RECENT CASES OF INTEREST TO OIL AND GAS LAWYERS

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This paper provides an overview of recent cases of significance to the oil and gas industry. Particular attention is paid to a series of constitutional decisions which have been handed down during the past year.

I. INTRODUCTION

In contrast to the cases reported at the previous seminar, there have been very few "caveat" cases of general applicability this year. However, the status of two cases discussed at that time should be mentioned. The decision of the Court of Appeal of the North West Territories in the *Paulette*[1] case has been upheld by the Supreme Court of Canada. In addition, amendments to the Land Titles Act[2] have halted, at least temporarily, litigation over the so-called "Whitehead" caveat in Northern Alberta. The amendments are contained in Bill 29 (passed in May, 1977) and retroactively prohibit the filing of a caveat on unpatented Crown land.

There are a significant number of cases dealing with property taxation, assessment, and insurance liability, indicating that economic considerations are of vital importance to company operations. Several constitutional cases have been appealed and will be covered in this paper. In particular, the *Central Canada Potash*[3] case and the *Amax Potash*[4] case have reached appellate levels. In the latter, the constitutionality of a provision of the Proceedings Against The Crown Act[5] has been resolved against the province by the Supreme Court of Canada.

The cases discussed are organized in two sections: miscellaneous cases and constitutional cases.

II. MISCELLANEOUS CASES

Minister of Municipal Affairs of New Brunswick et al. v. *Canaport Ltd.* (1976) 64 D.L.R. (3d) 1 (S.C.C.).

This Supreme Court of Canada decision, along with the next several cases, pertains to the property taxation and assessment of oil company facilities. The definition of real property in the Assessment Act[6] excluded "structures other than buildings not providing shelter for people, plant or moveable property and all machinery, equipment, apparatus and installations other than those for providing services to buildings as mentioned in sub-clause (ii) whether or not the same are affixed to land and buildings". Oil storage tanks were held to be structures which in fact provide shelter for moveable property. Thus, they are to be treated as buildings for the purpose of the Assessment

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1. *Paulette* v. *The Queen* [1977] 1 W.W.R. 321.
2. R.S.A. 1970, c. 198.
3. *Central Canada Potash Co. and A.-G. Canada* v. *Government of Saskatchewan* [1977] 1 W.W.R. 487.
4. *Amax Potash Ltd.* v. *Government of Saskatchewan* [1977] 6 W.W.R. 61.
5. R.S.S. 1965, c. 87.
6. S.N.B. 1965-66, c. 110.

Act. Once that conclusion is reached, no inquiry is necessary as to whether the tanks are "machinery, equipment, apparatus and installations other than those for providing services to buildings". The word "installation" was construed as having a meaning *ejusdem generis* with the words "machinery, equipment and apparatus" which preceded it. When so viewed, it connotes something quite separate and distinct from a building or buildings, as those words are used elsewhere in the section. Accordingly, the storage tanks were held assessable as real property.

Irving Oil Co. Ltd. v. *Minister of Municipal Affairs New Brunswick et al.* (1976) 64 D.L.R. (3d) 142 (S.C.C.).

This case dealt with the same provisions and questions as the *Canaport* case, *supra*.

Re Shell Canada Ltd. and City of Winnipeg (1976) 67 D.L.R. (3d) 747 (Man. C.A.).

This case also considered the question of the assessability of oil storage facilities for municipal tax purposes. Under the City of Winnipeg Act[7] a business tax was applied to all occupied "premises", defined as "land or buildings or both or any part thereof". The Act authorized a municipality to tax personal property by by-law. The trial court held that certain oil tanks situate on the surface of land within the city were not subject to assessment for business tax because they were chattels. In allowing the appeal, the Manitoba Court of Appeal held that the oil tanks were "buildings" within the broad definition of that term in the Act. Alternatively, the tanks could be assessable as "personal property", and thus could be taxed as such under another provision of the Act. It was also held that in determining whether a structure is rateable, the law of fixtures (which applies where the property rights of contending parties are in issue) is not relevant. Instead, regard must be had to the terms of the statute which seeks to impose the tax.

A decision of the English Court of Appeal, *Field Place Caravan Park, Ltd.* v. *Harding*[8] was relied upon. Lord Denning M.R. was quoted as follows:[9]

> The correct proposition today is that, although a chattel is not a rateable hereditament by itself, nevertheless it may become rateable together with land, if it is placed on a piece of land and enjoyed with it in such circumstances and with such a degree of permanence that the chattel with the land can together be regarded as one unit of occupation.

The Consumer's Gas Company and Others v. *The Deputy Minister of National Revenue for Customs and Excise* [1976] 2 S.C.R. 640.

This case dealt with the status of certain apparatus under the Excise Tax Act of Canada.[10] The issue was whether or not regulators, used to reduce the pressure of pipeline gas prior to delivery to consumers, were exempt from sales tax as apparatus used in "the manufacture or production of goods". It was argued that the case was governed by *Hydro-Quebec* v. *Deputy Minister of National Revenue for*

7. S.M. 1971, c. 105.
8. [1966] 3 All E.R. 247.
9. *Id.* at 250.
10. R.S.C. 1970, c. E-13.

Customs and Excise,[11] which exempted electrical transformers from the sales tax. The Tariff Board and the Federal Court of Canada distinguished the operation of the gas pressure regulators because they merely take the gas from higher to lower pressure pipes; in contrast, electrical transformers produce a new current at a different voltage. The Supreme Court concluded that the pressure regulators cannot be considered as used in the "production of gas" within the usual meaning of these words, and that the apparatus was not exempt.

Montreal Trust Company v. *Gulf Securities Corporation Ltd. and Tidewater Oil Company et al.* [1977] 2 W.W.R. 48 (S.C.C.).

In this case, Gulf had obtained certain petroleum and natural gas permits from the Provincial Crown. It assigned the permits to Tidewater Oil Company under an agreement which provided, *inter alia*, that Tidewater would pay Gulf 2½% of the sale value of the oil and gas produced as long as it retained an interest in the land. Under the agreement, Tidewater could assign, surrender or terminate its interest in the lands, so long as it gave Gulf notice of its intention to do so. This would permit Gulf to elect whether or not it would take over such lands. Any assignment of its interests by Tidewater was to be made subject to the assignee's assumption of Tidewater's rights and obligations. Gulf was later advised that Tidewater intended to surrender a number of leases covered by the original agreement; Gulf elected to take over certain of the leases and directed Tidewater to assign them to Imperial Oil. Shortly after the original agreement between Gulf and Tidewater, Gulf had assigned Montreal Trust all of the royalty payments which would become payable to Gulf by Tidewater. Notice of the assignment was given to Tidewater by Gulf and duly acknowledged. An agreement entered into between Gulf and Imperial, at the time of Tidewater's reassignment of the leases proposed for surrender, made provision for a 2½% royalty on the proceeds of production. In accordance with that agreement, and following discovery of production, Imperial commenced payments directly to Gulf.

Montreal Trust sued for an accounting of all royalty payments which it claimed under the terms of the royalty trust agreement. The Saskatchewan Court of Queen's Bench held that Gulf was bound to pay the plaintiff all monies it had received under the agreement with Tidewater and any payments received from Imperial, the assignee of the subject leases. The plaintiff's action against Tidewater for an alleged failure to stipulate that Imperial was required to make the royalty payments to Montreal Trust was dismissed on the ground that there was no privity between Tidewater and the plaintiff. The Court of Appeal allowed Gulf's appeal and dismissed the plaintiff's appeal insofar as it related to Tidewater. The plaintiff's appeal to the Supreme Court of Canada, relating to Gulf's liability, was allowed. Imperial was an assignee of Tidewater, and the royalty payments Imperial was required to pay Gulf were within the provisions of the royalty trust agreement between Gulf and Montreal Trust. When Gulf made its commitment to the holders of the royalty trust certificates under the royalty trust agreement, it gave them the benefit of royalties payable by any assignee of Tidewater, if such assignment came about due to

11. [1970] S.C.R. 30.

the operation of the Tidewater agreement. The plaintiff's appeal relating to Tidewater's liability was dismissed on two grounds. First, Montreal Trust was not an assignee from Gulf of the Tidewater agreement. It did not become entitled to enforce, against Tidewater, Tidewater's obligations to Gulf under clause 10 of the Gulf-Tidewater agreement. Secondly, Tidewater was under no contractual obligation to Montreal Trust. Its only legal duty to Montreal Trust was to honour the notice of assignment of royalties, which related solely to royalties potentially payable by Tidewater in respect of its production from the lands described in the Tidewater agreement. Thirdly, the provisions of the royalty trust agreement applied to royalties payable by Imperial which, at the instance of Gulf, had become the successor or assign of Tidewater. The obligation to require payment to Montreal Trust rested solely upon Gulf. Notice of the assignment of Gulf's royalty effected by the royalty trust agreement should have been given to Imperial by Gulf or by Montreal Trust. No duty to give such notice was imposed upon Tidewater.

While no new principle of law is enunciated by the case and it is perhaps restricted to its facts, it may be said to stand for the following principles:

(1) By assigning, to a third party, certain future benefits to which the assignor and its successors and assigns may become entitled, the assignor becomes liable to account for such future benefits. This is so even where the benefits could not arise but for the assignee's intervention. In the present case, if the leases proposed for surrender by Tidewater had been surrendered to the Crown, the royalty interest previously assigned to Montreal Trust would have been extinguished. Instead, Gulf elected to reacquire the leases.

(2) If A has contractual obligations with B with respect to certain lands, and B has contractual obligations to C with respect to the same lands, there is no basis for a claim by C against A for B's failure to comply with its contractual obligations. A is under no duty to require that B perform its obligations to C.

Alberta and Southern Gas Co. Ltd. v. *The Queen* [1977] 1 F.C. 395 (F.C.T.D.).

The company's claim for deduction of Canadian exploration and development expenses in 1972 and 1973 had been disallowed. Consequently, its claim for depletion allowances and deductions of interest on money borrowed for the purpose of earning income from the property during those two years was also disallowed. The company's *raison d'etre*—to supply its parent in the U.S.A. with natural gas—was limited by government requirement that needs of domestic consumers be satisfied before the granting of an export licence. The company must maintain adequate supplies and constantly seek new resources to provide for replacement of gas used and increased demand. Thus, according to the company, prepayments for existing gas are, in effect, loans for the development of future resources and risk exploration. Therefore, they are legitimate objectives incidental to the buying and selling of gas. Funds for these purposes were to be derived from three cents added by agreement to the price of the gas sold to the parent of the company. The funds so required in 1972 and 1973 were not in fact used in this way and would, therefore, normally constitute income.

However, the company agreed with a gas producing company (Amoco) in each of those years to advance it $4,000,000. In consideration for this, Amoco would give the plaintiff a percentage of its working interest, defined as a right, to produce and dispose of petroleum products in specified lands. The lands were in fact lands from which the plaintiff was receiving gas under gas purchase contracts. The right granted was to end when the plaintiff received either $4,000,000 or petroleum substances worth $4,000,000. In fact, the money was repaid each year in cash; the plaintiff owned the petroleum substances under the agreement but allowed Amoco to extract and dispose of them at its own expense and to pay the plaintiff its share of the working interest in cash. The lands specified were owned mainly, but not solely, by Amoco. The other interested parties concurred informally in the plaintiff's succession to the interest assigned to it by Amoco. On appeal, the appeals were allowed as the plaintiff proved that it had acquired Canadian resource property in 1972 and 1973 as defined by s. 66 of the Income Tax Act. The cost of doing so was deductible as being a Canadian exploration and development expense paid by a "principal business corporation" as defined in the Act. The plaintiff further proved that its business was "marketing", as defined by section 66, and that it was not merely an agent for its parent company since it had a separate corporate existence. The agreements between the plaintiff and Amoco were intended to and did create legal rights and obligations; they were, therefore, not a sham. Finally, the plaintiff had borrowed money to pay Amoco; the interest payable thereon was interest on a loan used for the purpose of earning income from property. Depletion allowances were allowed under Regulation 1202(1) since the plaintiff was not an "operator" as defined by Regulation 1202(1)(a).

Interprovincial Pipe Line v. *O'Neill et al.* (1976) 9 L.C.R. 248 (Ont. Co. Ct.).

The applicant was authorized by the National Energy Board Act[12] to construct a pipe line over an existing easement on the respondent's land. Having met with resistance from the respondent in attempting to exercise its powers, the applicant sought a warrant for possession pursuant to the Railway Act.[13] It was held that the warrant should be granted because the applicant had an indisputable right to expropriate the land and had established that there was an urgent and substantial need for immediate action. In such circumstances, the court had no discretion either to refuse to grant the warrant or to delay or suspend its operations.

Home Oil Company Limited v. *Page Petroleum Ltd.* [1976] 4 W.W.R. 598 (Alta. S.C.).

This decision related to the proper interpretation of an overriding clause in the farmout agreement. The facts were as follows: By a letter of agreement between the plaintiff and Berkley Oil and Gas Ltd., (the predecessor of the defendant) provision was made, *inter alia*, for Berkley to earn Home's working interest in certain land held by Home. Home reserved an overriding royalty which, as to oil, was on the sliding scale basis minimum 5%, maximum 15%, with the percentage to

12. R.S.C. 1970, c. N-6.
13. R.S.C. 1970, c. R-2, s. 181.

be expressed by dividing the monthly production by 100. A subsequent formal agreement was entered into, but the sliding scale provision was at variance with the letter agreement. Thereafter, the lands in question were made subject to a unit agreement which covered six separate tracts of land, each with a participation factor allotted to it. The unit agreement provided that each lease, and any other agreement relating to the unit lands, was thereby amended to the extent necessary to make it conform to the unit agreement. A dispute arose over computing the royalty payable to Home. The defendant had computed the royalty payable to Home on the basis that the rate was determined separately for each tract, by multiplying the production from that tract by 1/100th and expressing the result as a percentage with a maximum of 15% and a minimum of 5%. The plaintiff argued that the agreement required the rates to be determined by using the total production from the six tracts as the base of the computation. It was held that the royalty rate was to be computed on the petroleum substances produced or deemed to be produced from the whole of the lands farmed out rather than calculating a royalty for each tract. The unit agreement changed the right of the parties in providing for tract participation so that there became a deemed production as opposed to actual production. But there was nothing in the unit agreement to change the method in which the royalty was computed as set out in the agreement between the parties. There was no suggestion in the language of the agreement that the computation was made well by well or tract by tract. Furthermore, although the letter of agreement was at variance with the form of agreement, the letter could not be referred to in aid of interpreting the agreement, as there was nothing ambiguous about the agreement. A dispute or difficulty of interpretation does not mean ambiguity *per se*.

Guyer Oil Company Ltd., Golden Eagle Oil and Gas Limited and Husky Oil (Alberta) Ltd. v. *Fulton and Gladstone Petroleum Ltd.* [1976] 5 W.W.R. 356 (Sask. C.A.).

Under the above citation, the Saskatchewan Court of Appeal dismissed the plaintiff's appeal. Subsequently, in an unanimous oral judgment as yet unreported, the Supreme Court of Canada dismissed the plaintiff's further appeal.

Skyeland Oils Ltd. v. *Great Northern Oil Ltd.* [1976] 5 W.W.R. 370 (Alta. S.C.).

This case concerned the interpretation of an agreement involving a gross overriding royalty. The only portion of this case of general application is the finding as to the proper meaning of a "gross overriding royalty". It was held that in calculating "gross overriding royalty", no deduction for other royalties was to be made. Where the royalty was based upon the current market value at the time and place of production of petroleum substances, it was proper in making the royalty calculation to deduct the cost of transporting the substances to the refinery or gas plant from the gross proceeds.

Re Valentini et al. and Amerada Minerals Corp. of Canada Ltd. et al. (1977) 10 L.C.R. 233 (Alta. A.D.).

This case dealt with the right of appeal under The Expropriation Act.[14] Section 35 grants a right of appeal from a decision of the Surface

14. S.A. 1974, c. 27.

Rights Board of Alberta, except when it is carrying out the functions of an inquiry officer under the Act. Under the Act, the Board has a dual function. It acts as an inquiry officer when a complaint has been lodged against an intended expropriation as provided in section 14(8). Its proceedings in that capacity are not reviewable by reason of section 16. The Board must then make a report to itself as approving authority under section 15. Thereafter, acting as approving authority, the Board must, under section 17, approve or disapprove the proposed expropriation. Accordingly, where the Board has acted both as inquiry officer and approving authority, and purports to give the report and to approve an expropriation in a single document, the approval is given by it *qua* approving authority; and that decision is subject to appeal under section 35.

Vanguard Petroleums Ltd. v. *Vermont Oil & Gas Ltd., et al.* (1977) 72 D.L.R. (3d) 734, [1977] 2 W.W.R. 66 (Alta. S.C.).

The Alberta Supreme Court was called upon to determine whether a particular royalty agreement could be secured by caveat against the land under The Land Titles Act.[15] The court, in each case where it is claimed that a royalty agreement creates an interest in land, must examine the specific wording of the agreement. In the case of a royalty agreement in which the owner offers to pay the grantee a gross royalty of the proceeds of sale of the petroleum substances that may be produced, saved and marketed out of the land, the obligation thus created does not confer on the grantee an interest *in situ*. Rather, the obligation is to pay the grantee a sum of money out of the proceeds of sale of the petroleum substances after they have been removed from the land. This obligation does not amount to a rent—should no petroleum be removed from the land, the grantee would get nothing. In contrast, rent, by its very nature, accrues due to the lessor over a period of time and from time to time. As the obligation in this case does not create an interest in land, it cannot be the subject of a caveat. This is so notwithstanding that the agreement between the parties purported to give the grantee the right to file and maintain a caveat.

Guthrie McLaren Drilling Ltd. v. *Inland Development Co. Ltd.* February 15, 1977 (Alta. S.C.).

The plaintiff sued for the balance due on a drilling contract under which it was to drill a well for the defendant. In addition to amounts due under the main contract, sums incurred in "fishing" for equipment lodged in the hole were claimed. The plaintiff was found to have been working on a day-work-rate basis of remuneration at the time of the equipment being lodged in the hole. Accordingly, the costs incurred in "fishing" the equipment was properly payable by the defendant.

Interprovincial Pipe Line Company v. *Seller's Oil Field Service Ltd. and Lloyd's of London and General Accident Assurance Company of Canada* (1976) 66 D.L.R. (3d) 360, [1976] 3 W.W.R. 31 (Man. C.A.).

The trial decision in this case was briefly reported at the 1976 Seminar. That decision has been upheld on appeal.

Public Utilities Board Decision No. E76123, November 5, 1976.

This decision related to an application by Western Decalta

15. R.S.A. 1970, c. 198.

Petroleum Ltd. and Madison Natural Gas Co. Ltd., under section 6 of the Gas Utilities Act,[16] concerning the gate price to be charged by Madison for gas delivered from its Turner Valley plant. The application was dated November 28, 1975 and heard on May 17 and 18, 1976. The decision was rendered on November 5, 1976.

It was requested that the decision be dated retroactively, to the date of the application. The Board stated that it had serious reservations concerning its authority to make an order retroactive.

This decision is under appeal. It is of interest because retroactive orders under section 3 of the Act have been given in the past. Thus, if the Board's present position on retroactivity is upheld, many previous orders may be open to attack.

Dome Petroleum Ltd. v. *Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.* (1977) 2 A.R. 451 (S.C.C.).

The above citation contains the decision of the Supreme Court of Alberta, Appellate Division, as well as its affirmation, without elaboration, by the Supreme Court of Canada.

Although a number of issues arose in the case, two matters, relating to the jurisdiction of the Public Utilities Board over propane, are of particular interest. In 1974, amendments were made to the Gas Utilities Act.[17] These amendments expanded the Board's jurisdiction to include the distribution of propane by means of tank car, tank wagon, cylinder or vessel (the means of distribution to most consumers in the province). One reason behind the amendments was the difficulty consumers in Alberta experienced in obtaining propane: producers were able to receive a higher price out of the province because in-province consumption price was set by the Board, on the basis of a two-price system.

The propane allocation scheme implemented by the Board pursuant to s. 27 of the Gas Utilities Act required certain companies, including Dome, to contribute to the Alberta market a percentage of the demand for propane equal to its total share of propane production in the province. Dome resisted the plan on the grounds that this interfered with propane export permits it had already received from the Energy Resources Conservation Board (ERCB) under the Gas Resources Preservation Act.[18] The Alberta appeal court held that the Board possessed jurisdiction to infringe upon the ERCB export permits. One reason for the decision was that the Board's jurisdiction over gas supply to Alberta consumers predated that of the ERCB and that if the legislature had intended to restrict the Board's powers to price-fixing, it would have said so.

The second issue raised by Dome was whether the Board, in setting Dome's obligations under the plan, was entitled to take into account Dome's production of propane in a mix gathered for removal from Alberta. There are two basic forms of propane: specification propane, and propane as a component of a natural gas liquids mixture. In the latter form, propane must be separated out in fractionation facilities, prior to consumption. All of Dome's propane in Alberta (excepting

16. R.S.A. 1970, c. 158.
17. S.A. 1973, c. 91.
18. R.S.A. 1970, c. 157.

some produced by a subsidiary) is of the second type, and is shipped through a major gathering system to Sarnia, Ontario for fractionation.

The Board's plan required Dome to supply from 7.91% to 13.31% of Alberta's required specification propane, despite the fact that Dome itself produces no specification propane in Alberta. Dome argued that the Board ought not to have taken its natural gas liquids mix removed from the province into account in determining Dome's obligations. The Alberta court held that the Board's jurisdiction under s. 27(e) of the Gas Utilities Act was not restricted only to utilities producing specification propane, but was broad enough to require a gas utility to supply and deliver specification propane, whether or not the utility is producing it in that form.

III. CONSTITUTIONAL CASES

A. Oil and Gas

Canadian Industrial Gas and Oil Ltd v. *Government of Saskatchewan and A.-G. Saskatchewan* (1976) 65 D.L.R. (3d) 79, [1976] 2 W.W.R. 356 (Sask. C.A.).

This appeal has now been heard by the Supreme Court of Canada, but as yet no decision has been handed down.*

In view of the decision of the Supreme Court of Canada in the *Amax*[19] case (discussed *infra*) a successful appeal would pose serious problems to the Government of Saskatchewan. Undoubtedly, the Government would produce remedial legislation to avoid the economic impact of repaying monies levied by the province under the provisions of The Saskatchewan Oil and Gas Conservation, Stabilization and Development Act.[20]

B. Potash

The following cases, which were considered at the 1976 Seminar, are dealt with at their current level of appeal.

Central Canada Potash Co. Limited and Attorney General of Canada v. *Government of Saskatchewan* [1977] 1 W.W.R. 487 (Sask. C.A.).

At trial,[21] Disbery J. held that the Potash Conservation Regulations, 1969, the Orders-in-Council enacting and amending them, schemes of potash prorationing, and the directions and licences issued by the Minister and his Deputy in implementing the Regulations were *ultra vires* the Saskatchewan Mineral Resources Act.[22] He held further that the Minister of Mineral Resources and his Deputy had committed the tort of intimidation in writing a letter threatening to cancel the plaintiff's Crown leases and its production licences unless it complied with the prorationing scheme. Damages of $1,500,000 were awarded. The Saskatchewan Court of Appeal allowed the appeal.

Certain background information helps put this case into perspective. In 1969, there was a world-wide surplus production of potash

* *Editor's note:* The Supreme Court of Canada's decision in the *CIGOL* case was handed down on November 23, 1977. The appeal was allowed, and the Government of Saskatchewan ordered to return the collected monies. Remedial legislation has been passed.

19. *Amax Potash Ltd.* v. *Government of Saskatchewan* [1976] 6 W.W.R. 61.

20. S.S. 1973-74, c. 72.

21. [1975] 5 W.W.R. 193.

22. R.S.S. 1965, c. 50.

resulting in a price decline. Most of the potash produced in Saskatchewan was exported. Almost 50% of the potash in the United States market was received from Saskatchewan. In an attempt to reduce the overproduction, an Order-in-Council[23] dated November 17, 1969, was made under the provisions of the Mineral Resources Act. The Regulations were later amended effective July 1, 1970. Section 9 of the Act authorized the Minister to "do such things as he deems necessary to . . . manage, utilize and conserve the mineral resources of Saskatchewan". The Regulations required a licence to produce potash, giving the Minister power to allocate the amount each mining property could produce. Each producer was allowed to produce and sell 40% of its productive capacity; however, provision was made for a supplementary licence to produce an additional amount. During the years 1970-71, Central Canada Potash, with the use of supplementary licences, was producing close to its productive capacity. In 1972, the government introduced a prorationing and price stabilization scheme which would reduce the amount produced by Central Canada Potash. The company refused to be bound by the new scheme. By letter of September 20, 1972, the Deputy Minister demanded that the company comply with the scheme; he warned that if the company did not comply, its licence to produce potash would be cancelled. The company then attempted to obtain a writ of mandamus requiring the Minister to issue it a more favorable producing licence. The application was dismissed and two appeals were likewise dismissed. While the matter was pending before the Supreme Court of Canada, the company commenced this declaratory action, attacking the constitutionality of the legislation. The Attorney General of Canada intervened and was joined as a plaintiff in the action. Following Disbery J.'s disposition of the action, the legislature amended the Act in 1976. The amendments provided, in part, that the Regulations were ratified and confirmed retroactively, that the production quotas were made a schedule to the Act, and that the Minister had the power to refuse to issue a production licence and to cancel mineral leases.

In upholding the constitutionality of the legislation, the Saskatchewan Court of Appeal pointed out that courts have a responsibility to ensure that the British North America Act works. Constitutional validity must be determined by searching out the real intent and purpose of legislation or the true nature and character of the legislation, rather than by looking at the effect of the legislation. The real intent and purpose of the Regulations establishing prorationing and price stabilization programs was to protect the potash industry of Saskatchewan and to overcome its immediate economic problems. Although the Regulations might be *intra vires*, the question still remained whether the true nature and character of the plans as evolved and implemented under the Regulations was within the authority of the Act, rather than within the field of trade and commerce. The words "manage, utilize and conserve", as used in section 9, included the adoption of economic policies to assure a healthy and sound economy for the potash industry in the province. The schemes adopted were in pith and substance for the management, utilization and conservation of the potash industry. In determining the constitutionality of legislation, the transaction must be looked at in its

23. Sask. Reg. 1733/69 (1969).

particular circumstances to determine its intent and purpose. The intent and purpose is determined by the true nature of legislation and not by the ultimate economic results. The schemes introduced did not purport directly to control or restrict trade in potash. If they did affect the international market, that was a result and not the purpose: the purpose was to "manage, utilize and conserve" the potash so as to protect and maintain that industry within the province, a subject matter within legislative competence of the Province of Saskatchewan.

Disbery J.'s award of damages for intimidation was also set aside. The court was of the view that *Rookes* v. *Barnard*[24] should not have been applied and extended to recognize the tort of intimidation in this case, where there was not an alleged third party intimidation. Even if the tort of intimidation were to be recognized, the facts here were insufficient to support the claim. It seemed obvious that the company had complied with the prorationing scheme not because of intimidation, but because it had failed in the mandamus proceedings. Furthermore, the Deputy Minister's letter could not provide the basis for the tort since he had no authority to cancel licences, such action being only within the Minister's power. Finally, the regulation and scheme were valid; and a threat to do what one is legally entitled to do gives no cause of action.

The Court of Appeal held further that the 1976 amendments to the Act were valid. They not only expressed law as it existed at the time they were adopted, but declared what the law had always been under the Act. The amendments themselves being *intra vires*, they could be relied on to dispose of the appeal.

There can be little doubt that a final decision in this case will be made by the Supreme Court of Canada.

Amax Potash Limited et al. v. *Government of Saskatchewan* [1976] 6 W.W.R. 61 (S.C.C.).

This case appears to settle a significant constitutional point relative to Crown immunity.

The Government of Saskatchewan, by the Potash Reserve Tax Regulations, 1974 passed pursuant to the Mineral Taxation Act,[25] set out the amount of tax payable by persons engaged in mining potash in the province. The appellants commenced an action for a declaration that the taxing provisions were *ultra vires* and that all moneys paid on account of the imposed tax must be repaid. They applied for an order for the preservation of any amount paid in taxes until the trial of the action pursuant to the Queen's Bench Rules. Section 5(7) of the Proceedings Against the Crown Act[26] provided, in part, that no proceedings could be taken against the Crown, even if a statute authorizing the doing of an act was beyond the legislative jurisdiction of the province. The respondent argued that this section prevented the appellants from being repaid any taxes paid, even if the taxing legislation was *ultra vires*.

The Supreme Court held that section 5(7) was *ultra vires* insofar as it purported to bar recovery of taxes paid under a statute or statutory provision found to be beyond the legislative jurisdiction of the

24. [1964] A.C. 1129, 1 All E.R. 367.
25. S.S. 1973-74, c. 65.
26. R.S.S. 1965, c. 87.

province. The dismissal of the order for interim preservation of property was upheld. The court was of the view that in the event that sections 25A and 28A of the Mineral Taxation Act are *ultra vires*, section 5(7) of the Proceedings Against the Crown Act does not prevent recovery of any money paid as taxes under the Act. The implicit principle is that if a statute is found *ultra vires*, legislation which attaches legal consequences to acts done pursuant to the invalid law must also be *ultra vires*, because it relates to the same subject matter as that of the impugned legislation. The court stated at 74: "If a state cannot take by unconstitutional means, it cannot retain by unconstitutional means."

This appeal related only to an interlocutory matter arising out of the action attacking the validity of the Potash Reserve Tax Regulations. It does not, of course, deal with the principal issue of the litigation, namely, the constitutionality of the said tax. Nonetheless the decision is important to the oil and gas industry. It will undoubtedly have significant impact should the Oil Conservation, Stabilization and Development Act[27] be set aside as *ultra vires* in whole or in part. This appears to be the first constitutional case concerning whether or not a province could establish immunity for itself where the acts complained of arose from *ultra vires* legislation. It may be of interest to recite the relevant provisions of section 5(7) of the Proceedings Against the Crown Act of Saskatchewan:

> S. 5(7). No proceedings lie against the Crown under this or any other section of this Act in respect of anything heretofore or hereafter done or omitted and purporting to have been done or omitted in the exercise of a power or authority under a statute or statutory provision purporting to confer or to have conferred on the Crown such power or authority which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the legislature; . . .

Dixon J. in his judgment for the unanimous Court stated at 73:

> Section 5(7) of The Proceedings Against the Crown Act, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under the B.N.A. Act. It also brings into question the right of a province, or the federal parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal parliament or a provincial legislature can tax beyond the limit of its powers, and by prior or *ex post facto* legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within the proper constitutional limits. To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial legislature to do indirectly what it could not do directly, and by convert means to impose illegal burdens.

At the last legislative session, the Saskatchewan government authorized the repayment of several million dollars to potash producers who had paid the money under the Potash Reserve Tax Regulations, 1974. It is unlikely that this step will have any significant bearing on the continuing challenge by the potash industry of the taxing statutes and regulations to which the industry is subject.

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27. S.S. 1973-74, c. 72.