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 in the field of oil and gas. 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 this industry. Because of the increasing number of statutory developments the Part of the paper dealing with new legislation and regulations has been expanded.

I. LAND TITLES

A significant portion of the oil and gas rights in the provinces of Alberta and Saskatchewan are subject to the land titles or Torrens system of recording of interests in or in respect of lands. The land titles system is applicable to patented lands in Saskatchewan and Alberta by virtue of the Land Titles Acts of those Provinces.[1] The land titles systems established by those statutes are quite similar. Both systems provide that upon registration of an interest in or in respect of lands in accordance with the appropriate statute, the registering party obtains an indefeasible title, subject only to those interests registered prior to its interest and to certain statutory exceptions.

In the past 12 months, there have been a number of judicial decisions in the provinces of Alberta and Saskatchewan pertaining to the land titles system. Those cases can be divided into two different categories. The first category deals with the validity of caveats and the second category deals with exceptions to the rule of indefeasibility of registered interests.

Those cases which deal with the validity of caveats may be divided into two sub-categories. The first sub-category deals with whether or not the interest claimed is properly capable of being caveated under the appropriate statute and the second sub-category deals with the invalidity of caveats resulting from non-compliance with the form and content requirements prescribed by the appropriate statute.

The case of *Holt Renfrew & Co., Limited* v. *Henry Singer Limited*[2] is an appeal from a decision which was reported on in this paper at last year's seminar. Thomson & Dynes were the owners of certain lands in downtown Edmonton. It had leased those lands to Holt Renfrew for a clothing store. The original Holt Renfrew lease was granted in 1950. Holt Renfrew caused a caveat to be registered whereby it claimed an interest in the lands under the 1950 lease. That lease expired and a new lease was granted to Holt Renfrew. However, Holt Renfrew neglected to file a new caveat. Any party examining the original caveat would conclude, upon reading that caveat, that the interest claimed by Holt Renfrew had

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1. R.S.A. 1980, c. L-5 and R.S.S. 1978, C. L-5.
2. Unreported (Alta. C.A.).

expired by virtue of the expiry of the 1950 lease.

Thompson & Dynes agreed to sell the lands to Pekarsky, as agent for an undisclosed principal (which was Singer). The offer to purchase, prepared by Pekarsky, was stated to be subject only to the encumbrances endorsed upon the certificate of title although Pekarsky had been provided with a copy of the new Holt Renfrew lease. Pekarsky filed a caveat in which he claimed an interest in the lands "as agent for an indisclosed principal". Thereafter, Holt Renfrew registered a caveat.

Generally, the interests of Singer would have priority over the Holt Renfrew interest because Singer's caveat was registered prior to Holt Renfrew's caveat. However, section 195 (formerly section 203) of the Alberta Land Titles Act provides for an exception to the rule of indefeasibility of title in cases of fraud.

The lower Court, as reported in last year's paper, found that there was fraud within the meaning of section 195 of the Alberta Land Titles Act because Pekarsky, and therfore his principal Singer, had knowledge of the existence of the unregistered lease and knew that Holt Renfrew's interest would be defeated if Singer completed the purchase from Thompson & Dynes. Section 195 of the Act provides that: "the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud". All five justices of the Court of Appeal rejected the lower court reasoning, each stating that knowledge of an unregistered interest coupled with the knowledge that that interest will be defeated does not constitute fraud within the meaning of section 195 of the Act. In the result, the Court of Appeal agreed and unanimously held that Singer's caveat was invalid.

Each of the five justices of the Court of Appeal gave written reasons for his decision. Mr. Justice McDermid and Mr. Justice Prowse found that there was fraud but for different reasons than those quoted in the lower court. Mr. Justice McDermid stated that Pekarsky represented to the vendors of the land that his clients would be bound by the provisions of the Holt Renfrew lease. He found that when Pekarsky discovered that his clients would not acquire the lands subject to the Holt Renfrew lease, he had a duty to advise Thompson & Dynes that the statement in his letter was no longer true. That misrepresentation constituted actual fraud.

Mr. Justice Prowse, who agreed with the judgement of Mr. Justice McDermid, stated that there was fraud within the meaning of section 195 because there was a "course of conduct calculated from beginning to end to lead the vendor's solicitor into a false sense of security as to the purchaser's intention. That conduct deprives the appellant of the benefit of section 203 of the Land Titles Act".

Mr. Justice Moir and Mr. Justice Kerans, although agreeing that Pekarsky had a duty to correct his representation to the vendors that the purchasers would be bound by the Hold Renfrew lease, found that the failure to do so could only constitute fraud if the party to whom the representation was made, namely the vendors, relied upon the representation. There were no dealings between Pekarsky and Holt Renfrew. There was no evidence that the vendors were mislead by Pekarsky. In fact, there was evidence that the vendors assumed that Holt Renfrew's interest was protected by the 1950 caveat. Although Mr. Justice Moir did not say so, it is submitted that it would be irrelevant if the vendors were

mislead by Pekarsky since it is Holt Renfrew who is claiming relief in this case.

The Court of Appeal dealt with two different attacks on Pekarsky's caveat. First, it was contended that the caveat was invalid because the name of the party claiming an interest, Pekarsky's principal, was not disclosed. Secondly, it was claimed that as the caveat was worded, it was Pekarsky, and not Singer, who claimed an interest and since Pekarsky had no interest in the lands, the caveat was invalid.

Section 131 (formerly section 137) of the Alberta Land Titles Act provides that every caveat "shall state the name and address of the person by whom or on whose behalf it is filed". All of the Court of Appeal judges except Mr. Justice Moir found that the name of the person claiming an interest under a caveat is a matter of substance required by the Act to be stated in the caveat and that to not disclose the name of such party invalidates the caveat.

Mr. Justice Moir stated that for the caveat system to work properly, the caveat must disclose an address for service. Once the address is disclosed, the caveator may be notified and may thereafter prove his claim. The addition of the person by whom or on whose behalf the caveat is filed is unnecessary to the scheme of the Act. Thus the failure to disclose the name of the principal did not invalidate the caveat. However, Mr. Justice Moir found that in the caveat in question, it was Pekarsky who claimed an interest in the land. Since Pekarsky was merely acting as agent in his dealing with the vendors, and the vendors were aware of that fact, Pekarsky had no liability to the vendors under the contract of sale, nor did he have the right to enforce the contract. Thus, Pekarsky had no interest in the contract and therefore no interest in the lands capable of being protected by way of caveat. Accordingly, the caveat was invalid.

The case of *Kirilenko* v. *Lavoie*[3] is similar to the *Holt Renfrew* case. Lavoie had agreed to sell certain grazing lands to Kirilenko. A down payment of 10% of the purchase price was made by the purchaser. The sale was to close on March 1. In February, the vendor advised the purchaser that he would not be able to vacate the grazing lands until May 1 and it was agreed that the sale would be postponed until May 1. On April 1, the vendor stated that he would not execute a transfer of land until the entire purchase price was paid to his lawyer. On April 3, the total purchase price was paid to the vendor's lawyer. On April 8, the vendor sold the lands to Sinclair. Sinclair immediately registered a caveat. On the same day, the vendor advised Kirilenko that their agreement was terminated. Kirilenko then registered a caveat.

The vendor claimed that the original sale agreement had been breached because the sale was not closed on March 1. Sinclair claimed to have priority over the interest of Kirilenko.

The Court found that the vendor had requested the extension of time to May 1 and that he could not later complain because the March 1 deadline was not honoured.

The Court also found that Sinclair's actions constituted fraud and that therefore Kirilenko's caveat had priority over Sinclair's, notwithstanding the timing of the registrations of those caveats.

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3. [1981] 5 W.W.R. 645 (Sask. Q.B.).

Mr. Justice Sirois stated at 657:

> The mere fact that the holder of an unregistered interest is 'hurt' or 'deprived of his property' by the act of a person who, with notice or knowledge of that interest, acquires and registers an adverse interest, does not affect the position of that person. That person has the statute in his favour. But he must abstain from fraud. If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered, and thus fraudulently keeping the register clear.

Sinclair's caveat had been prepared and typed by the vendor's lawyer. The vendor's lawyer had advised Sinclair's lawyer of all of the circumstances. The court stated that notice to a solicitor is actual notice to his client and therefore Sinclair must be taken as also knowing all of the circumstances. Mr. Justice Sirois stated that Sinclair's actions constituted fraud.

A clear distinction between the *Kirilenko* and *Hold Renfrew* cases is that in the former case, the vendor and the ultimate purchaser acted in concert to defeat the interests of the first purchaser. In the *Hold Renfrew* case, there was no collusion between the purchaser and the vendor.

In *Don-Del Investments Ltd.* v. *The Registrar of North Alberta Land Registration District et al*,[4] which was only recently reported, the Alberta Supreme Court considered an exception to the rule against indefeasibility of title arising out of errors made by the Registrar of Land Titles. In 1927, McLarty transferred certain lands to Smith. The transfer reserved mines and minerals but lines were drawn through the words "mines and minerals" and the word "coal" substituted therefor. A certificate of title was issued to Smith covering a fee simple interest in the lands excepting coal. The lands were transferred on numerous occasions thereafter. Don-Del acquired the lands and thereafter, the Registrar of the North Alberta Land Registration District registered a registrar's caveat against the lands claiming an interest as a result of the error in the registration made in 1927. Don-Del brought the present application to have the registrar's caveat discharged. Mr. Justice Kirby found that the Registrar had the authority to register a caveat when it appeared that an error had been made in the certificate of title, regardless of the identity of the party who might benefit from that caveat. The real issue before the Court was as to the true intent of the 1927 transfer and whether or not the alteration was made prior to registration and was authorized by the transferor. The certificate of title which issued following registration of that transfer gave effect to the transfer as amended, which would indicate that the alterations were made prior to registration. The only party who could claim that the transfer was not properly registered was McLarty. Evidence was led to indicate that McLarty lived for some time after registration of the 1927 transfer and never mentioned owning any mineral rights. There was no mention of any mineral rights in his will or his personal papers. Accordingly, Mr. Justice Kirby found that, on the balance of probabilities, the alteration to the transfer was made prior to its registration, and that Don-Del had good title to the mines and minerals in question.

It is submitted that Don-Del had good title regardless of when the alteration to the 1927 transfer was made, for he was a bona fide purchaser for value who acquired his interest relying on the accuracy of the register.

4. (1975) 15 Alta. L.R. (2d) 51.

At the time Don-Del acquired its interests, the registrar's caveat had not been filed. Since McLarty's certificate of title had been cancelled there was no earlier registered interest competing with Don-Del's interest.

Director of Soldier Settlement v. *The Registrar of the North Alberta Land Registration District et al*[5] involved an action pursuant to section 57 of the Soldier Settlement Act[6] which provides:

> From all sales and grants of land made by the Board, all mines and minerals shall be deemed to have been reserved, whether the instrument of sale or grant so specified, and as respects any contract or agreement made by it with respect to land, it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatsoever.

The Soldier Settlement Board had sold certain lands without reserving mines and minerals and, as a consequence, its certificate of title for the mines and minerals was cancelled. The Director as successor to the Board, brought the present petition against the Registrar to have the error corrected. The Alberta Court of Queen's Bench held that bringing the action by way of a petition against the Registrar was inappropriate since the true issue is between the Director and the party who made the original purchase from the Soldier Settlement Board. The Director purported to proceed under section 174 of the Alberta Land Titles Act[7] which provides for the correction by the Registrar of administrative errors. In the present case, there is a substantive issue of law which could not be decided by the Registrar and therefore the present petition was improperly framed.

There were a number of decisions in the past year dealing with the nature of an interest which can be the subject of a caveat. Two such cases are *238420 Alberta Ltd.* v. *V.I. International Holdings Ltd. et al*[8] and *Powers* v. *Walter & Walter*[9] which consider whether a right of first refusal may be protected by way of caveat. In both of those cases, the decisions of the Supreme Court of Canada in *Canadian Long Island Petroleums Ltd.* v. *Irvine Industries (Irvine Wire Products Division)*[10] and in *McFarland* v. *Hauser*[11] were considered. In both of the latter decisions, Mr. Justice Martland considered rights of first refusal clauses. In the *Canadian Long Island* case, he found that a right of first refusal is a contractual right which does not by itself create an interest in land and therefore does not offend the rule against perpetuities. In the *McFarland* v. *Hauser* case, he extended his reasoning and stated that when an offer to purchase is made which triggers the right of first refusal, then the right of first refusal is converted into an option to purchase and the holder of the right of first refusal thereupon has an equitable interest in the lands involved.

In the *V.I. International* case, the holder of the right of first refusal claimed that the lands in question had been sold without his being offered the opportunity to exercise his right of first refusal. That case involved an application under section 139 (formerly section 146) of the Land Titles Act

5. Unreported, Alta. Q.B.
6. R.S.C. 1927, c. 188.
7. *Supra* n. 1.
8. Unreported, Alta. Q.B.
9. [1981] 5 W.W.R. 169 (Sask. Q.B.).
10. [1975] 2 S.C.R. 715, [1974] 6 W.W.R. 385, 50 D.L.R. (2d) 265.
11. [1979] 1 S.C.R. 337, 7 Alta. L.R. (2d) 204, 88 D.L.R. (3d) 449.

of Alberta which is an application whereby a caveator is required to show cause why his caveat should not be removed. It is well established law that the court's function on such applications is merely to determine if there is an issue between the parties and not to adjudicate upon that issue.[12] The Court in the *V.I. International* case decided that there was an issue as to whether or not the holder of that right had been given notice of the proposed sale. Further, there was an issue as to whether or not there was fraud within the meaning of section 195 of the Land titles Act so that the caveat filed by the holder of the right of first refusal had priority over the caveat filed by the purchaser. Accordingly, the Court ordered that the holder of the right of first refusal would have twenty days within which to commence legal proceedings on its caveat. Presumably the Court would have declared the second caveat invalid if the right of first refusal wasn't caveatable.

In the *Powers* case, the right of first refusal was embodied in a lease. The lessee had registered a caveat in which it claimed an interest "as lessee under a lease agreement in writing dated . . . ". No mention was made in the caveat of the right of first refusal. The Saskatchewan Court of Appeal followed the decision of *Ruptash* v. *Zawick*[13] in which it was stated by Mr. Justice Cartwright at 356:

> The purpose of filing a caveat is to give notice of what is claimed by the caveator against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such party sees fit to file a caveat claiming one only of such rights, it appears to me that any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made.

Since there was no mention of the right of first refusal in the lessee's caveat and since the purchaser of the land had registered a caveat to protect its interest, the purchaser's interest had priority over the right of first refusal.

Lane et al v. *Trans-Alta Mortgage & Financial Services Ltd.*[14] considered a listing agreement between a real estate agent and a vendor. The listing agreement purported to charge the lands in favour of the real estate agent as security for the payment of real estate commission. It was contended that the real estate agent did not have a caveatable interest. Section 135 of the Alberta Land Titles Act provides three instances in which a person may file a caveat, which are:

(a) where a caveator claims an interest in lands;
(b) where a caveator claims an interest in a mortgage relating to that land; and
(c) where a caveator claims an interest in an encumbrance relating to that land.

"Encumbrance" is defined in the Act as meaning a charge on land created or effected for any purpose whatsoever. The Court determined that since the listing agreement expressly charged the lands for the payment of the real estate commission, the realtor was entitled to file a caveat because it was claiming an interest in an encumbrance.

The following recent decisions also deal with caveats which claim an interest in respect of real estate commissions — *Osborne Bros. Land &*

12. *Re Gaar, Scott Co. and Giguere* (1909-10) 12 W.L.R. 245.
13. [1956] S.C.R. 347.
14. (1981) 15 Alta. L.R. (2d) 193.

Property Ltd. v. *Zinuel Hamid et. al.*;[15] *Kinross Mortage Corporation*;[16] *Vincent Brown et al* v. *Century 21 Westway Real Estate Ltd.*;[17] *Capital Management Ltd.* v. *First Federal Properties et. al.*[18] and *Bowglen Enterprises Ltd.* v. *Alberta Realty Ltd.*.[19] In the *Bowglen* case, the caveat did not refer to the listing agreement which charged the land. The Court ruled that such omission did not invalidate the caveat because the offer to purchase the lands was referred to in the caveat and it, in turn, referred to the listing agreement. In any event, the caveat adequately disclosed the nature of the interest claimed.

In *M.G.M. Developments* v. *Black Rose Farms Ltd.*,[20] the Master of the Court of Queen's Bench of Alberta stated that a vendor of lands who had not received full payment could register a caveat claiming an interest pursuant to an unpaid vendor's lien.

II. SALE OF LAND

Interests in petroleum and natural gas in its natural state are generally considered to be interests in land. Thus, sale of petroleum and natural gas rights are subject to the general rules concerning sale of land, and cases dealing with sale of land are of interest to oil and gas lawyers.

"Time of essence" clauses were considered in a number of recent decisions. It is well established that if a precise time is fixed for the completion of a contract, and that contract expressly stipulates that time shall be of the essence, then a default in observing the precise time will constitute a breach of the contract *(Whittall* v. *Kour).*[21] However, the situation is not so clear when the time for performing the contract is extended, and it is not an express condition of the extension that time shall remain of the essence.

Landbank Minerals Ltd. v. *Wesgeo Enterprises Ltd. et al*[22] involved an agreement by Landbank to purchase certain petroleum and natural gas rights from the defendants. The agreement of sale specified a closing date and stated that time would be of the essence. The agreement also stated that the purchasers would have an opportunity to examine title to the oil and gas properties being sold, and that if the vendors failed to satisfy all title requirements by the closing date, then the purchaser would have the right to terminate the contract. The original closing date for the sale was August 9. On July 31, the purchaser advised the vendors of certain title defects. On August 9, the purchaser confirmed to the vendors that the closing would be postponed until August 17, or a later mutually agreeable date. Prior to August 17, all title requirements made by the purchaser had been satisfied with the exception of a request for evidence of payment of delay rental payments with respect to one parcel of land. The purchaser contended that that parcel of land was the most valuable parcel covered by the sale agreement. On August 17, the extended date for closing, the

15. Unreported (Alta. Q.B.).
16. *Id.*.
17. *Id.*.
18. *Id.*.
19. *Id.*.
20. (1981) 15 Alta.L.R. (2d) 299.
21. (1970) 71 W.W.R. 733 (B.C.C.A.).
22. [1981] 5 W.W.R. 524 (Alta. Q.B.)

vendor and the purchaser and their lawyers had a meeting. At that time, the purchaser had a cheque for the balance of the purchase price. The vendor failed to deliver satisfactory evidence of payment of the delay rental and the purchaser refused to complete the sale. Later that day, the purchaser purported to terminate the sale agreement and requested return of its deposit. On August 20, the vendors delivered proof of the payment of the delay rentals to the purchaser. The purchaser brought the present action to recover its deposit.

The issue before the Court was whether or not the purchaser had the right to terminate the contract on August 17 because the precise time for completion of the contract was not complied with or whether, as a result of "time of essence" not having been stipulated in the extension of the closing date, the closing date became August 17, or a reasonable time thereafter. The Court reviewed the existing law and concluded as follows:

> I think that where time is of the essence of an agreement and there is an extension of time for performance of an obligation under the agreement to a specified date, the effect of the extension on the essentiality of time must be determined in the context of the circumstances of the case. If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the Court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in the substitution of a later date for the one stipulated in the agreement. I do not think that in any way affects the provisions in the agreement that time is of the essence.

The Court found that there was nothing expressed or implied in the extension of the closing, waiving the time of the essence provision. Further, there was nothing in the circumstances making it unjust or inequitable for the purchaser to insist that time be of the essence. Accordingly, the Court confirmed that the sale agreement had been effectively terminated by the purchaser and ordered that its deposit be returned to it.

In the case of *Adjala Properties Ltd.* v. *Town of Sundre*,[23] the Alberta Court of Appeal held that an extension of time for completion of a contract for the erection of buildings which did not specify that time would continue to be of the essence, resulted in time ceasing to be of the essence. In the *Landbank* decision, Madame Justice Hetherington rejected the *Adjala* decision on the basis that in the *Adjala* case the Court of Appeal did not consider the Supreme Court of Canada decision in *Boque Electric of Canada Limited* v. *Crothers Manufacturing Limited.*[24] It should be noted that the decision of the Supreme Court of Canada in the *Boque Electric* case is in conflict with all other authority in Canada and England.

In *World Land Ltd.* v. *Daon Development Corporation et al*,[25] the plaintiff had agreed to purchase certain lands from the defendants. The purchaser had also agreed to commence construction of a building on the lands prior to a specified date. Time was stated to be of the essence. The vendors allowed an extension of the commencement date without specifying that time would continue to be of the essence. Mr. Justice R.C. McDonald referred to both the *Adjala* and the *Landbank* decisions and stated that he considered the *Landbank* decision to be incorrect; that the law in Canada is that an extension of time with respect to a particular installment destroys the essentiality of time with respect, at least, to that installment.

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23. Unreported (Alta. C.A.).
24. [1961] S.C.R. 108.
25. Unreported (Alta. Q.B.).

Beacon Industrial Development Corp. Ltd. v. *G.C. Farm Supply Ltd.*[26] involved an agreement for the sale of land which provided for a closing date of January 15, and also provided that time would be of the essence. The time of the essence clause was as follows:

> Time shall be of the essence hereof, and if the purchaser fails to comply with the terms of this agreement within the time limited therefor, vendor, if not in default hereunder, may elect (a) to cancel this contract . . . or (b) to complete the sale at a later date, in which event the purchaser shall on such later date, pay to the vendor interest on the purchase price at the rate of 12% per annum from the original completion date to the later completion date and, in this latter event, time shall continue to be of the essence.

The solicitor for the vendor tendered a transfer to the solicitor for the purchaser on trust conditions, one of which was that the purchaser would pay interest on the purchase price at a rate of 17% per annum from January 15, the closing date, to the date of actual payment to the vendor. The trust letter also provided that if the transfer was not tendered for registration prior to January 18, then it was to be returned to the solicitor for the vendor. Prior to January 15, the purchaser requested an extension of the closing date and the request was denied. On January 18, the purchaser's solicitor informed the vendor's solicitor that he did not have the cash required to complete the transaction and could not satisfy the trust conditions under which the transfer had been forwarded to him. On January 21, the purchaser's solicitor returned the transfer to the vendor's solicitor as requested, but, at the same time, tendered a cheque for the purchase price, including interest at 17%. The purchaser was granted specific performance. The Court found that the trust conditions imposed by the vendor's solicitors constituted an extension of the time for closing since they referred to a date after the original closing date by which the transfer must be tendered for registration and since they referred to interest accruing after the original closing date. The trust condition did not make time of the essence and the time of the essence clause contained in the sale agreement which stated that time would continue to be of the essence in the event of an extension, was not applicable because the interest rate in the trust letter was different from the interest rate in the time of the essence clause. In order for the vendor to make time again of the essence it would have been necessary to specify a reasonable new completion date in a manner that the purchaser would know he was bound by it. Since the vendor's solicitors received the purchase price on January 21, there was no unreasonable delay in completion. When time of the essence requirements are waived, and no new closing date is set, then the Court will infer that the closing is to occur within a reasonable time.

In *Schmitt* v. *Terrace Corporation (Construction) Ltd.*,[27] the agreement of sale provided for a closing on September 1 and also provided that a significant portion of the purchase price was to be raised by way of a mortgage to be obtained by the purchaser. On August 26, the vendor's solicitor submitted an executed transfer to the purchaser's solicitor on certain trust conditions. However, the letter incorrectly stated that the whole of the purchase price was to be paid on September 1, rather than allowing for a portion of it to be raised by way of a new mortgage. The trust letter also provided for interest at a rate of 16% on the purchase price from September 1 to the date of actual payment. The Court found that those

26. (1981) 123 D.L.R. (3d) 467 (Alta. Q.B.).
27. (1981) 30 A.R. 518 (Alta. Q.B.).

items did not, by themselves, alter the initial closing date of September 1. A subsequent exchange of correspondence between the solicitors concerning the new mortgage, which took place after September 1, made provision for a transfer back from the purchaser to the vendor and made other provisions regarding the new mortgage. The Court found that the vendor, by accepting a transfer back to be used in the event that the new mortgage did not proceed, clearly indicated that the September 1 closing date was extended. That being the case, time ceased to be of the essence and the purchaser was permitted a reasonable time within which to complete the transaction. The Court ordered specific performance of the contract.

The case of *Day* v. *Roach*[28] also considered a time of essence clause in an agreement for the sale of land. That agreement provided that a deposit on the purchase price would be made on January 26, and the balance of the purchase price would be paid on January 30. The time of the essence clause provided as follows:

> It is understood that time shall be of the essence hereof, and unless the balance of the cash payment is paid and a formal agreement entered into within the time mentioned to pay the balance, vendor may (at his option) cancel this agreement . . . .

The January 26 deposit was not made by the purchaser. However, on January 30, the whole amount of the purchase price was paid. The vendor contended that the sale agreement had been breached and, in accordance with the time of the essence clause, purported to cancel the agreement. The Court found that the words "unless the balance of the cash payment is paid" in the time of the essence clause referred to the payment to be made on January 30, not to the payment to be made on January 26 so that that clause did not apply to the January 26 deposit. The Court found that the payment to be made on January 26 was not an essential term of the contract and was therefore a warranty as opposed to a condition. Accordingly, the breach of that clause by the purchaser entitled the vendor only to a suit for damages and did not entitle the vendor to consider the contract to have been repudiated by the purchaser. The Court ordered specific performance.

The recent cases of *Blockstock* v. *Geamen Farms Ltd.*[29] and *Bighorn et al* v. *Adam Yewchuk Management Ltd.*[30] also considered time of the essence clauses in agreements for the sale of land.

World Land Ltd. v. *Daon Development Corporation et al*[31] involved a number of issues in addition to a consideration of a time of the essence clause. The defendants in that case had agreed to sell some land to the plaintiff, who agreed to construct a building on the lands. The agreement granted an option to the vendors to re-acquire the lands. The vendors agreed to an extension of the commencement date. The extension agreement provided that all other terms of the sale agreement were to remain unchanged. The building was not commenced by the extended deadline.

The vendor then purported to exercise their option to re-acquire the lands (even though the lands had not yet been transferred to the purchaser) and gave notice to the purchaser to take proceedings on its caveat,

28. (1981) 29 B.C.L.R. 107 (B.C.S.C.).
29. (1981) 13 Sask. R. 119 (Sask. C.A.).
30. Unreported (Alta. Q.B.).
31. *Supra*, n. 25.

following which the purchaser brought this action in which it claimed to be entitled to complete the sale agreement or, in the alternative, to return of the deposit and the interest payments which it had made to the vendors. Thereafter the building permit was obtained.

The purchaser claimed that the refusal of the city to issue the building permit was a force majeure. The force majeure clause in the sale agreement stated that the time for performance of obligations thereunder would be extended if a party was unable to meet such obligation as a result of:

> acts of God or enemies of Canada, fire or other casualty, war, disaster, riots, strikes, lockouts or other disturbances or for any other causes (other than lack of finances) beyond the control of the party affected.

The Court said that the ejusdem generis rule did not apply to the interpretation of the words "or any other causes . . . beyond the control . . . " because to do so would not give true effect to the intentions of the parties. Although the refusal of the city to issue a development permit did not fit within the items or classes of items enumerated in the force majeure clause, the Court stated that if the refusal was a matter which was beyond the control of the purchaser, it would be a force majeure. However, the delay was in fact caused by the purchaser failing to provide sufficient parking requirements in its plans which was a matter solely within its own control.

The Court decided that the vendors could not exercise their option to re-acquire the lands. The option clause stated "the option shall be irrevocable and open for exercising by the vendors for a period of 60 days commencing on the commencement date . . . ". The "commencement date" was defined as the date that construction operations were commenced. Since construction operations were never commenced, the commencement date never occurred. Therefore, the right to exercise the option never arose.

The Court also considered whether or not the purchaser was entitled to relief from forfeiting the sale agreement, notwithstanding that it had failed to pay the balance of the purchase price and commence construction operations before the dates specified inthe contract. Section 19 of the Judicature Act[32] (now section 39 of the Law of Property Act[33]) gives the Court the authority to relieve against forfeiture in agreements for the sale of land. That section reads as follows:

> The Court has jurisdiction and shall grant relief from the consequences of the breach of any covenant or the non-payment of principal or interest, by a mortgagor or purchaser in any case in which the mortgagor or purchaser remedies the breach of covenant or pays all the arrears due under the mortgage or agreement for sale . . . .

The Court stated that, in its view, the section did not allow relief to be granted when the covenant breached by the purchaser had not been remedied and the purchaser could only say that he was ready, willing and able to remedy the breach. In any event, the breach could not be properly remedied because it was not possible to commence construction by December, 1979. In the Court's view, the date was an essential provision of the contract because the construction would increase the value of lands in the area, substantial portions of which were owned by the vendors.

32. R.S.A. 1970, c. 193.
33. R.S.A. 1980, c. L-8.

This finding by the Court, although it may be *obiter* since it appears that the relief from forfeiture issue was not fully argued by the purchaser, may be of significance in respect of farmout agreements. It is likely that a farmee could seek relief from forfeiture resulting from its failure to commence drilling a well in a timely manner. If the time of the drilling is essential to the farmor because, for example, of the necessity of maintaining a lease or of drilling to a Crown sale, then relief from forfeiture might be denied the farmee.

The Court also considered whether the purchaser was entitled to recover the deposit and the interest payments which it had made. The sale agreement provided that if the purchaser breached the agreement, the vendors could cancel the contract whereupon "the purchaser shall have no right to reclaim any monies paid in respect of this agreement and the same may be retained by the vendors as liquidated damages". The law is clear that a statement in a contract as to liquidated damages will only be enforceable if the liquidated damages are a genuine pre-estimate of damages. If the statement is intended to penalize, then it will be unenforceable. The Court noted that since the termination provision would apply with respect to any breach of the contract, no matter how minor, and since the amount of money which would be forfeit would be the entire amount which had then been paid to the vendors which could be substantial, the provision could result in liquidated damages being far in excess of what could reasonably be contemplated as being the damages flowing from a particular breach. The problem with the clause is that it applied to any breach no matter how minor and applied to any amount of money previously paid to the vendors, no matter how much. Accordingly the provision respecting liquidated damages was a penalty and not a genuine pre-estimate of damages and was unenforceable.

The Court noted that if the vendors exercised their option to repurchase, the price which they would pay to the purchaser would be 90 per cent of the purchase price paid by the purchaser to the vendors. Since the option was intended to be a mechanism to allow the vendors to reacquire the lands if the purchaser did not commence construction in a timely manner, it follows that an amount equal to 10 per cent of the purchase price was intended to be a true deposit and the balance of the deposit represented an installment on the ultimate purchase price. By a "true deposit" is meant a payment made in earnest to bind the contract. That is, a payment made by the purchaser to the vendors in consideration of the vendors tying up their lands during the period between the date that the sale agreement was executed and the date that it would be concluded. It is in the nature of a payment for the granting of an option. Since the purchaser received full value for that payment, that is, the lands were tied up during that period of time, the true deposit would not be recoverable under the normal rules. However, the Court stated that it had jurisdiction to relieve from forfeiture of the true deposit if it would be unconscionable to allow the vendors to retain the deposit. The Court found that in the present case, the vendors would suffer no loss by retaining the lands since the value of the lands had increased substantially. Accordingly, the vendors were ordered to return both the deposit and the installment payment to the purchaser.

There are a number of recent decisions dealing with failure of conditions precedent contained in agreements for the sale of land. Generally,

the law in Canada in this area, has been established by the case of *Turney* v. *Zhilka*,[34] which states that if there is a true condition precedent in the contract and that condition is not satisfied, then the contract is ended regardless of a purported waiver of the condition by the party for whose benefit it appears that the condition was inserted in the contract. It is submitted that the rationale for that principle is that the Court will not make a determination that a condition precedent was inserted solely for the benefit of one party. A true condition precedent was defined in that case as being a future uncertain event, the happening of which depends entirely on the will of a third party. Thus, in *Amic Mortgage Investment Corporation* v. *Marquette Financial Services Ltd.*,[35] it was stated in an agreement for the granting of a mortgage as follows: "This commitment is subject to the prior written approval of the Federal Department of Insurance on or before the 21st day of August, 1979." The mortgagor claimed that the appraisal was for its benefit and could be waived by it. The Court rejected that contention and found that the approval was a true condition precedent which could not be waived and since the approval was not obtained within the time specified, the contract was at an end.

In *Bem Enterprises Ltd.* v. *Kemple Corporation*,[36] an agreement for the sale of land was subject to the purchaser obtaining zoning approval for a shopping center. The major tenant of the shopping center reneged on its commitment with the result that it was uneconomical for the purchaser to proceed. The purchaser claimed that since the zoning approval had not been obtained by the date specified in the agreement, it was relieved of its obligations to complete the purchase. The Court found, as a matter of fact, that the failure to obtain the zoning approval was as a consequence of the purchaser not proceeding diligently. The Court said that there was an implied obligation on the purchaser to make its best efforts to obtain the necessary approvals, which obligation had been breached by the purchaser. The Court ruled in favour of the vendor.

Hechtor v. *Thurston*[37] involved an agreement for the sale of land in which it was stated: "It is a condition of this offer that the vendor will construct a road running parallel and to the rear of the land . . . ". The vendor contended that it was unable to obtain approval to build the road from the local municipality, that the condition was a true condition precedent and that since it has not been satisfied, the contract was at an end. The Court found that the condition was in fact an obligation on the part of the vendor which had been breached.

In *McNabb* v. *Smith et al*[38] the sale of land was stated to be "subject to purchaser arranging a first mortage". The purchaser was unable to arrange the first mortgage, but negotiated a further sale of the property, the proceeds of which would be sufficient to pay the purchase price. The vendor contended that the condition was a true condition precedent which had not been satisfied so that the contract was terminated, which would have resulted in the vendor being able to make the subsequent sale

34. [1959] S.C.R. 578.
35. Unreported (Alta. Q.B.).
36. (1980) 12 B.L.R. 255.
37. (1980) 34 N.R. 181 (S.C.C.).
38. (1981) 30 B.C.L.R. 37 (B.C.S.C.).

himself. Section 49 of the British Columbia Law and Equity Act[39] provides that a condition precedent can be waived by the party for whose benefit the condition is made, and thus *Turney* v. *Zhilka*[40] is not applicable in British Columbia. Since the mortgage financing provision was inserted for the benefit of the purchaser, she had the right to waive it. In any event, the purpose of the clause was to allow the purchaser to avoid her obligation if she did not obtain the financing by the date specified. If she failed to notify the vendor that she had not obtained the financing by that date then, notwithstanding that she had obtained it, she would remain bound by the contract.

There are a number of other recent interesting cases dealing with the sale of land. These cases cannot easily be categorized. In *Mainline* v. *Chandler*,[41] the Court of Appeal of Saskatchewan stated that a provision in a lease which provided: "that the lessee and the lessor will enter into agreement for sale to purchase the aformentioned land for a consideration of $325,000 on or before December 31, 1977" was unenforceable as constituting an agreement to agree. In *Southridge Properties (1975) Ltd.* v. *Tiessen & Tiessen*,[42] the Court found that an agreement for the sale of 147 acres of land out of a quarter section, comprising 159 acres in which the exact 147 acres were not specified, was void for uncertainty. It is interesting that in that case, the Court stated that once there was an agreement in writing for the sale of some lands, it would hear parole evidence concerning the exact lands agreed upon. However, even the parole evidence did not resolve the ambiguity. The agreement also did not specify the annual payments to be made on the mortgage back to be taken by the vendor, nor the period of time that interest on the mortgage was to be calculated. The Court stated that when considering if a contract should be avoided for uncertainty, every effort should be made by the Court to find a meaning for the contract so as to make it enforceable, but that the Court could not go so far as to create an agreement on a matter to which the parties had not spoken. The Court found that since interest rates are almost always calculated on a per annum basis, that a term to that effect could be implied. Nevertheless, the contract was held to be unenforceable.

In *Morris Greenwood* v. *Brian R. Magee et. al.*,[43] a right of first refusal clause contained in a lease provided that if the lessor "proposes to accept a bona fide offer to purchase the lands", it would first offer the lands to the lessee. The lands were held by Magee as a trustee for Loblaws. Magee subsequently sold the land to another company. The ultimate purchaser and Loblaws had interlocking directors and shareholders and were closely affiliated, although neither was wholly-owned by the other, nor were they wholly-owned by the same company. The Court found that since Loblaws and the purchaser were affiliated, there was no bona fide sale and therefore the right of first refusal clause did not apply. The Court also found that the lessee knew that Magee had acquired the lands as a trustee, although it did not know the identity of the beneficiary of the

39. R.S.B.C. 1979 c. 244.
40. *Supra*, n. 34.
41. (1981) 12 Sask. R. 12 (Sask. C.A.).
42. (1980) 31 A.R. 125 (Alta. Q.B.).
43. Unreported (Ont. S.C.).

trust. It is not clear if that fact is relevant although it would not appear to be.

Nor-Val Leaseholds Ltd. et. al. v. *Altador Heights Developments Ltd. et. al.*[44] involved a claim that a deposit on the purchase price for the sale of some land in Alberta was forfeit. The sale agreement was dated October 6, 1978 and provided that a deposit was to be made on that date, that possession was to be taken on that date, and that the balance of the purchase price was to be paid one year hence. The agreement also provided that if the purchaser failed to complete: "this agreement shall become void and the deposit shall be retained by the vendor as liquidated damages and not as a penalty". The purchaser did not make the final installment on the date specified. The Court found that the agreement was an agreement for sale since possession was to pass on the date of execution. Accordingly, the correct procedure to have been followed by the vendor was forclosure proceedings under the provisions of the Judicature Act.[45]

III. FREEHOLD OIL AND GAS LEASE

The cases of *Republic Resources Limited and Joffre Oils Ltd.* v. *Ballem*[46] and *Canadian Superior Oil Ltd. et. al.* v. *Crozet Exploration Ltd.*,[47] each deal with the situation in which a lessee under a freehold oil and gas lease drilled a well through the end of the primary term of the lease and considered whether or not such drilling was sufficient to maintain the lease in effect. In the *Canadian Superior* case, the lease was held to be valid and in the *Repubic Resources* case, the lease was held to have expired. The different wording in the two leases led to the different results.

In the *Canadian Superior* case, the habendum clause of the lease provided the lease would be for a term of 5 years and:

> so long thereafter as operation, as hereinafter defined, are conducted upon the said lands . . . Whenever used in this Lease, the word 'operations' shall mean any of the following: drilling, testing, completing, re-working, re-completing, deepening, plugging back or repairing of a well in search for or in an endeavour to obtain or increase production of the leased substances or any of them, excavating a mine, production of the leased substances or any of them (whether or not in paying quantities), or operations for or incidental to any of the foregoing.

The primary term of the lease expired on July 30. On July 22, the lessee gave instructions to its engineering consultants to supervise the drilling of a well on the lands. On July 24, an access road was completed and thereafter the lessee proceeded diligently and without undue delay, to prepare the wellsite for drilling operations and moved a rig onto the wellsite on July 29. On July 30, a drilling license was obtained and on July 30 and 31 the rig was erected. On July 31 at 9:00 p.m. the well was spudded and was thereafter continuously drilled and completed as an oil well. It should be noted that the well was not actually spudded until after the end of the primary term. However, it should also be noted that the Court found that from July 22 through to completion the lessee acted as expeditiously as weather, soil and site conditions would permit. The Court reviewed the oil and gas lease and stated that the words "or incidental to

44. (1981) 31 A.R. 587 (Alta. Q.B.).
45. R.S.A. 1980, c. J-1.
46. [1982] 1 W.W.R. 692 (Alta. Q.B.).
47. Unreported (Alta. Q.B.).

any of the foregoing" used in the definition of "operations" meant "actions subordinate and in preparation toward drilling" or, alternatively, "actions preparatory to the drilling of an oil or gas well". The Court stated that in order for preparatory work to satisfy the condition that drilling operations be commenced prior to the end of the primary term, the following three tests would have to be satisfied:

1. The preparatory steps must be taken in good faith and with the intention of drilling the well.
2. The steps must be taken with reasonable diligence and dispatch, determined in accordance with good oilfield practice.
3. The preparatory steps must not be minimal.

The Court held that the steps taken by the lessee in this case were clearly preparatory to drilling an oil well, were carried out in good faith and with diligence and were substantial. Accordingly, the Court found that the lease was valid and subsisting.

In the *Republic Resources* case, a proviso to the habendum stated as follows:

> or if at any time after the expiration of the primary term production of the leased substances has ceased and the Lessee shall have commenced further drilling, working or re-working operations on the said lands within 90 days after such cessation of production, then this Lease shall remain in force so long as such operations (whether on the same well or on different wells successively) are continuously prosecuted . . . Such operations, after the expiration of the primary term, shall be deemed to be continuously prosecuted if not more than 90 days shall elapse between the completion of drilling, working or re-working operations on one well and the commencement of drilling, working or re-working operations on another well.

The primary term of the lease expired on August 27. The lessee commenced drilling activity on August 20 and on September 1 natural gas was discovered in commercial quantities. Drilling operations were completed on September 2. Mr. Justice Holmes of the Alberta Court of Queen's Bench stated that the words "if at any time after the expiration of the primary term, production of the leased substances has ceased" used in the proviso to the habendum clause quoted above, meant that that proviso was only applicable if production of leased substances commenced sometime during the primary term and the production ceased after the end of the primary term. In order to apply the proviso to the case where there was drilling through the end of the primary term, the word "after" would have had to have been "at". In the actual circumstances, no leased substances were discovered during the primary term, much less produced. Accordingly, since there was no other proviso in the habendum clause which could be relied upon to extend the lease beyond its primary term, the lease expired in accordance with its terms.

The lease in question in the *Republic Resources* case contained an option to renew. The Court stated that since the lessee failed to exercise the option within the period specified, the option expired. The lessor had no obligation to advise the lessee that the lease had expired. The fact that the lessee had notified the lessor in writing that a successful well had been drilled and that a shut-in royalty payment was tendered is irrelevant. The lessor did not mislead the lessee or misrepresent its position. The lessor merely said nothing until the option period had expired.

In the *Republic Resources* case, the lessee sought reimbursement of its costs of drilling and completing the well under the doctrine of unjust enrichment. The Alberta Court of Queen's Bench stated that in order for

the claim for restitution to be successful, there must be an express or implied request by the lessee for the drilling of the well or subsequent adoption of the benefit conferred upon the lessor by the lessee drilling the well. It is not enough for the lessee to establish that a benefit was rendered under a mistake. The lessee must also prove that such benefit was either requested or in some way freely accepted by the lessor. The lessee contended that the fairest way to deal with the situation would be to grant the lessee a lien on the production from the well until such time as it had recovered its costs. In that way, the lessor would not be obligated to reimburse the lessee, except to the extent that it received actual financial benefit from the drilling of the well. The Court rejected the lessee's contention on the basis that the lessor had neither requested the drilling of the well nor freely accepted it. Accordingly, the Court refused to reimburse the lessee for the costs of drilling the well.

In *Voyager Petroleums Ltd.* v. *Vanguard Petroleums Ltd. et. al*,[48] the question before the Court was whether or not a freehold petroleum and natural gas lease had been extended beyond its primary term by virtue of having been included in a scheme of unitization. In 1949, the owners of the lands in question granted a petroleum and natural gas lease. The lessor royalty reserved in that lease was assigned under a royalty trust agreement in 1952. The royalty trust agreement was an assignment of the lessor royalty reserved under the 1949 lease and of the lessor royalties reserved under any leases granted thereafter. The 1949 lease expired in 1959. Subsequently, Vanguard acquired ownership of the petroleum and natural gas rights. It also acquired 76.5 per cent of the gross royalty trust. In 1966, Vanguard granted a petroleum and natural gas lease to Voyager. In 1972, Voyager sought to unitize the lands covered by the lease with other lands. The unit agreement was executed by Canada Permanent but not by Vanguard. Vanguard claimed the lands and the lease were not subject to the unit because the agreement had not been signed by Vanguard. Voyager argued that Canada Permanent was Vanguard's agent for purposes of signing the unit agreement and that if Canada Permanent had not been expressly appointed as Vanguard's agent then Vanguard was estopped from denying the agency.

Voyager had sent two copies of the unit agreement to Vanguard for execution. Vanguard had forwarded those agreements to Canada Permanent under a covering letter in which Vanguard indicated that it considered the terms of the unit agreement to be fair and stated:

> We confirm our consent pursuant to clause 16 of the Royalty Trust Agreement to the execution by your company of the Unit Agreement.

Mr. Justice Stratton found that Vanguard's execution of the unit agreement was required in two capacities. First, in its capacity as a royalty owner so that royalties would be payable under the scheme set forth in the unit agreement rather than as provided in the lease, and secondly, in its capacity as lessor so that the lease would be amended as provided in the unit agreement. The Court held that in its covering letter to Canada Permanent, Vanguard consented to the execution of the unit agreement in its capacity as royalty owner which is evidenced by its reference to clause 16 of the Royalty Trust agreement. However, he could find nothing in the letter which could be construed as expressly appointing Canada

48. [1982] 2 W.W.R. 36 (Alta. Q.B.).

Permanent as Vanguard's agent in its capacity as lessor.

However, the Court held that Vanguard was estopped from exercising the rights resulting from Canada Permanent not being its agent in its capacity as lessor because of its having forwarded the unit agreement to the Canada Permanent for execution and by accepting royalties based on the formula provided in the unit agreement before the unit agreement was sent to Vanguard for execution.

Mr. Justice Stratton stated that the case was distinguishable from *Canadian Superior Oil Ltd.* v. *Hambly*[49] and from *Sohio Petroleum Co. Ltd.* v. *Weyburn Security Co. Ltd.*[50] which refused to use the doctrine of estoppel to extend freehold oil and gas leases because in those cases, the acts which allegedly gave rise to the estoppel occurred after the leases had terminated. In the *Vanguard* case, the alleged acts occurred prior to the termination of the lease.

It was further alleged by Vanguard that the unit agreement only continued the lease as to the geological zone which was unitized. The unitization agreement provided as follows:

> All operations conducted with respect to the Unitized Zone or production of Unitized Substances shall, except for the purpose of calculating payments to Royalty Owners, be deemed conclusively to be operations upon or production from all of the unitized zone in each Tract, and such operations shall continue in force and effect each Lease and any other agreement or instrument relating to the Unitized Zone or Unitized Substance as if such operations had been conducted on and a well was producing from each Tract or Spacing Unit, or portion thereof, in the Unit Area.

The petroleum and natural gas lease was stated to have a term of ten years "and so long thereafter as the leased substances or any of them are produced from or deemed to be produced from the said lands . . . ". Mr. Justice Stratton found that the unit agreement and the lease when read together did not allow for the interpretation that the lease was continued only with respect to the unitized zone but that it was continued as to all zones and formations covered by the lease.

The case of *Dooley et al v. McLean Construction Ltd. et al*,[51] involved a gravel lease but is relevant to freehold oil and gas leases since it considered the Devolution of Real Property Act.[52] Section 14(1)(a) of that Act states as follows:

> The personal representative may, from time to time, subject to the provisions of any will affecting the property, do any one of the following:
> (a) lease the real property or a part thereof for a term of not more than one year . . . .

Section 14(1)(b) of the Act permits the personal representative to execute a lease for more than one year upon obtaining confirmation from the Court. In the *Dooley* case, the executor of the estate of a deceased person granted a gravel lease having a term in excess of one year. The lease was not confirmed by the Court, nor did the beneficiaries of the estate consent to the granting of the lease. The Court found that the agreement was a combination profit a prendre and surface lease, since it granted the lessee use of 5 acres of the surface for its operations. The Court found that the executor did not have the authority to grant the lease by virtue of the provisions of the Devolution of Real Property Act and therefore the lease

49. [1970] S.C.R. 932, 74 W.W.R. 356, 12 D.L.R. (3d) 247.
50. [1971] S.C.R. 81, 74 W.W.R. 626, 13 D.L.R. (3d) 340.
51. Unreported (Alta. Q.B.).
52. R.S.A. 1980 c. D-4.

was invalid. The Court further found that the beneficiaries of the estate were not estopped from denying the validity of the lease by virtue of having accepted several rent cheques. The beneficiaries, by their acceptance of the cheques, did not do anything which could lead the lessee to believe that they had acquiesced in the executor's actions. The Court found that the lessee trespassed on the lands and was liable in damages to the beneficiaries in an amount equal to the value of the gravel which had been removed. However, the value of such gravel was to be reduced by the amount of the rent cheques which had been paid to the beneficiaries.

IV. MINES AND MINERALS

The cases grouped under this heading are concerned with hard rock mining. All of the cases deal with mining claims located in British Columbia.

Newmont Mines Ltd. v. *The Queen in Right of British Columbia et al*[53] and the appeal court decision in that case which was rendered on March 9, 1982 and is unreported, deal with an assessment of the holder of a mineral claim under three separate British Columbia taxing statutes. All three statutes assessed the occupier of lands and in all three statutes, "occupier" was defined as follows:

> (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;
>
> (b) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, license, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land.

In the trial court decision, the holder of the mineral claims in question was held not to be an 'occupier' within the meaning of the taxing statutes. The Court stated that the mineral rights holder could not enforce a claim for trespass since it did not have an exclusive right to use or occupy the land. It held that the mineral rights holder did not fall within paragraph (b) of the definition for the same reason since "an occupier" connotes exclusive rights of occupation. The decision was overruled by the British Columbia Court of Appeal. The Court of Appeal noted that the mineral rights owner actually used the surface of the lands for purposes of open pit mining, dumping waste rock, storing mine tailings, building and operating a pumping system and a bridge for tailings, building and operating a conveyor system and a bridge for carrying crushed rock, erecting and maintaining construction camp-sites, field offices and security buildings, and building and operating roads. The Court agreed that in order to maintain an action for trespass, the mineral rights owner would have to have exclusive rights of occupation. However, if the same test were used for the purposes of paragraph (b) of the definition of "occupier" then there would be no need for paragraph (b). The Court decided that occupation within the meaning of paragraph (b) must be different than that covered by (a) and concluded that it meant possession in fact, whether based on an exclusive right or a non-exclusive right of occupation or even no right at all. The Court stated that once the mineral rights owner had been granted the right to use the surface for the purposes listed above, it became a possessor in fact of such lands and therefore, was the occupier for purposes of the taxing statutes. The mineral rights owner claimed that it was exempted from payment of taxes by virtue of the Taxation

53. (1981) 124 D.L.R. (3d) 710 (B.C.S.C.).

(Rural Area) Act. Section 13(n) of that Act exempted "tunnels and similar excavations of a mine". The Court found that open-pit mining was not similar to a tunnel and therefore the mining operations in question did not fall within the exception. Section 13(r) of that Act exempted "land used . . . for control or abatement of . . . pollution". The Court of Appeal stated that the land upon which waste rock is dumped by the mineral rights owner is polluted by that rock and the land used for such waste dumps cannot therefore be considered to be land used for control or abatement of pollution. Accordingly, the mineral rights owner was properly assessable, but only to the extent of the surface of the lands which it was actually occupying, and not for the surface of the whole of the mineral claim.

The case of *Aubrey* v. *Harkor Developments Ltd. et. a.*[54] involved an application for an interim injunction. The fee simple owner of the surface and mineral rights claimed, in the main action, that the lessee of its mineral rights had breached the leases and that they had terminated. The lessee sought an interim injunction permitting it to continue its operations on the lands until the main claim had been decided. The owner claimed that the lessee would suffer no irreparable damage by discontinuing its work until the main action had been decided and that, in any event, the lessee had not obtained access to the surface of the lands from the owner as required by the terms of the leases and by the Mining (Placer) Act.[55] On the latter point, the Court found that the lessee had an implied right of access to the surface since to deny that access would be to render the leases useless. The Court was of the view that the owner's claim that the leases had been breached would probably fail and that no element of hardship would be suffered by the owner if the lessee were permitted to continue its operations but that substantial hardship would be suffered by the lessee due to the delays and to the expense that the lessee had already incurred. Accordingly, the Court granted a mandatory injunction against the owner, permitting the lessee access.

The case of *Tener et al* v. *The Queen in Right of the Province of British Columbia*[56] dealt with the right to compensation when lands to which mineral claims pertained were included in a provincial park. The mineral claims were granted in 1937, and the park was created in 1939. In 1978, the Park Act[57] was amended to prevent the working of mineral claims located in the provincial parks. At that time, the plaintiff was preparing to commence operations on the claims, and had applied to the Government for a permit to do so. The plaintiff claimed that its mineral rights had been effectively expropriated, and that it was entitled to compensation. The plaintiff admitted and the Court of Appeal confirmed that there was no common law right to damages resulting from expropriation by the Government. However, the Court of Appeal, reversing the decision of the British Columbia Supreme Court, found that the plaintiff was entitled to cmpensation under British Columbia expropriation statutes. The Court of Appeal stated as follows:

54. Unreported (B.C. Co. Ct.).
55. R.S.B.C. 1979, c. 264.
56. Unreported (B.C.C.A.).
57. S.B.C. 1973, c. 67.

> We should not strain to deprive of compensation a person whose land has been injuriously affected by an enterprise carried out by the Crown for the benefit of the public. Quite the contrary. If there is any doubt then the doubt should be resolved in favour of the existence of a right of compensation.

The Court of Appeal stated that, in interpreting the expropriation statutes, it was influenced by the fact that the interpretation it selected did not result "in a denial of compensation in a case of injurious affection". The Court of Appeal stated: "The plaintiffs have been deprived of their mineral claims by the Crown for the benefit of the general public just as surely as if the claims had been openly confiscated in one straight forward expropriation". The Court of Appeal rejected the contention by the Government that the case was analogous to a reduction in the value of lands as a result of a change in zoning by-laws and said:

> To the extent that a comparison becomes close because, for example, the zoning is changed to a public use such as a park, I would not be disposed to reach any abrupt conclusions that a right to compensation (in connection with a change in zoning) would be denied.

Mr. Justice MacDonald dissented on the basis of his interpretation of the British Columbia statues.

V. SECURITIES TRANSACTIONS

The cases discussed under this heading deal with creditors' rights. The most interesting of such cases is *Coneco Equipment* v. *Raven Rentals Oilfield Construction Ltd. et al.*[58] Esso had contracted with Raven for the provision of certain services related to a petroleum and natural gas lease granted by the Crown in right of Alberta. Coneco was a subcontractor of Raven. Raven had made an assignment of accounts receivable to the Bank of Nova Scotia, a copy of which had been served upon Esso. In accordance with that assignment, Esso made payments under its contract with Raven directly to the bank, withholding 15% of the payments in accordance with the Builders' Lien Act.[59] Coneco filed a builders lien with the Minister of Energy and Natural Resources pursuant to the Builders' Lien Act. After the lien was registered, Esso made further payments to the bank subject to the 15% withholding. Coneco brought the present action alleging that the payments made by Esso to the bank after registration of Coneco's lien formed part of the lien fund and should have been held by Esso for the benefit of Coneco.

Section 15(1) of the Builders' Lien Act provides as follows:

> In this section and in section 18 "The Lien Fund" means the percentage retained by the owner as required by this section, plus any amount payable under the contract which has not been paid by the owner under the contract in good faith prior to the registration of the lien . . . .

The Court found that Esso was an "owner" within the meaning of section 15. The Court further found that the fact that Esso had no actual notice of the lien was irrevelant since secion 15(1) referred to registration. The Court stated that there was nothing in the Builders' Lien Act to suggest that a builder's lien on a mineral interest should be treated any differently than a lien on fee simple surface interest. The owner of the mineral interest should have conducted a search at the office of the Minister of Energy and Natural Resources before making payment to the bank. The provisions of the Builders' Lien Act had priority over the assignment made to the bank notwithstanding that notice of the assignment to the

58. Unreported (Alta. Q.B.).

59. R.S.A. 1980, c. B-12.

bank was given to Esso prior to registration of the lien. Accordingly, all of the funds which had not been paid to Raven at the date of the registration of the lien formed part of the lien fund and Esso was bound to make payment of the full amount thereof to Coneco notwithstanding that Esso had previously paid such amount to the bank.

Three recent cases considered section 88 of the Bank Act.[60] (now section 176). The plaintiff in *Henfrey* v. *G. H. Singh & Sons Trucking Ltd.*[61] was a shipper and dealer in gravel products. The defendant was a trucker and a distributor of raw gravel products. The plaintiff had given an assignment to the bank under section 88 of the Bank Act. After that assignment had been made and notice of it had been registered with the Bank of Canada, the defendant, with the authorization of the plaintiff, but without the knowledge of the bank, set off certain sums which it owed to the plaintiff for the purchase of gravel products from the plaintiff against certain sums which the plaintiff owed it for trucking services. The bank claimed that under section 88 of the Bank Act, the funds owed by the defendant to the plaintiff for the gravel products had been assigned to the bank and the defendant did not have the right to set them off against sums owed to it but was required to pay such funds to the bank. The Court found that registration of a notice of the section 88 assignment at the Bank of Canada in accordance with the provisions of the Bank Act constituted notice of the security to all interested parties, including the defendant. The Court stated that the plaintiff's assets stood as security for its debts to the bank and when those assets were turned into money by their sale, the money belonged to the bank. However, although the proceeds of the sale belonged to the bank, once those proceeds were in the hands of a bona fide purchaser for value without notice they ceased to be available as security for the debt. There is nothing in the Bank Act to allow the bank to trace the funds disposed of by the debtor. If the defendant had paid the money to the debtor and the debtor had subsequently paid those funds back to the defendant, then the bank could not have claimed against the funds. The Court seemed to be influenced by the fact that, notwithstanding the section 88 assignment, the bank had permitted the debtor to continue in its business and sell its inventory in the same way as before the assignment.

In *Royal Bank of Canada* v. *Charlotte Fisheries Ltd.*,[62] a debtor had given security on its ship to the bank pursuant to section 88(4) of the Bank Act. The ship was of such a size that registration of ownership of the ship was not required under the provisions of the Canada Shipping Act,[63] although such registration was permitted. Since the ship was not so registered, the section 88 assignment was not registered either. Subsequently, the ship was registered without the bank being advised of the registration and thereafter the owner of the ship granted a first mortgage to the defendant. The first mortgage was registered. After registration of the first mortgage, the bank learned that ownership of the ship had been registered and caused the section 88 assignment to be similarly registered. An issue arose as to the priorities between the section 88

60. R.S.C. 1970, c. B-1.
61. [1982] 2 W.W.R. 177 (B.C.S.C.).
62. (1981) B.B.L.R. 13 (B.C.S.C.).
63. R.S.C. 1970, c. S-9.

assignment and the first mortgage. The Court found that the bank had taken all proper and necessary steps to perfect its security. Because it was not possible to register the section 88 security at the time that it was taken, the bank was not obligated to do so in order to perfect its security. The subsequent registration of the ship under the Canada Shipping Act and of the first mortgage could not alter the priority which the section 88 assignment had under the provisions of the Bank Act. Accordingly, the bank security had priority over the mortgage.

Canada Trust Company v. *Cenex Ltd.*[64] considered a dispute as to the priorities between a bank holding a section 88 assignment in respect of a uranium lease, and the holder of a mechanics lien in respect of work done on the uranium lease. The section 88 assignment was registered prior to the mechanics lien. Section 12 of the Mechanics' Lien Act[65] provides as follows:

> 2. Where work is done, services are rendered or materials are furnished:
>
> (a) Preparatory to;
>
> (b) In connection with; or
>
> (c) For an abandoned operation in connection with;
>
> The recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done, the services to be rendered or the material to be furnished, the lien given by subsection 1 attaches to all the estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals. . . .
>
> 3. A lien attaching to an estate or interest in mines or minerals attaches also to the minerals when severed. . . .

The Court of Appeal stated that the intention of section 12(2) was that those who provide work and material to sever and extract ore from a mine should have first claim upon it. The provisions of the Bank Act do not deprive the lien holders of their priority.

Section 88 of the Bank Act purports to give the bank priority over all interest other than those registered prior to registration of the section 88 assignment. Since the section 88 assignment in the *Cenex* case was registered prior to the mechanics lien, the Bank Act would appear to give the bank priority. Thus, the Saskatchewan Court of Appeal in the *Cenex* case, is implicitly stating that the provisions of the provincial statute have priority over the provisions of the federal statute.

The case of *Minister of Resources for Ontario* v. *Bank of Nova Scotia et al*[66] dealt with a priority dispute between the Crown in right of Ontario and the Bank of Nova Scotia. The debtor in that case held a timber license granted under the Crown Timber Act.[67] The debtor had made a Section 88 assignment as well as an assignment of book debts. The debtor sold the logs and related materials acquired by it pursuant to the license. The present dispute concerned entitlement to the proceeds from such sale. Section 19 of the Crown Timber Act provides that all Crown charges are a lien and charge upon timber cut by a licensee. Section 22 of that Act, states, in part, as follows:

> . . . where such timber or product has been converted into cash that has not been distributed, the Minister may give to the sheriff, bailiff, assignee, liquidator or trustee in possession of such timber or product or cash, notice of the amount due or owing under such lien and charge (namely, the lien

64. [1982] 2 W.W.R. 361 (Sask. C.A.).
65. R.S.S. 1978, c. M-7.
66. (1980) 29 O.R. (2d) 411 (Ont. S.C.).
67. R.S.O. 1970, c. 102.

> provided for in section 19), and thereupon the sheriff, bailee, assignee, liquidator or trustee shall pay the amount so due or owning to the Treasurer of Ontario in preference to and in priority over all other fees, charges, liens or claims whatsoever.

In the present case, the timber was sold by the debtor and not by a sheriff, bailiff, etc. Accordingly, section 22 did not apply. Therefore, upon sale of the timber, the Crown lien was extinguished so that the Section 88 assignment had priority over the Province's claim.

VI. CONTRACTS

The cases discussed under this heading deal with the interpretation of contracts. It is a trite but true statement of the law that contracts are to be interpreted so as to give effect to the intention of the parties to the contract. Certain general rules have been formulated by the Courts to assist in determining that intention. The cases discussed below apply such rules.

TransCanada Pipelines Ltd. v. *Northern & Central Gas Corporation Ltd.*[68] concerns an interpretation of a force majeure clause in a gas sale contract. The contract provided for the sale of natural gas by TransCanada to Northern & Central in Ontario. The gas sale contract provided that Northern would pay a "demand charge" for the amount of gas that TransCanada was obligated to supply on a daily basis to Northern & Central regardless of whether or not that volume of gas was actually requested by Northern & Central. In addition, Northern & Central paid TransCanada a commodity charge for the gas actually delivered to it. Northern & Central entered into contracts for the sale of the gas which it purchased from TransCanada. Strikes occurred at the plants of three of Northern & Central's customers and an explosion occurred at the plant of a fourth. Northern & Central contended that it was relieved from its obligation to pay the demand charge to TransCanada because the strikes and explosion constituted force majeure.

There was a force majeure clause in the sale agreement between TransCanada and Northern & Central which read, in part, as follows:

> In the event of either Buyer or Seller being rendered unable, wholly or in part, by force majeure to perform or comply with any obligation or condition hereof . . . such party shall give notice . . . and the obligations of the party giving such notice . . . so far as they are affected by such force majeure, shall be suspended . . . the term "force majeure" as used herein shall mean . . . strikes . . . explosions . . . any act or omission (including failure to deliver gas) of a supplier of gas to, or a transporter of gas to or for, Seller which is excused by an event or occurrence of the character herein defined as constituting force majeure . . . and any other similar cause not within the control of the party claiming suspension. . . .

Section 58 of the National Energy Board Act[69] provides that any contract between TransCanada and its customers must be approved by the National Energy Board. Northern & Central intervened at the rate hearings at which TransCanada sought approval of its contract with Northern & Central. At those hearings, Northern & Central submitted that a failure of a Northern & Central customer to take gas should constitute a force majeure for purposes of the contract. The National Energy Board did not acceed to that submission.

In the present case, the Ontario Supreme Court found that the strikes and explosion affecting Northern & Central's customers did not constitute a force majeure within the meaning of the contract. The Court

68. Unreported (Ont. S.C.).
69. R.S.C. 1970, c. N-6.

noted that, as a general rule, when a contract has been reduced to writing, extrinsic evidence is not admissible to add, vary, subtract from or contradict the terms of the document. However, parole evidence is admissible for purposes of interpreting and giving meaning to a contractual term contained in the written agreement. The Court stated that the force majeure clause in question is ambiguous and that it was entitled to inquire beyond the language of the contract so as to interpret its meaning. It is submitted by the writers that the force majeure clause in question is not ambiguous and that there is no question that the events complained of do not constitute a force majeure. Nevertheless, the Court, on the basis of the ambiguity which it perceived, considered the evidence of the proceedings before the National Energy Board. The Court found that the submission made by Northern & Central which was not accepted by the National Energy Board was strong evidence that a failure by a Northern & Central customer to take delivery of gas was not a force majeure. Further, the express provision in the contract that a failure of a TransCanada supplier to deliver gas is a force majeure indicates that the parties considered the question and decided not to provide that a failure of a Northern & Central customer to take delivery would be a force majeure. Northern & Central's claim could not fall within the words "any other similar causes" in the force majeure clause because those words must be construed in accordance with the ejusdem generis rule and did not enlarge the scope of the force majeure clause. In any event, the strikes and the explosion did not prevent Northern & Central from paying the demand charges. In the Court's view, the force majeure clause only excuses a party from its primary obligations under the agreement. In the Court's view, those obligations were to deliver and take gas. The obligation to pay demand charges is not a primary obligation of Northern & Central and not one which should be excused by the force majeure unless that force majeure prevented actual payment.

There is also a discussion of a force majeure clause in *World Land Ltd.* v. *Daon Development Corporation et al*,[70] which is discussed in this paper under Sale of Land.

Great Plains Development Company of Canada Ltd. v. *Hidrogas Ltd.*[71] dealt with a dispute concerning an agreement to sell natural gas liquids. In 1973, the appellant had agreed to sell propane and butane to the respondent. The sale agreement was terminable by either party upon sixty days written notice prior to March 31 of any year. The sale agreement provided for fixed prices per gallon. The contract was dated April 1, 1973 and had a two year term. Shortly after the contract was signed, it became obvious that the market prices for propane and butane were rapidly increasing and that the seller would terminate the sale agreement as soon as possible. On September 7, 1973, the buyer wrote to the seller voluntarily offering to increase its prices "on the understanding that we will be able to renegotiate a new contract for the contract year beginning April 1, 1974, based on economic value at that time". That letter was never accepted by the seller. However, thereafter the seller invoiced the buyer at the higher prices quoted in the letter, the buyer paid such higher prices and the seller accepted the payments. On January, 30, 1974, the seller purported

70. *Supra* n. 25.

71. [1982] 1 W.W.R. 1 (Alta. C.A.).

to terminate the sale contract effective March 31, 1974.

The buyer contended that the letter agreement was a binding contract to enter into a new agreement effective April 1, 1974. The buyer further contended that the notice of termination was not valid because only fifty-nine days notice was given. In the alternative, the buyer argued that if the notice was valid and if the letter agreement was not a binding contract then it had overpaid the seller for the products which it paid for on the basis of the increased prices and was entitled to a refund.

The seller contended that the letter agreement was not a binding contract because it had not executed it and, in any event, it was void for uncertainty as it did not specify a price. The seller contended that the term "economic value" was too vague to be enforceable.

The Court of Appeal found that the seller's invoicing at the increased rates and its acceptance of the higher payments was an adoption by the seller of the terms of the letter. The Court of Appeal found that the term "economic value" meant fair market value at the date specified in the letter, namely April 1, 1974. It rejected the contention by the seller that that phrase could also mean a "net back price" whereby the buyer and seller would share the profits from the ultimate sale by the buyer. Thus, there was a binding agreement for the continuation of the sale contract through the 1974-1975 year on the basis of the fair market value of the substances being sold at April 1, 1974.

The Court of Appeal found that the letter agreement was binding on the buyer as there was consideration flowing from the seller, being a right of first refusal whereby the seller would offer to sell the products to the buyer for their economic value from April 1, 1974 to March 31, 1975.

Finally the Court of Appeal found that the notice of termination was ineffective because it consisted of fifty-nine days and not sixty days as provided in the agreement.

Cusac Industries Ltd. v. *Plaza Resources Corp.*[72] involved an interpretation of a joint venture agreement for the exploitation of certain mining claims. The joint venture agreement was a formal, lengthy document prepared with the assistance of legal counsel. The defendant contended that the joint venture agreement was not enforceable because the parties were not ad idem with respect to it or, in the alternative, that the joint venture agreement did not embody the whole of the agreement made by the parties. The agreement contained a provision whereby all prior agreements between the parties were merged into the formal written agreement.

On the first point, the Court stated that it would be very difficult to prove that the parties were not ad idem in view of the length and comprehensiveness of the written document, the fact that each party had legal advice in its preparation, and the evidence that both parties read the document thoroughly prior to executing it. The Court further noted the heavy burden on the defendant to show that an apparently complete agreement was not in fact complete, especially in view of the express provision in the agreement that it constituted the entire agreement made between the parties.

In order to determine the true intention of the parties with respect to

72. Unreported (B.C.S.C.).

certain language in the agreement which was ambiguous the Court looked to the conduct of the parties during the period of time when they carried out the terms of the joint venture, since the parties would have been acting in accordance with the intent of the agreement until such time as the dispute between them arose.

Fort Norman Explorations Inc. v. *Beltree Holdings Ltd.*[73] involved the applicability of a Canadian Association of Petroleum Landmen ("CAPL") operating procedure. Fort Norman was a farmee under a farmout agreement requiring the drilling of an earning well in the North West Territories. Fort Norman and Beltree entered into an agreement whereby Beltree agreed to pay a portion of the costs of drilling the well and would thereby earn a portion of the interest which Fort Norman would earn. That agreement was a letter agreement comprising three short paragraphs. The agreement provided that Beltree would be bound by the terms of the farmout agreement. There was a CAPL operating procedure attached to the farmout agreement. There was no reference to an operating procedure in the letter agreement between Fort Norman and Beltree. Fort Norman entered into a similar agreement with another party whereby the other party agreed to participate in the drilling of the earning well. That agreement had a CAPL operating procedure attached to it, and provided that such operating procedure would apply as between Fort Norman and such other party insofar as the drilling of the earning well was concerned. The CAPL operating procedure provided that the operator thereunder would not incur expenditures in excess of $10,000.00 without the approval of the non-operators. The operating procedure contemplated such approval being given by acceptance of an authorization for expenditure ("AFE"). Fort Norman submitted an invoice, but not an AFE, to Beltree in respect of the anticipated cost of drilling the earning well prior to those costs being incurred. Beltree paid its share of such invoice but not of subsequent invoices. Beltree contended that the operating procedure was applicable to the relationship between itself and Fort Norman insofar as the drilling of the earning well was concerned. Since Fort Norman did not obtain the approval of Beltree prior to incurring expenditures in respect of the well, Beltree was not obligated to pay any share of such costs. The Court found that there was nothing in the letter agreement incorporating the terms of the operating procedure. The farmout agreement provided that the operating procedure attached to it would not be applicable until after the earning well was drilled. Accordingly, the acceptance by Beltree of the terms of the farmout agreement did not make the operating procedure attached to it applicable to the drilling of the well. The agreement between Fort Norman and the other party in which the operating procedure was made applicable was irrelevant. The Court rejected Fort Norman's contention that the letter agreement did not contain the entire agreement reached between the parties. The Court stated that, as a general rule, where parties have embodied the terms of their contract in a written document, verbal evidence will not be allowed to be given to add to or subtract from or in any manner vary or qualify that written contract. Although extrinsic evidence may be admitted to show that the written contract does not express the whole agreement between the parties, a heavy burden rests upon the party

73. Unreported (Ont. C.A.).

alleging that a seemingly complete instrument is incomplete. The letter agreement stated that Beltree would pay 10% of the costs of the well. The Court stated that the provision was clear and complete and Beltree was obligated to pay its share of such costs.

In *Titan Landco Inc.* v. *WIS Development Corp. et al*[74] the following clause of an agreement was an issue:

> If default is made in the payment of any installment of purchase money or interest or of any taxes, rates or assessments rated or charged against the said lands, or if the Purchaser is otherwise in default hereunder and such default shall continue for a period of thirty days after notice thereof in writing has been given by the Vendor to the Purchaser, the whole of the balance of principal and interest then remaining unpaid shall forthwith become due and payable.

There was a default made in payment of an installment of the purchase price and the question before the Courts was whether or not the thirty day notice period applied to such a default or only apply to the defaults included in the words "if the Purchaser is otherwise in default hereunder".

The Court interpreted the contract in accordance with its plain and grammatical meaning. The presence of a comma after the words "said lands" and after the word "Purchaser" and the use of the word "and" show that all of the words between the commas constituted a separate phrase from the first part of the sentence so that the thirty day notice period did not apply to the default in payment of the installment on the purchase price.

In *Re Petrofina Canada Inc. and the Queen in right of Ontario*,[75] a provision in a service station lease provided that the lessee would pay to the lessor a certain percentage of its gross annual revenue. The lease provided that "gross revenue shall not include the amount of any [tax] required to be collected by the Lessee pursuant to the Gasoline Tax Act, the Motor Vehicle Fuel Tax Act, the Retail Sales Tax Act or any other taxing act". The lessee was required to pay an excise tax of $0.10 per gallon under the Excise Tax Act.[76] The three taxing statutes referred to in the lease are Ontario provincial statutes while the Excise Tax Act is a federal act. The three statutes specifically named in the lease imposed direct taxes upon the party to whom the gasoline was sold. These taxes were collected by the lessee as agent for the Crown. The Excise Tax Act imposed an indirect tax on the lessee itself. However, the Court found as a fact that the federal Parliament intended that the tax would be passed on to the consumer by an addition to the price charged by the lessee so the effect of the tax was the same as with respect to the statutes specifically named in the lease. Notwithstanding that the Excise Tax Act was not in precisely the same class as the three statutes named in the lease, the Court found that the parties to the lease intended that any tax which the taxing authorities contemplated would be passed on to the ultimate consumer by increasing the amount paid by the consumer to the lessee ought to be deducted when calculating gross revenue and accordingly found in favour of the lessee.

Djukastein v. *Warville*[77] involved a lease of a mining claim. Paragraph 1 of the lease provided as follows:

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74. (1981) 28 B.C.L.R. 143 (B.C.S.C.).
75. (1981) 33 O.R. 417 (Ont. S.C.).
76. R.S.C. 1970, c. E-13.
77. (1981) 28 B.C.L.R. 301 (B.C.C.A.).

> . . . the rights, powers and privileges hereby granted shall continue for a term of one year from the date of this agreement . . . Should the Landlord desire at the expiration of the term hereby granted to lease the mining lands for a further period, the Landlord agrees to afford the Tenant the first opportunity of leasing them, subject to the conditions set out in paragraph 12 of this agreement.

Paragraph 10 of the lease provided:

> This Agreement shall be renewed automatically for a further term of one year from year to year. . . .

Paragraph 12 of the lease was a time of the essence clause. There was a discrepancy between paragraphs 1 and 10. The Court stated that if different parts of an agreement are inconsistent, effect should be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the whole instrument. The old rule was that the first paragraph in the agreement was binding and the subsequent inconsistent paragraph was invalid. However, that rule is no longer applicable. The reference in the first paragraph of the agreement to clause 12 was clearly inappropriate. The Court found that the draftsman of the lease had ineptly utilized a precedent. He found that, on a reading of the lease as a whole, it was intended to be automatically renewed unless the tenant was in default, and, accordingly, ruled that paragraph 10 had priority over paragraph 1.

Rockland Industries Inc. v. *Amerada Minerals Corporation of Canada Ltd.*[78] is an appeal of a decision of the Alberta Court of Appeal dealing with agency law. In issue was a contract for the purchase of sulphur by Amerada from Rockland. Amerada contended that it was not bound by the contract because the individual who entered into the agreement on its behalf did not have the opportunity to do so. The agreement was negotiated by Amerada's representative who was responsible for purchases and sales of petrochemicals and specialty products including sulphur, for Amerada in Canada and in the United States. The purported contract was negotiated during August and early September, 1974. On September 3, the employee of Amerada was advised by his superiors that he did not have the authority to enter into the contract and that it would require the approval of his superiors. The employee executed the agreement on September 5. The Court found that prior to September 3, the Amerada representative had been authorized by Amerada to enter into contracts for the purchase of sulphur but that that authority was revoked on September 3. The Supreme Court of Canada stated that if the agreement had been entered into prior to the revocation of the agent's authority then it would be binding upon its principal regardless of any representations made by the agent or Amerada to Rockland and regardless of whether Rockland knew the agent was acting as agent for Amerada because the agent then had the actual authority to bind Amerada. Although the agent's actual authority was revoked on September 3, the Supreme Court of Canada found that the contract was binding because the agent had ostensible or apparent authority. That finding was based upon an implied representation made by Amerada to Rockland prior to September 3 that the agent had authority to bind Amerada and the fact that Amerada did not communicate the revocation of the agent's authority to Rockland. It is important to note that the only representation made to Rockland was that made by the agent himself. It

78. (1980) 11 B.L.R. 29 (S.C.C.).

may be argued that because the representation was made at a time when the agent had actual authority to bind Amerada it has the same effect as a representation made by Amerada. In the alternative, and preferably, it may be argued that since the agent had a position with Amerada which a reasonable person dealing with him would have assumed gave him the authority to bind Amerada and since Amerada knew that he had been dealing with Rockland, Amerada made an implied representation of authority to Rockland. In any event, Mr. Justice Martland stated at 42:

> Surely there can be no stronger instance of representing an agent as having permission to act in the conduct of the principal's business with other persons than by permitting an agent to negotiate who is clothed with actual authority so to do.

He stated at 41:

> In view of the fact that Kurtz had been clothed with actual authority up to September 3, it is my opinion that the respondent should have notified the appellant of the limitation on the authority of Kurtz before the deal was made.

Nevertheless, there is no evidence that Rockland had any dealings with any representatives of Amerada other than the agent so that any representations made by Amerada to Rockland must have been made by its agent. It is submitted that the decision is a fair one, although it strains the precise rules of agency to some extent.

In *Beaufort Realties (1964) Inc. et al* v. *Chomedey Aluminum Co. Ltd.*[79], the Supreme Court of Canada stated that there is no rule of law that a fundamental breach of a contract going to the contract's root eliminates the effects of exclusionary clauses contained in the contract. The question as to whether an exclusionary clause is applicable depends upon a true construction of the contract and upon the intention of the parties as determined therefrom.

VII. SURFACE RIGHTS

The bulk of the recent decisions dealing with surface rights pertain to hearings of the Surface Rights Board held under the Surface Rights Act.[80] That Act establishes the Surface Rights Board which holds hearings on compensation to be paid to surface rights owners for the taking of their land for use in connection with the oil and gas industry. The Act also allows for appeals from decisions of the Surface Rights Board to the Alberta Court of Queen's Bench. Although the Act provides that such appeals are to be trials *de novo*, it is established law that the decisions of the Surface Rights Board should not be overruled unless there is cogent evidence for doing so since the members of the Surface Rights Board have a great deal of expertise in evaluating the damages suffered by a surface rights owner, both by training and by their experience in sitting on the Board — *Caswell* v. *Alexandra Petroleums Ltd.*[81] and *Lamb* v. *Canadian Reserve Oil & Gas Ltd.*[82]

In *Esso Resources Canada Limited* v. *North Edmonton Gas Co-op Ltd.*,[83] the Alberta Court of Appeal reversed a decision of the Alberta Court of Queen's Bench and reinstated the findings of the Surface Rights

79. (1980) 13 B.L.R. 119 (S.C.C.).
80. R.S.A. 1980, c. S-27.
81. [1972] 3 W.W.R. 706, 2 L.C.R. 229, 26 D.L.R. (3d) (Alta. C.A.).
82. [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 (S.C.C.).
83. Unreported (Alta. C.A.).

Board. In that case, there was evidence before the Alberta Court of Queen's Bench which was not before the Surface Rights Board concerning crop production averages for the district in which the lands in question were located, which information was obtained from the Alberta Crop and Hail Insurance Corporation. Notwithstanding the new evidence, the Court of Appeal overruled the Court of Queen's Bench and reinstated the findings of the Surface Rights Board. Mr. Justice McClung stated:

> While such evidence may be admissible at the appellate stage, its unveiling at that time is not in keeping with the legislative objective of the Surface Rights Act *(supra)*, that is a summary proceeding determinative of the issue of compensation subject only to the appeal provided by Section 24 of the Act. Awards may be varied by reason of such evidence but the appellate judge should be clearly mindful that an appellant accepts the burden of proving that the Board's award was demonstrably wrong and that the award itself earns substantial evidentiary weight. Evidence which is not presented at the first opportunity and from a convenient source should be approached with caution. The ends of the Surface Rights Act *(supra)* are not promoted by inverting the Board's assessment into a mere stalking horse or provisional inquiry which lends itself to easy adjustment under the guise of the statutory appeal.

In *Chieftain Development Co. Ltd.* v. *Lachowich*,[84] Mr. Justice Cormack of the Court of Queen's Bench stated that when the Surface Rights Board has failed to provide written reasons for its decision, then the onus on an appealing party to show that the decision of the Surface Rights Board was incorrect is reduced.

In *Waldron Grazing Co-Operative Ltd.* v. *Dome Petroleum Limited*,[85] Mr. Justice Egbert referred to the Caswell case (supra) and the Lamb case (supra), but also noted the decisions of *Hanen* v. *Imperial Oil Enterprises Ltd.*[86] and *Kaatiala et. al.* v. *J. N. Huber Corporation*[87] and adopted the language in the *Hanen* case at 213 where it was said:

> . . . if the evidence before me is in fact different evidence than was heard by the Board or evidence that was not taken into consideration by the Board, and is cogent evidence, then there is a basis on which an appeal might be allowed.

Mr. Justice Prowse in *Dome Petroleum Limited* v. *Nikkel et. al.*[88] considered a suggestion that the surface owner be penalized by way of costs for calling evidence before the Court of Queen's Bench which he failed to call before the Surface Rights Board. Although Mr. Justice Prowse refused to do so in that case, he did say that in a proper case such a procedure might be appropriate. It is submitted that that approach is preferable to the approach suggested by the words of Mr. Justice McClung in the *Esso Resources Canada Limited* case.

In *NOVA, an Alberta Corporation* v. *Willfarms Ltd.*,[89] NOVA sought a right of entry order for purposes of looping or twinning an existing pipeline. The right of entry order was sought across lands for which NOVA had already obtained a right of entry order for which it had previously paid compensation. The Court of Appeal stated that the issue before it was the determination of the reduction caused by the new taking in the value of the residual rights left to the surface owner after the first right of entry order was made. The Court of Appeal rejected the contention that the second taking was permitted by the first right of entry order

84. (1981) 32 A.R. 449.
85. Unreported (Alta. Q.B.).
86. (1980) 19 A.R. 208 (Alta. Q.B.).
87. Unreported (Alta. Q.B.).
88. Unreported (Alta. Q.B.).
89. Unreported (Alta. C.A.).

because the wording of the first order referred to "a" pipeline and because the first order did not take away the surface owner's right to resist a trespass by a second line of pipe. In determining the reduction in value of the surface owner's residual interests in the lands, the Court of Appeal noted that the new right of entry order was required for purposes of looping or twinning the existing pipeline. Thus, it was reasonable to assume that the first right of entry order would expire, at the time NOVA ceased to use the first pipeline and that NOVA would cease to use the second pipeline at the same time. The Court held that since the second right of entry order did not expropriate any land in addition to that taken by the first right of entry order, and since the second right of entry order would expire at the same time as the first right of entry order, there was no reduction in the value of the residual rights of the surface rights owner and a token award was appropriate.

In the *Chieftain Development* case,[90] the Alberta Court of Queen's Bench also referred to the residual rights of the surface owner. In that case, Mr. Justice Cormack stated that for purposes of determining the "value" of land for purposes of the Surface Rights Act, expropriation cases were not wholly applicable since in expropriation cases, the land taken was taken forever whereas in the Surface Rights cases, the surface rights owner would recover the use of his land when the purposes for which the land was taken had been completed. Thus, according to Mr. Justice Cormack, in determining the "value" of land for purposes of the Surface Rights Act, the fair market value of the fee simple interest in the land should first be determined and there should be deducted from that amount the value of the residual interest retained by the owner. That approach was also used in *Foothills Pipelines (Alta.) Ltd.* v. *Dwaye B. Berezowski Professional Corporation.*[91]

In *Canadian Hunter Exploration Ltd.* v. *Her Majesty the Queen in right of Alberta and Dixson*,[92] Mr. Justice Hope stated that the surface owner has a duty to mitigate the damages he suffers upon the taking of his land pursuant to a right of entry order. In that case and in the *Dome* v. *Nikkel*[93] case, the Court noted and sustained the finding by the Surface Rights Board that the surface owner would have the right to come back to the Surface Rights Board for further compensation arising from future events. In the *Nikkel* case, the surface owner had requested compensation for interference with a planned irrigation scheme. It was contended that because of the taking of a portion of his lands, it would be more expensive for him to irrigate the balance of his lands. The Surface Rights Board could not ascertain with any certainty that the irrigation system would be implemented or that it would be adversely affected. Accordingly, the Surface Rights Board reserved to the surface owner the right to come back to the Board for further compensation if in fact it implemented the irrigation scheme. In the *Dixson* case, the Board had allowed damages on the basis that the pipeline for which the right of entry order was being granted would serve producing gas wells along the right of way and made its calculation of loss on the basis of the normal life of the wells. However,

90. *Supra* n. 84.
91. Unreported (Alta. Q.B.).
92. Unreported (Alta. C.A.).
93. *Supra* n. 88.

there was no evidence to indicate when, or for that matter if, there ever would be a pipeline installed. The Court of Queen's Bench stated that the Board erred in trying to assess the damages because all of the facts could not be ascertained. The Court stated that the Board should have reserved to Dixson the right to seek additional compensation as the Board had done in that case in connection with the compensation for the damages resulting from the pipeline construction work.

In *Dome Petroleum Limited* v. *Alaskan Holdings Ltd. et. al.*,[94] the land being taken was within the Sherwood Park West Restricted Development Area in which development was restricted. Dome contended that that fact diminished the value of the land. Mr. Justice O'Byrne noted that there was no provision in the Surface Rights Act which expressly provided that in determining the value of lands, consideration should be taken of zoning restrictions. He did note that there was such a provision in the Expropriation Act.[95] He stated that "The re-zoning and expropriating authorities need not be the same in order to ignore decreases in the value of the land caused by zoning restrictions. However, some link must be found between the two bodies. This link could be in the nature of a common scheme; or the creation and execution of a concept; or a finding that the re-zoning was merely a step in the expropriation procedure or an attempt to control future development, though without contemplating immediate expropriation". He found that there was no link between the restriction on development imposed by the lands being included in a restricted development area and the taking of the land under the Surface Rights Act. Therefore the restriction ought to be taken into account in determining compensation.

In the *Berezowski* case[96] the Court refused to take account of a possible subdivision of the lands because it did not appear probable that the municipal planning authority would allow the lands to be subdivided and, in any event, there was no evidence that the surface owner would suffer any damage as a result of the taking if the lands were subdivided.

The *Nikkel* case,[97] the *Chieftain Development*[98] case, and *Whitehouse and Whitehouse* v. *Sun Oil Company Ltd.*[99] dealt with the taking of a tract of farm land in the middle of the farm. The Court noted that the loss suffered by the surface owner in that situation is greater than if the lands had been located in the corner of the farm since it is more difficult to cultivate around the perimeter of a four cornered area because of the necessity of taking a wide swing. The taking of the wide swing results in some loss of lands under cultivation, causes the farmer to spend more time in cultivating and creates wear and tear on the farmer's equipment.

In the *Waldron Grazing* case,[100] the Court upheld the practise of the Surface Rights Board in awarding a lump sum payment rather than annual compensation for the loss of grass for grazing purposes. The Court supported the approach of the Surface Rights Board in not taking into ac-

94. Unreported(Alta. C.A.).
95. R.S.A. 1980, c. E-16.
96. *Supra* n. 91.
97. *Supra* n. 88.
98. *Supra* n. 84.
99. Unreported (Alta. Q.B.).
100. *Supra* n. 85.

count inflation, and in discounting future net revenues to a present value at a rate of 10 per cent per annum.

In *Palley et. al.* v. *Sulpetro of Canada Ltd.*,[101] the Court heard an appeal from the compensation awarded by the Surface Rights Board of Alberta and an appeal from the award of the Surface Reclamation Board. The Court noted that the Reclamation Board had no jurisdiction to grant compensation but could only direct procedures to be taken for the reclamation of land. However, the Court stated that in the circumstances, it would be difficult for Sulpetro to proceed any further to reclaim the land and increased the compensation awarded under the Surface Rights Act to allow for the fact that the lands had not been completely reclaimed when the well in question had been abandoned. Although this may be a fair way of proceeding, it is suggested that it is not within the framework of the Surface Rights Act.

Re Interprovincial Pipeline and Lewington[102] considered an appeal from an arbitration under the Railway Act,[103] in respect of compensation for land seized for a pipeline pursuant to the National Energy Board Act.[104] The Ontario Court of Appeal stated that the arbitrator appointed under the Railway Act was entitled to determine compensation in respect of temporary working rights and also the damages consequent to lands contiguous to those seized for the pipeline. The Court also noted that the case was not one of permanent expropriation and stated that account should be taken of residual rights. The Court also concluded that it was appropriate for the arbitrator to admit evidence of an expert who had examined lands in the area of those being seized but who had not examined the lands being taken. Thus, the approach taken by the arbitrator in such arbitration is roughly similar to that taken by the Surface Rights Board of Alberta. The *Berezowski* case involved an arbitration under the same statutes and the Alberta Court of Queen's Bench, which acted as arbitrator, approached the determination of compensation in roughly the same manner as the Surface Rights Board.

Norman Dragger v. *The Richfield Oil Corporation et. al.*[105] considered the provisions of a surface lease, as opposed to a right of entry order granted by the Surface Rights Board. The lease provided, in part, as follows:

> The Lessor, for the purposes and at the rental hereinafter set forth, DOTH HEREBY LEASE to the Lessee all and singular . . . to be held by the Lessee as a tenant . . . for any or all of the Lessee's drilling and/or production operations . . .
>
> AND THE LESSOR doth also hereby give and grant unto the Lessee the right . . . to lay down, construct, maintain, inspect, remove, replace, reconstruct and repair roadways, telephone and telegraph lines, pipes or pipelines necessary or incidental to all the operations whatsoever of the Lessee . . . .

The lessor contended that the lessee did not have the right to maintain oil wells, access roads and other works and claimed damages for trespass. The lessor submitted that the lessee only had the right to establish roadways, telephone and telegraph lines, pipes and pipelines, but not oil well sites, battery sites or access roads. The Court stated the language was in-

101. Unreported (Alta. C.A.).
102. (1981) 126 D.L.R. (3d) 317 (Ont. C.A.).
103. R.S.C. 1970, c. R-2.
104. R.S.C. 1970, c. N-6.
105. Unreported (Alta. Q.B.).

troduced by the word "also", clearly indicating that the rights were additional to other rights which had been granted to the lessee. The Court stated that the lease had been granted for the lessee's "drilling and/or production operations" and that such language governs oil well sites, battery sites and access roads.

VIII. CONFIDENTIAL INFORMATION

A. *Chevron Standard Limited* v. *Home Oil Company and Leeson*[106]

This is the appeal of the case reported in this journal last year at 203,[107] in which the trial judge, Moore, J. determined that Mr. Leeson, who had left his job as Acting-Chief Development Geologist for Chevron to join Home as Canadian Exploration Manager, did not provide confidential information to Home.

In summary, the issues raised on appeal all went to the question of Leeson's credibility as a witness at the trial. The Court of Appeal clearly indicated that this issue was as being one for the trial judge to determine and was not to be raised on appeal.

The Court stated that Home had no duty to avoid employing Leeson in an area where his knowledge would conflict with Chevron's interests. The Court also confirmed that Leeson was not in a fiduciary relationship with Chevron, as senior officers or directors would be, so as to attract a higher duty and a lesser standard of proof.

B. *Ridgewood Resources Ltd.* v. *Arthur Henuset*[108]

This case was an action for breach of confidence which was brought by Ridgewood Resources Ltd. to recover from Arthur Henuset a 25 per cent carried interest in certain oil and gas properties which Henuset purchased from Cardo Canada Ltd. Ridgewood claimed that after having provided Henuset with confidential information respecting oil and gas assets that were being offered for sale by Cardo, Henuset made use of the information to deal directly with Cardo and purchase the assets. The information which Ridgewood claimed was confidential consisted of an engineering evaluation done by Farries Engineering (1977) Ltd. for Cardo and made available to Ridgewood, and various summaries and comments made by Ridgewood with respect to the engineering report.

Laycraft, J. A. reviewed the law of breach of confidence and noted that the three requirements to succeed in this cause of action are: (a) the information must be of a secret nature; (b) the information must be given in circumstances which make clear its confidentiality; and (c) there must be an unauthorized use of the information to the detriment of the party communicating it.

In this case Cardo had made the engineering report available to more than twenty persons who were prospective purchasers. Although Henuset was not aware of the report, except through Ridgewood, the Court found that the information was, in the circumstances of the oil industry, in the public domain and not secret. Also, the information which was prepared by Ridgewood was simply extracted from the engineering

106. Unreported March 25, 1982 No. 13124 (Alta. C.A.).
107. (1982) 57 *Alta. L. Rev.* 179.
108. Unreported February 2, 1982 No. 13591 (Alta. C.A.).

report or other sources available to the public and was therefore not secret.

IX. FOREIGN INVESTMENT REVIEW

A. *Dow Jones & Company Inc.* v. *AG Canada*[109]

This case is the appeal of the Federal Court Trial Division decision reported in this paper last year.[110] The Federal Court of Appeal upheld the trial court's decision that if, as a consequence of a transaction which takes place outside Canada, between two foreign corporations, the control of a wholly-owned Canadian subsidiary of one of the corporations is acquired by a non-eligible person there has been an acquisition of control for purposes of the Foreign Investment Review Act.[111]

B. *B.C. Forest Products Ltd.* v. *Minister of Industry, Trade and Commerce*[112]

B.C. Forest Products Ltd. commenced an action in the Federal Court for a declaration that it was not a non-eligible person. In the course of that proceeding B.C. Forest Products applied for and was granted an interim injunction restraining the Minister of Industry, Trade and Commerce and the Commissioner of the Foreign Investment Review Agency from exercising certain powers under the Foreign Investment Review Act until the court determined the issue of B.C. Forest's non-eligibility. With respect to certain investments which the company intended to make the company was able to show irreparable injury which would not be adequately compensated by damages if any of the following powers were exercised by the Minister or the Commissioner:

(a) to cause an investigation of the investments,

(b) to make application for an injunction restraining the investments,

(c) to make application for an order declaring the investments to be rendered nugatory,

As well, the interim injunction restrained the Minister and the Agency from requiring that the company give formal notice of the investment to the Agency.

X. ADMINISTRATIVE REGULATION

A. *Saskatchewan Power Corporation and Many Islands Pipe Lines Limited* v. *TransCanada Pipelines Limited and The National Energy Board et. al.*[113]

This case is the appeal from the Federal Court of Appeal decision reported at [1980] 4 W.W.R. 174 and discussed in this paper last year.[114] The Supreme Court of Canada determined by this decision that the jurisdiction of the National Energy Board (NEB) under the National Energy Board Act, Part IV,[115] is limited to fixing transportation tolls and does not extend to authority to determine the price at which gas is sold.

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109. Unreported March 20, 1981 A-609-80 (F.C.A.).
110. *Supra* n. 96 at 195.
111. S.C. 1973-74, c. 46.
112. (1981) 15 B.L.R. 161 (F.C.T.D.).
113. Unreported (S.C.C.).
114. *Supra* n. 96 at 211-217.
115. R.S.C. 1970, c. N-6.

As was more fully discussed in this paper last year, a gas purchase contract, entered into prior to the 1975 Natural Gas Price Regulations made under the Petroleum Administration Act,[116] provided for TransCanada Pipelines Limited to sell gas to Saskatchewan Power Corporation at a price which was less than the regulated price at which TCPL purchased the gas pursuant to the 1975 regulations.

The relevant section of the NEB Act under consideration was section 61 which states:

> Where the gas transmitted by a company through a pipeline is the property of the company, the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part be deemed to be a toll charged by the company to the purchaser for the transmission thereof.

The Supreme Court of Canada adopted the reasons of Thurlow, CJFC by stating that Section 61 does not enable the NEB, in exercising its power to make orders respecting tolls and tariffs, to require that a price be charged for gas sold by TCPL that would be high enough to recover the acquisition cost of the gas plus the transportation tolls so that the difference between that selling price and the cost of the gas could be deemed to be a toll. This limitation on the powers of the NEB would be removed by the proposed Bill C-108.[117]

Having arrived at this conclusion respecting the limits of the NEB under the NEB Act the Court did not have to consider the constitutional issue of whether the federal parliament could legislate with respect to the prices to be charged under gas purchase contracts, a matter which Pratte, J. alone considered in the Federal Court of Appeal and found to be *intra vires.*

Federal Bill C-108, which would permit the NEB to establish gas prices through its regulation of tolls, may therefore be subject to constitutional challenge.

B. *Coseka Resources Limited* v. *Saratoga Processing Company Limited, Westcoast Transmission Company Limited, Husky Oil Operations Ltd., Petrogas Processing Ltd. and The Public Utilities Board, Alberta*[118]

In this case the Alberta Court of Appeal determined that where the Public Utilities Board ("PUB") fixes a gas plant processing fee by an interim order, the PUB's final order which replaces such interim order can take effect from any time back to the date of the interim order and is not limited to the period after the date of application for the final order.

Some of the circumstances of this case were discussed in this paper presented in Jasper in June, 1980 with respect to *Westcoast Transmission Company Limited* v. *Husky Oil Operations Ltd., Candel Oil Ltd., Canadian Propane Gas and Oil Ltd. and Mobil Oil Canada Ltd.*[119] and the following is a brief summary of the circumstances which are relevant to the present decision.

By Interim Order No. C75127 dated May 2, 1975 pursuant to Section 27 of The Gas Utilities Act and Section 52 of the Public Utilities Board Act, the PUB ordered Saratoga Processing Company Limited, owner of a gas

116. S.C. 1974-75-76, c. 47.

117. See Part XIV Federal Legislation, *infra.*

118. Unreported, July 20, 1981 (Alta. C.A.).

119. [1980] 3 W.W.R. 313 (Alta. C.A.).

processing plant in the Savanna Creek Field, to process the Coseka Producers' gas from the North Coleman Gas Field through its plant for a fixed unit charge of 14.4¢/Mcf. In its Interim Order the PUB recognized that a precise processing fee for Coseka Producers' gas could not be determined without a reasonable trial period to determine operating expenses, deliverability of gas, specifications of gas and other matters.

For many procedural reasons and as a result of complex facts surrounding related applications before the PUB and the courts, the application for a final order to replace the interim order could not be brought before the PUB by Saratoga until November, 1979. It resulted in PUB Decision No. E80108 dated August 12, 1980 in which the PUB stated that the processing fee established on May 2, 1975 for Coseka gas had ceased to be just and reasonable shortly after that date. The PUB therefore increased the processing fee payable by Coseka effective September 1, 1977, which was the date of a related application by Petrogas Processing Ltd. to split Westcoast Transmission Company Limited's Alberta Cost of Service into two components in order to isolate the Saratoga Plant costs. Saratoga is a wholly-owned subsidiary of Westcoast and was indemnified for all plant costs by Westcoast.

Laycraft, J. A. held that the law prohibiting the PUB from making retrospective orders did not apply to final orders made after an interim order made pursuant to Section 52 of the PUB Act. Sub-section 52(2) states:

> The Board may, instead of making an order final in the first instance, make an interim order and reserve further direction, either for an adjourned hearing of the matter or for further application.

The reasoning for the decision was that since the PUB may at any time, on its own initiative fix rates under Section 27 of the Gas Utilities Act,[120] the provision for making interim orders would have no purpose if a final order could not be effective from the date of the interim order.

The Court also held that in finding September 1, 1977 to be the effective date of the just and reasonable rates the PUB had erred by declining to exercise its jurisdiction and referred the question of the proper effective date back to the PUB.

C. *Waddell* v. *Schreyer et. al.*[121]

This application by Ian Waddell, Member of Parliament for Vancouver Kingsway, was brought pursuant to the Supreme Court Rules (B.C.) to determine whether an action for a declaration that certain Orders-in-Council were *ultra vires* the Northern Pipe Line Act[122] and the National Energy Board Act[123] was within the jurisdiction of the Supreme Court of British Columbia and whether the plaintiff had standing to bring the action.

Mr. Waddell's action concerned three Orders-in-Council which permitted the transmission of Canadian gas from Alberta through the prebuild portion of the Alaska Highway natural gas pipeline and permitted the construction of the Canadian prebuild portion of the pipeline when financing for the whole pipeline had not been obtained. Mr. Waddell

120. R.S.A. 1980, c. G-4.
121. S.C. 1977-78, c. 20.
122. S.C. 1977-78, c. 20.
123. *Supra* n. 115.

suggested that these matters were *ultra vires* the above mentioned Acts because the Acts created a scheme to establish a pipeline from Alaska through Canada to the U.S. border to transmit Alaskan gas.

The Court held, following various authorities, that the Supreme Court of B.C. had jurisdiction to hear the application and that the jurisdiction was not precluded by the exclusive jurisdiction of the Federal Court Trial Division under sections 17 and 18 of the Federal Court Act.[124] The Court also held, following various authorities, that Mr. Waddell had standing to maintain this action for a declaration as to the constitutionality of legislation.

D. *NOVA* v. *Amoco Canada Petroleum Company Ltd. et. al.*[125]

This is an appeal from a decision reported in [1980] 3 W.W.R. 48 (Alta. C.A.) and which was considered in this paper presented in Jasper in June, 1980. The case deals with a complaint filed by Amoco and other producers with the Alberta Public Utilities Board ("PUB") pursuant to the Alberta Gas Trunk Line Act,[126] requesting that NOVA, An Alberta Corporation (formerly Alberta Gas Trunk Lines Limited) base its income tax component of its cost of service on a flow-through basis rather than on a normalized basis; that is, on a cash basis rather than an accrual basis. The PUB as confirmed by the Alberta Court of Appeal held that the flow-through method was appropriate. NOVA appealed the following issues to the Supreme Court of Canada:

1. *Can the PUB make retroactive orders with respect to varying or fixing NOVA's rates, pursuant to Section 30 of the NOVA Act?*

The Supreme Court upheld the Alberta Court of Appeal on this issue by finding that the PUB's orders under Section 30 could be retroactive at least to the date of filing of the complaint. This interpretation was given to Section 30 because initially all NOVA rates are determined by NOVA subject only to being varied by the PUB upon a complaint to the PUB where the PUB does not find them to be just and reasonable. It would be unfair to users of NOVA's facilities if PUB orders were prospective only, because unjust rates would apply between the filing of the complaint and the date of the PUB order.

2. *Can the PUB's orders made pursuant to a complaint deal only with the matters subject to the complaint or must the PUB consider all elements comprising a rate, toll, or charge and make an order respecting the justness and reasonableness of all components of the rate?*

The Court found that the PUB need only make orders respecting the particular aspects of the rates which are the subject of the complaint. Therefore the PUB orders were not invalid although they were made with respect to depreciation and income taxes and did not deal with the transportation cost of service or with the return on rate base.

The Court found that the PUB need only make orders respecting the particular aspects of the rates which are the subject of the complaint. Therefore, the PUB orders were not invalid although they were made with respect to depreciation and income taxes and did not deal with the transportation cost of service or with the return on rate base.

124. R.S.C. 1970 (2nd Supp.), c. 10.

125. [1981] 6 W.W.R. 391 (S.C.C.).

126. R.S.A. 1970 c-5, renamed NOVA, An Alberta Corporation Act.

3. *Does the PUB order have the effect of directing NOVA as to the manner in which NOVA must pay its income taxes?*

The Court found that the PUB had not ordered NOVA to file its income tax return in any particular manner, which order would be outside the PUB's authority, but rather the PUB had ordered that the income tax component of NOVA's rates be limited to the income taxes which would actually be paid by NOVA if NOVA were to claim maximum capital cost allowance in its tax return.

4. *Does the PUB have jurisdiction to vary NOVA's methods of calculating income taxes? Are NOVA's income taxes a charge within Section 30 of the NOVA Act such that the PUB has jurisdiction to vary the quantum of the taxes which NOVA includes in its rates?*

The Court held that NOVA's income taxes are a charge within Section 30 and are subject to the PUB's determination of justness and reasonableness. The fact that NOVA had, prior to 1975, contractually agreed with certain shippers such as Alberta & Southern Gas Co. Ltd. and West Coast Transmission Company to include the NOVA's cost of service to the shippers income taxes calculated on a normalized basis did not preclude the PUB from varying NOVA's income tax component of its cost of service.

Therefore the appeal by NOVA was dismissed on all issues.

E. *Athabasca Tribal Council* v. *Amoco Canada Petroleum Company Ltd. et. al.*[127]

This case is an appeal from a decision reported at [1980] 5 W.W.R. 165 and which was discussed in this paper presented in Jasper in June, 1980. The two issues were whether the Alberta Energy Resources Conservation Board ("ERCB") had jurisdiction under Section 43 of the Oil and Gas Conservation Act[128] to make an affirmative action program in favour of the Athabasca Indians a condition of any approval of the Alsands project, and whether any such affirmative action program would conflict with the Individual Rights Protection Act[129] in that it might constitute "reverse discrimination".

The Supreme Court unanimously determined that conditioning any approval of Alsands on the basis of social criteria was outside the jurisdiction of the ERCB. Having decided the appeal for this reason five of the nine justices did not consider the issue respecting the Individual Rights Protection Act, other than to note that after the Alberta Court of Appeal decision the Act was amended to specifically provide for affirmative action programs. Four justices speaking through Ritchie J., stated by way of *obiter dicta* that affirmative action programs were not in conflict with the Act as it read prior to the amendment referred to above.

XI. TAXATION

A. *Edmonton Liquid Gas Limited* v. *Queen*[130]

This case determines that pursuant to Section 66.1(6)(1)(ii) of the In-

127. Unreported June 25, 1981 (S.C.C.).
128. R.S.A. 1980, c. 0-5.
129. R.S.A. 1980, c. I-2.
130. Unreported, June 13, 1981 T-4611-78 (F.C.T.D.).

come Tax Act[131] a payment of moneys made by a farmee in 1974 on account of the farmee's obligation to bear drilling costs is not a deductible expense in 1974 to the extent that the actual drilling and incurring of costs with respect to the drilling occurs in 1975.

B. *Midwest Oil Production, Ltd.* v. *Queen*[132]

Commencing December 1, 1974 the Alberta Petroleum Marketing Commission took delivery of the Crown's royalty share of crude oil and received payment for such royalty share directly from purchasers. Prior to this time proceeds of sale of both the royalty share and non-royalty share were paid to producers, who in turn paid the Crown's royalty share of proceeds. This case considers Section 12(1) of the Income Tax Act, which includes in a taxpayer's income any amount paid to the Crown by way of royalty and which become receivable by the Crown in the tax year. The taxpayer argued that royalties taken in kind and disposed of by the Crown were not amounts receivable by the Crown and thus not includeable in its income. The court rejected this argument, stating that the Alberta Mines and Minerals Act[133] requires the royalty share to be delivered to the Crown and thus it is receivable by the Crown.

The taxpayer also argued that Drilling Incentive Credits ("DIC's") which were applied in satisfaction of Alberta royalties payable with respect to its gas production be considered as a reduction of royalties such that royalties to be included in income would be net of DIC's. The court rejected this argument and found that the royalties to be included in income are gross royalties payable without regard to any DIC's which may be applied in partial satisfaction of royalties.

C. *Trans Mountain PipeLine Company Ltd.* v. *Assessment Commissioner of British Columbia*[134]

This was an appeal by Trans Mountain from the B.C. Assessment Appeal Board which upheld a decision of the Assessment Commissioner pursuant to the Assessment Act.[135]

Trans Mountain is a federally regulated pipeline which in 1981 had a rate base of 11 million dollars and a return on that rate base of 1.3 million dollars, all as determined by the National Energy Board. Based on the Assessment Act the Assessment Commissioner assessed Trans Mountain on the basis that the 1981 'actual value' of its pipeline was $127,518,165 using replacement value as his prime criterion for determining actual value.

The court acknowledged this discrepancy in values attributed to the pipeline for different purposes, but nevertheless upheld the assessed value.

D. *Leonard Pipeline Contractors Ltd.* v. *Minister of National Revenue for Customs & Excise*[136]

Section 2(c) of the Aircraft Sales Tax Exemption Regulations, SOR/75-699, and the Aircraft Excise Tax Exemption Regulations,

131. R.S.C. 1952, c. 148 as am.
132. Unreported, February 15, 1982 T-2132-78 (F.C.T.D.).
133. R.S.A. 1980, c. M-15.
134. Unreported, March 11, 1982 (B.C.S.C.).
135. R.S.B.C. 1979, c. 21.
136. [1981] 1 F.C. 147 (F.C.A.).

SOR/75-697, both state that aircraft providing air services directly related to the exploration and development of natural resources in Canada are exempt from tax.

This case holds that an aircraft owned by the taxpayer whose business is pipeline construction does not qualify as an aircraft used in development of natural resources. Development, where used in the regulations, refers to drilling of wells in a field.

XII. CONSTITUTIONAL LAW

A. *Societe Asbestos Ltee* v. *Societe Nationale De L'Amiante et. al.*[137]

Quebec Bill 121 provided for the expropriation by the Province of Quebec of asbestos owned by the Asbestos Corporation Limited. The Asbestos Corporation Limited challenged the constitutionality of Quebec Bill 121 on three grounds, of which the first two are of most interest. These are:

(a) that the Bill impinged upon the federal trade and commerce power respecting interprovincial and international trade because almost all of the asbestos being expropriated was exported from Quebec; and

(b) that the Bill would sterilize a federal company.

With respect to the first issue the court held that provincial expropriation of a natural resource was clearly within the authority of the province regardless of the extent to which the natural resource is exported from the Province.

With respect to the second issue the court noted that provincial legislation is *ultra vires* if it affects the status or powers of a federal company. This Bill, which caused the expropriation of rights granted initially by the province, did not alter the status or powers of the company.

In the process of considering the first issue, three of the five judges extended the present law respecting the admissibility of ministerial statements made in a legislature during the debate of a Bill. In *Reference re Anti-Inflation Act*,[138] it was determined that certain extrinsic evidence, in that case statements made in Parliament, were not admissible for assisting in interpreting the legislation, but only for determining whether the social and economic circumstances existed upon which the peace, order and good government power could be exercised. In the present case the evidentiary law was extended to permit this type of extrinsic evidence in order to determine whether provincial legislation which on its face conforms with provincial jurisdiction is in fact a colourable attempt to encroach on an area of federal competence.

XIII. LEGISLATION

A. *Introduction*

It is not intended to provide a detailed discussion of all of the legislative and regulatory developments during the past year in this paper. Instead, it is intended to identify those statutes and regulations which have been tabled or enacted in order that oil and gas lawyers may be aware of their existence. In some cases where significant developments have occurred, which developments are not or may not become the subject of papers themselves, a longer summary has been provided.

137. (1981) 128 D.L.R. (3d) 405 (Que. C.A.).

138. [1976] 2 S.C.R. 373.

XIV. ALBERTA LEGISLATION

During the past year there have been two sessions of the Alberta Legislature, the Third Session (Fall 1981) and the Fourth Session (Spring 1982) of the 19th Legislature, 30 Elizabeth II. Also on January 1, 1982 the Revised Statutes 1980 came into force. The Revised Statutes 1980 contain a new statute, the Law of Property Act,[139] which has incorporated in it a number of previously existing statutes, including:

Clay & Marl Act
Common Parties Contracts & Conveyances Act
Judicature Act (certain sections only)
Land Titles Act (certain sections only)
Land Titles Act Clarification Act
Mineral Declaratory Act
Mineral Titles Clarification Act
Sand and Gravel Act

A. *1981 Fall Session*

Mines and Minerals Amendment Act, 1981 (No. 2)[140]

This Act was proclaimed December 16, 1981 and brought abut significant changes to Part 8, governing the registration of security interests and transfers pertaining to Crown lands.

The amendments reorganize Part 8 into two divisions. The first of these divisions, comprising sections 135 to 139, deals with transfers and remains basically unchanged. Note, however, that the statutory transfer and notice forms annexed to the Act have been relettered by the 1980 Revised Statutes. The second division, sections 139.1 to 144, is concerned with security interests and contains significant changes which establish a priority scheme based on the date of registration of security notices.

Highlights of the changes created by the amendments are:

1. *Approved Lenders*

The concept of "approved lenders" has been discarded and now anyone with a security interest is permitted to register a security notice in this priority system (Section 140).

2. *Security Interest*

Section 139.1(1)(f) defines a "security interest" to mean:

> an interest in or charge on collateral if the interest or charge secures;
> (i) the payment of an indebtedness arising from an existing or future loan or advance,
> (ii) bonds or debentures of a corporation, or
> (iii) the performance of the obligations of a guarantor under a guarantee given in respect of all or any part of the indebtedness referred to in subclause (i) or all or any part of amounts owing on bonds or debentures referred to in subclause (ii),
> but does not include an operator's lien;

In addition, "agreement" is defined in Section 1(1)(a) to mean "any lease, licence, reservation . . . " and "collateral" is defined by Section 139.1(1)(a) to mean " . . . the interest of . . . any lessee in an agreement, or . . . an interest in an agreement derived directly or indirectly from . . . any of the lessees . . . or former lessees of the agreement."

When these definitions are read together the following conclusions may be drawn:

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139. R.S.A. 1980, c. L-8.
140. S.A. 1981, c. 55 (Bill 87).

(i) Security interests may be granted in respect of all types of Crown interests including Petroleum and Natural Gas Leases, Petroleum and Natural Gas Licences, Natural Gas Leases, etc.

(ii) "Operators' liens" are specifically excluded from the definition of security interest.

(iii) To qualify as a security interest the charge must be characterized as a debt obligation in respect of loans or advances or a guarantee of such obligations. This requirement would appear to initially exclude an interest such as the overriding royalty holder's lien on production as such lien is not in respect of a loan or advance.

3. *Security Taken Before December 16, 1981*

(a) *Bank Act Security:* Section 139.1(2), a transitional provision, allows a registered notice of financial transaction and a registered s. 82 or s. 177 (Bank Act) security instrument to continue as a registered security notice. It would appear that the original registration date for a s. 82 or s. 177 Assignment granted before December 16, 1981 will be the relevant date for determining its priority.

(b) *Non - Bank Act Security* Under Section 140(2)(c) a security interest acquired by anyone other than a bank prior to December 16, 1981 cannot be registered. Section 140(3) adds that a security notice is void to the extent that it refers to a non-bank security interest acquired before December 16, 1981. However, s. 140(6) states that the priority system established by the Act does not apply to pre-December 16, 1981 security and its priority is not affected by the inability to register.

4. *Mines and Minerals Act Priority System*

A priority scheme based on the registration date security notices is established by Section 140(4) which provides that:

> a security interest in respect of which a security notice is registered has priority;
>
> (a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first-mentioned security notice.
>
> (b) over any transfer acquired before the registration of that security notice unless that transfer is registered before the registration of that security notice.
>
> (c) over any builder's lien acquired before the registration of that security notice unless that builder's lien is registered before the registration of that security notice, and
>
> (d) over any interest, right or charge acquired after the registration of that security notice.

The effect of registration is now similar to registration under the Land Titles Act[141] in that priority is determined by date of registration and not date of acquisition.

As priorities are now established under both the Bank Act (Canada)[142] and the Mines and Minerals Act[143] there may be circumstances in which the priorities under the two statutes are not the same, such as in the case of Mechanics or Builder's Liens, respecting which the Bank Act, s. 177(7), states that Section 177 Assignments enjoy priority regardless of the dates of acquisition or registration.[144]

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141. R.S.A. 1980, c. L-5.
142. S.C. 1980-81-82, c. 40.
143. *Supra* n. 133.
144. *See Canada Trust Company* v. *Cenex Ltd., supra* n. 62.

5. *Notice to Take Proceedings*

The amendments provide a mechanism for removing a registered security notice that is similar in many respects to the procedure used for removing a caveat under the Land Titles Act. Section 143(2) allows specified persons to serve a notice to take proceedings on a secured party, and gives the secured party 60 days to apply by originating notice to the Court of Queen's Bench for an order substantiating the security interest. When the Minister is provided with an affidavit showing the notice to take proceedings was properly served and the application was not commenced within 60 days, or was commenced but dismissed or discontinued, he must cancel the registration of the security notice (s. 143(8)). The security notice can be registered again with leave of the Court of Queen's Bench (s. 143(9)). The 60 day period may be shortened upon *ex parte* application or may be extended by the Court (s. 143(5) and s. 143(6)). The amendments also provide that a specified person may apply by originating notice to the Court to require a secured party to show cause why the registration of the security notice should not be cancelled (s. 143(2)(b)).

An additional procedure is available where the persons entitled to serve a notice to take proceedings may serve a written demand on the registered secured party requiring him to inform them where the security instrument or a copy is located and to make it available for examination during normal business hours within a reasonable time (s. 142(2)). They may also serve a written demand requiring the secured party to mail or deliver to them a true copy of the security instrument (s. 142(3)). If the secured party does not comply, the specified persons may apply to the Court of Queen's Bench for an order requiring compliance (s. 142(8)). If the secured party does not comply with the court order, the Court may make a further order to insure compliance or make an order directing the Minister to cancel the registration of the security notice (s. 142(9)).

Natural Gas Pricing Agreement Amendment Act, 1981[145]

This amendment provides for certain matters contained in the Canada/Alberta Pricing Agreement dated September 1, 1981; such as specifying that the Alberta border price is that which is specified under any federal-provincial agreement; permitting the scheme of market development incentive payments to expand Alberta gas markets in eastern provinces; and making certain special provisions for Foothills PipeLines (Alta.) Ltd.

Petroleum Incentives Program Act[146]

This Act resulted from the Canada/Alberta Agreement dated September 1, 1981 which provided for the Province of Alberta to administer and pay incentives under the Petroleum Incentive Program ("PIP") with respect to activities on Alberta lands. The Act provides only the framework of the program with all significant aspects of the PIP in Alberta being left to the Petroleum Incentive Program Regulations which have been promulgated as A.R. 220/82.

145. S.A. 1981, c. 57 (Bill 88).
146. S.A. 1981, c. P-4.1 (Bill 78).

Energy Resources Conservation Amendment Act, 1981[147]

This amendment provides that the ERCB may make an award of costs in favour of local intervenors to its hearings, and may specify the parties to such proceedings who are to bear such costs.

Land Agents Licensing Amendment Act, 1981[148]

This amends the fixed 2 year term of licences under the Act and provides for the terms of licences and the different classes of licences to be governed by regulation.

B. *1982 Spring Session*

Land Titles Amendment Act, 1982[149]

S.11 — Section 92.1 is added to permit the registered owner of lands having a water boundary to apply to the Registrar to have the description amended to include accreted land. (*See Eliason* v. *Registrar, North Alberta Land Registration District,*[150] reported in this journal last year[151].)

S.14 — Section 106.1 is added to grant priority to all subsequent advances secured pursuant to a mortgage notwithstanding such advances being made after the registration of an intervening instrument. This amendment ensures the priority of a mortgagee who "tacks" whereas the case law previously denied such priority where the mortgagee had actual knowledge of a subsequent encumbrancer.

1. *Caveats*

S.19 — Section 131 is amended to provide that the address for notices or proceedings under a caveat need not be an Alberta address.

S.21 — Section 133 is repealed and replaced such that a caveat in respect of an unregistered mortgage must state the amount or maximum amount for which the mortgage was given in lieu of permitting a copy of the mortgage to be attached to the caveat.

S.23 — Section 135.1 is added to permit transfers of caveats and the preservation, upon a transfer, of the caveat's priority.

S.24 — Section 136 is amended such that the Registrar is no longer required to give notice to a caveatee of a withdrawal of a caveat.

Oil and Gas Conservation Amendment Act, 1982[152]

S.4 — Section 14.1 is added to authorize the ERCB to determine the location of a well licensee's access roadways and to require the Surface Rights Board to grant any necessary right of entry order for the same location.

S.5 — Section 26 is amended to permit the Minister of the Environment to direct that applications thereunder not be referred to him and to permit an employee of the Minister of the Environment to exercise the Minister's powers under the Section.

Part II of the Act entitled "Assessment and Taxation of Oil and Gas Properties" is repealed and substituted by Part II entitled "Administra-

147. S.A. 1981, c. 47 (Bill 93).
148. S.A. 1981, c. 52 (Bill 63).
149. S.A. 1982, c. 23 (Bill 18), received Royal assent and proclaimed in force May 4, 1982.
150. [1980] 6 W.W.R. 361 (Alta. Q.B.).
151. (1982) 57 *Alta. L. Rev.* 179 at 194.
152. S.A. 1982, c. 27 (Bill 19), in force effective April 1, 1982.

tion Fees" to replace the assessment and taxation system on oil and gas property by a system which levies an administration fee on operators of wells and oil sands projects.

Alberta Corporate Income Tax Amendment Act, 1982[153]

Part 6 of the Act has been repealed and substituted with a new Part 6 entitled "Refundable Tax Credits" of which Division 1 is entitled "Royalty Tax Credit". Section 26.1 increases the Alberta Royalty Tax Credit to 75 per cent of Crown royalties paid up to a maximum of $4,000,000 for tax years ending prior to January 1, 1984; and 50 per cent of Crown royalties paid up to a maximum of $2,000,000 thereafter.

2. *Alberta Regulations*

Natural Gas Price Administration Amendment Regulation AR 118/82
Natural Gas Pricing Agreement Amendment Regulation, AR 119/82

These regulations amend AR 307/80 and AR 127/77 respectively to prescribe specific categories of costs and charges to be included in an original buyer's Alberta cost of service. The prescribed categories include: an original buyer's return on rate base as determined by the Alberta Petroleum Marketing Commission; an original buyer's market development costs; and financing charges on take or pay obligations of an original buyer.

Natural Gas Pricing Agreement Amendment Regulation AR 185/82

This amends AR 127/77 by amending the definition of "eligible gas" on which price adjustment may be applied for to include ethane extracted from gas by the producer of the gas other than ethane extracted from gas on which price adjustment has been paid.

Gas Utilities Exemption Regulation AR 195/82

By section 5 of the Gas Utilities Act the PUB requires authorization by Order-in-Council is not permitted to exercise its jurisdiction to fix or redetermine gas prices. This amendment amends AR 127/76 by excepting from that requirement gas prices, processing fees, and transportation charges to be paid with respect to common purchasers, common processors, and common carriers where the PUB's jurisdiction to fix such tolls derives from the Oil and Gas Conservation Act, sub-section 44(2) and (3). This amendment is relevant to the procedural issue referred to in the *Saratoga* case.

Land Agents Licensing Regulations AR 224/82

These regulations prescribe the methods of licensing land agents and also amend the waiver forms required to be used by land agents.

Alberta Oil and Gas Activity Program

On April 13, 1982 the Premier of Alberta announced the Alberta Oil and Gas Activity Program. This Program includes amendments to oil and gas royalties intended to: increase producer net-backs particularly on old oil, old gas, and low productivity wells; increase the royalty tax credits available until December 31, 1983;[154] extend the natural gas royalty holiday from one year to 3 years for wells drilled in 1982 and to 2 years for wells drilled in 1983; and establish a grant system for the oil service in-

153. S.A. 1982, c. 1 (Bill 36), Royal assent and proclaimed in force May 4, 1982.
154. *Id.*

dustry worth 250 million dollars for work done prior to October 31, 1982. The Oil and Gas Activity Program and other regulatory amendments have been implemented by the following:

Crude Oil Par Price, Select Price and Royalty Factor, 1979 Amendment Regulations AR 35/82; AR 218/82

Natural Gas Royalty Amendment Regulations AR 183/82; AR 216/82

Pentanes Plus Select Price per Barrel and Royalty Factor Amendment Regulations AR 184/82; AR 219/82

Petroleum Royalty Amendment Regulations AR 34/82; AR 39/82; AR 182/82

Exploratory Drilling Incentive, 1981 Amendment Regulations AR 98/82; AR 217/82

Geophysical Incentive, 1981 Amendment Regulations AR 99/82

Well Servicing Incentive Program Regulation AR 215/82

XV. FEDERAL LEGISLATION

Since the National Energy Program was introduced in October, 1980 a number of federal bills have been introduced, although few have, to the date of writing, been passed into law. The following is a summary of the federal bills which have been introduced pursuant to the National Energy Program.

Excise Tax Amendment Act[155]

This amendment introduced two new oil and gas taxes:

(a) Petroleum and Gas Revenue Tax (PGRT) is contained in the Petroleum and Gas Revenue Tax Act[156] which introduced a 12% Production Revenue Tax, in Division I of the Act, and a 12% Resource Royalties Tax, in Division II of the Act. Pursuant to the November 12, 1981 federal budget and 1981 agreements between the federal and provincial governments this Act is to be amended by Bill C-93 introduced February 10, 1982 to be effective January 1, 1982. Bill C-93 will increase PGRT to 16% subject to a 25% resource allowance which will reduce the effective rate on production revenue to 12%. Bill C-93 also introduces a new Incremental Oil Revenue Tax (IORT) equal to 50% of incremental oil revenue after deduction of Crown royalties. Incremental oil revenue is the amount by which the September 1, 1981 Alberta-Canada Agreement price for old oil (discovered prior to January 1, 1981) exceeds the National Energy Program schedule of prices for old oil.

(b) Natural Gas and Gas Liquids Tax is contained in Part IV.1 of the Excise Tax Act[157] which was added by S.C. 1980-81, C.68, S.43 effective November 1, 1980. Pursuant to the Alberta-Canada Agreement of September 1, 1981 the amount of this tax on Alberta Marketable Pipeline Gas exports from Canada is fixed at zero during the period to January 1, 1987. The appeal to the Supreme Court of Canada of *Reference Re: Natural Gas and Gas Liquids Tax* on the constitu-

155. Bill C-57, received royal assent July 8, 1981.

156. S.C. 1980-81, c. 68, Part IV.

157. R.S.C. 1970, c. E-13.

tionality of the tax[158] has recently been decided in favour of the Province. Respecting Marketable Pipeline Gas for Canadian use the amount of the tax may be prescribed after January 31, 1982 by the federal Cabinet to a maximum of $4.00 per gigajoule so as to equal from time to time the difference between the eastern zone selling price of gas and the scheduled Alberta Border Price and transportation charges.

The amendment also prescribes and allows the federal Cabinet to prescribe the Natural Gas Liquids Tax on ethane, propane and butane as well as the Canadian Ownership Special Charge.

National Energy Board Amendment Act[159]

This Act primarily provides new procedures for establishing pipeline routes and for expropriating and compensating land owners.

National Energy Board Amendment Act No. 2[160]

This Act provides for the federal Cabinet to appoint temporary members of the NEB.

Canada Oil and Gas Act[161]

This Act contains new laws respecting land tenure for federal oil and gas lands. Pursuant to this Act a new federal agency, the Canada Oil and Gas Land Administration (COGLA) has been established to deal with the many areas of Ministerial discretion under the Act.

Energy Security Act[162]

After introduction into the House of Commons of omnibus Bill C-94 a parliamentary stalemate over the Bill resulted in its being split into eight separate bills which have been introduced as follows:

1. *Petro-Canada Act Amendments*[163]

This Bill increases the authorized capitalization of Petro-Canada from $500,000,000 to $5,500,000,000 and amends other provisions including directors' remuneration and borrowing.

2. *Department of Energy, Mines and Resources Act Amendments*[164]

This Bill provides for the cabinet, subject to parliamentary approval, to incorporate new Crown companies for exploration, production and marketing of fuel and energy or to take over existing companies operating in such fields. The Bill also limits parliamentary debate on these matters to 3 hours.

3. *Petroleum Administration Act Amendments*[165]

This Bill changes the name of the Act to the Energy Administration Act, and deals with such matters as ceilings on the Petroleum Compensation Charge, the Canadian Ownership Special Charge, and the excise tax

158. The Alberta Court of Appeal decision was reported in this paper last year, see (1982) 57 *Alta. L. Rev.* 179 at 213.
159. S.C. 1981, c. 80 (Bill C-60).
160. S.C. 1981, c. 84 (Bill C-87).
161. S.C. 1981, c. 81 (Bill C-48), proclaimed in force March 5, 1982.
162. Bill C-94.
163. Bill C-101.
164. Bill C-102.
165. Bill C-103.

on natural gas and natural gas liquids.

4. *Part I — Petroleum Incentives Program Act*
Part II — Canadian Ownership and Control Determination Act
Part III — Foreign Investment Review Act Amendments[166]

Parts I and II of the Bill implement the Canadian Ownership Rate ("COR") and Petroleum Incentive Program ("PIP") proposals contained in the National Energy Program. Many of the specific details of the programs have been left to the regulations under the Act. Part III includes amendments to the Foreign Investment Review Act respecting the definition of "non-eligible person" and respecting presumptions of non-eligibility.

5. *Canada Business Corporations Act Amendments*[167]

This Bill contains amendments to provide for constrained shares for Canada Business Corporations Act ("CBCA") companies in order that companies may ensure that they maintain necessary COR levels.

6. *Energy Monitoring Act*[168]

This Bill deals with the powers and functions of the Petroleum Monitoring Agency and also contains amendments to the Energy Supplies Emergency Act, 1979 and the Oil Substitution and Conservation Act.

7. *Motor Vehicle Fuel Consumption Standards Act*[169]

This Bill would permit the cabinet to prescribe by regulation a fuel consumption standard for any class of motor vehicle.

8. *National Energy Board Act Amendments*[170]

This Bill includes a number of amendments respecting oil and gas and extends the NEB's jurisdiction in the area of international power lines. The definition of "toll" in Section 1(8) is amended to include charges made in respect of purchases and sales of gas by a pipeline shipper owning such gas; and Section 51 is amended to provide that tolls may be charged if approved by the NEB. These amendments would seem to be in response to the *Saskatchewan Power Corp.* v. *TCPL decision*[171] and would alter the outcome of that case to permit the NEB to fix gas prices in the circumstances of that case. Also a new Part VI.I is added to the Act entitled "Interprovincial Oil and Gas Trade" to allow the Cabinet to order the NEB to supervise and control the movement and quality of oil or gas produced from federal offshore lands.

XVI. ADDENDUM

On May 31, 1982 the Federal Minister of Energy, Mines and Resources announced a number of amendments to the National Energy Program, the highlights of which are:

(a) the basic PGRT rate will be reduced from 16% to 14.67% for the period

166. Bill C-104.
167. Bill C-105.
168. Bill C-106.
169. Bill C-107.
170. Bill C-108.
171. *Supra* n. 113.

June 1, 1982 to May 31, 1983, resulting in an effective rate of 11% on production revenue after applying the resource allowance;

(b) the IORT on all conventional oil will be reduced to zero for the period June 1, 1982 to May 31, 1983;

(c) oil discovered after 1973 and which qualified as "new oil" for purposes of Alberta Crown royalty and which previously was not included as oil qualifying for the New Oil Reference Price, will effective July 1, 1982, be included as NORP oil;

(d) a small producers' PGRT credit of up to $250,000 annually will be available to corporations on their production revenue PGRT from May 31, 1982 until 1986.