and that its real estate assets be retained until the local real estate market improved, constituted a sale of all or substantially all of the corporation's property as contemplated by paragraph 184(1)(e) of the Business Corporations Act (Saskatchewan).[5] If so, the respondent would be a dissenting shareholder entitled to payment of the fair value of its shares in the corporation. The Court held that the contemplated sale was not one in the ordinary course of the corporation's business. It amounted to a liquida-

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* Barristers and Solicitors, Bennett Jones, Calgary and Edmonton, Alberta.

1. (1986) 30 D.L.R. (4th) 264 (B.C.S.C.).
2. R.S.B.C. 1979, c. 219.
3. *Supra* n. 1 at 268.
4. (1986) 25 D.L.R. (4th) 119, 32 B.L.R. 204 (Sask. C.A.).
5. R.S.S. 1978, c. B-10.

tion, notwithstanding that it was to take place over time and to involve a large number of different purchasers. It was not one which a manager of the business might reasonably be expected to be permitted to carry out on his own initiative without prior approval of, or subsequent reporting to, the board of directors or his superiors.

The Court interpreted the phrase "substantially all" to refer to a sale "which would effectively destroy the corporate business".[6] This is a qualitative test, consisting of a determination whether the sale has the effect of fundamentally changing the nature of the business carried on by the corporation.

C. *NOREN INVESTMENTS LTD.* v. *BROWNIE'S FRANCHISES LTD., JOHNS AND PHILLIPS*[7]

Paragraph 42(1)(c) of the Business Corporations Act (Alberta)[8] prohibits the giving of financial assistance by a corporation to any person in connection with the purchase of the corporation's shares if there are reasonable grounds for believing that the corporation is, or after the giving of the financial assistance would be, unable to pay its liabilities as they become due or if the realizable value of the corporation's assets, excluding the amount of the financial assistance, after the giving of it, would be less than the aggregate of its liabilities and stated capital. This case was tried under what is now subsection 127(1) of the Company Act (British Columbia).[9] The purchaser of the shares of Brownie's Franchises Ltd. agreed that Brownie's would enter into a royalty agreement, whereby the vendor would be entitled to 8% of the franchise payments received by Brownie's, as part of the consideration paid to the vendor for the covenants and agreements included in the purchase agreement, including the transfer of the shares. The Court held that entering into the royalty agreement constituted indirect financial assistance for the purchase of the shares even though the royalty agreement was not the sole consideration. However, the Court found that this giving of financial assistance was saved by paragraph 125(5)(b) of the B.C. Act, which permits the giving of financial assistance to or for the benefit of a holding company by its wholly owned subsidiary.

The Court also considered a provision of the contract which entitled the plaintiff to 8% of the royalties "received or receivable by Brownie's". The Court held that the inclusion of the word "receivable" entitled the plaintiff to the agreed upon percentage of all royalties whether or not actually collected by Brownie's.

On another issue, whether the individual defendants, Johns and Phillips, who agreed to indemnify the plaintiff against any breach of the royalty agreements, could escape liability on the basis that there was no legal consideration flowing from the plaintiff to them, the Court held that the indemnity was enforceable against the indemnitors although the benefit of the consideration ran to the principal debtor only.

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6. 32 B.L.R. at 211.
7. (1986) 9 B.C.L.R. (2d) 225 (S.C.).
8. R.S.A. 1980, c. B-15.
9. R.S.B.C. 1979, c. 59.

D. *CENTRAL TRUST CO.* v. *RAFUSE ET AL.*[10]

This case involved the purchase of shares of a corporation, and the granting of mortgages by the corporation on its real and chattel property, to secure a loan for a portion of the purchase price. The plaintiff was the lender and the defendants were the solicitors who acted for both the lender and the purchaser. The solicitors had certified to the lender, *inter alia*, that the real estate mortgage constituted a first charge on the corporation's real estate. The Companies Act (Nova Scotia)[11] provides, in subsection 96(5), that it shall not be lawful for a company to give direct or indirect financial assistance in relation to a purchase of shares of the company. In an earlier decision, the Supreme Court of Canada had held that this mortgage was void, being contrary to subsection 96(5).[12] In this decision, the Supreme Court of Canada considered whether the defendant solicitors were liable to the lender for damages resulting from the loan being unenforceable.

The Court concluded that the solicitors were negligent because a limitation upon the capacity of a corporation to borrow and give security imposed by a business corportions statute is basic knowledge that a reasonably competent solicitor must be held to possess, whether he is a general practitioner or a specialist. The Court rejected the defence of contributory negligence, advanced on the basis that certain employees of the lender had legal training, must fail since these employees had no duty with respect to the legal aspects of the transaction other than to retain qualified solicitors to perform the necessary services. The Court rejected the contention of the defendants that because the loan transaction was illegal, the contract whereby the plaintiff retained the defendant solicitors was also illegal and thus unenforceable.

E. *CYPRUS ANVIL MINING CORPORATION* v. *DICKSON ET AL.*[13]

The issue before the Court in this case was the determination of the fair value of shares held by dissenting shareholders of a corporation governed by the Canada Business Corporations Act.[14] The plaintiff acquired more than 90% of the outstanding shares of Vangorda Mines Ltd. from three shareholders and thereby became entitled to acquire the shares held by the "dissenting offerees" under section 199 of the Act. The plaintiff applied to the Court to fix the fair value of those persons' shares as of June, 1979. The Trial Judge determined the value of the shares based upon discounted net cash flow from the assets of Vangorda after having been incorporated into the operations of the plaintiff.

The Court reviewed the four accepted methods of valuing shares in a corporation. These are the market value method, using stock exchange quotes; the net asset value method, taking into account current value rather than book value; the investment value method, which relates to the capitalized earning capacity of the corporation; and a fourth method,

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10. (1986) 31 D.L.R. (4th) 481 (S.C.C.).
11. R.S.N.S. 1967, c. 42.
12. *Central & Eastern Trust Co.* v. *Irving Oil Ltd.* [1980] 2 S.C.R. 29, 110 D.L.R. (3rd) 257.
13. (1986) 8 B.C.L.R. (2d) 145 (C.A.).
14. S.C. 1974-75-76 c. 33 79.

which is a combination of the previous three. No method of determining value, if it might provide guidance, should be rejected. The approach adopted at trial, since it focused on the discounted net cash flow basis, was in error and the evidence as to the negotiated deal made between Cyprus Anvil and a 70% shareholder of Vangorda was given no weight. As a starting point, the Court of Appeal utilized the value of the ore reserves negotiated between the plaintiff and two of the major shareholders, which it said was buttressed by the fact that an independent third shareholder accepted this valuation. The shares of Vangorda were not traded on a stock market, so the market value method could not be utilized. As well, there was no free and open market for the underlying assets, nor were they producing income. It should be noted that the ore deposits were of significantly greater value to the plaintiff (since it already had a mining operation in the area) than they would have been on a free-standing basis.

The Court stated that the proper approach was to consider the market for these assets as it existed, *i.e.* with only one purchaser, and not to create an imaginary market where the special benefits of the assets to this purchaser are absent. While a portion of the special benefit to the single purchaser will be reflected in the fair value of the shares, the fair value of the assets before acquisition by the single purchaser will not reflect the full amount of that benefit. The Court also noted that the agreement with the main shareholders called for them to have a 5% net profits interest in production from their ore bodies, and 50% of any net profits gained on any resale.

The net cash flow method must be used with care when there is no historical cash flow to use as a basis for calculation. Minor variations in any one of a number of assumptions can produce great variations in total value. The Court established a value of $8.00 per share, a reduction of some $11.00 from the value established by the Trial Judge, but did not identify a particular method used in arriving at that value. The only specific calculation was a determination of the per share value of Vangorda's interest in certain mineral deposits based on such interest having a value equal to an aliquot share of the total cash price paid by the plaintiff for mineral deposits on a per ton basis.

F. *RE KELVIN ENERGY LTD.*[15]

Kelvin Energy Ltd. agreed to sell substantially all of its assets to Inland Financial Company Limited. Shareholders' approval was obtained on January 17, 1985. Under section 184 of the Alberta Business Corporations Act,[16] a shareholder who dissents on a sale of all the assets of a company is entitled to be paid the fair value of his shares. This case involved a determination of the fair value of the dissenting shareholders' shares of Kelvin as of January 17, 1985.

On January 17, 1985, the assets of Kelvin consisted of shares of a life insurance company and Canadian oil and gas assets. In assessing fair value, the Court stated that there were four approaches: market price, net assets, earnings or investment value and a combination of the foregoing.

15. Unreported, 29 April 1987, J. D. of Calgary, No. 8501-07146.

16. *Supra* n. 8.

Since Kelvin was in essence a holding company, the net assets approach was considered to be the most appropriate.

The Trial Judge defined "fair value" as being the following:

> The highest price, expressed in terms of money or money's worth, obtainable in an open and unrestricted market between knowledgeable, informed and prudent parties acting at arm's length, neither party being under any compulsion to enter into the transaction.

The Court stated that the fair value of the shares of the dissenting shareholder should be assessed as an aliquot portion of all of the shares of Kelvin without applying a minority discount.

In determining the value of Kelvin's assets, the Court gave heavy weight to the price paid by Inland, since the sale to Inland was an arm's length sale to a knowledgeable buyer.

The Court took into account the liabilities of Kelvin as at January, 1985. Kelvin was in the difficult position of suggesting to the Court in the present case that it was fully liable for all such claims while it was disputing the validity of such claims in other actions. By and large, the Court was unprepared to make an assessment as to the outcome of other existing litigation.

Four of the seven directors of Kelvin had resigned in December, 1984, some expressing concern that management was not considering the interest of all shareholders. The company's principal shareholder initially proposed to offer minority shareholders $.88 per share although an offer of $1.30 was actually made. The lone remaining outside director advocated an offer of $2.80 per share. Management did not obtain an independent valuation of Kelvin which the Court states was usual.

The fair value of the shares was found to be $2.85 per share.

G. *O'CONNOR* v. *WINCHESTER OIL & GAS INC. ET AL.*[17]

The petitioner, a resident of the United States, owned shares in Winchester Oil & Gas Inc., a British Columbia reporting company which was not publicly traded. The petitioner alleged that the affairs of Winchester were being conducted in a manner contrary to section 224 of the Company Act (British Columbia).[18] The Court held that the exclusion of the petitioner and other American shareholders from a share exchange offer, while it may have been unfair, was not the result of oppressive conduct on the part of the directors of Winchester. The exclusion was based upon the effect of U.S. securities legislation, which would have caused a dramatic increase in the cost of the offer and may have prejudiced the offer to Canadian shareholders.

The plaintiff also made a claim against the president of Winchester, alleging that he acted in breach of his fiduciary duty. The president's conduct was, however, *bona fide*, in the view of the Court, and not in breach of his fiduciary duty, because it was based on legal advice from Winchester's solicitor.

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17. (1986) 69 B.C.L.R. 330 (S.C.).
18. *Supra* n. 9.

II. SALE OF LAND

A. *LEMESURIER ET AL.* v. *ANDRAS* [19]

The action was for damages for breach of an agreement of purchase and sale of a residence. The purchaser refused to complete because the vendors failed to provide title to approximately twelve (12) square feet, or about 0.16% of the area of the property. The Court allowed the plaintiffs' appeal. On the first issue, whether the defendant purchaser was entitled to repudiate on the basis of a defect in title, the Court held in the negative. The test is an objective one, *i.e.* whether the vendors are in a position to convey substantially what the contract calls for. The defect constituted less than 1/600th of the entire property and did not affect any of the buildings on the property.

The Court also held that the clause providing that title must be free and clear and that if any valid objection is made and the vendor is unable or unwilling to remove same and the purchaser does not waive, the agreement shall terminate, does not justify a capricious or arbitrary repudiation. Vendors and purchasers owe a duty each to the other to perform honestly a contract honestly made. Corrective measures having been taken by the vendors, the purchaser was obliged, in the absence of some legitimate interest, to perform her part of the bargain with an abatement, which was offered.

The final issue was whether the vendors, having sold the property to another purchaser, disentitled themselves to any remedy. The Court held that where specific performance with an abatement was available to a vendor, he would equally be entitled to common law damages with an "abatement" (a reduction in damages) for the deficiency of title. A vendor in these circumstances is under a duty to mitigate. It should be noted that there can be no recovery by a vendor in equity or at law where the defect is material. A vendor who is willing and able substantially to perform his part of the bargain is, upon repudiation by the purchaser, entitled either to specific performance with an abatement or to damages (subject to a reduction for that part of the bargain he is unable to perform). Damages were therefore reduced by 0.16% of the total price.

B. *WILE* v. *CROOK* [20]

In this case, the purchaser claimed for specific performance of an agreement for the sale of land, or damages in lieu. The sale agreement provided that all buildings would be at the risk of the vendor until closing and that the vendor would hold all insurance policies and proceeds in trust for the parties as their interests may appear. The agreement provided that in the event of damage to the buildings, the purchaser would have the right to the proceeds of the insurance and complete, or to cancel the agreement and have all of his money returned without interest.

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19. (1986) 25 D.L.R. (4th) 424 (Ont. C.A.).
20. (1986) 31 D.L.R. (4th) 205, 42 R.P.R. 101 (S.C.C.).

A fire occurred the day before closing and the parties agreed to extend the closing date. Upon learning that the insurer might deny liability, the purchaser asked for a further extension, which was refused by the vendor. The purchaser's main concern was not the amount of coverage but whether any of it would be paid. A few days prior to the new closing date, the purchaser elected to complete the purchase when the premises were restored to the condition they were in at the time the agreement was entered into or when it was determined that there was a sufficient amount of coverage to restore the premises to that condition. Neither party tendered on the extended closing date. Some three weeks thereafter, the vendor's solicitor advised that the vendor considered the agreement to be null and void. The Court held that while the vendor's duties as trustee in respect of the insurance entitled the purchaser to sufficient time to determine which of the two elections he would make, the clause does not entitle the purchaser to the right to wait to see if the insurer will pay. If the purchaser was not prepared to bear this latter risk, he was entitled to cancel the agreement. The election which the purchaser made constituted a repudiation of the agreement which the vendor was entitled to and did accept.

C. *KOPEC* v. *PYRET* [21]

This is an appeal of a decision in an action by a purchaser on a contract for the sale of land for specific performance, or damages in lieu thereof. The vendor had entered into a written lease of the land with Borys. The lease contained a clause which provided that if there was a sale of the land, the lessor would give the lessee notice thereof and an option to purchase the land "upon terms and conditions to be agreed upon between the parties hereto". No caveat was filed in respect of this lease.

When the lessee learned of the proposed sale, he filed a caveat claiming an interest by virtue of an option to purchase and subsequently commenced an action on his caveat. The vendor/lessor conveyed the property to the lessee for the price agreed upon between the vendor and purchaser. The lessee agreed to indemnify the vendor from any claims of the original purchaser.

The Appeal Court held that the lease provision was properly characterized as a right of first refusal. Although a right of first refusal is not, under Saskatchewan law, an interest in land, it is capable of being converted into an interest in land upon the receipt by the lessor of an offer which he is willing to accept. Thus, at the time of the registration of the caveat, the lessee had an interest in land capable of supporting a caveat.

A right of first refusal is an interest in land in Alberta by virtue of section 59.1 of the Law of Property Act (Alberta).[22]

The plaintiff claimed that an order for specific performance should be made against both the lessee and the defendant vendor. The Court held that specific performance would not be made against a vendor where he was no longer able to comply with the order because of a sale to a *bona fide* third party whose rights are unaffected by the plaintiff's interest. Specific

21. [1987] 3 W.W.R. 449 (Sask. C.A.).

22. R.S.A. 1980, c. L-8, as am.

performance will be ordered where the subsequent purchaser is, in equity, bound by the prior sale. The Court held that in this case the lessee was acting in furtherance of a lawful interest, even though he had knowledge of the plaintiff's right, and his actions were therefore not fraudulent. Mere knowledge of the plaintiff's interest was not sufficient to invalidate the purchase.[23] Furthermore, the lessee's interest was registered prior in time to that of the plaintiff.

As to damages, the Court stated that the common law rule was that a party who sustains a loss by virtue of a breach of a contract is to be placed in the same situation as if the contract had been performed, insofar as that can be done by money damages. In the case of a breach of a contract for the sale of land, if the vendor's reason for not completing the sale is an innocent failure to deliver title, the purchaser is entitled to rescind, to recover his deposit, and to recover his expenses for investigating the title, but the purchaser is not entitled to a claim based on the value of the land. This limiting rule is not applicable, however, where the vendor, having title, has voluntarily disabled himself from being able to convey, or has risked and lost the ability to do so where he has been dealing concurrently with two different purchasers. It has also been suggested that the limiting rule should not apply in a Torrens jurisdiction, since it is based upon the existence of complicated real estate title law such as exists in England, and the consequent existence of numerous uncertainties and defects.[24] The Court held that the limiting rule had no application to the transaction before it and that the plaintiff was entitled to damages under the general common law rule. He was thus entitled to the difference between the value of the land at the date of judgment and the purchase price. The Court held that the plaintiff was not entitled to damages for loss of profit which he would have enjoyed during the two years following the date of the agreement preceding the trial. The plaintiff was also held to be entitled to recover his expenses incurred in connection with the transaction, including interest paid on money borrowed to finance the purchase, less interest earned on the investment of that money, the prepayment penalty in respect of the early repayment of the mortgage, costs incurred in working the land (including an appropriate rate for labour and equipment rental) and the deposit made by the plaintiff.

D. *ISLAND PROPERTIES LTD.* v. *ENTERTAINMENT ENTERPRISES LTD. ET AL.*[25]

This case also involved a request for an order for specific performance against a third party purchasing from a vendor who had wrongly taken the position that acceptance of his offer to sell to the plaintiff was invalid, and had thereafter conveyed to the third party.

It was held that a Court will not order specific performance, upon the establishment of the existence of a binding contract between a vendor and a purchaser, where there is a stranger to the contract who has procured a

23. Cf. *Holt, Renfrew & Co. Ltd.* v. *Henry Singer Ltd.* (1982) 135 D.L.R. (3d) 391.

24. *Quaere* whether and to what extent the limiting rule would apply to sales of lands subject to CAPL or other pre-emptive rights.

25. (1986) 26 D.L.R. (4th) 347 (Nfld. C.A.).

conveyance to himself, unless it is shown that the stranger had notice of the prior contract before receiving his conveyance. However, if the stranger gets possession of the subject matter of the contract with notice of the contract, he may be liable to an order for specific performance on the equitable ground that his conscience was affected by the notice.

E. *OSMAN AND TARR* v. *CALLANDER AND CALLANDER* [26]

It was held in this case that damages sought by the plaintiff vendor constituted relief "under an agreement for sale of land" as contemplated by subparagraph 2(a)(ii)(C) of The Land Contracts (Actions) Act (Saskatchewan).[27]

The agreement was subject to the purchaser arranging financing, but the Court held that the agreement was nevertheless one under which "land is . . . sold", as contemplated by subsection 2(1) of the Limitation of Civil Rights Act (Saskatchewan).[28] It was further held that a claim for damages by a vendor, to the extent that it is a claim for the benefit of the bargain in the place and stead of the purchase price, is prohibited by subsection 2(1) of the Act which provides, in part, that "no action shall rely on the covenant for payment". The Court, however, stated that not all claims for damages are barred by the Act.

F. *R.* v. *GOLDEN ET AL.*[29]

It was held that Section 68 of the Income Tax Act (Canada)[30] (which provides that where an amount can reasonably be regarded as being, in part, consideration for the disposition of any property, and, in part, consideration for something else, the part that can be regarded as being consideration for the disposition shall be deemed to be the proceeds of that disposition, irrespective of the form or legal effect of the contract or agreement in question) applies only to transactions in which there has been a disposition of property and something else other than property (as defined in subsection 248(1) of the Act). By the Court's admission, there is very little that is "non-property". The Court held that if the Income Tax Act has failed to provide a means whereby a figure can be allocated to the depreciable property in a transaction such as the one before the Court, the figure agreed upon by the parties in an arm's-length transaction, if it is not a sham or subterfuge, must govern.

III. INTERPRETATION OF CONTRACTS

A. *MACK* v. *EDENWOLD FERTILIZER SERVICES LTD.*[31]

The plaintiff sued to recover interest on money advanced to the defendant. The issue before the Court was whether the contract to pay interest was illegal and therefore unenforceable.

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26. (1986) 48 Sask. R. 23 (Q.B.).
27. R.S.S. 1978, c. L-3.
28. R.S.S. 1978, c. L-16.
29. [1986] 3 W.W.R. 1 (S.C.C.).
30. S.C. 1970-71-72, c. 63, as am.
31. [1986] 3 W.W.R. 731 (Sask. Q.B.).

In March, 1982, the plaintiff and defandant agreed, in connection with a sale of fertilizer, that the purchase order and the plaintiff's cheque would be dated in December, 1981 to enable the plaintiff to claim the expense for the fertilizer in respect of his 1981 taxation year. The defendant experienced financial difficulties and was unable to deliver fertilizer as requested. In June, 1982, the parties agreed in writing that the defendant would pay interest from April 1, 1982 to August 15, 1982 on the money held by the defendant to the credit of the plaintiff. Interest was not paid and in October, 1982, the parties agreed, again in writing, that the defendant would pay interest from August 15, 1982 until payment of the principal amount, which was to be no later than December, 1982. The Court found that the act of back-dating the original order and the cheque was for an unlawful purpose and had the effect of tainting the contract with illegality. Thus, neither party would be able to maintain an action based upon that agreement. However, the agreements to pay interest were new contracts and were not illegal, although related to an illegal transaction. No assistance from the illegal transaction was required to support these agreements and, therefore, the plaintiff was held to be entitled to interest on the unpaid balance.

B. *KINGU ET AL.* v. *WALMAR VENTURES LTD. ET AL.*[32]

This case involved the sale by one of the defendants to one of the plaintiffs of a hotel as a going concern, and the claim by the plaintiffs for rescission or damages for misrepresentation. The agreement for purchase and sale contained a provision to the effect that there were no other representations, etc. than those contained in the agreement. The judgment deals at length with the nature of the rescission remedy and the plaintiff's claim for damages based on misrepresentation. The Court found it unnecessary to consider the exclusion clause in the view it took of these matters, except to say that the appellants' argument that the exclusion clause negated any liability which they might otherwise have in tort carried considerable force.

The Court stated that rescission involves the contract in question being void *ab initio* and the parties being placed in the same position as they were prior to the contract having been made. In this case, rescission was not available, since the vendor had foreclosed on the mortgage which it had taken back as security for part of the purchase and had sold the property to a third party.

The plaintiffs cannot obtain damages for an innocent misrepresentation, but may do so on the basis of a collateral warranty, if that warranty does not contradict the main contract, and may also obtain damages for negligent misrepresentation. This issue of concurrent liability is also dealt with in the *Rafuse* case.[33] A plaintiff suing for damages for negligent misrepresentation is not, as a matter of principle, confined to his contractual remedies where he can establish that a false statement was made negligently by a person owing a duty of care, that there has been reliance thereon by the recipient acting reasonably and that a loss was

32. (1986) 10 B.C.L.R. (2d) 15 (C.A.).

33. *Supra* n. 10.

suffered as a consequence of that reliance. The duty of care will not arise unless the representor is possessed of special skill and knowledge on the matter in question and the circumstances establish that a reasonable person making that statement would know that the recipient was relying upon his skill or judgment. In this case, the Court held that the plaintiffs had failed to establish that a duty of care was owed to them by the defendants. The Court expressed the view that the determination as to whether a duty of care is owed is not far removed from one of the prerequisites for the existence of a contract, *i.e.* an apparent intention to be bound.

The Court held that the plaintiffs did not act reasonably in relying on the representations alleged, because they ought to have known that persons making them had no special knowledge or skill and that certain financial statements were not up-to-date, because one of the defendants advised one of the plaintiffs to speak to the vendor's accountants, which the plaintiffs failed to do, and because the plaintiffs otherwise made no independent inquiries.

C. *DAEYOO ENTERPRISE CO. LTD.* v. *LONG ET AL.*[34]

This is an action on a promissory note given by the defendants as part payment of the purchase price for a business, and a counterclaim for damages for fraudulent or negligent misrepresentation. The defendants alleged that the plaintiff vendor and/or his agent fraudulently or negligently understated the cost of sales in *pro forma* financial statements and the profitability of the business in an advertisement placed by the agent in the Calgary newspaper. The defendants, however, had available to them prior to the closing of the transaction financial statements prepared by the plaintiff's accountant which correctly set forth actual revenue and expenses and the defendant would have been in a position to rescind the sale agreement had these latter statements been reviewed. They were not reviewed until the month after closing, and no allegation of misrepresentation was made until one year later when the defendants became unable to honour the promissory note. The Court held that the defendants did not rely on the financial statements which contained the incorrect information and that, if they did, their reliance was unreasonable, since it was to the exclusion of all other information made available to them.

D. *LYNCH ET AL.* v. *ELFORD ESTATES LTD.*[35]

The Court held that the word "calculated" in a provision of an agreement for sale providing for interest at a rate per annum "calculated annually, not in advance" and providing for the application of monthly installments "firstly to interest and secondly to principal", required the application of an equivalent monthly interest rate of 10.48% per annum which, if compounded monthly, resulted in interest of 11% per annum. The word "calculated" is thus synonymous with "compounded". The use of an equivalent monthly rate does not require the application of the "deemed reinvestment" principle, whereby the recipient of the interest is

34. (1986) 75 A.R. 47 (Q.B.).

35. (1986) 6 B.C.L.R. (2d) 69 (S.C.).

assumed to be able to reinvest interest payments at the applied rate. The Court held that the vendor was not entitled to compute and charge interest at a rate which would produce a higher effective annual yield than the one specified.

E. *TRI-STAR RESOURCES LTD.* v. *J. C. INTERNATIONAL PETROLEUM LTD.*[36]

The operator of petroleum and natural gas lands, which were governed by a Canadian Association of Petroleum Landmen Operating Procedure, made a proposal under the Bankruptcy Act (Canada)[37] and an interim receiver was appointed. In an affidavit sworn immediately prior to the appointment of the receiver, the president of the operator stated, *inter alia*, that the operator was insolvent. A few days prior to the granting of the order, an officer of the plaintiff had represented to officers of the operator that no steps would be taken by the plaintiff to remove the defendant as operator.

On this application to remove the operator and appoint the applicant as the new operator, the Court held that there was no issue to be tried as to the operator's insolvency because of the admission by the president in the affidavit. The claim by the receiver that the plaintiff was estopped from seeking the order on the basis of the representation made by its officer failed in light of the wording of clause 202 of the Operating Procedure, which states that upon bankruptcy or insolvency an operator shall be replaced immediately. Furthermore, clause 2001 of the Operating Procedure provides that no waiver of any breach of the terms thereof shall be binding unless it is in writing.

This case is of particular current interest to practitioners but it leaves open a number of issues, one of which is whether the mere appointment of a receiver in the usual circumstances would be sufficient evidence of insolvency for the purposes of clause 202. Another issue is the status of an Operator "pro tem and so on as occasion demands" under subclause 206(b) of the Operating Procedure, particularly if the ex-Operator is resurrected into a state of solvency and wishes to regain its lost position.

F. *MARITIME COURIERS (INTERNATIONAL) INC.* v. *WOODSTOCK INTERNATIONAL EXPORT LTD.*[38]

The plaintiff was to be paid a commission on sulphur being shipped. No sulphur was shipped, because of the non-performance of a provision of the sale agreement which stated that "seller undertakes to arrange for supplier to provide a certified compliance bond". The defendant argued that the seller could not escape its obligation to pay commission by virtue of its own failure to perform its obligations under the sale contract. However, the Court held that the phrase quoted above is capable of the interpretation argued for by the defendant, *i.e.* that the words required the defendant to use its best efforts to have the supplier post the bond, rather than being, in

36. [1987] 2 W.W.R. 141, 48 Alta. L.R. (2d) 355 (Q.B.).

37. R.S.C. 1970, c. B-3.

38. (1986) 33 B.L.R. 309 (S.C.).

effect a guarantee or warranty that the bond would be posted. The Court noted that an obligation requiring the defendant to post the bond, or rendering it liable for the supplier's failure to post the bond, or guaranteeing the posting of the bond, could have been simply expressed in the agreement but was not. Furthermore, the supplier was identified to the buyer prior to the contract between the buyer and seller being signed, and the Court inferred that the buyer was prepared to make the contract with the seller on the basis that the supplier would post bond when asked. There was no evidence before the Court indicating that the buyer had sued the defendant seller on the sale contract for breach of the provision in question. Since the commission was payable only upon performance of the sale contract, the plaintiff's claim failed.

G. *MITCHELL ENERGY CORPORATION* v. *CANTERRA ENERGY LTD. ET AL.*[39]

The plaintiff and the defendants were party to a unit operating agreement and a gas processing agreement. The agreements provided that they were to be in full force and effect until January 1, 1980, and could be renewed thereafter in writing by the parties from year to year. However, no such written renewal occurred. From 1980 to 1983, Canterra continued to operate the processing plant and the field on the basis provided in the agreements, utilizing the "Jumping Pound" formula and making interim revenue distributions based on estimates of the quantities of gas sold and estimates of costs incurred, and thereafter adjusting same when the exact quantity of gas sold and actual costs incurred were known.

The plaintiff acquiesced in this course of conduct until it challenged an invoice sent by Canterra. Canterra deducted the disputed costs from the proceeds of subsequent sales of the plaintiff's gas. The Court dismissed the action. It found that there was an implied contract between the parties on the same terms as those contained in the written agreements. Where parties make an express contract for a fixed term and continue to act therafter as though the contract still binds them, an implied contract may arise. The Court held that it was customary in the Alberta natural gas industry that interim payments would be made on estimated sales and estimated costs and that these did not constitute settled accounts between the parties. Furthermore, the defendant Canterra had the right to set-off money owing to it by virtue of these interim payments against money otherwise payable by the plaintiff. This right of set-off arose out of the terms of the implied contract between the parties.

H. *AMERADA MINERALS CORPORATION OF CANADA LTD.* v. *MESA PETROLEUM (N.A.) CO. ET AL.*[40]

The trial decision[41] was discussed in the 1985 edition of this paper.[42] The case concerned the calculation of a royalty payable under a 1966 farmout agreement. The agreement stated that the defendants were obliged to pay

39. [1987] 2 W.W.R. 636, 42 Alta. L.R. (2d) 171 (Q.B.).
40. [1987] 1 W.W.R. 107 (Alta. C.A.).
41. [1985] 4 W.W.R. 607 (Alta. Q.B.).
42. (1985) XXIV *Alta. Law Rev.* 152.

to the plaintiff, on all petroleum substances produced, saved and marketed from the subject lands, a gross overriding royalty of 10% of the "current market value at the time and place of production" and that for the petroleum substances produced in non-liquid form, "the overriding royalty is to be computed at the plant outlet free and clear of all processing charges". The appeal by the plaintiff and the cross appeal by the defendants were dismissed. The Court of Appeal agreed with the trial decision that processing charges incurred prior to the plant outlet were deductible in computing the royalty and in the determination of how much of the processing charges were incurred prior to the plant outlet and how much was incurred beyond the plant outlet. On the basis of expert evidence, the Trial Judge held that "plant outlet" was the point at which the objective of making the natural gas marketable had been achieved, just short of enhancement. The Court of Appeal further held that the agreement required that there be marketing of the natural gas before any royalty was due. Fuel gas used by the operator is not marketed to a third party. Thus, no royalty was payable with respect to fuel gas used in the operation of the plant.

As to the appellant's claim for interest pursuant to section 15 of the Judicature Act (Alberta),[43] the Court of Appeal refused to interfere with the Trial Judge's exercise of discretion in concluding that it was not "fair and equitable" that interest should be paid. The Trial Judge had found that there was a genuine and complex dispute between the parties and that the plaintiff's failure to draw the defendant's attention to the errors made in the payment of the royalty contributed to the failure to pay. There is a duty on the creditor to monitor its accounts receivable. Thus, in the view of the Trial Judge, there was not a just debt improperly withheld. The appellant was held to be entitled to the interest pursuant to the Judgment Interest Act (Alberta)[44] at the rate of 11% computed subsequent to the date of the issuance of the statement of claim.

I. *ALDO IPPOLITO & CO. LTD.* v. *CANADA PACKERS INC.*[45]

The Appellate Court allowed the appeal, and held that the clause which provided that an agreement would remain in effect until terminated by either party "upon no less than 30 days' notice of termination" could be terminated upon notice of exactly 30 days. The inclusion of the words "no less than" was intended to avoid any contention that a shorter period of notice could be given. This phrase is not intended to mean that it was open to the Court to determine what period would be reasonable. In this case, no notice had been given, and the respondent was held to be entitled to damages in respect of profit which would have been earned during the 30 day notice period.

43. R.S.A. 1980, c. J-1, s. 15 as am. by S.A. 1984, c. J-0.5.

44. R.S.A. 1980, c. J-0.5.

45. (1986) 32 D.L.R. (4th) 440 (Ont. C.A.).

J. *HILLIS OIL AND SALES LIMITED* v. *WYNN'S CANADA LTD.* [46]

The issue before the Court was whether a clause providing for termination of a distribution agreement by either party "at any time", with or without cause, should be construed so as to require reasonable notice. Another clause in the agreement provided for termination by the manufacturer in certain specified events, to take effect upon the giving of notice.

The Trial Judge found that the distribution agreements were prepared by the manufacturer and were totally non-negotiable. The *contra proferentem* rule applied with the result that any ambiguity must be interpreted against the defendant manufacturer. The Court found that the clause providing generally for termination without cause would, if construed alone, permit termination with immediate effect. This clause could not be regarded as standing alone but must be construed in light of the agreement as a whole and, in particular, in the context of the clause providing for termination in specific situations. The presence, in the latter clause, of language to the effect that the agreement would be at an end upon the giving of notice, and the omission of these words from the general clause, were held to create an ambiguity as to whether the general clause permitted termination with immediate effect. The general clause was held not to permit termination with immediate effect. The rule requiring reasonable notice of termination was to be implied into the contract. Furthermore, the aforementioned ambiguity should be resolved in favour of the plaintiff. In the circumstances, a reasonable notice period was found to be one year.

K. *BANK OF MONTREAL* v. *MAROGNA* [47]

The plaintiff sought to enforce a guarantee executed by the defendant. To the knowledge of the plaintiff, it was the intention of the defendant that the defendant and another individual would be jointly and severally liable on the guarantee. This was, in fact, part of the plaintiff's financing plan for the corporation's business. The condition that the second individual would also be liable under the guarantee was made known orally by the defendant to the plaintiff. The issue before the Court was where only one of two intended guarantors executes a guarantee, whether it is enforceable against the party who executed it. The Court held that it was not enforceable, since it was clearly the purpose and understanding of all of the parties that the guarantee was to be given by two individuals, and that their liability thereunder was to be joint and several. The Court also rejected the plaintiff's argument that it should be entitled to recover one-half of the debt against the defendant on the basis that he would have been liable for one-half the guaranteed amount had there been no defect in the guarantee. Once it is determined that the guarantee is not as it was intended to be, its legal effect is nullified as against the co-guarantor who signed it.

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46. (1986) 65 N.R. 23 (S.C.C.).
47. (1986) 33 D.L.R. (4th) 405 (B.C.S.C.).

IV. RECEIVERS

A. *RE REGIONAL INVESTMENTS LTD.*[48]

Regional Investments Ltd. granted a debenture to certain lenders who, alleging a default thereunder, appointed a receiver who took possession of the secured assets, including certain land. The debenture granted a fixed charge on the land, but the land was not the subject of a statutory mortgage. The debenture did not expressly permit the receiver to execute a transfer of the land. The receiver sought an order requiring the registration of the land in the name of the purchaser.

The Court held that it was not its function to "approve" a sale by a private receiver, although the Court should expect to have evidence presented to it that there has been a genuine sale and that the transaction is not fraudulent. The Court held that section 180 of the Land Titles Act (Alberta)[49] contemplates the type of order requested. The Court further held that an application of this type is not a form of foreclosure, but rather a method of conveyance. The receiver is acting as transferor of the interest of the grantor of the debenture. The rights of other parties having interests in the land are not extinguished by this conveyance, and the order requested does not make the receiver a court-appointed receiver and thereby subject to the controls which might be applied to such a receiver.

B. *RE DAUBLER AND TRIPLE FIVE CORPORATION LTD.*[50]

This also involved an application under section 180 of the Land Titles Act (Alberta)[51] for an order directing the issuance of a new certificate of title free of all encumbrances. The application was made by the mortgagee of the land, who had obtained an Order Nisi/Order for Sale in relation to his mortgage. The new certificate of title would have been issued in the name of the purchaser under an agreement for sale with the mortgagor. The purchase price due under the agreement for sale was approximately $800,000 in excess of the amount due the applicant under the mortgage. The applicant also sought a discharge of certain subsequent encumbrances, which included writs of execution and caveats against the mortgagor and his interest in the land. The decision in *Re Regional Investments Ltd.*[52] was distinguished on the basis that here it was sought to extinguish the rights of other parties who had not been given notice of trial nor of the application, and that the present application would also require an order granting the applicant leave to abandon its application for a final order for foreclosure. The order sought by the applicant would, according to the Court, offend the rule *audi alteram partem*. Section 180 of the Act is not a substitute for a foreclosure action and can have no application where the order sought is founded upon a determination made in the absence of parties who would be adversely affected by the order sought.

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48. Unreported, 13 June 1985, Appeal No. 18516 (Alta. C.A.).
49. R.S.A. 1980, c. L-5, as am.
50. Unreported, 13 February 1987, Edmonton No. 8603-27007 (Alta. Q.B.).
51. *Supra* n. 49.
52. *Supra* n. 48.

V. FREEHOLD LEASES

A. *D. M. VIPOND CO. LTD.* v. *RUSTUM PETROLEUMS LIMITED AND WIELOCH* [53]

In this action, the plaintiff sought a declaration that it had a valid petroleum and natural gas lease with the defendant Wieloch. In November, 1983, the defendant Wieloch signed, as lessor, a petroleum and natural gas lease in favour of the plaintiff. The plaintiff's landman took all three copies of the lease with him and left Wieloch with a promissory note for the bonus consideration, unsigned, with a handwritten insert on the signature blank that stated "payable 25 days". The lease was stated to be under seal, but no seal had been affixed. Approximately four months later, Wieloch sent a letter to the plaintiff stating that she had not received the bonus payment and asking for the plaintiff's advice regarding this matter. Approximately three weeks later, Wieloch granted a lease on the same property to the defendant Rustum Petroleums Limited. Five days after the granting of this second lease, the plaintiff, without knowledge of the second lease, and without any notice to Wieloch, forwarded a fully executed copy of the lease and a cheque for the bonus payment to the depository identified in the lease. The Court held that the first lease was not valid and that the second lease was valid. The first lease document, when executed by Wieloch and delivered to the plaintiff, while not under seal, was for consideration, being a conditional promise to pay. It was therefore an irrevocable offer, but it was conditional upon payment by the plaintiff within the twenty-five day period identified in the "promissory note". Since payment was not made within that time, Wieloch was entitled to treat the offer as having lapsed.

As to acceptance, the Court stated that the plaintiff had not effected a valid acceptance of the offer by mailing the bonus cheque and a signed copy of the lease to the depository. Where no particular mode of acceptance is expressly required in an offer, the offer may be accepted in the manner which is to be implied from the nature of the offer and the surrounding circumstances. The Court held that a valid acceptance of the offer would have required that the payment be made to Wieloch within the twenty-five day period and that a duplicate original of the lease, executed by the plaintiff, be delivered to her.

The Court characterized Wieloch's letter of March, 1984 as a renewal of her first offer, but made without any consideration, and thus revocable by her at any time before acceptance. The plaintiff's mailing of the bonus cheque and the lease to the depository were held not to be acceptance within a reasonable time. Wieloch had justifiably concluded, when approached by Rustum, that the plaintiff had no further interest in the property.

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53. [1987] 2 W.W.R. 570, 49 Alta. L.R. (2d) 135 (Q.B.).

B. *CLARK LAND SERVICES LTD.* v. *ROXY-CLARION PETROLEUM LTD. ET AL.*[54]

The facts in this case are complicated. The action involved the validity of a petroleum and natural gas lease, the nature and effect of certain surface rights agreements and the effect of non-compliance with the Surface Rights Acquisition Act (Saskatchewan),[55] and the Oil and Gas Conservation Act (Saskatchewan).[56]

On behalf of a principal whose identity and existence were not revealed to the lessor, the plaintiff obtained a petroleum and natural gas lease from the defendant Weyburn Security Company Limited of an undivided 3/47ths interest in certain land. Weyburn Security held itself out to be the agent of the executors of the estates of the three owners thereof. On behalf of the same principals, the plaintiff also entered into an agreement with the surface owner of the subject lands whereby, for a term of three years, the assignee acquired the exclusive right to enter into surface leases with respect to well sites. Subsequent petroleum and natural gas and surface leases and options were obtained by the plaintiff as to the balance of the interests in the lands. Various caveats were registered, which generally reflect the priority as to time of the various agreements and leases. The plaintiff's principal, upon learning of certain of the difficulties which had been encountered, indicated that it was no longer interested in the petroleum and natural gas and surface rights in question, and the plaintiff and the principal entered into an agreement whereby the plaintiff acquired these rights from the principal.

After having accepted a fully executed copy of the lease and the bonus cheque from the plaintiff, Weyburn Security purported to repudiate the lease, having learned that it had no authority to enter into the lease in respect of the interest of two of the three estates.

It was alleged by Weyburn that the letter between the plaintiff and its principal did not satisfy the requirements of the Statute of Frauds. The Court held that this matter would be relevant only to an attempt by the plaintiff to enforce the letter as against its principal and was irrelevant to this action.

The Court also held that if an agent enters into an agreement in its own name without disclosing the existence of a principal, and thereby renders itself liable on those contracts, then, in the absence of any other impediment to the enforcement of the contracts, it is entitled to enforce them as against the other parties to the contracts. The plaintiff had acquired a valid and enforceable lease as to the 1/47th interest held by the estate with respect to which Weyburn Security had authority. The Court found that the evidence established that Weyburn Security represented that it had authority to act on behalf of all of the owners of the 3/47ths interest. There was also evidence that the plaintiff was concerned about Weyburn Security's authority in respect of two of the three executors. A defence based upon non-compliance with the Devolution of Real Property Act

54. (1986) 47 Sask. R. 31 (Q.B.).

55. R.S.S. 1978, c. S-35.

56. R.S.S. 1978, c. O-2.

(Saskatchewan)[57] was held to be without merit. The burden of proving compliance with the Act is upon the plaintiff, but only if the defendant has specifically pleaded non-compliance. If the defendant fails to plead non-compliance, he is not entitled to raise it. Furthermore, the relevant sections of the Act are not applicable to a petroleum and natural gas lease because it is not a true lease or a sale of land.

The Court also dealt with the plaintiff's contention that the lease had terminated by virtue of an alleged contravention of the Oil and Gas Conservation Act[58] and the Surface Rights Acquisition Act.[59] The exact nature of this contravention is not set forth but it appears that the plaintiff's arguments may have been based upon the submission to a government department by the defendant Roxy-Clarion Petroleums Ltd. that it had the necessary mineral and surface rights upon which to base an application for a drilling licence. The Court noted that these concerns were raised by the plaintiff with the government department and the licence was issued nonetheless.

VI. REAL PROPERTY

A. *STONY MOUNTAIN ENTERPRISES LTD.* v. *GENSTAR CORPORATION* [60]

This was an action for a declaration that the defendant did not have an interest in certain land owned by the plaintiff and, in particular, that it was not entitled to remove gravel from the land, and for an order removing a caveat registered by the defendant's predecessor.

The plaintiff's predecessor-in-title and the corporate predecessor of the defendant entered into a written agreement, in 1951, whereby the defendant's predecessor agreed to purchase the sand and gravel within and upon the subject lands and acquired the right of entry to remove the sand and gravel; the right to construct a road, a powerline and railroad track; and the right to use land on both sides of the sand and gravel ridge for working space. The Manitoba Court of Queen's Bench held this agreement to constitute a grant of a *profit à prendre*, constituting an interest in land. A *profit à prendre* was described as a right to enter upon land for the purpose of removing something from it. The grant was held to evidence the intention of the parties to transfer ownership of the sand and gravel to the defendant's predecessor. The absence of the word "all" was of no consequence. There was nothing in the agreement indicating that the parties had intended that the grant be for some limited time.

Some two years after the initial agreement was entered into, the plaintiff's predecessor purported to sell the sand and gravel by way of a bill of sale to the defendant's predecessor, as goods and chattels. There was no evidence before the Court as to why this bill of sale was executed. However, the caveat filed by the defendant's predecessor was based on the earlier agreement, and the Court held that the bill of sale did not detract from the initial agreement.

57. R.S.S. 1978, c. D-27.

58. *Supra* n. 56.

59. *Supra* n. 55.

60. [1986] 5 W.W.R. 763 (Man. Q.B.), [1987] 3 W.W.R. 441 (Man. C.A.).

In the appeal decision, the only issue before the Court was an argument by the plaintiff that the granting of the right of entry was inconsistent with the granting of an interest in land which, as one of its incidents, constitutes a right of entry. The Court of Appeal dismissed the appeal and held that the grant of the right of entry was made for the purpose of clarifying the extent of the rights given to the defendant's predecessor.

B. *GUARANTY TRUST COMPANY OF CANADA* v. *HETHERINGTON ET AL.*[61]

These proceedings involved a total of seven actions, the purpose of which was to determine the rights of various parties with respect to three different royalty trust agreements executed in 1952 between the predecessor of the plaintiff and Harry Alden, Nina Clair Alden and Sine Pedersen, respectively. The current owners of the fee simple interests formerly held by the Aldens were *bona fide* purchasers for value thereof. The following issues were before the Court:

(a) whether the royalty agreements created valid trusts;
(b) whether the royalty agreements were limited to the life of the mineral leases in existence at the time the agreements were signed;
(c) whether the executor of the estate of an "Owner" under one of these agreements was bound by the agreement;
(d) whether the royalty agreements created an interest in land; and
(e) whether the caveats filed by the plaintiff's predecessor, Prudential Trust Company, Limited, were valid.

The reasons for judgment contain interesting observations as to the rules of law which are applicable to the interpretation of contracts and to the admissibility of extrinsic evidence.

As to the first issue, the Court held that valid trusts were established under the agreements by virtue of the three certainties, *i.e.* of intention, objects and subject matter, having been satisfied. On the second issue, the Court held that the Owners intended to and did assign to the trust company the specific royalty to which they were entitled under the lease in existence at the time the agreements were signed, as well as any royalty to which they became entitled under the terms of any subsequent leases, with the result that the Owners' obligations under the agreements were not extinguished with the expiration of the leases in existence when the agreements were executed.

The relevant provisions of the royalty agreements provided, firstly, that the owners assigned their entire right in the "above-mentioned" royalty (being the royalty payable under the existing leases), and, secondly, that if the existing leases were "cancelled", the Owners would reserve the full royalty in negotiating a subsequent lease. The Court was of the view that meaning must be given to the second provision and could not be if the view was taken of the first provision that it constituted an assignment of only the royalty payable under the then existing leases. The Court expressed the view that the first provision, standing alone, constituted an assignment of only the royalty granted under the then existing leases.

61. [1987] 3 W.W.R. 316 (Alta. Q.B.).

It followed that the executrix of the will of one of the Owners was bound by the particular trust agreement, because the obligation of that owner was a contractual one originally binding upon her and now binding upon her estate.

In considering the fourth issue, the Court reviewed a large number of Canadian authorities and considered both the body of the royalty agreements as well as the recitals. It held that the language used in the agreements demonstrated an intention to assign a right to receive a payment calculated on the basis of production, and that the assignments were not intended to be assignments of fractional interests in the minerals in place. The Court noted that the interest claimed in the caveats filed by the trust company was an interest in the "total proceeds of production . . . which may be produced and removed from . . .". In the absence of a contractual relationship between the trust company and the successors-in-title to the Aldens, the successors-in-title were not bound by the royalty trust agreements, nor were their respective lessees. As a result, the caveats filed by the trust company were ordered to be discharged.

We understand that the decision has been appealed.

C. *CREAM SILVER MINES LTD. (N.P.L.)* v. *THE QUEEN IN RIGHT OF BRITISH COLUMBIA* [62]

The issue before the Court was whether a mineral claim under the provisions of the Mineral Act (British Columbia)[63] constituted "land" within paragraph 11(c) of the Park Act (British Columbia)[64] and the Interpretation Act (British Columbia).[65] "Land", as defined in the Interpretation Act, includes an interest in land, and any right, title or estate therein of any tenure. The Court compared section 32 of the Mineral Act, which provides that a mining lease is a conveyance for a term of years of the right to take minerals and thus a *profit à prendre*, with subsection 21(2) of that Act, which provides that the interest of a holder of a mineral claim is a chattel interest. The predecessor to subsection 21(2) had stated that the interest in a mineral claim is a chattel interest but went on to say that this interest was "equivalent to a lease". The Court was of the view that this amendment was of significance. The Court declined to accept the argument that by referring to the interest in a claim as being "chattel", the Legislature left open the question whether it was a chattel real or personal. There was no authority before the Court that the term "chattel real" meant anything other than a lease, which, in the view of the Court, the Legislature had expressly excluded by the change referred to above.

62. [1986] 4 W.W.R. 328, 27 D.L.R. (4th) 305 (B.C.S.C.).

63. R.S.B.C. 1979, c. 259.

64. R.S.B.C. 1979, c. 309.

65. R.S.B.C. 1979, c. 206.

VII. PETROLEUM INCENTIVE PROGRAM

A. *FULCRUM RESOURCES LTD.* v. *MINISTER OF ENERGY AND NATURAL RESOURCES (ALBERTA)* [66]

The issue before the Court was whether money expended by the appellant in conducting a seismic program in the absence of any proposed drilling program, but rather in speculation that it could sell the results or obtain a working interest in reliance on the results, constituted an "eligible exploration expense" under the Petroleum Incentive Program Act (Alberta)[67] and Regulation.[68] An "eligible exploration expense" included a geophysical expense for the purpose of determining the existence or location, extent or quality of an accumulation of oil and gas in Alberta. The Minister contended that if the claimant had a secondary purpose to speculate in the results of his work, this necessarily excluded the existence of the statutorily required purpose. The Court held that these two purposes were not mutually exclusive. It was common ground that seismic investigation records information about subsurface conditions. The secondary purpose was irrelevant. The presence of some mischief in the claimant's scheme does not disentitle it to the grant if the grant program was open to it and it was relied upon by the claimant in conducting its program.

VIII. JOINT VENTURES

A. *ASAMERA INC.* v. *SASKATCHEWAN MINING DEVELOPMENT CORPORATION* [69]

Asamera and Saskatchewan Mining Development Corporation ("SMDC") formed a joint venture to prospect for uranium and other minerals. Asamera, the operator of the venture, had dismissed employees involved in the joint venture's operations. An arbitrator had found that SMDC had no liability to reimburse Asamera for any of the severance paid to the employees. The Court dismissed Asamera's application to set aside the arbitrator's award.

The joint venture agreement empowered the operator to determine the number of employees and their terms of employment and to hire, direct and discharge employees. The agreement permitted Asamera to recover costs of employees engaged in joint venture operations:

> A. salaries and wages . . .
>
> B. Operator's costs of holiday, vacation, sickness and disability benefits and other customary allowances paid to the employees . . .
>
> C. expenditures of contributions made pursuant to assessments imposed by governmental authority which are applicable to Operator's labour cost of salaries and wages chargeable to the Joint Account . . .

The arbitrator found that severance pay was not covered by any of those items. The arbitrator applied the *ejusdem generis* rule to determine the meaning of the words "other customary allowances" in paragraph B.

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66. (1986) 45 Alta. L.R. (2d) 315 (Alta. C.A.).
67. R.S.A. 1980, c. P-4.1.
68. Alta. Reg. 220/82, as am.
69. (1986) 49 Sask. R. 5 (Q.B.).

The Court said that it was arguable that severance pay fell within paragraph C. However, the interpretation of the arbitrator was an interpretation that the agreement could reasonably bear.

Asamera also contended that the severance pay was covered by the following indemnification provision of the joint venture agreement:

> Each party, proportionate to its participating interest, hereby agrees to indemnify and to hold harmless the operator against any claim of or liability to any third person resulting from any act or omission of the operator or its agents and employees conducting operations pursuant to this agreement, provided however that the operator shall not be indemnified or held harmless by the parties for any loss, damage, claim or liability resulting from the gross negligence or wilful misconduct of the operator . . .

The Court held that the indemnification provision only related to obligations incurred "in conducting operations pursuant to this agreement". Thus, any claim for indemnification must be subject to compliance with the other provisions of the agreement, one of which stated that joint venture operations were to be carried out under approved budgets and another of which stated that the responsibility of the operator was "subject always to the control of the management committee". Since the severance payments were not covered by an approved budget or approved by the management committee, they were not incurred in compliance with the other provisions of the joint venture agreement and, therefore, the indemnification provision was not applicable.

The arbitration clause in the joint venture agreement provided that any determination by an arbitrator would be final and binding and not subject to appeal. The Court did not consider the effect of that clause since it would not have overturned the arbitrator's award in any event.

The indemnification clause in the joint venture agreement is similar to those encountered in oil and gas operating agreements. It is a reasonable inference from the decision that if an operator breaches a specific covenant contained in an operating procedure, then the operator will not be indemnified for the losses which it suffered as a consequence thereof.

B. *ROYAL BANK OF CANADA, ROYNAT INC. AND CANADIAN COMMERCIAL BANK* v. *BAUMAN ET AL.*[70]

Bauman had subscribed for units in a limited partnership promoted by Omni Drilling Ltd. pursuant to which he made a capital contribution to the limited partnership of cash and promissory notes. The notes were endorsed by the partnership to the plaintiff banks as security for loans to the partnership. In 1982, the plaintiffs called the partnership's loans and, in realizing upon their security therefor, demanded payment of the aforesaid promissory notes.

The plaintiffs contended that they were assignees of the partnership's interest in the notes. The plaintiffs conceded that they were not holders in due course because the notes were not promissory notes within the meaning of section 176 of the Bills of Exchange Act[71] (the notes were not made for a "sum certain in money", the notes stated on their face that they included accrued interest without specifying the rate thereof).

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70. (1986) 72 A.R. 89, 46 Alta. L.R. (2d) 68 (Q.B.).

71. R.S.C. 1970, c. B-5.

The private placement memorandum pursuant to which the defendant subscribed for units in the partnership stated that Omni Drilling Ltd. would be the general partner of the partnership. When the private placement memorandum was issued and when the defendant subscribed for units in the drilling fund, the limited partnership had not yet been formed. Subsequently, on advice of legal counsel, Omni decided that the general partner of the partnership should be a separate legal entity from Omni. Thus, when the partnership was formed, a numbered company was named as general partner.

Judgment was rendered in favour of the plaintiffs. It was held that the plaintiffs were assignees of the notes subject to the equities between the partnership and the defendant.

The defendant contended that the numbered company did not have the authority to execute the limited partnership agreement on his behalf with the result that he never became a limited partner. However, in connection with his subscription for units in the drilling fund, the defendant had executed a broadly worded power of attorney in favour of Omni with "full power of substitution". The Court held that Omni had the authority under that power of attorney to substitute the numbered company as attorney and that the numbered company, as substituted attorney, had the authority under the power of attorney to execute the partnership agreement and other documents pertaining to the formation of the partnership on behalf of the defendant.

The defendant was estopped from denying that he was a limited partner because he had stood by and allowed the partnership to carry on business and incur liability to the plaintiffs on the strength of his being a partner.

Further, the defendant had ratified the substitution of the numbered company as his agent under the power of attorney and had ratified his status as a limited partner. The defendant had claimed to be a limited partner in his income tax returns and had claimed the deductions flowing therefrom. The defendant had received a form of closing book pertaining to the formation of the drilling fund which indicated that the numbered company was the general partner and that the general partner had executed the partnership agreement on his behalf. In addition, he had received two progress reports on the affairs of the partnership without denying his status as a limited partner. The defendant had attended at least one meeting of limited partners and had paid a small fee to defray costs of a special committee of partners.

The defendant could not deny his liability on the notes on the basis that the drilling fund was not established in accordance with the terms of his original agreement with Omni as set forth in the private placement memorandum. The defendant was fully informed, knowledgeable and sophisticated. He knew that the indebtedness that he had undertaken was to be assigned to the plaintiffs as security for loans to the partnership. He knew that he would lose his profits and his capital if things went badly. The private placement memorandum specifically referred to the loans and stated that if the partnership's revenues were not sufficient to meet the loan repayments, the limited partners might be called upon to cover the deficiency under the notes. The private placement memorandum stated

that the limited partners would have to rely upon the judgment, integrity and good faith of Omni's management. Omni acted in good faith and its actions were intended to and did further the original intentions of the subscribers.

The fact that the power of attorney was not under seal was irrelevant because no special form of contract is required in order for an agent to enter into or execute a contract, even in writing, unless that contract itself is required to be under seal.

C. *MILOSIS AND JONES* v. *LADD EXPLORATION COMPANY* [72]

Milosis and Jones were limited partners in a Texas partnership organized for the purpose of exploring for oil and gas in Canada. The partnership agreement provided that the sharing of partnership revenues would change at payout (being the point in time when partnership revenues equalled partnership investments). The partnership was dissolved in 1971 and the partners entered into an operating agreement under which the general partner was appointed operator. In 1983, the operator discovered that payout had occurred in 1977. He demanded that the limited partners reimburse the operator the amounts paid to them in excess of the amounts which would have been paid to them between 1977 and 1983 if payments during that time had been based on post-payout sharing percentages. The limited partners did not make such refund and the general partner set-off the refund against revenues otherwise payable to the limited partners.

The plaintiffs, being former limited partners, sought to recover the funds that had been set-off by the operator in recovery of the overpayment.

The operating agreement provided that the operator would furnish the non-operators (including the plaintiffs) with monthly statements of the Joint Account which would be "conclusively considered as correct" if not objected to within six months. The plaintiffs argued that since the operator had not objected to the statement of revenue sharing as set forth in the monthly statements that were delivered between 1977 and 1983, within six months of such statements being rendered, it was prevented from doing so now. The Court rejected that argument on the basis that the statements related only to the "Joint Account", which covered the collective operations of the operators and the non-operators and not the sharing among the parties. Sharing was covered by the provisions of the partnership agreement which had survived dissolution of the partnership by being expressly incorporated into the operating agreement. Also, the Joint Account was intended to set forth joint costs and joint revenues and the provision deeming the statements of the joint account to be correct related to the amount of the costs and revenues and not whether they had been properly incurred or distributed, matters which could be objected to after the six month period.

The sharing provisions of the partnership agreement provided that in each year a determination of payout would be made as of the last day of the preceding year and, if payout had occurred, a determination of when

72. Unreported, 14 May 1986, J.D. of Calgary, No. 8301-27575 (Alta. Q.B.).

"during each preceding year" payout had occurred. The agreement further provided that "from and after the last day of the fiscal month during such preceding year during which payout last occurred the Post Payout Percentage shall be applicable . . .". The Court ruled that these provisions meant that once payout was determined to have occurred, the general partner could readjust accounts back to the end of the month in which the payout actually occurred even if the determination of payout was made more than one year after payout had occurred. The Court made this finding relying on the phrase "each preceding year" as allowing the general partner to go back more than one year. It may be that if the words "such preceding year" had been used, the Court might have come to a different conclusion.

The limited partners also contended that the errors in distributions occurred as a result of a mistake of law and not a mistake of fact so that the operator could not recover the overpayments. The Trial Judge found there was a mistake of fact and not a mistake of law because there was no mistake in the interpretation of the contract but rather there was a clerical error resulting from the operator's employees not determining if payout had occurred.

In dealing with statutorily-imposed limitations, the Court found that there was no debt due from the limited partners to the operator until payout was determined to have occurred. Alternatively, the debt did not arise until the date upon which the payout calculation was required to have been made, being, at the earliest, January 1, 1978. In either case, the cause of action arose less than six years prior to the commencement of the suit so that statutory limitations were not applicable.

In any event, the Trial Judge stated that he would have relieved against forfeiture, because it would be unconscionable to allow the limited partners to retain the overpayments which were made as a result of a mistake of fact.

D. *HAUGHTON GRAPHIC LTD.* v. *ZIVOT ET AL.*[73]

This was an action against two limited partners of a limited partnership by a creditor of the partnership. The limited partnership was formed pursuant to the Alberta Partnership Act[74] for the purpose of publishing a magazine. The defendants were individual limited partners. The general partner was a corporation. The plaintiff sought to recover amounts owing for printing the magazine. Both the partnership and the general partner had insufficient assets to pay the debt. The defendants claimed that their liability was limited by virtue of being limited partners. The plaintiff claimed that they had lost their limited liability in accordance with section 63 of the Partnership Act,[75] which provides as follows:

> A limited partner does not become liable as a general partner unless, in addition to exercising his rights and powers as a limited partner, he takes part in the control of the business.

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73. (1986) 33 B.L.R. 125 (Ont. S.C.).

74. R.S.A. 1980, c. P-2.

75. *Id.*

The defendants had complete control of the partnership. One of the defendants had promoted the offering of interests in the partnership to various investors and had incorporated and was the sole shareholder of the general partner. The defendants were known as the president and vice president of the partnership.

Before the plaintiff did any printing, it knew that it was dealing with a limited partnership. It was not aware that the defendants were partners.

The defendants referred to a line of authority in the United States to the effect that a limited partner who takes part in the control of the business of a limited partnership should only lose his limited liability if, as a result of his conduct, the creditor believed that the limited partner was a general partner. The Court rejected that argument on the basis that there was nothing in section 63 of the Partnership Act[76] to that effect. The test in the section related only to actual participation in control of the business.

The defendants also relied upon section 59 of the Act,[77] which provides that "a limited partner may loan money to and transact other business with the limited partnership . . .". The Court stated that transacting business "with" a partnership is not the same as transacting business "on behalf of" a partnership.

Judgment was entered for the plaintiff.

E. *VOLZKE CONSTRUCTION LTD.* v. *WESTLOCK FOODS LTD.*[78]

The issue in this case was whether the defendant and another party, Bonel Properties Ltd., had formed a partnership or a joint venture. Bonel owned a shopping centre in Westlock. Bonel sold an undivided 20% interest in the shopping centre to the defendant who was also a tenant in the shopping centre. Bonel retained the plaintiff to construct an expansion to the shopping centre. The plaintiff sued the defendant under the construction contract claiming that the defendant and Bonel were partners. The action was dismissed at trial on the basis that no partnership had been formed, since there was no intention to form a partnership and since the defendant had no control over the business. The plaintiff appealed.

The Alberta Court of Appeal reversed the trial decision and gave judgment to the plaintiff. The Trial Judge erred in finding that, since the defendant had no control over the business, there could not be a partnership. Control is irrelevant to the existence of a partnership.

A partnership is defined in section 1 of the Partnership Act[79] as follows:

> (d) "partnership" means the relationship that subsists between persons carrying on business in common with the view to profit.

The Court also noted section 4(c) of the Act,[80] which states:

> . . . the receipt by a person of a share of the profits of a business is prima facie proof that that person is a partner in the business . . .

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76. *Id.*
77. *Id.*
78. [1986] 4 W.W.R. 668, 45 Alta. L.R. (2d) 97 (C.A.).
79. *Supra* n. 74.
80. *Id.*

The defendant owned an undivided 20% interest in the shopping centre. The defendant sent prospective tenants for the shopping centre to Bonel who negotiated the leases. Tenants made complaints to the defendant who referred them to Bonel who arranged for repairs and maintenance. The business opened a bank account and paid its bills on printed cheques in the name of Bonel and the defendant. Although none of the principals of the defendant had signing authority. Interim financing of the expansion was arranged through a loan for which Bonel and the defendant were jointly and severally liable and in respect of which both executed a debenture. On these facts, the Court of Appeal found that there was a partnership.

F. *YORKSHIRE TRUST CO.* v. *EMPIRE ACCEPTANCE CORP. LTD.*[81]

Empire Acceptance was in the mortgage brokerage business. Empire would negotiate a mortgage and then sell it to a group of investors following which Empire would administer the mortgage, charging a management fee for its services. Empire went into receivership. The receiver sued an appraiser who had provided an appraisal on the basis of which Empire had taken a second mortgage. The appraisal had been done negligently and Empire recovered substantial damages. The issue in the case was whether the receiver should pay the damage award to the persons who had invested in the mortgage or to Empire's general creditors.

The investors advanced two claims, first that Empire was their agent and secondly that they were entitled to the award under the doctrine of unjust enrichment.

The Court rejected the agency argument on two grounds. First, the judgment under which the damage award was obtained from the appraiser did not proceed on the basis that Empire was acting as an agent. Secondly, Empire could not have been the investors' agent when the appraisal was obtained. At that time, Empire had not yet made arrangements to sell the mortgage to the investors. Agency (apart from agency of necessity) is a legal relationship founded upon contract. There could be no agency contract when the identities of the parties to the contract were unknown.

The Trial Judge accepted the unjust enrichment argument. He stated that there are three essentials to unjust enrichment: an enrichment; a corresponding detriment; and the absence of any juristic reason for the enrichment. There was enrichment because Empire had suffered no loss on the defaulted mortgage other than the loss of its management fee. There was a detriment because the investors lost their claim against the appraiser which they would have had, even though there was no direct relationship between the appraiser and the investors, on the basis of the *Hedley Byrne* doctrine. There was no juristic reason for the enrichment (and corresponding deprivation), since there was no equitable reason why Empire should be entitled to retain the award, while it would be unfair for the investors not to obtain the award since they had suffered the loss.

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81. (1986) 24 D.L.R. (4th) 140 (B.C.S.C.).

IX. CREDITOR-DEBTOR RELATIONS

A. *BANK OF MONTREAL* v. *SAXTON ET AL.*[82]

Saxton had agreed to purchase land in Alberta. He had borrowed the down payment from two individuals. He had executed a Declaration of Trust acknowledging that those individuals had provided the down payment; stating that he was acting as trustee for them as to an undivided 51% interest; declaring that an undivided 51% interest "in the said land and all benefits and advantages accruing thereon are and shall be held by Jeffrey E.H. Saxton only for the sole beneficial use and ownership of (the individuals)"; and agreeing that "upon the first cash available from the resale of the said lands, Jeffrey E.H. Saxton shall assign to the said . . . and account to pay over to them a full refund of the said monies provided by them in the sum of . . ". The individuals assigned all of their interest to Bonanza Creek. Saxton and Bonanza then entered into an agreement in which Saxton agreed that the first proceeds of sale of the land would be paid to Bonanza in repayment of the down payment; that any additional funds would be divided equally between them; and that "he holds one half of the net profit realized by himself upon resale of the lands . . . in trust for the sole benefit, use and ownership of Bonanza . . ".

Saxton subsequently agreed to sell the lands to Melcor. That agreement provided that if Saxton defaulted under the first purchase agreement, Melcor could cure the default with amounts paid by it in connection therewith being applied to reduction of the purchase price payable to Saxton. Both sale agreements provided for installment payments, the installments under the Melcor agreement being greater than those under the Saxton agreement.

Saxton encountered financial difficulties, as a result of which the Bank of Montreal garnisheed an installment payable by Melcor under its sale agreement and the Ukrainian Credit Union directed the Sheriff to seize Saxton's interest in the Melcor sale agreement to satisfy a judgment.

Melcor had previously paid a number of installments on its sale agreement, paying a portion of each directly to the vendor under the first purchase agreement and the balance to Bonanza and Saxton. Melcor paid the garnisheed installment into court.

The Court of Queen's Bench held that the written declaration of trust, the assignment to Bonanza and the agreement between Saxton and Bonanza resulted, at least, in an equitable assignment to Bonanza from the prospective proceeds of resale of amounts necessary to reimburse Bonanza for the loan and to pay to Bonanza 50% of the profits. An express trust existed in favour of Bonanza or, at the very least, a constructive trust. Saxton was trustee for Bonanza as to a one half interest in the land prior to the Melcor sale agreement and, thereafter, a one half interest in the sale agreement. A garnishee or execution creditor can obtain no better title than its debtor had. Notice to the garnisheeing or execution creditors, whether constructive or actual, of the assignment to Bonanza or the trust in favour of Bonanza was not required in order to preserve Bonanza's priority.

82. (1987) 76 A.R. 208 (Q.B.).

The garnishment and the seizure were ruled to be ineffective to the extent of the interest of Bonanza and were subject to Melcor's rights to make payments directly to the original vendor. Melcor was obligated to pay interest on the garnisheed installment from the date it was payable until the date it was paid into court at the rate provided for in its sale agreement.

B. *IN THE MATTER OF THE BANKRUPTCY OF PETROLEUM ROYALTIES LTD.*[83]

Petroleum Royalties was the operator of oil and gas properties under a 1974 Canadian Association of Petroleum Landmen (CAPL) Operating Procedure. The applicant had a working interest in the properties and was a party to the operating procedure. Petroleum Royalties, in its capacity as operator, received revenues from the sale of petroleum substances produced from the properties. Petroleum Royalties was placed in bankruptcy. At the time of the bankruptcy, there were revenues from the sale of oil and gas attributable to the interests of the applicant which had been received by Petroleum Royalties but had not been distributed to the applicant.

The applicant's argument was based upon the case of *In re Hallett's Estate*,[84] which provides that if a person mixes money which he holds as a trustee or a fiduciary with his own money in a commingled account, and thereafter draws funds out of that account, he will be deemed to have drawn out his own funds before he has drawn out the funds held in trust. In the present case, the applicant argued that Petroleum Royalties must be deemed to have produced only its share of the petroleum and natural gas contained in the lands and to have left the applicant's oil and gas in the ground.

It was held that the rule in *Hallett's* case was not applicable, based upon a review of the entire operating procedure. Under the operating procedure, the operator not only controls and manages operations but has the right to commingle money and to utilize that money as he sees fit in the day to day operations of producing and selling the leased substances. Upon a sale of such substances, the operator becomes liable to account for same. Where Petroleum Royalties was not bound to keep money received for the account of the other parties to the operating procedure separated from its own, and was entitled to mix it with its own and deal with it in accordance with the terms of the agreement and when called upon after sale to hand over an equivalent sum, then no trust relationship was established but rather that of creditor and debtor.

It is submitted that this case does not establish any new law but merely confirms the normal rule that, if a person receiving funds for another is entitled to commingle those funds with his own, then that person is a mere debtor of the other and not a trustee. Upon a bankruptcy of the person holding the funds, the other person may merely claim as an ordinary creditor with no greater right to an interest in the funds received by the holder than those of ordinary creditors. However, the decision discussed

83. (1986) 45 Alta. L.R. 273 (Q.B.).

84. (1879) 13 Ch. D. 696.

immediately following also deals with a bankrupt operator under a CAPL operating procedure but reaches the opposite conclusion to the *Petroleum Royalties* case.

We understand that the decision in the *Petroleum Royalties* case has been appealed.

C. *BANK OF NOVA SCOTIA* v. *SOCIETE GENERALE (CANADA) ET AL.*[85]

This case involves claims of various parties to funds held in a bank account at the Bank of Nova Scotia in the name of Sorrel Resources Ltd. The decision was delivered orally and the facts of the case and the reasoning for the judgment are not very clear. The summary of the case set forth herein is based, in part, on some assumptions made by the writers of this paper.

Sorrel was the general partner of a limited partnership. Sorrel and the partnership had entered into a joint venture agreement which, it seems, provided for the joint acquisition and development of oil and gas properties. It would also seem that the joint venture agreement provided that the jointly acquired properties would be operated in accordance with an attached operating procedure and that Sorrel would be the operator under that attached CAPL operating procedure. The attached operating procedure permitted the operator to commingle funds received by it thereunder. The joint venture agreement provided that funds received by Sorrel from the partnership would not be commingled with Sorrel's own funds.

Sorrel had borrowed money from Societe Generale (Canada) and as security therefor had granted a general assignment of book debts and other security interests to Societe Generale.

Sorrel and a number of other parties held interests, as tenants in common (it seems), in one or more oil and gas properties. These properties were subject to operating agreements. Sorrel was named as operator thereunder. The operating agreements provided for cash calls whereby the operator could require the other owners to advance their shares of anticipated expenses to the operator prior to the expenses having been incurred or paid. It would seem, as well, that Sorrel had received revenues from the sale of oil and gas produced from such properties and that under the operating agreements Sorrel was to account to the other owners therefor and to hand over to the other owners their respective shares of such revenues.

Societe Generale claimed all the money held at the Bank of Nova Scotia under its general assignment of book debts.

The partnership claimed the funds to the extent of amounts previously advanced by the partnership to Sorrel on account of the costs which had never been incurred.

Certain of the co-owners of the oil and gas properties had paid their shares of costs incurred on the jointly owned lands twice and made a claim on the fund for recovery of the overpayment.

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85. Unreported, 16 February 1987, J. D. of Calgary, No. 8601-08004 (Alta. Q.B.).

Certain of the co-owners had made cash call advances to Sorrel on account of anticipated costs which, it would seem, were never incurred and made a claim on the funds for recovery thereof.

Certain of the co-owners had not been paid their shares of revenues from the sale of oil and gas from the jointly owned lands and claimed recovery thereof out of the funds in the bank account.

The Court found that claims of the partnership and the co-owners had priority over the claim of Societe Generale.

The funds advanced by the partnership related to lands in which Sorrel and the partnership had not acquired an interest. As a result, such lands were not subject to the operating procedure attached to the joint venture agreement or to any third party operating procedure, but were subject to the joint venture agreement itself. Under the terms of the joint venture agreement, Sorrel was not entitled to commingle funds advanced to it pursuant thereto with its own funds. It would seem that since Sorrel was not entitled to commingle such funds, it held them as a trustee for the benefit of the partnership. If the partnership could trace such funds to the account in the Bank of Nova Scotia, then the partnership would be entitled to such funds in priority to the creditors of Sorrel.

The claims of the other parties, except Societe Generale, were sustained on the basis that Sorrel was a trustee for their benefit. The Court stated that a trust can be found even when there is no prohibition against commingling. The Trial Judge stated it would be wrong in law and on principle not to find a trust, for otherwise the partnership's funds and those of the co-owners would be used to pay Sorrel's debts.

The following statement was made in the decision to support the finding of a trust:

> The first indicia of the trust is the compellability of the parties to establish and demand something that Sorrel created in this case or received on the claimant's behalf. It may thereafter be determined to be a debtor/creditor relationship or it may be a trust, depending on the circumstances . . . The CAPL agreement and in particular, the joint account provisions, satisfies me that a trust was impressed on these funds for these claimants having met the test or — as Miss Nation has said the three certainties; i.e. intention, subject matter and objects.

The Court stated that, as to those claimants who had paid the same expenditures twice, once by means of a cash call and once by means of setoff against revenues otherwise payable to them, their claims were on the basis of monies paid by mistake and that the funds were impressed with a trust for these claims.

The decision *In the Matter of the Bankruptcy of Petroleum Royalties Ltd.*[86] was distinguished on the basis that it dealt with ownership of petroleum substances in the ground and not with claims on a particular fund of money. It is submitted that, although that distinction is factually correct, it is immaterial.

It is submitted that the decision in this case respecting the monies advanced to the partnership pursuant to the joint venture agreement is correct, since that agreement prohibited commingling which raises an inference of a trust. It is submitted that if the operating agreements

86. *Supra* n. 83.

permitted commingling, the decision as to the claims of the co-owners is wrong. It is assumed that all the cash call advances and the revenues from sales referred to in the decision were deposited in the account at the Bank of Nova Scotia so that tracing was not an issue.

We understand that the decision has been appealed.

D. *RE ONTARIO SECURITIES COMMISSION AND GREYMAC CREDIT CORP.*[87]

A trustee had been entrusted funds by two separate beneficiaries which it commingled with its own funds. The trustee made withdrawals of the commingled funds and, at the date of its receivership, the commingled funds could be traced to two separate bank accounts in the name of the trustee. The aggregate balance of those accounts was insufficient to allow full reimbursement to each beneficiary.

The Trial Judge ruled that the losses should be first allocated to the trustee, so that the trustee was entitled to none of the funds in the two accounts, and that the remaining losses should be allocated between the two beneficiaries on a pro rata basis. The allocation to the trustee was not appealed but the allocation between the beneficiaries was.

It was contended that the rule in *Clayton's Case* [88] should be applied. That rule would have the effect of allocating losses on a first in, first out basis with the result that the losses would be allocated to the funds which had been held in trust the longest.

The commingled funds were originally held in one bank account. Subsequently, a portion of the funds in that account were transferred to another bank account. The Trial Judge ruled that the remaining commingled fund was the aggregate of the funds in both accounts. On appeal, one of the beneficiaries argued that when funds were withdrawn from the first account and deposited in the second account, the rule in *Clayton's Case* should have been applied and those funds attributed solely to the beneficiary whose funds had been held the longest.

The Ontario Court of Appeal sustained the Trial Court decision. The rule in *Clayton's Case* was not applied to trace the funds so that both beneficiaries were considered to have an interest in both bank accounts. Further, a pro rata sharing of losses is more just than a sharing based upon the rule in *Clayton's Case*. The Court of Appeal noted that pro rata sharing could result, in some circumstances, in considerable inconvenience but that fact is not sufficient to deter the court from applying the rule which it considered to be fairer.

The Court of Appeal also stated that the competition between the two beneficiaries was in fact a competition of proprietary claims, either claims as holders of equitable charges (presumably a beneficiary of a trust has an equitable charge on trust property) or as owners of the trust property. Thus, personal claims that one of the beneficiaries had in addition to its claim as beneficiary should not be taken into account in determining the pro rata sharing.

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87. (1986) 55 O.R. (2d) 673, 34 B.L.R. 29 (C.A.).

88. (1816) 1 Mer. 572; 35 E.R. 781.

E. *SPARTAN DRILLING LTD.* v. *SNOWHAWK ENERGY INC.*[89]

The plaintiff had obtained a garnishee summons before judgment, garnisheeing funds in the hands of the Alberta Petroleum Marketing Commission ("APMC") otherwise payable to the defendant. The defendant sought to set aside the garnishment. Snowhawk was the operator of a well owned by itself and other parties. On behalf of itself and such other parties, Snowhawk had delivered petroleum produced from the well to the APMC for sale. The garnisheed debt represented the proceeds of the sale.

The Court reviewed sections 21 and 21.1 of the Petroleum Marketing Act[90] which provide, in part, as follows:

> 21(1) The Commission
>
> (c) shall, on the sale of any of the lessee's share of petroleum, pay to the owners of it the proceeds of the sale . . .
>
> 21.1(3) Subject to subsection 4, an operator to whom a payment is made by the Commission pursuant to subsection 2
>
> (a) is the agent of the owners otherwise entitled to the net sale proceeds . . .
>
> (b) shall keep any proceeds so paid to him separate from other money held by him;
>
> (c) shall hold those proceeds in trust for the owners of the petroleum entitled to receive them;

The operator sought to set aside the garnishee summons on the basis that the debt of the APMC to Snowhawk was a joint debt. The Court rejected this argument because the owners were designated and their respective ownership interests known. The share of the funds payable to the operator as his ownership share was ascertainable and did not form any part of a joint ownership fund.

Although the Court does not deal with the issue, it would seem that upon receipt of the garnisheed debt, the plaintiff would have received the funds from the APMC subject to the same obligations as Snowhawk would have received them and, therefore, would have been obligated to pay to each of the other owners their respective shares of the fund.

The judgment contains a number of errors. Section 21.1(4) of the Petroleum Marketing Act[91] provides that an operator need only comply with subsections 21.1(3)(b) and (c) after the date prescribed by regulation as the date on which they come into operation. That date has not been prescribed and therefore those provisions are not effective. Further, Sections 21 and 21.1 are within Part 3 of the Act.[92] The operation of Part 3 was suspended effective June 1, 1985. In addition, for some reason, at the beginning of the judgment, reference is made to petroleum incentive payments while it is clear that the APMC has nothing to do with such payments and that the garnisheed debt represented proceeds from the sale of petroleum.

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89. (1986) 45 Alta. L.R. (2d) 310, 74 A.R. 375 (Q.B.).

90. R.S.A. 1980, c. P-5, as am.

91. *Id.*

92. *Id.*

F. *RE DOWE* [93]

Dowe had granted a general assignment of book debts to the Bank of British Columbia which purported to assign the following:

> All debts, accounts, choses in action, claims, demands and monies now due or owing or accruing due or which may hereafter become due or owing to the Assignor . . .

Dowe became bankrupt. The British Columbia Court of Appeal ruled that Dowe's interests in three registered retirement savings plans constituted choses in action and were subject to the general assignment of book debts so that the bank had an interest therein ranking ahead of the interest of the trustee in bankruptcy.

The Court referred to choses in action as personal rights of property, which are claimable or enforceable by legal action as distinct from things capable of physical possession, and which are divided into legal and equitable choses in action, the latter including equitable rights in property such as interests under trusts. The R.R.S.P.s constituted interests under trusts.

The Court rejected the argument that since the assignment was entitled "Assignment of Book Debts" it only caught book debts or book accounts and not other choses in action.

G. *ROYAL BANK OF CANADA* v. *FRASER VALLEY CREDIT UNIT* [94]

A company had granted a general assignment of book debts to a bank. The company and another company opened a joint account at a credit union. The bank sought to seize the funds in the joint account under the general assignment.

The general assignment assigned:

> . . . all book accounts, book debts and generally all accounts, debts, dues and demands and choses in action of every nature and kind howsoever arising or secured and now due, owing or accruing or growing due, which may hereafter become due, owing or accruing or growing due to the undersigned . . .

The Court stated that a bank account constitutes a debt owing to the holder of the account and is a chose in action. However, the assignment was not wide enough to include a debt held by the assignor and another. The words "chose in action of every nature and kind" were construed as meaning legal, equitable, present and future choses in action but not jointly owned debts. In any event, as the assignment was ambiguous, the *contra proferentum* rule should be applied against the bank so as to narrowly construe the assignment.

The Court also considered whether a joint debt could be the subject of an assignment. It made the following statement:[95]

> What is less certain is whether an assignor can assign only a portion of a debt. Authorities suggest that the assignment of an unascertained portion or definite part of a complete debt owed to the assignor falls outside the ambit of the statute since one of the statutory requirements is that the assignment be absolute and "an unnecessarily great burden would be placed upon the debtor" . . . Nevertheless, they may be valid equitable assignments.

The Court did not decide whether joint debts could be validly assigned.

93. [1986] 5 W.W.R. 378 (B.C.C.A.).

94. (1986) 1 B.C.L.R. (2d) 295 (S.C.).

95. *Id.* at 298.

H. *COLONIAL BANK* v. *BUTEC INTERNATIONAL CHEMICAL CORPORATION* [96]

This case deals with an assignment of a chose in action as security for a debt and the notice which needs to be given to the obligor in order to perfect the assignment.

Butec had agreed to purchase coal leases in Kentucky from Midland. The consideration for the leases was cash and shares of Butec. Midland had borrowed funds from Colonial Bank and, as security therefor, executed a pledge agreement, which purported to assign its shares of Butec to the bank, and a letter addressed to Butec requesting Butec to "please forward" the cash and shares which represented the consideration for the coal leases to the bank. The bank wrote to Butec enclosing Midland's letter which it referred to as "a letter of instructions . . . directing remittance . . . to our bank" and requesting Butec to acknowledge receipt of "the instructions". No mention of the pledge agreement was made in either letter, nor was there any reference in those letters to an assignment.

The cash was paid by Butec to Midland before the bank's letter could have been received by Butec. The bank acknowledged that Butec had no liability to the bank in respect of the cash. The shares of Butec were issued, probably after receipt by Butec of the bank's letter, and share certificates were delivered to Midland. The bank brought this action against Butec for damages for failing to deliver the share certificates to the bank.

The Court found that the letters from Midland and the bank to Butec did not constitute sufficient notice. The Court stated that notice of an assignment must be clear and unambiguous and if it merely indicates that, on grounds of convenience, payment should be made to a third party as agent of the creditor, the debtor is not liable if he pays the creditor directly. However, the Court did refer to authorities for the proposition that, in some circumstances, a simple direction to pay may constitute sufficient notice of an assignee's interest to put the debtor on inquiry. However, the notice in the present case was ambiguous and, therefore, insufficient.

I. *R. IN RIGHT OF ALBERTA* v. *CANADA WEST INTERIORS LTD. ET AL.* [97]

Canada West entered into a construction contract with the Crown in Right of Alberta. Canada West made a general assignment of book debts in favour of Continental Bank. The bank advised the Province of the assignment. The Crown in Right of Canada demanded that the Province pay amounts owing to Canada West under the contract to Revenue Canada on account of income tax obligations of Canada West. The Province paid the amounts into court.

Section 91 of the Financial Administration Act[98] provides that the Crown is not bound by an assignment of a Crown debt unless the Crown consents to the assignment. However the section does not make an assignment of a Crown debt a nullity. It only permits the Crown to ignore

96. (1986) 7 B.C.L.R. (2d) 381 (S.C.).

97. (1986) 43 Alta. L.R. (2d) 155 (Q.B.).

98. R.S.A. 1980, c. F-9.

an assignment even if it has notice of the assignment. In this case, the bank did obtain a property interest in the debt but it could not enforce that interest against the Province. Alternatively, the Court found that the Province had, by implication, consented to the assignment by paying the money into court. The bank was entitled to the funds.

J. *NORTHLAND BANK* v. *VAN De GEER* [99]

This case considers whether an assignment of rents constitutes an interest in land. Van de Geer assigned to the Northland Bank rent from certain of his lands. The Northland filed a caveat against such lands. After the Northland's caveat was filed, Van de Geer granted an equitable mortgage on the lands to the Bank of Montreal who also filed a caveat. During the dispute over the priority of the banks' claims, the lands were sold and the proceeds paid into court.

After the granting of the mortgage to Bank of Montreal, the Law of Property Act[100] was amended to provide that rights of first refusal and assignments of rents are equitable interests in land and that they may be protected by way of caveat.

Northland Bank initially asserted that it had priority as to all of the proceeds from the sale of the land, even though such proceeds were not rent. However, it subsequently conceded that its priority, if any, would only be to the extent of the probable present value of rents which might be received in the future from the lands.

The Court held that at the time the assignment of rents was made to the Northland, it did not create an interest in land. The Court referred to the reasoning in *Canada Trustco Mortgage Company* v. *Skoretz*.[101]

The Court would not apply the provisions of the Law of Property Act[102] to give priority to the Northland Bank, because to do so would interfere with the vested right which the Bank of Montreal had at the time of the amendment, the Bank of Montreal having then had priority over the interest of the Northland Bank.

K. *WINTERS* v. *CANADIAN IMPERIAL BANK OF COMMERCE* [103]

The owner of a number of trailers used to provide accommodation for drilling crews engaged in drilling oil and gas wells in remote areas had granted a chattel mortgage over such trailers to Canadian Imperial Bank of Commerce and had granted a fixed and floating charge debenture to Bank of Montreal. There were two issues in the case; first, did the debenture create a fixed charge on the trailers in favour of Bank of Montreal and secondly, was the chattel mortgage in favour of CIBC invalid due to incomplete registration.

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99. (1986) 49 Alta. L.R. (2d) 113, 75 A.R. 20, 34 D.L.R. (4th) 156 (C.A.).
100. *Supra* n. 22.
101. 26 Alta. L.R. (2d) 60, [1983] 4 W.W.R. 618, 28 R.P.R. 168, 147 D.L.R. (3d) 130, 45 A.R. 18 (Q.B.).
102. *Supra* n. 22.
103. (1986) 2 B.C.L.R. (2d) 119, 27 D.L.R. (4th) 220 (C.A.).

The debenture granted a fixed and specific mortgage to Bank of Montreal on:

> all its presently owned or held or hereafter acquired or held property as follows . . .
>
> (ii) all structures, buildings, plant and other fixtures and all machinery, equipment, furniture, motor vehicles and apparatus and all other fixed assets (whether or not the same be affixed to the said realty);
>
> and in particular and without limiting the generality of the foregoing, the properties described in the Schedule hereto . . .

The trailers were not specifically described in the schedule.

The British Columbia Court of Appeal held that the general words in the granting clause in the debenture, namely "all its presently owned or held . . . property" was not, by itself, sufficient to charge the trailers, because those words were modified by the words "as follows" so that only those assets set out in the subclauses in the charging language were caught by the mortgage.

The real issue was whether or not the trailers constituted "equipment". The Court noted that just because the charging language is wide does not necessarily mean that it is indefinite or uncertain. The Court reviewed various dictionary definitions of the term "equipment". It noted that the company granting the debenture was in the business of leasing the trailers to third parties. As a result, the trailers were not used by the company in its operations and were not, therefore, equipment from the company's point of view although they might have been equipment from the point of view of parties leasing them. The most that can be said is that the trailers might be described as equipment in some contexts and might not in others. If an intending purchaser or lender must determine their use in order to find out whether, at any given time, they are more or less likely to be within the meaning of the word, the word must be inadequate. Accordingly, the Court of Appeal found that the trailers were not "equipment" and, therefore, not subject to the fixed charge contained in the debenture.

The British Columbia Chattel Mortgage Act[104] provided that a chattel mortgage which was not registered at the Registrar of Companies was void as against various classes of persons including assignees. CIBC had forwarded the chattel mortgage to the Registrar of Companies for registration but, due to clerical error or some similar reason, the chattel mortgage was registered at the Central Registry instead. The bank's covering letter enclosing the chattel mortgage was returned to the bank bearing a stamp stating that it had been filed at the Central Registry. CIBC relied on a line of authorities to the effect that a mortgagee should not be held responsible for an error or omission by a registrar. The Court of Appeal distinguished the present case from those authorities on the basis that in each of the other cases, the mortgagee had done everything in its power to ensure registration. In the present case, the bank knew or ought to have known of the error because of the stamp on the covering letter which was returned to the bank. Accordingly, the Court of Appeal held that the chattel mortgage was invalid as against the Bank of Montreal who had priority under the floating charge contained in its debenture.

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104. R.S.B.C. 1979, c. 48.

L. *SCHMITT MECHANICAL LTD. ET AL.* v. *OUTLOOK AND DISTRICT CREDIT UNION LIMITED* [105]

A chattel mortgage had been granted on certain property, one class of which was described as follows:

> EQUIPMENT — all machinery, equipment, goods, fixtures and other tangible personal property now owned or hereafter acquired . . .

The issue in the case was whether a number of motor vehicles were subject to the chattel mortgage. In contrast to the *Winters* case[106] discussed above, the term "equipment" was considered to be clear and unambiguous. However, in this case, the term was defined. The Court held that the charge covered "all tangible personal property". Motor vehicles are tangible personal property and were, therefore, caught by the mortgage. The fact that the motor vehicles were not specifically listed in the chattel mortgage, while substantial other properties were, is irrelevant since the language was clear and unambiguous.

M. *ROYAL BANK OF CANADA* v. *DONSDALE DEVELOPMENT LTD.*[107]

The issue in this case was whether an equitable mortgage protected by way of caveat has priority over a subsequent builders' lien.

The lienholders relied on section 9(2) of the Builders' Lien Act[108] which provides that a registered mortgage has priority over a builders' lien. The lienholders argued that a mortgage registered by way of a caveat is not a registered mortgage.

It was first determined that the Royal Bank was the holder of an equitable mortgage. The Court reviewed a line of authorities which establishes that equitable interests are not excluded under a Torrens system. The Court referred to a definition of an equitable mortgage as a mortgage created by a contract evidenced in writing for valuable consideration to execute, when required, a legal mortgage, or by a contract so evidenced and for valuable consideration that certain properties stand as security for a certain sum. The Court also referred to a line of authorities establishing that a deposit of a certificate of title as security for a loan constitutes an equitable mortgage.

Under the Land Titles Act,[109] the bank clearly would have priority over the lienholders since the bank registered a caveat in respect of its equitable mortgage prior to registration of the builders' liens. The terms "registered mortgage" and "mortgage" are not defined in the Builders' Lien Act.[110] The Court held that an equitable mortgage registered by way of caveat is a registered mortgage.

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105. (1986) 51 Sask. R. 268 (Q.B.).
106. *Supra* n. 103.
107. 48 Alta. L.R. (2d) 289, [1987] 2 W.W.R. 14 (Q.B.).
108. R.S.A. 1980, c. B-12.
109. *Supra* n. 49.
110. *Supra* n. 108.

Section 143 of the Land Titles Act[111] provides that no one shall file more than one caveat "in respect of the same matter" without court order. The lienholders argued that the bank's caveat was void because an earlier caveat (since discharged) of the Bank in respect of an earlier equitable mortgage was still registered when the caveat under consideration was registered. The Court held that the word "matter" to which the second caveat related was different than the "matter" to which the first caveat related because slightly different lands were covered by the second equitable mortgage than by the first. Thus, the bank's equitable mortgage had priority over the builder's lien.

N. *AXELSON CANADA, INC.* v. *VONCO OILFIELD SUPPLY LTD. ET AL.*[112]

Vonco agreed to supply valves to Gulf Canada Corporation for its Westerose plant. Vonco purchased the valves from Axelson. Gulf paid Vonco for the valves but Vonco did not pay Axelson. Axelson filed a builders' lien. A court order was obtained providing that Gulf could incorporate the valves into its plant without prejudice to Axelson's rights and without prejudice to any defence of Gulf other than the defence that the material had been incorporated into the plant. The decision dealt with Axelson's claim against Gulf. The Court referred to section 14(2) of the Builders' Lien Act[113] and a line of authority which establishes that a supplier of materials to a project has an unpaid vendor's lien until the material is incorporated into the project whereupon the lien is converted into a conventional builders' lien. The issue in the case was whether or not Gulf was liable for 15% of the unpaid purchase price of the valves or 100%. The Court found that because of the prior court order, Gulf was not entitled to raise the defence that the valves had been incorporated into the project, with the result that Gulf could not argue that Axelson's unpaid vendor's lien had been converted into a conventional builders' lien. As a result, Gulf was liable for 100% of the costs of the valves. The Court noted that Gulf was placed in the situation of either not incorporating the goods with the result that its plant could not function, or of incorporating the goods but being liable for 100% of the value of the valves.

O. *STYLE PROPERTIES LTD.* v. *220293 DEVELOPMENTS LTD. ET AL.*[114]

This case considered whether an order of foreclosure on a mortgage of land extinguished the mortgage debt such that a guarantee of the mortgage debt became unenforceable. Section 44(1) of the Law of Property Act[115] provides that an order of foreclosure of a mortgage operates "as full satisfaction of the debt secured by the mortgage". In the case of *Canada*

111. *Supra* n. 49.
112. Unreported, 2 March 1987, J. D. of Edmonton, No. 8603-15479 (Q.B.).
113. *Supra* n. 108.
114. (1986) 39 R.P.R. 102 (Alta. C.A.).
115. *Supra* n. 22.

Permanent Trust Co. v. *King Art Developments Ltd.*,[116] the Alberta Court of Appeal had ruled, in similar circumstances, that a guarantee was unenforceable. In that case, however, the Court indicated that, if appropriately worded, a guarantee could survive an order of foreclosure.

In the present case, the guarantee guaranteed payment of "the said sum of . . . or such amount as may from time to time be owing to the Mortgagee under and pursuant to the terms of the said Mortgage". The beneficiary of the guarantee argued that the word "or" should be disjunctive so that, although the second item guaranteed might have been satisfied by the order of foreclosure, the first item had not since the beneficiary had not received the full amounts specified in the guarantee.

The beneficiary also referred to the following two clauses in the guarantee:

> The obligations of the Guarantor hereunder shall be direct and unconditional and independent of the obligations of the Mortgagor and a separate action or actions may be brought and prosecuted against the Guarantor without the necessity of joining or previously proceeding against or exhausting any other remedy against the Mortgagor or any securities then held in respect of the obligations or undertakings secured hereby.
>
> This instrument is to be construed as a continuing, binding, absolute and unconditional Guarantee which shall remain in full force and effect as written until the Mortgagee has actually been paid all sums secured by this Guarantee . . .

There were two decisions rendered by the Court of Appeal. The majority decision, rendered by Mr. Justice Moir, rejected the argument relating to the disjunctive use of the word "or" and found that it was the mortgage debt alone that was guaranteed. The dissenting judgment, rendered by Mr. Justice Stevenson, did not deal with this issue.

The majority judgment confirmed that a properly worded guarantee could survive an order of foreclosure. However, it would be necessary to bring to the guarantor's attention that he was waiving the protection that he would normally have under the Law of Property Act.[117] It was held that the guarantee was co-extensive with the mortgage debt and could not be proceeded on after the mortgage debt had been satisfied by the foreclosure order. The majority decision noted that waiving the protection of section 44(1) of the Law of Property Act[118] might be against public policy.

The dissenting judgment stated that section 44 of the Law of Property Act[119] is not directed towards anyone other than the mortgagor and is not intended to protect any other parties, including guarantors. It provides for the deemed "satisfaction" of the debt but not for "deemed payment". The guarantee under consideration continued until actual payment of the debt and payment had not occurred.

P. *CANADIAN COMMERCIAL BANK* v. *C.I.B.C.*[120]

Drew Sawmills Ltd. granted a floating charge debenture to North Continent Capital Ltd. ("Norco") in 1974, a floating charge debenture to

116. [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, 52 A.R. 139 additional reasons 54 A.R. 172 (C.A.).

117. *Supra* n. 22.

118. *Id.*

119. *Id.*

120. (1986) 4 B.C.L.R. (2d) 256 (S.C.).

Canadian Commercial Bank in 1978 and security on inventory pursuant to Section 88 (now Section 178) of the Bank Act[121] to C.I.B.C. in 1980. C.I.B.C. had knowledge of the two prior debentures when the Section 88 security was granted.

The case concerned the priorities of the debenture holders and C.I.B.C. to proceeds of insurance arising from the destruction of Drew's inventory.

The debentures obligated Drew to maintain insurance and, in one case, to "cause the policies providing the insurance called for . . . above to be assigned to Norco . . ." and, in the other case, to "assign to the Bank the policies of insurance and all claims thereunder".

The fire insurance contract made losses payable, as their respective interests may appear, to the Insured, Canadian Commercial Bank, Norco and C.I.B.C.

The Court held that under the provisions of the Bank Act,[122] C.I.B.C. had the same rights and powers as if it had acquired a warehouse receipt or bill of lading governing the inventory. Thus, when the inventory was destroyed, C.I.B.C's entitlement to the insurance proceeds stood in place of the inventory as substitute security. That entitlement occurred, by operation of law, immediately upon the destruction of the inventory.

The debenture holders' interest arises by virtue of the assignments of the insurance proceeds contained in the debentures. Such assignments gave the debenture holders no higher right to payment of the insurance proceeds than their right to the property insured. At the date that the inventory was destroyed, the floating charges contained in the debentures had not yet crystallized and the security interest of CIBC had priority.

Accordingly, C.I.B.C. had first claim on the insurance proceeds.

Q. *BANK OF MONTREAL* v. *CANADA PACKERS INC.*[123]

A farmer had granted security on his crops to Bank of Montreal pursuant to Section 88 (now Section 178) of the Bank Act.[124] The farmer delivered corn grown on his farm to an elevator operator for drying and storage. Subsequently, the farmer agreed to sell the corn to the elevator operator at which time he warranted that there were no liens or encumbrances against the corn.

The bank had registered its Section 88 security at the Bank of Canada. The elevator operator had not made a search at the Bank of Canada.

The Court found that registration at the Bank of Canada constituted constructive notice to the elevator operator of the section 88 security notwithstanding that there was no provision in the Bank Act[125] stating that registration constituted notice. The Court relied on judicial authority and on the fact that searches at the Bank of Canada are easily made and persons dealing with farmers know or ought to know of the likelihood of such security. The Court discussed, but did not apply, a line of cases indicating

121. S.C. 1980-81-82-83, c. 40.

122. *Id.*

123. (1986), 55 O.R. (2d) 332 (D.C.).

124. *Supra* n. 121.

125. *Id.*

that a farmer who grants section 88 security may have authority to sell the subject matter thereof in the ordinary course of his business in which case the purchaser obtains good title to the property free and clear of the section 88 security.

The Court found, however, that the elevator operator was entitled to a common law lien for charges for drying the corn and to a statutory lien for storage charges both of which had priority to the bank's security.

R. *ROGER (D.)* v. *BANK OF MONTREAL* [126]

A farmer had granted security to Bank of Montreal under section 178 of the Bank Act[127] covering grain and livestock. The issue in the case which is relevant to this paper is whether the Exemptions Act,[128] a provincial statute, limits the ability of the bank to realize on the section 178 security. The Court noted that in section 178(1)(e) of the Bank Act,[129] which deals with security over livestock, a specific exemption is allowed for livestock which are exempt from seizure by any statutory law. No similar exemption is contained in the provisions dealing with security on grain. The Court also noted that realization on security is necessarily incidental to banking and the taking of security for bank loans, with the result that where the federal statute and the provincial statute conflict, the federal statute will be paramount. Accordingly, the bank was entitled to realize upon all of the grain.

S. *BANK OF MONTREAL* v. *HALL* [130]

In this case, the Saskatchewan Court of Appeal considered the applicability of the Saskatchewan Limitation of Civil Rights Act[131] on the rights of a Canadian chartered bank to realize on security granted pursuant to section 178 of the Bank Act.[132] The Saskatchewan Limitation of Civil Rights Act[133] provides that a secured party may not take any proceedings to take possession of property which is subject to security without giving notice to the party granting the security; that the party granting the security may, following receipt of such notice, require a court hearing to be held before any further proceedings may be taken; and that, if the secured party takes such proceedings without having given such notice or, if the party who granted the security has required a court hearing, without approval of the court, then the debtor is released from all liability and the secured party must pay over to the debtor all sums obtained by the secured party upon realization of any security for the debt.

The majority of the Saskatchewan Court of Appeal held that the constitutional law doctrine of paramountcy was not applicable. The majority view was that the provincial legislation under consideration did

126. (1986), 47 Sask. R. 213 (Q.B.).
127. *Supra* n. 121.
128. R.S.S. 1978, c. E-14.
129. *Supra* n. 121.
130. (1987) 54 Sask. R. 30 (C.A.).
131. *Supra* n. 28.
132. *Supra* n. 121.
133. *Supra* n. 28.

not in any way impair the status of the bank to carry on business and was not aimed at impairment of bank security, although its operation may incidentally, in certain cases, have that effect. Paramountcy applies only where there is actual conflict between federal and provincial legislation. The provincial legislation in the current case merely requires the bank to follow certain procedures before realizing upon its security but does not deny the bank's remedy so long as the bank follows the required procedure.

In a dissenting judgment, Mr. Justice Wakeling found that the provincial legislation interfered with federal legislation since the remedy provided to the bank under the federal legislation would not be available to the bank if the bank did not follow the procedure required by the provincial legislation. In his view, the federal legislation had occupied the field under consideration (namely, bank security and realization thereon), with the result that provincial legislation could not be applicable.

The writers would submit that the dissenting judgment in this case is correct.

X. BROKERS

A. *NOLIN GEO ENTERPRISES LTD.* v. *CHEROKEE RESOURCES LIMITED* [134]

In 1980 and 1981, George Nolin had been a consultant for Czar Resources. In late 1982, Cherokee hired Nolin, as a consultant, to be the drill site geologist on a well owned by Cherokee and several other parties.

In early 1983, Nolin invited the exploration manager of Cherokee to lunch. During the lunch, Nolin mentioned that Czar was looking for natural gas and indicated some features of the Czar contract which could be of advantage to Cherokee if it could obtain a gas contract subject to a small royalty. In response to his question, the exploration manager indicated that some benefit might be obtained by Nolin if such a contract could be obtained. Some weeks later, an officer of Czar contacted the exploration manager to discuss the well. Several months after the lunch, Cherokee contacted Czar in writing and several months after that a gas purchase contract was entered into on a different arrangement than that proposed by Nolin. Nolin claimed to be entitled to a royalty on the production from the well.

The Trial Judge found that the fact that Czar was looking for gas was well known and already in the hands of other officers of Cherokee before Nolin disclosed that fact to the exploration manager. No contract was entered into between Cherokee and Nolin during the lunch, since there was no consensus between them and no intention to enter into a binding contractual relationship. The making of contracts for the sale of production was not within the range of the exploration manager's responsibility. Nolin knew that Cherokee had partners in the well whose approval would have to be required before a contract could be made. It would only make sense that any contract between Nolin and Cherokee would be in writing.

134. Unreported, 21 February 1986, J.D. of Calgary, No. 8401-06439 (Alta. Q.B.).

No effort was ever made by Nolin to reduce his arrangement with Cherokee into writing nor did Nolin contact Cherokee after the lunch. The defendant was not entitled to a royalty.

XI. TAXATION

A. *CANTERRA ENERGY LTD.* v. *HER MAJESTY THE QUEEN* [135]

This case dealt with the interpretation of the term "frontier exploration base", that term being defined as follows:[136]

> (a) the aggregate of all amounts, each of which is an amount in respect of a particular oil or gas well in Canada equal to 66⅔% of the amount by which
>
> (i) expenses incurred after March, 1977 and before April, 1980 . . .
>
> exceeds
>
> (ii) the taxpayer's threshold amount . . . minus the amount that would be determined under subparagraph (i) . . . if the reference therein to "after March, 1977 and before April, 1980" were read as "after June, 1976 and before April, 1977", . . .

The net effect is that expenses incurred between 1977 and 1980 are deductible but only to the extent that they exceed a threshold amount, subject to a proviso that if expenses were incurred in 1976, the threshold amount will be reduced by the 1976 expenses so that the amount of the expenses incurred between 1977 and 1980 that are deductible will be greater if expenses were incurred in 1976 than they would be if no expenses were incurred in 1976.

In the present case, the taxpayer had incurred large expenditures in 1976, such that its 1976 expenditures exceeded its threshold amount. Thus, the subtraction provided for in paragraph (ii) resulted in a negative amount. The taxpayer sought to add the absolute value of that negative amount to its 1977-1980 expenditures in determining the deduction to which it was entitled.

The Minister of National Revenue took the position that the computation provided for in paragraph (ii) could never be less than zero.

The Federal Court Trial Division agreed with the Minister. In this decision, the Federal Court of Appeal overruled the decision of the Trial Division.

The issue turned on the meaning of the word "minus" in paragraph (ii). The ordinary grammatical meaning of that word would result in the Minister's contention being sustained while a technical, mathematical use of the word would result in the taxpayer succeeding. The Federal Court of Appeal ruled that the definition was a formula which was clearly mathematical in nature with the result that the word "minus" must be given a technical, mathematical meaning.

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135. [1985] 1 C.T.C. 329, 85 D.T.C. 5245 (F.C.A.).

136. Income Tax Regulations, C.R.C. 1978, c. 945, as am, s. 1207(2).

B. *ALBERTA (PROVINCIAL TREASURER) AND MINISTER OF NATIONAL REVENUE* v. *CARTER OIL & GAS LIMITED ET AL.*[137]

The Provincial Treasurer of Alberta and the Federal Minister of National Revenue had sued a number of defendants seeking repayment of money paid on account of Alberta royalty tax credits. The defendants contended that until a notice of reassessment had been given, the Crown could not properly sue to recover alleged overpayments so that the statement of claim should be struck out. The Court of Appeal ruled that this issue was a triable one which could not be decided on an interlocutory motion. Accordingly, the defendants' motion was dismissed but without prejudice to their right to raise the issue at trial.

C. *MacMILLAN BLOEDEL LTD.* v. *THE QUEEN IN RIGHT OF BRITISH COLUMBIA* [138]

B.C. Hydro uses water, for which it pays a water rental payment to the province, to generate power which it sells to its customers. In 1981 and 1982, the province substantially increased its water rental charges. B.C. Hydro passed on the increased charges to its customers, including the plaintiff. The plaintiff contended that the increased charges were *ultra vires* and relied on the case of *Canadian Industrial Gas & Oil Ltd.* v. *Government of Saskatchewan et al* (the *CIGOL* case).[139] The British Columbia Supreme Court ruled that the water rental charge was a royalty. If it had been a tax and that tax had been found to be an indirect tax, then it would have been *ultra vires*. The Court distinguished the *CIGOL* case on the basis that, in that case, the Saskatchewan government had purported to levy an impost equal to one hundred percent of the increase in value of petroleum and natural gas. By definition, a royalty is a "share" of something and thus the impost in the *CIGOL* case could not be a royalty.

The increases in the present case were imposed by the government in its capacity as owner of the resource. Every holder of a water license in the province takes that license knowing that the government has the right to vary the rentals and charges therefor. Water licenses are subject to the provisions of the Water Act,[140] including the Crown's right to increase the rent from time to time. Thus the increases were imposed as a term or implied term of the license and not by separate legislation as in the *CIGOL* case. Further, in the *CIGOL* case a royalty was defined to be a percentage of profits. The royalty surcharge under consideration in that case was designed to freeze the revenue flowing to the producer by diverting any future increases in the price of oil to the government. In the present case, the profit flowing to B.C. Hydro was not frozen by the legislation increasing the water rentals. As a regulated utility, B.C. Hydro could apply for increases in its rates. In addition, it was noted that the water rental rates

137. (1986) 72 A.R. 314 (C.A.).

138. (1985) 25 D.L.R. (4th) 337 (B.C.S.C.).

139. (1977) 80 D.L.R. (3d) 449, [1978] 2 S.C.R. 545, [1977] 6 W.W.R. 607, 18 N.R. 107 (S.C.C.).

140. R.S.B.C. 1979, c. 429.

remain below fair market value. In the *CIGOL* case, there was no spread between the market value of oil and gas and the amount of the impost.

The fact that the increases in the water rentals bore no relation to the cost to the province of the water was irrelevant. The Court also stated that there is no reason why royalties charged by a province for the use of its resources should be restricted to small sums nor why the proceeds therefrom cannot be used for general provincial purposes.

XII. SURFACE RIGHTS

A. *SOUTZO* v. *CANTERRA ENERGY LTD. ET AL.*[141]

This is an appeal from three orders of the Alberta Surface Rights Board relating to compensation for farm land near Calgary taken for a right of way for a sour gas pipeline. The land owners contended that the Surface Rights Board erred in discounting the probability that the land would be annexed to the City of Calgary and developed for urban purposes. The Trial Judge ruled that the land owners' evidence related to the situation which existed prior to the economic downturn in Alberta in 1981 when there was a greater likelihood of annexation and urban development. The Board did not err in discounting the likelihood of urban development.

The land owners also contended that the Board did not award adequate compensation for the adverse effect of the pipeline on other lands owned by them. By law, there must be a minimum separation of 500 metres between a sour gas facility and urban development. Thus, the presence of the pipeline would render the land within 500 metres unfit for development. The operator contended that the presence of the sour gas reserves and the sour gas wells which had been previously drilled caused the restrictions and that the taking of land for the pipeline did not increase the restrictions. The Court ruled that there was no additional adverse effect on lands which were within 500 metres of the existing wells, since they were already subject to restrictions. However, even though the likelihood of urban development was small, some award should have been made for the fact that lands within 500 metres of the pipeline could not be developed.

B. *CHAMPLIN CANADA LTD.* v. *CALCO RANCHES LIMITED*[142]

In determining the value of the surface of land taken for a well site, the Alberta Surface Rights Board relied upon information not in evidence before it but of which it was aware from other hearings. The Alberta Court of Queen's Bench ruled that it is contrary to the rules of natural justice for the Board to use information without giving the affected party an opportunity to contradict it.

The Court stated that evidence of freely negotiated agreements involving comparable land is admissible in considering fair compensation. However, it is merely evidence, the weight of which will vary depending upon the number of freely negotiated agreements and the similarities of the situations under which they were made to the situation being considered.

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141. (1986) 42 Alta. L.R. (2d) 340 (Q.B.).

142. (1986) 46 Alta. L.R. (2d) 182, 72 A.R. 154 (Q.B.).

There was evidence of eight freely negotiated surface leases entered into in the previous year, of which six were between Champlin and other land owners, involving land within six miles of the subject lands. The Court stated that some degree of uniformity in setting compensation in different regions is desirable and, further, that the freely negotiated agreements do show a *prima facie* value. Hence, it is much better to follow such evidence, if available, than to attempt to evaluate the numerous factors which are listed in the applicable legislation.

C. *ZAJES* v. *PANCANADIAN PETROLEUM LIMITED* [143]

This was an appeal by the land owner of an order of the Alberta Surface Rights Board. The land owner appeared on his own behalf. Most of his evidence was not considered because it was not properly proven and was nebulous. As a result, the Trial Judge found that there was no evidence that the award of the Surface Rights Board was not cogent and, under a line of quoted authorities, the Board's decision should not normally be varied.

D. *TRANSALTA UTILITIES CORPORATION* v. *GREENFIELD* [144]

Annual compensation for land taken for electrical power towers in Alberta was in issue. A great number of land owners had been collectively organized and jointly represented when the land was first taken for the power line right of way. Five years later, the power company renegotiated annual compensation with the land owners individually. The power company submitted that the new annual awards should be based upon the settlements which it had recently negotiated with other land owners. The Court reviewed the judicial authorities which establish that a pattern of dealings should be followed unless there is good reason for not doing so. In the present case, since the land owners were not organized and jointly represented, the evidence of the awards made at the previous hearing when they were organized and represented is better evidence than the recently individually negotiated leases. Also, it is not clear that a pattern of dealing had been established, since a number of settlements were outstanding, and since some of the settlements were higher than the settlement proposed by the power company in this case. The annual compensation awarded as a consequence of the hearing five years earlier was continued.

E. *PENNZOIL PETROLEUMS LTD.* v. *JORSVICK* [145]

A surface owner may apply to vary the annual compensation payable under an award of the Alberta Surface Rights Board every five years. This case dealt with an appeal from such an order of the Board. The Board had doubled the compensation payable. In its award, the Board took into account those factors usually considered by it, but did not give any reasons justifying its decision to almost double the award. The Court noted that the land remained the same as it was when the initial compensation was awarded, that the use of adjoining land by the land owner was virtually

143. (1986) 72 A.R. 197 (Q.B.).

144. (1986) 49 Alta. L.R. (2d) 48 (Q.B.).

145. (1986) 49 Alta. L.R. (2d) 190 (Q.B.).

unchanged, and that the costs of using the land and the revenues obtained therefrom were also virtually unchanged. Accordingly, the Court set aside the award of the Board and ordered that the compensation should not be varied.

F. *MOBIL-GC CANADA LTD.* v. *MACKEY ET AL.*[146]

This was an appeal of a compensation award made by the Alberta Surface Rights Board. The Court noted judicial authority whereby an award of the Alberta Surface Rights Board should not be varied without cogent reasons, because of the expertise of the Board in making awards. The Trial Judge ruled that it was difficult to give the Board's award much evidentiary weight because it could not tell what factors the Board took into account in awarding a global sum. If there is a pattern of freely negotiated comparable agreements establishing the value of similar land, then it is a basis upon which to make an award. If there is no such pattern, then the Board must consider each of the factors set forth in section 25 of the Surface Rights Act,[147] although the Board need not award compensation for each factor.

The Trial Judge estimated the value of the land taken based upon the experiences of the operator in negotiating leases. He was not prepared to consider residual value of the land (being the value of the land after the purpose for which it has been taken has been completed and the land is returned to the surface owner) for lack of evidence thereof. The Trial Judge also ignored potential subdivision value as being too remote. The Trial Judge varied the award of the Board.

G. *NORTHWESTERN UTILITIES LIMITED* v. *KELLAR* [148]

This case involved a freely negotiated surface lease for an access road and a well site. By legislation, the annual compensation payable under such leases is renewable every five years. This case dealt with an appeal of a compensation award made by the Alberta Surface Rights Board upon a review of the compensation payable under such a lease in the fifth year thereof. Different experts testified before the Court than before the Board. Since the evidence was different, the Trial Judge ruled that the Board's decision was of limited evidentiary weight. There had been very little change in circumstances since the lease was first negotiated and, thus, the Trial Judge ruled that the compensation payable under the lease should not be varied.

H. *PALOMA PETROLEUM LTD.* v. *HUTTERIAN BRETHREN CHURCH OF SMOKEY LAKE* [149]

A Trial Judge may confirm a decision of the Alberta Surface Rights Board even if the Board has not provided reasons for its decision, if the judge is satisfied, based on the evidence before him, that the award is correct.

146. Unreported, 31 March 1987, J.D. of Grande Prairie, No. 8404-008959 (Alta. Q.B.).

147. S.A. 1983, c. S-27.1, s. 25.

148. (1986) 47 Alta. L.R. (2d) 129 (Q.B.).

149. Unreported, 14 January 1987, Court of Appeal of Alberta, Edmonton Sittings, No. 19276.

I. *GROENEVELD* v. *TRANSALTA UTILITIES CORPORATION* [150]

This was an appeal of a compensation award made by the Alberta Surface Rights Board. The Trial Judge rejected the operator's contention that an appraiser's evidence is irrelevant to the determination of compensation. He also ruled that the Board need not necessarily base its award on compensation paid in settlements involving neighbouring land owners.

J. *HUHN ET AL.* v. *DOME PETROLEUM LIMITED* [151]

Section 26(3) of the Alberta Surface Rights Act[152] specifies that notice of an appeal of an order of the Surface Rights Board must be served on all parties to the order. The owner of the land and a rural electrification association who had filed a lien against the land had not filed any objection with the Board in connection with the original order and had not appeared before the Board. Huhn, who had an arrangement for the grazing of his cattle on the land, had filed an objection and appeared before the Board. Huhn appealed the Board order but did not serve notice of the appeal on the owner or the rural electrification association. The Court of Appeal ruled that a party who is not affected by an order and who has made it clear that it is not interested in the proceedings is not a party to the proceedings, with the result that proper notice had been served.

K. *WAINOCO OIL & GAS LTD.* v. *SOLICK* [153]

Section 26 of the Alberta Surface Rights Act[154] provides that the legal cost incurred by a land owner on an appeal of an award of the Surface Rights Board shall be paid by the operator. In this case, it was decided that the operator had the right to tax the account of the land owner's solicitor. The account of the solicitor was substantially reduced.

L. *BADZIOCH* v. *ALBERTA ENERGY CO. LTD.* [155]

The Alberta Court of Appeal granted leave to appeal on the issue that 1983 amendments to the Surface Rights Act[156] have obviated the finding made in the case of *NOVA* v. *Will Farms Ltd.*,[157] which deals with the value to be attributed to the reversionary interest of the surface owner arising after the use to which the taking of the land relates has been completed.

M. *DIDOW ET AL.* v. *ALBERTA POWER LIMITED* [158]

A power line was located on a municipal road allowance. Cross-arms on the power poles protruded approximately six feet into the air space above

150. Unreported, 9 January 1987, J.D. of Calgary, No. 8501-14063 (Alta. Q.B.).
151. (1986) 72 A.R. 101 (C.A.).
152. *Supra* n. 147.
153. (1987) 49 Alta. L.R. 390 (Q.B.).
154. *Supra* n. 147.
155. Unreported, 24 October 1986, Court of Appeal of Alberta, Edmonton Sittings, No. 8603-0316.
156. *Supra* n. 147.
157. [1981] 5 W.W.R. 617 (Alta. C.A.).
158. (1986) 45 Alta. L.R. (2d) 116, 70 A.R. 199 (Q.B.).

the plaintiff's lands. The plaintiff sought damages for trespass. The action was dismissed. Trespass relates to interference with possession as opposed to ownership. The surface owner was not possessing the air space involved. Damages suffered by the owner, had there been any, would have been recoverable by an action in nuisance.

N. *NORTHWEST TRUST COMPANY* v. *LIBERTY INVESTMENTS ET AL.*[159]

The issue in this case was the priority among various purchasers to compensation awarded by the Alberta Surface Rights Board in connection with a right of entry order. The lands were subject to four agreements of purchase and sale. The Board ruled that the purchaser under the fourth agreement was the beneficial owner of the lands and, therefore, entitled to the compensation award. After the Board rendered its decision, the fourth purchaser defaulted and the third purchaser obtained a court order under which it reacquired the interest of the fourth purchaser in the lands and it obtained a deficiency judgment.

The Trial Judge ruled that the compensation award was not "rents, profits or benefits" from the lands, so that the fourth purchaser was not entitled to the award under the provision in its sale agreement whereby it was entitled to rents, profits and benefits. He also ruled that he could take into account events which had occurred since the Board's compensation award was made and that the unpaid vendors had compensible interests in the lands.

He found that the taking of land pursuant to a right of entry order is analogous to an expropriation and that expropriation principles ought to be applied to resolve the issue of entitlement to the award. By application of those principles, the vendor under a sale agreement does not have a beneficial interest in the lands, but has a claim against the expropriation award for the amounts owing to him. Accordingly, the award should be paid to the fourth purchaser but subject to the claim of his vendor whose rights are subject to the claim of his vendor, and so on. The result was that the compensation award was paid to the vendor under the first purchase agreement with any excess being paid to the vendor under the second purchase agreement and likewise until the whole amount had been paid. The amounts outstanding under each sale agreement and under the deficiency judgment were reduced by corresponding amounts.

O. *SHELF HOLDINGS LTD.* v. *HUSKY OIL OPERATIONS LTD. ET AL.*[160]

This case considered whether a pipeline right-of-way constitutes an easement, in connection with a determination of whether a surface owner's title was subject to Husky's unregistered right to construct a pipeline.

In 1967, Peregrym entered into an agreement to purchase certain unpatented land from the Crown in Right of Alberta. In 1974, Peregrym granted Husky the right to construct a pipeline across the land. Husky

159. (1986) 75 A.R. 109, 49 Alta. L.R. (2d) 309.

160. Unreported, 23 April 1987, J.D. of Edmonton, No. 8103-35024 (Q.B.).

registered the grant in the Day Book of the North Alberta Land Registration District Land Titles Office. In 1977, the Crown caused the land to be patented as a result of which a certificate of title was issued subject to a caveat in favour of Canadian Hydrogas, which was unrelated to Husky's pipeline, but not subject to Husky's right. Shortly thereafter, the land was transferred to Peregrym and a new title issued. In 1979, Peregrym agreed to sell the land to Fernwood. Fernwood assigned its rights to purchase to Shelf. The principal of Shelf (who was also a principal of Fernwood) was aware of Husky's right, although it was not noted on Peregrym's certificate of title. The sale was completed and a new title was issued to Shelf with no mention of Husky's right. In 1981, the Registrar made a correction to Shelf's certificate of title to make it subject to Husky's right. Shelf sought a declaration that its interest was not subject to Husky's right and that the Registrar had exceeded its authority in making the 1981 correction.

The priorities of interests in Alberta land which have been patented are governed by the Land Titles Act.[161] Under section 64 thereof, the person in whose name a certificate of title has been granted holds the land "absolutely free from all other encumbrances, liens, estates or interests" except in cases of fraud, except interests noted on the certificate of title and except as otherwise provided in that statute. Under section 65(1)(g) of that statute, a certificate of title is subject to:

> (g) a right-of-way or other easement granted or acquired under any Act or law in force in Alberta.

Section 72 provides that an instrument granting "a right on, over or under the land for . . . laying . . . pipelines" may be registered "notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the grantee".

Husky contended that the pipeline right fell within the exception provided for in section 65(1)(g). The Trial Judge rejected that argument because the pipeline right-of-way was not an easement or a right-of-way.

In the decision, an easement was defined as an interest in the land of another person as opposed to a right of possession of land itself. A right-of-way was defined as being a positive easement. The Court referred to numerous decisions dealing with the nature of rights to construct underground railway tunnels and water pipes. Although these cases were not consistent, the Trial Judge ruled that, since Husky's pipeline rights gave it virtually exclusive possession of the portion of the subsurface in which the pipeline was laid and excluded the owner of the lands therefrom, it was not an easement but was a possessory right.

The Judge stated that the Torrens System should increase certainty of title. Thus, the Land Titles Act[162] should be construed in a fashion consistent with the concept of indefeasibility of title.

It would seem that the Trial Judge would have been prepared to rule that the pipeline right was not an easement because there was no dominant tenement, which he found was one of the essential elements of an easement.

161. *Supra* n. 49.

162. *Id.*

It was also held that there had been no fraud on the part of Shelf, notwithstanding its prior knowledge of the pipeline right. The case of *Suncor Inc.* v. *Allarco* [163] was distinguished because, in that case, the person who bought land with knowledge of an unregistered interest which it later sought to deny had agreed in the purchase agreement to assume liability for the unregistered interest. Shelf had not agreed to assume or represented that it would assume liability for Husky's pipeline rights.

The Trial Judge also found that the Registrar had exceeded its jurisdiction in correcting Shelf's certificate of title. Under section 177(4) of the Land Titles Act,[164] the Registrar can only make corrections if the corrections do not prejudice rights conferred for value. Since the correction prejudiced Shelf's rights, which were conferred for value, the Registrar lacked authority.

XIII. ADMINISTRATIVE LAW

A. *REFERENCE RE NATIONAL ENERGY BOARD ACT* [165]

This was a reference brought by the National Energy Board ("NEB") to determine whether it has jurisdiction to award costs. The Federal Court of Appeal held that although the Board has all the powers, rights and privileges vested in a superior court of record to fulfill certain specified functions and other matters necessary or proper for the due exercise of its jurisdiction, the power to order costs is not *ejusdem generis* with such powers. In finding that the Board had no jurisdiction to award costs, the Court further noted that the power to award costs is not necessary or proper for the due exercise of the Board's jurisdiction and the kind of costs which arise in proceedings before the Board are not the kind customarily awarded by a superior court of record.

B. *TRANSCANADA PIPELINES LIMITED* v. *NATIONAL ENERGY BOARD* [166]

This case was an appeal by TransCanada PipeLines Limited ("TCPL") from the NEB's decision RH-5-85 and related order TG-1-86. TCPL argued that the operating demand volume methodology established in that decision changed its contracts with its distributors and, accordingly, exceeded the jurisdiction of the Board. The Federal Court of Appeal dismissed the appeal, confirming that the determination of volumes to which a monetary charge applies is a matter relating to tolls and tariffs and the NEB obligation to set just and reasonable tolls extends to that determination as well.

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163. (1984) 52 A.R. 32 (Q.B.).
164. *Supra* n. 49.
165. (1986) 29 D.L.R. (4th) 35.
166. [1987] 2 W.W.R. 253 (Fed. C.A.).

C. *RE ONTARIO ENERGY BOARD AND THE QUEEN IN RIGHT OF ONTARIO ET AL.*[167]

This was a stated case to the Divisional Court asking it to confirm the jurisdiction of the Ontario Energy Board ("OEB") over a gas storage facility that had been proposed by The Consumers' Gas Company Ltd. ("Consumers"). The Court found that the proposed facility was *prima facie* a local work or undertaking as the work was entirely within the province. Since its degree of operational integration with the federally regulated transmission system would be insufficient to make it an integral part thereof, the Court concluded that the facility would be within the exclusive legislative jurisdiction of the province.

XIV. REGULATORY BOARD DECISIONS

A. NATIONAL ENERGY BOARD

1. GH-2-85: Phase 1 — The Surplus Determination Procedures Phase of the Gas Export Omnibus Hearing, 1985[168]

The purpose of this hearing was to review the procedures used by the NEB to determine natural gas surplus, which is the amount available for export.

Since 1982, the surplus determination procedures consisted of a $25A_1$ Reserves Formula which compared remaining established reserves with 25 times the current year's Canadian demand, plus the maximum quantities exportable under current licenses, together with a Deliverability Appraisal which compared the Board's best estimates of future natural gas supply and demand on a year-to-year basis.

The Board determined that its existing procedures were inappropriate for a market-sensitive pricing environment in which the large inventories of natural gas associated with the $25A_1$ Reserves Formula were not required. The Board's new surplus determination procedure --- the Reserves to Production (R/P) Ratio Procedure --- incorporates estimates of annual additions to reserves and forecasts of both Canadian demand and authorized export. It also involves an assessment of future annual productive capacity which takes the place of the previous Deliverability Appraisal. The Board decided that a ratio of 15 between reserves and production would ensure sufficient spare productive capacity to meet Canadian requirements not only during any period of export but also for a number of years thereafter.

As part of its new surplus determination procedure, the Board plans to conduct reviews at appropriate intervals in order to update its projection of Canadian demand, forecast exports, reserves, additions and productive capacity.

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167. (1986) 57 O.L.R. (2d) 281, 32 D.L.R. (4th) 706.

168. 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.

In recognition of the potential impacts if a somewhat different R/P ratio were to be chosen, the Board stated that it would seek input when considering future natural gas export applications on the continuing appropriateness of an R/P ratio of 15.

The Board also reviewed whether surplus should be determined nationally or by region, the treatment to be accorded to frontier reserves, imports, border markets and synthetic natural gas and decided that no changes to existing procedures were necessary.

2. RH-5-85: TransCanada PipeLines Limited Availability of Services[169]

Paragraph 7 of The Agreement on Natural Gas Markets and Prices dated October 31, 1985 (the "Agreement")[170] requested the NEB to review whether an inappropriate duplication of demand charges would result from the possible displacement of one volume of gas by another and whether the policy regarding the availability of transportation service ("T-Service") was still appropriate.

The NEB decided that the duplication of demand charges resulting from displaced volumes is inappropriate and, effective November 1, 1986, implemented a new system of toll design and allocation for TCPL based on the establishment of an operational demand volume for the purpose of determining demand tolls. The operating demand level for each distributor is calculated as the CD volume specified in its CD contract with TCPL, less the volume of all direct displacement sales occurring in its franchise area. The Board's definition of displacement volumes only includes firm service direct sales volumes. The operating demand volume is now used instead of the contracted demand volume in determining the daily demand under the CD toll schedules.

With respect to the availability of T-Service, the NEB decided that the displacement proviso that was included in TCPL's T-Service, Short-Term T-Service, Interruptible Transportation and T-AOI toll schedules, should be removed in order that transportation service could be made available to direct purchasers of natural gas displacing gas supplies previously acquired from TCPL.

A central issue at the hearing was whether non-system gas sales should be required to share the carrying charges on the advances made by TOPGAS to TCPL's producers for prepaid gas. It was the Board's view that there is a shared responsibility for the oversupply situation and the ensuing take-or-pay problem and, accordingly, it would be fair and equitable to require non-system gas sales to bear a portion of the TOPGAS carrying charges. For the year November 1, 1986 to October 31, 1987, the NEB recommended a contribution of 10¢ per gigajoule of gas sold, 9¢ for the year 1987

169. National Energy Board, "Reasons for Decision, In the Matter of TransCanada Pipelines Limited, Availability of Services" May 1986, published by Minister of Supply and Services Canada, 1986, as Cat. No. NE22-1/1986-7E.

170. "Agreement Among the Governments of Canada, Alberta, British Columbia and Saskatchewan on Natural Gas Markets and Prices" 31 October 1985, reproduced in Canada Energy Law Service, Hunt *et al* Editors, Canadian Institute of Resources Law, Richard De Boo Publishers, Volume II at 30-1806 *et. seq.*

to 1988 and 8¢ for the year 1988 to 1989. These charges represent approximately 50% of the TOPGAS per unit carrying charges which might have occurred had there been no displacement.

This decision was unsuccessfully appealed by TCPL.[171]

3. GH-3-86: Cyanamid Canada Pipeline Inc. Application for Orders to Construct Natural Gas PipeLine Facilities[172]

Cyanamid Canada Pipeline Inc. applied to the NEB for orders which would have the effect of authorizing the construction and operation of certain natural gas pipeline facilities that would bypass the facilities of Consumers' currently serving the Welland Plant of Cyanamid Canada Inc. The application also requested an order directing TCPL to construct interconnecting facilities.

The NEB considered first whether it had jurisdiction over the project and second whether the project was in the public interest. On the question of jurisdiction, the Board found that the proposed facilities were within the legislative authority of Parliament pursuant to subsection 91(29) and paragraph 92(10)(a) of the Constitution Act, 1867.[173] Further, the Board found that the balance of public interest lay in the applicant's favour. While it was recognized that the bypass could result in something less than an optimum use of resources, the Board stated that this was outweighed by the need to allow market signals to flow through to the OEB as well as the utilities.

Appeals were launched and withdrawn, but the NEB has decided to refer its own decision to the Federal Court of Appeal.

B. ALBERTA PUBLIC UTILITIES BOARD

1. Report and Order No. E86110: Natural Gas Transportation Rates Inquiry[174]

The Board ordered the Alberta utilities to provide producers, industrial end-users and brokers non-discriminatory access to T-service on a short-term basis in addition to the long-term service that was available. The utilities were also ordered to offer buy/sell arrangements and peaking and overrun service. Canadian Western Natural Gas Company Limited and Northwestern Utilities Limited were required to provide the Board with a review of their storage capacity and, if capacity is available, they are to provide storage service to their T-service customers at rates approved by the Board. Transportation customers are to be allowed to return as sales customers provided reasonable and sufficient notice is given and the utilities have enough gas available.

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171. *Supra* n. 166.
172. 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.
173. The Constitution Act, 1867, enacted by The Constitution Act, 1982, Schedule B to The Canada Act 1982, (U.K.) 1982, c. 11.
174. Public Utilities Board of Alberta, "Report No. E86110: Natural Gas Transportation Rates Inquiry" 30 December 1986.

C. ALBERTA ENERGY RESOURCES CONSERVATION BOARD

1. Report 87-A: Surplus Hearing[175]

In its surplus decision, the Energy Resources Conservation Board ("ERCB") replaced the 25-A_1 test with the 15-C_1 "available for inclusion in permits" test. The deliverability test was discontinued.

The ERCB indicated that the new 15-C_1 test will not be applied in a rigid manner, but will be used as a guide in dealing with removal applications. In applying the "available for inclusion in permits" test, the Board will approximate the core market requirements and the volume of gas contracted for non-core markets. The ERCB decided that in April of each year it will issue a report summarizing the then-current situation respecting gas available for inclusion in permits during the year following. In calculating total available reserves as part of the new test, the ERCB will consider one-half of the Reserves Beyond Economic Reach and one-half of the Deferred Reserves. This is a change in the ERCB's policy which previously excluded all such volumes.

The new ERCB procedure appears to be designed to annually reflect changes in rate of reserve additions as a result of fluctuations in drilling activity. As a result, the ERCB will be required to exercise more judgment instead of using formulae when issuing its annual report in which it establishes the volumes of gas available for permits.

D. ONTARIO ENERGY BOARD

1. E.B.R.O. 410, 411 and 412: Interim Contract Carriage Arrangements[176]

This decision set out the general terms and conditions governing the provision of interim transportation service by Ontario's three gas utilities. The decision adopted a formula suggested by the Ontario Minister of Energy for a T-Service rate based on the utility's current selling price less avoided cost plus added cost. For the interim period, the avoided costs were defined as the utility's cost of gas under its CD contracts with TCPL. Both the demand and commodity components of that cost were included. As the double demand charge issue had yet to be resolved by the NEB, the OEB decided that direct purchasers would also have to pay TCPL's demand charge as an added cost. In general, no other added or avoided costs were allowed. For the interim period, T-rates were to remain bundled. The existing rate structures of the utilities were to be applied to the T-Service customers. The OEB decided that both T-Service and buy/sell arrangements would have to be approved by the Board.

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175. Energy Resources Conservation Board, "Report 87-A: Gas Supply Protection for Alberta: Policies and Procedures" March 1987.

176. Ontario Energy Board, "Reasons for Decision, In the Matter of a Hearing Respecting Interim Contract Carriage Arrangements on The Consumers' Gas Company Ltd.'s, Northern and Central Gas Corporation Limited's and Union Gas Limited's Ontario Distribution Systems: E.B.R.O. 410, 411 and 412" 4 April 1986.

2. E.B.R.O. 414-1, 429 and 430: Passthrough Applications of The Consumers' Gas Company Ltd., Union Gas Limited and ICG Utilities (Ontario) Ltd.[177]

The three Ontario utilities each applied for approval of a "passthrough" to their customers of lower gas costs resulting from their pricing agreements with TCPL. Under those agreements, core customers were to receive discounts of 20¢ per gigajoule, while larger industrial users could receive discounts of $1.00 or more per gigajoule. In separate Partial Reasons for Decision, the Board ruled that the discounts could lead to undue discrimination and effectively require it to abandon part of its jurisdiction by transferring responsibility to fix rates for large volume customers directly to the utilities. Instead of approving the arrangements for the two year term of the agreements, the Board approved the passthrough on an interim basis for six months only. In granting the interim approval, the Board concluded that it would be in the interest of all concerned if there was time for the utilities to further renegotiate their contracts with TCPL. The Board said that the renegotiated arrangements would be evaluated using various criteria, including a prohibition on the streaming of gas coming into the Province, which has been fundamental to the marketing of system gas. Within weeks of its decision, the Board extended the review period to a full year in return for the commitment by TCPL and the utilities to work together to address the concerns of the OEB.

3. E.B.R.O. 410-I, 411-I and 412-I: Contract Carriage Arrangements

(a) Bypass[178]

The OEB separated the issue of bypass from the other contract carriage issues because of its potential impact and jurisdictional concerns.

The Board decided that a bypass pipeline would be a local work and undertaking and, accordingly, the Province of Ontario and the Board as its delegate has jurisdiction over bypass within Ontario. The Board stated that this jurisdiction is imperative for the Board to carry out its statutory duties and responsibilities to regulate the transmission and distribution of natural

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177. Ontario Energy Board, "Partial Reasons for Decision, 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. 414-1" 28 November 1986, and *see also* "Amendment to Partial Reasons for Decision E.B.R.O. 414-1 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 Dated November 1987; "Partial Reasons for Decision Respecting an Application by ICG Utilities (Ontario) Ltd. for an Order or Orders To Reflect Reductions in 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. 430-1" 28 November 1986, and *see also* "Amendment to Partial Reasons for Decision E.B.R.O. 430-1 Dated November 28, 1986" 11 December 1986, and "Interim Decision: E.B.R.O. 430-2" 14 May 1987.

178. 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.

gas in Ontario and to approve and fix just and reasonable rates in connection therewith.

The Board was of the view that it was in the best position to properly balance the competing interests in regard to bypass. The Board decided that it would consider each application for bypass on the basis of its individual merits and stated that it would consider cost/economic factors related to the utility, the applicant and the utility's other customers, rate making alternatives to bypass, safety and environmental factors, public policy, the type of bypass, the duration of the bypass, and any other relevant factors. Part of the Board's decision was that it was important to remove any uncertainty with respect to its jurisdiction over bypass and, therefore, it was decided to state a case to the Divisional Court of the Supreme Court of Ontario. This case was heard March 16 and 17 and confirmed the jurisdiction of the OEB.[179]

The question of jurisdiction over bypass has since been referred to the Court of Appeal of Ontario, which has scheduled a hearing for October 5, 1987.[180]

(b) Other Issues[181]

The OEB's decision on the other issues of contract carriage endorsed the concept of a competitive gas supply market in Ontario and laid out the general rules to govern that market.

As a result of the decision, core market customers are free to purchase gas directly if they choose to accept the risks. If this does not result in sufficiently competitive prices in the core market, the Board is to consider a public tender system.

Subject to complying with legal requirements, brokers have full access to the market and to utility services. The legal requirements for supplying gas in Ontario are a Section 19(8) Order and certificate of public convenience and necessity granted by the OEB, as well as compliance with municipal by-laws approved by the OEB. Although the Board has strictly enforced these requirements against brokers, for some unexplained reason, TCPL is being allowed to supply gas without any provincial approvals.

The utilities were ordered to unbundle rates to the maximum extent possible, including transportation, storage, load balancing and best efforts backstopping services. Postage stamp rates were found to be appropriate, but the utilities are to build in some flexibility through the use of distance factors and rate design and the application of value of service criteria.

Groups may form for the purposes of improving gas purchasing power and contracts may provide for multiple service locations.

Any unabsorbed demand charges resulting from a current gas sales customer switching to T-Service were ordered to be entered in deferral

179. *Ontario Energy Board* v. *The Consumers' Gas Company*, unreported, 26 March 1987, Toronto Divisional Court, Action No. 1243/86 (Ont. S.C.).

180. Ontario Order in Council O.C. 1079/87 dated 30 April 1987.

181. Ontario Energy Board, "Reasons for Decision, In the Matter of the Ontario Energy Board Act Subsection 13(5) and Section 19, And In the Matter of a Hearing to Determine Certain Matters Relating to Contract Carriage Arrangements on The Consumers' Gas Company Ltd:s, ICG Utilities (Ontario) Ltd:s and Union Gas Limited's Ontario Distribution Systems: E.B.R.O. 410-II, 411-II and 412-II" 23 March 1987.

accounts until a decision is made as to how they should be recovered. The Board ordered that the Petrosar SNG premium costs should be recovered from all customers of Union Gas Limited ("Union"). TCPL, Consumers' and Gaz Métropolitain, inc. ("GMi") each applied for a review of this aspect of the decision. By an Order dated May 27, 1987, the issue was deferred to Union's Phase II rate hearing.

The Board decided that there should be a T-Service contract, although most of its terms and conditions should be capable of publication in the rate schedule. The Board outlined most of its basic features though the details will not be settled until the utilities' Phase II rate hearings.

While non-core direct purchasers are responsible for their own gas supplies, with respect to core market sales, the Board may require backstopping and an independent professional evaluation of the ability of the seller to meet its contractual commitments.

Unused storage is to be available on a first-come, first-served basis, with sales customers who change to T-Service allowed to retain their existing storage entitlement.

The Board decided that the separation of marketing and transportation is necessary and that a separation of costs by division should be accompanied by the Phase II hearings.

Prior approval is required for affiliate transactions over a threshold amount. At the Phase II hearings, the utilities are to propose procedures to ensure that all shippers will have equal access to pipeline and storage capacity.

The Board decided that it could compel both the provision of services and the entering into a contract for such services by a utility. Further, it can intervene and remedy any situation where the utility attempts to abuse its position of dominance.

With respect to legislative changes, the Board concluded that the Section 19(8) Order requirement for brokers should be removed by an exemption regulation. The Board recommended that the legislation be amended to better reflect the competitive gas supply market, to allow an end-user to divert gas to another end-user without the same approvals required of brokers, and to affirm its jurisdiction to compel service by a utility and approve contract terms.

4. E.B.C. 177, 178, 179 and 180: Applications by Northridge Petroleum Marketing, Inc., ATCOR Ltd., Brenda Marketing Inc. and ConsoliGas Management Ltd. for Certificates of Public Convenience and Necessity[182]

Although the OEB in the contract carriage decision approved in principle access to the market for brokers, it outlined various legal impediments, including the requirement for any seller of gas to hold a certificate of public convenience and necessity. Accordingly, four gas

182. Ontario Energy Board, "Interim Decision With Reasons: In the Matter of an Application by Northridge Petroleum Marketing, Inc.... Pursuant to Section 8 of the Municipal Franchises Act For a Certificate of Public Convenience and Necessity... And Pursuant to Section 16 of the Ontario Energy Board Act For There To Be Included as a Term of the Said Certificate a Declaration that the Applicant Is Not Required To Obtain Franchises for the Supply of Gas in the Said Municipalities: E.B.C. 177, 178, 179 and 180" 8 April 1987.

marketers applied to the Board for such certificates. An interim decision was issued which stated that more information was needed from interested parties on what criteria the Board should apply to applicants. In particular, the Board was concerned with what financial tests should be met and what, if any, restrictions there should be on a marketer's access to the market. A procedural order soliciting this information was issued on June 8, 1987. It has been suggested though that the Ontario government has agreed to slow down the entry of brokers as a concession in their negotiations with the Alberta government on core market direct sales.

E. MANITOBA PUBLIC UTILITIES BOARD

1. Hearing to Inquire into Impact on Natural Gas Distribution in Manitoba as a Result of Agreement on Natural Gas Markets and Prices[183]

The Board made an interim decision that the full benefits of the competitive prices that had resulted from the Agreement could be realized by means of buy/sell arrangements alone. Accordingly, the utilities were not required to provide T-service. Brokers were required to limit their role to arranging for gas sales between producers and end-users with the title to the gas being transferred to the utility at the TCPL interconnect. Bypass was found to be inefficient and contrary to the public interest. The unbundling of rates was unnecessary as the buy/sell is the only means of direct purchase. Postage stamp rates were found to be appropriate. Diversion is permitted because of its potential benefit to gas customers. End-users who enter into buy/sell arrangements are responsible for security of the supply.

Although the utilities were ordered in this decision to provide load balancing to buy/sell customers, evidence given at a recent hearing to establish buy/sell criteria indicates that they are unable to do so. This may require a re-evaluation of the adequacy of the buy/sell arrangement in Manitoba.

Backstopping is to be available on a "best efforts" basis. The Board stated that the present arrangement for the marketing and distribution of gas by the utilities is satisfactory. With respect to gas purchasing from affiliates, the Board stated that while a technical conflict of interest exists, because there are no direct purchases, the present gas arrangements are satisfactory. As a statement of principle, the Board decided that the impact of deregulation on the cost of gas should be fair and equitable to all customers of the utilities.

183. Manitoba Public Utilities Board, "Order No. 158/86: Public Hearing To Inquire Into Certain Matters Relating to the Impact on Natural Gas Distribution in Manitoba as a Result of Various Changes Proposed By The Agreement on Natural Gas Markets and Prices Dated October 31, 1985" 18 December 1986.

2. Hearing into the Matter of Natural Gas Rates Charged to the Manitoba Distribution Utilities Pursuant to the Deregulation of Natural Gas Prices in Canada[184]

This hearing had two separate though related aspects. In part, the purpose was to consider the applications of Greater Winnipeg Gas Company and ICG Utilities (Manitoba) Ltd. to passthrough to their customers on a discriminatory basis their reduced cost of gas resulting from their pricing agreements with TCPL. The hearing was also in response to a Ministerial request that the Board inquire into whether the utilities' cost of gas exceeded the competitive market price and whether the regulatory, contractual, administrative and institutional arrangements concerning the supply of gas ensured that in the future, gas would be provided to Manitoba consumers at competitive prices.

The Board had the same concern as the OEB that the streaming of gas coming into the Province could result in rates that were unduly discriminatory. A new issue that was raised but not resolved was whether the utilities' CD contracts with TCPL would have terminated for lack of a price had the utilities not agreed to the gas pricing agreements. The position of the utilities was that they had no choice but to sign the gas pricing agreements. The Board noted that this was not the kind of voluntary negotiation that was contemplated by the Agreement and for various reasons decided to allow the passthrough for one year only instead of the two year term of the gas pricing agreements. It stated that at the end of the year the utilities should have made the necessary arrangements to purchase their gas supplies by a system of public tender. It was the decision of the Board that the prices being charged to the utilities by TCPL were not competitive.

This decision has been appealed by the Society of Seniors and the Consumers' Association. However, that appeal, together with the decision, may be rendered academic by the Manitoba Government which, in a news release dated June 9, 1987, announced its intention to replace TCPL as the system supplier of gas to the province. This announcement was followed by the introduction of The Natural Gas Supply Act, Bill 68, which establishes The Manitoba Consumers Gas Corporation and lays the groundwork for replacing TCPL.

F. QUEBEC RÉGIE DE L'ÉLECTRICITÉ ET DU GAZ

1. Order G-441[185]

The Régie dealt with certain deregulation issues in the context of the rate case of GMi. The portion of the Order that dealt with deregulation was interim only.

For the first time, the Régie applied conditions to the use by GMi of marketing and incentive programs. The Régie required GMi to show that

184. 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 or Orders Approving a Change in Rates and Other Matters" 13 May 1987.

185. Régie De L'Électricité Et Du Gas, "Ordonnance Partielle et Provisoire G-441: Dossier 3081-85: Gas Métropolitain, inc." 24 March 1986.

the programs would have at least a minimum return, and GMi was required to assume the risk of the non-realization of the volume of sales projected to result from such programs. The Régie determined that the risk associated with these programs should be borne by the shareholders and not by the customers so that investment in the program was excluded from rate base.

The Régie decided that as a result of the October 31, 1985 Agreement,[186] it was in the public interest that customers have the opportunity to make direct purchases and have available to them both T-Service and buy/sells. The Régie ordered that a contract be entered into between GMi and any customer requesting carriage of gas on the utility's system. However, the consumer must agree not to file any lawsuit against the utility and indemnify it against any lawsuits of third parties with respect to the transportation of the customer's gas. The carriage rate for firm gas is determined by a formula which essentially brings to the utility a gross margin, based on the median of the range similar to that earned on normal rates. However, for interruptible gas, the Régie determined that the price paid under the carriage contract must include the fixed cost of the TCPL transmission, even though this cost is already paid by the customer who brings the gas at his expense to the GMi city gate. The Régie was of the view that this measure was necessary to correct what it perceived to be the unfair competitive advantage of the unregulated producer over the regulated utility. The Régie stated that carriage rates were to reflect the cost of service as much as possible in the same manner as other existing rates. While the Régie set out in detail the provisions of a buy/sell arrangement, the fact that the Régie could not foresee the effects of the introduction of a T-Service rate meant that the parties to such contracts would have to consider the contracts provisional and subject to modification by the Régie. Every contract for direct sale must be filed with the Régie prior to its implementation. The contracting party must be the end user. While the Régie believed in principle that there should be no limitation on access to direct sales, it did limit the access to direct sales or buy/sell arrangements to those customers consuming 32 10^3m^3/day. The Régie stated that there would be no priority of service granted to firm gas purchased from the utility over the gas delivered on a direct sale basis.

With respect to double demand charges, the Régie decided that in all cases the consumer is responsible for the double demand charge which might be collected from the utility by TCPL. The Régie did request that the utility place in a separate account all the double demand charges that they may collect from customers in the event that the NEB decided that these amounts should be credited to the utilities and thus later credited to customers.

At the Board's request, GMi had submitted a proposal describing the method to pass on reductions in cost of gas as they may occur from time to time, based on the negotiations between GMi and the producers. GMi proposed that they be entitled to give incentives to targeted customers or groups of customers by way of CMP's. The Régie turned down GMi's application in this respect, indicating that reductions in the cost of gas should be passed on equally to all customers.

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186. *Supra* n. 170.

2. Order G-442[187]

Based on the reasoning set out in Order G-441, the Régie in this Order granted consumers of gas the right to purchase gas either directly, using buy/sell or T-service, or to continue purchasing gas as regular sales customers of GMi.

3. Order G-450[188]

This Order was the final disposition of the matters dealt with on an interim basis in Order G-441.

The Régie maintained the principle of the territorial exclusivity of the GMi's pipeline system because it believes that such regulated monopolies can be advantageous to society. The Régie was of the view that this monopoly has to be regulated for subscribers with low volume needs, in order to assure them a supply of gas which would not be available to them without cross-subsidization; for small and middle size enterprises, to limit the power of the monopoly of GMi; and for large enterprises, to ensure their access to the free market of the commodity transported by GMi.

Notwithstanding the need to maintain GMi as a regulated monopoly, the Régie endorsed the October 31, 1985 Agreement,[189] and the importance of direct sales to a competitive gas supply market.

The Régie observed that the maintenance of GMi's monopoly would reduce the number of buyers vis-à-vis sellers, that transportation and distribution services must be accessible to all buyers who want to participate in the natural gas market, and that the price of gas depends on the volume which distributors will accept to deliver on behalf of consumers willing to buy it. Based on these observations, the Régie concluded that it is not in the public interest for GMi to have a monopoly over gas sales.

It was recognized that the regulation of transportation is essential to ensure its availability and that such regulation must not be an obstacle to free negotiation between sellers and buyers of natural gas. The Régie decided that it is in the public interest that GMi conclude T-service contracts in order to contribute to the volume of gas transacted on the open market.

The Régie noted that the principal effect of the deregulation of the price of natural gas has been to distinguish between the marketing of such gas and its transportation. However, the Régie stated that GMi must maintain the marketing function for the benefit of subscribers with low or average volume needs who cannot acquire their gas from a producer or broker in the new developing market. This means that GMi must protect the interests of its subscribers by making every effort to buy gas under the best conditions, notably price. The Régie decided that the separation of the price of gas from transportation and distribution is essential to this and will be reflected in a new format of the tariff regulation. The Régie also intends

187. Régie De L'Électricité Et Du Gas, "Ordonnance G-442: Dossier 3083-85: Noranda Inc. et Brenda Mines Ltd."

188. Régie De L'Électricité Et Du Gaz, "Ordonnance Definitive G-450: Dossier 3081-85: Gaz Metropolitain, inc."

189. *Supra* n. 170.

to treat the price of gas and that of delivery separately in the next tariff case.

On the delivery tariffs themselves, the Régie noted the problems of double and unabsorbed demand charges, load balancing, the supposedly limited volumes sold on the free market and TOPGAS. The Régie decided that it would correct the economic effects of double demand charges through adjustments to the tariff.

XV. GOVERNMENT AGREEMENTS

A. CANADA — NOVA SCOTIA OFFSHORE PETROLEUM RESOURCES ACCORD[190]

On August 26, 1986, the Federal and Nova Scotia governments signed a long-term agreement on the joint management of oil and gas exploration, development and production in the offshore of the province (the "Accord"). The Accord replaces the March, 1982 Canada — Nova Scotia Agreement on Offshore Resource Management and Revenue Sharing. "The price objective of [the] Accord is that the joint management regime continue to foster a spirit of agreement and cooperation between the Parties as they continue working together to meet the challenge of the Offshore Area."[191]

XVI. ALBERTA LEGISLATION

A. STATUTES

The First Session of the 21st Legislature convened on June 12, 1986 and was dissolved September 18, 1986. The Second Session commenced March 5, 1987 and was still in progress as of the date of this paper. The following are the Acts enacted and the Bills introduced during those Sessions.

1. Department of Energy Act, S.A. 1986, c. D-18.1

This Act establishes the Department of Energy as one of the two successor departments to the Department of Energy and Natural Resources. The Act repeals the Department of Energy and Natural Resources Act and amends the necessary legislation to reflect the name of the new department.

2. Natural Gas Marketing Act, S.A. 1986, c. N-2.8

This Act facilitates netback pricing, ensures that gas contracts are not frustrated or rendered ineffective because their price provisions are dependent upon a regulated price, and allows the Alberta Petroleum Marketing Commission ("APMC") to obtain information on Alberta natural gas.

Part 1 of the Act authorizes the APMC to provide services to buyers and sellers under gas contracts, including determining, redetermining, con-

190. Governments of Canada and of Nova Scotia, "Offshore Petroleum Resources Accord" 26 August 1986.

191. *Id.* at 2.

firming, allocating or otherwise ascertaining price components which are necessary to gas pricing under a netback or add-on pricing gas contract.

Part 2 is concerned with producer support for the downstream pricing of netback gas, which is gas sold by more than one producer to a shipper where the price payable to producers is calculated by a netback formula based on the shipper's resale price. A shipper may not remove netback gas from Alberta for resale outside Alberta or resell netback gas in Alberta unless there has been an APMC finding of producer support for the shipper's resale price. The producers of netback gas are asked to approve their shipper's resale price in terms of either a specified price, a minimum price, a price formula or any price negotiated by the shipper. If the resale price or the resale price formula is to be determined by arbitration under the resale contract, the APMC finding is based on the producer support for the arbitration standards and procedures, and an APMC determination that these standards and procedures were followed in any arbitration under the resale contract. Where there is price arbitration under a shipper's resale contract, the APMC must determine that the arbitration has been concluded or is in progress at the time of the finding of producer support. If the arbitration has been concluded, the APMC must also determine that the procedures and criteria were in accordance with those previously agreed to by the producers. If a finding of producer support is made on the basis of an arbitration then in progress, the finding is conditional upon a subsequent finding that the procedures and criteria were in accordance with those previously agreed to. There is grandfathering for determinations of substantial producer approval which were made by the APMC prior to deregulation. Although the resale of netback gas without the required finding of producer support can give rise to a criminal prosecution, the principal sanction is the imposition by the APMC of a penalty, which is then distributed to the affected producers.

Part 3 deals with the problem of gas contracts that rely on regulated pricing. If, after November 1, 1986, the price of gas delivered under an otherwise effective gas contract is unascertainable because it is calculated with reference to or derived from the Alberta border price or some other amount dependent upon pricing regulation and the contract has no effective alternative pricing mechanism, the contract continues for the remainder of its term and either party, upon written notice within the prescribed time, may direct that the price for all purposes of the contract shall be redetermined by arbitration under the Arbitration Act.[192] If notice was given but an arbitration award was not made before deregulation, unless otherwise agreed, the last regulated price remains in effect until the arbitration award, which is retroactive. If notice is not given within the prescribed time, the price during that period is the last regulated price, and after that period, the contract terminates. The prescribed time under the Act is January 15, 1987, but that was extended first to June 15, 1987 and then to January 15, 1988.[193]

Part 4 provides for information gathering and record keeping by the APMC. The APMC, by written notice, may require any person to submit

192. R.S.A. 1980, c. A-43, as am.

193. Period Extension Regulations, Alta. Reg. 10/87, 250/87.

in confidence a written return showing the required information or pertaining to any records identified in the notice to the extent that they are relevant to Parts 1 or 2. Contravention of the Part 4 requirements is an offence.

3. Take-Or-Pay Costs Sharing Act, S.A. 1986, c. T-0.1

The purpose of this Act is to spread the costs of financing TCPL's take-or-pay obligations over all persons who sell to or use TCPL's system, rather than just those producers who have received take-or-pay payments. This is done by imposing a levy on gas delivered to TCPL.

Unless the gas is exempted by the regulations, a levy set by order of the APMC is payable to the APMC by the seller or owner of gas delivered to TCPL, as buyer or transporter, or to Consolidated Natural Gas Limited ("Consolidated").

The levies, along with interest and penalties, are paid into the Take-Or-Pay Costs Sharing Fund administered by the APMC for distribution according to the Act or the Regulations.

Recipient corporations, which are Topgas Holdings Limited, Topgas Two Inc., Topcon Holdings Alberta Limited, TCPL and Consolidated, receive payments from the Fund subject to conditions prescribed by the Regulations or the APMC.

Designated collectors may be appointed to act as agent for the APMC, which may direct persons subject to levies to pay such levies to the designated collector who will hold funds collected in trust pending remittance to the APMC.

A person required by the Regulations to keep records must keep them available for inspection by the APMC at the prescribed place and, unless otherwise allowed or required, for a period of three years after the end of the year to which they relate. Anyone required to keep records may, if directed, be required to submit to the APMC, on a confidential basis, a written return disclosing in detail the required information.

An anti-avoidance provision permits the APMC to determine that a levy has been improperly or artificially avoided or reduced by some act or arrangement, and in such a case, the levy is payable as it would be in the absence of the act or arrangement.

Failure to pay a levy entitles the APMC to issue a stop order to NOVA, AN ALBERTA CORPORATION ("NOVA") directing it to cease transporting gas for the person in default. The person in default is also subject to prosecution.

The APMC, NOVA and any designated collector are immune from any action or proceeding in respect of any act done purportedly in pursuance of the Act, Regulations or an APMC order or decision.

4. Alberta Energy Company Amendment Act, 1986, S.A. 1986, c. 2

These amendments update the Alberta Energy Company Act,[194] to make it consistent with the Business Corporations Act[195] to which Alberta Energy

194. R.S.A. 1980, c. A-19, as am.

195. S.A. 1981, c. B-15, as am.

Company Ltd. ("AEC") became subject when it was continued. The amendments provide for various exemptions from the Business Corporations Act, including exemptions with respect to the use of AEC's name, subscriptions for shares by the Crown, dissolution and liquidation and the making of certain regulations. The Act is made prevalent over the Business Corporations Act as well as AEC's articles and by-laws.

5. Arbitration Amendment Act, 1986, S.A. 1986, c. 10

Paragraph 15 of the Agreement[196] provided that the Arbitration Act was to be amended so as to be consistent with market-responsive domestic gas pricing. Section 17 of the Act[197] previously required the gas price arbitration to determine the field value of gas based on its commodity value and prohibited parties from contracting out of that provision. This amendment provides an arbitration standard that permits consideration of a wide variety of factors, including gas to gas competition, and allows the parties to contract out of the arbitration standards provided by the Act.

6. Gas Resources Preservation Amendment Act, 1986, S.A. 1986, c. 17

The condition of gas removal requiring that the expected costs and benefits be in the Alberta public interest is replaced by the broader condition that gas removal be in the Alberta public interest having regard to any matter considered relevant by the ERCB.

The amendments empower the Lieutenant Governor in Council to direct the ERCB to reconsider a permit or application for a permit generally or in respect of matters specifically in the order of the Lieutenant Governor in Council.

Previously, the authority of the ERCB to cancel a permit for failure to comply with its terms, or for wilfully contravening the Act or Regulations, required Lieutenant Governor in Council approval. The amended Act permits the Board on its own to suspend a permit, although approval of the Lieutenant Governor in Council is still required to cancel the permit.

The authority of the ERCB to amend permits without approval of the Lieutenant Governor in Council no longer includes permit extensions of up to 2 years.

Emergencies which jeopardize adequate supply of gas to Albertans, thereby permitting diversion of permitted volumes, are no longer required to be unforeseen and gas to be diverted is no longer restricted to gas intended for industrial use.

The Minister or his authorized employee, rather than the Lieutenant Governor in Council, may now approve removal permits for up to 3 billion cubic meters over a 2 year term. Formerly, Ministerial approval was limited to removals for up to 1 billion cubic meters over a 2 year term.

Reference to the pool, field, or area from which gas is to be removed has been replaced by reference solely to a removal point. Also, permit terms may now refer to the maximum annual quantities of gas to be removed rather than the annual quantities.

196. *Supra* n. 170.

197. R.S.A. 1980, c. A-43, s. 17 (am. by S.A. 1986, c. 10).

7. Mines and Minerals Amendment Act, 1986, S.A. 1986, c. 22

This amendment expands Section 4.1, which now deals with the accounting treatment of grants relating to development drilling and well servicing as well as exploratory drilling and geophysical exploration.

8. Petroleum Incentives Program Amendment Act, 1986, S.A. 1986, c. 28

These amendments require that eligible costs and expenses be incurred within defined time periods which depend upon the type of costs or expenses.

9. Petroleum Marketing Statutes Amendment Act, 1986, S.A. 1986, c. 29

With respect to the Mines and Minerals Act,[198] these amendments change a reference in section 117(1) and repeal provisions dealing with the marketing of the lessee's share, the Crown's share of pentanes plus and the lessee's share of pentanes plus. The Petroleum Marketing Act[199] is also amended, to require the APMC to return annually to the Treasurer its net profit, to extend the APMC's powers to matters outside Alberta, and to replace the references to "petroleum" with references to "crude oil". The Petroleum Marketing Amendment Act[200] is repealed.

10. Pollutant Spills Act, Bill 23

This Bill requires persons having control of a pollutant that is spilled or discharged with adverse effects to notify appropriate authorities and do everything practicable to mitigate the adverse effects. The Minister may order any practicable action. The Crown or any person may have a right to compensation for loss or damage suffered as a result of a spill. The Environment Compensation Board is established to hear and determine all claims for compensation.

11. Small Producers Assistance Commission Act, Bill 41

This Bill constitutes and empowers the Small Producers Assistance Commission as successor to the Commission established by Ministerial Order E11/86. Oil or gas producers are authorized to apply to the Commission for assistance to restore the competitiveness of producers, to help producers, interested parties and public bodies co-operate to enhance the effective operation of producers and establish economic plans.

If the Commission considers an applicant producer to be small, to have made a reasonable attempt to satisfy its creditors and there is a likelihood of the producer, interested parties and public bodies being able to agree on the effective operation of the producer, the Commission may facilitate such an agreement and, if appropriate, an economic plan. Federal participation may be invited with respect to an economic plan.

198. R.S.A. 1980, c. M-15, as am.

199. R.S.A. 1980, c. P-5, as am.

200. R.S.A. 1980, c. 17 (Supp.).

The Commission is required to keep information collected confidential and is immune from any proceedings in respect of any act done, purportedly in pursuance of the Act.

12. Gas Resources Preservation Amendment Act, 1987, Bill 45

This Bill authorizes retroactive regulations respecting the terms and conditions to which permits are subject. The Bill is aimed at eliminating the "hunting licence" type of blanket permits that were once available.

B. REGULATIONS

1. Energy Grant Regulation, Alta. Reg. 309/86

This Regulation authorizes the Minister of Energy or his delegates to make grants in respect of matters under his administration and sets out the application procedures.

2. Designation Amendment Regulation, Alta. Reg. 305/86

This amendment removes various companies, townships and villages from the list of designated gas utilities in the Designation Regulation.[201]

3. Crude Oil Par Price and Royalty Factor (No. 4) Amendment Regulations, Alta. Reg. 113/86, 163/86, 205/86, 248/86, 283/86, 296/86, 353/86, 7/87, 59/87, 97/87

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

4. Development Drilling Assistance Regulation, as amended, Alta. Reg. 244/86, 310/86

These Regulations establish the Development Drilling Assistance Program ("DDAP") which was designed to encourage development drilling on Crown lands in Alberta.

Under DDAP, cash grants are made, or transferable credits established, at the rate of approximately 40% of the costs of drilling or deepening development or injection wells, as well as certain source, disposal, observation and evaluation wells, spudded between June 3, 1986 and January 1, 1987. Credits can be applied against certain royalties payable to the Crown on production after May 31, 1986. The total money available for DDAP assistance is $100 million.

In addition, where the well qualifies for Exploration Drilling Assistance Program ("EDAP") benefits, DDAP assistance is available for any depth interval which is not determined as exploratory meterage and for which credits are not established under EDAP.

DDAP is divided into a drilling component and a completion component. The drilling component covers a portion of the cost of drilling or deepening an eligible development well and is available after the finished drilling date of the well. The completion component covers an additional

201. Alta. Reg. 171/85.

portion of the cost of drilling an eligible development well and is available on completion of the well.

If a DDAP applicant already received an incentive for drilling a well under earlier programs, the applicant may still be entitled to the completion component of DDAP assistance.

No well is eligible for more than $200,000 in DDAP assistance. No assistance is given for the first 400 meters drilled.

5. Exploratory Drilling Assistance Regulation, Alta. Reg. 156/86, 245/86

These Regulations establish EDAP, which was designed to encourage exploration drilling in the Province of Alberta in 1986.

EDAP allows for a reduction of Crown royalties payable on production after April 1, 1987, based upon an earned EDAP credit. The credit is earned at the rate of 50% of the eligible drilling costs of exploration wells drilled on Crown lands and spudded from April 1, 1986 to December 31, 1986, inclusive.

Credits can be refused, revoked or reduced if the Minister is of the opinion that credits were applied for or allocated on the basis of artificial transactions.

The total amount available under EDAP is $300 million.

6. General Amendment Regulation, Alta. Reg. 421/86

This amendment extends the ability of the Minister to release information received pursuant to the Mines and Minerals Act[202] or the Regulations made thereunder.

7. Geophysical Assistance Regulation, Alta. Reg. 246/86

This Regulation establishes a program referred to as the Geophysical Assistance Program ("GAP"), which was designed to provide assistance to the geophysical sector of the petroleum industry in Alberta during 1986.

GAP applies to seismic reflection programs recorded between June 3, 1986 and January 1, 1987.

Cash grants are made or transferable credits established at the rate of 35% of the eligible costs of programs that evaluate the subsurface of lands located not more than 1.7 kilometers from lands in which the petroleum, natural gas or oil sands are owned by the Crown. Credits can be applied against certain Crown royalties payable on production after May 31, 1986.

The total amount available under GAP is $50 million.

8. Lloydminster Upgrader Bi-Provincial Project Royalty, Adjustment Regulation, Alta. Reg. 157/86

This Regulation prescribes an adjusted Crown royalty payable on eligible production which is subject to a maximum dollar reduction below that which would have been payable without the adjustment.

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202. *Supra* n. 198.

9. Natural Gas Royalty Amendment Regulation, Alta. Reg. 268/86

This amendment modifies the formulae set out in Schedule 1 of the Natural Gas Royalty Regulations[203] which shows how to calculate the royalty on natural gas and residue gas.

10. Natural Gas Royalty Amendment Regulation, 365/86

This amendment allows the Minister to consent to liability of the Crown for costs and allowances in relation to the Crown's royalty share of gas that relate to Take-Or-Pay Costs Sharing Act[204] levies. The amendment also changes Schedule 1 formulae.

11. Petroleum Royalty Amendment Regulation, Alta. Reg. 380/86

This amendment enhances the benefits under the Crude Oil Royalty Holiday Program.

To be eligible, a well must be spudded or deepening commenced in a drilling spacing unit ("DSU") which is outside the pool boundaries as defined by the ERCB in G-Orders established at October 1, 1986. Where a well has produced before October 1, 1986 and is located in an area which has not yet been designated as a pool by the ERCB G-Orders, the pool boundary with respect to that well shall be defined as the DSU existing at October 1, 1986 or the 64-hectare DSU associated with that well, which ever is smaller.

Where a well has been spudded or drilling to deepen has commenced during the period October 1, 1986 to October 31, 1987, the well will be eligible for a crude oil royalty holiday of 60 production months; where it was November 1, 1987 to October 31, 1988, the well will be eligible for a crude oil royalty holiday of 36 production months; and where it was November 1, 1988 to October 31, 1989, the well will be eligible for a crude oil royalty holiday of 12 production months.

The $1 million maximum benefit has been removed and the level of benefit under this program is no longer affected by the depth of the well or the area of the province in which the well is located.

12. Suncor Oil Sands Royalty Amendment Regulation, Alta. Reg. 158/86

This amendment prescribes, for the period April, 1986 to December, 1986, the Crown royalty with respect to synthetic crude oil obtained from oil sands recovered from the project area.

13. Well Servicing Assistance Regulation, as amended, Alta. Reg. 247/86, 311/86

These Regulations establish and extend a program referred to as the Well Servicing Assistance Program ("WSAP"), which was designed to create or sustain employment for a maximum number of Albertans in the petroleum service industry.

203. Alta. Reg. 16/74, as am.

204. S.A. 1986, c. T-0.1, discussed *supra*.

WSAP pays 50% of the contract labour portion of eligible maintenance, repair and service work on eligible wells, pipelines and batteries to a specified maximum per facility. The work must have been done between June 3, 1986 and January 1, 1987.

The total available under WSAP is $50 million.

14. Exploration Amendment Regulation, Alta. Reg. 93/87

This Regulation changes the fee to accompany an application for an exploration licence or an exploration permit from $25 to $50.

15. Suncor Oil Sands Royalty Amendment Regulation, Alta. Reg. 6/87

This Regulation extends the date for the 1% Crown royalty on synthetic crude oil obtained from oil sands recovered from the project area from December, 1986 to June, 1987.

16. Prescribed Deregulation Date Regulation, Alta. Reg. 352/86

This Regulation designates November 1, 1986 as the prescribed deregulation date for purposes of the Natural Gas Marketing Act.[205]

17. Natural Gas Marketing Regulation, as amended, Alta. Reg. 358/86, 31/87

The Part I Regulations, relating to Part I of the Act, define what classes of costs and charges constitute the Alberta cost of service, how to apply to the APMC for approval of a price component, and how to apply for a review or appeal of an APMC decision with respect to a price component.

The Part II Regulations set out the procedures with respect to an APMC finding of producer support and continue the 51%/70% rule originated in the Natural Gas Pricing Agreement Regulations.[206] The Part also provides a maximum penalty of $1/GJ for failure to comply, and exempts netback gas resold under the original terms of a downstream contract under which deliveries commenced before November, 1986.

Part III sets out the requirements for reporting and record keeping.

Part IV deals with appeals to the Court of Appeal.

The Regulation also includes a Schedule detailing the standard method of converting volumetric measurements of gas to gigajoules.

18. Period Extension Regulations, Alta. Reg. 10/87, 250/87

These Regulations extend the period under the Natural Gas Marketing Act[207] for giving notice of arbitration, first to June 15, 1987, and then to January 15, 1988.

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205. S.A. 1986, c. N-2.8, as am.

206. Alta. Reg. 127/77.

207. *Supra* n. 205.

19. Natural Gas Pricing Agreement Act Market Development Levy Orders, Alta. Reg. 23/86, 52/86, 100/86, 151/86, 192/86

These orders prescribed on a monthly basis the market development levy.

20. Natural Gas Pricing Agreement Amendment Regulations, Alta. Reg. 174/86, 423/86

These amendments prescribe the pricing of intra-Alberta discount gas, provide for corrections of APMC miscalculations, and direct the appropriate transfers in the case of a surplus in the Natural Gas Pricing Agreement Market Fund.

21. Natural Gas Pricing Agreement Act Price Adjustment Orders, Alta. Reg. 39/86, 71/86, 125/86, 165/86, 204/86, 252/86, 269/86, 291/86, 326/86, 350/86, 374/86

These orders prescribed on a monthly basis the price adjustment, which represented the surplus value of export sales for credit to all Alberta producers.

22. NOVA, AN ALBERTA CORPORATION Regulation, Alta. Reg. 359/86

Under these Regulations, an order of the PUB varying or confirming the corporation's rates, tolls or other charges is effective, where an interested party initiated proceedings, on the date of the complaint, or, where the Lieutenant Governor in Council made a direction, on the date of the direction.

23. Oil and Gas Conservation Amendment Regulations, Alta. Reg. 234/86, 302/86

These amendments change the administration fee applicable to Class 5 oil sands projects and the annual adjustment factor, set the prescribed date for the 1986/87 fiscal year, and modify the rules respecting the release of information to the public.

24. Petroleum Incentives Program Amendment Regulation, Alta. Reg. 312/86

These amendments define blowout expenses and make such expenses if incurred after March 31, 1986, as well as other expenses, ineligible. Applications are required to include a Ministerial Certificate. The notification period for over and under payments as well as the time limit for making application is changed.

25. Designation Amendment Regulation, Alta. Reg. 397/86

This amendment removes Lottie Lake Holdings Ltd. from the list of designated public utilities.

26. Pipeline Regulation, Alta. Reg. 28/86, 122/87

These Regulations set out the procedures and forms for applying to construct, operate or abandon pipelines and related facilities as well as the codes, standards and fees applicable thereto.

27. Take-Or-Pay Costs Sharing Act Levy Orders, Alta. Reg. 367/86, 441/86, 442/86, 20/87, 21/87, 54/87, 129/87, 130/87, 131/87, 150/87, 151/87

These orders prescribe the rates of the levies payable under the Take-Or-Pay Costs Sharing Act.[208] For non-system gas, the levy for the 12 month period commencing November 1986 is 10¢/GJ.

28. Take-Or-Pay Costs Sharing Regulation, as amended, Alta. Reg. 366/86, 32/87

These Regulations include a definition of what classes of costs and charges constitute take-or-pay costs for the purposes of the Act. They provide that the levies are payable from November, 1986 to October of 1994. TCPL and Consolidated are appointed as designated collectors. The Regulations prescribe how to calculate and pay the levies and establish an exemption procedure. They also deal with adjustments and interest payments out of the Fund, and records and information.

XVII. FEDERAL LEGISLATION

A. STATUTES

1. Competition Act and Competition Tribunal Act, S.C. 1986, c. 26

This legislation is discussed in a separate paper in this Supplement. In summary, the act replaces the old Restrictive Trade Practices Commission with a more effective Competition Tribunal and sets out a long-awaited new regime of competition law.

Whereas before, mergers resulting in a lessening of competition were dealt with under a criminal regime, they now can be subject to civil proceedings by the Tribunal. Subject to certain exemptions, persons proposing a merger must give prior notice and information to the Director of Investigation and Research. The criminal prohibition against monopolies has been replaced by a provision giving the Tribunal authority to prohibit abuse of dominant position.

The maximum penalty for conspiracy is increased and it is made clear that conspiracy can be established on the basis of circumstantial evidence. The exemptions for export consortium and joint ventures are broadened. The powers of investigation have been extended, but are subject to new safeguards. There are new provisions with respect to specialization agreements, delivered pricing schemes, arrangements between banks and the activities of Crown corporations.

208. *Supra* n. 204.

2. An Act to Amend the Energy Administration Act and Provide for Certain Matters in Relation Thereto, S.C. 1986, c. 39

These amendments provide for more flexible methods of prescribing and approving prices for natural gas entering into interprovincial and international trade.

3. Canada Petroleum Resources Act, S.C. 1986, c. 45

A substantial portion of this Act was proclaimed into force in respect of frontier lands with the exception of the Nova Scotia offshore area, the Newfoundland offshore area and portions of lands within the Northwest Territories.[209]

4. An Act to Amend the Petroleum and Gas Revenue Tax Act and the Income Tax Act and to Repeal the Petroleum and Gas Revenue Tax Act, S.C. 1986, c. 58

As a result of this Bill, no petroleum and gas revenue tax ("PGRT") is payable with respect to oil and gas revenues and royalties attributable to production of oil and gas on or after October 1, 1986. The annual small producer's credit limit is increased from $500,000 to $2,000,000 effective May 1, 1986, but is to be prorated to reflect the elimination of the PGRT. Corporations and individuals are permitted to include up to $1,500,000 of royalty income in the income qualifying for the small producer's credit. The PGRT offset provisions in the Income Tax Act[210] are not available in respect of Canadian exploration expenses and Canadian development expenses incurred after September 30, 1986, and the existing deduction under the Income Tax Act in respect of the cumulative offset account is to be available for seven more years. Revenues attributable to synthetic production are exempt from the PGRT starting May 1, 1986. Various deductions for exploration and development expenses and equipment costs are no longer available for expenses and costs incurred after September 30, 1986. A mechanism is established to permit a taxpayer to receive a refund for his unused exploration and development expense tax credits. The PGRT Act[211] is automatically repealed effective at such time as the tax liability of all taxpayers who have oil and gas revenues from production before October 1, 1986 has been fully determined.

5. Canada — Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3

This Act implements the Atlantic Accord, which is an agreement between the Government of Canada and the Government of Newfoundland and Labrador on offshore petroleum resource management and revenue sharing. The Act establishes the Canada — Newfoundland Offshore Petroleum Board for the joint management of offshore petroleum resources and for approving development plans. The Board may issue interests in respect of any portion of the offshore area that is subject

209. Certain Sections of the Act Proclaimed in Force 15 February 1987, SI/87-63.

210. S.C. 1970-71-72, c. 63, as am.

211. S.C. 1980-81-82-83, c. 68, as am.

to the Accord. However, with respect to Crown reserved areas, the Board cannot issue an interest unless there has been a call for bids in relation to those areas. Where a significant discovery or commercial discovery has been made on any portion of the offshore area that is subject to an interest, the Board is required to make a written declaration of significant discovery or commercial discovery, as the case may be, upon the application of the interest owner.

Production licences can only be issued if the Federal Minister is satisfied that the Canadian ownership rate of the interest owner would not be less than fifty percent. A public register of all interests and instruments transferring, assigning or disposing of an interest is to be established and maintained.

Where there is a shortfall of petroleum deliveries in the Province, the Provincial Minister may, after consulting with the Federal Minister, give notice to holders of production licences in the offshore area that the Province have the first option to acquire petroleum produced in the offshore area.

Where a petroleum spill occurs, any person carrying on any work in the area is required to report the spill to the Chief Conservation Officer and take all reasonable steps to prevent any further spill.

Newfoundland has mirror legislation of its own.

B. REGULATIONS

1. Environmental Studies Revolving Fund Regions Regulations, 1986, SOR/86-771

These Regulations prescribe regions for which there are to be sub-funds in accordance with section 49 of the Canada Oil and Gas Act.[212]

2. Natural Gas Prices Regulations, 1981, amendments SOR/86-34, 86-35, 86-87, 86-155, 86-212, 86-253, 86-292, 86-293, 86-296, 86-343, 86-424, 86-499, 86-500, 86-519, 86-550, 86-626, 86-645, 86-756, 86-838

These amendments modified the Regulations that prescribed the prices at which gas was exported from Alberta, which Regulations were revoked.

3. Miscellaneous Crude Oil Exports Exemptions or Reduction Order, amendment SOR/86-181

This order exempts from export charges certain exports of crude oil and reduces the export charges on certain other exports of crude oil.

4. Exemption From Petroleum Compensation Charge, SOR/86-423

This order exempts a cargo of Ninian crude oil imported by Ultramar Canada Inc. from the petroleum compensation charge.

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212. S.C. 1980-81-82-83, c. 81, as am.

5. Primary Industries Levy Offset Program Regulations, Amendment SOR/86-518

These amendments modify the date of application for a levy offset, change a reference in the definition of "petroleum product" and make the English version of a provision consistent with the French version.

6. Marine Transportation Fuel Exemption and Reduction Order, Amendment SOR/86-786

These amendments broaden the exemption provided in paragraph 3(1)(b) to include vessels engaged in any exploration or development activity in the offshore area and provide an exemption for the fuel consumed by vessels engaged in the supply of cargo to sites on the DEW line.

7. Alberta Natural Gas Prices Regulations, 1986, SOR/86-838

These Regulations prescribe prices for natural gas sold and delivered in Canada outside its province of production and subsequently consumed in Canada outside its province of production or exported and consumed outside Canada. The prescription of negotiated prices, for the sale and delivery of gas on or after November 1, 1985, was effective upon the acknowledgment of the receipt of the executed contracts by the NEB. The prescription of individual and specific prices contained in contracts by a specific regulation under the Natural Gas Prices Regulations 1981[213] was no longer required. Those Regulations were revoked on the same day the new Regulations were approved.

8. General Revocation Order, SOR/86-899

This order revokes various general and specific gas pricing orders made by the NEB pursuant to subsection 53(1) of the Energy Administration Act.[214] Many of these orders were made in the last year and have not been noted here.

9. Alberta Natural Gas Domestic Pricing Order, 1986, SOR/86-900 and Alberta Natural Gas Export Pricing Order, 1986, SOR/86-901

These general pricing orders approved the prices paid to purchase or otherwise acquire natural gas within Alberta for movement outside the province, and the prices paid to purchase or otherwise acquire natural gas within Alberta for consumption in Canada outside the province (the "Domestic Pricing Order") and for export and consumption outside Canada (the "Export Pricing Order"). The definitional aspects of the new orders were more encompassing and permitted a more generalized method of approving prices paid for natural gas within Alberta for subsequent sale and consumption outside the province. For the most part, the general orders provided for the determination of the effective date of the approval of prices upon the filing of executed contracts and any executed amending

213. SOR/81-973.

214. S.C. 1974-75-76, c. 47, as am. (previously titled the Petroleum Administration Act).

agreements with the Board and the Board's acknowledgment of their receipt. Special Orders under section 53(1) of the Energy Administration Act to approve the prices of each sales transaction generally were no longer required.

10. Energy Administration Act Sections 53 to 65 Non-Application Order, 1986, SOR/86-1049

The Governor in Council issued this order, pursuant to Section 52(1.1) of the Act, to suspend the applicability of Sections 53 to 65 of the Act effective November 1, 1986. As a result, administered natural gas prices are no longer in effect.

11. Energy Administration Act General Revocation Regulations, 1986, SOR/86-1050

These Regulations were issued effective November 1, 1986 to revoke the Alberta Natural Gas Prices Regulations, 1986, and the Energy Administration Act Part III Regulations.

12. Energy Administration Act General Revocation Order No. 2, 1986, SOR/86-1056

This order revokes, among other provincial and territorial pricing orders, the Alberta Natural Gas Domestic Pricing Order, 1986 and the Alberta Natural Gas Export Pricing Order, 1986.

13. Energy Monitoring Regulations, Amendments SOR/86-375, SOR/86-704

These amendments set out and revise forms which certain energy enterprises referred to in the Regulations are required to include with their returns.

14. Petroleum Incentives Program Regulations, Amendment SOR/86-373

This amendment provides that an expense incurred in respect of Canadian lands that are subject to an exploration agreement the primary term of which commenced before March 29, 1985 is not an eligible expense where it is incurred after expiration of the primary term, unless the expense is incurred in respect of a well spudded during the primary term of the exploration agreement or an extension thereof but on or before February 5, 1986.

15. Gas Export Prices Regulations, Revocation SOR/86-1051

The Gas Export Prices Regulations[215] establish regulated base and incentive prices as well as base volumes for purposes of the Volume Related Incentive Pricing Program ("VRIP"), which allowed exporters of gas to offer U.S. importers regulated discounts for sales volumes in excess of base amounts. These Regulations were revoked when it was confirmed that there no longer would be any gas export licences operating under the VRIP.

215. SOR/83-332.

16. National Energy Board Part VI Regulations, Amendment SOR/86-33

The Regulations that established a specific reference to a minimum price for export sales by order are amended to allow prices to be set by buyer/seller negotiations without government approval. This fulfills commitments undertaken in the Agreement.[216]

17. Petroleum and Gas Revenue Tax Regulations, Amendment SOR/86-446

These amendments delegate certain powers and duties of the Minister in respect of new sections of the Income Tax Act to various officials, and redelegates certain powers and duties of the Minister to reflect an organizational change in the Policy and Systems Branch of the Department of National Revenue (Taxation).

18. Petroleum Incentives Program Regulations, Amendments SOR/86-32, 86-373, 86-459, 86-1089

These amendments clarify certain provisions of the English and French versions of the Regulations. New terms are defined. Eligible and ineligible expenses are further defined and clarified. Time periods are prescribed. Certain technical amendments and corrections have been made.

216. *Supra* n. 170.