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

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*The purpose of this paper is to discuss recent developments in the law which are of interest to lawyers whose practice relates to the oil and gas industry. It 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. These cases have been included either because they involve situations analogous to those which occur frequently 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, which is the subject of a separate paper delivered at this year's conference. The review of the legislation is effective as of May 1, 1985.***

I. LAND TITLES

A. *RE: OWNERSHIP OF LANDS KNOWN AS "MONARCH", "EXTENSION", "PRINCE ALBERT", "SASKATCHEWAN", AND "HERON" MINERAL CLAIMS:*[1] *SUB. NOM. RE: MASTER OF TITLES AND PAMON GOLD MINES LTD.*[2]

Pamon Gold Mines Limited, a Manitoba company, was dissolved on February 26, 1966 for failure to file returns. It was revived on December 15, 1983 for the purpose of preserving its assets. In 1978, the Crown successfully prosecuted forfeiture proceedings under the Mineral Taxation Act (Saskatchewan). However, the surface of the mineral claims was inadvertently included in the certificates of title issuing as a result of the proceedings. In the instant proceedings, the company claimed to be entitled to be the registered owner of the surface of the mineral claims.

The Court held that, upon revival, the company was restored to its former position subject to any limitations which may have been imposed in the terms of the revival. Since the relevant corporations legislation was held to be silent on the question of forfeiture, the common law applied, *i.e.*, that the Crown's title is defeasible and may terminate if a company is revived before those rights have been determined by a procedure such as that provided for in the Escheats Act (Saskatchewan).

The company was, therefore, declared to be entitled to be registered as owner of the surface of the subject lands.

B. *BELL* V. *GUARANTY TRUST CO. OF CANADA* [3]

This case was discussed in the 1984 edition of this paper (23 *Alta. L. Rev.* 183). An application for a rehearing of the appeal was made by the appellants on the basis that the Court's attention was not directed to several authorities. The application was dismissed.

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1. [1984] 5 W.W.R. 761 (Sask. C.A.).
2. (1984) 13 D.L.R. (4th) 760 (Sask. Q.B.).
3. (1984) 13 D.L.R. (4th) 477 (Sask. C.A.).

C. *RE REGISTRAR'S CAVEAT (NALRD) NO. 752031464 AND SIGNALTA RESOURCES LTD.*[4]

This was an application for a direction to the Registrar of the North Alberta Land Registration District to discharge a Registrar's caveat. The lands concerned were all mines and minerals other than gold, silver and coal within, upon or under some 13.45 acres taken for a railway right of way in Section 3-44-17 W4M. Section 3 was granted by the Crown to the Canadian Pacific Railway Company ("CPR"). By 1910, Section 3, other than the coal thereunder, came to be held by one Otto Schuler. In 1913, Schuler transferred a right of way to the Canadian Northern Western Railway Company ("CNWR"), which involved the Northwest, Southwest and Southeast Quarters of Section 3. A certificate of title was issued to the CNWR for the right of way lands and the title excepted all coal thereunder. In 1917, Schuler transferred to one John Z. Gent all of his title to Section 3 except the right of way lands. The legal description in the transfer contained the following exception:

> excepting thereout a right-of-way containing 13.45 acres . . . reserving unto the C.P.R. all coal on or under the said Land.

A certificate of title was issued in the name of Gent with respect to all of Section 3 excepting thereout a right of way and reserving unto the CPR all coal. All transferees subsequent to Gent were agreed by the parties to be "volunteers". Title to the mines and minerals stood at the time of the application in the names of seven individuals. In 1984, one of those individuals granted a petroleum and natural gas lease to the applicant Signalta Resources Ltd., as to an undivided one-sixth interest. The Registrar's caveat was registered on April 1, 1975.

The applicant argued that when the CNWR acquired the right of way lands, it was precluded by law from acquiring the mines and minerals thereunder, with the result that when Schuler transferred Section 3 to Gent, the mines and minerals, including those under the right of way, except coal, were transferred, and with the further result that Signalta's lessor and the other registered owners were entitled to the mines and minerals underlying the right of way.

At the relevant time, the Railway Act (Alberta) and the Railway Act (Canada) contained a provision to the effect that all mines and minerals underlying lands purchased by a railway company were to be deemed to be excepted from the conveyance of the right of way lands unless expressly named therein and conveyed thereby.

McBain J. referred to the decision of the Manitoba Court of Queen's Bench in *Re Moir's Estate*.[5] In that case, on similar facts, it was held that the owner in the position of Schuler retained ownership of the mines and minerals underlying the railway right of way. McBain J. expressed his disagreement with the conclusion reached by Maybank J. in the *Moir* case. The *Moir* decision was followed by Cormack J. in *Re Panther Resources Ltd.*,[6] discussed in the 1984 edition of this paper.

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4. [1985] 4 W.W.R. 545, 37 Alta. L.R. (2d) 243, 60 A.R. 21.
5. (1961) 36 W.W.R. 83 (Man. Q.B.).
6. (1984) 4 D.L.R. (4th) 531 (Alta. Q.B.), discussed at (1985) 23 Alta. L. Rev. 209.

McBain J. declined to apply the *Panther* decision. His Lordship held that the mines and minerals underlying the right of way lands, other than coal, remained in Schuler's title after the transfer of the right of way lands to the CNWR. The learned Judge held that the exception of the right of way lands contained in the transfer from Schuler to Gent did not operate to except the mines and minerals thereunder: the exception in the transfer from Schuler to Gent, of "a right of way containing 13.45 acres as described in certificate of title 23 R 28" could not have included the mines and minerals thereunder, because the mines and minerals were not included in certificate of title 23 R 28. It is important to note that these words of limitation are different from those used in the material transfer before the Court in the *Panther* case; in the latter case, the transfer excluded "25.17 acres taken for a right-of-way" without reference to the certificate of title relating to the right of way lands.

D. *MASIDON INVESTMENTS LTD.* V. *HAM* [7]

This case involved an action for a declaration of title by the owner of certain property against a person claiming to have acquired possessory title to the property. The Court held that the question whether a possessory title has been acquired is a question of fact and that the statutory period commences to run only after the following conditions have been satisfied:

(a) the person claiming possessory title must have had actual possession throughout the statutory period;
(b) he must have had the intention, throughout the statutory period, of excluding the true owner from possession; and
(c) he must have effectively excluded the true owner from possession.

E. *DIRECTOR OF SOLDIERS SETTLEMENT* V. *REGISTRAR, NORTH ALBERTA LAND REGISTRATION DISTRICT, KING, SNIDER & SNIDER* [8]

This case involved the mines and minerals underlying certain Soldiers Settlement lands. The land in question was granted by the Crown in right of Canada to the CPR in 1901, who transferred the land to one Diercks in 1912. The land was transferred to the Soldiers Settlement Board in 1919, and the Board, in 1928, transferred the land to one Lynn, and at the same time took a mortgage from Lynn that was ultimately discharged in 1935. In 1928, Lynn transferred the land to the present respondents. In the original Crown grant, the mines and minerals were included. In the grants from the CPR to Diercks, and from Diercks to the Board, mines and minerals, other than coal, were included.

The Soldiers Settlement Act (Canada) provides, in s. 57, that:

> All mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines and minerals whatever.

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7. (1984) 31 R.P.R. 200 (Ont. C.A.).
8. [1985] 2 W.W.R. 149 (Alta. Q.B.).

The grant from the Board to Lynn made no mention of the reservation of mines and minerals other than coal. The present respondents were undoubtedly *bona fide* purchasers for value and had dealt with the mines and minerals and paid the freehold taxes thereon.

The Court stated that there was no doubt that if the mines and minerals had been held by the Crown in right of Alberta, the provisions of the Land Titles Act (Alberta) would apply thereto, but stated that it was also beyond doubt that if the mines and minerals remained with the Crown in right of Canada, the provisions of the Land Titles Act would not apply so as to deprive the federal Crown of these mineral rights.

The Court rejected the argument that, by using the Alberta land titles system to register its mortgage, the Director of Soldiers Settlement had taken the benefit of the Land Titles Act and was now bound by it, stating that s. 57 of the Soldiers Settlement Act had made it clear that the Board could not part with the mines and minerals, whether intentionally or otherwise.

The respondents also argued that these lands, including mines and minerals, were transferred to His Majesty in right of the Province of Alberta by the terms of the agreement set out in the schedule to the Alberta Natural Resources Act, 1930, because they were not excluded by s. 13 or s. 18 of that agreement. However, the Court held that the lands fell within the exception in paragraph 18(a) of that Act, being:

> lands for which Crown grants have been made and registered under the Land Titles Act of the Province of which His Majesty the King in the right of His Dominion of Canada is, or is entitled to become, the registered owner at the date upon which this Agreement comes into force . . .,

because at the coming into force of the agreement, the Board was entitled to become registered as owner of the mines and minerals.

The Court therefore granted the relief requested by the petitioner (the Director of Soldiers Settlement), which was an order requiring the Registrar of Land Titles to cancel certain certificates of title and to issue a new certificate in the Director's name with respect to the mines and minerals in question, free and clear of any encumbrances.

F. *FRADO* V. *BANK OF MONTREAL* [9]

The owner applied to have the bank's caveat discharged. The caveat purported to warn of a claim arising from an "equitable mortgage" pursuant to a letter signed by the applicant and her husband, wherein they undertook not to further encumber the subject property or to dispose of same without the bank's prior consent. The Court held that the document constituted only a negative covenant and was not an equitable mortgage of the land, because it did not constitute a "charge" on the land. The existence of a "charge" is a precondition to the existence of an interest sufficient to support the caveat.

9. (1985) 34 Alta. L. R. (2d) 293.

II. MINES AND MINERALS

A. *FRY* V. *DAYON AND SACK* [10]

The plaintiff and one of the defendants entered into a "lay agreement" respecting two mining claims held by that defendant, which provided that the defendant would lease the rights on those claims to the plaintiff (the "layman") for a cash bonus plus ten per cent of the gross value of gold mined in excess of a fixed amount. The Court characterized the agreement as an irrevocable licence combined with a grant of property, giving the layman the right to enter on the property and a right to the property in the gold which he recovered, subject to delivery of a percentage *in specie* to the owner of the claims.

III. INTERPRETATION OF CONTRACTS

A. *B. L. T. HOLDINGS LTD.* V. *EXCELSIOR LIFE INSURANCE COMPANY* [11]

The plaintiff, B.L.T. Holdings Ltd., required funds to finance the construction of a commercial building. The defendant Cumberland Realty Group Limited agreed to find a lender for a commission of one per cent of the principal amount of the loan. Cumberland found the defendant, The Excelsior Life Insurance Company, and Excelsior agreed to pay Cumberland a fee for finding the plaintiff as a borrower. This latter arrangement was never disclosed to the plaintiff.

The defendant Excelsior required the plaintiff to pay a stand-by fee of two per cent of the principal amount of the loan. Prior to the advancement of funds, the plaintiff sold the subject property to another person and claimed the return of the stand-by fee and the commission. As to the commission, the plaintiff based its claim on Cumberland's failure to reveal its conflict of interest.

Clause 23 of the mortgage commitment agreement between the plaintiff and Excelsior provided that the commitment fee would remain the absolute property of the Excelsior as liquidated damages, and not as a penalty, and that the commitment fee represented a fair estimate of damages.

The Court held that Cumberland had entered into a fiduciary relationship with B.L.T. and was in breach of its duties to B.L.T. in failing to make full and fair disclosure of its contract with Excelsior before recommending the Excelsior mortgage loan commitment to B.L.T. It was held that Cumberland was not entitled to retain its commission and was required to repay it to B.L.T.

In the reasons for judgment, Prowse J. cited the decision of the New Brunswick Court of Appeal in *Cecil McManus Realty Ltd.* v. *Bray*,[12] wherein it was stated that an agent is obliged to show the utmost good faith in his dealings with his principal. If in the transaction of the agency

10. (1984) 56 B.C.L.R. 123 (Y.T. C.A.).
11. (1984) 52 A.R. 1 (Alta. Q.B.).
12. (1970) 14 D.L.R. (3d) 564 (N.B. C.A.).

he represents other persons having interests adverse to those of his principal, the agent will lose his right to compensation unless the principal, either expressly or by implication, consents to the dual appointment or waives or estops himself from asserting any objection.

The Court also considered whether or not clause 23 of the commitment agreement, which required the deposit of the commitment fee, constituted a genuine pre-estimate of damages or a penalty. The Court cited in this regard the decision of the House of Lords in *Dunlop Pneumatic Tyre Company* v. *New Garage and Motor Company.*[13] The principles therein enunciated are:

(a) the use of the words "penalty" or "liquidated damages" is not conclusive;
(b) a penalty is a payment *in terrorem* of the offending party whereas liquidated damages are a genuine pre-estimate;
(c) the question whether a sum is a penalty or liquidated damages is a question of construction based upon the terms and circumstances of each particular contract judged as at the time of its making; and
(d) it is no obstacle to the sum being held to be a genuine pre-estimate that the circumstances of the breach are such as to make pre-estimation virtually impossible.

Applying the law to the facts before it, the Court held that the retention of the entire commitment fee by the defendant Excelsior would be exorbitant and extravagant having regard to Excelsior's actual costs, and that it was therefore a penalty, and the B.L.T. should, therefore, be granted relief from forfeiture. However, the Court held that Excelsior was entitled to retain $15,000 in payment of its costs.

B. *BRENT PETROLEUM INDUSTRIES LTD.* v. *CAINE ENTERPRISES LTD.*[14]

This case involved the sale of two drilling companies by the defendants to the plaintiff by way of a share-for-share exchange. During the period between the execution of the agreement for sale and the closing, the drilling companies continued to carry on business, but the general downturn in the oil industry resulted in a substantial reduction in retained earnings. The plaintiff closed, notwithstanding that it was aware of this decline, but later sued for damages for alleged breaches of certain warranties and representations. The defendants counterclaimed, alleging that the plaintiff's shares were less valuable than agreed and claiming an indemnification in respect of certain guarantees which the plaintiff had agreed to assume.

The Court held that there had been a breach of a warranty, but that there had been no extraordinary losses, *i.e.*, in the words if the Court, losses "of a kind not usually met with by [the subject company]", on the basis of a comparison between the financial situation during the material period and that of similar periods in the two previous years.

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13. [1915] A.C. 79 (H.L.).
14. [1985]A.W.L.D. 064 (Alta. Q.B.).

The Court held that a warranty to conduct business in "its usual and normal manner" had not been breached, on the basis of a comparison between the material period and the period just prior thereto, rather than previous years, because there was no evidence "that there was any change in the style or substance of the management . . .".

The Court further held that a warranty that the defendants were not "aware of any fact which may have occurred or is likely to occur or any information which may have arisen which would or is likely to materially adversely affect the financial condition" had been breached. The warranty was interpreted to encompass facts which had occurred, were known to the vendors (whether or not such facts or information had already had an adverse effect) and which were likely to have an effect after closing.

The warranty that there would be no material adverse change in the financial position, except in the "ordinary course of business" was held not to have been breached because, although there was a material adverse change, it was in the "ordinary course of business", which was defined as being something which occurs normally in the kind of business under consideration.

The Court held that "substantial damage to assets" referred to physical damage. A covenant to conduct business in the ordinary course during the pre-closing period involves the application of the standards of the reasonable person in relation to a business of the relevant type.

The closing agreement before the Court in this case contained a clause stating that certain warranties and representations made in the letter agreement would survive closing, and made no mention of others. In respect of the others, the Court held that the doctrine of merger does not apply otherwise than with respect to conveyances of interests in land or the effect of judgments.

In respect of a breach of a representation and warranty, which is not an indemnity, the party at fault is liable for damages only in respect of reasonably foreseeable losses in the usual course of things, which losses did not arise in this case.

C. *GREAT NORTHERN PETROLEUMS & MINES LTD.* v. *MERLAND EXPLORATIONS LIMITED AND CANADA NORTHWEST LAND LIMITED* [15]

This case was discussed in the 1983 (22 Alta. L. Rev. 61) edition of this paper. The appeal by the plaintiffs, whose action was dismissed at trial, was dismissed. The Court of Appeal refused to interfere with what it considered to be findings of fact made by the trial judge as to which of three operating agreements applied and whether there was a breach of a fiduciary duty.

D. *BROWNE* v. *CORE RENTALS LTD.* [16]

This case dealt with an exculpatory clause in an equipment lease which purported to exclude the lessor's liability for damage caused by or arising

15. [1985] A.W.L.D. 157 (Alta. C.A.), discussed at (1984) 22 Alta. L. Rev. 78.

16. (1983) 23 B.L.R. 291 (Ont. S.C.).

out of the use of the leased equipment. The agreement also required the lessee to maintain fire and liability insurance. The Court referred to the Privy Council decision in *Canada Steamship Lines* v. *The Queen* [17] and held that the clause did not purport to exempt the lessor from liability for its own negligence. If there is no express reference to negligence, the Court must consider whether the words used are wide enough to cover negligence; the Court stated that in this case there was a strong doubt whether the words were broad enough. If the words were held not to be broad enough for that purpose, it was arguable that there are other heads of damage which might be covered by the clause, such as nuisance and trespass in relation to the rented machine.

The foregoing tests are based on the principle that the courts are loath to let a party contract out of its own negligence.

E. *ERNST AND WIEMERS* v. *DUMLICH* [18]

The plaintiffs entered into an agreement to purchase a guiding and outfitting business in northern British Columbia. One of the assets of the business was a "trapline", *i.e.*, an "area for which registration is granted to a licensed trapper for the trapping of fur-bearing animals". The relevant statutory provisions provide that traplines shall be registered only to a resident of the Province of B.C. who is a Canadian citizen, eighteen years of age and over. The trapline was registered in the name of an employee of the plaintiffs, who subsequently was fired and who refused to transfer registration of the trapline to his successor as the plaintiff's manager. The defendant alleged that, firstly, the transfer of the trapline to him was part of his employment compensation package and, secondly, in the alternative, if there had been no beneficial transfer to him, he was entitled to remain the registered owner of the trapline because both the purchase agreement and the agreement alleged to exist between the defendant and the plaintiffs were contrary to the provisions of the Wildlife Act (B.C.) and, therefore, were illegal and unenforceable.

On the evidence, the Court held that the arrangement between the plaintiffs and the defendant was that the trapline was to be registered in the defendant's name for his temporary use during the course of his employment, with the beneficial ownership of same reserved to the plaintiffs.

On the second issue, the Court held that the purchase agreement, insofar as it purported to convey the trapline, was illegal and unenforceable, with the result that the plaintiffs received no property in the trapline pursuant thereto and with the further result that there was nothing which could be made the subject of a trust or contract between the plaintiffs and the defendant.

The Court held that since the sale agreement was ineffective to transfer the trapline to the plaintiffs, they never enjoyed that right and were never in a position to impose any trust condition upon the defendant. Further-

17. [1952] 1 All E.R. 305 (P.C.).

18. (1984) 55 B.C.L.R. 285 (B.C. S.C.).

more, they could not require him to transfer the trapline to a new nominee.

The Court referred to *Holman* v. *Johnson*,[19] where it was stated that "no court will lend its aid to a man who founds his cause of action upon immoral or an illegal act. . . . The question therefore is, whether . . . the plaintiffs' demand is founded . . . upon the ground of his being guilty of anything which is prohibited by a positive law of this country". The Court also referred to *Re Mahmoud & Ispahani*.[20]

The Court held that the agreement between the plaintiffs and the defendant was void from the outset and that the plaintiffs should fail because the Court could not give effect to an illegal agreement. For the same reasons, the Court refused the plaintiffs' request for an accounting.

F. *THORNE RIDDELL INC.* v. *ROLFE* [21]

This case involved the trial of an issue to determine whether all or part of a parcel of land was held in trust by Abacus Cities Ltd. for its client-developers and the entitlement to the sale proceeds thereof. The Court held that there was a constructive trust, on the basis that the trustee, Abacus Cities Ltd., had breached its duty of full disclosure.

G. *CASCADE IMPERIAL MILLS LTD.* v. *LINDSAY AND ENGLISH BAY CEDAR PRODUCTS LTD.*[22]

In this action, the plaintiff relied on provisions in an employment agreement with the defendant Lindsay which prohibited Lindsay from competing with the plaintiff and which prohibited Lindsay from selling lumber products to any of the plaintiff's regular customers. These provisions were recognized as reasonable by the parties to the agreement because of the unique nature of the plaintiff's business and certain other factors.

The main ground of the plaintiff's appeal was that the trial judge had erred in applying *American Cyanamid Co.* v. *Ethicon Ltd.*[23] to an application for an injunction in respect of an alleged breach of a negative covenant. The plaintiff argued that where there is an alleged breach of a negative covenant, a court of equity will, by way of injunction, enjoin the doing of the thing which the parties have agreed shall not be done; the questions of the balance of convenience and irreparable harm are irrelevant. However, the Court held that the trial judge was correct in considering the questions of balance of convenience and irreparable harm, because the issue before the Court was whether the restrictive covenants were broad enough to prevent Lindsay seeking employment and, therefore, in restraint of trade. The Court cited authority to the effect that there should not be an absolute and inflexible rule in the case of the enforcement of negative covenants, since all equitable remedies are

19. (1775) 1 Cowp. 341 at 343, 98 E.R. 1120 at 1121.

20. [1921] 2 K.B. 716.

21. (1984) 58 B.C.L.R. 71 (B.C. S.C.).

22. (1985) 59 B.C.L.R. 392 (B.C. C.A.).

23. [1975] A.C. 396 (H.L.).

discretionary; courts of equity will often refuse orders to enforce negative covenants, on grounds of hardship.

H. *AMERADA MINERALS CORPORATION OF CANADA LTD.* v. *MESA PETROLEUM (NA) CO., DOME PETROLEUM LIMITED* [24]

This case concerned the proper method of calculating a royalty payable under a 1966 farmout agreement between the plaintiff and the predecessors of the defendants. The provision in question stated that the defendants were obliged to pay to the plaintiff, on all petroleum substances produced, saved and marketed from the subject lands, a gross overriding royalty of ten per cent of the "current market value at the time and place of production" and that for 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 first issue was whether the royalty was to be calculated free of or net of processing charges. The Court held that the plain ordinary meaning of the words was to be adopted in construing the document and that consideration of the commercial setting is relevant so that the court can know the commercial purpose of the contract. The word "produced" envisaged the point at which the product can be measured, where its value can be tested and where it can be stored and used, which is immediately downstream of the plant outlet. The Court further held that there should be a distinction made between marketability and enhancement and that the plaintiff is not entitled to the economic benefit of enhanced processing. The Court found that a certain proportion of the costs of operating one of the plants in question was referable to product enhancement and therefore deductible in computing the royalty, because this product enhancement was the objective of making the total stream of petroleum substances more valuable. The Court concluded that "plant outlet" in the clause meant that point in the particular plant where the objective of making the natural gas marketable is achieved, just short of the product enhancement referred to above.

On the second issue, the Court held that the royalty was to be calculated net of fuel gas used in the operation.

As to the plaintiff's claim for interest on the amount which ought to have been paid in respect of the improperly deducted processing charges, the Court held that the plaintiff was not entitled to interest because there was a genuine dispute between the parties and there was no evidence of anything improper about the defendant's conduct, beyond mere failure to pay an amount due.

I. *NORCEN INTERNATIONAL LTD.* v. *SUNCOR INC.*[25]

These proceedings involved an action for a declaration as to the interpretation of an overriding royalty caluse in a 1965 sublease agreement, and a counterclaim for the recovery of money had and received. The clause in question required the defendant to pay to the plaintiff a royalty

24. [1985] 4 W.W.R. 607 (Alta. Q.B.).

25. Action No. 8201-25068 (Alta. Q.B.).

equal to a certain percentage of the amount by which the price of crude oil exceeded a fixed amount.

In 1978, several years after the imposition of controlled domestic prices for crude oil produced in Canada, the defendant was able to obtain agreement from the federal government to authorize petroleum compensation payments in respect of certain of its production, with the result that, in effect, the defendant became entitled to world price for production from the Great Canadian Oil Sands project.

At issue was whether or not the petroleum compensation payments paid by the federal government to the purchasers of the defendant's oil, and in effect passed through to the defendant, were part of the "price received by GCOS for such barrel . . .".

The Court concluded that they were not. The parties contemplated an unregulated price for oil at the time the contract was entered into, and the ability thereafter of the defendant to obtain some additional benefit was not within the contemplation of the word "price". The Court was of the view that the parties took great care in drafting the language used to express their specific intent, and that these words ought to be given their "plain and ordinary meaning" because there was no absurdity, repugnancy or inconsistency.

The plaintiff also advanced the claim that the defendant was in a fiduciary position with respect to the plaintiff, with the result that the petroleum compensation payments were within the scope of the defendant's control over production and sale of crude oil. As a fiduciary, the defendant would have the obligation to account for profits. The Court looked to the terms of the sublease for the purpose of determining whether fiduciary obligations had been breached, and concluded that they had not.

The Court allowed the defendant's counterclaim for the amount of royalty it had mistakenly paid on the petroleum compensation payments before June 12, 1981. It held that payments made before that date were made under a mistake of fact, by virtue of the defendant's failure or omission to construe the material clause. On that date, a senior officer of the defendant made a decision that it ought to have a legal opinion prepared by outside counsel with regard to the matter but failed to instruct outside counsel until approximately one year later. The Court appeared to consider that the defendant at that time had directed its mind to the proper interpretation of the sublease and any payments made after that date were made under a mistake of law, namely, a mistake in the construction of the document.

J. *ORION CONSTRUCTION LTD.* v. *HUDSON'S BAY OIL AND GAS COMPANY LIMITED* [26]

This case concerned the interpretation of a contract for the construction of a pipeline. In its action, the plaintiff claimed various amounts in respect of extras. The Court found for the plaintiff in several of the claims and against the plaintiff in others. The particular matters with

26. Action No. 8203-01965 (Alta. Q.B.).

respect to which the claims were made are too numerous to mention here. The Court stated that while it is essential to insist that parties be held to their agreements, it is clear that the contract before the Court in this case was that of the defendant. Since the contract said a great deal about the plaintiff's responsibilities and very little about the defendant's, any ambiguities should be resolved in favour of the plaintiff.

K. *ALTA-WEST GROUP INVESTMENTS LTD.* v. *FEMCO FINANCIAL CORPORATION LTD. AND FEMCO VENTURES LTD.*[27]

This was an action for specific performance and damages for the breach of a real estate joint venture agreement. At the commencement of the trial, the plaintiff elected to proceed only with the claim for damages.

The first issue was whether a letter agreement constituted a binding contract between the parties, or was subject to the signing of a formal joint venture agreement. The Court held that the parties intended to and did enter into a binding agreement. The material clause stated that "the parties will be required to enter into a formal agreement and such agreement would contain the usual first refusal and 'shot-gun' provisions". The Court held that this did not constitute a condition precedent to the existence of a binding contract, but merely reflected the parties' intention to set out the terms of their agreement in a formal document. The Court did not consider the right of first refusal and "shot-gun" provisions to be essential. In this regard, the Court cited *First City Investments Ltd.* v. *Fraser Arms Hotel Ltd.*[28]

The Court rejected the defendants' argument that the contract had been frustrated because the development project had become economically inadvisable. The parties had clearly contemplated the possibility that the building development would not proceed and, in any event, economic inadvisability does not result in the frustration of a contract.

In assessing damages, the Court considered whether damages are to be calculated at the date of the defendant's breach of the agreement or at the date of trial. At common law, the usual rule for the assessment of damages due a purchaser is that the difference between the contract price and the market price for the land at the date of the breach is to be measured. However, the general common law rule for measurement of damages is that where a person sustains a loss through a breach of contract, he is to be placed in the same position as if the contract had been performed, insofar as that can be done by money. In Canada, it is this latter rule that has been followed in cases of breach by a purchaser where the subject property has been resold. The Court held that where the decision by the innocent party to accept repudiation is made at the commencement of the trial, that is the appropriate time at which damages ought to be measured. To utilize the date of breach would be to force the innocent party to accept the other's repudiation as at the date of that

27. Action No. 8203-21479 (Alta. Q.B.).

28. (1979) 6 W.W.R. 125 (B.C. C.A.).

repudiation. The Court noted that the loss in value of the property was a reasonably foreseeable consequence of the defendant's breach.

The Court refused to award the present value of future interest and taxes, because to do so would be highly speculative and unjustified on the evidence and because no legal authorities were cited to permit such an award.

L. *THORNE RIDDELL INC., TRUSTEE OF THE ESTATE OF ABACUS CITIES LTD., A BANKRUPT* v. *KEITH C. ROLFE* [29]

The trustee applied for a determination whether or not the client-developers were creditors of the bankrupt under the Bankruptcy Act (Canada) and therefore entitled to rank as creditors against its estate. The Court examined the nature of the relationships between Abacus Cities Ltd. and its client-developers and stated that Abacus was an independent contrctor with respect to the client-developers, not subject to control as to the details of work to be performed. Each client-developer gave a great degree of control and authority to Abacus as to how it dealt with the money provided by a client-developer. This money was commingled with other funds of Abacus and could not be traced. Each client-developer was aware that Abacus was engaged in a number of projects similar to the one in which he had invested.

The Court held that Abacus would be liable, if at all, in damages for breach of contract or tort and not in debt.

IV. CREDITORS' RIGHTS

A. *FIRST NATIONAL SECURITIES LTD.* v. *HEGERTY AND ANOTHER* [30]

This case concerns the creation of an equitable charge. A husband, who with his wife held their family home as joint tenants, made a loan application and executed a legal charge in respect of the family home. The wife's signature was forged. It was held that since the wife was not a party to the loan agreement, she incurred no liability in respect thereof and the loan agreement took effect as if it was the husband's agreement alone. Since the wife did not execute the legal charge to the lenders, she incurred no liability under that instrument, but the instrument was a sufficient act, by the husband, to sever the beneficial joint tenancy and to convert the husband and wife into tenants in common and it was also effective to create a valid equitable charge in favour of the lenders.

B. *THAMES GUARANTY LTD.* v. *CAMPBELL* [31]

This case also concerns the creation of an equitable charge. The Court held that the following passages from three separate credit facility letters (between the husband and the plaintiff) did not create an equitable charge on a home owned by a husband and wife as joint tenants:

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29. Action No. 8301-02909 (Alta. Q.B.).
30. [1984] 1 All E.R. 139 (Q.B.).
31. [1984] 1 All E.R. 144 (Q.B.).

(a) this facility is to be secured by a first charge on your property at . . .;
(b) this facility will continue to be secured by a first charge on the property owned by you and your wife at . . .; and
(c) this facility will continue to be secured by the first charge given by yourself on the property at . . . which is owned jointly by your wife and yourself.;

because they constituted a promise to create a charge of the entire legal and beneficial interest in the property, and it was not within the husband's power to charge that entire interest.

The Court cited the decision of the Court of Appeal in *Swiss Bank Corp.* v. *Lloyd's Bank Ltd.*,[32] which was affirmed in the House of Lords.[33] It was there stated that an equitable charge may take the form of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable mortgage is created when the legal owner of the property does some act which is not sufficient to confer a legal estate but nevertheless demonstrates a binding intention to create a security. An equitable charge which is not an equitable mortgage is created when the property is expressly or constructively made liable to the discharge of a debt or some other obligation and confers on the recipient of the charge the right to realize by judicial process.

The company also argued that it was entitled to an equitable charge on the basis of the deposit with the company of the documents of title by the husband. The Court held that a deposit of title deeds by one joint tenant without the consent of the other is not effective to operate as an equitable charge. The deposit is effective only if the creditor can retain custody of the deeds until the debt is paid. However, joint owners of a legal estate are jointly entitled to custody of the title deeds and can act only with unanimity. The other joint owner, in this case, has always been entitled to request the return of the title deeds to the joint custody of herself and her husband.

C. *ROYAL BANK OF CANADA* v. *MAPLE FORD SALES LTD.*[34]

The applicant, the Federal Business Development Bank, applied for an order setting the priority of a fixed charge on certain equipment in favour of the FBDB as against the floating charge in favour of The Royal Bank of Canada. On January 27, 1978, Maple Ford Sales Ltd. executed a debenture in favour of the Royal Bank which was filed under the Corporations Securities Registration Act on January 31, 1978. It contained a fixed charge on certain equipment and real estate as well as a floating charge. On July 15, 1981, Maple executed a debenture in favour of the FBDB which was filed under the same Act on July 24, 1981 and which contained a fixed charge on certain other equipment and a floating charge.

The solicitor who was instructed to provide the FBDB with security added to the preprinted form of debenture supplied by the FBDB, words to the effect that it was subject to a first charge in favour of The Royal Bank by debenture dated January 27, 1978. The Royal Bank took the position

32. [1980] 2 All E.R. 419 (C.A.).
33. [1981] 2 All E.R. 449 (H.L.).
34. (1983) 24 B.L.R. 166 (N.S. S.C.T.D.).

that its floating charge has priority over the fixed charge held by the FBDB.

The Royal Bank debenture contained a usual provision regarding sales in the ordinary course of business and a provision that Maple would not create any other security, whether fixed or floating, which ranked or purported to rank in priority to or *pari passu* with the security created by The Royal Bank debenture.

The Court held the FBDB had actual or constructive notice of all of the contents of the Royal Bank debenture, and that the FBDB debenture was subject to the Royal Bank debenture because of the words added by the solicitor. The Court held that it was irrelevant that the solicitor may have been exceeding his authority.

D. *ADRIATIC DEVELOPMENT LTD.* v. *CANADA TRUSTCO MORTGAGE CO.*[35]

The Court held that a clause in a mortgage, which had been executed and registered and then discharged, to the effect that the lender would not be bound to advance the principal sum or the balance thereof and that advances would be in the sole discretion of the lender, gave the lender an absolute discretion which it had exercised. The lender, therefore, did not commit a breach of contract.

E. *NUWEST GROUP LTD.* v. *100433 CANADA INC.*[36]

This was an application for an order that a requisition on title had been validly answered. The vendor of certain land and a third party (the owner of land immediately adjacent to the vendor's land) had agreed that the third party would construct a pumping station and related facilities and that the vendor would pay the cost thereof on the earlier of two dates, one of which was the sale of any or all of the vendor's land. The Court held that this agreement did not create an equitable mortgage, because an essential feature thereof is the common intention of the parties to make the property in question security for the debt. An acknowledgement which permits lenders to share in the proceeds from a sale of the property does not amount to an equitable mortgage.

However, the Court stated that while an equitable charge is normally founded upon a contract, an equitable lien can arise by operation of law or equity. The Court stated, however, that it was not prepared to hold that a court of equity would refuse to recognize an equitable lien in the present situation. The application was dismissed.

F. *CANADIAN IMPERIAL BANK OF COMMERCE* v. *WHITTIN*[37]

The bank sold certain assets seized pursuant to s. 179 of the Bank Act, and claimed an amount in respect of the deficiency. The defendant debtor counterclaimed on the basis of the alleged failure of the bank to sell

35. (1983) 2 D.L.R. (4th) 183 (B.C. C.A.).

36. (1984) 33 R.P.R. 93 (Ont. Dist. Ct.).

37. (1984) 12 D.L.R. (4th) 326 (N.S. S.C.A.D.).

the goods at prices that could have been realized by careful advertising and sale. At trial, it was held that the bank's claim for deficiency should be reduced by $85,000, because the bank had, in the opinion of the trial judge, failed to act "honestly and in good faith" and had failed to deal with the property in a manner appropriate to the nature of the property and the interests of the person by whom the security was given, which are the requirements set out in s. 179(4) of the Bank Act.

The bank's appeal was allowed in part. The bank was held to be liable for the loss of the certified disease-free status of certain cattle, by removing cattle from the debtor's farm, but the Appellate Court held that the Bank Act, by authorizing sale by public auction, contemplated that the best possible price for security may not be obtained, and that the bank was not required to act as the manager of the debtor's business.

G. *CANADIAN IMPERIAL BANK OF COMMERCE* v. *FEDERAL BUSINESS DEVELOPMENT BANK* [38]

The plaintiff was an assignee under an assignment of book debts from the corporation, and the defendant was the holder of a debenture granted by the corporate defendant. The debenture allowed for the corporation to assign its receivables. The defendant was aware of the giving of the assignment and that the plaintiff was advancing money on the strength of the assignment. Judgment was for the plaintiff because it had become the owner of the receivables in existence up to the date of the appointment of the receiver. The defendant's receiver had converted the funds which he had collected and had used them in a manner inconsistent with the plaintiff's right of possession.

H. *CANADIAN IMPERIAL BANK OF COMMERCE* v. *281787 ALBERTA LTD.*[39]

The issue before the Court was the priority as between the claim of Richfield, as an unpaid landlord who had instructed seizure of the assets of Crockett's Western Wear, and the bank, who had taken s. 178 Bank Act security but had registered a notice of intention only after the security had in fact been taken. The Court held that, on its plain wording, s. 178(4)(a) of the Act required the registration of the notice of intention prior to the actual granting of security and rejected the bank's argument that by registering the notice after the granting of security, the bank had acquired a priority as and from the date of registration. The security was held to be invalid by reason of a failure to register the notice prior to the granting of security.

I. *RE EL-ROSA MODES LTD.*[40]

The Court held that s. 178 security granted after the bank had made the last loan advance was not valid and enforceable, because s. 180 requires that the bank shall only acquire s. 178 security if the loan is con-

38. [1985] A.W.L.D. 236 (Alta. Q.B.).
39. [1984] 5 W.W.R. 282 (Alta. C.A.).
40. (1984) 52 C.B.R. 194 (B.C. S.C.).

tracted or made at the time of the acquisition of the security or on the written promise to give such security.

J. *CITY OF VANCOUVER* v. *SMITH; CANADIAN IMPERIAL BANK OF COMMERCE* v. *SMITH*[41]

This case concerned an application to determine the priority of claims to proceeds of the sale of land. In a letter of undertaking, the debtor had undertaken to raise alternative financing to apply on any loans with the bank if so requested by the bank, or to provide collateral mortgage security to support such loans. At the time of the giving of the undertaking, the property in question was the only real estate owned by the debtor. The issue was whether or not the undertaking created an equitable mortgage over the real estate in question. The Court held that it did not, although a mortgage is created in equity by a contract wherein a person agrees, when required to do so, to execute a legal mortgage. The undertaking simply gave the bank the right to call on the customer to raise money elsewhere or to provide security. It created an option, probably that of the borrower, and if so could not constitute an agreement to execute a mortgage. Even if it was the option of the bank, the letter did not create a covenant constituting an equitable mortgage.

K. *BANCORP FINANCIAL LIMITED* v. *RANFURLY INVESTMENTS LTD.*[42]

This was an appeal from a Master's decision. It was held on appeal that an assignment of rents was not an assignment of book debts and that a general assignment of choses in action included an assignment of rents. Both of these assignments were equitable assignments. The Court applied the rule in *Dearle* v. *Hall*,[43] which is that where notices of several encumbrances are simultaneously given, the encumbrances will rank in the order that they have been created; provided that in determining whether notices have been simultaneously given, portions of days will be taken into account. Each fund-holder who is served, for example, with respect to rents owing, is bound with respect not only to rents owing at that moment but with respect to all rents which may subsequently become due to the assignor.

An assignment of rents is not an assignment of book debts because the nature of the tenant's obligation is quite different from the obligations of a debtor to his creditor. The Court also held that an assignment of rents is not a floating charge. Furthermore, the assignment of rents states that "all money received . . . shall be received and held by the customer in trust for the bank", and this clause has been previously held to create an immediate and specific assignment, rather than a floating charge.

41. (1984) 33 R.P.R. 189 (B.C. S.C.).
42. Action No. 8303-07449 (Alta. Q.B.).
43. (1828) 38 E.R. 475.

V. PARTNERSHIPS

A. *MOLCHAN* v. *OMEGA OIL & GAS LTD.*[44]

The trial decision in this case was discussed in the 1984 paper. On appeal, the Alberta Court of Appeal reversed the trial decision. The reasons for judgement on appeal were released by the Court on September 4, 1985 and are not yet reported.

B. *LEE* v. *BLOCK ESTATES LTD.*[45]

The plaintiffs were the limited partners of two limited partnerships established for the purpose of constructing and selling two condominium projects in the Lower Mainland area of British Columbia.

The defendant Block Estates Ltd. was the Class B Limited partner in each of the limited partnerships and had been brought in when the limited partnerships experienced financial difficulties. The first-named plaintiffs were Class A limited partners and the second plaintiff was the general partner. The arrangement which was made for the entry of the defendant into the limited partnership was that it would make up the monthly operating deficit of the limited partnership and in exchange receive the allocation of the soft costs and other available write-offs.

The tax write-offs which eventually became available to the defendant did not meet its expectations which had, in part, been formed on the basis of representations made by the general partner and the general partner's accounting firm. When these shortfalls came to the attention of the defendant through its review of the financial statements of the limited partnership, it refused to continue to advance funds sufficient to cover the operating deficit and claimed the right to set-off, against the shortfall from the tax write-offs, the amount which it would otherwise have been obliged to pay in respect of the operating deficits.

Prior to the judgment being handed down after trial, a tentative settlement was reached between the general partner (on behalf of the limited partnership) and the defendant. However, the limited partners maintained their action against the defendant because the Class A limited partners did not stand to gain the same benefits as the general partner and Block from this settlement.

McEachern C.J.S.C. held that the rule in *Foss* v. *Harbottle*,[46] which is that the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or association of persons itself, applies not just to corporations but also to associations of persons such as partnerships, in view of the absence from the Partnership Act (B.C.) of any provisions regarding derivative and representative actions, similar to the rules in the Company Act (B.C.). The Court held that the Class A limited partners could not enforce the defendant's covenant to contribute capital to fund the

44. 51 A.R. 54 (Alta. Q.B.), discussed at (1985) 23 *Alta. L. Rev.* 203 (appeal decision as yet unreported).

45. [1984] 3 W.W.R. 118 (B.C. S.C.).

46. (1843) 2 Hare 461.

operating losses. It is important to note, however, that the Class A partners did not bring a derivative or representative action, which precluded the Court, in its view, from applying the exceptions to the rule in *Foss* v. *Harbottle.*

McEachern C.J.S.C. stated that if the Class A limited partners had standing, they could require the defendant to pay the amount it ought to have paid to the limited partnership. The general release given to the defendant by the general partner on behalf of the limited partnership would not be effective as against the representative or derivative rights of the Class A limited partners, because the general partner has, by releasing the defendant from an obligation owed to the limited partnership, avoided a substantial personal obligation. The general principle is that a wrongdoer who is in control of the enterprise cannot rely upon the rule in *Foss* v. *Harbottle* to preclude the enforcement of representative or derivative rights.

VI. ABORIGINAL LAND CLAIMS

A. *OMINAYAK* v. *NORCEN ENERGY RESOURCES LIMITED* [47]

The Court dismissed the plaintiff's application for an interim injunction in a class action seeking a declaration as to the plaintiff's rights in respect of approximately 8,500 square miles of land in Alberta. The plaintiff's claim was that the oil and gas exploration activity of the defendant was driving away wild animals and threatening to destroy the plaintiff's culture and way of life. The Court held that the plaintiff had failed to prove that the defendant's activities were causing the harm alleged and the balance of convenience favoured the defendant.

Leave to appeal to the Supreme Court of Canada has been refused.

VII. COPYRIGHT

A. *INTERNATIONAL BUSINESS MACHINES CORP.* v. *SPIRALES COMPUTERS INC.*[48]

This case concerned an application by the plaintiff for an injunction to restrain the defendant from importing and selling certain computers which contained a copy of a program which had been copyrighted by the plaintiff. The program was one which was recorded in read-only memory mounted in the IBM personal computer and intended to remain there permanently.

On the copyright issue, the Court refused to interpret s. 4 of the Copyright Act restrictively and found authority for the Court to be cognizant of changes in ideas and technology in construing copyright legislation. The Court cited authority for the proposition that copyright law is basically and fundamentally concerned with the expression of ideas rather than with the purpose of those ideas. The Court also noted that the

47. [1985] A.W.L.D. 247 (Alta. C.A.).

48. (1984) 12 D.L.R. (4th) 351 (F.C. T.D.).

program is reduced to material form in the technical manual, which has been published.

On the balance of convenience issue, the Court stated that the relative sizes of the plaintiff and the defendant was not the only consideration. The effect of not granting an injunction may encourage others to breach the copyright of the plaintiff. Furthermore, the plaintiff might suffer a loss of business credibility if its dealers' confidence was lost. The plaintiff pointed out that it may never be able to prove its damages because of the inadequacy of the defendant's accounting systems and bank records. The Court also noted that since copying does not normally take place inadvertently, the courts are more willing to grant injunctions in clear cases of copying, without requiring a finding of irreparable harm or inadequacy of damages.

VIII. REAL PROPERTY

A. *DYCK* v. *SHINGLES ESTATE* [49]

This case is support for the proposition that real property cannot be the subject of a *donatio mortis causa*. Secondly, any gift *inter vivos* or *donatio mortis causa* must be complete to be effective. For example, a delivery of an executed transfer, without the duplicate certificate of title, renders a gift incomplete.

In this case, all that was delivered were the keys to the house in question, and the Court held that this was hardly satisfaction of the criteria of the definitions of a gift *inter vivos* or a *donatio mortis causa*.

B. *257565 B.C. LTD.* v. *BARTELL BROTHERS CONSTRUCTION LTD. AND 1280 MANAGEMENT CORPORATION* [50]

The petitioner sought to have certain property sold in lieu of partition pursuant to the Partition of Property Act (B.C.). The parties were party to a joint venture agreement relating to the property and were trustees pursuant to a declaration of trust. There was disagreement between the parties as to whether or not the property should be sold, which gave rise to the application.

The joint venture agreement provided that none of the parties could sell their respective interests in the joint venture agreement unless they had first offered their interest to the other parties on the same terms as those on which they proposed to sell. The agreement also contained an arbitration clause governing disputes remaining unresolved for a period of fifteen days.

The Court cited the principle that trustees must act unanimously and held that the petitioner was not one of those entitled under the Act to a right of partition, because the question of the sale of the property was covered by the joint venture agreement. Furthermore, were it not for the arbitration clause, the trustees would be required to agree unanimously as to how the property should be dealt with.

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49. (1984) 54 A.R. 382 (Alta. C.A.).

50. (1983) 50 B.C.L.R. 155 (B.C. S.C.).

C. *CAPTAIN DEVELOPMENTS LTD.* v. *NUWEST GROUP LTD.*[51]

The plaintiff respondent claimed damages under the Land Titles Act (Ontario) and the Judicature Act (Ontario), on the basis that a caution had been registered on its lands without reasonable cause and without a reasonable claim to title to or an interest in the lands.

The defendant had purported to exercise an option to purchase certain lands pursuant to an 1980 agreement between the parties. This agreement created a number of areas of difficulty which made the exercise of the option difficult. At trial, the judge concluded that there was no contract created by the purported exercise by the defendant of its option and that the defendant had acted in bad faith.

However, the Court of Appeal held that, even if the trial judge was correct as to the first matter, his finding did not have the significance which he gave to it. This judicial determination was not conclusive of whether the defendant had reasonable cause to register a caution or whether it had a reasonable claim to title or an interest in the lands.

As to the second matter, the Court of Appeal held that the defendant had attempted to comply with the 1980 agreement in purporting to exercise its option and had taken what appeared to be appropriate legal action at that time. Therefore, it could not be said that the defendant had acted in bad faith.

D. *PATTERSON* v. *GALLAUGHER*[52]

This case concerned an action for a declaration that the plaintiff had title to certain property. The dispute related to a triangular parcel of land between two residential lots. The parcel was approximately 3.6 meters at its base and had two sides of approximately sixty meters each. The plaintiff and its predecessors had continuous, open, undisputed and sole possession of the parcel for the forty-five years preceding a conveyance of it to the Director under the Veterans' Land Act (Canada), and claimed a possessory title as against the Director. The Court stated that the plaintiff would have a good possessory title against all persons other than the Crown, prior to 1968, but that the case turned on the effect of s. 5(3) of the Act, which provides that all conveyances from the Director constitute new titles and have effect as grants from the Crown of previously ungranted Crown lands. The Court held that the plain meaning of this provision is that a grant from the Director is to be treated as if it were a Crown grant, with the result that a prescriptive title could only be acquired by the plaintiff as against the Crown in accordance with s. 3(1) of the Limitation Act (Ontario), which provides for a requirement of sixty years of adverse possession.

The plaintiff argued that the Director could convey nothing more than he had received from his vendor, who held the paper title to the parcel in dispute. However, the Court held that the purpose of s. 5(3) is to enable the Director to give good title to lands which he purports to convey.

51. (1983) 6 D.L.R. (4th) 179 (Ont. C.A.).

52. (1983) 10 D.L.R. (4th) 151 (Ont. H.C.J.).

During the course of argument, the matter of the constitutional validity of s. 5(3) was raised but not decided. Interestingly, and in contrast to Alberta cases regarding minerals underlying Soldiers Settlements lands, the Court stated that it had grave doubts as to the constitutional validity of s. 5(3).

E. *RE CO-OP CENTRE CREDIT UNION LTD.* v. *GREBA* [53]

The respondent lender held first and second mortgages on the appellant's land and, as further security, held a registrable transfer of land. The respondent had applied for an order for possession.

The first issue before the Court was whether the respondent had a right to possession. The Court held that it did and that the right derived from the transfer.

The second issue was whether the respondent ought to be permitted to exercise any rights it derived from the transfer without pursuing foreclosure proceedings. The Court held that it ought not to be so permitted, because a mortgagee cannot, unless it has obtained a final order pursuant to s. 41(2)(b) of the Law of Property Act, exercise any rights as owner which the mortgagor may grant it prior to default. The Court stated that s. 41 is based on the policy that a mortgagor has a right, which he cannot waive or release prior to default, to have a court consider whether there ought to be a judicial sale attempted before the mortgagee is able to foreclose the equity of redemption. The Court recognized that Alberta's foreclosure rules address themselves to Torrens mortgages, which this one was not. However, s. 41 must be considered in a broader context, which is an intervention by the Legislature to prevent a mortgagee from exercising rights set forth in the contract. The Court stated that there was a recognition that there had been "no equality at the bargaining table" and cited these provisions as an "early example of consumer protection law".

IX. SALE OF LAND

A. *BERNARD ET AL.* v. *WEISS* [54]

This case involved a failure to close and complete the sale of a residence. The interim sale agreement stipulated that the title was to be clear of all encumbrances except, among other things, certain easements and right-of-ways. In the handwritten portion of the agreement, the document specified that cash was to be paid for "clear title". The defendant refused to close the transaction after the plaintiff refused or was unable to have certain easements for hydro, telephone and sewer removed from the title. As a result of the failure to close, the plaintiff was unable to complete the purchase of a substitute home and paid its vendors approximately $10,000 in damages for a release from liability. The vendors subsequently sold the subject home for some $30,000 less than the agreed-upon price.

53. (1984) 10 D.L.R. (4th) 449, 33 R.P.R. 71 (Alta. C.A.).
54. (1983) 31 R.P.R. 185 (B.C. S.C.).

The Court held that the easements in question, being of a relatively insignificant nature, would not have significantly detracted from the use and enjoyment of the subject property.

The defendant argued that the "cash for clear title" provision conflicted with the aforementioned printed provision regarding title and that, as a result, the agreement was so ambiguous as to be unenforceable. The Court held, however, that these alleged ambiguities could be resolved within the four corners of the agreement and that the intention of the parties could be clearly made out. It held that the phrase "cash for clear title" referred to financial encumbrances only, and, therefore, did not conflict with the printed provision.

B. *McKAY* v. *HIMMEL HOLDINGS CORPORATION AND CANADIAN IMPERIAL BANK OF COMMERCE* [55]

This was an appeal from an order cancelling an agreement for sale. The agreement provided for the sale and purchase of a parcel of land and for the payment of the purchase price in three installments. An initial payment was to be made on the execution of the agreement and the balance was to be paid as follows:

> $175,000 plus interest at Vendor's bank rate, prime plus 2% on May 31, 1981 and a final payment of $340,000 plus interest at Vendor's bank rate, at prime rate plus 2% on January 31, 1982.

The purchaser was to receive a conveyance of ten acres upon receipt of the initial payment and a further five acres upon receipt of the second payment. The balance of the land was to be conveyed upon receipt of the final payment. The first and second payments were made, but a total of only ten acres was conveyed to the purchaser. However, no complaints were made by the purchaser until after the litigation was commenced by the vendor. The purchaser alleged that the agreement was unenforceable because it was void for uncertainty.

The Court repeated the principle set forth in *First City Investments Ltd.* v. *Fraser Arms Hotel Ltd.*,[56] where it was said that the court must give effect to the real intentions of the parties by supplying anything necessary to be inferred and by rejecting whatever is repugnant, if those intentions can be collected from the language within the four corners of the instrument. Only the lack of a term so essential to the contract, without which a court cannot collect the real intention from the instrument and so cannot give effect to those intentions, will render the contract unenforceable.

The Court concluded that it was the purchaser who was to have the land surveyed and who was to obtain subdivision, and thereafter designate the parcels which it wanted conveyed at the time of the payment of installments, and that it was clear that interest was to be calculated and payable on the installment dates on the whole principal balance outstanding, whereas interest on overdue installments was to be calculated on the total of the installment due, excluding regular interest.

55. (1983) 51 B.C.L.R. 74 (B.C. C.A.).

56. *Supra* n. 28.

The rate of interest was to be a fluctuating rate as opposed to the rate in effect at the date of execution.

The purchaser also alleged that the document did not provide for interest after maturity and that the Trial Court was wrong in ordering interest. The Court followed the principle set out in *International Railway* v. *Niagara Parks Commission*,[57] where it was held that where a court grants specific performance in a case where a purchaser has obtained possession before payment, the purchaser must in the absence of express agreement pay interest on the purchase price from the date when he gets possession until the date of payment, because it would be inequitable for him to have the benefit of possession and also of the purchase money.

C. *LEMESURIER* v. *ANDRUS* [58]

This was an action for damages for breach of an agreement of purchase and sale between the plaintiffs as vendors and the defendant as purchaser. The defendant refused to complete the purchase because the vendors failed to provide title to an area of encroachment comprising approximately twelve square feet and being approximately 0.16 per cent of the area of the property. The property was a residence for which the agreed upon purchase price was substantially in excess of $500,000. The encroachment related to the curb of the driveway being approximately three inches to the west of the actual boundary line of the property. When the purchaser notified the vendors of the encroachment and made a requisition on title to this area, the vendors responded by having the encroaching curb moved onto the subject property. The purchaser, nevertheless, refused to complete the sale.

The Court concluded that the premises described in the agreement included the west curb of the driveway as it existed at the time the purchaser viewed the property. The relocation of the curb was an improper response to the title requisition which brought the agreement to an end, according to its own terms, with the result that the purchaser was not in breach at the time of closing.

The Court next considered the doctrine of substantial performance. The plaintiff argued that it had offered substantial performance and that there is no distinction in law between contracts dealing with the sale of land and other types of contracts, insofar as this doctrine is concerned.

The Court held that the absence of the twelve square feet in question was material and not encompassed in the *de minimis* rule. The question of materiality and substantiality are, however, different questions. The Court stated that if this was an action for specific performance as opposed to an action for damages, and if the provision in the agreement regarding unanswered title requisitions did not apply, it would have to consider whether it would grant specific performance with abatement. In such a situation, the onus would be upon the plaintiff vendors to satisfy the Court that the reduction in the quantity of land was not substantial to the defendant purchaser. The Court doubted that the plaintiffs could

57. [1941] A.C. 328 (P.C.).

58. (1984) 31 R.P.R. 143 (Ont. S.C.).

meet that burden because, in a residential real estate transaction for a purchase price in excess of $500,000, even the loss of twelve square feet is sufficient to deprive a purchaser of substantially what he bargained for. The Court held further that there is a significant distinction between the remedies available in an action at law for damages for breach of contract in respect of the sale of land and the remedy of specific performance with abatements. The latter remedy was not available in this case, because the plaintiffs had resold the property.

The Court construed the agreement to require the vendors, on the closing date, to convey all of the land that was the subject of the agreement, and that this was a condition precedent to the purchaser's obligation to pay the purchase price. Neither at equity nor at common law would a court apply the doctrine of substantial performance with compensation or abatement in the face of contractual provision requiring exact performance.

D. *JORIAN PROPERTIES LTD.* v. *ZELLENRATH* [59]

This was an appeal and cross-appeal from a judgment awarding the appellant purchaser nominal damages for breach of a warranty in an agreement for sale between the appellant plaintiff and the first defendant.

The agreement for sale included the following terms:

The Vendor warrants as follows:

> (a) the property may continue to be lawfully used as it is presently being used.
>
> . . .
>
> (c) all zoning by-laws have been complied with.

The property was being used as a five-plex at the time of sale, but was in an area zoned only for three-plexes. Until late in the proceedings, the plaintiff's claim was described by it as one for damages for breach of warranty. The Court stated, however, that the plaintiff's perception of the term might not be determinative if the term was clearly one of critical importance. The classification test set out in *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.* was set out:[60]

> . . . does the occurrence of the event deprive the party with further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

Nowhere in the plaintiff's evidence was it stated that it was essential that the property in question be a five-plex. Thus, the terms in dispute were not conditions. The Court stated that, had the transaction closed, the diminished rental value would have formed the basis for a claim in damages. It did not appear that the conveyance of a property which could be used only as a three-plex rather than as a five-plex would have deprived the plaintiff of substantially the whole benefit of the contract. This view was reinforced by the fact that the plaintiff, after the first defendant had sold the property to the second defendant, purchased the property at a higher price from the second defendant. This circumstance

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59. (1984) 10 D.L.R. (4th) 458 (Ont. C.A.).

60. [1962] 1 All E.R. 474 (C.A.).

paralleled that in *Cehave N. V.* v. *Bremer Handelsgesellschaft m. b. H.*,[61] where the original buyer of animal feed, who had rejected the entire shipment, purchased it for one-third of the contract price and used it for its intended purpose.

Having elected not to complete the contract, the plaintiff was held not to be entitled to damages for breach of warranty.

E. *259202 ALBERTA LTD.* v. *BARNIEH INVESTMENTS LTD.*[62]

A purchaser was held entitled to recover his deposit money when the vendor failed to exercise his option to purchase the subject property from a third party. The Court held that unless the contract otherwise stipulates, the purchaser is entitled to require the vendor to provide good title by exercising the option by the completion date. If the vendor declines to exercise his option, the purchaser may lawfully rescind the contract and recover his deposit money. In this case, the agreement did not deal with the question whether the option was to be exercised.

F. *MORETTA* v. *WESTERN COMPUTER INVESTMENT CORPORATION LTD.*[63]

The appellant entered into an agreement to purchase an apartment block from the respondent. The agreement of purchase and sale included a statement to the effect that the existing first mortgage, which was to be assumed by the appellant, had a term which ended in November, 1985. The remaining principal payable in respect of the first mortgage represented approximately sixty per cent of the purchase price. In fact, the term of the first mortgage ended in November, 1980 and the appellant was forced to seek alternate financing at an interest rate which was more than fifty per cent higher than the interest rate under the existing first mortgage. Neither the appellants nor their solicitor examined the first mortgage, a copy of which would have been available from the Land Titles Office and which would have disclosed the actual maturity term of the mortgage. A transfer was registered and title issued in the name of the appellants.

There were two issues before the Court. The first was whether the statement contained in the agreement of purchase and sale was a mere representation or a warranty. If the statement was a mere representation, damages would not be available after completion of the transaction, whether or not the doctrine of merger applied. If the statement was a warranty, damages would be available after completion unless the doctrine of merger applied to merge the warranty into the transfer.

The Court concluded that the statement was a warranty and stated that if there is any doubt as to whether a statement of fact contained in an agreement is a warranty or not, this doubt should be resolved against the person giving the statement.

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61. [1976] 1 Q.B. 44 (C.A.).
62. [1984] Alta. D. 2244-01 (Alta. C.A.).
63. (1983) 50 A.R. 168 (Alta. C.A.).

The Court cited a number of authorities which show that the question whether a statement is a mere representation or a warranty is a question of construction and that the court must look at the language of the document and the circumstances under and purpose for which the document was entered into.

Whether the purchaser could have discovered a breach by taking ordinary care is important but not conclusive. The factor which is of greatest assistance in determining the intention of the parties is the importance of the matter to which the words relate. The term of the mortgage would be extremely important, considering that the principal amount represented approximately sixty per cent of the purchase price.

The second issue before the Court was whether the warranty was merged in the transfer of the property. The Court held that it was and cited the Privy Council decision in *Knight Sugar Company Ltd.* v. *Alberta Railway and Irrigation Company*,[64] where it was held that when parties enter into an agreement which is to be carried out by a subsequently executed deed, the completed contract is to be found in the deed and the executory agreement is merged with the deed. All of the rights of the purchaser in relation to the executory contract are satisfied by the deed, but there may be provisions in the executory contract which, by their nature, survive completion. The Supreme Court of Canada held in *Fraser-Reid* v. *Droumtsekas* [65] that the doctrine of merger is not applicable to independent covenants or collateral stipulations in an executory agreement of sale, where these provisions are not intended by the parties to be incorporated into the conveyance. The issue is whether the facts disclose a common intention to merge, in the absence of which there is no merger.

The Court held that it did not find any evidence of a common intention to displace the presumption respecting the matter going to title and decided that the provisions as to the mortgage were merged in the transfer.

G. *WISHLOFF* v. *BOYKO* [66]

The purchasers purchased a home and acreage which was represented by the defendants to have "two very good wells". In fact, the wells on the property were seriously inadequate and the plaintiffs were forced to have a deep well drilled on the property and to have a pressure tank and pressure pump installed. The plaintiffs claimed damages from the defendants.

The Court examined two legal issues. The first of these was the plaintiff's contention that the statement regarding the wells was a collateral warranty. All of the authorities cited by the Court required that before a collateral warranty can be found to exist, it must be determined that the alleged warranty is not in conflict with the agreement to which the alleged warranty is argued to be collateral. The interim agreement before the Court provided that the purchaser agreed "that there is no representation, warranty, (or) collateral agreements". In this case, a collateral war-

64. [1938] 1 W.W.R. 234 (P.C.).

65. (1980) 9 R.P.R. 121 (S.C.C.).

66. (1984) 52 A.R. 260 (Alta. Q.B.).

ranty would be inconsistent with the interim agreement and the Court held that there was, therefore, no collateral warranty.

The second issue before the Court was whether or not there was a negligent or fraudulent misrepresentation. The Court quoted from the reasons for judgment of Lord Herschell in the classic case *Derry* v. *Peek*,[67] where the elements of an action for deceit are set out, *i.e.*, firstly, that there must be proof of fraud and nothing short of that will be sufficient and, secondly, that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly with no care taken as to whether it is true or false.

X. TORTS AND THIRD PARTY LIABILITIES

A. *REVELSTOKE CREDIT UNION* v. *MILLER, BERRY, MILLER AND BERRY*[68]

This case concerned the duties and liabilities owed by an auditor to his client. The fact pattern is somewhat complex and the reasons for judgment are lengthy. In summary, the case involved a situation in which the manager of the plaintiff credit union had made a series of unauthorized loans to two customers, of which the credit union's auditors ought to have been aware and which they failed to bring to the attention of the credit union's board of directors. The auditors also failed to examine a report of the provincial inspector of credit unions which would have revealed one of the problem situations.

It was clear on the evidence that the credit union would have dismissed its manager if the auditors had brought the problem situations to the board's attention. The credit union, therefore, brought an action against the auditors for negligence, and the auditors commenced third party proceedings against several directors and employees of the credit union.

The Court first quoted the classic statement relating to the duties of an auditor which is set forth in *Re London and General Bank*.[69] It is there stated that an auditor is not bound to do more than exercise reasonable care and skill in making his inquiries and investigations. His purpose is to determine and set forth the true financial position of the company at the time of the audit. He must not certify what he does not believe to be true and he must use reasonable care prior to making his certifications. He is not an insurer. He is not bound to exercise more than reasonable care and skill even in the case of suspicion and he is justified in relying upon the opinions of experts where special knowledge is required.

The Court went on to cite various Canadian authorities including the Supreme Court of Canada decision in *Guardian Insurance Company* v. *Sharp*,[70] where it was stated that auditors are not special auditors or investigators, but are required to exercise the care and skill which other competent auditors would have exercised in identical circumstances. The duty of auditors is to ascertain whether the balance sheet truly exhibits

67. (1889) 14 A.C. 337 (H.L.).

68. [1984] 2 W.W.R. 297 (B.C. S.C.).

69. [1895] 2 Ch. 673 (C.A.).

70. [1941] S.C.R. 164, [1941] 2 D.L.R. 417.

the company's financial position according to the books and information obtained. Auditors are not detectives and are justified in believing in the honesty of the company's employees. If the books of the company do not give rise to suspicions, the auditors are justified in abstaining from making inquiries which might otherwise be necessary in the case of special audits. Auditors are not special investigators who must presume "malversation and embezzlement".

The Court also referred to a *dictum* in *Re Thomas Gerrard and Son, Ltd.*,[71] to the effect that an auditor does not discharge his duty without making reasonable inquiries. The Court also stated that an auditor who complies with generally accepted accounting principles may, however, not be excused for an omission in certain circumstances. The Court also quoted from "A Scandal in Bohemia", wherein Holmes attempts to explain the difference between "seeing" and "observing" to a somewhat baffled Watson.

The Court noted that the directors of a company are entitled to rely on and place their trust in the company's managers, unless some reason has come to their attention which might justify suspicion. Furthermore, it has been held that the directors, in certain circumstances, may not be negligent in failing to examine documents that are tabled during a directors' meeting.

The Court dealt with the case on the basis of contributory negligence. It concluded that the actions of an employee who is acting dishonestly and in breach of his authority should not be attributed to the plaintiff, whereas the negligence of a second employee, who was responsible for uncovering and monitoring these situations, should be attributed to the plaintiff.

XI. RIGHTS OF FIRST REFUSAL

A. *ELFENBAUM* v. *ELFENBAUM* [72]

The Court held that a right of first refusal contained in a matrimonial property order of the same Court made in 1982 did not create an interest in land, and, therefore, the applicant's application to continue a caveat which the respondent had requested be lapsed was dismissed. The Court cited the Supreme Court of Canada decisions in *Canadian Long Island Petroleums Ltd.* v. *Irving Industries (Irving Wire Products Division) Ltd.*[73] and in *McFarland* v. *Hauser.*[74] The Court expressed the view that the material time for determining whether or not the particular interest claimed was capable of being the subject of a caveat was the time of the application and not the time at which the caveat was registered. Therefore, it would appear that, subject to amendments to the Law of Property Act (Alberta), a caveat registered in respect of a right of first refusal is maintainable if that right of first refusal is converted into an option to purchase prior to the time of the application.

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71. [1967] 2 All E.R. 525 (Ch. D.).
72. (1984) 32 Sask. R. 266 (Sask. Q.B.).
73. [1974] 6 W.W.R. 385, [1975] 2 S.C.R. 175.
74. (1977) 2 Alta. L.R. (2d) 289 (S.C.A.D.).

B. *L. M. ROSEN REALTY LTD.* v. *D'AMORE* [75]

This appeal concerned various aspects of an agreement of purchase and sale of certain lands and a trust agreement between various parties with regard to the purchase by them of that land. Clauses 6 and 7 of the trust agreement related to the ability of the three purchasers to sell their respective interests in the subject land and gave a restricted right to make one assignment to a member of the family of a party to the agreement. One of the parties (Renaud) assigned his interest to his wife. His wife then purported to convey that interest to a corporation of which she was the sole shareholder and then to convey the shares of that company to another party (D'Amore) to the trust agreement. The court held that there could be no doubt that both the assignee Mrs. Renaud and D'Amore were aware of clauses 6 and 7. Therefore, the purported assignment to the corporation was invalid and did not convey any interest. As between the parties, it was a nullity.

The Court held that the three requirements for a novation set out in *Re Abernethy-Lougheed Logging Co.*; *A.G.B.C.* v. *Salter* [76] were satisfied, that is to say: (a) Mrs. Renaud had assumed all of the liabilities of her husband under the trust agreement; (b) she had been accepted as a party to the contract because the trust agreement contemplated the assignment by a party to a member of his family; and (c) the other parties had accepted the "new" contract in full satisfaction and substitution for the old one. Since there was a novation, Mrs. Renaud was bound by the provisions of clauses 6 and 7, which prohibited further assignments except after waiver of the right of first refusal. Since the assignment to the corporation was a nullity, the plaintiff suffered no damages.

The Court went on to hold that if Mrs. Renaud had breached the provisions of clauses 6 and 7 by purporting to sell her entire interest in the subject lands to D'Amore by way of a conveyance to the corporation and the sale of its shares, and if she was induced to do so by Mr. Renaud and D'Amore, the plaintiff had suffered no damage, for the same reason, *i.e.*, that the purported assignment was a nullity.

XII. TRUSTS

A. *ONTARIO WHEAT PRODUCERS' MARKETING BOARD* v. *ROYAL BANK OF CANADA* [77]

This is an appeal from a decision discussed in the 1983 edition of this paper (21 *Alta. L. Rev.* 114). The appeal was dismissed. The facts involved a feedmill which encountered financial difficulties after it had given the bank s. 178 security. The feedmill's usual arrangement with the Board was that it would acquire and purchase wheat as the Board's agent, with the approval of the Board, and would receive the sale price therefor and remit it to the Board on the fifteenth of the month following receipt of the offer to purchase the particular wheat. The Court held that

75. (1984) 45 O.R. (2d) 405 (C.A.).

76. [1939] 1 D.L.R. 513 (B.C.C.A.).

77. (1984) 46 O.R. (2d) 362 (C.A.), discussed at (1984) 22 *Alta. L. Rev.* 75.

the feedmill was properly characterized as an agent for the Board and, as a result, became a constructive trustee of any money received in respect of sales. The bank took over the operation of the feedmill business with actual knowledge of the true owner of the wheat in question and was, therefore, under fiduciary obligation to account. While the trial judge found that the bank had knowingly participated in a fraudulent scheme, the Court of Appeal held that it was not necessary so to find.

XIII. SURFACE RIGHTS

At common law, the owner of mineral rights was entitled to use the surface of the lands to the extent required to recover the minerals. The Alberta Legislature enacted legislation to regulate the mineral owner's access to the surface and to provide for payment of compensation to surface owners. The legislation currently in force in the Province of Alberta with respect to such matters is the Surface Rights Act[78] ("the Act"). There is similar legislation in effect in the other producing provinces.

The Act establishes a tribunal, the Surface Rights Board, which grants right of entry orders to mineral rights owners enabling them to use the surface of lands for various purposes relating to mineral exploitation. The Board also awards compensation to the surface owner.

The Act provides for an appeal of Board decisions by way of a *trial de novo* before the Court of Queen's Bench of Alberta. Usually, appeals are concerned with compensation.

A. *CHRISTENSEN* v. *ALBERTA POWER LTD.*[79]

The surface owner contended that a right of entry order did not grant the right to construct and operate a powerline on the wellsite. The right of entry order provides as follows:

> The Operator . . . is hereby granted right of entry . . . for the removal of minerals and for or incidental to any drilling operations and for the construction and operation of tanks, stations and structures for or incidental to such drilling operations or the production of minerals.

Petro-Canada drilled an oilwell on the lands and engaged Alberta Power to provide electricity for a pump to be used in producing the well. The surface owner contended that a new right of entry order and new compensation were required in connection with the proposed powerline. The surface owner relied on s. 12(1) of the Act, which provides, in part, as follows:

> 12(1) No Operator has a right of entry . . .
>
> (a) for the removal of minerals . . .
>
> (b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures, . . .
>
> (d) for the construction of a power transmission line . . .
>
> until the Operator has obtained the consent of the owner . . . or has become entitled to right of entry by reason of an order of the Board pursuant to this Act.

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

79. [1985] 4 W.W.R. 362 (Alta. C.A.).

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

> (i) the person . . . having the right to a mineral . . . or the agent of such a person . . . or
>
> (ii) . . . with reference to a . . . power transmission line . . . the person empowered to acquire an interest in land for the purpose of the . . . power transmission line . . . under . . . the Hydro and Electric Energy Act or the Water, Gas, Electric and Telephone Companies Act, as the case may be.

The surface owner contended that since there was a separate provision for power transmission lines in s. 12(1)(d) of the Act, a right of entry order, which used only the words of s. 12(1)(a) and (b), did not extend to power lines. The Alberta Court of Appeal rejected the argument, finding that paragraphs (a) and (b) ought to be interpreted independently of the following provisions. Paragraphs (a) and (b) relate to a different class of Operator than paragraph (d). The former relate to a mineral owner, while the latter relates to a person who has the authority by statute to construct a power transmission line. In the present case, Alberta Power did not have authority pursuant to a statute to erect the power line. Rather, Alberta Power was acting through Petro-Canada and derived its authority from Petro-Canada's authority to exploit its mineral rights. That was the case notwithstanding that Alberta Power would construct, own and operate the power line. The Court of Appeal also pointed out that the Act is not an expropriation statute and, therefore, the principles regarding strict construction of expropriation statutes were not applicable. It is not an expropriation statute because it alters the common law rights of the mineral owner to enter the land for purposes of exploiting its mineral rights, as opposed to providing for an expropriation of the surface owner's lands. The Court of Appeal also noted that, in its view, the construction of the power line was intended to supply energy to a pump used on the well and, therefore, was incidental to drilling operations and fell within the ambit of the right of entry order.

B. *ESSO RESOURCES CANADA LTD.* v. *MAINE* [80]

This case involved the surface owner's right to compensation when a second well is drilled on a wellsite. A right of entry order was obtained in connection with the first well and compensation was paid to the surface owner. The surface title was transferred to a new owner but the previous owner retained the right to receive the annual compensation under the right of entry order. As a result, the Board viewed the adverse effect of the right of entry on its individual merits. The Board ordered additional compensation to the new owner in respect of the drilling of a second well. Notwithstanding the appellant's argument that additional compensation amounted to double compensation, the Court declined to vary the Board's award. The Court reviewed the authorities which clearly stated that considerable weight must be given to the Board's decision since it has expertise in the area, had heard the evidence and had viewed the site.

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80. Unreported, 15 April 1985, J.D. of Wetaskiwin, Q.B. 8412-01302 (Alta. Q.B.).

C. *ROCKING P RANCH LTD.* v. *TRANSALTA UTILITIES CORP.*[81]

This case construed s. 19(1) of the Act, which provides for an entry fee to be paid to the surface owner of an amount equal to the lesser of $5,000 or "$500 per acre . . . calculated in respect of each titled unit". The issue in the case was the meaning of the words "titled unit". The Court of Appeal found that the term "titled" was intended to mean that the land was covered by a Certificate of Title registered in the Land Titles Office. The Court of Appeal found that the term "unit" meant the standard unit used in the Province of Alberta when defining the magnitude of landholdings. In the view of the Court of Appeal, that standard unit is a quarter section. As a result, the surface owner was entitled to a fee of not less than $500 for each acre in each quarter section of land over which the right of entry order extended.

D. *NOVA, AN ALBERTA CORPORATION* v. *BAIN*[82]

The Board based its award of compensation in connection with a right of entry order for a pipeline right of way on negotiated settlements between other parties. The operators who made such settlements offered evidence that the settlements were made under undue pressure and were not freely negotiated. The Board found that the market value of the land was only one-half of its per acre award and ignored the surface owner's residual and reversionary interests in the lands. The Board found the pattern of freely-negotiated settlements to be overwhelming. In comparing cases decided under the Act and those decided under the former Surface Rights Act,[83] the Court stated that the Act enlarged the Board's scope for determining compensation. The Court also noted that freely negotiated settlements must be presumed to take into account such factors as adverse effect on surrounding lands, general disturbance, nuisance and inconvenience. The Court stated that it should only vary the Board's assessment if there were cogent reasons for doing so. The Court found that the Board's awards were not unreasonable and that there was no manifest error in the Board attaching considerable weight to the evidence of comparable negotiated settlements.

E. *WESTMIN RESOURCES LTD.* v. *BRODBIN*[84]

The appellant objected to the Board's using an offer which had been made to the respondent as the starting point for calculating damages. The appellant argued that its offer was, in part, in consideration of eliminating the necessity of taking proceedings before the Board. The Board's award under several heads exceeded the appellant's offer. For example, the Board stated that the appellant's offer for compensation for loss of land value should be increased by between ten per cent and fifteen per cent to account for uncertainty. The board's award was sustained.

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81. (1984) 32 Alta. L.R. (2d) 72, 10 D.L.R. (4th) 635 (C.A.).
82. (1984) 33 Alta. L.R. (2d) 187 (Q.B.).
83. R.S.A. 1980, c. S-27, repealed on July 4, 1983, by *supra* n. 78.
84. Unreported, 18 December 1984, J.D. of Vegreville (Alta. Q.B.).

F. *TRANSALTA UTILITIES CORP.* v. *OLSON*[85]

The Alberta Court of Queen's Bench relied on previous decisions involving the Administrative Procedures Act[86] in finding that the Board is not entitled to rely solely on its expertise as a substitute for its duty to set out reasons based upon findings of fact. It is not necessary for the Board to provide detailed calculations. However, it must rely on evidence and provide written reasons for its award. The Court rejected the surface owner's contention that it was entitled to be compensated for the cost of collision insurance which it maintained to cover risks of colliding with transmission towers installed by the appellant. The Court noted that the surface owner was required to use care in moving machinery around existing structures on his land, in any event. The Court also refused to award damages for inconvenience and general nuisance related to aerial crop dusting and cattle surveillance, because it found that the claims were speculative at best and would, in any event, be included in the damages for adverse effect. The Court refused to award damages for adverse aesthetic or visual impact of the transmission towers, because they were not located near the owner's dwelling. The Court rejected a claim for health danger resulting from proximity to the electro-magnetic field emanating from the transmission lines.

G. *ARTHUR* v. *DOME PETROLEUM LTD.*[87]

In this case, the Court stated that it was reasonable that adverse effect on surrounding lands from the appellant's entry on two small sites was approximately equal to the adverse effect from entry on a larger site having an area approximately equal to the combined area of the two smaller sites and having an access road longer than those for the two smaller sites. Accordingly, the Court sustained a Board award of damages for adverse effect on surrounding lands which was based upon the settlement reached between the same parties for damages for the adverse effect from the taking of the two smaller sites.

H. *PERCIVAL* v. *CALGARY POWER LTD.*[88]

This case involved an appeal from the Board's award of damages for injurious effect on surrounding lands caused by a right of entry order and its award of interest. The Board had found that there was no adverse effect on surrounding lands caused by the entry. The Court agreed with the Board that there was no reduction in the market value of the surrounding lands caused by the erection of the appellant's transmission lines. The Court also found that under the former Surface Rights Act,[89] which applied to the present case, the Board had absolute discretion in awarding interest. The Board had the power to order interest at a fixed rate of thirteen per cent per annum rather than at the borrowing rate available to the surface owner, and the Court sustained the Board's finding on that issue.

85. Unreported, 19 April 1984, J.D. of Medicine Hat, Q.B. 8308-000551 (Alta. Q.B.).

86. R.S.A. 1980, c. A-2.

87. Unreported, 2 May 1984, J.D. of Vegreville (Alta. Q.B.).

88. (1984) 35 Alta. L.R. (2d) 9 (Q.B.).

89. *Supra* n. 83.

I. *GEHLERT* v. *TRANSALTA UTILITIES CORP.*[90]

The Court refused to vary the Board's compensation award because there were not cogent reasons for doing so. The Court stated that:

> while it may well be that the Court would have made some slight variations in the values awarded by the Board, it cannot be said that the Board's evaluations were manifestly wrong nor can the Court see any errors in law on the part of the Board.

The Court noted that it was not necessarily appropriate for the Board to base its award for damages for the value of the land on sales of comparable land. The Court stated that comparable sales are only an indication of what a willing seller would accept and do not indicate the value of land to an owner who does not wish to part with it.

J. *ICG RESOURCES LTD.* v. *HEAMAN*[91]

This case dealt with procedures to be followed in appeals from awards made by the Surface Rights Board of Manitoba pursuant to the Manitoba Surface Rights Act.[92] The Court stated that an appeal from the granting of the right of entry or an award of compensation must be commenced in the Manitoba Court of Queen's Bench by originating Notice of Motion and shall name the Board as a respondent. All proceedings under the right of entry order or the compensation award are to be stayed until the appeal has been disposed of. Although the Act stipulated that leave to appeal is required in respect of a question of law or jurisdiction, no leave is required from an appeal of the granting of the order or the compensation. Thirdly, an appeal of a right of entry order or the award of damages is to be a *trial de novo.*

XIV. TAXATION

There is a separate paper at this year's conference devoted to recent developments in income tax law. Nevertheless, there are three recent cases dealing with taxation which have been included in this paper.

A. *EDMONTON LIQUID GAS LTD.* v. *MINISTER OF NATIONAL REVENUE*[93]

This case dealt with the timing of tax write-offs for drilling expenses. Dome Petroleum Limited entered into two farmout agreements in December, 1974. Dome was acting, in part, on behalf of its subsidiary, Edmonton Liquid Gas Limited. Both agreements required the drilling of an exploratory well. In the same month, Dome entered into two drilling contracts for the drilling of the exploratory wells. Both drilling contracts provided that Dome would make a cash payment to the contractor in December, 1974. One of the exploratory wells was commenced in December, 1974 and completed in March, 1975. The other exploratory well was drilled entirely in 1975. Edmonton Liquid Gas Limited claimed

90. Unreported 26 September 1985, J.D. of Edmonton (Alta. Q.B.).

91. [1985] 3 W.W.R. 44 (Man. Q.B.).

92. S.M. 1982-83-84, c. 4.

93. (1984) 56 N.R. (321) (F.C.A.).

Canadian exploration expense ("CEE") for its share of the amounts paid by Dome to the drilling contractors in December, 1974. That claim was challenged to the extent that the drilling did not actually occur in 1974. Section 66.1(6)(a) of the Income Tax Act[94] defined CEE as follows:

> (i) any expense including a geological, geophysical or geochemical expense incurred by him (other than an expense referred to in subparagraph (ii)) for the purpose of determining the existence, location, extent or quality of an accumulation of petroleum or natural gas (other than a mineral resource) in Canada,
>
> (ii) any expense incurred in drilling or completing an oil or a gas well in Canada, building a temporary access road to the well or in preparing the site in respect of the well,
>
> (A) incurred by him in the year, or . . .
>
> if, within six months after the end of the year, the drilling of the well is completed and,
>
> (D) it is reasonable to expect that the well will not come into production in commercial quantities within twelve months of its completion.

The Federal Court of Appeal stated that the drilling of a well could fall within paragraph (i) of the definition if the well was drilled for the purpose of determining the existence, location, extent or quality of an accumulation of petroleum or natural gas. However, in the present case, the Court found, as a fact, that both wells were drilled for the purpose of taking commercial production even though both wells were dry and abandoned. The Court found that the word "drilling" as used in paragraph (ii) of the definition was not intended to mean that the drilling had to have occurred before the taxpayer could claim the expense. If Parliament had meant to do so it would have used the phrase "in having drilled". The Federal Court of Appeal found that the word was used in the sense of "in relation to drilling" without specifying any timing. The decision really turned on the meaning of the word "incurred" in paragraph (ii) of the definition. It was found that that word had the meaning of "to become liable for or subject to". The test applied was: "Are the transactions absolute, with no contingencies as to disposition, use or enjoyment? Has he retained any measure of control? Is there, for instance, any element of refundability?" The Court then examined the two drilling contracts. In one instance, the farmor was also the drilling contractor. Clause 3 of the agreement provided for a payment to be made by Dome in December, 1974 on account of drilling costs. That clause also provided that: "in no event shall Dome's obligation under Clause 3 hereof be changed solely by virtue of the drilling of the test well at such lesser depth". Dome's obligation was absolute, so that the payment required to be made in December, 1974 was "incurred" in that month for purposes of the definition of Canadian exploration expense. The drilling contract for the second exploratory well provided that drilling costs would be paid on a turn-key basis but that completion costs and other costs were not to be turn-keyed. The drilling contract contained the following provision:

> In adjusting for extras, if any, an equitable allowance will be made to Operator for any decrease which may occur in any other services to be performed or materials to be supplied, if these are significantly less than indicated to contractor in negotiating the Drilling Contract.

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

The Court stated that this provision did not provide for refunds to Dome but merely that a portion of the payment could be applied to other expenses which it was clearly contemplated would be incurred. The Court also found that it was irrelevant that the transactions were structured for purposes of creating the write-off in 1974, stating that:

> where provisions of the Income Tax Act have the obvious purpose of encouraging taxpayers to enter into an expenditure of a particular kind, a taxpayer who otherwise falls within the object and spirit of the relevant provisions cannot be said to unduly or artificially reduce income because he was influenced to enter into it by tax considerations . . . The lack of a business purpose other than a reduction of tax was not a ground for disallowing the transaction.

It should be noted that the Income Tax Act now provides that expenses in respect of future services are deductible only when the services are provided.

B. *DOME PETROLEUM LTD.* v. *GOVERNMENT OF SASKATCHEWAN* [95]

This was a case which involved the Oil Well Income Tax Act,[96] which provides for a tax on oil well income. The Oil Well Income Tax Act Regulations 1978[97] provide that in computing the tax payable pursuant to the Act, a taxpayer may deduct up to ten per cent of its cumulative Saskatchewan development expense as at the end of the year. The Regulations define cumulative Saskatchewan development expense as being the amount by which the aggregate of certain items exceeds the aggregate of certain other items. Basically, Saskatchewan development expenses are drilling and development expenditures. A separate provision of the Regulations provides that upon a sale of a resource property, the vendor taxpayer shall deduct the proceeds of the sale (not in excess of fair market value) from its cumulative Saskatchewan development expense and the purchaser taxpayer shall add the purchase price to its cumulative Saskatchewan development expense, with the result that the amount available to the vendor as a write-off will be reduced while the amount available to the purchaser will be increased. Dome purchased certain Saskatchewan properties from Canpar Holdings Ltd. and from Starvest Pension Funds. Dome added the entire amount of the purchase price which it paid to its cumulative Saskatchewan development expense and Canpar and Starvest deducted the proceeds which they received from Dome from their cumulative Saskatchewan development expense. That resulted in Canpar and Starvest having negative cumulative Saskatchewan development expenses. The Saskatchewan taxing authorities claimed that the Act and the Regulations did not contemplate a negative balance in the pool, with the result that Starvest and Canpar could not reduce their pools below a nil amount. They further contended that Dome could not increase its pools by any more than Starvest and Canpar reduced their pools. The Saskatchewan Court of Appeal found that the cumulative Saskatchewan development expense of a taxpayer at any time could not be a negative amount, because it was defined as being the

95. (1984) 30 Sask. R. 229 (C.A.).

96. R.S.S. 1978, c. O-3.1.

97. S.R. 265/78.

amount by which the aggregate of certain items "exceeds" the aggregate of certain other amounts. One amount cannot exceed another amount by a negative amount. However, the regulation prescribing the addition of amounts paid to acquire resource properties was clear and unambiguous. In the result, the cumulative Saskatchewan development expenses of Canpar and Starvest could never be a negative amount. However, Dome was entitled to add the entire purchase price which it paid to the companies to its cumulative Saskatchewan development expense.

C. *NEWMONT MINES LIMITED* v. *MINISTER OF FINANCE OF BRITISH COLUMBIA* [98]

This case involved the Corporation Capital Tax Act,[99] which imposes a tax upon the paid up capital employed in Canada by a non-resident corporation. Paid-up capital is defined in the Act as the amount "by which the total assets of the corporation in Canada exceeds the amount of the indebtedness of the corporation relating to its permanent establishment in Canada". Newmont operated copper mines in British Columbia. Copper concentrate from the mines was sold to Mitsubishi Metal Corporation of Japan pursuant to contracts whereby the concentrate was delivered to ships in British Columbia ports for transfer to Japan. Title to the concentrate passed upon delivery to the ships. The issue in the case was whether or not the accounts receivable from Mitsubishi to Newmont were assets of Newmont in Canada for purposes of the Act. The Court stated that the general rule is that simple contract debts are situate in the jurisdiction in which the debtor resides. Mitsubishi was a Japanese company registered to carry on business in British Columbia. Accordingly, Mitsubishi resided in both Japan and British Columbia. The Court stated that the rule applicable in that situation is that the debt is situate where it is properly recoverable and can be enforced. The contracts did not provide the place at which payments were to be made to Newmont. The contracts did provide that they were governed by British Columbia law. In fact, payments had been made in New York. The contracts called for payment in United States dollars. Mitsubishi had no assets in British Columbia, so that from a practical standpoint the contracts could not be enforced in British Columbia. The Court found that the accounts receivable were not situate in British Columbia.

XV. FREEHOLD LEASES

A. *KISSINGER PETROLEUMS LTD.* v. *KEITH McLEAN OIL PRODUCTS LTD. AND FALCON RESOURCES LTD.*[100]

In this case, it was contended that a lease granted by an estate of a deceased person was not validly granted because of lack of judicial approval pursuant to the Devolution of Real Property Act[101] or, in the alternative, had expired as a result of drilling through the end of its

98. (1984) 51 B.C.L.R. 291 (S.C.).
99. R.S.B.C. 1979, c. 69, as am.
100. [1984] 5 W.W.R. 674, 54 A.R. 100 (Alta. C.A.).
101. R.S.A. 1980 c. D-34.

primary term. The trial judgment is discussed in the 1984 edition of this paper.[102]

The lease in question was granted on March 6, 1970 by the executor of an estate. Shortly thereafter, each beneficiary of the estate executed a consent to the lease. At the time of executing the consents, each beneficiary was at least twenty-one years old, although one of them had not been twenty-one years old when the lease was granted. The lease was executed by Kissinger after all of the consents were obtained. Section 14(1) of the Devolution of Real Property Act provides, *inter alia*:

> 14(1) The personal representative may, from time to time, subject to the provisions of any will affecting the property, do any one or more of the following:
>
> (a) lease the real property or a part thereof for a term of not more than one year;
>
> (b) lease the real property or a part thereof, with the approval of the Court, for a longer term;

The Court of Appeal held that, as there were no creditors of the estate and as all the beneficiaries had consented to the granting of the lease, it was unnecessary to obtain court approval even though the lease was for a term in excess of one year. This conclusion made it unnecessary for the Court to determine whether the Trial Court could have or ought to have approved the lease at trial. The Court of Appeal stated that s. 14 is an enabling section which grants a personal representative the power to apply to court for approval to grant a lease when the personal representative would otherwise not have such power. The Court gave as an example a situation where a beneficiary would not agree to the granting of a lease.

On the second issue, concerning drilling through the end of the primary term, the facts were as follows. On March 1, 1980, five days before the end of the primary term of the lease, the lessee began the drilling of a well on the leased lands. On March 4, the lessor deposited an amount equal to a shut-in royalty payment to the personal account of the executrix of the estate. She considered it to be a payment to the estate and distributed the funds accordingly. Drilling continued until March 9, when logging and drill stem testing were commenced. A flow rate in excess of 2,000 mcf of gas was encountered on that date, no production having been encountered prior to the end of the primary term. On March 11, the well was cased and capped and the executrix was advised that the well had been cased as a gas well so that the lease was maintained by production. The well was completed on May 21, 1980.

It was argued that the lease had terminated for any one of the following three reasons:

(a) there was no actual production from the leased lands at the end of the primary term;

(b) the payment of the shut-in royalty was not valid because it was made at the time when there was no well on the leased lands capable of production; or

(c) the shut-in royalty was not paid to the lessor in accordance with the lease, payment having been paid to the executrix personally.

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102. (1983) 26 Alta. L.R. (2d) 378 (Q.B.), discussed at (1985) 23 *Alta. L. Rev.* 188.

The first issue turned on the meaning of the *habendum* clause of the lease, the relevant portions of which are:

> TO HAVE AND ENJOY the same for the term of Ten (10) years from the date hereof and so long thereafter as the leased substances or any of them are produced or deemed to be produced from the said lands, subject to the sooner termination of the said term as hereinafter provided.
>
> AND FURTHER ALWAYS PROVIDED that if at the end of the said Ten (10) year term the leased substances are not being produced from the said lands and the Lessee is then engaged in drilling or working operations thereon, then this Lease shall remain in force so long as any drilling or working operations are prosecuted with no cessation of more than Ninety (90) consecutive days, and, if they result in the production of the leased substances or any of them, so long thereafter as the leased substances or any of them are produced from the said lands; provided that if drilling or working operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's reasonable control, or if any well on the said lands is shut-in, suspended or otherwise not produced as the result of a lack of or an intermittent market, or any cause whatsoever beyond the Lessee's reasonable control, the time of such interruption or suspension or non-production shall not be counted against the Lessee, anything hereinbefore contained or implied to the contrary notwithstanding.

The Court of Appeal held that since drilling operations were being conducted at the end of the primary term, the proviso to the *habendum* quoted above had the effect of extending the lease until the drilling operations were completed. The Court then stated that the drilling operations resulted in production which was established by the drill stem test. The Court found that the well was not produced as a result of a lack of a market so that, pursuant to the proviso, the time of non-production is not to be counted, with the result that the well should be considered as producing from its completion.

The Court also stated that the well must be deemed to be producing as a result of the provisions of the shut-in royalty clause in the lease, so that the lease was continued after the drilling was completed in accordance with the proviso. It was not necessary that the proviso refer to deemed production for that result to occur, even though there is a reference to deemed production at the beginning of the *habendum*, implying that deemed production will only be effective for purposes of the lease where there is an express reference to deemed production.

Kissinger made a payment to the executrix on March 4. On March 11, Kissinger advised her that the payment was a shut-in royalty payment. When the payment was made at the end of the primary term, drilling operations had not been completed and commercial production had not been established. It was argued that no shut-in royalty could be paid until there was a shut-in well. The Court of Appeal quoted, with approval, Kuntz' *A Treatise on the Law of Oil and Gas*, and noted that there were no precedents to the contrary and decided that the payment was a valid shut-in royalty payment. The Court of Appeal specifically declined to consider what the effect of the payment would have been if it had been rejected by the lessor or if it had been paid after the anniversary date of the lease or after the well was established as being commercial.

Regarding the issue of payment to Mrs. Grover's personal bank account, the Court of Appeal held that the payment was valid, because Mrs. Grover had accepted the payment as executrix and had accounted for it to the beneficiaries without objection from any of them.

Leave to appeal the decision to the Supreme Court of Canada has been refused.

B. *ESSO RESOURCES CANADA LTD.* v. *PACIFIC CASSIAR LTD.* [103]

The respondent challenged the validity of Esso's freehold oil and gas lease. The *habendum* clause of the Esso lease provided that the lease would be for a primary term of ten years and so long thereafter as leased substances were produced from the said lands. A unit agreement was entered into seven years after the lease was granted. The lessor was a party to the unit agreement. The unit agreement provided that production from any part of the unitized zone would, except for the purpose of determining payments to royalty owners, be considered as production from each tract and that such production would continue in force and effect each lease as if such production was from the unitized zone underlying each tract. The lease covered lands not included in the unit as well as lands in the unit. There had been three wells drilled on the leased lands but, after the unitization, these wells had been abandoned. The primary term of the lease had expired.

The issue before the Court was whether, by virtue of the unit agreement, production from the unit area extended the term of the lease insofar as it pertained to lands not included in the unit. The Court held that the provision of the unit agreement referred to above continued the term of the lease as to all of the lands covered thereby.

The respondent had also alleged that caveats filed by Imperial Oil Ltd., the predecessor of Esso, did not give adequate notice, since they did not state that deemed production would continue the lease. The caveats stated that the term of the lease was ten years "and so long thereafter as the leased substances or any of them are produced from the said lands". The Court held that whether production was actual or constructive, the nature of the interest claimed would not be changed and that, therefore, the caveat was adequate notice.

XVI. CONSTITUTIONAL LAW

A. *FLAMBOROUGH* v. *NATIONAL ENERGY BOARD* [104]

Interprovincial Pipeline Limited ("Interprovincial") transported natural gas liquids by pipeline from Alberta, Saskatchewan and Manitoba to Sarnia, Ontario, where it was delivered to Dome Petroleum Limited which separated the natural gas liquids into different components, one being specification propane. Dome Petroleum Limited then transported the specification propane from Sarnia to market by truck and rail. Interprovincial applied to the National Energy Board for permission to modify its pipeline number 8 for the transportation of specification propane within the Province of Ontario. In order to transport specification propane, it was necessary to isolate line number 8 from Interprovincial's other lines carrying crude petroleum and products. The Board allowed the application and approved the construction of the delivery facilities in the Township of Flamborough.

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103. [1984] 6 W.W.R. 376, 33 Alta. L.R. (2d) 175 (Q.B.).

104. (1984) 55 N.R. 95 (Fed. C.A.).

The Township of Flamborough objected to the approval, but was over-ruled by the Board. The Federal Court of Appeal then granted the Township of Flamborough leave to appeal on two substantive grounds:

1. Did the Board have the constitutional jurisdiction to issue the approval in relation to the pipeline and loading facilities?
2. Was there a reasonable apprehension of bias on the part of the Board member, Mr. Stewart, by reason of past business relationships on the part of Mr. Stewart with Mr. Caughey, the current Vice-President in charge of Projects for Interprovincial?

The Federal Court of Appeal considered s. 92(10)(a) of the Constitution Act 1867:

> 92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: . . .
>
> (10) local works and undertakings other than such as are of the following classes:
>
> (a) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other of the provinces or extending beyond the limits of the province.

The Court found that notwithstanding that pipelines are not specifically mentioned in s. 92(10)(a), there is no doubt that an oil pipeline that connects one province with another province comes within s. 92(10)(a). Counsel for the appellants argued that the isolation necessary to convert line number 8 for the transportation of specification propane severed the line from the rest of the interprovincial work and undertaking. He contended that the transportation of the specification propane through the modified line was a work or undertaking entirely with the Province of Ontario and subject to provincial jurisdiction. He also argued that the specification propane was not the same substance as the propane transported through the Interprovincial pipeline from the prairie provinces to Sarnia, Ontario. The Court held that the question to be decided was whether or not the transportation of specification propane through the modified line number 8 was severable from Interprovincial's crude oil and products transportation operations which are clearly within the scope of s. 92(10)(a). The Court found that specification propane was not a new substance, but merely a substance which had been segregated from the mixture in which it was shipped. The Court also held that line number 8 was an integral part of the system operated by Interprovincial and that the system was one undertaking from which modified line number 8 was not severable. Having reached this conclusion, the Court held that the Board had both the constitutional right and the jurisdiction to make the Order approving the modification to line number 8.

The bias issue was also dismissed. The Court determined that the test to be applied was an objective test of whether or not a reasonable apprehension of bias existed. In this case, the Court agreed with the Board that a prior business association did not create, *per se*, a reasonable apprehension of bias, even when it was an association with an organization having a direct interest in the matter to be decided. The Court suggested that bias may have existed if the tribunal member had been involved with the organization when it made its decision regarding the matter, which was not the case in this situation.

This decision raises interesting questions with respect to the reach of federal jurisdiction in respect of pipelines, and appears to support federal regulation of pipelines which are totally within a province but which operate as part of an interprovincial system.

B. *THE RE UPPER CHURCHILL WATER RIGHTS REVERSION ACT, 1980: CHURCHILL FALLS (LABRADOR) CORPORATION LTD.* v. *A. G. OF NEWFOUNDLAND* [105]

This case dealt with the constitutional validity of the Upper Churchill Water Rights Reversion Act,[106] (the "Reversion Act"). The Churchill Falls (Labrador) Corporation Limited (the "Company") was issued a lease on May 16, 1961 granting the Company the exclusive use of certain waters of the Churchill River and its watershed for the generation of hydro-electric power with the right to transport the power through and export it from the Province of Newfoundland. The Company entered into a power contract with Hydro-Quebec on May 15, 1969 for the purchase of the power produced at Churchill Falls for a term of forty years renewable at the option of Hydro-Quebec for a further term of twenty-five years. The price to be paid for the power was based on the capital costs of the project. The project was constructed and commenced delivery of power in 1971 and was completed in 1976. As early as 1974, the Province of Newfoundland was dissatisfied with the terms of the power contract, because it was of the view that the power was being sold below an equitable price with the benefit accruing to Hydro-Quebec. The Government of Newfoundland was unsuccessful in attempts to renegotiate the power contract.

The Reversion Act was passed on December 17, 1980 but was not proclaimed. The Government of Newfoundland referred the constitutional validity of the Reversion Act to the Newfoundland Court of Appeal, which held that it was *intra vires.*[107] That decision was appealed to the Supreme Court of Canada. The Reversion Act repealed the Act[108] which granted the lease to the Company, and provided that all rights and interests arising under the repealed statute and lease reverted to the Province of Newfoundland clear of all claims and encumbrances. It also provided for compensation to the shareholders and creditors of the company, but not compensation to the company itself. The Court admitted extrinsic evidence in respect of the power contract and was of the opinion that, in pith and substance, the object of the Act was to derogate from the rights of Hydro-Quebec under the power contract. Thus, the Reversion Act was *ultra vires,* as a colourable attempt to legislate in respect of rights outside of the Province of Newfoundland. The Court, however, stated that where in pith and substance a provincial enactment is in relation to matters which fall within the field of provincial legislation, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires.*

C. *R.* v. *CROWN ZELLERBACH CANADA LTD.*[109]

This case held that the Ocean Dumping Control Act,[110] which provides that no person shall dump except in accordance with the terms and condi-

105. (1984) 53 N.R. 268 (S.C.C.).
106. S.N. 1980, c. 40.
107. (1982) 134 D.L.R. (3rd) 288 (Nfld. C.A.).
108. S.N. 1961, c. 51, as am.
109. (1984) 7 D.L.R. (4th) 449 (B.C. C.A.).
110. S.C. 1974-75-76, c. 55.

tions of a permit, did not apply to wood waste dumped into the waters of Beaver Cove, a place which was found to be within the inland waters of the Province of British Columbia.

XVII. ADMINISTRATIVE LAW

A. *WADELL* vs. *SCHREYER ET AL.*[111]

In this case, Mr. Wadell, a member of Parliament, challenged the validity of an Order in Council (the "Order") made on July 17, 1980 by the Governor in Council authorizing construction of the pre-build segments of the Alaska Highway Pipeline (the "Prebuild"). Mr. Wadell contended that the Order was *ultra vires*, as it differed substantially from what was originally contemplated by the Northern Pipeline Act.[112] The Act originally provided for construction of a pipeline for the transportation of American natural gas from Alaska to the United States border and the requirement that financing for the whole pipeline be obtained before construction of any part of the pipeline should begin. The Order, however, provided for transportation of Canadian natural gas through a prebuilt portion of the pipeline and construction of the prebuild prior to the time when financing was available for the whole of the pipeline.

The Order was issued by the National Energy Board with the approval of the Governor in Council under s. 20(4) of the Act, which authorized the Board with Cabinet approval to rescind, amend or add to the terms and conditions set out in Schedule III to the Act. The original conditions respecting financing were contained in that Schedule.

The Court was of the opinion that Mr. Wadell's challenge raised two issues: the delegation issue and the conformity issue. The delegation issue was stated in the proposition that Parliament cannot delegate to a subordinate agency the power to amend the provisions of the parent statute itself. This type of provision sometimes is referred to as a Henry VIII Clause. The Court held that Parliament may delegate such authority if it clearly expresses its intention to do so and found that s. 20(4) was unambiguous in its intention to delegate such a power.

The judge found that the Act did not expressly authorize the construction of the prebuild together with the export of Alberta gas; however, he also found that it did not expressly rule it out. The judge was of the opinion that the paramount object of the Act related to the construction of the whole pipeline, but that it did not follow that the Order approving construction of the prebuild was inconsistent with this object. Accordingly, the Order was determined to be consistent with the literal terms of the delegating provisions contained in s. 20(4) of the Act and also within the spirit of the Act. Mr. Wadell's challenge to the Order was, therefore, dismissed. Mr. Wadell's challenge to several Orders in Council with respect to the approval of the export of Alberta gas through the prebuild was also dismissed.

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111. (1983) 5 D.L.R. (4th) 254 (B.C. S.C.).

112. S.C. 1977-1978, c. 20, as am.

B. *RE ALKALI LAKE INDIAN BAND AND WEST COAST TRANSMISSION CO. LTD.*[113]

The British Columbia Utilities Commission (the "Commission") conducted a public hearing in respect of an application to construct and operate a natural gas transmission system to Vancouver Island. The Alkali Lake Indian Band (the "Band") was an intervener in the proceedings, because there was a proposal to put a pipeline through the Band's traditional hunting and fishing grounds. The Commission made a ruling in the proceedings that the interveners were to be responsible for their own costs. The Commission had received a letter from the Minister of Energy, Mines and Resources indicating that Cabinet wished the Commission to discontinue awarding costs to participants. The Commission has the discretion to award costs pursuant to section 133 of The Utilities Commission Act.[114] The Band made an application to the Commission to reconsider and vary its Order as to costs. The Commission refused the application without giving reasons. The Band then appealed the decision to the British Columbia Court of Appeal. The Court held that the Commission had not exercised its unfettered discretion conferred by s. 133 of the Act but had acted in accordance with the Cabinet policy. The Order as to costs was thus made improperly. Rather than sending the matter back to the Commission for reconsideration, the Court determined that pursuant to the Court of Appeal Act,[115] the Court had jurisdiction to make any order that the Commission could have made. The Court granted the appeal to the Band and awarded it costs in the proceedings.

C. *EDMONTON* v. *PUBLIC UTILITIES BOARD* [116]

The City of Edmonton intervened in hearings by the Public Utilities Board regarding a rate increase application by Alberta Government Telephones. The city was represented at the hearing by a salaried solicitor. The Board refused to award the city costs for legal fees on the grounds that the city was represented by internal counsel. The city appealed the Board's decision to the Alberta Court of Appeal. The Court found that the Board had the general discretion to award costs under the Public Utilities Board Act,[117] but that this discretion was limited by the Municipal Government Act,[118] which allows the municipality to collect lawful costs in all actions and proceedings to which the municipality is a party notwithstanding that the remuneration of the municipal solicitor is paid in whole or in part by salary. The Court found that the two Acts should be read together and that the Board in exercising its discretion was to consider the city solicitor on the same footing as a solicitor in private practice. Accordingly, the Court found that the Board erred in its decision on costs and sent the matter back to the Board for reconsideration.

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113. (1984) 8 D.L.R. (4th) 610 (B.C. C.A.).
114. S.B.C. 1980, c. 60, as am.
115. S.B.C. 1982, c. 7, s. 9(1)(a).
116. [1985] 3 W.W.R. 120 (Alta. C.A.).
117. R.S.A. 1980, c. P-37, as am.
118. R.S.A. 1980, c. M-26, s. 80.

D. *TRANS QUEBEC & MARITIMES PIPELINE INC.* v. *NATIONAL ENERGY BOARD* [119]

In connection with an appeal of the National Energy Board's 1983 Trans Quebec & Maritimes Pipeline Inc. ("TQ & M") toll decision, TQ & M applied to the Federal Court of Appeal for an order requiring the National Energy Board to produce certain papers prepared by board staff in connection with that decision. The Court denied the request on the basis that TQ & M failed to establish that the decision was based on staff reports to which parties had not had access and which contained evidentiary material in respect of which they had not had an opportunity to respond. The Court also observed that the analysis and opinion in staff memoranda were irrelevant to establishing the Board's reasons for decision which was TQ & M's principal reason for seeking production of those documents.

While this case establishes that production of staff papers will not be permitted if the predominant purpose is to facilitate a "fishing expedition", the Court suggested that production may be required where the staff papers might contain evidentiary material to which parties have had neither access nor an opportunity to respond.

E. *THE CANADIAN PETROLEUM ASSOCIATION* v. *TRANS QUEBEC & MARITIMES PIPELINE INC.*[120]

In this case, an application for leave to appeal the Board's decision concerning a review of the TQ & M toll decision was denied. In the decision, TQ & M had been authorized to establish a fixed interest recovery rate of 11.875 per cent following full consideration of the issue including cross-examination by all interested parties at a public hearing. TQ & M subsequently applied for a review of that decision in order to raise the interest rate to 14.25 per cent. Written comments were sought from all parties to the hearing and all parties were given the opportunity to comment upon each other's submissions. Several interveners asserted that any review should take place utilizing the normal hearing process. By an order dated August 9, 1984, the Board, without a public hearing and cross-examination, approved the request effective August 1, 1984. The Canadian Petroleum Association and the Independent Petroleum Association of Canada, two of the interested parties, applied for leave to appeal to the Federal Court of Appeal on the grounds that natural justice required a full public hearing and cross-examination. An additional ground of appeal was that the Board had no authority to make the order retroactive or retrospective to a date eight days prior to its actual issuance.

The Court refused leave to appeal without written reasons.

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119. (1984) 54 N.R. 303 (Fed. C.A.).

120. Unreported, (No. 84-A-346) Fed. C.A.

F. *ALBERTA FISH & GAME ASSOCIATION* v. *THE ENERGY RESOURCES CONSERVATION BOARD* [121]

The Alberta Court of Appeal considered whether the appellants were "local interveners" within the meaning of s. 31 of the Energy Resources Conservation Act[122] and held that they were without status for an award of local interveners' costs because they did not have an "interest in land". The Court held that the definition of "interest in land" advanced by the appellants was so broad that it would apply to anyone who might have a concern about land that may be affected by a decision of the Energy Resources Conservation Board, and that it would not attribute such a broad intention to the Legislature.

G. ENERGY RESOURCES CONSERVATION BOARD DECISIONS

1. Decision 84-5 Lodgepole Blowout Inquiry — Phase 2

The Board conducted a technical inquiry to investigate sour gas well blowouts, their causes and actions required to minimize their future occurrence. In addition to a number of other findings, the Board was of the opinion that a category of "critical sour wells" should be established for the implementation of special precautions and blowout prevention controls. The Board has issued a draft Interim Directive in this regard.

2. Decision D 85-9 Consoligas Management Ltd. Application for Gas Removal Permit

The public hearing of this application was the first occasion for the Board to consider the expected economic costs and benefits to Alberta of a gas removal permit, as required by s. 5(3)(c) of the new Gas Resources Preservation Act.[123]

The Board considered the fundamental question to be whether or not an application represents a sale incremental to existing Alberta sales. An incremental sale was found to be one that would not otherwise occur without approval of the application and includes a "totally new market" and "retention of an existing market that would otherwise be lost".

The Board approved the portion of the application which would displace the use of fuel oil by the end user, but denied the part of the application which would replace existing interruptible Alberta gas sales. The Board said it did not have enough evidence to show that denial of the application might result in a reduction or discontinuation of the existing Alberta interruptible gas sales by the end user.

H. NATIONAL ENERGY BOARD DECISIONS

During October 1984, the Board held several hearings and issued a number of decisions which assessed the extent to which negotiated gas export contracts and short-term export contracts complied with the Federal Government's new export pricing policy. These decisions represent the

121. Unreported, (No. 16982) Alta. C.A.

122. R.S.A. 1980, c. E-11.

123. S.A. 1984, c. G-3.1.

Board's interpretation of those guidelines and may provide some guidance as to how it will treat other export contracts and negotiations during the annual reviews and in future applications.

XVIII. ALBERTA LEGISLATION

A. 1984 FALL SESSION

1. The Gas Resources Preservation Act[124]

This Act repeals and replaces The Gas Resources Preservation Act and The Gas Resources Preservation Amendment Act.[125] The major changes from the former provisions are as follows. The scope of the Act has been expanded to give the Energy Resources Conservation Board jurisdiction to consider, when granting removal permits, the expected economic costs and benefits to Alberta of the removal of gas or propane from the province. Formerly, the Board had jurisdiction to consider only the present and future needs of persons in Alberta and the impact of granting a removal permit upon the present and future reserves of the province. This expanded jurisdiction will allow the Board to regulate transactions such as direct sales, where the producer and end user are the same person, and ensure that the economic costs and benefits of such transactions are in the public interest of Alberta. The Act applies to all gas and propane produced in Alberta. In addition, s. 3 of the former Act, which provided that the intent of that Act was to effect the preservation and conservation of oil and gas resources of Alberta, has not been included in the new legislation.

The Board's authority to impose conditions in a permit has been expanded to include conditions relating to the price of the gas or propane to be removed from Alberta or relating to other factors relevant to the expected economic benefits to Alberta.

The Act also streamlines the process for issuing and amending permits. The Board may now, with the consent of the Minister of Energy and Natural Resources, issue short term permits for the removal of less than one billion cubic meters of gas or 50,000 cubic meters of propane within a two year period. Administrative amendments may be made to permits by the Board without a hearing, notice or the approval of the Lieutenant Governor in Council.

2. Business Corporations Act[126]

There have been minor amendments made to the Act concerning continuation.[127] An amalgamated corporation must now apply for continuance by January 31, 1986. Amendments to the regulations were also passed providing new rules for permitted names of corporations.[128]

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124. *Id.*
125. R.S.A. 1980, c. G-3 and R.S.A. 1980, c. 10 (supp.).
126. S.A. 1981, c. B-15.
127. S.A. 1984, c. 46.
128. Alta. Reg. 196/84 and 299/84.

3. The Hazardous Chemicals Act[129]

The legislation and regulations controlling hazardous waste have been revised.[130] The Alberta Special Waste Management Corportion has been given the jurisdiction to regulate and manage the storage, transportation, treatment and disposal of hazardous wastes. New regulations specify the substances subject to control. Most substances produced or used in operations for the exploration, drilling and production of oil and gas have been specifically exempted. The penalties for an offence under the Act have been increased and the Minister has been given the right to apply to a judge of the Court of Queen's Bench for a restraining order where the Act is being breached and for an order directing remedial action.

4. Exemptions Act[131]

The Act has been amended to increase the value limits of personal and real property which are exempt from seizure under a writ of execution.[132] The following limits now apply: furniture $4,000, automobile $8,000, tools and equipment used in the debtor's trade or profession $7,500, equity in the home of the debtor $40,000, and equity in the mobile home of the debtor $20,000.

5. Natural Gas Pricing Act[133]

The Act has been amended and regulations passed in connection with the Market Development Incentive Payment Plan.[134] The Alberta Petroleum Marketing Commission (the "Commission") enters into agreements with distributors delivering gas to consumers in Manitoba, Ontario and Quebec pursuant to which incentive payments are made in order to develop additional gas markets. The Commission finances the incentive payments by imposing a market development levy upon gas intended to be removed from Alberta. This legislation deals with the operation of the plan during the period May 1, 1984 until April 30, 1985; however, the Governments of Canada and Alberta in the Western Accord[135] have indicated their intention to extend the program until the earlier of April 30, 1986 or when $160 million in additional payments have been made.

The Act has also been amended such that gas delivery to an interprovincial or international transporter or seller may now be deemed by regulation to be gas consumed in Alberta and thus qualify for a lower price.[136]

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129. R.S.A. 1980, c. H-3.
130. S.A. 1984, c. 50; Alta. Reg. 49/85.
131. R.S.A. 1980, c. E-15.
132. S.A. 1984, c. 51.
133. R.S.A. 1980, c. N-4.
134. S.A. 1984, c. 58; Alta. Reg. 331/84 and 332/84.
135. *Infra*, Part XX(C).
136. S.A. 1984, c. 59.

6. Utilities Statutes Amendment Act, 1984[137]

This amendment is of particular note to oil and gas lawyers. Formerly, the Gas Utilities Act[138] and the Public Utilities Board Act[139] prohibited the owner of a gas utility or public utility from carrying out certain transactions without the approval of the Public Utilities Board. The definitions of gas utility and public utility in the Acts are very broad and any person owning or controlling an interest in a gas well or an oil pipe line or a gathering system falls within the scope of the definitions. The prohibited transactions included:[140]

(a) the issuance by the owner of the public utility or gas utility of any shares or stocks or bonds or other evidences of indebtedness having a maturity in excess of one year;

(b) the sale, lease, mortgage, encumbrance, disposition or merger of the property of the owner of a public utility or gas utility; and

(c) if the owner of the public utility or gas utility was an Alberta corporation, the sale or transfer of any of its stock on the books of the corporation which would result in the vesting in another corporation of more than fifty per cent of its outstanding stock.

The sanctions for carrying out the prohibited transactions listed in (b) and (c) above without the approval of the Board were particularly severe, because such transactions were deemed to be void and of no effect. As almost all corporations and individuals exploring for, developing, and producing oil and gas in Alberta came within the scope of the Acts, it was necessary to obtain general exemption orders from the Board declaring such persons not to be the owners of public utilities or gas utilities for the purposes of the Acts.[141]

The Acts have now been amended such that the prohibited transactions will apply only to utilities designated by the Lieutenant Governor in Council. It is our understanding that the intent is to designate only true utilities, such as persons distributing gas to consumers. The prohibitions will no longer apply to "technical owners" engaging only in oil and gas exploration development and production. The amendment also, to the relief of many oil and gas lawyers, retroactively validates any transactions which were made in contravention of the prohibitions contained in the former provisions of the Act. At the time of writing this paper, the amendment had not yet been proclaimed.

It should be noted that the amendment does not affect s. 99 of the Public Utilities Board Act.[142] Section 99 provides that:

> When by a general or a special Act, an owner of a public utility is authorized to unite with the owner of any other public utility, the union is subject to the consent of the Board, and has no effect until the order authorizing it is published in the Alberta Gazette.

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137. S.A. 1984, c. 66.

138. R.S.A. 1980, c. G-4.

139. *Supra* n. 117.

140. *Supra* n. 138 s. 25(1)(e), (f), (g) and (h); *supra* n. 117 s. 91(1)(e), (f), (g) and (h).

141. *Supra* n. 138 s. 3(1)(b); *supra* n. 117 s. 71(1)(b).

142. *Supra* n. 117.

The consent of the Public Utilities Board is therefore still required where an owner of a public utility wishes to unite with the owner of any other public utility pursuant to a statute. The consent is necessary for transactions such as amalgamations and for other transactions which may not be restricted to corporations but are in the nature of a merger. Section 99 still applies to "technical owners".

B. 1985 SPRING SESSION

1. Real Property Statutes Amendment Act, 1985[143]

A new section 106.1(1.1), is to be added to the Land Titles Act.[144] This section provides that a mortgage securing a revolving line of credit up to a specific principal sum has priority for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that the advances and obligations are made or incurred subsequent to the registration of any other instrument or caveat and that at any time during the term of the mortgage there may be no outstanding advances. The provision appears to apply to all advances made after December 31, 1982. The effect of this amendment, together with the existing provisions of s. 106.1, will be to remove the restrictions on tacking and make it clear that a mortgage secures all present and future advances up to its specific amount.[145]

Section 165 of the Land Titles Act presently requires the Provincial Treasurer to pay the amount of any judgment recovered against the Registrar out of the assurance fund. The assurance fund consists of the amounts paid to the Registrar over the years in fees plus interest. At any time when the monies in the assurance fund reach $75,000, the funds are required to be transferred to the province's general revenue fund. There has been concern expressed that the amount available to satisfy claims against the Registrar is limited to either the cumulative or the current amount in the assurance fund. The new s. 165 provides that to the extent the assurance fund is not sufficient to pay claims against the Registrar, funds are to be transferred from the general revenue fund. However, there is an overall limit on payments of $31 million plus amounts paid into the assurance fund after March 31, 1983 less claims paid after March 31, 1983. This limitation is in addition to s. 169, which limits claims against the Registrar for errors in respect of mines and minerals to $2,500 per hectare.

The Law of Property Act[146] is to be amended by the addition of a new section 59.1 which will make rights of first refusal and assignment of rents equitable interests in land. Since the Law of Property Act applies to all lands in Alberta, rights of first refusal in respect of both patented and unpatented lands will be equitable interests in land. A caveat for a right of first refusal in respect of patented land may be registered under the Land Titles Act, and, in accordance with that Act, will take priority over

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143. Bill 19, 3rd Sess., 20th Leg. Alta. 34 Eliz. II, 1985.

144. R.S.A. 1980, c. L-5.

145. R. Megarry and H. Wade, *The Modern Law of Real Property* (4th ed. 1975) 983.

146. R.S.A. 1980, c. L-8.

unregistered and subsequently-registered interests. Prior to this amendment, a right of first refusal was not considered to be an interest in land and the holder was not entitled to register a caveat until the event triggering the right to purchase occurred.[147] This amendment clarifies and strengthens the position of holders of rights of first refusal. However, to preserve such rights, it now will be necessary to register caveats in respect of same.

2. Mines and Minerals Amendment Act, 1985[148]

Bill-40 will amend the Mines and Minerals Act[149] in the following respects. The definition of spacing unit has been amended to mean the producing or drilling spacing units prescribed pursuant to the new regulations under the Oil and Gas Conservation Act.[150] A new section 65(2) will be added to allow the Minister of Energy and Natural Resources, on the recommendation of the Energy Resources Conservation Board, to authorize the lessee of a coal lease to recover natural gas in the coal seam if it is necessary for conservation or safety reasons.

Sections 90 to 112, which deal with continuance of petroleum and/or natural gas leases, will be repealed and replaced. The new provisions generally expand and modify the existing continuation provisions while maintaining the same substantive rules. These new provisions may be summarized as follows: The definition of petroleum and natural gas will be changed to conform with the Oil and Gas Conservation Act. A lessee will be permitted to apply for continuation of a lease within the 120 day period prior to its expiry, rather than the present 90 day time period. If the Minister disagrees with the application, the Minister is required to notify the lessee and specify the time in which the lessee is entitled to respond. The Minister is not to decide on the continuation of a lease until after the expiry of the term of the lease or the time specified in the notice. The methods of continuing a lease will be substantially the same, although the provisions have been redrafted. The part of the lease that is within any or all of the following will continue:

(a) the spacing unit of a producing well,
(b) the area of a unit operation to which the lease is subject,
(c) the spacing unit of a lease for which the lessee has elected to pay compensatory royalty in respect of a laterally adjoining spacing unit of a freehold well,
(d) all or part of a spacing unit considered by the Minister to be capable of production in paying quantities of petroleum or natural gas from a zone in the location if the lease grants such rights.

The lease will continue down to the base of the deepest zone granted by the lease which is producing, capable of production in paying quantities, subject to a unit operation or which is laterally adjoining a spacng unit of a freehold well in respect of which compensatory royalty is being paid.

147. *Irving Industries Ltd.* v. *Canadian Long Island Petroleums Ltd.* (1974) 3 N.R. 430 (S.C.C.); *McFarland* v. *Hauser* (1978) 23 N.R. 362 (S.C.C.).

148. Bill 40, 3rd Sess., 20th Leg. Alta. 34 Eliz. II, 1985.

149. R.S.A. 1980, c. M-15.

150. R.S.A. 1980, c. O-5, as am.; Alta. Reg. 151/71, as am.

If the Minister does not receive an application for continuance of a lease, he is to make a decision, provided that he is not to continue the lease on the basis that it is capable of producing in paying quantities. Further, if the Minister receives an application he is not to consider any part of the lease not contained in the application. The Minister's decision as to the continuation of a lease is final and effective upon the expiry of the term of the lease. Thereupon, the lease ceases to include any part of the location or any zones not approved for continuation.

The provisions dealing with continuation of a lease where there is a well in the process of being drilled or where a well has been drilled in a spacing unit contained in the lease within ninety days prior to the expiry of the term of the lease have been redrafted. The lease will continue for the part of the lease that the Minister considers will be evaluated by the well up to a maximum of one section. The continuation of the lease applies for a period of ninety days following the finishing date of the well or any subsequent wells drilled within ninety days of each other.

A new provision will be added to allow one application to be made in respect of two or more leases where the well on which the application is based will be used to evaluate the other leases. Continuation for unproven areas will be retained but renamed continuation for a "potentially productive part of the location". These new provisions will be substantially the same as the existing provisions for continuation of an unproven area. The deeper rights reversion sections for ten and twenty-one year leases will be deleted as such rights have now reverted. The subsequent reversion mechanism will be retained and at any time after continuation, upon notice by the Minister that, in his opinion the deepest zone is no longer productive, capable of producing in paying quantities or subject to a unit operation, the lease will expire after one year of the notice unless continued on the basis of other zones. The one year period may be extended by the Minister if he considers the extension to be in the public interest.

Amendments were also made to the regulations passed under the Act. The Crown Land Registration Regulation[151] was amended[152] with respect to the fees and tariffs to be charged for registrations. A new General Regulation[153] has been passed which replaces the Administration Regulations, the Interest and Penalty Regulation and the Tariff and Fees Regulation. The General Regulation deals with the mechanics of issuing leases, transfers, surrenders, division of leases and consolidations. The holders of agreements are required to keep records of production and file production reports on a monthly basis. The regulation provides for interest on late royalty payments and interest on overpayments.

3. The Alberta Corporate Income Tax Amendment Act, 1985[154]

The main changes proposed by Bill 43 are as follows. The small business deduction rules for 1985 and subsequent taxation years are to be

151. Alta. Reg. 420/81.

152. Alta. Reg. 162/84.

153. Alta. Reg. 163/84.

154. Bill 43, 3rd Sess., 20th Leg. Alta. 34 Eliz. II, 1985.

simplified. The amendments will make the deduction available to any Canadian controlled private corporation including those whose cumulative deduction account under existing legislation exceeds $1 million. Income from businesses other than specified investment businesses and personal service businesses will qualify for the deduction. The rules respecting corporate partnerships will be simplified, primarily through the elimination of the concept of connected partnerships. Amendments are also to be made in respect of the period for reassessment, revocation of a waiver, and the payment of disputed amounts. The Bill also provides for amendments with respect to the late filing of elections to transfer exempt status for royalty tax credit and makes amendments in respect of late filing penalties. In addition, the Bill also introduces a deduction for small manufacturing and processing corporations.

4. Pipeline Amendment Act, 1985[155]

This Bill will amend the Pipeline Act[156] to simplify the licencing procedures for intraprovincial pipelines. The definition of pipeline has been simplified and the Energy Resources Conservation Board has been given the power by regulation to exempt a pipeline or class of pipelines from any provisions of the Act or the regulations and to prescribe alternative regulations therefor.

C. ALBERTA REGULATIONS

1. Royalty Regulations

The Natural Gas Royalty Regulations[157] and The Petroleum Royalty Regulations[158] have been amended.[159] The royalty for a well in respect of a Crown lease that comprises only part of a spacing unit or a unit operation is to be pro-rated according to the spacing unit or unit operating percentage held by the Crown lease. The amendments also provide that the Crown is liable for costs for which the Minister of Energy and Natural Resources has consented, incurred in the gathering and compression of the Crown's royalty share of natural gas. The Minister may estimate such costs and make adjustments for same. The costs are normally to be paid by deduction from the Crown royalty otherwise payable.

2. Oil Sands Royalty Regulation No. 1 Amendment Regulation[160] and Oil Sands Royalty Regulation, 1984[161]

These new regulations provide that the royalty applicable to production of oil sands from a well is the same as the royalty under the Petroleum Royalty Regulation.[162] The lessee is appointed as the agent of

155. Bill 41, 3rd Sess., 20th Leg. Alta. 34 Eliz. II, 1985.
156. R.S.A. 1980, c. P-8.
157. Alta. Reg. 16/74.
158. Alta. Reg. 93/74.
159. Alta. Reg. 164/84 and 167/84, respectively.
160. Alta. Reg. 165/84.
161. Alta. Reg. 166/84.
162. *Supra* n. 157.

the Crown for the purpose of disposing of the Crown's royalty share of oil sands production. The Minister has the right to determine the value of the Crown's royalty share production at the time of sale or disposition notwithstanding the consideration actually given. The royalty is payable not later than the last day of the month following the month in which the oil sands production was sold or otherwise disposed of. The lessee is required to file a report with the Minister not later than the last day of each month showing the amounts of production from each well sold or otherwise disposed of in the preceding month. The regulations do not apply to oil sands to which The Experimental Oil Sands Royalty Regulations[163] apply.

3. Alberta Petroleum Incentives Program Amendment Regulation[164]

The regulations[165] have been amended in several areas. Preincorporation expenses are now allowed and new restrictions apply to geological, geophysical and geochemical expenses. Payments received under Alberta incentive programs for the industry now reduce eligible expenses. In addition, the adjustment rules were amended.

4. Incentive and Royalty Exemption Systems[166]

The geophysical incentive system, the exploratory drilling incentive system and the oil royalty exemption system which were scheduled to expire on April 1, 1985 have been extended until August 1, 1985. It is the announced intention of the Alberta Government to undertake a review of these incentive programs in light of deregulation in accordance with the Western Accord.[167] The four-month extension period is to provide the Alberta Government with the necessary time to carry out the thorough review of these programs and to determine if they are to be extended, modified or replaced.

5. The Oil and Gas Conservation Regulations[168]

The regulations were amended primarily with respect to allowable production and the penalties to be applied.[169]

XIX. FEDERAL LEGISLATION

A. FEDERAL STATUTES

1. Investment Canada Act[170]

Since this issue of the Petroleum Law Supplement contains a separate paper on this Act, this paper will discuss only the highlights of the Act. Bill C-15 will repeal and replace the Foreign Investment Review Act[171]

163. Alta. Reg. 287/77.
164. Alta. Reg. 247/84.
165. Alta. Reg. 220/82.
166. Alta. Reg. 79/85, 81/85, and 80/85, respectively.
167. *Infra*. Part XX(C).
168. Alta. Reg. 151/71.
169. Alta. Reg. 264/84.
170. Bill C-15, 1st Sess., 33rd Parl. Can. 33-34 Eliz. II, 1984-85.
171. S.C. 1973-74, c. 46.

and provide for dramatic changes to the rules governing foreign investment in Canada. Investment Canada replaces the Foreign Investment Review Agency and is given the mandate to encourage and promote investment in Canada in addition to the responsibility of regulating foreign investment. The most significant change is that only the acquisitions of existing businesses in Canada will be subject to review. The establishment of new businesses in Canada by non-Canadians will be monitored and notice to Investment Canada will be required, but such transactions will not be subject to review. The exception is the establishment of new businesses in the sensitive areas of cultural heritage and national identity, which will require approval at the option of the government. Acquisitions of control of Canadian businesses by non-Canadians are only reviewable where the gross assets of the acquired Canadian business are $5 million or more. Indirect acquisitions are reviewable in two cases. If the Canadian assets are less than one-half of the total assets acquired, the indirect acquisition is reviewable if the gross Canadian assets are $50 million or more. If the Canadian assets are more than one-half of the total assets acquired, the indirect acquisitions are reviewable if the gross Canadian assets are $5 million or more.

The Bill refers to non-Canadians rather than to non-eligible persons and the rules for determining control have been clarified and relaxed. Where transactions are reviewable, the test for approval is now whether the transaction "is likely to be of a net benefit to Canada" rather than a "significant benefit to Canada". Although it is not clear, it appears that the standard for approval has been lowered with this new test. The remedies for non-compliance have also been revised. The Bill provides for sanctions for non-compliance including injunctions, fines and divestiture orders. The concept of rendering the transaction "nugatory" has been deleted.

2. An Act To Amend The Petroleum And Gas Revenue Tax Act[172]

This Act amends the Petroleum and Gas Revenue Tax Act.[173] It contains provisions reported in last year's paper respecting the taxation of production royalties at the twelve per cent withholding rate and other amendments which were contained in the amendment Bill introduced last year but not passed.[174] The major change is that the annual tax credit available to a corporation in respect of production revenues will increase to $500,000 from the $250,000 that had applied since June 1, 1982. The regulations were also amended primarily in respect of the resource allowance.[175]

172. Bill C-8, 1st Sess., 33rd Parl. Can. 33 Eliz. II, 1984.

173. S.C. 1980-81-82-83, c. 68. Part IV, s. 78-117.

174. See discussion at (1985) 23 Alta. L. Rev. 237.

175. SOR 84/828.

B. FEDERAL REGULATIONS

1. Petroleum Incentives Program Regulation Amendments[176]

Regulation S.O.R. 84 - 296 amended the definition of production payment. Regulation S.O.R. 84 - 861 made amendments with respect to eligible expenses and new restrictions to apply to geological, geochemical and geophysical expenses. Expenses incurred in respect of an abandoned development well on Canada lands will be eligible for incentives at the development rate only. Minimum earning requirements for Canada Lands have been changed.

S.O.R. 84 - 909 revised the provisions for calculating interests on refunds of payments received under the Petroleum Incentives Program Act.[177]

S.O.R. 85 - 354 has revised the regulation such that a cost or expense is not an eligible cost or expense to the extent it is reimbursable under a policy of insurance. New restrictions on geological, geochemical or geophysical expenses were introduced. In addition, rules have been added concerning connected persons and partnerships.

2. Canadian Ownership and Control Determination Regulations, 1984[178]

These regulations replace the Canadian Ownership and Control Determination Regulations[179] and formally establish the stream-lined rules that were announced in 1983. New forms were prescribed by the Canadian Ownership and Control Determination Forms Order, 1984.[180]

XX. GOVERNMENT AGREEMENTS

A. CANADA - NOVA SCOTIA OIL AND GAS AGREEMENT ACT[181]

This Act formally establishes the Canada - Nova Scotia Off-shore Oil and Gas Agreement reached on March 2nd, 1982. Since that time, both governments have been operating on the basis of informal arrangements including an interim Canada - Nova Scotia Off-Shore Oil and Gas Board. The agreement establishes the co-operative management regime for the Nova Scotia off-shore and the provision for revenue sharing. Both the federal and provincial legislation continues to apply but will be administered cooperatively under the provisions of the agreement. The Board is delegated powers by both levels of government. The major elements of the Act include:

(a) the establishment of a permanent Canada - Nova Scotia Off-Shore Oil and Gas Board for managing petroleum activity in the Nova Scotia off-shore area;

176. SOR 84/296; SOR 84/861; SOR 84/909; SOR 85/354.
177. S.C. 1980-81-82-83, c. 107.
178. SOR 84/431.
179. SOR 83/40.
180. SOR 84/412.
181. S.C. 1984, c. 29.

(b) a mechanism to ensure that the province receives all revenues from off-shore activity (with the exception of federal corporate income tax) until its *per capita* fiscal capacity reaches 110 per cent of the national average fiscal capacity, adjusted upward to take account of the extent to which the province's unemployment rate exceeds the national average. These revenues include the federal Petroleum and Gas Revenue Tax. Once it has moved above this level, the province will begin to share the revenue;
(c) a provision to allow the Government of Nova Scotia to purchase up to fifty per cent of any Crown share in a natural gas field and twenty-five per cent in an oil field;
(d) the establishment of a $200 million development fund to assist the province in meeting the cost of providing an infrastructure for off-shore oil and gas activity;
(e) the provision for equalization offset payments, which will protect the province for up to ten years from the full effects of reductions in equalization payments as it gains off-shore revenue.

The composition of the Board will be the same as that of the interim Board. The federal government will continue to have three representatives on the Board and the provincial government two representatives.

Part II of the Act imposes a retail sales tax upon persons who acquire tangible personal property in the Nova Scotia off-shore area for use or consumption.

B. ATLANTIC ACCORD

Since this issue of the Petroleum Law Supplement contains a separate paper on the Atlantic Accord, only the highlights of the Agreement will be discussed in this paper. An off-shore oil and gas agreement between the Federal and Newfoundland Governments was signed on February 11, 1985. The agreement sets out principles of joint management and revenue sharing in respect of oil and gas resources off shore of Newfoundland. The agreement requires enabling legislation to be introduced within a year, but both governments have agreed to act as though the legislation were already in place.

The major provisions of the agreement are as follows: A Canada - Newfoundland Off-Shore Petroleum Board will be created. The Board will be empowered to make decisions on all matters relating to the management of all oil and gas resources off-shore Newfoundland and Labrador. The Board will assume the functions and operations of the Canada Oil and Gas Lands Administration and the Newfoundland and Labrador Petroleum Directorate. The Board will be comprised of three members appointed by the Government of Canada, three members appointed by the Government of Newfoundland and a chairman. With respect to decisions relating to the pace and mode of exploration and the pace of production, the responsibility for approval will rest with the federal government when Canada has not attained or has lost energy self-sufficiency and security of supply. In periods when these conditions are achieved, approval will rest with the provincial government. With respect to decisions relating to the mode of development, the responsibility will

rest with the provincial government, providing that such decisions do not unreasonably delay the attainment of self-sufficiency and security of supply.

The principles of revenue sharing between Canada and Newfoundland will be the same as those between Canada and those provinces with petroleum-related activities on land. The federal government will enact legislation to enable the provincial government to establish and collect royalties and other provincial-type revenues and taxes of a general application. Newfoundland will receive the proceeds of royalties, provincial corporate income tax, sales tax, bonus payments, rentals and fees and other forms of provincial type revenue and taxes as may be established.

A joint off-shore development fund (the "fund") of $300 million to be financed by the two governments will be established and cost-shared seventy-five per cent federal and twenty-five per cent provincial. The fund is intended to enable the province to develop the necessary infrastructure to meet the demands of oil and gas development and to ensure that the province can reap the economic benefits of the off-shore development.

An equalization offset payment formula has been developed to ensure that there will not be loss of equalization payments as a result of off-shore revenues.

The Board will be responsible for determining the need for conducting public review of any prospective development. When public reviews are required, the Board may establish terms of reference and a timetable for review, appoint a commissioner or panel, or require project proponents to submit a preliminary development plan and environmental and socio-economic impact statements, including a preliminary benefits plan. Not more than 270 days will elapse between the receipt of the plan by the Board and its decision with respect to the plan.

An oil pollution compensation regime with respect to absolute liability for oil spill damages and debris, requiring financial security, will be established. The regime will include provisions to compensate fishermen with respect to absolute liability for oil spill and debris-related damages.

Should the Government of Newfoundland achieve the requisite support among the other provinces, the Government of Canada will introduce a mutually agreeable resolution in Parliament to entrench the agreement.

C. WESTERN ACCORD

On March 28, 1985 the federal Government announced a comprehensive oil and natural gas agreement among itself and the Governments of Saskatchewan, Alberta and British Columbia. In the agreement, the four governments stated that their objectives can best be met with a regime of market sensitive pricing for both oil and gas and with a fiscal regime based on profit sensitive taxation. To this end, the four governments have agreed to replace existing arrangements covering the pricing and fiscal treatment of oil and gas. The legislation to implement the agreement has not been introduced, so that at this time the Western Accord is an expression of the governments' intent. The Western Accord deals with three

topics: deregulation of crude oil prices, domestic natural gas pricing and fiscal principles.

The price for oil in Canada is deregulated effective June 1, 1985 with the price to be determined by market forces. The price for conventional oil, which had been set at $29.75 per barrel, will accordingly rise to world price. The price for new oil reference price oil, which had been approximately $41.00 per barrel, will drop to the world price. The world price as at June 1, 1985 is expected to be approximately $37.50 per barrel. The producing provinces will retain their power to control production of crude oil to ensure good conservation practice and to ensure equitable sharing of production. The Alberta Petroleum Marketing Commission will cease to act as the exclusive agent for marketing of the Crown lessee share of crude oil and pentanes and will, in its role as buyer and seller of oil in Alberta, be in competition with the buyers and sellers of oil in the private sector. In the event that there are disturbances in the international oil market that result in sharp changes to crude oil prices, with potentially negative impacts on Canada, the Government of Canada will consult with the provincial governments and take appropriate measures to protect Canadian interests. Volume and price restrictions on short terms crude oil and petroleum product exports will no longer be required. The National Energy Board will issue non-restrictive licences for short term exports on an after-the-fact basis. The Board will monitor the volumes of prices for such exports, and any distortions in the competitive market or any particular problems associated with the free market will be addressed by the Minister of Energy, Mines and Resources in consultation with the provincial governments. Longer-term exports of more than one year for light crude petroleum products and two years for heavy crude will continue to require the prior approval of the Board and the Governor in Council.

It was agreed among the four governments that by November 1, 1985 they would develop a new market sensitive pricing scheme for natural gas. In the interim, the Alberta Border Price will remain at its present level. A task force of senior officials from the federal Government and the producing provinces will work with all interested parties to develop the system. The Market Development Incentive Payment Plan will be extended for one year until April 30, 1986. The market development incentive payments will terminate following payments for gas delivered up to April 30, 1986 or to a maximum level of $160 million in incentive payments, whichever comes first. The subsidy of TransCanada Pipelines Limited tariffs under the Federal Transportation Assistance Program will be terminated in conjunction with the elimination of the Canadian Ownership Special Charge.

The Western Accord will implement the following fiscal measures. The Government of Canada will remove the Natural Gas and Gas Liquids Tax (which includes the Natural Gas Export Levy), the Incremental Oil Revenue Tax, the Canadian Ownership Special Charge, the Crude Oil Export Charge and the Petroleum Compensation Charge. The Government of Canada will not introduce any special tax on the oil and gas producing industry in order to recover the deficit in the Petroleum Compensation Account. The Petroleum Incentives Program will terminate on

March 28, 1986, subject to the grandfathering arrangements for existing exploration agreements. For new production on oil and gas and gas liquids on or after April 1, 1985, the Petroleum and Gas Revenue Tax ("PGRT") will not apply. Further, subject to federal approval, PGRT will not apply to natural gas or oil consumed by or produced by major new energy projects undertaken on or after April 1, 1985. PGRT levied on prior production will be phased out according to the following schedule:

	Effective Tax Rate	
Period	Conventional Oil & Gas	Synthetic Oil
Jan. 1, 1986 to Dec. 31, 1986	10%	6%
Jan. 1, 1987 to Dec. 31, 1987	8%	4%
Jan. 1, 1988 to Dec. 31, 1988	6%	2%
Jan. 1, 1989 and thereafter	0%	0%

The first $10,000 of an individual's resource income will not be subject to PGRT. The current enhanced oil recovery fiscal regime will continue to apply. The Western Accord states that the four governments expect that the increased cash flow to the industry as a result of the reduction of the PGRT will result in reinvestment and the development of new oil and gas resources for all Canadians. The four governments will pursue an active program of monitoring the industry in respect to this reinvestment. The Government of Canada will allow new exploration and development write-offs which are not immediately used under the federal Corporate Income Tax to reduce the PGRT otherwise payable. The reduction will be calculated as thirty per cent of the unused amount of write-offs related to new expenditures in the year. The reductions will be applied to PGRT payable on both production income and resource royalty income, for corporations only, and will be taken after the small producers credit calculation. The Government of Canada agreed that the tax base incentive design to stimulate investment in Canada's oil and gas industry shall be of a general application to the industry without discrimination as to the location of the activities in question or as to the ownership and control.