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

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The purpose of this paper is to discuss recent developments in the law which are of interest to lawyers whose practice relates to the oil and gas industry. It deals with both judicial decisions and statutory developments during the last year. Many 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 apply 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.

I. LAND TITLES

Judicial decisions dealing with the Land Titles Systems of the four western provinces are of interest to oil and gas lawyers since most of the activities of oil and gas companies occur on lands which are covered by the Land Titles Acts.

The nature of an easement for an oil pipeline was in issue in *Edmonton Structures Ltd.* v. *North Alberta Land Registration District, Registrar of Land Titles and Imperial Oil Pipeline Company Limited.*[1] Imperial Oil owned an easement for a pipeline across certain lands subject to the Alberta Land Titles Act.[2] The plaintiff wished to register a plan of subdivision involving such lands. Imperial Oil had not consented to the subdivision. Section 86 of the Land Titles Act provided that no subdivision could be registered "unless it is approved and signed by one or more encumbrancees."[3] The Court referred to the case of *Pflueger* v. *South Alberta Land Registration District*[4] as standing for the proposition that an encumbrancee is a person who has a charge on lands and that a charge on lands is a security for the payment of a debt or performance of an obligation. The Court noted that the terms of the easement provided that Imperial Oil could hold and enjoy the easement without interruption from the grantor, and that the grantor would not excavate on the lands without the consent of Imperial Oil. Accordingly, the Court found that the easement stood as security for the performance of those obligations, and that therefore Imperial Oil was an encumbrancee. As a result, the plaintiff could not register the plan of subdivision without the approval of Imperial Oil.

Thomas C. Assaly Corporation Ltd. v. *Alberta Industrial Developments Ltd.*[5] is a case which may relate to the entitlement of a royalty owner or the owner of a net profits interest to register a caveat under the Alberta Land Titles Act.[6]

The *Assaly* case involved the validity of a caveat in which the caveator claimed an interest by virtue of the fact that the land was to be held by the registered owner and the caveator "in proportion to their profit shares". An

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1. (1982) 23 Alta. L.R. (2d) 89 (Q.B.).
2. R.S.A. 1980, C. L-5.
3. *Supra* n. 2.
4. (1977) 2 Alta. L.R. (2d) 398, 76 D.L.R. (3d) 574, 4 A.R. 279 (T.D.).
5. (1982) 41 A.R. 436 (C.A.)
6. *Supra* n. 2.

affidavit filed by the caveator stated that the lands were acquired pursuant to an agreement in the nature of a joint venture, the purpose of which was to develop a MURB project. The Court of Appeal, Mr. Justice Kirans dissenting, stated that a mere profit sharing program does not create an interest in land and that a joint venture is not a sufficiently defined interest to imply co-ownership. Accordingly, as the caveat did not disclose an interest in land, it was ordered that the caveat be removed. It is submitted that a royalty on net profits interest may be analogous and may not be caveatable.

The case of *274489 Alberta Ltd.* v. *Baldev Singh Dhillon*[7] considered the degree of certainty with which a caveat must define the interest in respect of which it is registered. Section 131(1) of the Alberta Land Titles Act[8] provides that every caveat shall state: "the nature of the interest claimed and the grounds on which the claim is founded". That provision has caused concern to lawyers preparing caveats since it is necessary to describe both the nature of the interest and the grounds upon which it is claimed. Interests arising in the oil and gas industry can be unique and a derivation of that interest can be long and complex. There are, of course, a number of decisions dealing with the extent of disclosure required in a caveat. The case referred to above is one which indicates that the disclosure requirements are not great. The caveat in that case described the interest claimed as follows:

> Claims an interest in the land in the amount of $26,500.00, which land is described hereafter. Caveator assigned his interest to the company, 274489 Alberta Ltd., by way of assignment dated April 5, 1982.

The Alberta Court of Queen's Bench noted that the caveat was poorly drafted and seemed to indicate that the caveator had assigned all of its interest to the numbered company, so that the caveator would have no further interest. The Court stated that since the caveator claimed to have assigned its interest in the land to the numbered company and claimed an interest in an amount of money, the caveator must be claiming an interest as an unpaid vendor. The Court noted the long line of cases establishing that an unpaid vendor's lien is an interest in land. The caveat was held to be valid.

II. CROWN RIGHTS

The rights of the Crown in right of a province or in right of Canada are of increasing interest to oil and gas lawyers. Many of the oil and gas rights in Canada are owned by the Crown, particularly in Alberta, British Columbia and the frontier areas. Further, many of the surface rights which oil and gas companies require in order to exploit their oil and gas rights are also owned by the Crown. In addition, Crown agencies such as Petro-Canada, the British Columbia Petroleum Commission, the Alberta Petroleum Marketing Commission and similar agencies are becoming increasingly active in the day to day affairs of the oil and gas industry.

In the case of *Atlantic Richfield* v. *Petro-Canada*,[9] discussed in the Contracts Section of this paper, it was held by the Alberta Court of Queen's Bench that

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7. Unreported (Q.B.).

8. *Supra* n. 2.

9. *Infra* n. 51.

Petro-Canada, being an agent of the Crown in right of Canada, was not subject to provincial taxation.

In the case of *Carex Limited* v. *Her Majesty the Queen*,[10] discussed in the Security Transactions and Creditors' Rights Section of this paper, it was held that an assignment of a debt owed by the Crown in right of Canada was not binding on the Crown, notwithstanding that all of the other requirements for an assignment of a chose in action had been met, unless the assignment had first been acknowledged by the Crown in the statutorily prescribed form. It should be noted that assignments of petroleum incentive payments ("PIP") payable by the Crown in right of Canada are assignable as security in accordance with the Financial Administration Act[11] which was the statute under consideration in the *Carex* case. Thus, it would seem that assignments of PIP payments are not enforceable against the Crown in right of Canada until acknowledged in accordance with that Act.

The case of *Ed Miller Sales & Rentals Ltd.* v. *R. in Right of Alberta*[12] considered the effect of a builder's lien filed in accordance with the Alberta Builders' Lien Act[13] against the interests of Crown agencies in oil and gas properties. It is clear that a builder's lien can be registered against an interest in mines and minerals, including interests held under Crown leases. In the present case, the interest against which the builder's lien was filed were held by Syncrude Canada Ltd. as an agent for six parties, four of whom were ordinary corporations. The other parties were Petro-Canada Exploration Inc., and Her Majesty the Queen in right of Alberta. The issue in the case was whether or not the builder's lien could be filed against the interests of Petro-Canada, as an agent of the Crown in right of Canada, or against the interest of the Crown in right of Alberta. The Court found that the lien could not be registered against the interests of the Crown, which included Petro-Canada as an agent of the Crown. Notwithstanding that the lien could not be registered against the interests of the Crown, it was validly registered against the undivided mineral interests of the remaining four owners.

Aboriginal rights were in issue in the case of *Ominayak* v. *Norcen Energy Resources Limited*.[14] That case involved certain issues raised in connection with the plaintiff's claims to mineral rights in extensive portions of Alberta. In essence, the plaintiff's position was that the Crown in right of Alberta had purported to grant mineral leases in respect of lands over which it had no jurisdiction so that such leases were a nullity. Two of the defendants in the action were Petro-Canada Exploration Inc. and Petro-Fina Canada Ltd., both of whom were wholly-owned subsidiaries of Petro-Canada. Petro-Canada was an agent of the Crown in right of Canada. Their application sought a declaration that the Crown and its agents were entitled to immunity from injunctive relief under the Proceedings Against the Crown Act.[15] The Court declined to make such declaration on a preliminary application based solely upon the pleadings.

10. *Infra* n. 37.
11. *Infra* n. 38.
12. (1982) 22 Alta L.R. (2d) 9 (Q.B.).
13. R.S.A. 1980 c. B-12.
14. (1982) 23 Alta. L.R. (2d) 284 (Q.B.).
15. R.S.A. 1980, c. P-18.

III. FREEHOLD LEASES

Many interests of oil and gas companies in Canada are held under the terms of freehold leases in respect of mineral rights held by private individuals. It is generally considered that freehold oil and gas leases create interests in land which are, or are in the nature of, *profits à prendre*. The case of *Re the Queen in right of Manitoba and Senick*[16] considered the nature of a *profit à prendre*. The province of Manitoba, through its Department of Public Works, acquired certain lands from the Senicks for purposes of a sewage lagoon. The acquisition was made voluntarily and not by way of expropriation. In connection with the acquisition, the province granted the Senicks the following rights:

> The vendor, his successors and assigns, will be granted the right to remove hay from said parcel as long as he wishes to do so. Also will have the right to upgrade the hay on said parcel whenever he wishes to do so.

The province subsequently wished to install a new lagoon. The province contended that it had the right to terminate the Senicks' rights to remove hay upon reasonable notice. The Manitoba Court of Appeal found that the interests of the Senicks was a *profit à prendre* and not a licence. Licences are revocable upon reasonable notice, unless there is a convenant not to revoke the licence. A *profit à prendre* is an incorporeal hereditament which, like an easement, is not revocable on the same basis as a licence. The Senicks' interest was granted for valuable consideration and was for at least their lifetimes and was probably a fee simple grant of a *profit à prendre*.

IV. SALE OF LAND

The rights to drill for and produce oil and gas are generally considered to be *profits à prendre*. *Profits à prendre* are interests in land. Since such interests in land are frequently sold or farmed out, the law relating to the sale of interests in land is of significance to oil and gas lawyers.

A. RIGHTS OF FIRST REFUSAL

Four recent cases deal with rights of first refusal or similar rights, in respect of the sale of land. Rights of first refusal are frequently encountered in the oil and gas industry. The case of *L. M. Rosen Realty Ltd. v. D'Amore*[17] considered a provision similar to a right of first refusal clause in an agreement covering the co-ownership of farm land by three parties. The two provisions of the agreement which came into play were as follows:

> 6. In case a bona fide written Offer to Purchase for the said lands shall be presented, the same may be accepted only unanimously, and any party who rejects such bona fide offer hereby convenants and agrees with any other party or parties hereto who would accept such bona fide offer to purchase the share or shares of such party or parties on the basis of the price and terms set out in such bona fide offer . . . In the event of the receipt of a bona fide offer which one or more parties hereto has rejected which the other party or parties hereto would accept, the party or parties agreeable to accepting such bona fide

16. (1982) 134 D.L.R. (3d) 586 (Man. C.A.).

17. (1982) 132 D.L.R. (3d) 648 (Ont. H.C.).

offer hereby covenant and agree to sell his, its or their share or shares herein and in the said lands to the rejecting party or parties on the price and terms contained in such bona fide offer . . ."

7. This Agreement shall not be assignable or transferable . . . save and except any transfer to any member of the family of either of the parties hereto (except D'Amore) or to a corporation owned completely by the family of such party, without the written consent of the other parties hereto . . . No further assignment may be made without such consent.

The plaintiff was one of the three owners and the two defendants were the other two owners. One defendant owner was indebted to the other defendant owner. The two defendants agreed that the indebted one would transfer his entire interest in the lands to the other defendant in satisfaction of the indebtedness. In order to avoid clause 7 of the agreement, the transfer was effected by the indebted owner transferring his interest in the lands to his wife. His wife then transferred the interest to a company which she owned and thereafter she transferred her shares in the company to the other defendant. The original transaction involving the indirect transfer of the indebted owner's interest to the other defendant was attacked on two grounds. First, it was contended by the plaintiff that the transaction was a sham and should been seen as one transaction whereby the indebted owner transferred its interest to the other defendant and therefore breached the provisions of clause 7. Secondly, the transaction involved two assignments of interests in the lands, one to the wife and the other to the wife's company. It was argued that clause 7 did not allow the wife to assign her interest to the company. The Trial Judge accepted the second of such arguments on the basis that the words "no further assignment may be made without such consent" in clause 7 of the agreement meant that clause 7 could only be applied once, so that if an assignment were made without consent as permitted by clause 7 the assignee would not be permitted to further assign the interest. Thus, although clause 7 permitted the assignment to the wife, it did not permit the wife to make a further assignment. The Court stated that it was not required to determine if the series of transactions was a sham but stated that it would have so found had it been necessary. It is interesting to note that most rights of first refusal clauses encountered in the oil and gas industry provide that the rights of first refusal will not apply to an assignment to an affiliate corporation. The rights of first refusal clause normally applies only to a sale of an interest in lands with the result that a sale of shares will usually not be caught by the clause. Thus, a means of avoiding a rights of first refusal is to transfer the interests to an affiliate corporation which owns no other assets and then to transfer the shares of the affiliate corporation to the ultimate purchaser. The question then arises as to whether or not such transaction is a sham and should be viewed as a sale directly by the original assigning party to the party acquiring the shares of the affiliate. The *Rosen* case dealt with an almost identical fact situation. The Trial Judge was able to dispose of the action without making a final determination on the issue. Nevertheless, he did say, by way of obiter, that he considered the transaction to be a sham and, presumably, would have ruled that in fact it constituted a sale directly by the indebted owner to the other defendant. It should be noted, however, that the parties in this case were unsophisticated; in the case of sophisticated parties represented by legal counsel, as is normally the case in the oil and gas industry, the courts might find that the parties were aware of the loophole in the agreement and intended that it be applicable.

In *Captain Developments Limited* v. *Nu-West Group Ltd.*[18] a right of first refusal clause was also considered by the Ontario High Court. An agreement of purchase and sale between the plaintiff, as vendor, and the defendant, as purchaser, granted an option to the purchaser to purchase additional lots of land from the vendor. The agreement provided that if the vendor received an offer from a third party to purchase any of the additional lots, it would give written notice to the purchaser, who could exercise its option immediately, and if the purchaser did not do so, the vendor would be free to sell to the third party. The vendor received an offer from a third party which it was willing to accept. It gave notice to the purchaser who, in accordance with the option provisions of the sale agreement, submitted a written offer on the terms and conditions set forth in the option provisions of the sale agreement. The lands being sold were various sized lots. The option provisions provided for a different purchase price for each type of lot. The option provisions also provided that a 5 percent deposit would be submitted upon exercise of the option. The purchaser made a mistake of approximately $64,000 in calculating the purchase price payable upon exercise of the option, the total purchase price being approximately $7,100,000. Due to the mistake in the calculation and the fact that the deposit was not exactly 5 percent of the purchase price, the vendor refused to accept the purchaser's offer. The purchaser contended that the vendor was obligated to accept the offer to purchase. The purchaser registered a "caution" (which is in the nature of a caveat) against the title to the lots. As a result, the third party withdrew its offer to purchase. The Ontario High Court stated that a right of first refusal is merely an option and that, as with all options, it must be exercised strictly in accordance with its terms. Although the mistake made by the purchaser was less than 1 percent of the actual purchase price, the option was nevertheless not strictly complied with. The vendor had no obligation to advise the purchaser of the error or to allow the purchaser to correct it. The value of the property was reduced substantially between the date that the offer of the third party was submitted and the date of trial. The vendor sought to recover damages suffered as a consequence of the third party withdrawing its offer. The purchaser also argued that the vendor was required to prove that there had been malice in registering the caution. The Trial Judge found that the purchaser had no right to register the caution since the right of first refusal was not validly exercised and also found that the purchaser had been malicious. In support of the latter finding, the Trial Judge referred to a statement made by an official of the purchaser to an official of the vendor, as follows:

> It doesn't make any difference who is right and who is wrong. You are stupid; if you don't accept we will tie you up for two years and you will lose much more.

The case of *Lomac Holdings Ltd.* v. *Prijatelj and Richmond Holdings Ltd.*[19] might be contrasted with the *Nu-West* case[20] as it did not insist upon absolute compliance with the right of first refusal clause. However, it was the party who wished to sell who was not obliged to strictly comply with the right of first refusal clause rather than the party wishing to exercise the option to purchase

18. (1982) 37 O.R. 697 (H.C.).

19. (1982) 38 B.C.L.R. 238 (S.C.).

20. *Supra* n. 18.

as in the *Nu-West* decision. The right of first refusal clause in the *Lomac* case read as follows:

> If the Grantor shall receive a bona fide offer to purchase the said property from a Third Party . . the Grantor shall, before accepting such Third Party Offer, deliver a true copy thereof to the Grantee . . .

The grantor accepted an offer to purchase before delivering a true copy thereof to the grantee. However, the offer to purchase was expressly subject to the grantee's right of first refusal. The grantee alleged that since the offer had been accepted before a copy was delivered to it, the grantor was in breach of the provision. The Trial Judge determined that the prohibition against accepting an offer before the expiry of fifteen days was intended to ensure that the grantor did not commit itself to selling the land without first giving the grantee an opportunity to buy the property on the same terms. Since the sale offer was subject to the right of first refusal, the objectives of the clause were satisfied and there was no breach by the grantor. The grantee also contended that, under the terms of the right of first refusal, the grantor could only accept an unconditional offer to purchase and that an offer to purchase which was subject to financing and inspection, did not trigger the right of first refusal clause. The defendants argued that only upon the conditions having been satisfied would the clause be triggered, whereupon they would be entitled to exercise their right of first refusal. The Court rejected that contention stating that there was nothing in the clause to state that the offer must be unconditional, and that, in fact, the clause stated that if the grantee wished to purchase the lands, it must do so on the same terms as set forth in the offer.

238420 Alberta Ltd. v. *V.I. International Holdings Ltd.*[21] was an application to set aside a caveat on the grounds that the caveat did not claim an interest in lands. The caveat claimed an interest under a right of first refusal clause which the caveator alleged had been triggered by the plaintiff having accepted an offer to purchase. The Master held that in such circumstances the defendant might have an interest in land. Since the right of first refusal may have created an interest in land, the caveator was permitted a period of time within which to commence an action in respect of its claim failing which the caveat would then be removed. The case does not decide that the caveator had an interest in land but merely that there was a triable issue involved.

B. AGREEMENTS FOR PURCHASE AND SALE

Two recent decisions considered whether agreements of purchase and sale were void for uncertainty or whether they contained implied terms to cover matters which had not been expressly dealt with in the agreements. In one case, the agreement was held to be sufficiently certain and terms were implied into the contract and in the other case, the agreement was held to be void for uncertainty.

In Farkash and Farkash v. *Henningsen and Henningsen*[22] the sale agreement read as follows:

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21. (1981) 33 A.R. 77 (Q.B.).
22. (1981) 32 A.R. 436 (Q.B.).

> I, (defendant), agree to sell to (plaintiffs) the following four quarters of land for the amount of $200,000.00, reserving the right of residence on the home site of N.W. 24-51-7-4. I hereby accept as a binding agreement the sum of $5,000.00.

The defendant vendors contended that the foregoing did not constitute a binding agreement as a result of, among other things, uncertainty with respect to possession date, description of the reserved residence, tax adjustments and other items. The Court of Queen's Bench stated that terms can be implied in a contract in order to give effect to the contract. Such terms will be those which are reasonable having regard to the express written terms of the contract and to the other circumstances. If there are a large number of alternatives as to what is "reasonable", the court cannot make such a decision and the contract will be void. However, in the present case, the Trial Judge found that the alleged uncertainties could be fairly easily resolved. The Court avoided the problem with the description of the reserved residence because the vendor had not obtained dower consent with the result that the homestead could not, in any event, be sold. Notwithstanding that the portion of the lands comprising the homestead could not be sold, the Court ordered specific performance of the sale of the balance of the lands stating that a vendor contracting to sell an estate cannot avoid his contract because he does not own the whole. The Court ordered that the purchase price be abated by the value of the homestead at the time that the sale agreement was made. The Judge also awarded damages to the plaintiffs for loss of farming income and for interest costs caused by an increase in interest rates between the date that the sale was to have been completed and the date of the judgment.

In the case of *Fraser, Lam and Fields* v. *Gill*,[23] the sale agreement was found to be void for uncertainty because one of the purchasers was described as a "nominee" and because the agreement was uncertain as to alternative methods of completing the purchase price (i.e. cash to mortgage or assumption of mortgage).

Thiel and Thiel v. *Perepelitza and Perepelitza*[24] involved an agreement for the sale of land in which the property being sold was stated to be approximately 4.8 acres. In fact, the lands, as legally described in the agreement, contained 6.20 acres. The Court of Appeal accepted the Trial Judge's finding, based upon oral evidence, that the lands to be sold had been agreed upon as a result of the visual inspection of the lands by the purchaser and that the acreage description in the sale agreement was not a fundamental term of the contract. The vendor had sought to increase the purchase price by stating that the price was to be $10,000 per acre plus real estate commission. The Court found that although that may have been the means used by the vendor to arrive at the price which it was willing to accept, the selling price as discussed by the parties had always been a lump sum.

The case of *Vladimer Holdings Co. Ltd.* v. *203136 Alberta Ltd.*[25] involved an interpretation of an agreement for the sale of land. The issue in the case was whether or not the purchaser was to acquire the lands subject to an easement

23. (1981) 32 B.C.L.R. 132 (S.C.).
24. (1982) 37 A.R. 43 (C.A.).
25. (1982) 39 A.R. 104 (Q.B.).

and a caveat. The agreement of purchase and sale stated that the lands would be conveyed:

> subject to the conditions and reservations expressed in the original grant thereof from the Crown, and in the existing certificate of title . . . (vendor) will produce at the proper Land Titles Office or deposit therein, the duplicate Certificate of Title covering said lands and premises, free and clear, except as aforesaid, so that the purchaser may upon registering the transfer aforesaid obtain a Certificate of Title for said lands and premises in his own favour free and clear except as aforesaid.

Appended to the agreement was the following:

> PROVIDED FURTHER that the vendor and the purchaser hereby agree and acknowledge as to the following:
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> 1. There is a caveat registered against the lands herein as number 7726N.G. . . .
>
> 2. There is an easement registered against the lands herein as number 772205420 . . .
>
> 3. Following subdivision of the said lands or any portion thereof, the vendor shall supply clear title subject to caveat 7726N.G. and easement 772205420 . . .

The Master found that, notwithstanding the language used in the earlier portion of the agreement as to clear title, the subsequent provisions of the agreement were clear and specific and overrode the earlier provisions so that the purchaser was obligated to take the lands subject to the easement and the caveat. It should be noted that the agreement was a standard printed form of sale agreement and that the subsequent specific provisions were typed on a separate page attached to the agreement.

The cases of *Kapchinsky* v. *Begam Holdings Ltd., Top Realty Ltd. and Biegel*[26], *Howren and Howren* v. *J. Heathcoate & Co. Ltd.*[27] and *Williams Lake Realty (1978) Ltd.* v. *Symynuk*[28] all dealt with time of the essence provisions in sale agreements. From these decisions it would appear to be accepted law that if an agreement of sale stipulates that time is to be of the essence and that clause is subsequently waived then, unless time is stated to remain to be of the essence, it will cease to be of the essence. The time of the essence clause is an important provision of a sale agreement since it prohibits a party from delaying performance, even if the delay is small and for good reason. In the *Williams Lake* case, the purchase price for the lands being sold was stated to be the difference between a certain cash amount and the balance owing on an existing mortgage as of a certain date. Despite its diligent efforts to do so, the purchaser was unable to determine the balance owing on the existing mortgage as at that date. Time was of the essence of the contract. The British Columbia Court of Appeal stated that the purchaser's diligence was irrelevant because the contract provided that time was of the essence. Arguably, if the contract had contained a force majeure clause, that provision might have extended the time for the completion for purchase.

In the *Howren* case the vendors agreed to sell certain lands to the plaintiffs and to build a house thereon. The sale was not conditional upon the house being completed. The closing date was extended by agreement because the

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26. [1982] 5 W.W.R. 135 (Q.B.).
27. (1982) 37 B.C.L.R. 279 (S.C.).
28. (1982) 39 B.C.L.R. 313 (C.A.).

house was not completed and the mortgage company would not advance funds. The extension was effected by a letter between lawyers for the parties which did not expressly state that time would remain of the essence. However, the vendor was a reluctant vendor who wished to avoid the sale because it felt that the purchase price was too low. That fact had been communicated by the vendor's lawyers to the purchaser's lawyers on numerous occasions as well as the fact that the vendor expected strict compliance with the terms of the sale. The Trial Judge stated that in order for time to remain of the essence in a sale agreement following an extension of the closing date, it is not necessary that it be expressly so stated. What is necessary is that the vendor must have brought home to the purchaser that if the new completion date was not met the vendor would treat the contract as at an end. The Court found that the conversations between the solicitors in which the vendor's dissatisfaction and request for strict compliance were communicated was sufficient to bring home to the purchaser's solicitors that the vendor considered time to remain of the essence.

In the *Kapchinsky* case, the closing of the sale of land was extended by verbal agreement which was confirmed by a letter stating, in part, as follows:

> ... [t]his will confirm our client's instructions to extend the closing date in the above-mentioned transaction to a date no more than (10) ten days after the registration of the subdivision of the above captioned two lots and, in any event, no later than the 15th of February, 1980.

The Trial Judge reviewed the authorities and stated that the law is as follows:

> ... [t]he original closing date, having been waived by mutual agreement, in order to maintain or re-establish the stipulation that time be of the essence, the new or extended time must be reasonable under all the circumstances and must be imposed in such a way as to leave no doubt in the mind of the vendor that time with respect to the newly established date is of the essence.

He found that the reasonableness of the length of the extended time given must be considered in light of the fact that the plaintiff and his solicitor knew that the re-subdivision, which he was insisting upon, would take considerable time. Since the letter quoted above was not sufficient to alert Begam that if the transaction did not close by February 15 the Defendant would treat the Agreement as ended, time was not of essence with respect to the extended date.

The *Kapchinsky* case,[29] *Imperial General Properties Limited, v. Her Majesty the Queen*[30] and *Koster v. Smith*[31] are recent decisions which considered conditions precendent in agreements for the sale of land. In *Kapchinsky* the lands being sold were described as follows:

> Lot 30 & 31, Block 9, Plan 782-2679, ... the above two lots being subdivided into three lots, containing approximately 3.25 acres more or less ...

The plaintiff purchaser contended that it was a condition of the sale that the subdivision of the lots be completed prior to the sale occurring. The Court of Queen's Bench of Alberta found that the words quoted above were not

29. *Supra* n. 26.

30. Unreported (F.C.T.D.).

31. Unreported (Alta. C.A.).

sufficient to render the subdivision a condition precedent to the completion of the sale. Rather, based upon a reading of the agreement and oral evidence, the Trial Judge concluded that the words were intended merely for descriptive purposes.

Imperial General Properties was a tax case involving a sale of land by the appellant under an agreement for sale which was subject to certain conditions. The issue in the case was when were payments on account of the purchase price to be recognized for income tax purposes: when actually received or when the conditions were satisfied? If the conditions were true conditions precedent there would be no contract until those conditions were satisfied and the payments would not be recognized until the conditions were satisfied. If the conditions were conditions subsequent then, in the event of nonfulfillment, there would still have been a contract and the payments would be recognized when received. The provision in the sale agreement read as follows:

> This agreement is conditional upon the following conditions, and if the same are not fulfilled within two years from the date of closing the purchaser must either complete the within transaction and waive such unfulfilled conditions, or terminate the within transaction, in which event he shall be entitled to the return of any and all monies paid hereunder without deduction or without interest . . . Provided that if such conditions are not satisfied within one year from the date of closing the purchaser can declare the within agreement null and void in which event he shall be entitled to the return of all monies paid hereunder.

The agreement provided that the purchaser would have access to the lands to carry out construction. The agreement contained a right of first refusal in favour of the vendor whereby if the purchaser, prior to commencing construction, wished to sell the property, it would give the vendor the prior option to purchase at the same price. The Federal Court found that the conditions were not true conditions precedent since they allowed for the possibility of the agreement being completed before the conditions were fulfilled. First, the purchaser was entitled to access to the lands to commence construction and, for that purpose, the privilege of demolishing existing buildings. Secondly, the purchaser was permitted to accept a bona fide offer to purchase from a third party, subject to the vendor's right of first refusal. Thirdly, the agreement included a waiver allowing the purchaser to waive unfulfilled conditions and to complete the transaction. Thus, the portion of the purchaser price paid to the appellant when the agreement was executed and the portion paid when the plan of subdivision was registered, both of which events occurred in different years than the year in which the last of the conditions were satisfied or waived, were treated as income accruing in the year received rather than in the year that the last of the conditions was satisfied or waived.

The *Koster* case involved the following condition contained in an agreement of sale of lands:

> The balance of $811,000 to be raised by way of mortgage by purchaser and proof of the financing to be provided to vendor no later than February 1, 1981.

The purchaser provided the vendor with a letter from the Treasury Branch of Alberta indicating that financial arrangements had been made. The vendor subsequently wished to avoid the sale. He contended, among other things, that the financing commitment from the Treasury Branch was subject to certain conditions and therefore did not provide "proof of financing". The Alberta

Court of Appeal found that the condition did not require written proof nor did it specify the standard of proof. The oral communication to the vendor's real estate agent and his solicitor's secretary that financing had been arranged was sufficient.

V. SECURITY TRANSACTIONS AND CREDITORS' RIGHTS

Although mortgages, assignments under Section 177 of the Bank Act and similar fixed charges are the most commonly encountered security instruments, assignments of production contracts and the revenues thereunder and similar assignments are also common. Such assignments affect a company's cash flow directly, and are as important as Section 177 Assignments. The distinction must be made between an assignment of a contract and an assignment of the rights to revenues under the contract. The former assigns to the assignee all of the rights and benefits under the contract and the latter assigns only the rights to receive revenues thereunder. The case of *Irving Oil Limited* v. *Her Majesty the Queen*[32] illustrates the distinction. That case involved an assignment of revenues under a contract. The assignor had contracted with the Federal Government to build an extension of harbor facilities in New Brunswick. The assignee, Irving Oil, agreed to provide asphalt to the assignor, but, due to the assignor's financial position, demanded an assignment of the revenues becoming due to the assignor under its agreement with the Crown. The operative provisions of the assignment were as follows:

> The assignor does hereby GRANT, ASSIGN, TRANSFER AND SET OVER unto the assignee all the right, title and interest of the Assignor in and to that portion of those sums at any time from time to time due or accruing due from the Board to the assignor under or by virtue of the Contract which aggregates $800,000.

The assignor advised the appropriate federal agency, being the National Harbor Board, of the assignment which was acknowledged by an official of the St. John's Office of the National Harbor Board. The first payment under the contract between the assignor and the National Harbor Board was, in fact, delivered to Irving Oil. Irving subsequently discovered that the assignor was not using all the asphalt supplied to it by Irving to meet its National Harbor Board contract but was using some of the asphalt for other work. Accordingly, Irving Oil thereafter demanded cash on delivery. However it did not advise the National Harbor Board of its action.

The assignor advised the National Harbor Board that it was on a cash on delivery basis with Irving and suggested to the Board that Irving was therefore in breach of its undertaking to supply asphalt. Accordingly, the assignor requested the Board to make future payments under its contract directly to the assignor. The Board did not confirm this with Irving but made subsequent payments to the assignor rather than to Irving. The assignor became bankrupt and Irving sought payment from the National Harbor Board of amounts equal to the payments which the Board made directly to the assignor after acknowledging the assignment.

The contract between the assignor and the National Harbor Board contained the following provisions:

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32. Unreported (F.C.T.D.).

> 16. This contract shall inure to the benefit of and be binding upon the parties hereto and their and each of their executors, administrators, curators, successors and assigns but (as regards asigns of the contractor) insofar only as such assigns are duly consented to by the Board under this contract.
>
> 17. This contract may not be assigned without the written consent of the Board.
>
> 18.(1) Neither the whole nor any part of the work may be subcontracted by the contractor without the written consent of the Board.

The Federal Court, Trial Division, distinguished between an assignment of a contract and the assignment of proceeds becoming payable under the contract. It stated that the assignment of proceeds simply entails the payment of money to the assignee as and when the assignor has done what he has contracted to do under the contract and the money becomes payable. It found that clause 17 did not require the consent of the Board to an assignment of proceeds and that clause 18 dealt with assignments of the contractor's obligations rather than its rights, and therefore was not relevant. In dealing with clause 16, the Court considered the words "insofar only as such assigns are duly consented to by the Board under this contract" and found that the words "under this contract" were intended not to add to the requirements for consent to assignments otherwise contained in the agreement but to modify the provision that the contract shall inure to the benefit of the contractor's assigns by making clear that inurement was subject to the provisions of the contract, found elsewhere, requiring consent to certain assignments. Since no consents were required under the other provisions of the contract for an absolute assignment of the monies becoming payable under the contract, clause 17 was not applicable. Accordingly, Irving was entitled to payment from the Federal Government.

The case of *Armco Canada Ltd.* v. *Dome Petroleum Ltd.*[33] is similar to the *Irving Oil* case. Armco supplied materials to a company known as Steelmasters. That company, in turn, had entered into an agreement with Dome for supply of steel at its plant site in Steelman, Saskatchewan. Armco refused to supply material to Steelmasters unless Steelmasters made arrangements for Dome to pay the sum of $11,000 out of the amounts otherwise payable under the contract between Dome and Steelmasters directly to Armco. Accordingly, Steelmasters wrote a letter to Dome, stating, in part, as follows:

> ... [w]e hereby instruct and authorize you to pay $11,000. of the money to be paid to use on this job to Armco ... The $11,000.00 will be deducted from the total contract.

Dome confirmed and accepted the terms of the letter and returned it to Steelmasters. Armco then wrote Dome advising that it had obtained a copy of the letter from Steelmasters and that it anticipated receiving payments directly from Dome. Dome subsequently paid all of the revenues under the contract directly to Steelmasters and did not pay anything to Armco. Armco sued Dome claiming payment of $11,000. The Saskatchewan Court of Queen's Bench referred to the Saskatchewan Choses in Action Act[34] and also referred to Cheshire and Fifoot's *Law of Contract*[35] in finding that there were three conditions required for an assignment of a chose in action to be valid under the statute: the assignment must be absolute, it must be in writing and written

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33. (1981) 17 Sask. R. 111 (Q.B.).

34. R.S.S. 1978, c. C-11.

35. (9th ed. 1976) 499.

notice of the assignment must be given to the debtor (in this case Dome). While the letter from Steelmasters to Dome was not framed in legal terminology and did not contain words such as "assign" or "assignment", the Trial Judge found it sufficient to comply with the Choses in Action Act.[36] Accordingly, judgment was awarded to Armco.

The case of *Carex Limited* v. *Her Majesty the Queen*,[37] also dealt with an assignment of a contractual debt. The debt in question was a contractual debt of the Federal Government under a contract for the supply of goods. The issue in the case was not the form of the assignment but rather whether or not under the terms of the Financial Administration Act[38] the Federal Government was entitled to ignore the assignment of which it had received notice. The relevant provisions of that act are as follows:

> 81(1) Any absolute assignment, in writing, under the hand of the assignor, not purporting to be by way of charge only, of a Crown debt of any following description . . . of which notice has been given to the Crown as provided in Section 82, is effectual in law, . . . to pass and transfer from the date service of such notice is effected . . . the legal right to the Crown debt, . . .
>
> 82(2) Service of the notice referred to in subsection (1) shall be deemed not to have been effected until acknowledgment of the notice, in prescribed form, is sent to the assignee, by registered mail, under the hand of the appropriate paying officer.

Although notice of the assignment had been properly served on the Crown and the assignment was in the prescribed form, the notice had not been acknowledged in accordance with subclause 82(2). Accordingly, the Federal Court of Appeal ruled that the notice was not binding on the Crown and that the Crown was free to pay monies due under the contract directly to the assignor of the debt notwithstanding the assignment.

The labor law case of *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada* v. *J. Neilson and Son (Mechanical) Ltd.*[39] deals with a situation frequently encountered in the oil and gas industry. The case involved a collective agreement under which the company was empowered to deduct union dues from the paycheques of union members. The company was then required to pay the deducted amounts to the union. Although the company deducted the union dues, it did not pay them to the union. The company became bankrupt and the union claimed funds held in the company's bank account were held on a trust in favour of the union giving the union priority over other creditors. The Trial Judge quoted Waters in *Law of Trusts in Canada*[40] as follows:

> If the agent, who is collecting monies from third parties for the principal, or is required to pay over the principal's money to a third party, is to be trustee of any kind, it is vital that it be shown the agent was required contractually or otherwise, to keep these monies identifiable from other assets. Otherwise, the agent is a debtor only.

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36. *Supra* n. 34.

37. Unreported (F.C.C.A.).

38. R.S.C. 1970, c. F-10.

39. (1982) 40 A.R. 609 (Q.B.).

40. (1974) 45-6.

The Trial Judge found that since the company was not required to hold the deducted union dues separately, the union was an unsecured creditor. It is submitted that the same reasoning would apply in a case of a bankrupt operator under a joint operating agreement who had been receiving revenues from the sale of production on behalf of non-operators. Conventionally, operators are entitled to commingle such revenues with their other funds. If that is the case, then, the non-operators would have a claim against the operator's bankrupt estate only as unsecured creditors. If the operator were required to segregate the production revenues and was forbidden from commingling them, the non-operators could claim that the segregated funds were held on a trust. It would appear that that would be the case, even if the operator breached its obligation to segregate the revenues and did in fact commingle them.

The *Ontario Wheat Producers' Marketing Board* v. *The Royal Bank of Canada and Wellandport Feed Mill Limited*[41] is a creditors' rights case which may have some application with respect to agencies such as the Alberta Petroleum Marketing Commission. The Ontario Wheat Board is established by provincial statute. The regulations pertaining to the Board provide that producers must sell their wheat to duly appointed agents of the Board. Wellandport was a duly appointed agent. In connection with its appointment as an agent, Wellandport had entered into a contract with the Wheat Board which provided, among other things, that Wellandport could purchase, from the Board, wheat which it bought as the Board's agent from producers but only on certain specified conditions. The agreement provided that Wellandport would pay the Board for wheat which it purchased as the Board's agent on the 15th day of the month following the month of purchase. For that purpose, the date of purchase of wheat was deemed to be the date upon which the agent verbally offered to purchase wheat from the Board.

Wellandport had borrowed funds from the Royal Bank of Canada. As a consequence of Wellandport's poor financial position, the Royal Bank appointed an accountant to manage Wellandport's affairs and its accounts receivable. The Wheat Board was not advised of the appointment. The court held that the accountant was acting as the Bank's agent and not as Wellandport's agent. Thereafter, Wellandport sold wheat which it had received as the Board's agent. By reporting the sale to the Board at the beginning of the month following the month of sale, Wellandport did not pay the Board for the wheat until the 15th day of the month which was two months after the month in which the sale took place. The Bank's agent took all revenues from the sale of wheat accruing to Wellandport in accordance with the terms of various security assignments which Wellandport had granted to the Bank. The Board sought to recover such funds from the Bank. The Bank contended that Wellandport and the Board stood in the position of purchaser and vendor since Wellandport had bought the wheat from the Board and that, therefore, the Board was an unsecured creditor. The Bank said that it had valid assignments of Wellandport's accounts receivable and other similar security interests, so that it was a secured creditor and entitled to the revenues. The Wheat Board contended that Wellandport received the revenues as a trustee for the benefit of the Wheat Board. Thus, such revenues belonged to the Board and not to

41. Unreported (Ont. S.C.).

Wellandport and therefore were not caught by the security assignments. The Ontario Supreme Court found in favour of the Wheat Board. The statutory provisions pertaining to the Wheat Board provided that Wellandport received wheat as agent for the Wheat Board. Under normal circumstances, the Wheat Board would then sell the wheat to the agent. However, in accordance with Wellandport's agency agreement, Wellandport was required to give verbal and written notice to the Board that it wished to purchase wheat from the Board and to comply with various provisions concerning the parties to whom, and the price for which, the wheat was sold. In the present case, in order to delay the date upon which it was required to pay the Board for wheat, Wellandport did not notify the Board that it wished to purchase wheat from the Board until the month following the month in which it sold such wheat. Accordingly, Wellandport sold the wheat before it had purchased it from the Board. Thus, at the time of sale, the Board had title to the wheat and Wellandport received the proceeds from the sale as a constructive trustee. The authorization for the sale of the wheat which was given by the Board after the wheat had already been sold by Wellandport was not effective as it was given without complete or informed knowledge. Although the revenues belonged to the Board, they had been paid by Wellandport to the Bank so that the Court had to consider whether the Bank also held the revenues as a constructive trustee. The Bank was not acting as the Board's agent and therefore could not be held to be a constructive trustee by virtue of the agency relationship. Nevertheless, the Supreme Court of Ontario quoted lengthy authority for the proposition that a person not nominated as a trustee may be liable as if he were a nominated trustee where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property. In the present case, the Bank's agent knew of and participated in the arrangment. It is sufficient to show that the Bank knew of and concurred in the intention to misapply the funds, a knowledge which will easily be presumed if the Bank derives a personal benefit from the transaction.

In *Bank of Montreal* v. *Walter Soja*[42] a guarantor of a loan contended that its guarantee had been terminated because the creditor, the Bank, had dealt with security for the loan in a manner detrimental to the guarantor. The Bank had appointed a receiver to collect the accounts receivable of the principal debtor. The guarantor alleged that the receiver relinquished control of the inventory of the principal debtor when there was sufficient inventory available to realize the outstanding amount of the loans. The Bank had sought recovery of the outstanding amount of the loans from the guarantor under the guarantee. The guarantee contained a provision which stated:

> ... and (the Bank) may otherwise deal with the Customer and all other persons ... and securities, as the said Bank may see fit ... said Bank may not be obliged to exhaust its recourse against the Customer or other persons or the securities it may hold before being entitled to payment from the undersigned ...

The Ontario Supreme Court held that in view of such provisions, the Bank was not obliged to sell all of the inventory before suing on the guarantee.

Comments made in *Province of Alberta and Coopers & Lybrand Limited* v. *Ryan Construction Ltd.*[43] indicate that a mortgagee can, under certain circum-

42. Unreported (Ont. S.C.).

43. (1982) 40 A.R. 413 (Q.B.).

stances, sell mortgaged land without complying with all of the foreclosure and sale proceedings stipulated in the Law of Property Act.[44] Ryan Construction had granted a debenture to the Province of Alberta Treasury Branch in connection with a loan made to Ryan. Under the terms of the debenture, Ryan mortgaged and charged certain lands, as collateral security, in favour of the Treasury Branch, as a fixed and specific mortgage and charge. In addition, the debenture made certain lands subject to a floating charge. Under the terms of the debenture, the Treasury Branch appointed Coopers & Lybrand as receiver. The provisions of the debenture relating to the appointment of a receiver stated that the receiver had the power to take possession and sell the property charged by the debenture. The receiver wished to sell a portion of the lands charged by the debenture. The Court of Queen's Bench stated that the receiver had the power and authority to sell the charged lands under the express terms of the debenture which defined the receiver's rights and under which the receiver was acting as Ryan's agent. However, the receiver was unable to provide the prospective purchaser with a transfer in registrable form since the receiver did not have a power of attorney. If the receiver had held a power of attorney complying with the Land Titles Act,[45] the receiver could have sold that land, according to the Master, without complying with the foreclosure provisions of the Law of Property Act.[46]

In *Briar Building Holdings Ltd.* v. *Bow West Holdings Ltd.*[47] it was contended that an acceleration clause in a mortgage whereby the total sum secured by the mortgage became payable upon a sale, was void as being a restraint on alienation. The Trial Judge found that the acceleration clause was not a restraint on alienation for two reasons. First, a mortgage under the Land Titles Act [48] does not affect a transfer of title but is merely a charge. Secondly, the acceleration clause did not prohibit the transfer of title but merely provided for an obligation to repay the secured sums.

In *Bank of British Columbia* v. *Davis*,[49] the Bank sought a declaration that it held an equitable mortgage by virtue of the following letter:

> In consideration of the Bank of British Columbia lending us the sum of $40,000.00, we hereby agree not to further encumber or sell our property located at . . . without the prior written consent of the Bank. We further agree to provide mortgage security over the above mentioned property if so requested by Bank of British Columbia.

The Bank advanced the sum of $40,000 to the borrowers and subsequently made a written request that a formal mortgage be granted. Prior to the formal mortgage being executed and registered, the borrower became bankrupt. The Alberta Court of Queen's Bench held that the letter coupled with the demand for formal documentation created an equitable mortgage in favour of the Bank giving it a security interest in the lands as against the other creditors of the bankrupt.

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44. R.S.A. 1980, c. L-8.
45. R.S.A. 1980, c. L-5.
46. *Supra* n. 44.
47. (1981) 41 A.R. 171 (Q.B.).
48. *Supra* n. 45.
49. [1983] 1 W.W.R. 185 (Alta. Q.B.).

VI. CONTRACTS

The case of *Great Northern Petroleums & Mines Ltd.* v. *Merland Explorations Limited*[50] is a significant decision involving a consideration of area of mutual interest obligations and of fiduciary duties arising under conventional oil and gas arrangements. The plaintiffs and the defendants were joint owners of oil and gas leases comprising nineteen and one-half sections of land near the town of Westlock and known as the Westlock Field. The plaintiffs had acquired their interests in the Westlock Field pursuant to two farmout agreements with the defendants. Pursuant to the first farmout agreement, dated February 2, 1972, the plaintiffs drilled one well in the Westlock Field and thereby acquired from the defendants a portion of the defendants' interests in the Westlock Field. The second agreement was dated August 18, 1972 and pursuant to that agreement the plaintiffs drilled three wells and thereby earned additional interests in the Westlock Field from the defendants. Both farmout agreements contained an area of mutual interest clause which stated that if any of the parties acquired any lands in the area defined therein as the area of mutual interest then it would offer the other parties the right to participate in the acquisition in accordance with specified percentages. The area of mutual interest was described in a plat attached to the farmout agreements. The area of mutual interest clauses in the two farmout agreements were identical. Each of such clauses expired when the plaintiffs' right to acquire additional interests under the particular farmout agreement expired.

The February 1972 farmout agreement contained the following provision regarding future operation of the Westlock Field:

> All operations on lands subject to this Agreement shall be conducted in accordance with the provisions of the Operating Agreement between Canada Northwest Land Limited and Merland Explorations Limited, attached as Schedule "A" of this Letter Agreement.

Schedule "A" was a draft unexecuted operating agreement between Canada Northwest Land Limited and Merland. The August 1972 farmout agreement contained a similar provision regarding subsequent operations, which was as follows:

> Upon Great Northern having earned its interest in the farmout lands, Canada Northwest shall be designated Manager-Operator of the lands and wells located on the lands. All operations shall be conducted in accordance with the provisions of the Operating Agreement between the Farmors (being Merland and Canada Northwest Land).

In February 1973, after the two farmout agreements had been executed, Merland and Canada Northwest Land entered into an operating agreement. That operating agreement was the same as the draft operating agreement attached to the first farmout agreement except that it contained an area of mutual interest clause which covered a larger area than the area of mutual interest clause provided for in the two farmout agreements and which was effective for a longer period of time.

The plaintiffs and the defendants constructed a gas plant and a gathering system to service the Westlock Field. They entered into agreements to govern

50. Unreported (Alta. Q.B.).

the construction, ownership and operation of such facilities. In addition, Merland, Canada Northwest Land and Great Northern entered into a gas purchase contract with TransCanada PipeLines Limited for the sale of gas from the Westlock Field.

The dispute in the case involved the acquisition by the defendants of interests in certain lands known as the Pacific-Imperial Lands. Those lands are bordered on the north, south and partially on the west by the Westlock Field. The Pacific-Imperial Lands were not covered by the area of mutual interest clause attached to the two farmout agreements nor were they covered by the gas purchase contract. However, they were included in the area of mutual interest clause under the February, 1973 operating agreement between Merland and Canada Northwest Land. The plaintiffs and the defendants had had some discussions at operators' meetings about acquiring the Pacific-Imperial Lands. As a consequence of those discussions, Merland made inquiries about acquiring the Pacific-Imperial Lands. Such inquiries were not successful. However, Merland and Canada Northwest Land did subsequently acquire interests in the Pacific-Imperial Lands by way of a farmin. The plaintiffs were not offered the opportunity to participate in the farmin.

The plaintiffs claimed to be entitled to participate in the acquisition of the Pacific-Imperial Lands on four grounds, which are as follows:

1. that the effective operating agreement between the plaintiffs and the defendants was the agreement entered into in February, 1973 whose area of mutual interest included the Pacific-Imperial Lands;
2. that it is established and well-known custom and usage in the oil and gas industry in Canada that joint operators acquiring interests within the area of jointly held lands offer the other joint operators the opportunity to participate in the acquisition and, accordingly, there is an implied term in the agreement (presumably the farmout agreements) between the plaintiffs and the defendants, whereby the plaintiffs are contractually entitled to share in the acquisition of the Pacific-Imperial Lands;
3. that there was an oral agreement whereby Merland agreed to negotiate the acquisition of the Pacific-Imperial Lands on behalf of the plaintiffs; and
4. that the defendants owed a fiduciary duty to the plaintiffs to share the acquisition of the Pacific-Imperial Lands with them; such fiduciary duty was alleged to have arisen out of, *inter alia*, the operating agreement, the gathering system agreement, the gas plant agreement, the gas purchase contract and the factual circumstances.

The plaintiffs did not succeed in the suit. Mr. Justice Shannon rejected the plaintiffs' arguments for the following reasons:

1. The 1973 operating agreement between Merland and Canada Northwest Land was not applicable. It was not in existence at the date that the two farmout agreements were entered into.

> [A reading of the two farmout agreements] renders it abundantly clear that the only operating agreement in the minds of the parties was that which was a schedule to the February 2nd agreement. Furthermore, the preponderance of the testimonial and documentary evidence supports that conclusion . . . it is clear that the operating agreement referred to in both instances (i.e. both farmout agreements) is the operating agreement attached as Schedule "A" to the February 2, 1972 Letter Agreement.

It should be noted that the plaintiffs were unaware of the existence of the operating agreement between Canada Northwest Land and Merland until after the trial commenced. It is submitted that the fact that the plaintiffs had always operated on the basis that the draft operating agreement attached to the February 2, 1972 farmout agreement was applicable was of significant importance to the Trial Judge. However, no mention of that fact is made in the written decision.

2. There was no implied term in the contracts between the parties obligating the defendants to permit the plaintiffs to share in the acquisition of the Pacific-Imperial Lands. The Trial Judge stated:

> While the evidence indicates that, in all of the circumstances of this case, the usual practice in the industry is that the defendants would notify the plaintiffs of their intention to attempt to acquire an interest in the lands in question or to actually offer the plaintiffs the opportunity to participate in the acquisition. I am not satisfied by the evidence that such a practice is so certain and notorious that a requirement to conform with the practice would be held to be a term of the contract between the parties.
>
> Furthermore, such an implied term would be contrary to the express agreement of the parties as set out in the farmout agreements. On that ground alone it must be excluded.

Presumably the express agreement of the parties referred to is the area of mutual interest provision actually set forth in the February and August farmout agreements which, by their terms, did not cover the Pacific-Imperial Lands and which, in any event, had expired prior to the defendants acquiring the Pacific-Imperial Lands.

3. The Trial Judge found, as a fact, that there was no oral agreement regarding the joint acquisition of the Pacific-Imperial Lands by the plaintiffs and the defendants. He stated:

> It (the evidence) established only that at a number of operators' meetings representatives of Merland informally undertook to make inquiries into the possibility of acquiring an interest in the Pacific-Imperial Lands.

4. There was no breach of a fiduciary duty owed by the defendants to the Plaintiffs. Merland did stand in a fiduciary position by virtue of being the operator of the field, the gas plant and the gathering system, and in certain respects pertaining to the gas purchase contract. However, the defendants' fiduciary duties were defined and limited by the terms of the agreements creating such fiduciary duties.

> The farmout agreements expressly limited the duty with respect to acquisition of other lands to an area of mutual interest which did not include the Pacific-Imperial Lands. The agreements with respect to the gas plant and gathering system were limited to those specific operations and did not purport to apply to the acquisition and exploration of other lands. Similarly, the fiduciary duties created by the trust declarations (which pertain to the gas purchase contract) were expressly limited to matters arising under the gas purchase contract. I am unable to find anything in the nature of the relationship or the course of dealings between the parties which extended the defendants' fiduciary duties to the extent suggested by the plaintiffs.

A notice of appeal has been filed by the plaintiffs.

Atlantic Richfield Company v. *Petro-Canada and Petro-Canada Exploration Inc.*[51] involved the interpretation of a provision contained in the share

51. (1982) 41 A.R. 46 (Q.B.).

purchase agreement pursuant to which Petro-Canada purchased all of the shares of Atlantic Richfield Canada Limited ("ARCAN") from Atlantic Richfield Company ("ARCO"). The share agreement had been made in August, 1976. ARCAN had carried on business in Saskatchewan prior to the share sale. In connection with such business, ARCAN had paid taxes in accordance with the Oil and Gas Conservation Stabilization and Development Act.[52] In November, 1977, certain portions of Bill 42 were declared to be *ultra vires* of the province of Saskatchewan in *Canadian Industrial Oil & Gas Ltd.* v. *Government of Saskatchewan.*[53] Shortly thereafter, the province of Saskatchewan enacted the Oilwell Income Tax Act.[54] Bill 47 was designed to have retrospective effect with the result that it purported to levy taxes equivalent to the taxes which had been collected by the province of Saskatchewan under Bill 42 prior to the determination that the latter bill was *ultra vires.* ARCO contended that under the terms of the share sale agreement, Petro-Canada was obligated to contest the retrospective provisions of Bill 47 and that, if such retrospective provisions were declared *ultra vires,* Petro-Canada would be obligated to seek a refund of the taxes paid by ARCAN under Bill 42 and to pay such refund to ARCO. The case involved two issues: first, whether or not the purported retrospective provisions of Bill 47 were valid, and secondly, whether or not the share sale agreement obligated Petro-Canada to contest the validity of the retrospective provisions of Bill 47.

Clause 12.6 of the Share Sale Agreement between ARCO and Petro-Canada provided, in part, as follows:

> In the event that after the Closing, Vendor determines that . . . ARCAN has a monetary claim against a third party, Purchaser, at the request of Vendor, shall cause ARCAN to prosecute, at the sole cost and expense of Vendor, such claim. . . . If ARCAN is successful in receiving payments of such claim, Purchaser shall pay to Vendor as an adjustment to the Purchase Price an amount equivalent to the amount received by ARCAN . . .

Petro-Canada did not seek a refund of the taxes paid under Bill 42 by ARCAN.

The Trial Judge suggested that the retrospective provisions of Bill 47 were unconstitutional. He stated:

> To impose a new tax levy on the same transactions arising out of the same circumstances, is, for all practical purposes, to effectively bar the recovery of the monies previously obtained. The sections of Bill 47 referred to above amount to no more than a colourable device to permit the province to retain monies previously obtained by it by unconstitutional means.

However, his review of the Petro-Canada Act[55] resulted in a determination that Petro-Canada is an agent of the Crown in right of Canada. Section 14(3) of that Act provides that the income of Petro-Canada is the property of Her Majesty in the right of Canada and is not subject to taxation by the government of the province of Saskatchewan. He noted that Section 14(5) of that Act imposed obligations on Petro-Canada to comply with provincial legislation but found that that obligation was confined to conservation and similar laws and not to taxation laws. Section 14(5) reads as follows:

52. S.S. 1973, c. 42.

53. [1978] 2 S.C.R. 545, 18 N.R. 107.

54. R.S.S. 1978 (Supplement) c. O-3.1.

55. S.C. 1974-75-76, c. 61.

> It is the duty of the Corporation in carrying out its business in any province to comply with the laws of that province relating to the conservation of natural resources and applying generally to corporations engaged in business similar to those in which the Corporation is engaged.

He also referred to Section 125 of the Constitution Act, 1867 and to the decision of Mr. Justice Martland of the Supreme Court of Canada *In the matter of the Constitutional Questions Act, R.S.A. 1970, Chapter 63 (the Gas Export Reference)*.[56] Thus, he found that Petro-Canada, as an agent of the Crown, was not subject to provincial taxation. It is interesting to note that the taxpayer in the case was not Petro-Canada but Petro-Canada Exploration Inc., a company resulting from a name change of ARCAN. The latter company is not directly subject to the Petro-Canada Act[57] but is incorporated under the Canada Business Corporations Act. It would seem that his finding on this point is, however, *obiter*.

The Trial Judge found in favour of Petro-Canada on the question of liability to ARCO. He found that the indemnity provisions of the share purchase agreement did not obligate Petro-Canada to seek recovery of the taxes paid by ARCAN under Bill 42. The share purchase agreement contained a number of lengthy provisions relating to indemnities and tax adjustments which are too lengthy to set forth in this paper. Those provisions, read as a whole, lead to the Trial Judge's finding. It would appear that the Trial Judge concluded that the words "a third party" as used in subclause 12.6 did not include provincial taxing authority. He stated that:

> The subclause forms a part of an overall routine Indemnification Clause which provides for the pursuit of third party claims on the part of the plaintiff arising out of routine business operations of the plaintiff prior to the effective date.

It would also seem that the Trial Judge did not consider that the payment of taxes was a routine business operation. However, it should be noted that the decision is based upon the interpretation of all of the indemnity provisions read together. A notice of appeal has been filed by ARCO.

Morin Technical Services (1978) Ltd. v. *Morin and Nirom Energy Ltd.*[58] involved an allegation of misrepresentation in an agreement for the sale of a business. The plaintiff had contracted to purchase an oil well servicing business from the defendants. The purchase was effected by selling all of the assets of the business. During the negotiations leading to the entering into of the sale agreement, the vendor's accountants provided the purchaser with a profit and loss projection for the then current fiscal year. In addition, financial statements were appended to the sale agreement. The sale agreement contained the following representation and warranty:

> The Vendor undertakes, represents and warrants to the Purchasers, the Purchasers relying on such undertakings, representations and warranties in entering into this Agreement and the Assumption Agreement that:
> (a) The financial statement fully and fairly sets forth the financial position of the Vendor as of January 31, 1978, and the results of its operation for the period indicated . . .

56. (1982) 42 N.R. 361, 37 A.R. 541.

57. *Supra* n. 55.

58. (1982) 40 A.R. 15 (Q.B.).

In fact, the net income of the vendor before tax for the period covered by the financial statements was overstated by approximately $85,000 with the result that the financial statements showed a profit of approximately of $45,000 when in fact they should have shown a loss of approximately $40,000. Further, the projections supplied to the purchaser by the vendor's accountants were incorrect.

The purchaser sued the vendor claiming breach of representation and warranty with respect to the financial statements and also claiming fraudulent misrepresentation with respect to the projections and other information supplied to him by the vendor's accountant.

The Trial Judge found that there was a misrepresentation and breach of warranty with respect to the financial statements. He stated that since the purchaser bought revenue producing assets rather than shares, the loss suffered by the purchaser as a consequence of the misrepresentation was not necessarily limited to the amount by which the income of the business was overstated in the financial statements. Presumably that was because the financial statements indicated not just the present state of the company but also the likely revenues to be generated from the company in the future.

The Trial Judge reviewed the law relating to fraudulent misrepresentation and found that the projections were, to the knowledge of the vendor and its accountant, unrealistic and false and were delivered to the purchaser so that he would rely on them. The vendor maintained that the projections constituted merely an opinion and not a statement of fact. The Trial Judge indicated that if facts are not equally known to both sides, a statement of opinion by the one who better knows the facts often involves a statement of a material fact because he implicitly states that he knows the facts which justify the opinion. The purchaser was an extremely naive and trusting person with little experience and with very little knowledge of the vendor's business. Accordingly, there was a fraudulent misrepresentation. The Trial Judge awarded the plaintiff damages in the amount of $175,000 plus interest. The Trial Judge refused to allow the plaintiff to recover consequential damages because the plaintiff had retained the property purchased and made substantial profits therefrom.

The case of *Jarvis Hotels Inc.* v. *R & P Metals Corporation Limited and Singleton*[59] dealt with an application for rectification of a mortgage. The plaintiffs had purchased a hotel from the defendants and granted a mortgage back to the defendants securing a portion of the purchase price. An interim agreement setting forth the terms of the sale had been entered into. That agreement contained the following provision:

> Accepted subject to final agreement being drawn and executed between vendor's and purchaser's solicitors.

Thus, the interim agreement was similar to many letter agreements encountered in the oil and gas business. The mortgage prepared by the vendor's solicitors contained an acceleration provision whereby the whole amount of the mortgage became due upon a sale by the plaintiff of its interest in the hotel. The mortgage was executed and registered. The plaintiff subsequently sought to sell the hotel and, upon discovering that the mortgage contained the acceleration

59. (1982) 36 B.C.L.R. 263 (S.C.).

provision, sought rectification of the mortgage to delete that provision. The interim agreement was silent on the matter of acceleration. The Trial Judge found that the acceleration clause was an important provision which ought to have been mentioned in the interim agreement. He found, as a fact, that mortgage transferability had been discussed in the negotiations between the parties and that the vendors had been told that the purchasers would not accept a restriction on transferability. The defendant contended that the interim agreement was not a binding contract but was subject to the provisions of the final agreement which must therefore govern. The Trial Judge summarized that issue as follows:

> If the documents relied on as constituting a contract contemplate the execution of a further contract, it is a question of construction as to whether the execution of a further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

In the present case, the Trial Judge found that the interim agreement formed the binding contract between the parties. Accordingly, rectification was ordered.

Cotterhill and Cotterhill v. *The Parkway Development Corp. Ltd.*[60] also involved an interim agreement. The interim agreement stated:

> This offer is subject to financing arrangements being made satisfactory to Mr. and Mrs. Cotterhill and to Parkway and to a contract covering the terms of the sale/purchase between Mr. and Mrs. Cotterhill and Parkway being executed by all parties prior to November 15, 1977.

Mr. Justice Laycraft, on behalf of the Court of Appeal, stated:

> This was not a case where the parties have agreed to all essentials of a contract in an informal way but have stipulated that their agreement will be spelled out more formally in a contract to be drawn. Rather, at the time of the offer which was signed and marked Exhibit 5 in the action, much remained to be agreed. The terms of the payment, the completion date, and the specifications of the house are not set forth in that document . . . $15,000 is to be paid upon signing the agreement. To sign the agreement therefore is more than a mere formality.

The *Cotterhill* case may be contrasted with the case of *Farkash and Farkash* v. *Henningson and Henningson*,[61] in which the Court of Queen's Bench was willing to imply a number of terms into the agreement of purchase and sale in order to make it enforceable. The *Farkash* case is discussed in Section IV of this paper dealing with Sale of Land.

Three recent cases dealt with the right of a landlord to withhold its consent to an assignment of a lease. These cases are relevant to the oil and gas industry since most operating agreements governing joint operations on oil and gas leases provide that a party will not assign its interest in the oil and gas properties without the consent of the other joint operators, such consent not to be unreasonably withheld (see for example the standard operating procedures published by the Canadian Association of Petroleum Landmen). The three cases involved conventional leases and not oil and gas leases or joint operating agreements. Although distinguishable since they involve the relationship

60. (1982) 39 A.R. 398 (C.A.).

61. *Supra* n. 22.

between landlord and tenant, they are nevertheless relevant decisions as they do involve contractual provisions requiring a party not to unreasonably withhold its consent to assignment.

Sundance Investment Corporation Ltd. v. *Richfield Properties Limited and Beaver Lumber Company Limited*[62] involved a shopping centre lease. There were two principal tenants of the shopping centre, the plaintiff and the defendant, Beaver Lumber. The plaintiff wished to sublet to a Swiss Chalet restaurant, approximately 9,000 square feet out of the 60,000 square feet which it held under lease. The plaintiff's lease provided as follows:

> The Lessee shall not be entitled to assign this lease or sublet any portion of the demised premises without the prior written consent of the Lessor which consent shall not be arbitrarily or unreasonably withheld, however, it is understood and agreed that the withholding of consent by the Lessor shall not be construed or pleaded as being unreasonable if the other major tenant occupying the building objects to the nature of the business to be conducted by any sub-tenant or assignee . . .

Beaver Lumber objected to the sublease on the grounds that Swiss Chalet would attract large numbers of customers who would use the parking space in the shopping centre for extended periods of time. Further, Swiss Chalet's proposed layout would result in its entrance being close to Beaver's entrance so that the parking spaces used by Swiss Chalet's customers would be those closest to Beaver's entrance. Parking close to Beaver's entrance was important to Beaver's customers because of the large articles purchased at the Beaver store. Beaver's rent was composed, in part, of a percentage of its sales. If the subletting to Swiss Chalet was likely to reduce Beaver's sales, then the rent payable by Beaver would be reduced. The issues in the case were whether Beaver's objection was to the "nature of the business" and whether, in any event, the landlord had reasonable grounds for withholding its consent. It was alleged by the tenant that Beaver's objection was in respect of parking which was extraneous to the "nature of the business" which Swiss Chalet proposed to conduct. If Swiss Chalet proposed to conduct a business in competition with that of Beaver, then, the plaintiff contended, Beaver would be objecting to the "nature of the business". The Court of Appeal found, Mr. Justice Harradence dissenting, that Beaver's objection went to the "nature of the business" and that, in any event, the tenant had failed to show that the landlord's withholding of consent was unreasonable in view of the potential reduction in the rent payable by Beaver which might occur as a consequence of the subletting.

Crescent Leaseholds Ltd. v. *Gerhard Horn Investments Ltd. and Mariposa Stores Limited Partnership*[63] considered whether an amalgamation of the tenant with two other companies resulted in an assignment of the lease to the amalgamated company thus constituting a breach of the lease. The lease provided, in part, as follows:

> The Lessee will not assign this lease in whole or in part, nor sublet all or any part of the leased premises, without the prior written consent of the Lessor in each instance. The Lessee (sic) agrees that such consent by the Lessor may not be unreasonably withheld . . .
>
> This prohibition against assigning or subletting shall be construed to include a prohibition against any assignment or subletting by operation of law.

62. (1983) 41 A.R. 231 (C.A.).

63. [1983] 1 W.W.R. 305 (Sask. Q.B.).

The lessee amalgamated with two other companies in January 1979. The lessor was not informed of the amalgamation. On February 1, 1979, the amalgamated company entered into a partnership with two other companies and contributed all of its assets relating to the store in question to the partnership.

The amalgamated company executed a trust declaration whereby it declared that it held its interest in the lease as a bare trustee for the partnership. On February 1, 1980, the amalgamated company withdrew from the partnership and had no further interest therein. The Court found that since the amalgamation involved a "contribution of assets by each amalgamating company to the amalgamated company", there was an assignment or, at least, an assignment by operation of law. The Court also found that the assignment to the partnership without the landlord's consent breached the lease. Although the landlord was not entitled to unreasonably withhold its consent to assignment, a provision of the lease specifically provided as follows:

> No rights, however, shall enure to the benefit of any assignee of the Lessee unless the assignment to such assignee has been approved by the Lessor in writing as provided in Section 16.01 hereof.

Thus, although the landlord might have been forced to consent to the assignment of the lease if its consent had been sought prior to the assignments, since it was not sought or given, the assignments were not valid. The case seems to contradict the Supreme Court of Canada decision in *R* v. *Black & Decker Manufacturing Co.*,[64] in which it was held that an amalgamation did not result in an assignment of lease. The *Black & Decker* case was considered in the *Crescent Leaseholds* decision.

The third case, *Toronto Housing Co. Ltd.* v. *Postal Promotions Ltd.*,[65] dealt with a lessor of a commercial lease who refused to consent to an assignment of the lease. The tenant had vacated the premises but wished to assign its lease. Its assignee did not intend to go into possession for some time although the assignee would honour the terms of the lease. The landlord refused to consent to the assignment on two grounds. First, the landlord owned 9,000 square feet of unleased premises in the same neighbourhood and if the 30,000 square feet covered by the present lease were also vacant, it would be more difficult for the landlord to rent the other 9,000 square feet. Secondly, it would be difficult, if not impossible, to obtain insurance coverage for vandalism and malicious damage on a vacant property. The Trial Judge found that the landlord did not act unreasonably in withholding its consent.

In the case of *M.L. Baxter Equipment Ltd.* v. *GEAC Canada Ltd.*,[66] interpretation of a notice clause in a contract was in issue. The clause read as follows:

> . . . upon such default continuing for ninety (90) days after notice thereof is given by the Lessee, the Lessee may terminate this Agreement . . .

The lease was in fact an agreement by the lessor to install and supply a

64. (1974) 43 D.L.R. (3d) 393, 1 N.R. 299 (S.C.C.).

65. (1981) 34 O.R. (2d) 218 (H.C.).

66. (1982) 16 B.L.R. 98 (Ont. H.C.).

computer system. The system was to be in place by a specific date but due to problems in adapting the computer to the lessee's business, that date was not met. Several other deadlines were established, none of which was met. On April 13, the lessee wrote to the lessor as follows:

> Your letter dated February 16. 1978 stated that our computer project would be completed by March 31. 1978. This deadline has not been met. This will advise you that we expect you to complete the project by May 1, 1978.

On July 31, the lessee wrote to the lessor as follows:

> You are hereby notified that GEAC Canada Limited is in breach of the provisions of an Agreement . . . and that M.L. Baxter Equipment Limited . . . as lessee, terminates the aforesaid Agreement. The provisions of the contract were breached as of May 1, 1978, and remain so; therefore in accordance with Paragraph 10 of the aforesaid Agreement, this document constitutes written notice of termination of the Agreement.

The issue in the case was whether or not 90 days notice had been given to the lessor as required by the termination provision quoted above. The lessee claimed that the April 13 letter commenced the 90 day period running. The Trial Judge stated that the purpose of the 90 day period was to allow the defendant to remedy the breach. The April 13 letter did not state that the defendant was in breach nor did it make any reference to the termination clause or to the fact that the contract would terminate in 90 days if the default was not remedied. Since termination of a contract is a very serious matter, the notice commencing the 90 day period must be one which brings home the purpose of the notice. Accordingly, the notice was defective and the 90 day period did not commence to run on April 13.

The case of *Thorne Riddell Inc.* v. *Rolfe*[67] was an agency case involving a situation similar to the situation which occurs under joint operating agreements in the oil and gas industry. Under joint operating agreements, one of several owners of an oil and gas lease is appointed to administer and manage operations in respect of the lease on behalf of all of the owners. Traditionally, the operator enters into agreements with drilling contractors and similar parties in its own name. The joint operating agreement usually provides that the operator shall be an independent contractor. The *Thorne Riddell* case evolved from the Abacus Cities insolvency. Abacus Cities had entered into land development agreements with investors in which the investor, known as a client developer, agreed to purchase a condominium unit then under construction. A second agreement was entered into between Abacus and the client developer called a "building development agreement" pursuant to which Abacus contracted to construct the condominium unit for construction costs plus a fixed fee. Abacus became insolvent and the suppliers and sub-trades of the condominium contended that the client developers were undisclosed principals of Abacus and therefore personally liable for the costs of the condominium. The land development agreement between Abacus and the client developers stated that Abacus "will enter into agreements . . . on behalf of the developer (as agent of the developer)". Abacus never indicated to the suppliers and sub-trades that it was acting on behalf of an undisclosed

67. (1972) 22 Alta L.R. (2d) 76 (Q.B.).

principal. All contracts were entered into by Abacus in its name. All billings were addressed to and in the name of Abacus. All financing of the development above the equity initially advanced by the client developers, was through mortgage loans arranged by Abacus and secured against the project with the proceeds of the mortgage assigned by the client developers to Abacus to pay development and building costs. Abacus had complete charge and control over the development and only Abacus was looked to for payment. The Trial Judge found that Abacus was not acting as an agent nor was there a master and servant relationship between the client developer and Abacus. At best, Abacus might be classified as an independent contractor. The Court stated that even if Abacus were an undisclosed agent, Abacus had no authority to pledge the credit of a client developer, beyond the assignment of mortgage proceeds and the equity funds actually advanced by the client developer. The Trial Judge stated that the law was established that if an undisclosed agent does not have the authority to pledge the credit of an undisclosed principal, then a third party cannot look to the undisclosed principal beyond the sums that the undisclosed principal has expressly agreed to advance. The case is distinguishable from the position of a non-operator under an operating procedure in that a non-operator is more actively involved in the conduct of the business than the client developers who were really investors. Further, most joint operating agreements contain provisions whereby the non-operators agree to indemnify the operator, as to their undivided interest, with respect to all the costs and expenses incurred by the operator except in cases of gross negligence and wilful misconduct. Nevertheless, the principles enunciated in the case are applicable to some extent to the position of non-operators under an operating procedure.

VII. SURFACE RIGHTS

In order to exploit oil and gas rights and to produce and transport oil and gas production, it is necessary for oil and gas companies to have access to, and the use of, the surface of lands. Of course, the owners of the surface of lands are reluctant to grant such access since it adversely affects their use of the land, as well as its value. In order to balance the interests of oil and gas companies and surface owners, surface rights legislation has been enacted both provincially and federally. Because most oil and gas activities take place in Alberta, the Alberta provincial legislation is the legislation most often litigated. The legislation currently in effect in Alberta is the Surface Rights Act.[68] However, a new Surface Rights Act, Bill 60 has recently received first reading. (See discussion under Section X "Legislation" *infra*). Both the present Act and Bill 60 establish a Surface Rights Board, which has the authority to determine the compensation to be paid to the surface owner. Of course, the surface owner and the oil and gas company may voluntarily agree upon the compensation. Decisions of the Surface Rights Board respecting compensation can be appealed to the Alberta Court of Queen's Bench by way of a trial *de novo*. A large body of law has been established as to the factors which the Surface Rights Board should consider in determining the compensation to be paid to the surface owner and as to the procedure to be followed on an appeal from the decision of the Board. The factors which the Surface Rights Board may consider in determining compensation are set forth in Section 23(2) of the

68. R.S.A. 1980, c. S-27.

Surface Rights Act[69] and are as follows:

1. The value of lands.
2. Loss of the use of the land.
3. Adverse effect on adjacent land and nuisance, inconvenience and noise.
4. Damage to adjacent land caused by the oil and gas company's operations.
5. Any other factors the Board considers proper.

Frequently, in determining compensation to be awarded to a surface owner, the Surface Rights Board will look at voluntary arrangements made between other surface owners and oil and gas companies involving land in the same area.

The leading case on the procedure to be followed by the Alberta Court of Queen's Bench on appeals from decisions of the Surface Rights Board is *Caswell* v. *Alexandra Petroleums Ltd.*[70] as approved in *Lamb* v. *Canadian Reserve Oil & Gas Ltd.*[71] Those cases established that the court should not disturb the findings of the Surface Rights Board, unless there is cogent evidence that the Board was wrong.

The granting of a right of entry order pursuant to the Surface Rights Act[72] is not an expropriation and does not grant an interest in fee simple in the surface rights and the value of the residual interest of the surface owner is sometimes an issue in compensation cases. In the recent case of *Krupa* v. *Camel Resources Ltd.*[73] Mr. Justice Wachowich states:

> It is vital, in my view, to remember that a right of entry order does not constitute an expropriation. In this case all of the freehold rights will revert back to the landowner after the 15 years. The appellant is not losing his land but only rights to the surface for a certain period . . . In my view it appears somewhat unreasonable for a landowner demanding full market value for his land, and be paid for it now . . . and reacquire it in 15 years . . . "market" or "market value" appear nowhere in the compensation part of the Act (the Surface Rights Act).

In *Dome Petroleum Limited* v. *Liivam Farms Ltd. and Farm Credit Corporation*[74] the Trial Judge reduced the award of the Surface Rights Board as it pertained to the value of the lands taken by 75 percent in order to take into account the residual value of the lands.

Another issue which has arisen, from time to time, in consideration of compensation awards granted by the Surface Rights Board is the manner in which inflation should be taken into account. The law seems to have been settled in Alberta that inflation should not be taken into account.[75]

In the recent case of *Hudson's Bay Oil & Gas Company Limited* v. *Dau*[76] the Trial Judge found that the Surface Rights Board was in error in taking into account inflation. A similar finding was made in the *Liivam Farms* case.[77] The

69. *Id.*

70. [1972] 3 W.W.R. 706, 2 L.C.R. 229, 26 D.L.R. (3d) 289 (Alta. C.A.).

71. [1977] 1 S.C.R. 517, [1976] 4 W.W.R. 79, 10 L.C.R. 1, 70 D.L.R. (3d) 201, 8 N.R. 613.

72. *Supra* n. 68.

73. (1982) 40 A.R. 528 (Q.B.) at 531, 532.

74. (1982) 39 A.R. 567 (Q.B.).

75. *See Barber* v. *Pan Canadian Petroleum Ltd.* (1979) 18 L.C.R. 75 (Alta. Q.B.).

76. (1982) 19 Alta. L.R. (2d) 379.

77. *Supra* n. 74.

reason that inflation is not taken into account, according to the *Barber* case[78], is because Section 36 of the Surface Rights Act[79] provides for a periodic review of compensation which would permit the surface owner to apply to the Board for a change in compensation if he were adversely affected by inflation.

Another issue which has risen several times is the consideration to be given to the possibility that the land taken could be put to a different use than that which it is being put to at the time of the taking. If the land taken is farm land located near a large city, the surface owner may argue that the land would likely have been subdivided and sold as residential lots, so that the value of the land is greater than its agricultural value. That situation arose recently in *Rene Management and Holdings Ltd.* v. *B.P. Exploration Canada Limited.*[80] The lands taken in that case were located within the city limits of Calgary, but were undeveloped. The Board determined the value of the land and the injurious effect to surrounding land on the basis of agricultural value and not on the basis of the land being developed. The Trial Judge found that the lands were not serviced and it was unlikely that they would be developed before the middle of the 1980's. He also found that the owner would not likely develop the land himself. The Trial Judge did not disturb the compensation awarded by the Board in respect of the value of the land and the injurious effect to the surrounding land. A similar issue arose in *Gulf Canada Resources Inc.* v. *Moore and Farm Credit Corporation.*[81] In that case, the lands taken were farm land. The surface owner contended that the taking of the land prevented him from constructing a retirement home. The Trial Judge found that, in all probability, the land would continue to be used for mixed farming. He found that subdivision was unlikely. In the *Liivan Farms* case the land being taken was agricultural land. The surface owner contended that he intended to remove peat from the land and there was some evidence to that effect. Mr. Justice Egbert said:[82]

> I am of the opinion that the highest and best use of any land is the use at the time of taking. The evidence clearly indicates that when this right of way was taken, the said lands were being used for agricultural purposes, and not as a peat quarry . . . Thus, I am left with nothing other than tenuous conjecture as to the value of the peat in the said lands if, in fact, it will ever be sold . . . In my opinion, the onus is upon Liivam to establish a case for damages for loss of peat and it has not done so.

As noted above, the Surface Rights Board frequently calculates compensation awards on the basis of the amount of compensation accepted by other surface owners in the same area for similar lands. The question arises as to when it is appropriate for the Board to do so and if the Board is obligated to do so. In *Petryshen & Petryshen* v. *NOVA, An Alberta Corporation* Mr. Justice Stevenson of the Alberta Court of Appeal stated:[83]

> [t]he board was not bound to set compensation in the amount agreed to by others negotiating compensation for similar holdings, but where, as here, a pattern has been established, the board should

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78. *Supra* n. 75.
79. *Supra* n. 68.
80. Unreported (Alta. Q.B.).
81. (1982) Alta. L.R. (2d) 328 (Q.B.).
82. *Supra* n. 74 at 581.
83. (1982) 23 Alta. L.R. (2d) 200 (C.A.) at 200.

> depart from that pattern only with cogent reasons. No reasons for departing from that pattern were put forward by the board . . . In these circumstances, the board erred . . . A finding based on compensation for comparable transactions does, of course, take into account residuary value because the figure is compensation for all but those items excluded under the agreement.

Similarly, in the *Dau* case Mr. Justice Home states:[84]

> From those comments it appears evidence of negotiated settlements may be considered by the board and this court, but that such settlements must be weighed in the light of other relevent evidence.

See also the *Moore* case.[85]

In the *Rene Management* case[86] the question of interest was considered. The Surface Rights Board had fixed a rate of interest to be paid on its award at 10% per annum, being a reasonable return on a temporary withholding of capital approximately equivalent to a reasonably expected return on a low risk investment, such as term deposits. Mr. Justice Lomas of the Alberta Court of Queen's Bench, stated at page 16 of the unreported reasons for judgment:

> This reasoning assumes that the interest to be paid the appellant (respondent) in the Board hearing is the rate it could reasonably expect to receive on a low risk investment such as a term deposit. In my opinion, this is not the basis on which the interest rate to be applied should have been determined in this case. Evidence was adduced on the appeal that the appellant's cost of borrowing was the bank prime rate plus 1% and since the date of the taking of the right of way its bank debt had never been less than $5,000,000.
>
> The respondent has the use of the funds payable for the taking until the date of payment. No evidence was adduced as to the respondent's cost of borrowing but I do not believe it could borrow from Canadian chartered banks at a rate less than the bank prime rate, a rate considerably in excess of that set by the Board.

Accordingly, he changed the rates of interest fixed by the Board to the prime commercial rate charged by the Bank of Nova Scotia plus 1 percent.

The Alberta Court of Appeal decision in *Sulpetro of Canada Ltd.* v. *Albert M. Palley*[87] considered evidence arising after the hearing of the Surface Rights Board and the admissibility of such evidence in an appeal of the Board's decision. The Court of Appeal held that such evidence was admissible on the basis that the appeal from the Surface Rights Board was in the nature of a trial *de novo*. It is submitted that such a decision is sensible in view of the fact that Section 24 of the Surface Rights Act[88] permits a review of a decision of the Board in any event. In the *Dau* case,[89] the Surface Rights Board compensated the surface owner for the quantity of wheat which the surface owner could produce on the basis of its estimates of the 1981 grain prices. By the time that the appeal of the Board's decision was heard, those prices had been established by the Canadian Wheat Board. The Board's award was varied to take into account the difference between its estimates and the actual prices.

An issue as to evidence also arose in *Whitehouse* v. *Sun Oil Co. Ltd.*[90] In that

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84. *Supra* n. 76 at 386.
85. *Supra* n. 81 at 332, 337.
86. *Supra* n. 80.
87. Unreported (Alta. C.A.).
88. *Supra* n. 68.
89. *Supra* n. 76.
90. (1982) 40 A.R. 380 (C.A.).

case, the Surface Rights Board had given consideration to a study published by the Resource Economics Branch of the Provincial Department of Agriculture even though the author was not available for cross-examination on his report. It was argued before the Court of Appeal that under Section 9 of the Surface Rights Act[91] the Board is not bound by the rules of law regarding evidence and since under Section 24 the court has the power and jurisdiction of the Board, the court has power to receive hearsay evidence. The Court of Appeal stated, at page 390, as follows:

> Whether the document was itself properly admitted, the weight to be given to the owner's evidence is a function of the trier of fact and I would not disturb the trial judge's finding on this subject.

Thus, the Court of Appeal decided the issue on the basis of oral evidence from the owner of the property which was the same as the conclusions contained in the report and was not based on the basis of the report itself. Of course, the owner probably based his evidence on the report.

In the case of *Grant C. Bergman and Reid J. Bergman* v. *Francana Oil and Gas Ltd.*,[92] Madame Justice Veit stated that orders of the Surface Rights Board concerning costs are not appealable. Section 24(1) of the Surface Rights Act[93] states:

> Except as otherwise provided for in this section, an order of the Board made in writing is final and there is no appeal therefrom.

Section 24(2) states that the appeal can be: "as to the amount of the compensation payable or the person to whom the compensation is payable or both". Section 24(3) defines "compensation order" as follows:

> 'compensation order' includes:
>
> (a) an order of the Board to amend a compensation order in respect of the amount of compensation payable or the person to whom it is payable, and
>
> (b) an order of the Board for the replacement of a compensation order, if the new compensation order results in a change as to the amount of compensation payable or the person to whom the compensation is payable.

Madame Justice Veit concluded that Section 24(1) of the Act established a privitive clause with a specific statutory exception relating to compensation orders. She concluded that costs were not part of the compensation order. Thus, in her view, the only possible way of objecting to an order of the Board regarding costs was by way of a prerogative writ. It is interesting to note that in the *Petryshen* case,[94] the Court of Appeal considered the amount awarded to Mrs. Petryshen for the value of the time which she expended in respect of the taking of the surface of her land. The Court of Appeal restored the order of the Surface Rights Board on the basis that there was no evidence that it was wrong. It would appear that the issue decided in the *Bergman* case as to the appealability of an award of costs was not considered by the Court of Appeal in *Petryshen*.

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91. *Supra* n. 68.
92. Unreported (Alta. Q.B.).
93. *Supra* n. 68.
94. *Supra* n. 83.

In the *Whitehouse* case,[95] the Alberta Court of Appeal considered the basis upon which awards of the Surface Rights Board should be disturbed on appeal. As noted above, the law has been well established by the *Caswell* case[96] and the *Lamb* case[97] that the awards of the Board should not be disturbed unless there is cogent evidence for doing so. The Court of Appeal in the *Whitehouse* case stated that the reason that the Board's decisions should not be disturbed without cogent evidence, is because the findings of the Board have substantial evidentiary value in view of the fact that the Board is presumed to have expertise and it must be assumed that the Board has used such expertise. However, Mr. Justice Stevenson stated at page 386:

> It is difficult to accord the decision that value unless there are detailed findings of fact made which enable the appellate tribunal to conclude that the board has brought its knowledge or expertise to bear.

and again at page 387 he stated:

> We were pressed with the argument that the board is presumed to have expertise and that we must assume it was used. Without knowing what evidence was before the board, let alone what evidence it accepted or rejected, this is an unwarranted assumption.

Foothills Pipelines (Alta.) Ltd. v. *Ralph R. Roe*[98] dealt with the taking of the surface of land as an easement for a pipeline under the Northern Pipeline Act[99] in respect of which two other statutes are applicable, the National Energy Board Act,[100] and the Railway Act.[101] The Court stated that the Railway Act[102] establishes no guidelines as to the manner in which compensation and damages are to be determined other than a simple direction found in Section 161(2) to the effect that the arbitrator shall determine compensation in such manner as he deems fit. He considered the rule, frequently used by the Surface Rights Board of Alberta, that the value of a small parcel of land taken from a larger parcel, should be determined on the basis of the per acre value of the whole of the larger parcel. He stated that such rule is only applicable when the acreage taken is homogeneous with the larger parcel. In the case before him, most of the lands in the large parcel were sloped while the parcel taken was mostly flat and capable of development. He noted that all the lands were zoned for agricultural use and determined that, notwithstanding the topography, the whole of the larger parcel was homogeneous so that the aforementioned rule was applicable. However, he noted that the taking of the flat portion of the lands made it more expensive for the surface owner to build a dwelling on the remainder of the property. Accordingly, he awarded compensation to the surface owner for the estimated increased costs of building an average dwelling on the land, having regard to the average type of dwelling place which would likely be built on lands in the area.

95. *Supra* n. 90.

96. *Supra* n. 70.

97. *Supra* n. 71.

98. Unreported (Alta. Q.B.).

99. S.C. 1977-78, c. 20.

100. R.S.C. 1970, c. N-6.

101. R.S.C. 1970, c. R-2.

102. *Id.*

Dome Petroleum Limited v. *Juell*[103] involved the taking of land in British Columbia pursuant to the Petroleum and Natural Gas Act.[104] That Act is similar to the Alberta Surface Rights Act[105] although by no means identical. Mr. Justice Berger found that the taking of land was not an expropriation so that expropriation cases do not automatically apply. However, he found that it was not necessarily an error in law to apply expropriation principles. He attached significant value to the award which had been made by the mediation and arbitration board established under the Petroleum and Natural Gas Act.[106] It would appear from that decision, that the law in British Columbia is evolving in a similar fashion to the law in Alberta.

VIII. ADMINISTRATIVE REGULATION

A. *ATCO LTD. V. CALGARY POWER LTD.*[107]

This is the Supreme Court of Canada decision of the case previously reported[108] in which the Alberta Court of Appeal held that the word "control", where used as part of the expression "owning, operating, managing or controlling" the plant and equipment of a public utility, includes control through ownership of the shares of the company which owns the public utility. The Supreme Court of Canada upheld the Alberta Court of Appeal by concluding that "owner of a public utility"[109] must, by reason of the proper interpretation of "controlling", include a person not having legal ownership of the public utility but who has the power to control the public utility. Therefore, until amendments to the legislation are made, all persons, who through direct or indirect shareholding have the power to control companies owning gas utilities or public utilities, shall have regard to the obligations and limitations imposed on them as owners of public utilities or gas utilities by the Gas Utilities Act[110] and Public Utilities Board Act.[111]

B. *TANNY V. ERCB AND CALGARY POWER LTD.*[112]

Charles Tanny was the owner of a cottage located on the south shore of Lake Wabamun one quarter mile north of the northern boundary of a Calgary Power coal stripmine approved by ERCB permit C77-7 issued in 1977 and permit C77-20 issued in 1978. Tanny received no notice of and had no knowledge of the applications for or hearings respecting these permits. In 1980 Calgary Power applied to extend the mine area and Tanny was served with notice of the application and hearing. This was his first notice or knowledge of the mine which was approved in 1977.

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103. (1982) 41 B.C.L.R. 299 (S.C.).
104. R.S.B.C. 1979, c. 323.
105. *Supra* n. 68.
106. *Supra* n. 104.
107. [1983] 1 W.W.R. 385 (S.C.C.).
108. (1982) 20 Alta. L. Rev. 210.
109. R.S.A. 1980, c. P-37, s. 99.
110. R.S.A. 1980, c. G-4.
111. R.S.A. 1980, c. P-37.
112. Unreported (Alta. Q.B.).

The Energy Resources Conservation Act[113] provides in Section 29(2) for notice of an application to be given to any adversely affected person and permits in Section 43(2) any person, affected by an ERCB order and to whom notice was not given, the right to apply to the ERCB within 30 days of the giving of the order to have the order varied, amended or rescinded. Section 44 provides a right to appeal an ERCB order to the Court of Appeal within one month of the giving of the order or such further time as a Judge under special circumstances may allow. Tanny was too late to apply under Section 43(2) and did not attempt to exercise his appeal rights based on special circumstances under Section 44. Instead, Tanny sought a writ of *certiorari* to quash Permits C77-7 and C77-20 or alternatively a declaration that these permits were invalid and null; in either case, on the basis that the failure to give him notice caused the ERCB to lack jurisdiction to grant the permits.

Cavanagh, J. rejected the *certiorari* application following *Rozander and Groeneveld* v. *ERCB and Calgary Power Ltd.*[114] which held that *certiorari* would not lie when a statutory appeal right was provided in Section 44 but was not exercised. However, Cavanagh J. did declare that Tanny had not been provided with notice and the other opportunities provided in Section 29(2) of the Act and therefore declared Permits C77-7 and C77-20 to be of no force and effect and nullities. It is interesting to note that although raised in argument by counsel, the decision did not mention or distinguish *Groeneveld* v. *Calgary Power Ltd., Energy Resources Conservation Board and Surface Rights Board (Groeneveld No. 2).*[115] In *Groeneveld No. 2,* the Court held that declaratory relief would not lie to void an ERCB decision because to do so would be contrary to the legislative intent set forth in Section 45 which prohibits ERCB processes or proceedings from being removed by *certiorari* or otherwise in any court, where a statutory appeal lies. The distinction between the *Tanny* case and *Groeneveld No. 2* might be in the *obiter dicta* in the *Groeneveld No. 2* decision which suggests that the legal consequences of a denial of natural justice may depend upon the degree of such denial and the circumstances of such denial. Whereas in the *Tanny* case no notice of the application or the hearing was given at all, in the *Groeneveld No. 2* case the affected parties did receive notice and appeared at the hearing but were denied the right to be heard and make representation in respect to a posthearing report (the Wacker Report) which the ERCB took into consideration in rendering its decision. This basis for distinguishing these two cases is weakened in light of the fact that Tanny received notice and appeared at the 1980 hearing respecting extension of the mine boundaries and argued that the mine boundary nearest his residence be moved back to a point further from his property. In response to the argument that Tanny had his day in court in 1980, Cavanagh J. noted that the boundary extensions applied for in 1980 did not affect the nearest point to Mr. Tanny's property and that his appearance would not affect the matter which had been decided in 1977 and respecting which he had not received notice.

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

114. (1978) 13 A.R. 461 (S.C.A.D.).

115. (1980) 25 A.R. 451 (S.C.T.D.).

C. *CHEVRON STANDARD LIMITED AND CHEVRON CANADA RESOURCES LIMITED V. ERCB AND GASCAN RESOURCES LTD.*[116]

On February 23, 1983 the ERCB granted GasCan's application for approval of an enhanced oil recovery scheme for part of the Mitsue Gilwood A oil pool. The scheme provided for a GasCan water injection well to enhance oil recovery from a GasCan oil well. The distance between the injection well and the producing well was 5 miles and the location between the two wells included land on which a Chevron producing oil well was located.

In this case Chevron sought and was granted leave to appeal the ERCB's decision under Section 44 of the Energy Resources Conservation Act[117] which requires issues of law or jurisdiction to be raised as a condition to any appeal.

Chevron argued that regulation 5.160 of the Oil and Gas Conservation Act Regulations[118] requires that a project (and therefore any scheme preceding a project) for enhanced oil recovery contain only whole contiguous drilling spacing units and that the ERCB erred in law by concluding that the only drilling spacing unit in the GasCan proposal was that of the producing well because the injection well would be assigned zero hectares for allowable purposes.

Laycraft, J. A. directed that the appeal be heard in June because of the prejudice to GasCan of any delay.

IX. CONSTITUTIONAL LAW

A. *REFERENCE RE PROPOSED FEDERAL TAX ON EXPORTED NATURAL GAS*[119]

This is the Supreme Court of Canada decision of the constitutional reference reported two years ago[120] respecting the validity of the then proposed federal Natural Gas and Gas Liquids Tax[121] on gas produced from Alberta Crown lands by the Province of Alberta and transported and sold by the Province to an export market at the Montana border. The Supreme Court of Canada in a 6 to 3 decision upheld the Alberta Court of Appeal by declaring the NGGLT to be *ultra vires* with respect to this provincially owned, produced and sold natural gas.

Like the Alberta Court of Appeal, the Supreme Court based its decision on Section 125 of the Constitution Act, 1867[122] which states that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation". The Court examined the proposed legislation containing the NGGLT and found that it was solely based on the federal power under section 91(3) of the Constitution Act, 1867 respecting the "raising of money by any Mode or System of Taxation", and that it did not have any aspects of regulation so as to be saved by Section 91(2) as being with respect to the regulation of trade and

116. Unreported (Alta. C.A.).
117. *Supra* n. 113.
118. Alta. Reg. 151/71 as am.
119. (1982) 136 D.L.R. (3d) 385 (S.C.C.).
120. *Supra* n. 108 at 213.
121. Now 1980-81 S.C., c. 68 (assented to July 8, 1981).
122. Formerly the British North America Act.

commerce. To support its finding that the proposed legislation lacked any regulatory aspect the Court noted that that tax did not apply only to exports and the tax could therefore not be regarded as a regulation of international trade; that the tax was not intended to discourage either consumption or production of natural gas so as to promote any policy with respect to natural gas use; that the natural gas industry is otherwise regulated by federal legislation in virtually all respects so as to leave little if any further regulatory functions available for new legislation; and that all government statements with respect to the tax indicated only that its purpose was to increase the share of federal revenues from the production and sale of natural gas.

As reported last year[123] by federal-provincial agreement the NGGLT on exports from Canada has been fixed at zero until January 1, 1987.

B. *RE NEWFOUNDLAND AND LABRADOR CORPORATION LTD. AND A-G FOR NEWFOUNDLAND*[124]

This is an appeal from the Newfoundland Court of Appeal decision reported on two years ago[125] respecting the validity of the Newfoundland Mining and Mineral Rights Tax Act, 1975. The Supreme Court of Canada upheld the decision that none of the taxes imposed under this Act were indirect taxes and were therefore not *ultra vires* Section 92(2) of the Constitution Act, 1867.[126] The Court affirmed that the Mining Tax of 15 percent of taxable income derived from mining operations of a taxpayer is nevertheless an income tax (and thus a direct tax) notwithstanding that the tax is upon a particular part of the taxpayer's income and not upon all income.

Secondly, the Court affirmed that the Mineral Rights Tax, payable on royalties reserved out of grants of mineral rights, was not a production tax, and therefore not an indirect tax, simply because royalties are calculated and payable based on production. The Court affirmed the test of directness being whether the tax is demanded from the person who is intended to pay it rather than with the expectation that the tax be passed on to another person.

This case and other cases involving challenges to provincial legislation on the basis of being indirect taxation may now be of less interest in light of Section 92A(4) of the Constitution Act, 1867 pursuant to which the provinces have acquired the right to institute indirect taxes in the area of natural resources. In this regard, see also the proposed Alberta Freehold Mineral Rights Tax Act.[127]

X. LEGISLATION

A. ALBERTA LEGISLATION

There was no fall session of the Alberta Legislature in 1983 and the following summaries are with respect to legislation proposed during the 1983 Spring Session, the First Session of the 20th Legislature, prior to June 7, 1983.

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123. (1983) 21 Alta. L. Rev. 161.

124. (1982) 138 D.L.R. (3d) 577 (S.C.C.).

125. *Supra* n. 108 at 216.

126. *Supra* n. 122.

127. *Infra*, Alberta Legislation section.

1. Alberta Corporate Income Tax Amendment Act, 1983[128]

A 1982 amendment to the Alberta Corporate Income Tax Act[129] increased the annual maximum Alberta Royalty Tax Credit available to any corporation or associated group of corporations from two million dollars to four million dollars based on tax credits equal to 75 percent of royalties paid. Thus, corporations or associated corporations having Alberta Crown royalties in excess of $5,333,333 ("above-limit corporations") reached an annual ceiling of Alberta Royalty Tax Credit of four million dollars. On August 24, 1982 the Alberta government stated that it perceived an increase in the number of dispositions of producing oil and gas properties from above-limit producers to below-limit producers primarily to increase the amount of Royalty Tax Credit available. This Act aims to prevent any increase in the available Royalty Tax Credit through transfers of producing properties from above-limit to below-limit corporations; however, the legislation does not accomplish this by addressing such property transfers. Rather, the Act provides that any royalty accruing after August 31, 1982 from wells which had a finished drilling date on or before August 24, 1982 and which were owned on August 24, 1982 by an above-limit corporation (called "restricted resource property") can no longer be included as royalty available for Royalty Tax Credit by any taxpayer except one which was an above-limit corporation on August 24, 1982 or one which is later formed by an amalgamation of two or more such corporations (an "exempt corporation"). The legislation would therefore create a new class of oil and gas property known as a restricted resource property respecting which royalties paid, other than royalties paid by an exempt corporation, are not eligible for Royalty Tax Credit. A likely consequence of this amendment will be the inclusion in the typical representations and warranties of a vendor of producing oil and gas properties that the properties are not restricted resource properties.

2. Attorney General Statutes Amendment Act, 1983[130]

A new Section 11.1 is introduced to the Arbitration Act[131] requiring that effective July 1, 1983 any application to the Court to set aside an arbitration award is to be made within 45 days of the publication of the award.

3. Chattel Security Registries Act[132]

This Act establishes a Registrar of Personal Property and provides for filing of a prescribed form of financial interest statement as the procedure for registering a personal property security. Regulations under the Act will determine in which cases financial interest statement filings are mandatory and in which cases they are optional. The Central Registry and Vehicle Registry continue under the direction of the Registrar of Personal Property.

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128. S.A. 1983, c. 2 (Bill 40).
129. *Supra* n. 123 at 160.
130. S.A. 1983, c. 18 (Bill 14).
131. R.S.A. 1980, c. A-43.
132. S.A. 1983, c. C-7.1 (Bill 27).

4. Department of Energy and Natural Resources Amendment Act, 1983[133]

In addition to establishing the Advisory Committee on Heavy Oil and Oil Sands Development, this Act expands, greatly, certain powers of the Minister. A new Section 3.1 states that except with respect to making regulations, the Minister may delegate in writing to any person any power or duty conferred or imposed on the Minister by this Act or any other Act or regulation under his administration. A replacement Section 4 authorizes the Minister to enter into agreements respecting policies, programs or other matters under his administration, specifically including agreements with the Government of Canada or a province.

5. Freehold Mineral Rights Tax Act[134]

This Act repeals and replaces the Freehold Mineral Taxation Act[135] for 1983 and subsequent years. The Freehold Mineral Taxation Act levied tax on the basis of the assessed value of remaining recoverable reserves. Although this Act is silent with respect to the basis of the new mineral rights tax and provides only for regulations to determine the basis of assessment and calculation of tax, it is understood that the tax will be based on production and will perhaps be consistent with last year's amendment to the Oil and Gas Conservation Act[136] which replaced that Act's property-based tax with an administration fee based on production. Both the Freehold Mineral Rights Tax and the Oil and Gas Conservation Act administration fee are administered by the Energy Resources Conservation Board. These two changes from a property tax to a production tax are permitted through last year's constitutional amendments, which extended the provinces' taxation powers to include indirect taxation in respect of non-renewable natural resources.[137] Similar changes are occurring in the Saskatchewan freehold taxation system where the new Freehold Oil and Gas Production Tax Act[138] and Regulations thereto replace, effective January 1, 1983, the Oil Well Income Tax Act,[139] the Road Allowances Crown Oil Act[140] and the Producing Tract Tax under the Mineral Taxation Act.[141]

6. Petroleum Marketing Amendment Act, 1983[142]

Part 3 of the Petroleum Marketing Act[143] provides for the Alberta Petroleum Marketing Commission to market the Crown lessee's share of petroleum as agent for the owners of the lessee's share. Section 21(1)(c) provides for the APMC to pay to the owners the proceeds of sale less any

133. S.A. 1983, c. 24 (Bill 32).

134. S.A. 1983, c. F-19.1 (Bill 33).

135. R.S.A. 1980, c. F-19.

136. S.A. 1982, c. 27 (Bill 19), in force effective April 1, 1982: *Supra* n. 123 at 159.

137. Constitution Act, 1867, Section 92A(4).

138. S.S. 1982-83 c. F-22.1.

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

140. R.S.S. 1978, c. R-23.

141. R.S.S. 1978, c. M-17.

142. S.A. 1983, c. 40 (Bill 49).

143. R.S.A. 1980, c. P-5.

transportation charges. This Act introduces a new Section 21.1 which introduces two new concepts. First, the APMC may discharge its obligation to pay proceeds to the owners by paying the operator shown on the APMC's records. An operator so paid becomes the agent of the owners and is obligated not to commingle these funds with the operator's own, to hold the proceeds in trust for the owners, and to pay the proceeds to the owners within 5 days of receiving them. Secondly, Section 21.1 will permit an operator, with the APMC's consent, to designate a bank or treasury branch as a financial institution to whom the APMC may make payments, whereupon the financial institution is subject to the same obligations to the owners as was the operator. This amendment will expand the security available to financial institutions since the APMC previously would not acknowledge an assignment of revenues.

7. Financial Administration Amendment Act, 1983[144]

Section 91 of the Financial Administration Act[145] presently provides that the Crown is not bound by an assignment of any debt of the Crown except where consented to by the Provincial Treasurer. This Act repeals and replaces Section 91 and introduces Section 91.1 which will expressly permit the assignment of Crown debts, owing by either the Crown or a Provincial corporation, in accordance with regulations to be made by the Provincial Treasurer. This amendment should be of particular use to persons wishing to assign Alberta Petroleum Incentive Program payments or drilling or geophysical incentive credits.

8. Surface Rights Act[146]

This Act has been introduced to replace the previous Surface Rights Act.[147] The following is a summary of some of the new provisions contained in this Act:

(a) Definitions: "Crown" is now defined to mean the Crown in right of Alberta.

(b) Surface Rights Board: Acting members now exist in addition to Board members.

(c) Application for Right of Entry: Applications must include the most recent written offer of an operator to a respondent, evidence of the respondent's refusal, and information required by regulation.

The Board may require the ERCB to supply the relevant ERCB licence, permit or approval and related information of the ERCB and the Board's order shall not be inconsistent with the licence, permit or approval.

The minimum time to obtain order is changed from:

(i) 7 days from an operator's personally serving a respondent with an application and notice of hearing; to

(ii) 14 days from the Board's serving a respondent with a notice and application.

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144. S.A. 1983, c. 29 (Bill 54).

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

146. S.A. 1983, c. S-27.1 (Bill 60).

A hearing is no longer mandatory but is in the Board's discretion.

(d) Entry Fee: Whether pursuant to a surface lease or a right of entry order, an operator entering on land must first pay to the lessor, the respondent, or the Board (if the respondent is not known) an entry fee of $500 per acre per titled unit of land. This payment is in addition to all other compensation.

(e) Prepayment of Compensation: Prior to entering upon land under a right of entry order, an operator must prepay compensation to the respondent (or to the Board where there is more than 1 respondent and the share of each respondent is not agreed) in an amount equal to 80 percent of the compensation offered in the written offer filed with the application respecting the first compensation year.

(f) Compensation Hearing: Compensation hearings are now always separate from the right of entry hearings and are held after the right of entry order is issued.

(g) Site Inspections: Respecting compensation hearings, the Board is expressly permitted to inspect sites.

(h) Determining Compensation: New in the list of considerations in determining compensation, and replacing "value of the land" are:

(i) the amount expected to be realized in an open market sale by a willing buyer to a willing seller; and

(ii) the per acre value based on the highest use of the land.

The Board may ignore the residual value of land to the owner after the operator's use has ceased.

The 80 percent prepayment of compensation is credited to the operator or refunded to the operator upon final determination of the compensation order.

The Board may order an operator to pay interest on the compensation amount at the Bank of Canada rate calculated from the date the right of entry order is made to the date of payment.

(i) Appeals: Previously, orders of the Board (except compensation orders) were stated to be non-appealable. This prohibition of appeals has been omitted from the new Act.

(j) Review of Compensation Order and Review of Surface Lease Compensation: The five year review of annual compensation which can presently be initiated by either an operator or a respondent is now the responsibility of the operator to initiate whether or not the operator is seeking a review. Failure to do so permits the Board to make a discretionary order respecting interest to be paid on adjusted compensation from the date that review was to take place.

(k) Pre-January 1, 1972 Compensation Orders and Surface Leases: Pre-1972 compensation orders and surface leases are available to be reviewed after June 1, 1985 as to annual compensation for loss of use, adverse effect on remaining land, nuisance, inconvenience and noise and thereafter a 5 year review must be initiated by the operator.

(l) Settlement of Disputes: The Board's jurisdiction to determine any dispute has been extended:

(i) from 6 months to 2 years from last date of damage, and

(ii) from $2,000 to $5,000.

(m) Recovery of Compensation: Where a respondent is paid out of the Province's General Revenue any compensation respecting which an operator is

in default under either a lease or a right of entry order, the amount now becomes a debt owing by the operator to the Crown.

(n) Costs: The Board may make regulations respecting schedules of fees and expenses.

(o) Service of Documents: Service on persons other than the Crown can be by personal service or registered mail to the last known address.

(p) Regulations: The Minister now has power to make regulations, including:

(i) required contents of surface leases;

(ii) respecting information to accompany an application for a right of entry order;

(iii) prescribing forms;

(iv) exempting operators of local distribution systems from paying entry fees or prepaying compensation.

B. ALBERTA REGULATIONS

1. Oil and Gas Conservation Amendment Regulations[148]

This amendment provides for special drilling spacing units or no drilling spacing units for an experimental scheme, upon an order of the ERCB after a notice or hearing.

2. Natural Gas Price Administration Amendment Regulation,[149] Natural Gas Pricing Agreement Amendment Regulation[150]

These amendments extend from 6 months to 12 months the time within which an application for price adjustment may be made.

3. Oil and Gas Conservation Amendment Regulation[151]

This amendment establishes the classes and rates of administration fees payable by operators of wells under the new Part II of the Act which has replaced assessment taxes. For 1982/83 the administration fee for oil and gas wells has been divided into four classes based on production rates and the fee ranges from $0 to $1000.00 per well per year.

4. Natural Gas Price Administration Amendment Regulation,[152] Natural Gas Pricing Agreement Amendment Regulation[153]

These amendments permit original buyers, which the PUB has required to pay costs of movement and metering of gas, to subsequently have these charges included in the Alberta cost of service determined by the APMC.

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147. *Supra* n. 68.
148. Alta. Reg. 267/82.
149. Alta. Reg. 309/82.
150. Alta. Reg. 310/82.
151. Alta. Reg. 337/82.
152. Alta. Reg. 344/82.
153. Alta. Reg. 345/82.

5. Security Notice Registration Amendment Regulation[154]

This amendment changes the title of the regulation to "Crown Land Registration Regulation" and changes the title of "Director" to "Crown Land Registrar". The Registrar is now required to assign a registration number to any registrable document upon receiving it and to record the registration number and date it was signed. Registration is effective when the registration number is assigned to a document.

6. Forms Amendment Regulation[155]

This regulation under the Land Titles Act[156] provides a number of new and amended prescribed forms to be used under the Land Titles Act, including a form of Transfer of Caveat.

7. Rules of Practice Amendment Regulation[157]

This amendment makes the Crown subject to the ERCB's rules of practice.

8. 1983 Drilling and Service Incentives

On May 13, 1983 the Alberta Department of Energy and Natural Resources announced a further development drilling and well servicing incentive program from May 15, 1983 to September 30, 1983 containing many of the same aspects as the 1982 programs. As well the Minister announced the continuation of the Geophysical Incentive Credits and Exploratory Drilling Incentive Credits to March 3, 1984 and amendments to the two programs which allow incentive payments to be received in cash rather than only as credits to payments due to the Crown.

C. FEDERAL LEGISLATION

In comparison to recent years there was very little federal legislation or new regulation directly affecting the oil and gas industry since the report in this paper last year.

In the 1983 Spring federal budget introduced April 19, 1983 the suspension of the incremental oil revenue tax (IORT) on conventional oil was extended to May 31, 1984 from May 31, 1983. Also a proposed amendment to the Petroleum and Gas Revenue Tax (PGRT) will permit the deduction of capital costs incurred in enhanced oil recovery projects after December 31, 1982 to defer production revenue PGRT until such projects reach a payout.

D. FEDERAL REGULATIONS

1. Canada Oil and Gas Interests Regulations[158]

These are the first regulations under the Canada Oil and Gas Act[159] and deal

154. Alta. Reg. 385/82.
155. Alta. Reg. 538/82.
156. *Supra* n. 45.
157. Alta. Reg. 60/83.
158. S.O.R./83-151.
159. S.C. 1980-81-82, c. 81.

very briefly with certain matters for which regulations are required by the Act such as, how to give a notice required by the Act, how to surrender or transfer an interest in Canada lands, how to appoint a representative or agent, and setting forth a fee schedule. More comprehensive regulations are currently being drafted.

2. Natural Gas and Gas Liquids Tax Regulations[160]

This regulation sets forth the uses and sources of marketable pipeline gas which are exempted from the Natural Gas and Gas Liquids Tax. They are:

(a) use by the producer thereof in

(i) compressors used in a field gathering system for transporting gas to a gas processing plant,

(ii) line heaters in a gas gathering system,

(iii) pilot lights in flare stacks located within a gas gathering system or gas field, or

(iv) buildings or other structures that are designed and used to house equipment described in subparagraphs (i), (ii) and (iii), or equipment related thereto; and

(b) wells

(i) that are not part of a business of producing, distributing or processing gas, and

(ii) whose production of gas does not exceed 1,000 gigajoules in a calendar year.

160. S.O.R./82-359.