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

ROBERT P. DESBARATS* AND LORNE W. CARSON**

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. The review of the legislation is effective as of May 9, 1984.

I. FREEHOLD LEASES

A. *NORTHWESTERN UTILITIES LIMITED* v. *PEYTO OILS LTD.*[1]

This case involved an agreement made in 1938 and amended in 1942. Under the agreement, the predecessor to Peyto Oils Ltd. ("Peyto") had granted the predecessor to Northwestern Utilities Limited ("NUL") rights to drill for, produce, save and market petroleum substances within, under or upon approximately 27,000 acres in east-central Alberta. Peyto contended that NUL had failed to develop the lands and to market production in accordance with the agreement. The agreement is somewhat unique. The decision deals with nine separate issues as follows:

1. Lease or Agreement of Sale

NUL submitted that the agreement constituted an agreement of purchase and sale. Peyto contended that it was in essence a petroleum and natural gas lease. Mr. Justice Lomas found that the agreement granted a *profit à prendre* and therefore was in essence a petroleum and natural gas lease.

Both the 1938 agreement and the 1942 amendment referred to a sale and NUL's predecessor was referred to as the purchaser and Peyto's predecessor as the vendor. The agreement did not have a fixed term. Those factors indicated a sale.

On the other hand, the agreement had been entered into 41 years prior to the trial and there had been no transfer of mineral title to the purchaser or its successors. The agreement provided for the payment of certain percentages of production to the vendor and further provided that if the purchaser did not satisfy its drilling obligations, the vendor would have the right to cancel the agreement and re-enter the lands. The agreement also restricted assignments by the purchaser and included a clause providing for peaceable possession and enjoyment by the purchaser. Such factors indicated a grant of a *profit à prendre*, rather than an absolute sale.

---

* Partner, Bennett Jones, Calgary, Alberta.

** Solicitor, Bennett Jones, Calgary, Alberta.

1. (1984) 49 A.R. 1 (Q.B.).

In determining that the agreement granted a *profit à prendre*, Mr. Justice Lomas laid particular emphasis on the fact that the vendor was required to pay a share of production taxes, similar to the situation referred to by Mr. Justice Rand of the Supreme Court of Canada in *Berkheiser* v. *Berkheiser and Glaister.*[2] His Lordship specifically held that the fact that the agreements did not have a defined term did not make them absolute. A *profit à prendre* may be for an indefinite term.

It is interesting to note that the agreement does not appear to contain any granting language or *habendum* clause. The agreement merely obligates NUL to drill wells, to deliver a stated percentage of the production to Peyto, and to perform various other obligations.

2. Meaning of "Paying Quantities"

The 1942 amendment released NUL's predecessor from obligations to make annual payments, such release to be in effect "until such time as petroleum and (or) natural gas in paying quantities shall be recovered, saved and marketed by the Purchaser from agreed area". A well drilled by NUL in the agreed area commenced to produce in 1978. During November and December, 1978, NUL received $7,500 in revenue from the well and paid $6,500 in operating, transportation and treating costs. However, from January to March, 1979, production revenue was $2,700 and expenses were $11,000. The well was abandoned in December, 1979. Peyto contended that during the months of November and December, 1978, the well produced in paying quantities, thus the provision in the 1942 amending agreement releasing NUL from its obligation to make the annual payments was terminated and NUL was obligated to make such payments. NUL contended that during the five-month period that the well was on production, total operating revenues were less than total operating expenses, so that the well did not produce in paying quantities. Based upon American textbooks and Canadian case law, Mr. Justice Lomas distinguished between two different types of "paying quantities" as follows:

(a) for the purpose of the *habendum* clause of a lease (that is, for the purpose of keeping the lease in force after the expiration of the primary term), "paying quantities" means production in quantities sufficient to yield revenues in excess of operating costs; and

(b) for the purpose of measuring the duties of the lessee under the covenants of the lease, the term means production in quantities sufficient to yield a return in excess of drilling, development and operating costs.

The intention of the parties in this case, as determined from the context, was that the phrase had the second meaning quoted above. Since the well did not produce sufficient revenues to cover the drilling, completion and equipping costs, it was not capable of producing in "paying quantities".

3. Off-Set Drilling Obligations

Clause 4(a) of the 1942 amending agreement provided that Peyto could, by notice, require NUL to drill a well on the agreed lands. Clause

2. [1957] S.C.R. 387, 392.

4(b) of the amending agreement imposed an off-set obligation. Clause 4(b) stated in part:

> If petroleum and (or) natural gas should be discovered in paying quantities in the agreed area by drilling as aforesaid then the Purchaser shall be under an obligation thereafter to drill such further well or wells for the production of petroleum and (or) natural gas on the agreed area as may be required by adherence to good operating and business practice, having due regard to the amount of available production and the marketability of the production obtained and the Purchaser further agrees to protect the agreed area from drainage of petroleum and (or) natural gas due to production wells being drilled on adjoining lands . . .

Peyto argued that clause 4(b) of the amending agreement imposed an off-set obligation in two situations: when a well drilled at Peyto's request pursuant to clause 4(a) encountered production in paying quantities, and when wells drilled on adjoining lands were productive. NUL contended that it was obligated to drill off-set wells only if both circumstances arose. Mr. Justice Lomas agreed with Peyto and found that clause 4(b) imposed two distinct obligations. However, His Lordship found that the second obligation was "to protect the agreed area from drainage". The mere presence of a productive well on adjoining acreage would not give rise to the obligation to drill off-set wells. It must be established that the wells on the adjoining acreage were causing drainage. It was found, as a fact, that Peyto did not establish that drainage had occurred. Therefore, NUL was not in breach of its obligations under clause 4(b).

4. Damages for Breach of Off-Set Obligation

Although Mr. Justice Lomas found that no action lay against NUL for breach of its off-set obligations, he nevertheless considered the damages which would have been awarded to Peyto had he found otherwise. His Lordship reviewed a number of Canadian decisions and an American text and determined that there were three possible ways to calculate the damages:

(a) the estimated costs of drilling the off-set wells as contended by Peyto in reliance on the decision in *Dolly Varden Mines Ltd.* v. *Sunshine Exploration Ltd.*;[3]

(b) the amount which would have been paid to Peyto in respect of its lessor's royalty on the petroleum substances which were lost through drainage; and

(c) the amount which would have been paid to Peyto on account of its lessor's royalty if an off-set well had been drilled in accordance with the off-set obligation.

His Lordship held, on the basis of *Farmers Mutual Petroleums Ltd.* v. *United States Smelting Refining and Mining Company and Agawam Oil Co. Ltd.*,[4] that the proper measure of damages is the sum necessary to place Peyto in the same position it would have been in if the drilling covenant had been performed. Thus, the third measure of damages quoted above would have been the proper measure.

3. (1969) 8 D.L.R. (3d) 441 (S.C.C.).

4. (1962) 39 W.W.R. 682 (Sask. Q.B.).

5. Failure to Produce

Clause 3 of the 1938 ageement provided as follows:

> If and when and so long as commercially profitable production is obtainable in any well on the agreed area, the Purchaser will continuously and diligently operate the said well.

Peyto contended that NUL was in breach of this clause due to its failure to diligently market production from the agreed area. NUL argued that the clause only imposed on it an obligation to continue to produce a well which was profitable, not an obligation to market. Mr. Justice Lomas disagreed with NUL. He stated that if the word "obtained" had been used in clause 3, rather than "obtainable", he might have agreed with NUL. His Lordship also pointed out that the agreement contained no covenant by NUL to market production. It was not likely, in his view, that the parties did not intend that NUL have an obligation to market production. Accordingly, His Lordship found that the obligation imposed in clause 3 to "operate" included an obligation to diligently seek markets for the production.

Mr. Justice Lomas then considered the meaning of the phrase "commercially profitable production". On his review of case law and textbooks, His Lordship found that the phrase "commercial production" usually refers to production which is sufficient to return a profit over the costs of drilling, equipping, completing and operating the well. His Lordship found that in this case, the use of the word "profitable" indicated that NUL's obligation was contingent upon it being able to make a profit from production. NUL would only be able to make a profit if there was sufficient production to cover equipping costs. Since the wells were natural gas wells, it would be necessary to install a gathering system before the production could be marketed. The production would have to be sufficient to cover the costs of installing the gathering system. His Lordship considered whether or not NUL was obligated to gain access to gathering systems owned by third parties in the general vicinity. If NUL did so, the wells tied into such other gathering systems would not have been tied into any gathering system eventually installed by NUL. The tying-in of wells to other gathering systems would have delayed the installation by NUL of its own system. NUL wished to develop the agreed area on a project basis utilizing its own gathering system. Whether or not NUL should have farmed out any portion of the agreed area to third parties who owned gathering systems or had access to existing gas purchase contracts was also considered. Mr. Justice Lomas found, as a fact, that NUL had diligently sought markets and therefore was not in default of its obligations under clause 3 of the agreement.

6. Failure to Provide Information

The agreement imposed obligations upon NUL to provide drilling and production information to Peyto. Peyto did not claim any damages as a result of such failure. Mr. Justice Lomas found that NUL was in breach of its obligations to provide information because of lengthy delays in providing the information, but awarded no damages. His Lordship suggested that it would have been difficult for Peyto to have proved any damages.

7. Lack of Consideration

It was suggested by Peyto that there was no consideration flowing from NUL in respect of the 1942 amendment, as it merely reduced NUL's obligations. That argument was rejected. The agreement was executed under seal, being the corporate seals of the parties thereto, and did not require consideration. Further, the parties to the agreement and their successors and assigns had dealt with each other consistently for almost 40 years on the basis that the second agreement was enforceable and Peyto was estopped from claiming that it was not enforceable.

8. Mandatory Arbitration

Clause 4(d) of the second agreement provided that if the vendor (Peyto) notified the purchaser (NUL) of an alleged default by the purchaser of its obligations under paragraphs 4(a), 4(b) or 4(c), then:

> The Purchaser may . . . apply in writing raising the contention that it has not committed the default . . . whereupon the matter shall be referred to arbitration . . .

Peyto had notified NUL of various alleged defaults by NUL under the agreement, including alleged defaults under clauses 4(a), (b) and (c) of the amending agreement. NUL's solicitors had responded stating that the question should be referred to arbitration. Accordingly, NUL contended that the matter should be decided by arbitration rather than by the courts.

The defaults alleged by Peyto were not merely defaults under clauses 4(a), (b) and (c), but included defaults under other provisions of the agreement. In addition, the agreement contained no term, expressed or implied, to the effect that arbitration was a condition precedent to the commencement of legal proceedings. In any event, NUL did not apply for a stay of proceedings under the Arbitration Act.[5] Accordingly, the arbitration clause in the agreement did not preclude court proceedings.

9. Availability of Damages as a Remedy

Clause 4 of the amending agreement and clause 9 of the original agreement both provided that if a default occurred and was not remedied within a specified period of time following receipt by NUL of a notice of the default, Peyto would have the right, by giving a second notice, to terminate the agreement. NUL argued that by virtue of those two clauses, the only remedy available to Peyto if NUL was in default was to terminate the agreement. According to NUL, damages were not available as a remedy.

Both clauses 4 and 9 used the word "may". There was nothing in the agreements, expressed or implied, restricting the vendor's remedy to termination. Accordingly, NUL's contention was rejected.

5. R.S.A. 1980, c. A-43.

B. *KISSINGER PETROLEUMS LTD.* v. *GROVER* [6]

In this case, the validity of a petroleum and natural gas lease granted to Kissinger Petroleums Ltd. ("Kissinger") was attacked. Falcon Resources Ltd. ("Falcon") had obtained an option to lease the lands covered by the Kissinger lease. Falcon contended that Kissinger's lease was invalid for the following reasons:

1. Failure to obtain approval under the Devolution of Real Property Act[7]

Section 14(1)(b) of the Alberta Devolution of Real Property Act[8] provides that a personal representative of a deceased person may lease real property owned by the estate for a term in excess of one year with the approval of the Court. The Court had not approved the Kissinger lease in accordance with that Act.[9] The Alberta Court of Queen's Bench canvassed judicial decisions and determined that the failure to obtain Court approval rendered the lease voidable. It also found that the purpose of requiring Court approval was to prevent a personal representative from tying up real property to the detriment of the beneficiaries of the estate. All of the beneficiaries had consented to the granting of the Kissinger lease. The Court indicated that, although unanimous consent does not insure automatic Court approval, no question of a detriment to the estate or the beneficiaries could arise in the present case, because all interested parties had consented. It has been the practice of the Court to grant late approvals. In this case, Kissinger sought such approval and it was granted.

It is interesting to note that the Court did not consider that the granting of the approval affected the rights of an intervening third party, namely Falcon. Arguably, because Falcon is prejudiced by the granting of the approval, it should not have been granted. On the other hand, the provisions requiring approval are not intended to protect a third party in the position of Falcon.

2. Section 116 of the Land Titles Act[10]

When the Kissinger lease was granted, the estate's title to the mineral rights had not been transferred to the executrix. Section 116(2) of the Land Titles Act[11] provides as follows:

> Section 116(2). The personal representative before dealing with the land shall apply in writing, executed by himself or his solicitor, to the Registrar to be registered as owner...

Falcon contended that because title had not been transferred to the executrix, she did not have the power to grant the lease. The Court of Queen's Bench found that the provisions of Section 116 are administrative only. Section 116(7) of the Land Titles Act[12] states that:

6. (1983) 26 Alta. L.R. (2d) 378 (Q.B.).
7. R.S.A. 1980, c. D-34.
8. *Id.*
9. *Id.*
10. R.S.A. 1980, c. L-5.
11. *Id.*
12. *Id.*

> The title of the executor or administrator to the land relates back and takes effect from the date of the death of the deceased owner.

Thus, the executrix had the power to grant the lease.

3. Drilling Through End of Primary Term

The Kissinger lease was dated March 6, 1970 and was for a primary term of 10 years. On March 1, 1980, shortly before the expiry of the primary term, Kissinger commenced a well on the leased lands. Drilling was completed on March 9, 1980 and drill-stem tests were run on March 10, 1980, at which time it was determined that the well was capable of producing 2,000,000 cubic feet of natural gas per day. The rig was released and the well was capped on March 11, 1980. It was completed on May 22, 1980. On March 4, 1980, prior to the end of the primary term and prior to completion of drilling, Kissinger deposited a cheque in the amount of $640 (equal to the delay rental payment) in the executrix' personal bank account which was not the estate's bank account. The executrix distributed the funds to the beneficiaries of the estate. On March 11, 1980, after the well had been rig-released, Kissinger advised the executrix that a successful well had been drilled and that the payment made to her on March 4, 1980 would "act as the shut-in royalty payment as per clause 3 of the subject lease".

The third proviso to the *habendum* clause of the lease provided as follows:

> 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 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 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 third covenant in the lease dealt with shut-in wells and stated as follows:

> If at the expiration of any year during the primary term or any extended term of this Lease and Grant there be a well or wells upon the said lands . . . from which leased substances are not produced as a result of a lack or an intermittent or uneconomical or unprofitable market or any cause whatsoever beyond the Lessee's reasonable control the Lessee may, on or before such anniversary date, pay to the Lessor in the same manner provided for the payment of the delay rental hereunder, as royalty, an amount equal to the annual delay rental payable hereunder, and if such sum is so paid, the well or wells shall be deemed to be a producing well or wells on the said lands under the provisions of this Lease and Grant for the following twelve (12) month period.

The well was completed on May 22, 1980. The Court found that the effect of the third proviso to the *habendum* clause was that the term of the lease was extended until May 22. The Court found that under the shut-in royalty clause, the lessee had the right to make a shut-in royalty payment until the end of the extended term of the lease. Since the shut-in royalty payment was made prior to May 22, 1982, the provisions of the shut-in royalty clause were complied with and the lease was valid.

It is submitted that the Court was in error in holding that the phrase "extended term of this lease" in the shut-in royalty clause referred to an extension of the lease, under the third proviso of the *habendum* clause, until completion of drilling operations. The introductory words of clause 3 of the shut-in royalty clause can be read in two ways. The words "at the expiration of any year" may modify only "during the primary term" or may modify both that phrase and the phrase "any extended term of this Lease and Grant". The Court appears to have adopted the former view. However, subsequently in the shut-in royalty clause, the date upon which the shut-in royalty payment must be made is specified by use of the words "the Lessee may, on or before such anniversary date pay to the Lessor...". The use of the words "such anniversary date" clearly refers to the anniversary date of the lease. It is submitted that because of the words "such anniversary date", the words "at the expiry of any year end" in the introduction of the shut-in royalty clause must also modify "any extended term of this Lease and Grant". Otherwise, there is no time specified for the payment of a shut-in royalty at the end of the extended term. Also, the words "such anniversary date" are without meaning in that instance. The clause also states that if the lessee does make the shut-in royalty payment, then the well shall be deemed to be producing for "the next twelve (12) month period". It is submitted that the "next twelve (12) month period" is the 12 month period from the end of the anniversary date of the lease until the next anniversary date of the lease.

The Court stated that the proviso in the third proviso to the *habendum* clause had the effect that the presence of the shut-in well would continue the lease indefinitely until such time as there was a market. The Court stated that the shut-in royalty clause was intended to compensate the lessor during that period of time by providing for a minimum royalty payment. However, the word "may" is used in the shut-in royalty clause so that the lessee is not obligated to make the shut-in royalty payment but has the option of doing so.

The entire *habendum* clause of the lease is not reproduced in the reported decision. Presumably, the *habendum* clause states that the lease is to be for a primary term of 10 years and for so long thereafter as leased substances are produced or deemed to be produced from the leased lands. If that is the case (as it usually is in freehold leases) then, it is submitted, the purpose of the shut-in royalty clause is to provide the lessee with a mechanism whereby a shut-in well can be deemed to be producing, so that the lease can be continued beyond its primary term in accordance with the *habendum* clause.

It is submitted that the proviso in the third proviso to the *habendum* clause, which deals with interruptions due to circumstances beyond the lessee's control not being counted against the lessee, only relates to the requirement that operations be continuous without cessation of more than 90 consecutive days. If those words were intended to continue the lease indefinitely beyond the end of its primary term, it is likely that more specific language to that effect would have been employed. In fact, it is probable that a fourth proviso to the *habendum* clause would have been inserted.

It is submitted that the lease contained no provision to permit the lessee to continue the lease if it drills through the end of the primary term and the drilling results in a shut-in well. The onus was on the lessee to ensure that a well had been drilled and capped on or before the expiry of the primary term.

4. Was the Shut-In Royalty Payment Proper?

The Court found that the shut-in royalty payment was properly made on March 4, 1980, since it was regarded and dealt with by all parties as a payment to the executrix in that capacity and not in her personal capacity. It is arguable that the lessee did not have the right to make a shut-in royalty payment prior to there being a shut-in well located on the leased lands. In that event, the payment on March 4, 1980 could not have been a valid payment of a shut-in royalty.

It is also arguable that the provisions regarding shut-in royalty payments are in the nature of a condition precedent, so that if the payment is not made in precisely the manner specified in the lease, then the condition precedent is not satisfied. The shut-in royalty clause states that shut-in royalty payments are to be made in the same manner as delay rental payments. The provisions regarding the payment of delay rentals are not reproduced in the reported decision. Normally, those provisions state that a delay rental must be paid or tendered to the lessor or to a designated depository, usually a specified bank account. It is likely that a bank account was specified in this case, namely, the estate's bank account, rather than the executrix' personal bank account in which the shut-in royalty payment was directed to be deposited by Kissinger. In that case, it is arguable that the shut-in royalty payment was not paid to the designated depository and it is also arguable that deposit of the shut-in royalty payment in the executrix' personal bank account does not constitute tendering of the payment to the executrix. If so, then the shut-in royalty payment may not have been properly made and the lease may have expired.

The writers have been advised that the case has been appealed.

C. *CAMERON* v. *SILVERGLEN FARMS LTD.*[13]

By written agreement, a father granted timber rights to his son. The son assigned the timber rights to his brother. The father sold the lands to which the timber rights pertained, and the purchaser refused to permit the brother access to the lands to cut trees.

The written agreement contained the following granting clause:

> . . . Does hereby grant, bargain, sell and assign to the Purchaser all trees and timber now standing, growing, lying and being in and upon . . .

The written agreement contained an *habendum* clause which provided as follows:

> TO HAVE AND TO HOLD the said trees and timber and every part thereof to the Purchaser to and for his sole and only use; provided, however, that the Purchaser remove the same within ten (10) years from the date hereof, after which date all trees or timber not removed shall revert to and be and become the property of the Vendor.

13. (1983) 144 D.L.R. (3d) 544 (N.S. S.C. App. Div.).

The written agreement also contained the following provisions:

> The consideration for the sale of the trees and timber herein being sold by the Vendor to the Purchaser is as follows, that is to say: The sum of Three ($3.00) Dollars per cord for each cord of wood removed . . . And it is hereby declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns, respectively.

The lower Court found that the agreement granted a *profit à prendre* to the son, since it granted the right not only to cut trees but to remove them from the property. It follows that the agreement granted an interest in land and that the son had priority over the purchaser. The Trial Court found that the agreement was not assignable by virtue of the use of the words "for his sole and only use" in the *habendum* clause. As a result, the purchaser would have the right to exclude the brother, who was an assignee, from the lands.

The Court of Appeal disagreed with the finding of the lower Court with respect to assignability, holding that the words used in the *habendum* clause were intended to exclude the grantor rather than to prevent assignments. The enurement clause showed that the agreement was assignable.

The brother argued that the payment of $3.00 per cord provided for in the agreement was a personal right of the father and did not pass to the purchaser when he bought the land from the father. The Court of Appeal disagreed, holding that the agreement was assignable by both the grantor and the grantee. The Court held that the payment was an intricate part of the conveyancing of the timber rights, and was therefore indistinguishable from rent reserved in a lease, which is an interest in real property. When the fee is sold all incidental rights, such as the right to receive fees or rents, go with it. This case can clearly be quoted for the proposition that when a freehold lessor transfers his mineral title, his transferee becomes entitled to receive royalties and delay rental payments, since those payments are incidental to the mineral rights. A similar issue is discussed in *Canada Trustco Mortgage Company* v. *Skoretz* [14] discussed at Part II.C, below.

D. *VOYAGER PETROLEUMS LTD.* v. *VANGUARD PETROLEUMS LTD.*[15]

This case was an appeal from the decision of the Alberta Court of Queen's Bench discussed in the 1982 edition of this paper. Voyager Petroleums Ltd. ("Voyager") was the holder of the lessee's interest in a freehold petroleum and natural gas lease. Vanguard Petroleums Ltd. ("Vanguard") was the holder of the lessor's interest. Prior to Vanguard acquiring the lessor's interest, a royalty trust in respect of the lessor royalty reserved in the lease had been created. Vanguard held a number of units in the royalty trust. Voyager wished to include the lease in a unit, and asked Vanguard to execute the unit agreement. Vanguard forwarded the unit agreement, unexecuted, to the trustee of the royalty trust, indicating that Vanguard consented, as a holder of royalty trust units, to

14. *Infra* n. 18.

15. [1983] 5 W.W.R. 622 (Alta. C.A.).

the execution of the unit agreement by the trustee. The trustee did execute the unit agreement. Vanguard subsequently contended that the lease was not bound by the unit agreement since it had not executed the lease in its capacity as lessor. The president of Vanguard was a lawyer knowledgeable and experienced in the oil and gas business in Alberta. The Court of Appeal upheld the finding of the Trial Court that the doctrine of estoppel by acquiescence was applicable, with the result that Vanguard was estopped from denying that its lessor's interest in the lease was bound by the unit agreement.

II. ROYALTIES

A. *RESMAN HOLDINGS LTD.* v. *HUNTEX LIMITED* [16]

This case considered whether or not costs incurred beyond the wellhead, such as costs of transporting, treating, and processing petroleum substances, were to be deducted in computing a gross overriding royalty. The royalty was created by a written agreement which stated:

> The Hunt Berisoff Royalty shall be Two and One-Half (2½%) Percent of the actual market value at the wellhead of all petroleum and associated substances on all production produced, and on natural gas Two and One-half (2½%) Percent payable at the outlet valve to the pipeline, produced, saved and sold from the Said Lands . . .

The Court held that because there was no ambiguity in the terms of the contract, no extrinsic evidence was admissible, and that the issue before it was to interpret the agreement according to its express terms. The Court reviewed certain American authorities and received expert evidence as to the accepted industry practice with respect to the calculation of royalties, and concluded that the expenses for processing and transportation incurred beyond the wellhead were properly deductible in computing the royalty.

At the trial, the defendants attempted to produce letter agreements which pre-dated the royalty agreement. The royalty agreement stated that "it shall supersede and take precedence over the above cited letters of agreement and all other understandings reached among the parties hereto". The Court ruled that the letter agreements had been superseded and were not admissible.

B. *RE NORTHRIM MINES LTD.*[17]

This case involved priorities as among royalty interests in mineral claims, fixed and floating charge security interests in the mineral claims, and rights created under a writ of execution.

The royalty interests in question were created by written agreement. The royalties were described as follows:

> An amount equal to Two (2%) Percent of the net smelter returns received by the Assignor from the sale of ores and other products from the said lands.

The term "net smelter returns" was defined by reference to the proceeds from the sale of ore after deduction of certain costs. The Court found

16. [1984] 1 W.W.R 693 (Alta. Q.B.).
17. (1983) 43 A.R. 1 (N.W.T. S.C.).

that the royalty interests were interests in the proceeds from the sale of production. The royalties did not create an interest in the minerals themselves and certainly did not create an interest in the mineral claims. Accordingly, the holders of the royalties had no interest in the mineral claims but merely a contractual right to receive a share of revenues. As a result, upon realization of the security interests, the holders of the security interests took title free and clear of the royalty interests.

The North West Territories Supreme Court also found in favour of the holder of the security interests as against the holder of the writ of execution. Since the judgment creditor had not realized upon its execution before the floating charge security crystallized and became a fixed charge, the holder of the floating charge had priority over the unrealized execution under the writ.

C. *CANADA TRUSTCO MORTGAGE COMPANY* v. *SKORETZ* [18]

This case considered whether an assignment of rents created an interest in land. Skoretz had purchased the lands in question from a corporation. As security for certain loans, the corporation had granted a mortgage and an assignment of rents to Canada Trustco Mortgage Company ("Canada Trustco"). Canada Trustco registered its mortgage and a caveat claiming an interest under the assignment of rents. After the sale to Skoretz, Canada Trustco began to realize upon its security by commencing foreclosure actions and by directing the tenants to pay rents to it.

Skoretz contended that the assignment of rents did not create an interest in land, with the result that the caveat in respect thereof was invalid. Skoretz further contended, however, that the right to receive rents is an interest in land in the hands of the landlord. Accordingly, Skoretz argued that upon purchasing the lands, it acquired the right to receive payment of the rents, since it acquired all of the corporation's interest in the lands. As Canada Trustco's caveat was invalid, Skoretz' right to receive the rents was free and clear of any claims by Canada Trustco.

Mr. Justice Miller of the Alberta Court of Queen's Bench canvassed the law in Canada, England and the United States. His Lordship concluded that the assignment of rents did not create an interest in land, since the assignee had only the right to receive certain revenues once they became due. However, the right to receive rents in the hands of the landlord was an interest in land, since it was coupled with a right to recover the property upon termination of the lease and to enter the property and distrain for arrears of rent. His Lordship noted that he did not have sufficient evidence to determine whether Skoretz had actual notice of the assignment at the time that he bought the land. It is submitted that, in the absence of fraud, this factor should be irrelevant by virtue of the provisions of the Alberta Land Titles Act.[19] His Lordship also noted that if the proceeds from the foreclosure proceedings were sufficient to pay the loan in full, the entitlement to the rent would be merely academic.

---

18. [1983]4 W.W.R. 618 (Alta. Q.B.).
19. *Supra* n. 10.

Accordingly, it was ordered that ownership of the rents be determined, if necessary, after completion of the foreclosure proceedings.

It is submitted that rents are analogous to royalties payable under freehold leases. This case suggests that assignments of freehold royalties may not create interests in land and may not be capable of protection by caveat.

III. INTERPRETATION OF CONTRACTS

A. *RENAISSANCE RESOURCES LTD.* v. *METALORE RESOURCES LTD.*[20]

Metalore Resources Ltd. ("Metalore") contacted Renaissance Resources Ltd. ("Renaissance") to discuss the possibility of Metalore participating in an oil and gas prospect operated by Renaissance. Metalore indicated that it wished to expend approximately $225,000. The land manager of Renaissance prepared an information package for Metalore concerning the proposed participation of Metalore in a well to be drilled by Renaissance. The information package outlined the basic terms of the proposed participation and contained a geological assessment of the proposed well prepared by a geologist employed by Renaissance. The geological assessment stated: "since this is a re-drill, the risk is low". Discussions took place between the companies concerning this proposal. They agreed that Metalore would pay 30% of the drilling costs of the well, and 22.5% of the completion costs, to earn a 22.5% interest. It was estimated that Metalore's costs would be $216,000. A participation agreement, an Authority for Expenditure ("AFE"), and a cash-call invoice were forwarded to Metalore by Renaissance. The participation agreement provided that all operations would be conducted in accordance with the 1974 model form of Operating Procedure published by the Canadian Association of Petroleum Landmen ("CAPL") and the 1976 model form of Accounting Procedure published by the Petroleum Accountant's Society of Western Canada ("PASWC"). The participation agreement also provided for the participation by Metalore in an option well and in acquisitions in a specified area of mutual interest. The documents forwarded to Metalore indicated that the well was to be spudded on August 20, 1980.

On August 22, 1980, Metalore wrote to Renaissance advising that it objected to certain of the provisions of the participation agreement pertaining to the option lands and the area of mutual interest. At the same time, Metalore forwarded to Renaissance its share of the cash-call invoice for the proposed well. The well was spudded on August 29, 1980. Serious drilling difficulties were encountered through September. On October 18, a core sample was taken from the well. On October 20, an unsuccessful drill-stem test was run and the well was logged. The results from the logging were not received until October 21. On October 20, Renaissance wrote to Metalore stating that it accepted all of the proposals set forth in Metalore's letter of August 22. The well was tested on October 21, 22 and 23. Drilling of the well recommenced on October 24 and terminated on October 30. The well was abandoned on November 16.

20. 53 A.R. 289 (Q.B.).

There were extensive cost overruns on the well. Renaissance demanded that Metalore pay its participating share of the cost overruns together with interest at a rate of 24% per annum. Metalore contended that there was an oral agreement between the parties that its liability would be limited to $225,000. The Court found that there was no such oral agreement.

Metalore also argued that at the time of the acceptance of the agreement by Renaissance on October 20, Renaissance knew that a representation which it had made, namely that Metalore's share of the costs of the well would not exceed $225,000, was not true. Mr. Justice Kidd of the Alberta Court of Queen's Bench stated the law to be that if a statement made during negotiations becomes untrue, then the person having knowledge of that fact must disclose it to the other. However, knowledge of the untruth must come to the attention of the party making the representation before the contract is entered into. His Lordship found that the counter-offer made by Metalore by its letter of August 22 was accepted orally by Renaissance in August. The October 20 letter from Renaissance would, in any event, not have been acceptance within a reasonable time and would have been invalid. His Lordship found that when a counter-offer (or an offer) does not specify a mode of acceptance, oral acceptance may be sufficient, even if the counter-offer was in writing.

Metalore's third argument was that it was not obligated to pay the cost overruns by virtue of clause 3.01 of the 1974 CAPL Operating Procedure which provides, in part, as follows:

> The Operator shall not make an expenditure for any single undertaking the total estimated cost of which is in excess of Ten Thousand ($10,000) Dollars without a written authority for expenditure from Joint Operators . . .

The parties agreed that all of the work done on the well constituted a single undertaking for purposes of clause 3.01. Mr. Justice Kidd found that acceptance of an AFE by a joint operator constitutes consent to participate in the undertaking covered thereby. Once such consent is given, the joint operator is liable for its share of the total costs of that undertaking. He was satisfied that Metalore was aware that the costs set forth in the AFE were merely estimates. His Lordship pointed out that his decision might have been different if the 1981 CAPL form of Operating Procedure had been in effect, since it contains specific provisions requiring supplementary AFE's in the event of cost overruns. He also pointed out, by way of *obiter dicta*, that in a proper case an operator could be negligent in estimating the costs of a proposed operation, and that such negligence could relieve a joint operator from its obligation to pay the costs of an operation covered by an accepted AFE. In the present case, no such negligence was alleged.

The Court did not allow Renaissance's claim for interest. Clause 105 of the applicable Accounting Procedure and clause 502 of the applicable Operating Procedure provided, in part, as follows:

> 105 The unpaid amount, may, at Operator's election, bear interest (payable by that Non-Operator) for the account of the Operator at the rate of 2% per annum higher than the average prime rate . . .

502 Failing payment when due, the amount paid, may at the Operator's-option bear interest from the date such payment is due for the account of the Operator at a rate 2 percentage points higher than the then prevailing prime bank interest rate . . .

Mr. Justice Kidd found that there was no evidence that Renaissance had exercised its election under clause 105 of the Accounting Procedure or its option under clause 502 of the Operating Procedure. Accordingly, it could not claim to recover interest under those provisions. It is submitted that making a claim for interest in the action constitutes an exercise of those rights by Renaissance. The Court also refused to order pre-judgment interest under the Judicature Act.[21]

B. *DIXON* v. *MERLAND EXPLORATIONS LTD.*[22]

This is a wrongful dismissal case. Dixon was president and a director of Merland Explorations Limited ("Merland"). In July, 1981, Turbo Resources Ltd. ("Turbo") acquired effective control of Merland. As a result, Turbo was obligated to offer to purchase the minority shares of Merland. Dixon made public comments respecting Turbo's obligation to make the follow-up offer and the value of such offers, which resulted in a deterioration of his relationship with the principal officers of Turbo. On March 31, 1982, Dixon's employment with Merland was terminated. Dixon sued Merland and Turbo, claiming damages for wrongful dismissal.

The Court found that Dixon acted properly in attempting to oppose the takeover by Turbo, since he considered that the takeover was not in the best interests of Merland. The Court further found that Dixon was unjustly dismissed on January 28, 1982, during a meeting with Robert Brawn, the president of Turbo. In that meeting, the Court found that Brawn stated to Dixon: "if you are unable to do the job you should prepare a package for termination". At no subsequent time did Brawn indicate that Dixon's employment was not terminated. In fact, at a number of meetings, questions concerning a possible termination package were raised by Brawn.

The Court found that the minimum notice period for dismissal of executives with 10 or more years of professional service is 12 months. It concluded that in the current case, Dixon was entitled to 18 months' notice, having regard to the level of his skills, his length of service, his age and medical history (he suffers from Hodgkin's disease), and his financial ability to arrange new employment for himself. The Court indicated that the last factor reduced the notice period.

The Court awarded damages to Dixon for amounts which he would have received from Merland during the 18 month period in respect of the following:

— salary (including an increase of 10% of the salary he was receiving, by virtue of the fact that the salaries of Merland's employees were generally raised by that amount at about the time his employment was terminated),
— car allowance,

21. R.S.A. 1980, c. J-1.
22. (1984) 50 A.R. 353 (Q.B.).

— club memberships,
— medical/dental program,
— stock purchase plan, and
— deferred profit-sharing plan.

The Court refused to grant damages for loss of director's fees, since Dixon's function as a director of Merland was not related to his employment.

The Court also considered Dixon's entitlement to a net profits interest in respect of Merland's properties. Pursuant to a Net Profits Interest Agreement, Merland had agreed to pay Dixon a net profits interest. That agreement specifically stated that Dixon would have no net profits interest effective as of the termination of his employment with Merland. The agreement also contained the following provision:

> It is expressly understood and agreed that the Net Profits Interest hereinbefore granted is in the nature of a discretionary payment only and under no circumstances whatsoever, is it to be treated as part of salary, wage or other regular income.

Accordingly, since the net profits interest terminated on the termination of his employment by its express terms, Dixon was not entitled to any further payments on that account. Also, since the net profits interest was expressly not compensation for employment, Dixon was not entitled to any damages for loss of the net profits interest.

Dixon abandoned his claim against Turbo at the commencement of the trial. The Court found that Turbo's costs should be paid by Merland, since it was reasonable for Dixon to have joined Turbo in the lawsuit and since the lawsuit was caused by Merland's default.

C. *ATLANTIC RICHFIELD COMPANY* v. *PETRO-CANADA* [23]

This is an appeal to the Alberta Court of Appeal from a decision which was reported in the 1983 edition of this paper. The dispute arose out of the purchase by Petro-Canada of all of the shares of Atlantic Richfield Canada Limited ("ARCAN") from Atlantic Richfield Company ("ARCO") in 1976. Prior to that purchase, ARCAN had carried on business in the Province of Saskatchewan and had paid approximately $12,000,000 to the Saskatchewan Government pursuant to the Oil and Gas Conservation, Stabilization and Development Act, 1973.[24] Following the sale of the shares of ARCAN to Petro-Canada, that Act was declared to be *ultra vires* the Saskatchewan Government by the Supreme Court of Canada.[25] The Province of Saskatchewan subsequently enacted The Oil Well Income Tax Act, 1978.[26] That Act purported to have retroactive effect over the period which had been covered by the *ultra vires* statute. In accordance with the second Act, Petro-Canada caused ARCAN (now known as Petro-Canada Exploration Inc.) to waive its right to claim recoupment of taxes paid under the invalid statute, in lieu of payment of taxes payable under the second statute for the retroactive period.

23. (1984) 49 A.R. 109 (C.A.).
24. S.S. 1973-74, c. 72.
25. *Canadian Industrial Gas & Oil Ltd.* v. *Government of Saskatchewan* [1978] 2 S.C.R. 545.
26. S.S. 1977-78, c. 26.

ARCO claimed that under the terms of the Share Sale Agreement, Petro-Canada was required to cause ARCAN to seek recoupment of the taxes paid under the invalid statute and to pay such amount to ARCO as an adjustment to the purchase price for the shares. The Alberta Court of Queen's Bench rejected ARCO's claim on the grounds that the Share Sale Agreement did not contain provisions applicable to the situation. The Court of Appeal of Alberta sustained the finding of the Court of Queen's Bench.

The provision of the Share Sales Agreement relied upon by ARCO read, in part, as follows:

> In the event that after the Closing Vendor determines that by reason of any act or omission prior to the Effective Date, ARCAN has a monetary claim against a third party, Purchaser, through request of Vendor, shall cause ARCAN to prosecute, at the sole cost and expense of Vendor, such claim . . . If ARCAN is successful in receiving payment of such claim, Purchaser shall pay to Vendor as an adjustment to the purchase price an amount equivalent to the amount received by ARCAN . . .

Mr. Justice Prowse, on behalf of the Court of Appeal, stated that the words "act or omission" in that provision did not cover the action of a province passing and enforcing a statute that is subsequently held to be *ultra vires.* Further, as no liability attaches to the province by virtue of having passed the *ultra vires* statute, that action *per se* does not give rise to a monetary claim. His Lordship stated that if any "act" gave rise to a monetary claim, it was the decision of the Supreme Court of Canada. However, that act did not occur until after the "Effective Date" and, therefore, did not fall within the scope of the clause.

D. *TRANSCANADA PIPELINES LTD.* v. *NORTHERN & CENTRAL GAS CORP. LTD.*[27]

This was an appeal to the Ontario Court of Appeal from the decision discussed in the 1982 edition of this paper. It involved consideration of a *force majeure* clause in a gas supply contract. TransCanada Pipelines Ltd. ("TCPL") contracted to supply natural gas to Northern & Central Gas Corp. Ltd. ("Northern"). Northern in turn sold such gas to various other parties. Due to strikes at the plants of two of Northern's customers and an explosion in the plant of a third customer, the volume of gas which Northern was required to supply between 1977 and 1980 was substantially reduced. Northern claimed that it was relieved from its obligation to buy comparable quantities of gas from TCPL by virtue of the *force majeure* provisions of the contract between them.

The Court of Appeal subdivided the definition of *force majeure* contained in the agreement into four parts as follows:

(a) strikes, explosions and other specified occurrences rendering a buyer or seller unable to perform;
(b) failure of a supplier or transporter of gas to deliver gas to TCPL;
(c) any act or omission by parties not controlled by the party claiming relief under the *force majeure* clause; and
(d) any other similar causes not within the control of the party claiming relief and which by the exercise of due diligence it could not overcome.

27. (1983) 146 D.L.R. (3d) 293 (Ont. C.A.).

The act which Northern alleged constituted *force majeure* in this case was the failure of the purchasers to accept deliveries because of the strikes and the explosion. The Court of Appeal noted that this was the converse of the second portion of the *force majeure* definition. The Court found that it was exceedingly unlikely that the parties intended that a failure by Northern's purchasers to accept delivery should fall within the first, third or fourth category of the definition of *force majeure* when the similar situation applied to TCPL was expressly provided for in the second category. The Court also held that as a general rule it is appropriate to limit the application of a *force majeure* clause to events besetting the parties to the contract unless the parties have expressly provided to the contrary. Since the *force majeure* clause imposes an obligation upon the party claiming the benefit thereof to remedy the event, the implication is that an event of *force majeure* is one befalling a party because events befalling third parties could not possibly be remedied. Further, the *force majeure* clause specifically stated that the settlement of strikes would be in the discretion of the party having the difficulty. That provision implies that the strikes contemplated as constituting *force majeure* are strikes against a party to the contract and not strikes against a third party. The Court held that the strikes and explosions suffered by Northern's purchasers did not fall within the second category in the definition of *force majeure* contained in the agreement.

There was evidence before the Trial Court that, at hearings before the National Energy Board for the approval of the supply contract, Northern had objected to the fact that failure of TCPL's suppliers constituted *force majeure* in view of the fact that failure by Northern's purchasers did not constitute *force majeure*. The Board had expressly rejected Northern's complaint. That evidence was considered extrinsic evidence by the Court of Appeal and not necessary to its finding, although it had been relied upon by the Trial Court.

E. *WEST FRASER MILLS LTD.* v. *CROWN ZELLERBACH CANADA LTD.*[28]

This case also dealt with a *force majeure* clause. West Fraser Mills Ltd. ("Fraser") had agreed to supply pulp to Crown Zellerbach Canada Ltd. ("Zellerbach") to be used in the manufacture of newsprint in its mill in British Columbia. There was a provision in the supply contract which read as follows:

> 5. *Economic Clause*:
>
> (a) If the paper manufacturing facilities at the Buyer's pulp mill should be shut down or curtailed because of . . . market conditions or any other cause whether or not similar to the foregoing which requires the Buyer to reduce or halt its supply of pulp to its paper manufacturing facilities, then the Buyer may, at its option . . . either suspend entirely its purchase . . . under this Agreement or reduce such purchases to such an extent as the Buyer may elect from time to time . . .

In connection with the supply contract, Zellerbach had installed new manufacturing facilities at its British Columbia mill. The quantities of pulp contracted for precisely met the capacity of the new facilities. The new facilities had been installed because there had been a shortage of

28. (1983) 23 B.L.R. 126 (B.C. S.C.).

newsprint in the western United States, the principal market of Zellerbach, during the preceding years. The capacity of the new facilities was carefully calculated to meet that market. Shortly after the contract was entered into, the demand for newsprint dropped dramatically. As a result, Zellerbach notified Fraser of its intention to reduce the quantities of pulp purchased from Fraser.

The British Columbia Supreme Court found that the downturn in market fell within the Economics Clause and entitled Zellerbach to relief from its obligation to purchase pulp from Fraser. The Court found that the clause was, essentially, a *force majeure* clause. The Court reviewed Canadian judicial decisions respecting *force majeure* clauses and found that to rely on the clause, Zellerbach must show that the downturn in markets could not have been prevented by reasonable human foresight and skill. The Court stated that Zellerbach was required to prove that:

(a) there was a significant reduction in sales volume;
(b) this was not caused by lack of reasonable marketing skill on its part; and
(c) this was not something over which Zellerbach could have exercised control so as to prevent it.

The Court reviewed the newsprint market in the western United States and the efforts made by Zellerbach when planning its production facilities, and determined that Zellerbach had satisfied all three tests.

The Court noted that the *contra proferentem* principle did not apply in this situation, because the contract was negotiated between two very large corporations with highly sophisticated management, represented by firms of solicitors.

F. *MITSUI & CO., LTD.* v. *OCELOT INDUSTRIES LTD.*[29]

In this case, Ocelot had contracted to provide methanol to Mitsui. The price payable for the methanol was to be the average of the prices published by Dupont and Celanese on the United States Gulf Coast. The agreement provided that if the price could not be determined by reference to the prices published by Dupont and Celanese, and the parties could not otherwise agree, the price was to be determined by arbitration.

Prices for the sale of methanol on the United States Gulf Coast dropped sharply. For unknown reasons, Dupont and Celanese ceased to publish methanol prices. Ocelot contended that the last price published by Dupont and Celanese should be utilized in determining the price payable by Mitsui. That price was considerably higher than the prevailing price. Mitsui claimed that the arbitration provisions of the sale agreement should be invoked.

The Alberta Court of Appeal rejected Ocelot's contention. There was no reference in the sale agreement stating that the last published price should continue to be used (although it did say "published price"). The parties' manifest intention was to have a fluctuating price in accordance with published market prices. Therefore, Mitsui was entitled to refer the matter to arbitration.

---

29. Unreported, 23 Feb. 1984, J. D. of Calgary, App. No. 15756 (Alta. C.A.).

G. *NIR OIL LTD.* v. *BODRUG* [30]

This case involved insider trading. The plaintiff and defendant were substantial shareholders in a public company. The plaintiff held an option to purchase 310,000 shares of the public company for 65¢ a share. A dispute arose between the plaintiff and the defendant over the conduct of the company's business and other matters. On the eve of the trial of that dispute, the parties reached a settlement whereby the plaintiff's option was cancelled for the difference between $4.25 per share and the option price for such shares. In addition, the defendant agreed to purchase 25,000 shares owned by the plaintiff at $7.00 per share. Shortly before the settlement agreement was made, the defendant was contacted by a large public corporation with a view to a takeover of the company and some negotiations in that regard transpired. After the settlement agreement was made, the company was taken over for a price of $15.50 a share. The plaintiff sued the defendant on the basis of insider trading.

Section 115(1) of the Alberta Securities Act[31] provides as follows:

> Every insider of a corporation . . . who, in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities, is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction . . .

The Alberta Court of Queen's Bench canvassed the case law and stated that if the confidential information was a factor which induced the defendant to enter into the settlement agreement, then it must compensate the plaintiff for the damage which the plaintiff has suffered which it would not have suffered if it had had knowledge of such confidential information.

H. *GIBRALTAR MINES LTD.* v. *M.N.R.* [32]

This case involved the entitlement of Gibraltar Mines Ltd. ("Gibraltar") to deduct, in computing its income for income tax purposes, costs of developing mining claims owned by Cuisson Lake Mines Ltd. ("Cuisson"), a related company. Cuisson and Gibraltar both owned mining claims in the same general vicinity. Cuisson had no employees or place of business. Cuisson's mining claims did not appear, by themselves, to justify development. However, Gibraltar estimated that by utilizing its existing facilities, thereby saving the cost of having to install duplicate facilities, Cuisson's claims could be developed economically. Cuisson and Gibraltar entered into an agreement whereby Gibraltar was granted the sole and exclusive right to prospect and develop Cuisson's claims. Cuisson agreed to sell the ore extracted from its claims to Gibraltar. Title to the ore was to pass to Gibraltar at Gibraltar's concentrator. Gibraltar agreed to pay Cuisson for its ore the price received by Gibraltar less the costs incurred by Gibraltar in developing Cuisson's claims. As long as

30. (1983) 23 B.L.R. 52 (Alta. Q.B.).
31. R.S.A. 1980, c. S-6.
32. (1983) 48 N.R. 188 (Fed. C.A.).

that amount was negative, it was to be carried forward and deducted from the price otherwise payable to Cuisson for ore subsequently delivered to Gibraltar.

Gibraltar incurred approximately $900,000 of costs in developing the claims which it did not recover out of the proceeds from the sale of the ore. In filing its income tax returns pursuant to the Income Tax Act (Canada),[33] Gibraltar claimed that the unrecovered costs constituted a debt owed by Cuisson. It claimed that payment of such debt was doubtful and, therefore, deducted a reserve in respect of it in computing its income tax.

The Federal Court of Appeal found that Gibraltar was developing Cuisson's claims on its own behalf. Nothing in the agreement constituted Gibraltar as Cuisson's agent and the agreement expressly stated that it did not create a partnership. The fact that Gibraltar maintained its books as if its expenditures on Cuisson's claims had been made by Cuisson was irrelevant. However, in the view of the Court, since Gibraltar had the right to be reimbursed for the costs it incurred in developing Cuisson's claims, the unrecovered costs were properly shown as receivables and Gibraltar was entitled to claim a reserve for doubtful debts in accordance with the provisions of the Income Tax Act (Canada)[34] in respect thereof.

IV. PARTNERSHIPS

A. *MOLCHAN* v. *OMEGA OIL & GAS LTD. AND HALL* [35]

Omega Hydrocarbons Ltd. ("Hydrocarbons") is a publicly-traded oil and gas exploration company. In 1977, it incorporated Omega Oil & Gas Ltd. ("Oil & Gas") as a wholly-owned subsidiary. Oil & Gas formed a limited partnership for purposes of acquiring, developing and operating oil, gas and other mineral properties in Canada. A prospectus was issued to the public, offering limited partnership interests in the limited partnership, and Molcan purchased one such unit. The partnership expended its funds on a number of oil and gas prospects. Those prospects did not generate much revenue, and as a result, the partnership did not have sufficient funds to pursue its business actively.

In December, 1980 and April, 1981, Hydrocarbons offered to purchase all of the limited partnership interests in the limited partnership. Molcan was the only limited partner who rejected the offer. In May, 1981, Hydrocarbons offered to purchase all of the oil and gas properties owned by the partnership. That offer was accepted by Oil & Gas on behalf of the partnership and in August, 1981, the sale was completed.

The Alberta Court of Queen's Bench found that the sale of the partnership's properties to Hydrocarbons contravened Section 55(b) of the Partnership Act,[36] which provides that without the consent of all limited partners, a general partner has no authority to do any act which makes it impossible to carry on the ordinary business of the limited partnership.

33. S.C. 1970-71-72, c. 63.

34. *Id.*

35. [1984] 3 W.W.R. 246 (Alta. Q.B.).

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

Molcan did not consent to the sale to Hydrocarbons. The partnership's business was to explore for oil and gas properties, and the disposition of all its oil and gas properties, in the view of the Court, rendered it incapable of carrying on that business. Since Hydrocarbons knew, at least constructively, that it acquired the oil and gas properties of the partnership in breach of the provisions of the Partnership Act,[37] it held such properties on a constructive trust in favour of the partnership.

The Court also found that Hydrocarbons was the *de facto* general partner of the partnership, since there was no practical distinction between it and Oil & Gas. As a consequence, Hydrocarbons was responsible for the breach by Oil & Gas of its obligations to the limited partnership.

V. RIGHTS OF FIRST REFUSAL

A. *KOPEC* v. *PYRET*[38]

In this case, Pyret granted a farm lease on lands in Saskatchewan to Borys. The lease contained the following provision:

> In the event of a sale of the said land, the Lessor agrees hereby to give the Lessee Notice of such sale, and the option to purchase said land upon terms and conditions to be agreed upon between the parties hereto.

Neither the lease nor a caveat in respect of it were registered in the Land Titles Office. Pyret agreed to sell the lands to Kopec and an agreement of purchase and sale was executed. The agreement provided that Kopec would have immediate possession of the land. Following execution of the sale agreement, Kopec took possession of the land to the exclusion of Borys. Borys thereupon filed a caveat against the land "claiming an interest pursuant to a lease in writing containing an option to purchase". Following registration of that caveat, Kopec registered a caveat claiming an interest under its sale agreement.

The issue in the case revolved around the nature of the rights granted to Borys under the clause in his lease which is quoted above. The Saskatchewan Court of Queen's Bench considered whether that provision was void for uncertainty and then considered whether, at the time Borys registered his caveat, he had an interest in land or merely a contractual right. The Court stated that a right of first refusal was a negative covenant by the owner of the lands not to sell the lands unless he gave the other party to the contract the first opportunity to purchase. The essential characteristic of a right of first refusal is an intention to give a preference over other potential purchasers if the grantor of the right should decide to sell. As long as the grantor does not intend to sell, the preference is a potential right which may or may not be transformed into an agreement for sale. That situation is contrasted with an option, where the purchase right comes into existence upon the option being granted, so that control over whether a sale will result resides in the holder of the option.

37. *Id.*

38. [1983] 4 W.W.R. 246 (Sask. Q.B.).

Although the Borys lease used the word "option", the Court found that the clause created a right of first refusal. The rights granted under the clause could only be exercised in the event of a sale of the land. Borys' rights thereunder were contingent upon the willingness of Pyret to sell. The fact that the right of first refusal provision stated that the terms of any sale pursuant thereto would be agreed upon, did not render the provision unenforceable for lack of certainty. The Court stated that if the words are capable of conveying an intention to give a preferential right to purchase without creating an immediate obligation on the part of the grantor to sell, the parties do not need to use the exact words "right of first refusal". The Court found the language was sufficient to disclose that the intention of the parties was that if Borys exercised his rights under the right of first refusal clause, he could purchase the land on the same terms as Pyret wished to sell.

The Court found that as soon as Pyret was willing to accept Kopec's offer to purchase, Borys' contractual right of first refusal was transformed into an interest in land in the nature of an option because thereupon the right to purchase depended solely on a matter within the control of Borys. As such, the right was capable of being protected by a caveat. Since Borys registered its caveat prior to Kopec's, Borys' right to purchase the land had priority over Kopec's right.

B. *DESA STORES LTD.* v. *MELCOR DEVELOPMENTS LTD.*[39]

Desa Stores Ltd. ("Desa") entered into an agreement with Trans-Canada Mortgage Corporation (Western) Ltd. ("Trans-Canada"). Clause 2 of that agreement provided, in part, as follows:

> Desa hereby grants Trans-Canada an option . . . to purchase one-third of all lots created by the subdivision of any or all of the lands which are zoned or otherwise classified as residential lots . . .
>
> From time to time and immediately after any unregistered residential lots are available for sale . . . Desa shall give Trans-Canada written notice . . . and Trans-Canada may, within 20 days of receipt by it of such notice, exercise its option to purchase one-third of such lots . . .

The agreement provided a mechanism for the selection of the lots and the price to be paid for them. Trans-Canada registered a caveat against the lands in question claiming an interest under the option agreement.

Mr. Justice D. C. McDonald of the Alberta Court of Queen's Bench found that the agreement did not grant Trans-Canada any property rights. Trans-Canada's rights to acquire an interest in the lands were subject to the occurrence of an uncertain event which was in the control of Desa and not in the control of Trans-Canada, namely the subdivision of the lands into residential lots. Until that event occurred, the agreement did not create an interest in land, but only an interest similar to a right of first refusal. The use of the word "option" in the agreement was not determinative of the nature of the rights granted thereunder to Trans-Canada. As a result, Trans-Canada's caveat was invalid.

39. (1983) 45 A.R. 154 (Q.B.).

C. *PROGRESSIVE DEVELOPMENTS (1978) LTD.* v. *WINNIPEG*[40]

The City of Winnipeg expropriated approximately 1,000 acres for redevelopment purposes. The plaintiffs held a right of first refusal on a 40 acre parcel comprised in the expropriated lands. The City determined not to proceed with the redevelopment. Pursuant to Section 50(1) of the Manitoba Expropriation Act,[41] the City was obligated to notify "each owner of the land, or estate or interest, who has been served or is entitled to be served with notice of the expropriation". Each such owner was entitled to a reconveyance of its interest and to consequential damages. The City contended that a right of first refusal did not constitute an interest or estate in land. The Manitoba Court of Appeal found that the basic principle of expropriation is that things of value cannot be expropriated without compensation. A right of first refusal has value. As a result of the expropriation, the right of first refusal was lost. Accordingly, for purposes of The Expropriation Act,[42] the right of first refusal constituted an interest or estate in land.

VI. SALE OF LAND

A. *KENTON NATURAL RESOURCES CORPORATION* v. *BURKINSHAW*[43]

Kenton Natural Resources Corporation ("Kenton") agreed to purchase interests in 484 petroleum and natural gas leases pertaining to lands in the State of Tennessee from Exotic Minerals Inc. ("Exotic"), one of the defendants. $50,000 (U.S.) of the purchase price was paid on execution of the sale agreement, and the balance was to be paid upon delivery of assignments of the leases and the furnishing of an opinion of a "responsible attorney" with respect to title. Two opinions from a Tennessee attorney covering 395 of the leases were submitted to the purchaser. The opinions merely stated that it "appears" that the lessors owned the property in fee simple. The purchaser refused to complete the transaction and sought return of its deposit.

The sale agreement did not specify the law which was to govern the contract. The vendor was incorporated in Nevada; however, most of its business was conducted from Calgary and its principal officers and directors were resident in Calgary. The purchaser was an Alberta corporation whose officers and directors were ordinarily resident in Calgary. The purchase price was payable in U.S. funds and the lands were located in Tennessee. The Court inferred that the parties intended that the contract be governed by the law having the most substantial connection with the subject matter of the contract. The Court found that this law was the law of the State of Tennessee. Based upon expert testimony of a Tennessee lawyer, the Court found that the title opinions were insufficient. The

40. [1983] 2 W.W.R. 258 (Man. C.A.).
41. S.M. 1970, c. 78.
42. *Id.*
43. (1983) 47 A.R. 321 (Q.B.).

Court further found that the Guarantees Acknowledgment Act of Alberta[44] did not affect a covenant by Burkinshaw to repay the deposit to the plaintiff if the sale failed to close. Accordingly, the Court found that the agreement had been properly rescinded by the plaintiff and that the plaintiff was entitled to repayment of the deposit.

B. *IRIS M. REILLY, EXECUTRIX OF THE ESTATE OF CLEO E. REILLY* v. *HER MAJESTY THE QUEEN*[45]

This case involved a determination of the date of the sale by Cleo E. Reilly ("Reilly") to Carma Developers Ltd. ("Carma") to ascertain in which tax year the proceeds received by Reilly from the sale should be included, for purposes of determining tax payable by Reilly under the Income Tax Act (Canada).[46]

By a letter dated November 24, 1972, Carma and Reilly made an agreement for the sale of certain land owned by Reilly to Carma. The agreement provided that the purchase price was to be payable in annual installments of $75,000 each, payable on December 1 of each year, commencing December 1, 1973. Following approval to subdivide the lands, the annual installments were to be increased to $125,000 per year. Title was to be transferred to Carma as follows: upon the payment of each $75,000 installment, title to one legal subdivision would be transferred, and upon the payment of each $125,000 installment, title to two legal subdivisions would be transferred. Carma had the right to accelerate payments at any time. Interest was payable on the purchase price. Reilly was entitled to a lease of the lands so long as he required them, and he was to pay an annual rental of $10,000 per year commencing December 1, 1973.

A formal agreement was entered into in January, 1973. It superseded the letter agreement, and changed and expanded on certain provisions thereof. The letter agreement had provided that taxes would be adjusted as at the date of the final payment by Carma, which would probably occur in 1987. The formal agreement provided that interest would be adjusted as at December 1, 1972.

The Trial Division of the Federal Court found that the disposition occurred in 1972. However, the notice of reassessment issued to the taxpayer was issued after the statutory limitation therefor and, accordingly, was invalid.

It is submitted that the finding as to the time that the disposition occurred is incorrect. The only event occurring in 1972 was the execution of the letter agreement. In 1973, the parties amended their agreement to provide that taxes would be adjusted as at December 1, 1972. However, no title was to pass until December 1, 1973, and then only as to one or two legal subdivisions and no payments were to be made until that date. The vendor was to have use of the surface of the land until December 1, 1973 without payment of rent. The Court appears to have considered the

44. R.S.A. 1980, c. G-12.

45. Unreported, Dec. 7, 1983, J. D. of Calgary, T-582108 (Fed. Ct. T.D.).

46. *Supra* n. 33.

issue to be whether or not the agreement of purchase and sale was enforceable and absolute, rather than whether or not it constituted an agreement to sell or an agreement effecting a sale, which, it is submitted, was the real issue.

C. *MORRETTA* v. *WESTERN COMPUTER INVESTMENT CORPORATION LTD.*[47]

The defendants agreed to sell certain land to the plaintiffs. The agreement of purchase and sale, which was on a standard printed form, stated that there was an existing mortgage encumbering the land and expiring in 1985. The purchase was completed. Subsequently, the plaintiff purchaser discovered that the mortgage matured in 1980 and sued for damages. The Alberta Court of Appeal, with a partial dissent by Mr. Justice Kierans, found that the statement in the agreement of purchase and sale constituted a warranty, rather than a mere innocent misrepresentation, because it was an important term of the agreement having regard to all the circumstances. Accordingly, the purchaser was entitled to damages for the breach of warranty. However, by virtue of the doctrine of merger, in the absence of an intention by the parties to the contrary, all of the terms of the sale agreement are merged in the conveyance pursuant to which the sale was effected. As a consequence, following execution of the transfer, the purchaser could only sue the vendor on the terms of the transfer. The transfer contained no representations or warranties whatsoever. As a result, the purchaser's action failed. It should be noted that the Court of Appeal held that the purchaser was under no obligation to search the title and the fact that the search would have revealed the maturity date of the mortgage was irrelevant to the purchaser's right to sue for breach of warranty.

VII. LAND TITLES

A. *PASSBURG PETROLEUMS LTD.* v. *LANDSTROM DEVELOPMENTS LTD.*[48]

Passburg Petroleums Ltd. ("Passburg") had acquired the interest of Quasar Petroleum Ltd. ("Quasar") in a surface lease. Quasar had registered a caveat protecting its interest but Passburg had not. The surface owner sold its interest in the surface to the defendant. At the time of the sale, Quasar's caveat was registered against the land. Quasar subsequently discharged its caveat. The plaintiff then registered a caveat. The defendant contended that by virtue of section 135 of the Land Titles Act,[49] his interest was not subject to the interest claimed by Passburg, because Passburg's caveat was not registered when the defendant took title. Section 135 of the Land Titles Act states as follows:

> So long as a caveat remains in force the Registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance in respect of which the caveat is lodged, unless the instrument is expressed to be subject to the claim of the caveator.

47. [1984] 2 W.W.R. 409 (Alta. C.A.).
48. Unreported, 15 Mar. 1984, J. D. of Edmonton, App. No. 16275 (Alta. C.A.).
49. *Supra* n. 10.

The Alberta Court of Appeal construed this provision as effectively stating that a person is entitled to rely upon the accuracy of the register. Thus, when the defendant purchased the land, he was entitled to rely solely on the register to determine the interests which his vendor owned and which he could purchase. At the time of the purchase, the register revealed that the vendor owned the fee simple surface interest subject to the surface lease granted to Quasar. That was the interest which the defendant could purchase and that was the interest which it now owned. If a new party had purchased the defendant's interest after Quasar's caveat was discharged and before Passburg registered its caveat, it would rely upon the register which would indicate that the defendant had good title. In that instance, the interest purchased by the new party would defeat Passburg's surface lease. However, no subsequent sale had occurred and Passburg's surface lease was sustained.

B. *RE PANTHER RESOURCES LTD.*[50]

This case involved a railway company's title to mines and minerals and the effect of a correction to the register made by the Registrar pursuant to the Alberta Land Titles Act.[51] In 1910, Z sold two parcels of land comprising 25 acres to the Canadian Northern Railway ("Northern"). The Railway Act[52] in effect at that time specified that a railway could only acquire title to mines and minerals if they were expressly included in the transfer. Such was not the case in the sale by Z to Northern. Subsequently, Z transferred the lands to his sons. The transfer and the Certificate of Title issued pursuant thereto excepted the 25 acres sold to Northern. No mention was made in the exception of mines and minerals underlying the 25-acre parcels.

In 1946, the Registrar corrected both Northern's title and the title of Z's sons' beneficiaries (the sons having died). The correction removed mines and minerals from one of the parcels in Northern's title and inserted it in Z's sons' beneficiaries' titles. Mines and minerals underlying the other parcel remained in Northern's title. In 1972, a Registrar's caveat was registered in respect of the parcel of lands, the mineral title to which had been corrected. In 1977, a Registrar's caveat was registered in respect of the mines and minerals underlying the other parcel.

All of the successors to Z's sons in respect of the lands in question were either volunteers or acquired their interests after the registration of the Registrar's caveats. The interest of Northern has been acquired, by virtue of a corporate reorganization, by Canadian National Railway Company ("CNR"). Accordingly, no parties acquired a certificate of title to the mines and minerals for value in reliance upon the register.

CNR claimed that Northern obtained an indefeasible title as a result of the Registrar's correction in 1946. In the alternative, it argued that it had acquired title to mines and minerals through adverse possession. The first argument was based upon a construction of the various Railway Acts

50. [1984] 2 W.W.R. 247 (Alta. Q.B.).

51. *Supra* n. 10.

52. R.S.C. 1906, c. 37, as am.

which have been in force since 1910.[53] The logic of the argument is difficult to follow and it was rejected by the Court. In any event, the Court held that the correction of the title by the Registrar in 1946 did not vest new rights in the Railway. The Court found that the 1906 Railway Act[54] prevailed, so that Northern did not obtain title to mines and minerals from Z in 1910.

CNR also claimed title through adverse possession. The Court referred to the following basic principles in dealing with that issue:

(a) holding registered title does not establish adverse possession;
(b) adverse possession of mines and minerals requires actual occupation, exclusive, continuous, open or visible and notorious for 10 years in a manner suitable to the nature of the property; and
(c) the granting of a lease does not constitute adverse possession.

Since there was no development of the property by CNR, it failed to establish adverse possession.

The Court found that the beneficiaries of Z's estate were entitled to the mines and minerals underlying the two parcels. Z's sons did not acquire them because the transfer from Z to his sons expressly excluded the two parcels. That exclusion did not mention mines and minerals and, therefore, excluded both surface and mines and minerals. No other parties had acquired a title covering mines and minerals for value in reliance upon the register. Thus the transfers and Certificates of Title occurring after the sale by Z to Northern did not create any interests having priority over Z's estate.

C. *OMINAYAK* v. *NORCEN ENERGY RESOURCES LTD.*[55]

This case involved a native Indian claim. Certain natives claimed aboriginal rights over lands located in the Province of Alberta. In connection with that claim, they sought an interim injunction preventing the Province of Alberta from issuing petroleum and natural gas leases covering any of such lands and restraining the defendant oil companies from developing the petroleum and natural gas leases covering such lands which had been granted to them. The Court refused to grant the injunction, finding that no irreparable harm would be suffered by the applicants even if their land claim was successful, while irreparable harm could result to the respondents.

D. *BELL* v. *GUARANTY TRUST COMPANY OF CANADA*[56]

The plaintiff was the registered holders of certain mineral rights. The defendant, Guaranty Trust Company of Canada ("Guaranty Trust") had registered a caveat against the mineral titles in 1951, prior to the plaintiff's acquiring title, pursuant to which Guaranty Trust claimed an interest in the mines and minerals under an unregistered transfer. At the

53. R.S.C. 1927, c. 170, as am.
54. *Supra* n. 52.
55. (1983) 29 Alta. L.R. (2d) 151 (Q.B.).
56. (1984) 30 Sask. R. 246 (C.A.).

trial, Guaranty Trust indicated that it had been unable to register the transfer because the registered owner of the mineral title failed to provide it with the duplicate Certificates of Title required in order to effect the transfer despite several requests for same. It is clear that the requests were not persistent. The lands had never been developed.

The plaintiff contended that any interest which Guaranty Trust had in the lands had expired due to laches or the Limitations of Actions Act.[57] The Trial Division of the Saskatchewan Court of Queen's Bench and the Court of Appeal both found in favour of Guaranty Trust. They both stated that the plaintiff held title as trustee for the benefit of Guaranty Trust. The Court of Appeal rejected the suggestion by the plaintiff that a trust relationship cannot arise under the Torrens system until registration of a conveyance.

VIII. MINES AND MINERALS

A. *SUNSHINE VALLEY MINERALS INC.* v. *REYES*[58]

Sunshine Valley Minerals Inc. ("Sunshine") was a corporation extra-provincially registered to carry on business in British Columbia. It was the holder of certain mineral claims. The defendant claimed that the mineral claims did not extend to certain slag deposits on the lands to which the claims related. Also, Sunshine had been struck from the B.C. companies register on April 20, 1982 and restored to the register on October 15, 1982. Its mineral lease was renewed on July 22, 1982.

The British Columbia Supreme Court found that under the terms of the British Columbia Company Act,[59] upon an extra-provincial company being restored to the register, its registration is deemed not to have been cancelled, subject to the rights of third parties acquired prior to restoration. As a result, the fact that Sunshine was struck off the register and then later restored was immaterial.

The defendant was a "free miner", as defined in the British Columbia Mineral Act.[60] As a result, he had the right under that Act to prospect for minerals on Crown lands. Hence, the issue was whether or not the slag deposit constituted a mineral for purposes of the Mineral Act,[61] which defines "mineral" as follows:

> 'Mineral' means ore of metal and every natural substance that can be mined and that:
>
> (a) occurs in fragments or particles lying on or above or adjacent to the bedrock source from which it is derived, and commonly described as talus; or
>
> (b) is in the place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary or broken rock or float, which, by decomposition or erosion of rock, is found in wash, loose earth, gravel or sand.

A slag deposit is a waste product of mining operations deposited on the land by human agency. Accordingly, it can only fall within the definition of "mineral" quoted above if it is talus. Based upon dictionary meanings, the Court found that talus meant a sloping mass of detritus lying at

57. R.S.S. 1978, c. L-15.
58. (1983) 43 B.C.L.R. 374 (S.C.).
59. R.S.B.C. 1979, c. 59.
60. R.S.B.C. 1979, c. 259.
61. *Id.*

the base of a cliff or the like and consisting of material which has fallen from its face. As a result, slag did not constitute talus and, therefore, was not a mineral for purposes of the British Columbia Mineral Act.[62]

IX. CREDITORS' RIGHTS

A. *CANADIAN PIONEER PETROLEUMS INC.* v. *FEDERAL DEPOSIT INSURANCE CORPORATION*[63]

The plaintiffs were partners in a partnership. To secure their contributions to the partnership, the plaintiffs caused The Royal Bank of Canada to issue letters of credit in favour of Penn Square Bank ("Penn"). Unknown to the plaintiffs, Penn was also a partner in the partnership and issued its own letter of credit for its contribution. Penn went into receivership and its receiver would not honour Penn's letter of credit. The plaintiffs sought an injunction restraining The Royal Bank of Canada from making payments to the receiver on the letters of credit which they had caused that bank to issue in favour of Penn.

The Court described a letter of credit as being, in effect, a guarantee that, upon presentation of predetermined documentation, the bank will pay the beneficiary named in the letter. They are the backbone of commercial credit and are not to be interfered with lightly. However, the Courts will enjoin payment on a letter of credit where there is a fraudulent demand. In the present case, although there may have been fraud by Penn concerning its failure to disclose its partnership interest to the plaintiffs, there was no fraud relative to the enforcement of the letters of credit. Penn advanced a loan to the partnership and took the letters of credit as security. There was nothing fraudulent in that transaction. Hence, the injunction was refused.

B. *HENDERSON* v. *CANADIAN IMPERIAL BANK OF COMMERCE*[64]

The Henderson case also dealt with a letter of credit. Henderson agreed to purchase an interest in 20 episodes of a television show to be produced by the payee of the letters of credit. The payee became bankrupt and the television shows were never produced. A demand for payment on the letters of credit was made by the payee's receiver. Unlike the *Canadian Pioneer* case,[65] the Court found that it was fraudulent for the receiver to demand payment, because the television shows in question had never been delivered.

X. SURFACE RIGHTS COMPENSATION

Cases dealing with compensation paid to surface owners for the taking of their land for use as well sites, pipeline easements or similar purposes predominantly turn on the facts of the individual case under consideration. It is beyond the scope of this paper to review the detailed factual

62. *Id.*
63. [1984] 2 W.W.R. 563 (Sask. Q.B.).
64. (1982) 40 B.C.L.R. 318 (S.C.).
65. *Supra* n. 63.

matters pertinent to such cases. However, there are a number of principles which the Courts have determined should be applied in such cases and it is within the scope of this paper to review the cases which establish such principles.

Most of the cases dealing with surface rights compensation arise in Alberta. Generally, most of them arise under the Surface Rights Act.[66] That Act was repealed and replaced in 1983.[67] The new statute was reviewed in the 1983 edition of this paper. Most of the cases which are discussed below are decisions under the repealed statute.

In Alberta, under both the old Surface Rights Act[68] and the new Surface Rights Act,[69] a Surface Rights Board has been established to determine disputes between oil companies and land owners as to the compensation to be paid for the taking of the surface of land for oil and gas operations. An appeal lies to the Alberta Court of Queen's Bench by way of a trial *de novo*. A similar arrangement applies in the province of Saskatchewan.

The recent cases dealing with surface rights compensation are as follows:

A. *DOME PETROLEUM LTD.* v. *GREKUL ET AL.*[70]

This case involved a dispute over compensation payable for the taking of land for a well site in Alberta. At the time that the dispute was heard by the Surface Rights Board, the well had been abandoned. Mr. Justice Miller of the Alberta Court of Queen's Bench stated that, in considering the compensation payable to the surface owner, account must be taken of the reversionary and residual values of the land to the surface owner. The reversionary value is the value to the surface owner by virtue of the fact that when the oil company's operations are completed, the taken land will be returned to the surface owner. The residual value is the value by virtue of the fact that the owner can continue to use the surface, to some extent, during the term of the right of entry order. He found that the Surface Rights Board erred in not taking into account reversionary and residual values. He also found that if the Surface Rights Board had known that the well was abandoned, it should have taken that fact into account.

His Lordship also found that the Surface Rights Board did not meet its obligation under the Administrative Procedures Act[71] to provide written reasons for its decision. Mr. Justice Miller stated that, although the Board was not obliged to specify the actual method or mathematical calculation which it used, it must set out the terms of reference under which it makes its award in the same way that a judge does in rendering a decision. The Board had awarded $3,700 damages for severance, inconvenience and damage done to the demised premises. The Court found

66. R.S.A. 1980, c. S-27.
67. S.A. 1983, c. S-27.1.
68. *Supra* n. 66.
69. *Supra* n. 67.
70. [1984] 1 W.W.R. 447 (Alta. Q.B.).
71. R.S.A. 1980, c. A-2.

CNR claimed that Northern obtained an indefeasible title as a result of the Registrar's correction in 1946. In the alternative, it argued that it had acquired title to mines and minerals through adverse possession. The first argument was based upon a construction of the various Railway Acts that lumping those heads of damages together prevents the Court from assessing the correctness of the award under any of the four heads and was, therefore, contrary to the Administrative Procedures Act.[72]

B. *WESTERN MINES LIMITED* v. *BUGEJA* [73]

This case involved the taking of lands for a well site. However, the oil company had been forced to abandon its plan to drill the well. The Alberta Court of Queen's Bench found that the oil company, having obtained a right of entry order pursuant to the Surface Rights Act,[74] was bound to pay compensation in accordance therewith. It found that the Board had been correct in determining the value of the land taken by comparing it to market values of comparable land. However, it found that the Board erred in not taking into account the reversionary interest. It stated that since the surface owner has a residual interest, a preferable method of determining the compensation was on the basis of what rent would have been paid had the surface lands been leased rather than on the value of the land, as is used in expropriation cases. The Court stated that the only exception to that case would be where there was some special relationship between the surface owner and the land. It found that because no well was drilled nor would be drilled, the residual value of the land and the reversionary value of the land were virtually unaffected by the right of entry order. The Court also stated that to award annual damages, equal to the value of the land taken, would over-compensate the owner.

C. *SASKATCHEWAN OIL & GAS CORPORATION* v. *ADAM ET AL.*[75]

This case considered compensation payable under the Surface Rights Acquisition and Compensation Act of Saskatchewan.[76] The case involved the taking of land for a well site. Prior to the hearing before the Surface Rights Arbitration Board, the well was abandoned. The Saskatchewan Court of Appeal held that the Board erred in law in not taking into account the abandonment, and returned the case to the Board for further consideration.

D. *TRANSALTA UTILITIES CORPORTION* v. *OLSON ET AL.*[77]

This case involved the taking of land by the appellant for purposes of erecting power transmission towers. The issue before the Alberta Court of Queen's Bench was the obligation of the Surface Rights Board under

72. *Id.*
73. (1983) 26 Alta. L.R. (2d) 180 (Q.B.).
74. *Supra* n. 66.
75. (1983) 28 L.C.R. 146 (Sask. C.A.).
76. R.S.S. 1978, c. S-65.
77. Unreported, 22 Feb. 1984, J. D. of Grande Prairie, 8304-6220 (Q.B.).

the Administrative Procedures Act[78] to provide written reasons for its decision. The Court stated that the Board is not entitled to rely on its expertise as a substitute for its duty to set our reasons based upon findings of fact. It found that the Board had erred in not setting out its reasons for one head of compensation which it awarded.

E. *KLIBER* v. *EDEN GAS COMPANY LTD. ET AL.*[79]

At issue was the compensation awarded by the Surface Rights Board pursuant to the old Alberta Surface Rights Act[80] for the taking of land for purposes of a gas plant. Mr. Justice Kryczka of the Alberta Court of Queen's Bench looked at the compensation paid to the Crown in right of Alberta for farm leases of its land. His Lordship stated that the rights given up under a lease were in excess of the rights given up under a right of entry order, since, under the latter, the surface owner retains the right to use the surface to the extent that it can do so without interfering with the oil company's operations. The oil company does not obtain exclusive possession. Accordingly, the compensation payable to the surface owner should be something less than the compensation payable under Alberta Crown farm leases. He found that, generally, the Crown is paid 30% of the market value of the land, of which approximately 5% is paid for the market value of the land and the remaining 25% is paid for the quiet enjoyment granted to the lessee. Accordingly, since the oil company is not granted quiet enjoyment, the compensation awarded should be something less than 30% of the value of the land.

F. *MARKOVICH BROTHERS FARMING CO. LTD.* v. *PAN CANADIAN PETROLEUM LIMITED*[81]

In this case, Mr. Justice Decore distinguished between two approaches which can be taken in determining compensation. The first is the "four heads approach", pursuant to which a specific award is made under each of the four heads of damages listed in paragraphs 23(2)(a) to 23(2)(d), inclusive, of the old Surface Rights Act.[82] The other approach is the "global approach", pursuant to which only one compensation award is made. It should be noted that under subsection 23(2) of the Surface Rights Act,[83] the Surface Rights Board is obligated to consider the four heads of damages listed therein but is not obligated to make a specific award for each of them.

Mr. Justice Decore stated that he preferred the "global approach". His Lordship stated that if there is a pattern of voluntary agreements with the owners of comparable land, then that is the most cogent form of evidence and should be used by the Board to determine compensation, and based his compensation award on compensation under a series of agreements relating to lands in the area, even though they were all made with the same oil company.

78. *Supra* n. 71.
79. (1984) 49 A.R. 161 (Q.B.).
80. *Supra* n. 66.
81. *Supra* n. 77.
82. *Supra* n. 66.
83. *Id.*

G. *HAUKEDAL v. DOME PETROLEUM LIMITED*[84]

This is also a decision of Mr. Justice Decore of the Alberta Court of Queen's Bench. In this case, His Lordship declined to follow his own decision in the *Markovich* case[85] as to the utility of basing a compensation award on other agreements dealing with similar lands, as there was only one such agreement which could be referred to and one agreement does not constitute a pattern which can be relied upon to establish fair compensation.

H. *MOBIL GC CANADA LTD. v. FLETCHER ET AL.*[86]

Mrs. Fletcher, the surface owner, had objected to the granting of a right of entry order. Her objections were rejected by the Surface Rights Board who sent her a letter advising her of same. Mrs. Fletcher claimed that she never received that letter. The oil company attempted to enter her land and she refused them admission, requested that they provide her with satisfactory evidence of their legal authority to enter her land. The oil company obtained an *ex parte* injunction, following which it was allowed on the land. The oil company sought to recover the costs incurred by it in obtaining the *ex parte* injunction and in paying stand-by time for a service rig. Mr. Justice D. C. McDonald of the Alberta Court of Queen's Bench rejected the oil company's claim, holding that it was entirely reasonable for the surface owner to demand proof of the oil company's right of entry order. There was no evidence that if the oil company had provided her with copies of the right of entry orders, she would have persisted in refusing it admission.

The Court also reviewed the compensation awarded to the surface owner by the Surface Rights Board and varied it based upon the facts.

I. *FOOTHILLS PIPELINES (ALTA.) LTD. v. STELTER ET AL.*[87]

Mr. Justice Rowbotham of the Alberta Court of Queen's Bench was acting as an arbitrator under the provisions of the Railway Act[88] as it applies to expropriations under the National Energy Board Act.[89] The surface owners had executed a release of damages, and the issue in the case was whether they were entitled to further compensation having regard to the release. The operative words of the release were as follows:

> remise, release and forever discharge the said Foothills Pipelines (Alta.) Ltd. . . . from all manner of actions, causes of action, suits, debts, claims and demands whatsoever arising out of or connected with, resulting or alleged to have resulted from, any operations down to the date hereof conducted by Foothills Pipelines (Alta.) Ltd. . . . within, upon, over, across or under the following lands . . . provided however . . . that these presents shall not cover or relate to any damages which may hereafter arise . . .

The Court found that claims for compensation relating to the surface owners' subsequent desire to expand or relocate certain farmstead struc-

84. Unreported, 13 March 1984, J. D. of Grande Prairie, 8304-5678 (Q.B.).
85. *Supra* n. 77.
86. Unreported, 13 Feb. 1984, J. D. of Edmonton, 8203-30375 (Q.B.).
87. Unreported, 16 Nov. 1983, J. D. of Medicine Hat, 8301-18444 (Q.B.).
88. R.S.C. 1970, c. R-2.
89. R.S.C. 1970, c. N-6.

tures and their concern about a pipeline rupture or explosion did not fall within the words "damages which may hereafter arise".

J. *T.M.L. INVESTMENTS LTD.* v. *PETRO-CANADA EXPLORATION INC.*[90]

This case dealt with procedures on appeal from decisions of the Surface Rights Board of Alberta. Section 24 of the Surface Rights Act[91] states that the notice of appeal must specify the grounds for the appeal, must be filed within 30 days of the decision, and must be served within 10 days thereafter on the parties to the compensation order. In the present case, the notice of appeal was not received by the respondent until the 11th day after its filing. It dealt with 26 separate right of entry orders and stated that the grounds for appeal were that the compensation orders were made contrary to law. The notice of appeal was not served upon two parties who had registered caveats against the certificate of title to the land and who were served with notice of the proceedings before the Surface Rights Board but who did not appear at those proceedings.

Mr. Justice MacNaughton of the Alberta Court of Queen's Bench stated that the rules of the Surface Rights Board[92] do not contain procedures to be followed on appeals. His Lordship held that the Alberta Rules of Court, while they cannot override the procedures otherwise specified by statute, may be applied where there are no procedures prescribed, and that, as a result, the Court had an inherent discretion to extend the period of time within which the notice of appeal must be served. Mr. Justice MacNaughton extended that period to 11 days following the filing so that, in the present case, the notice was served in a timely manner.

His Lordship held that the grounds for the appeal were sufficiently stated in the notice of appeal, since it appealed the entire compensation award made by the Surface Rights Board. He also held that the caveators were not parties to the proceedings, because they did not become parties merely by filing an instrument at the Land Titles Office and, in any event, they did not appear before the Surface Rights Board.

K. *ROES AND ROES ET AL.* v. *HUDSON'S BAY OIL AND GAS COMPANY LTD.*[93]

This case also dealt with procedures on appeals from the Surface Rights Board of Alberta. It was contended that the notice of appeal had not been served on the Crown and, therefore, was invalid. The appellant argued, on the basis of the *TML Investments* case,[94] that the Rules of Court were applicable and that, under those Rules, a Court has the jurisdiction to dispense with service on a party. The Court of Queen's Bench determined that it did not have the jurisdiction under the Rules of

90. (1983) 45 A.R. 261 (Q.B.).
91. *Supra* n. 66.
92. Alta. Reg. 91/82.
93. Unreported, 9 Feb. 1984, J. D. of Drumheller, 8202-00147 (Q.B.).
94. *Supra* n. 90.

Court to dispense with service of the notice of appeal on a party and, therefore, ruled that the appeal should be dismissed on procedural grounds.

XI. TORTS AND THIRD PARTY LIABILITIES

A. *NORCEN ENERGY RESOURCES LIMITED ET AL. v. FLINT ENGINEERING AND CONSTRUCTION LTD. ET AL.*[95]

At the request of Norcen Energy Resources Limited and various other parties owning interests in certain wells near Fort St. John, British Columbia (collectively, "Norcen"), Flint Engineering and Construction Ltd. ("Flint") had installed certain facilities required for the expansion of an oil battery owned by Norcen so that the battery could accept and treat oil from some newly-drilled wells. Flint's employees advised a Norcen employee who was in the field that the facilities had been installed. The Norcen employee then turned on one of the new wells which was approximately 1½ miles from the battery. He then travelled to the battery and discovered that the oil was spraying into the air. He then returned to the well site and turned off the well. However, in the interim, the oil ignited and the ensuring fire caused considerable damage. Norcen brought this action against Flint to recover damages.

The Court found that the inlet of the new flowline installed by Flint to the battery was not properly installed and that that was the cause of the oil spray. However, the Court found that Norcen was negligent in not utilizing two employees to test the flowline, one at the well site and one at the battery. It was reasonably foreseeable that something might go wrong with the new facility so that an employee should have been posted at either end of the flowline. He assessed the liability two-thirds to Flint, and one-third to Norcen.

Norcen claimed damages not only for the physical damage to its facilities, but also for the loss of production during the period that its wells were shut-in. The Alberta Court of Queen's Bench said that in assessing damages for loss of production, it had to take into account the fact that the wells were unitized shortly after the fire occurred and that Norcen received its unitized interest share of production from the whole unit. It also stated that it was necessary to take into account the limitations imposed by governmental regulation on the maximum daily amount of production which could be taken from these wells. Further, it deducted the savings in mineral taxes which accrued to Norcen as a result of the reduction in production.

The Court determined the damages for lost production as being the present value to Norcen of recovery of the lost production over the life of the field. Presumably, this accounts for the fact that the production was not in fact lost, but was merely delayed.

95. Unreported, 31 Jan. 1984, J. D. of Calgary, 8001-17485 (Q.B.).

B. *PANCANADIAN PETROLEUM LIMITED* v. *OTIS ENGINEERING CO. LTD. AND CANADIAN GENERAL ELECTRIC COMPANY LTD.*[96]

This case dealt with a claim by PanCanadian Petroleum Limited ("PanCanadian") for damages to oilfield equipment resulting from a fire. Otis Engineering Co. Ltd. ("Otis") had been hired by PanCanadian to perform well servicing on a PanCanadian well. A fire started as a result of the overheating of a well heater unit manufactured by Canadian General Electric Company Limited. The Court found that the overheating resulted from faulty installation by a third-party independent contractor who had become defunct.

The Court stated that the custom within the well servicing industry is that Otis is to be characterized as a bailee for reward and not as a gratuitous bailee and that its obligation is to take reasonable and proper care of the bailor's goods. Since the damage resulted from the negligence of the third party, neither of the defendants was liable.

C. *BLACKMORE* v. *MURPHY OIL COMPANY LTD. ET AL.*[97]

Saskatchewan Telecommunications ("Sask Tel") was laying a telephone cable in the general vicinity of an oil pipeline owned by Wascana Pipelines Ltd. ("Wascana") and operated by its major shareholder, Murphy Oil Company Ltd. ("Murphy"). The pipeline right-of-way was marked by stakes. One of the stakes which purportedly marked the eastern boundary of the right-of-way was in fact slightly west of the pipeline. Sask Tel dug a trench up to that wooden stake and in doing so, ruptured the pipeline. Sask Tel had originally wished to cross the pipeline and had requested permission to do so from Murphy. However, since Sask Tel did not have the required approval from the National Energy Board, Murphy refused permission. Wascana argued that Sask Tel was negligent in not taking a very great care to determine the exact location of the pipeline before digging. Sask Tel contended that Wascana and Murphy were negligent in not properly locating the stakes and in not advising Sask Tel, when contacted, of the precise location of the pipeline.

The Saskatchewan Court of Queen's Bench found that Murphy was not aware when it was contacted that Sask Tel would be relying on the stakes, nor did it know that Sask Tel would proceed to lay its cable even though it did not have permission to cross the pipeline. The Court found that when digging in the general vicinity of a pipeline, a person must exercise a very high degree of care to avoid damaging the pipeline. The proper procedure is to avoid attempting to cross the pipeline until its location is known by exposing the line. Accordingly, Sask Tel was liable for the damages to the pipeline.

---

96. Unreported, 9 March 1983, J. D. of Calgary, 144312 (Q.B.).

97. (1983) 26 Sask. R. 146 (Q.B.).

XII. FOREIGN INVESTMENT REVIEW

A. *ATTORNEY GENERAL OF CANADA* v. *KSC LTD.*[98]

In this case, the U.S. parent of KSC Ltd. had twice been refused approval to establish its new business in Canada. The parent then agreed to sell 51% of the shares of the Canadian company to its Canadian sales manager. The Attorney General of Canada sought an order under section 20 of the Foreign Investment Review Act[99] to render KSC Ltd.'s investment in Canada nugatory.

The sole issue before Jerone, A.C.J.F.C. was the contention of the Attorney General of Canada that the control of KSC Ltd. was theoretical in nature and was in the hands of the Canadian manager under such circumstances as effectively placed the control in the hands of the U.S. parent, a non-eligible corporation. The Court held that the ownership of 51% of the shares of KSC Ltd. by the Canadian manager was conclusive control of the company. It also held that outright ownership of 51% of the shares of a private company, if not conclusive of control, would at the very minimum, place a heavy onus of disproof of control upon the Attorney General. The Associate Chief Justice recognized that there were loan agreements and management and pricing policies in existence between the U.S. parent and the Canadian manager which in many respects resembled those of a franchise agreement. However, His Lordship was not satisfied that they were sufficient to dislodge the concept of control in the hands of a 51% shareholder. The Associate Chief Justice also stated that he had no doubt that the Canadian manager would not have become the owner of the company had it been not for the Foreign Investment Review Act.[100] However, His Lordship held that the very purpose of the Act[101] was to place control of Canadian business enterprises in the hands of Canadians.

This case indicates that it may be more difficult than previously thought for the Foreign Investment Review Agency to establish that foreign control of a Canadian corporation has been obtained by means other than the acquisition of voting shares. The Agency has for some time taken a broad view of the circumstances in which control is acquired, notwithstanding that the Act[102] provides that the business carried on in Canada by a Canadian corporation can be acquired only by the acquisition of its voting shares or of substantially all of the property used in carrying on the business.

B. *RE CAMCO INC.*[103]

Camco Inc. ("Camco") was created by Canadian General Electric Limited ("CGE") and GSW Inc. ("GSW"). Each of the companies held 50% of the voting shares in Camco. A dispute between CGE and GSW

98. (1983) 22 B.L.R. 32 (Fed. Ct. T.D.).
99. S.C. 1973-74, c. 46.
100. *Id.*
101. *Id.*
102. *Id.*
103. (1983) 22 B.L.R. 1 (Ont. S.C.).

concerning the operation of Camco led to an application for a just and equitable winding-up of Camco. In the course of the litigation, an application was brought for the production of documents which CGE had filed with the Foreign Investment Review Agency.

The issue before Callaghan, J. was whether section 14 of the Foreign Investment Review Act[104] created a statutory privilege, such that the documents were not producible. The Court held that section 14 makes it clear that, except as provided therein:

> . . . all information with respect to a . . . business . . . obtained by the Minister . . . is privileged and no person shall communicate or allow to be communicated to any person not legally entitled thereto . . . any such information . . .

Callaghan, J. held that the section creates a privilege not only where the information is sought from the Crown, but also where the information is in the hands of a party to legal proceedings. In the absence of a waiver of the privilege, information supplied to the Foreign Investment Review Agency was held to be non-compellable.

XIII. ADMINISTRATIVE REGULATION

A. *COMMITTEE FOR JUSTICE AND LIBERTY FOUNDATION, ET AL.* v. *INTERPROVINCIAL PIPE LINES (N.W.) LTD. ET AL. AND THE NATIONAL ENERGY BOARD*[105]

The National Energy Board granted a certificate of public convenience and necessity to Interprovincial Pipe Lines (N.W.) Ltd., to permit construction and operation of an oil pipe line from Norman Wells, Northwest Territories to Zama, Alberta. The certificate was granted after a 21-day hearing at which the appellants had intervened. The appellants applied for judicial review under section 18(1) of the National Energy Board Act,[106] alleging that the evidence before the Board was deficient and that certain conditions attached to the certificate by the Board were improper. The Court held that there was ample evidence before the Board after its 21-day hearing upon which it could make the findings of fact and draw the conclusions it did, and that no question of law arose for review. It also held that the matters dealt with by the Board by way of conditions were matters that the Board could properly deal with, because they were purely administrative matters.

B. *CHEVRON STANDARD LIMITED AND CHEVRON CANADA RESOURCES LIMITED* v. *ENERGY RESOURCES CONSERVATION BOARD AND GASCAN RESOURCES LTD.*[107]

The appellants were owners of wells in, and were the operators of, a unit which had embarked upon a scheme for enhanced recovery of an oil pool. Gascan Resources Ltd. ("Gascan") was not a party to the unit but owned a drilling spacing unit just outside the unit. Gascan made an application under the Oil and Gas Conservation Act[108] for approval of its

104. *Supra* n. 99.
105. (1984) 50 N.R. 117 (Fed. Ct. C.A.).
106. R.S.C. 1970, c. N-6.
107. (1983) 27 Alta. L.R. (2d) 84 (C.A.).
108. R.S.A. 1980, c. O-5.

own scheme of enhanced recovery. The Energy Resources Conservation Board approved the scheme of recovery which included an injection well which was approximately 5 miles from Gascan's producing well. Certain of the unit lands lay between Gascan's injection and producing wells. The Board granted approval of Gascan's scheme but stated that it was premature to approve the scheme as a project. The appellants brought an application that the Board erred when it approved Gascan's scheme. The appellants' contention was that the approval of a scheme is merely the first step in a program leading to the status as a project, that a project must relate to more than one drilling spacing unit, and that, as Gascan's scheme only included one productive drilling spacing unit, the Board had no jurisdiction to approve the scheme.

Interpreting the regulations,[109] the Court found that a project or scheme does not have to include more than one drilling spacing unit. It also held that an injection well site does not have to be located within the drilling spacing unit when there is only one unit. The injection site must only be in an area that will permit injection into the producing strata.

C. *R.* v. *PANARCTIC OILS LIMITED*[110]

Panarctic Oils Limited was charged under section 4(1) of Ocean Dumping Control Act[111] with dumping wastes through the ice of the Arctic Ocean at an oil well drilling site. The dumping occurred late in the drilling season at the Whitefish site as rig-out was approaching. The air strip which was the only means of access to the site was deteriorating. Under these conditions, Panarctic's employees dumped a large amount of waste through the ice, including hundreds of 45 gallon drums which contained chemical residues of various sorts, hundreds of bags of caustic soda and barite, cement, scrap metal, paper, plastic, drilling mud, antifreeze and a pick-up truck.

The dumping occurred over a 13-day period and approximately one-third of the work force on site was involved. Bourassa, J. found that the dumping took place under the direction of three full-time supervisors. The company raised the defence that the dumping occurred without the knowledge and consent of the company and that the company had exercised all due diligence to prevent this kind of prohibited act. His Lordship held that the company through its drilling foreman, who was the superior servant on site, knew of the dumping and, therefore, had consented to the violation of the Act.[112] The defence was also raised that the company had adequately trained its men and instructed them not to breach the dumping regulations. It was held that due diligence was something more than to say "we hire and train carefully"; due diligence requires successful communication and adequate information and instructions from the company right down to the man on the job. Furthermore, the Court was of the opinion that the dumping was foreseeable and that the problems with the air strip were foreseeable and preventable. It was found as

109. Alta. Reg. 151/71.

110. (1983) 43 A.R. 199, 44 A.R. 385 (N.W.T. T.C.).

111. S.C. 1974-75-76, c. 55.

112. *Id.*

a fact that there was ample surplus cargo capacity available in the aircraft that were in and out over the total period that the drill site was in existence, to fly out the garbage.

Accordingly, the company was found guilty of the offense and sentenced to a fine of $150,000 and two years of probation. In sentencing, the Judge stated that the primary objective was deterrence.

D. *R.* v. *ESSO RESOURCES CANADA LIMITED* [113]

In this case, the employee in charge at a barge site improperly delegated his responsibility to two subordinates. They had both been drinking on the job, and fell asleep. As a result, there was an oil spill of approximately 22 cubic meters into the MacKenzie River when the barge was filled to overflowing. The company was charged pursuant to section 752 of the Canada Shipping Act.[114] The company pleaded guilty to the offense and, in its sentencing submission, stated that it was operating in a "gold fish bowl" and was subject to conflicting pressures from all corners of society: to produce more oil, cheaper and faster; to make every conceivable effort to avoid pollution; and to observe "Hire North" policies. Bourassa, J. found that the company had expended significant efforts to see that employees were aware of their responsibilities and were properly trained, which he found was in significant contrast with the facts in *Panarctic Oils Limited.*[115] Although His Lordship found that the company had done everything that could reasonably be expected of it, he held that, in sentencing, deterrence of both the company and other potential offenders was the most important factor. The sentence imposed was a fine of $8,000.

It should be noted that the Canada Shipping Act[116] does not contain a defence of due diligence similar to the one found in the Ocean Dumping Control Act.[117]

E. *THE MARTIN MINE LTD. ET AL.* v. *R IN RIGHT OF BRITISH COLUMBIA* [118]

This case dealt with a lease issued under the Mining (Placer) Act.[119] Section 9 of the Act[120] requires every lessee, before the anniversary date of his placer lease, to pay a rental to the Minister and to submit an affidavit confirming that the prescribed work has been performed on the lease. The anniversary date for this particular lease was June 30, 1982. A cheque for the rental and the sworn affidavit were mailed to the Minister on June 16, 1982; however, they were not delivered to the Ministry until after the anniversary date. It was held on the basis of the particular legislation in question that the lease was forfeited by operation of law

113. (1983) 46 A.R. 375 (N.W.T. T.C.).
114. R.S.C. 1970, c. S-9.
115. *Supra* n. 110.
116. *Supra* n. 114.
117. *Supra* n. 111.
118. (1983) 45 B.C.L.R. 106 (S.C.).
119. R.S.B.C. 1979, c. 264.
120. *Id.*

and that there was no discretion exercisable by the Minister under the legislation to reinstate the lease. Proudfoot, J. stated that there was no onus on the Minister to give notice of non-receipt of the rentals and affidavit, but rather that the onus is on the lessee to comply with the Act.[121] Accordingly, the lease terminated on its anniversary date and the area became open and free to be staked by others.

F. *RE OKANAGAN HELICOPTERS LTD. ET AL. AND THE CANADIAN TRANSPORT COMMISSION ET AL.*[122]

This case dealt with the meaning of the words "a change of control" in section 21 of the Air Carrier Regulations.[123] The Court held that the word "control", which was not defined in the regulations, means either legal, *de jure* control, which is control by virtue of the ownership of the majority of voting shares, or effective, *de facto* control, which is control by something less than a majority of shares.

G. *RE UNION GAS LTD. AND ONTARIO ENERGY BOARD ET AL.*[124]

This case upheld the Ontario Energy Board's decision in determining just and reasonable rates to exclude, as an operating cost, "demand charges" under Union Gas Ltd.'s gas purchase contract with TransCanada Pipelines Limited.

H. *RE DOW CHEMICAL CANADA INC. ET AL. AND UNION GAS LTD.*[125]

This case dealt with the issue of retroactive and prospective rate making with respect to the cost of synthetic natural gas produced by Union Gas Ltd.

XIV. CONSTITUTIONAL LAW

A. *REFERENCE RE MINERALS AND OTHER NATURAL RESOURCES OF THE CONTINENTAL SHELF*[126]

The question of the ownership of and the right to legislate with respect to the seabed and soil from the low water mark of the Province of Newfoundland to the seaward limit of the continental shelf was referred to the Newfoundland Court of Appeal by the Government of Newfoundland. In considering this Reference, the Court of Appeal first considered the lands underlying the territorial sea, which extends from the low water mark or, where appropriate, from the proper base lines of inland waters, seaward for a width of three nautical miles. The Court stated that the common law rule was that the realm ended at the low water mark but found that prior to the union of Newfoundland with

121. *Id.*

122. (1983) 144 D.L.R. (3d) 10 (Fed. C.A.).

123. C.R.C. 178, c. 3.

124. (1984) 43 O.R. (2d) 489 (High Ct.).

125. (1984) 42 O.R. (2d) 731 (C.A.).

126. (1983) 145 D.L.R. (3d) 9 (Nfld. C.A.).

Canada, international law had developed to an extent that the territorial sea was subject to the sovereignty of the coastal state.

The Court then addressed whether or not Newfoundland had the necessary constitutional status, prior to union, to acquire rights to the territorial sea. The Court found that pursuant to the Balfour Declaration and the Statute of Westminister,[127] Newfoundland had sufficient status at international law to acquire the rights. The arguments that such status was lacking as Newfoundland had not adopted the operative provisions of the Statute of Westminister,[128] had failed to assume full responsibility for its external affairs, and had adopted a Commission of Government in 1936 were rejected. Accordingly, the Court held that the ownership of and the rights to legislate with respect to the territorial sea remained with the Province of Newfoundland on union, subject to interference with these rights by the Parliament of Canada with respect to matters within its jurisdiction.

The next issue considered was the ownership and right to legislate in respect of the continental shelf. The development of international law respecting a coastal state's right to explore and exploit the continental shelf was examined. The Court was satisfied that at the time of union these continental shelf resource rights existed in international law. However, it found that a declaration and rationalization of the rights was required and that Newfoundland had not made any constitutional act whereby these rights were adopted into its municipal law. Therefore, the Court held that the right to exploit and to legislate in respect of the lands from the seaward limit of the territorial sea to the outer edge of the continental shelf belonged to Canada.

B. *NEWFOUNDLAND REFERENCE RE CONTINENTAL SHELF (1984)*[129]

The question of the right to explore, exploit and legislate in respect of the Hibernia Area was referred to the Supreme Court of Canada. It delivered a unanimous judgment. The Reference was restricted to the continental shelf off Newfoundland and the Court did not consider the territorial sea.

The Court addressed the nature of the coastal state's rights to explore and exploit the continental shelf, which it considered to be limited rights which co-exist which the rights of other nations to make use of the sea bed for cables and pipelines and which do not affect the status of the superjacent waters or air space. The Court found that the coastal state could not own the continental shelf but had only limited rights of exploration and exploitation, which it characterized as an extra-territorial manifestation of, and an incident of, the external sovereignty of the coastal state.

The next issue reviewed was whether or not Newfoundland, under international law, ever became independent such that it had external sovereignty. The Court found for a variety of reasons, including failure

127. 1931 (U.K.) c. 4.

128. *Id.*

129. (1984) 51 N.R. 361 (S.C.C.).

to adopt the Statute of Westminister[130] and the implementation of a Commission of Government in 1934, that Newfoundland did not have external sovereignty at the time of union. Further, the Court was of the opinion that even if continental shelf rights existed in 1949, which it later found not to be the case, and even if Newfoundland had acquired them, such rights were lost on union. Accordingly, it held that Canada was entitled to explore, exploit and legislate in respect of the continental shelf, because, after union, it was the only entity possessed with external sovereignty.

C. *BRITISH COLUMBIA REFERENCE RE OWNERSHIP OF THE BED OF THE STRAIT OF GEORGIA AND RELATED AREAS*[131]

This case was an appeal of a 1976 reference to the British Columbia Court of Appeal.[132] The Court of Appeal held that the lands including the minerals and other natural resources of the seabed covered by the water of the Straits of Juan de Fuca, the Strait of Georgia, Johnstone Strait and the Queen Charlotte Strait to be the property of the Province of British Columbia.

Dickson J., as he then was, delivered the majority judgment of the Supreme Court of Canada, concurred with by Beetz, Estey and Chouinard, JJ. In *Reference Re Offshore Mineral Rights of British Columbia*[133] (the "*1967 Offshore Reference*"), the Court had held that lands seaward from the low water mark off the coast of mainland British Columbia and the several islands were the property of Canada over which Canada had the rights to explore and exploit. Dickson, J. concluded that the *1967 Offshore Reference* dealt with the rights to the territorial sea as defined by international law, *i.e.* the waters and submerged lands to a width of three nautical miles seaward of the coast of the mainland but where the mainland is deeply indented or has a fringe of islands in its immediate vicinity, seaward from the baselines enclosing these features. His Lordship held that, because the straits in question were enclosed by the indentation of the mainland and the islands, they were not part of the territorial sea and that, therefore, the *1967 Offshore Reference* did not resolve the issue before the Court on the present appeal.

Dickson, J. began with the common law principle that the realm ends at the low water mark, and reviewed the history of British Columbia to determine whether there was any overt act to incorporate the straits into the Colony of British Columbia before Confederation. After reviewing the acts of Captains Meares and Vancouver in taking possession of the lands and waters for the King, and after reviewing the Oregon Treaty of 1846, which set the boundary between British and American Territory at mid-channel through the Straits of Juan de Fuca, His Lordship concluded that the straits were British territory after 1846.

130. *Supra* n. 127.
131. May 17, 1984 (S.C.C.).
132. (1976) 1 B.C.L.R. 97 (C.A.).
133. [1967] S.C.R. 792.

Dickson, J. then considered whether the straits were transferred to British Columbia prior to Confederation in 1871. On an examination of the constructive instruments of the Colony of British Columbia, His Lordship determined that the boundaries described as "south to the Territories of the United States, and west to the Pacific Ocean" included the straits in question. Therefore, Dickson, J. was of the opinion that the straits were part of the Colony of British Columbia when it entered Confederation and that the seabed belonged to the Province.

A dissenting judgment was delivered by Wilson, J. concurred with by Ritchie, J. Their Lordships were of the opinion that, *prima facie*, the territory of the Colony of British Columbia ended at the low water mark, and were not of the view that the constructive documents of the colony expressly extended the colony's boundaries to the straits in question. They also found that the straits were not inland waters at common law. Accordingly, the dissenting Justices held that the ownership of the seabed in the straits belonged to Canada.

D. *THE CITY OF MEDICINE HAT* v. *THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF NATIONAL REVENUE*[134]

The City of Medicine Hat sought a declaratory judgment that the Natural Gas and Liquids Tax and Petroleum and Gas Revenue Tax[135] did not apply to the City. The City produced and distributed both natural gas and electricity generated from natural gas through utility operations. It held over 114,665 acres of petroleum and natural gas rights for such purposes. The City argued that it was an agent of the Provincial Crown and was, therefore, immune from taxation under section 125 of the Constitution Act, 1867.[136] The Alberta Natural Gas Tax Reference[137] was relied upon.

Moore, A. C. J. considered the nature of municipal government and concluded that an agency relationship exists only where the City carries out express duties imposed by the Province. It was held that the provision of the natural gas and electricity services by the City were discretionary and, therefore, not performed as an agent for the Provincial Crown.

The City also raised the argument that the financial impact of the taxes upon the City had a material adverse effect on the City's ability to manage its affairs and that, therefore, the taxes were an interference with a matter in provincial jurisdiction and thus *ultra vires*. The Court rejected this argument and found that, since the City had simply passed the tax on to its consumers, the City's integrity and financial capacity to manage its affairs had not been impaired by the taxes. Based on this reasoning, the Court was of the opinion that the taxes as they applied to the City were *intra vires*.

---

134. 4 Feb. 1984 (Alta. Q.B.).

135. S.C. 1980-81-82-83, c. 68.

136. Constitution Acts, 1867 to 1981, adopted by the House of Commons on Dec. 2, 1981 and by the Senate on Dec. 8, 1981.

137. (1982) 42 N.R. 351 (S.C.C.).

E. *RE CANADA METAL CO. LTD. AND THE QUEEN*[138]

This case held that the provision of the Clean Air Act[139] which makes it an offence to emit air contaminants which could cause significant damage to health was *intra vires* Parliament, under both the criminal law power and the "national dimensions" doctrine of the peace, order and good government power.

F. *RE MINING AND MINERAL RIGHTS TAX ACT*[140]

This Newfoundland case dealt with the Mining and Mineral Rights Tax Act,[141] which imposed a mining tax and a mineral rights tax. The taxes were, respectively, a percentage of taxable income derived from mining operations and a percentage of income derived from rentals and royalties respecting mineral rights. The taxes were imposed on the component of the taxpayers income derived from these sources, and deductions were limited to these sources and were dependent upon Ministerial discretion.

The appellants contended that the mineral rights tax was really a gross revenue tax akin to a production tax and, therefore, was an indirect tax and *ultra vires* the Legislature. Martland, J., for the Supreme Court of Canada, rejected this argument and held that the deductions were appropriate, that the taxes were income taxes and, thus, direct taxation and *intra vires*.

The appellants also contended that as the royalties were paid to them outside of the Province, this tax should not apply, because it was taxation outside the Province. The Court rejected this argument and found that the tax was validly imposed upon the grant of a mineral right within the Province.

XV. LEGISLATION

This paper does not attempt to provide a detailed discussion of all of the legislative and regulatory developments during the past year. Rather, it attempts to identify only those statutes and regulations which may be of particular relevance to oil and gas lawyers. A longer summary is provided of those significant developments which are not or may not become the subject of published comment.

A. ALBERTA LEGISLATION

During the past year there have been two sessions of the Alberta Legislature, the First Session (Fall 1983) and the Second Session (Spring 1984) of the 20th Legislature, 30 Elizabeth II.

138. (1983) 144 D.L.R. (3d) 124 (Man. C.A.).
139. S.C. 1970-71-72, c. 47.
140. (1982) 43 N.R. 406 (S.C.C.).
141. S.N. 1975, c. 58.

1. 1983 Fall Session

(a.) Oil Sands Conservation Act[142]

This Act replaces the former provisions of the Oil and Gas Conservation Act which dealt with the regulation of oil sands development. The Energy Resources Conservation Board remains as the regulatory authority, and the Act generally follows the former provisions of the Oil and Gas Conservation Act[143] which dealt with oil sands. The major changes from the former provisions are as follows:

(i.) Definition of Crude Bitumen

The definition of crude bitumen has changed from:

> "crude bitumen" means a naturally occurring viscous mixture, mainly of hydrocarbons heavier than pentane, that may contain sulphur compounds and that, in its naturally occurring viscous state is not recoverable at a commercial rate through a well;

to:

> "crude bitumen" means a naturally occurring viscous mixture, mainly of hydrocarbons heavier than pentane, that may contain sulphur compounds and that, in its naturally occurring viscous state will not flow to a well;

In consequence, *in situ* oil sands projects come within the scope of the Act. The Board has also been given the power for the purpose of orderly and efficient development, to declare, as oil sands, oil reserves surrounding oil sands deposits.

(ii.) Approval of Oil Sands Operations

The Board, with the prior approval of the Lieutenant Governor in Council, may authorize both *in situ* and mining operations for the recovery of oil sands. Experimental projects producing approximately 1,000 BPY do not need the approval of the Lieutenant Governor in Council.

(iii.) Industrial Development Permits

The use of crude bitumen in Alberta as a raw material or fuel in an industrial or manufacturing operation is prohibited unless it is within a scheme of operation approved by the Board or unless an industrial development permit has been issued by the Board.

(iv.) Scheme to Maximize Recovery of Oil Sands

The Act provides that the Board may recommend to the Lieutenant Governor in Council, and it may approve, a scheme to maximize recovery of oil sands. The scheme is to apply to the area adjoining the boundaries of an oil sands site and the approval may provide for working rights to surrounding oil sands that are required to maximize recovery. The Act is very broad and provides that the scheme may set forth the persons who are entitled to compensation and the amount of compensation they are to receive.

142. S.A. 1983 (Fall Session), c. O-5.5.

143. *Supra* n. 108.

(b.) Environment Statutes Amendment Act[144]

The Clean Air Act[145] and the Clean Water Act[146] have been amended to authorize the Minister to release to the public monitoring information which licencees are required to provide to the Director of Pollution Control.

(c.) Real Property Statutes Amendment Act 1983 (No. 2)[147]

Section 170 of the Land Titles Act[148] has been amended to authorize the Attorney General to direct payment from the assurance fund of claims against the Registrar in the sum of $5,000.00 or less. Payment of claims in excess of $5,000.00 still require the approval of the Lieutenant Governor in Council.

The provisions of the Law of Property Act[149] dealing with a personal action against an individual mortgagor in a foreclosure action have been amended.

(d.) Natural Gas Pricing Agreement Amendment Act[150]

This Act establishes the "Natural Gas Pricing Agreement Market Development Fund". The Alberta Petroleum Market Commission is authorized to charge gas purchasers a market development levy for deposit into the Fund. The Lieutenant Governor in Council is authorized to make regulations approving market development payments out of the Fund to Canadian distributors of gas outside of the Province of Alberta. The intent of the incentives is to develop new markets for Alberta natural gas.

(e.) Alberta Corporate Income Tax Amendment Act, 1983 (No. 2)[151]

Several changes were made respecting the royalty tax credit. The Act was amended to clarify that, in the calculation of the royalty tax deduction, attributed Canadian royalty income generated in a partnership is not to be calculated at the partnership level, but that the components flow through to the partners as separate and distinct amounts.

For taxation years commencing after December 31, 1983, an application for a royalty tax credit must be filed within one year of the end of the taxation year to which it applies. Before amendment, the Act allowed the claimant four years to submit an application. A further restriction was passed in order to prevent what the government viewed as excessive claims of the royalty tax credit. The Act now provides that where, because of a change in control or a short taxation year (by reason of an amalgamation or otherwise), one or more royalty tax credit entitlements

144. S.A. 1983 (Fall Session), c. 77.
145. R.S.A. 1980, c. C-12.
146. R.S.A. 1980, c. C-13.
147. S.A. 1983 (Fall Session), c. 97.
148. *Supra* n. 10.
149. R.S.A. 1980, c. L-8.
150. S.A. 1983, c. 90.
151. S.A. 1983, c. 63.

are greater than they would otherwise be, the Provincial Treasurer may reduce the entitlements to an amount determined by him. Alberta Treasury considers that the amount determined by the Provincial Treasurer will be the amount to which the corporation(s) would have been entitled in the absence of the change in control or the short taxation year.

2. 1984 Spring Session

(a.) Pipeline Amendment Act, 1984[152]

This Bill contains amendments respecting low-pressure distribution pipelines which are not part of rural gas utilities or are not located in municipalities.

(b.) Department of Energy and Natural Resources Amendment Act, 1984[153]

This Bill delegates some of the responsibility of the Minister of Energy and Natural Resources to the Associate Minister of Public Lands and Wildlife. The Bill also contains amendments concerning the financial administration of the Department.

(c.) Employment Standards Amendment Act, 1984[154]

The Employment Standards Act[155] is to be amended with respect to demands for the payment of unpaid wages and the appeal process. A new section 106.1 is to be added to the Act, which will grant priority to the claim of an employee for wages, overtime pay or entitlements of up to $5,000.00 over (a) the claims of secured creditors with charges registered at a Land Titles Office or the Chattel Security Registry with respect to wages, etc. that were earned prior to the registration of the security; (b) the claims of a receiver appointed under a floating charge debenture with respect to the wages, etc. that were earned prior to the appointment of the receiver; and (c) the claims of any other secured creditors with respect to wages etc. that were earned prior to the making, giving, accepting or issuing of such secured claim.

(d.) Queen's Counsel Amendment Act, 1984[156]

This Bill provides that members of the Law Society of Alberta who are also members of the Legislative Assembly, members of Parliament, the Deputy Attorney General or a Bencher of the Law Society may be appointed Queen's Counsel without the requirement of ten years practice at the Bar.

152. Bill 14.

153. Bill 18.

154. Bill 24.

155. R.S.A. 1980, c. E-10.1.

156. Bill 30.

(e.) Corporation Statutes Amendment Act, 1984[157]

This Bill amends the provisions of the Business Corporations Act[158] dealing with names of corporations. The ability to reserve a name for a corporation will be eliminated, and prohibited names and expressions are to be published in regulations. The amendments will apply to extra-provincially registered corporations.

(f.) Mines and Minerals Amendment Act, 1984[159]

Funds to be expended under the Exploratory Drilling Incentive or Geophysical Incentive Programs will be derived from the General Revenue Fund. The funds expended under these programs will be applied against the non-renewable resource revenue in the Alberta Heritage Savings Trust Fund.

(g.) Oil Sands Technology and Research Authority Amendment Act, 1984[160]

This Bill will extend the purpose of the Act to provide the means whereby technological methods and information may be further developed and provided to persons, industries and other institutions.

(h.) Public Lands Amendment Act, 1984[161]

This Bill provides that the title to the beds or shores of all permanent and naturally-occurring bodies of water and all naturally-occurring rivers, streams, water-courses and lakes is vested in the Crown in right of Alberta, unless a grant or certificate of title conveys the shore or bed by express description. A river, stream or water-course remains as such even though its water may be diverted by human act.

(i.) Alberta Corporate Income Tax Amendment Act, 1984[162]

The Small Business Equity Corporations Act, which is to be introduced in the Legislature during the current sitting, will provide an incentive for Alberta investors who purchase equity shares of "small business equity corportions" registered under that Act. Corporate investors that are subject to Alberta corporate income tax will receive a refundable tax credit equal to 30 per cent of a qualifying investment.

3. Alberta Regulations

(a.) 1984 Drilling and Service Incentives

The Geophysical Incentive and Exploratory Drilling Incentive Programs were continued from March 31, 1984 to April 1, 1985 by Alberta

157. Bill 34.
158. S.A. 1981, c. B-15.
159. Bill 36.
160. Bill 37.
161. Bill 38.
162. Bill 42.

Regulations 137/84 and 138/84. The significant changes to the Geophysical Incentive Program are that all grants will be made in cash and that the requirement to file certain information and data requests has been eliminated. The major change to the Exploratory Drilling Incentive Program is that oil production for 60 months and gas production for 12 months continues to be exempt from Crown Royalty but the exemption is now capped to $2,000,000.00 per well. The Alberta Oil and Gas Servicing Incentive Program and the Development Drilling Incentive System, implemented in 1983, were not continued.

(b.) Pricing

Petroleum Royalty Amendment Regulations A.R. 291/83, 415/83, 13/84

Crude Oil Par Price, Select Price and Royalty Factor Regulation, 1979 A.R. 292/83

Natural Gas Royalty Amendment Regulation A.R. 293/83

Pentanes Plus Select Price and Royalty Factor Amendment Regulation A.R. 294/83

Natural Gas Pricing Amendment Regulation A.R. 28/84

The Canada-Alberta Energy Agreement dated September 30, 1981 ("the 1981 Canada-Alberta Agreement") was amended June 30, 1983 ("the 1983 Amending Agreement"), to provide, with the above regulations, for the following changes:

(i.) Crude Oil Prices

With respect to "conventional old oil" produced within the Province of Alberta, the 1981 Canada-Alberta Agreement established a schedule of annual wellhead oil price increases effective through 1986. The price of "conventional old oil" was increased to $29.75 per barrel effective January 1, 1983 and was scheduled to be increased by $4.00 per barrel every six months thereafter until July 1, 1986, subject to a ceiling of 75% of the actual international price of oil landed in Montreal. However, as a result of the decline in the international price of oil since January 1, 1983, this ceiling had been exceeded. The 1983 Amending Agreement provides that during the period from July 1, 1983 to December 31, 1984, the price of "conventional old oil" shall remain at $29.75 per barrel, provided that if the international price increases such that the domestic price falls more than 1% below 75% of the international price, the domestic price will be increased to the lesser of the 75% level or the level set out in the 1981 Canada-Alberta Agreement. If the international price decreases such that the domestic price exceeds the international price by more than 1%, the domestic price will be reduced to the international price. The price of "old" oil after December 31, 1984 will be determined in accordance with the schedule set out in the 1981 Canada-Alberta Agreement.

Effective January 1, 1982, a New Oil Reference Price ("NORP") applies to "conventional new oil" in Alberta. As a result of the 1983 Amending Agreement, the definition of "new" oil in Alberta now includes:

- oil from pools initially discovered after December 31, 1973 which qualifies as new oil for provincial royalty purposes (i.e. "special old" oil which is to be included until December 31, 1984);
- oil produced from certain infill wells completed on or after July 1, 1983;
- incremental oil recovered from pools subject to enhanced recovery schemes (other than waterflood schemes) commencing operation after December 31, 1980;
- crude bitumen obtained from experimental and non-integrated oil sands;
- oil from existing tertiary recovery projects which pay royalties no higher than those applicable to "new" oil;
- oil from experimental projects which pay a royalty no greater than 5 percent of gross revenue; and
- oil from oil wells that have been suspended for a period of at least three years, provided the production from these wells qualifies for provincial new oil royalties.

The NORP (estimated at the wellhead) was scheduled to be set at $45.92 per barrel on January 1, 1982 and to be increased at six-month intervals to at least $77.48 per barrel by July 1, 1986. The NORP applicable to each semi-annual increase will be not less than a phased-in moving average of actual international prices. However, the NORP is subject to a ceiling of 100% of the international price adjusted for quality. This ceiling has already been reached resulting in an actual NORP wellhead price on December 1, 1983 of approximately $37.92 per barrel.

(ii.) Natural Gas Prices

The Alberta border price was increased to $2.98/Mcf on February 1, 1984. The 1981 Canada-Alberta Agreement and the 1983 Amending Agreement provide for future increases in this price at six-month intervals. However, the 1983 Amending Agreement provides that no increases shall be made to the price if the current price is 65% of the equivalent cost of oil at the Toronto Refinery Gate. In accordance with the federal government's policy of maintaining this 65% ratio, the Natural Gas Liquids Tax was reduced to zero on February 1, 1984.

(c.) Oil Royalty Exemption Regulations A.R. 317/84

On March 29, 1984 the Alberta Government announced the implementation of a 12-month Crown royalty holiday on exploratory oil wells. A well must be spudded between April 1, 1984 and March 31, 1985 and is eligible if it is classed as New-Field Wildcat, New-Pool Wildcat, Deeper Pool Test, or Outpost. In the case of a Deeper Pool Test, crude oil discovered in the exploratory portion of the well is eligible for a royalty holiday. Also, the crude oil produced from a new pool discovered in a development well, a Shallower Pool Test, or the development portion of a Deeper Pool Test, is eligible if that pool was not known to exist prior to the spud date of the well. Crude oil production that has been exempted or is eligible for exemption from payment of Crown royalty under the Exploratory Drilling Incentive Program is not eligible under this program. The 12-month royalty holiday must be used within four years of the first production and is capped at $1,000,000 per well.

(d.) Freehold Mineral Rights Tax Regulations A.R. 12/84 and 108/84

These regulations were passed pursuant to the Freehold Mineral Rights Tax Act[163] which was reported on in Bill form in the 1983 edition of this paper. The Act applies to 1983 and subsequent years. The regulations provide that petroleum and natural gas rights forming a production entity, and on which no Alberta Crown royalties are reserved, are taxable minerals. The tax is levied on an annual basis in the year following the taxation year. It is calculated on a well-by-well basis, recognizing the status of the well as a production entity as of December 31 in the taxation year. The tax is levied on the gross value of the well determined by the value and amount of production in the taxation year. For petroleum, this is the weighted average of production, and for natural gas, this is determined on net revenues. Each mineral right taxed may be allowed a reduction of the tax payable to a maximum of $1600 for each owner's specified interest in a tract as registered in a certificate of title at the Land Titles Office.

(e.) Petroleum Incentives Program Amendment Regulations A.R. 371/83, 444/83, 465/83, 140/84

These regulations made the following changes:

(i.) The threshold exemption from adjustment was increased from $500,000 to $3,000,000.

(ii.) An overhead allowance of 12% on the first $5,000,000 and 10% on the balance replaces the requirement to define internal overhead expenses.

(iii.) The Minister may declare persons other than applicants to be Canadian owned or controlled.

(iv.) The deadline for filing the applications for the fiscal year ending 1981 was extended to December 31, 1983.

(v.) The assignment of incentives to persons other than financial institutions is now permitted, provided that the assignment is within a class of assignments that has been approved by the Minister.

(vi.) The eligibility of expenses incurred to purchase or contract for the acquisition of geological, geophysical or geochemical data (Geo^3) was restricted. Such expenses are not eligible if they are paid or determined by future use, sale or licencing or the revenues from same. Geo^3 expenses incurred after May 31, 1983 that are not paid within 12 months of the date that they were incurred will not be eligible.

(vii.) A reduction of incentives for the amounts received from the other Alberta incentives programs was also included.

163. S.A. 1983, c. F-19.1.

(f.) Oil and Gas Conservation Amendment Regulations A.R. 221/83, 336/83, 339/83, 416/83, 15/84, 112/84

These regulations dealt with the approval and regulation by the Energy Resources Conservation Board of waste processing and disposal facilities. Operators are required to control waste materials on the well site and plant site and to take contaminated materials to approved waste processing and disposal facilities for treatment. The amendments also deal with the requirements for multiple producing spacing units for both oil and gas wells and set out the evidence to be submitted in rateable take, common carrier, common purchaser and common processor applications.

(g.) Oil Sands Conservation Act — Release of Information Regulation A.R. 120/84

This regulation dealt with the release of information submitted to the Energy Resources Conservation Board in the process of administering of the Act. Generally, commercial and technical data is not to be released for 5 years. The Board has the jurisdiction to extend the period or to shorten it in certain circumstances. Well information is to be made available within one year of the finishing drilling date.

(h.) The Lands Agents Licencing Regulation A.R. 58/84

By virtue of this regulation, the Lands Agents Licencing Act[164] does not apply to acquiring additional surface rights in respect of an electric distribution system or a rural gas utility if the owner or occupant has granted such rights in the past. It also does not apply to persons who are negotiating gratuitously on behalf of such an owner or occupant. Further, the Act does not apply to any person who negotiates for or acquires an interest in land on behalf of the Alberta Irrigation Projects Association.

(i.) Surface Rights Act General Regulation A.R. 238/83

This regulation provides for the information that must accompany an application for a right of entry order. It also prescribes the fees applicable to the administration of the Act and the forms to be used.

(j.) Rules of Procedure and Practice of the Surface Rights Board A.R. 239/83

The regulation sets out the rules of practice and procedure for the Surface Rights Board.

The regulation divides the Province of Alberta into the Calgary district and the Edmonton district, with the dividing line being the boundary of Township 34. Right of entry proceedings in respect of land in the Calgary district are to be held at the Board's office in Calgary, and those in respect of the land in the Edmonton district, at the Board's office in Edmonton. Proof of service in the Board's proceedings is to be by way of

164. R.S.A. 1980, c. L-2.

affidavit. A party to a proceeding does not have to be present but may submit his representations to the Board in writing, and the Board may conduct a hearing in the absence of party, if the party has been given proper notice of the hearing. If an applicant desires to withdraw an application, it must submit satisfactory evidence that the respondent has no claims for damages as a result of the application. An application may be amended to include additional lands, provided that the respondent has consented. A party to a proceeding may also appoint a person other than a solicitor to represent him. The Board may also hold inquiry if requested by a party to review, rescind or amend a decision. Such a request must clearly set out the reasons for the request.

(k.) Chattel Securities Registries Regulation A.R. 113/84

These regulations were passed pursuant to the Chattel Securities Registries Act[165] which was reported on in the 1983 edition of this paper and which will come into force on August 1, 1984. The major change is a requirement of a financial interest statement or an amending financial interest statement to accompany documents for registration at the Central Registry and the Vehicle Registry branches of the Chattel Securities Registry. Security instruments such as assignments of book debts, bills of sale and conditional sales agreements will be registered together with these financial interest statements. The regulations set forth the forms and the information required. It should be noted that the Chattel Securities Registry will be introducing a new computerized system for both the Central and Vehicle Registries. The financial interest statements will facilitate the input of the data into the new computerized system.

B. FEDERAL LEGISLATION

1. Bills

(a.) An Act to Amend the Excise Tax Act and the Excise Act and to provide for a Revenue Tax in respect of Petroleum and Natural Gas[166]

This Bill will make the following major changes to the Petroleum and Gas Revenue Tax: (i.) an annual tax credit was introduced for a corporation or an associated group of corporations of up to $250,000.00 on production revenue, other than production royalties; (ii.) new rules were introduced to allow a deduction in respect of certain costs associated with prescribed enhanced oil recovery projects; (iii.) production royalties paid after December 31, 1983 will be taxed under Division II instead of Division I and will be subject to a withholding tax rate of 12%; and (iv.) the resource allowance will not be available in respect of production royalties.

165. S.A. 1983, c. C-7.1.

166. Bill C-14.

(b.) Customs and Excise Offshore Application Act[167].

This Bill applies the customs and exercise jurisdiction of Canada to the continental shelf. Federal customs law will now apply to offshore operations on the continental shelf. The Act will not apply to non-Canadian goods used in connection with offshore operations that are located on the continental shelf or in Canada at the time the Act comes into force. There are certain exemptions for goods under lease or contract as of January 6, 1983.

(c.) An Act to Amend the Energy Administration Act[168]

This amendment will authorize the Federal Government to make payments out of the Consolidated Revenue Fund to compensate for natural gas transmission costs pursuant to an agreement with a province. This allows the federal government to keep the price of natural gas at the 65% level.

2. Federal Regulations

(a.) Petroleum Incentives Program Regulations Amendments S.O.R. 83-639, 83-638, 84-77, 84-284

Due to what the federal government perceived as excessive costs of wells that had been drilled, Regulation S.O.R. 83-639 provides that any expense incurred in consideration of property used, or a service performed, in the preparation of a well site or the drilling or testing of a well on Canada lands, is not an eligible expense to the extent it exceeds the lowest reasonable price to obtain such property or service at the time that the well is spudded. Further, the Regulation requires Ministerial approval of eligible expenses incurred on wells spudded after August 5, 1983 for which the eligible expenses incurred by all persons who participate in the well may reasonable be forseen to be in excess of $50,000,000.

Regulation S.O.R. 83-683 provides that, where a person already owns oil and gas rights and is incurring an earning expense to earn additional oil and gas rights in respect of the same lands, eligible expenses and earning expenses are to be adjusted separately. The definition of eligible development expense has been expanded to include injection wells for substances other than water or gas. The definition of eligible exploration expense has been limited by providing that any expense incurred on Canada lands or provincial lands after 1982 in respect of a capped well will no longer qualify as eligible exploration expense but will qualify as eligible development expense. The Regulation also provides that the "grandfathering" of an agreement will now be lost only where there has been a material amendment to the agreement. An application may now be filed for incentives earned by a defunct entity within one year of the date on which it ceased to exist.

Regulation S.O.R. 84-77 provides that an eligible cost or expense incurred on behalf of a corporation prior to that corporation coming into existence shall be deemed to be incurred by the corporation on the date

167. Bill C-16.

168. Bill C-22.

that the pre-incorporation contract is adopted in accordance with the applicable laws of incorporation. It also restricts the eligibility of lay up charges for drilling rigs, submersibles, caissons, seismic vessels, drill ships, support vessels used in off-shore drilling and construction equipment used in on-shore drilling. To be eligible, lay up charges must now meet a cost effective test, where the expenses are expected to reduce the cost of the exploration or drilling operation to be conducted following the lay up period. Lay up charges may also be eligible if the lay up results from environmental conditions prevailing in the area. The Regulation also requires that a forecast be given to the Minister if a person believes that he will incur more than $5,000,000 in eligible expenses in a calendar year. The forecast is to be submitted by September 15 of the preceding year. It also provides that where a person has been reimbursed in respect of an eligible expense and has received incentives, he must reimburse to the Crown the amount by which he was over paid for the incentives.

Regulation S.O.R. 84-284 broadens the circumstances in which a person may request the Minister to fix his Canadian ownership rate and determine his control status. The time at which the lowest reasonable price is to be determined for off-shore wells subject to the restrictions in section 12 has been amended. The lowest reasonable price is to be determined not at the spudding of the well but at the time pre-spudding activities commence, provided that contracts for the relevant equipment have been entered into at that time. If such contracts have not been entered into, the lowest reasonable price is to be determined at the earlier of the date of the arrangements are entered into or the time the well is spudded.

(b.) Canadian Ownership and Control Determination Regulations, Amendment S.O.R. 84-131

This regulation provides that shares issued after the date on which an application for a COR/CS certificate is officially received are to be treated as a separate class for the purposes of an amendment to the original application. It also limits the special treatment given by the COR rules to COR constraints on the exercise of rights conferred by classes of forward equity to those classes of forward equity that were issued on or before July 15, 1983 with respect to applications filed on or after the day the amendment comes into force.

The Department indicates that regulations to be known as the Canadian Ownership and Control Determination Regulations 1984 have been drafted but not yet promulgated.

(c.) Canadian Oil and Gas Operations Regulation S.O.R. 83-149

This regulation sets out conditions for obtaining an operating licence and a work authorization and for reporting oil spills.

(d.) Foreign Investment Review Regulations 1983 S.O.R. 83-493

These regulations increase the ceilings for the shorter review process, which were $2,000,000 in assets and 200 employees. Indirect acquisitions involving assets of less than $15,000,000 and fewer than 600 employees are also now eligible for consideration under the shorter review process. The regulations also redefine and restructure the information requirements and forms that must accompany an application. These regulations were passed in accordance with the federal government's policies to streamline the FIRA process.

(e.) Arctic Waters Pollution Prevention Amendment S.O.R. 83-229

This amendment revokes the provision permitting the Minister to suspend an operation engaged in exploring for, developing or exploiting oil and gas which has been emitting a significant deposit of waste.

(f.) National Energy Board Part 6 Regulations Amendment S.O.R. 84-36

This regulation amends the provisions dealing with oil imports and exports, in order to provide for the authorization by Board order of oil exports in cases where oil is to be exported and subsequently imported into Canada or in cases where oil is to be exported pursuant to an exchange whereby an equal volume is to be imported into Canada.

(g.) Natural Gas and Gas Liquids Tax Regulations Amendment S.O.R. 84-124

This amendment reduces the natural gas and gas liquids tax to zero after January 31, 1984. This was necessary in order that the federal government maintained its policy of keeping the price of natural gas below 65% of the equivalent cost of oil at the Toronto refinery gate.

(h.) Gas Export Prices Regulations Amendment S.O.R. 83-579

This amendment implements a volume-related incentive pricing scheme for natural gas exported under the authority of the National Energy Board.

(i.) Gas Export Price Regulations S.O.R. 83-332

This regulation set the price for gas exported to the U.S. at the Canadian dollar equivalent of $4.10 U.S. per gigajoule.