RECENT JUDICIAL DEVELOPMENTS OF INTEREST TO OIL AND GAS LAWYERS

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The purpose of this article is to provide a brief survey of recent Canadian case law in areas of interest to oil and gas lawyers.

TABLE OF CONTENTS

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I. INTRODUCTION

The biggest challenge in the preparation of this paper has been in the selection of the most significant judicial decisions. While we have generally selected cases of particular interest to those practising in the oil and gas area, we have also sought to include some decisions which we feel are of general interest to lawyers. In addition, we have included several American authorities which we found to be relevant as well as interesting. As in years previous, the cases are grouped under headings for ease of reference. However, these are a guide only as some of the decisions include issues which lend themselves to various headings. In addition, although we have given brief summaries of the cases, the actual case reports should be referenced.

II. CONTRACT

A. *OPTIMA ENERGY CORP. (C.O.B. OAE RESOURCES CORP.)* v. *ORTYNSKY EXPLORATION LTD.*[1]

This case concerns the 1983 PASWC Accounting Procedure, and whether responses to audit enquiries are final. An application for summary judgment in the amount of $644,996.07 was made for non-payment of accounts. The Court held that because audit inquiries had been made, there were sufficient grounds for the finding of a triable issue; summary judgment was therefore refused.

Optima, as non-operator, refused payment and arranged for an audit. The auditor prepared an "interim audit report" which raised a number of audit queries. The operator

[1] (4 November 1992), Calgary 9001-16465 (Alta. Q.B.).

responded to those queries in accordance with the provisions of clause 108, which states as follows:

> Any of the Non-Operators, upon notice in writing to Operator and all other Non-Operators, shall have the right to audit Operator's accounts and records maintained for the Joint Account for any calendar year within the 24 month period next following the end of such calendar year. Where two or more Non-Operators desire to conduct audits, they shall make every reasonable effort to conduct joint or simultaneous audits in a manner which will result in a minimum of inconvenience to Operator. The cost of audits shall be borne by all Non-Operators. Any claims of discrepancies disclosed by such audit shall be made in writing to Operator within two months of the completion of such audit.
>
> Operator shall respond to any claims or discrepancies within six months of receipt of such claims. If the Operator is unable to respond to the claims during the six month period, one extension of three months may be presented by the Operator to the Non-Operators for approval in accordance with Clause 110. Claims unanswered after the above six month period and/or additional three month extension, shall be credited forthwith to the Joint Account as originally submitted, until such claim of discrepancies are resolved.[2]

The operator's responses were extensive. Optima did not accept either the accuracy or adequacy of a number of the responses and continued to withhold payment on the basis that the interim audit report indicated an amount owing from the operator to Optima in the amount of $475,757.41. The auditor purported to find charges that were based on unsigned authorizations, unsupportable management fees and overpayments. McMahon J. stated that the audit raised as many questions as it answered. It was also equally clear that the three volumes of written responses prepared by the operator to the audit queries themselves raised additional questions. The standard accounting procedure incorporated into the joint venture agreement, and in particular clause 108, did not by its terms contemplate what remaining remedies the parties had if the operator's response to the audit did not satisfy the issues raised by the non-operator.

The Court held that it would require the clearest language to compel the non-operator to pay, notwithstanding its view, supported by audit, that payment was not required. McMahon J. was satisfied that such language did not exist in the present case. Therefore, there were meritorious factual issues to be tried between the parties, and the wording of the agreement was not so clear as to permit summary judgment against the non-operator for non-payment given such factual issues.

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2 *Ibid.*

B. *ATLANTIS RESOURCES LTD.* v. *CANADIAN CRUDE SEPARATORS LTD.*[3]

The plaintiff had its oil treated and cleaned at the defendant's processing facilities. Prior to shipping, the plaintiff took tests to determine oil and water content. The defendant also took samples, using a different testing method. Sometimes there was a discrepancy between the two methods, resulting in the defendant shipping a greater amount than the plaintiff thought was shipped. Overages were to be credited back to customers pro rata. In addition, a small amount of what is called "skim oil" was sold by the defendant for its own account. The plaintiff brought its action in breach of contract, alleging that the defendant was in breach of its duty to maintain records, for falsifying records, for overstating water content, for overcharging for processing fees, and for failing to account. The defendant counterclaimed for unpaid processing fees.

The Court held for the defendant in both claims and seems to have been persuaded by two factors. First, it discounted the evidence of the plaintiff's main witness (a former employee and later a competitor of the defendant). Second, the Court accepted the view of the defendant's expert who gave evidence that the cutting of oil is not an exact science. While the defendant's method may not have been perfect, it was more reliable than the plaintiff's method. In addition, the Court held that there was no evidence that the parties had made any formal agreement as to fees, overage, proration and shrinkage.

C. *LUSCAR LTD.* v. *PEMBINA RESOURCES LTD.*[4]

This case was discussed in last year's review of cases.[5] The Court considered an area of mutual interest clause and the existence and scope of fiduciary duties among the parties to the area of mutual interest agreement. At trial, Egbert J. held that there was a fiduciary relationship among the parties and that the constructive trust remedy was available. The Court granted the plaintiffs a share of the revenue of which they had been wrongfully deprived since 1971.

Subsequent to the trial decision but prior to the entry of the Order, the defendant brought an application to introduce further evidence relating to the income tax effect of having received proceeds from net production.

The trial judge dismissed the motion for the following reasons:

(a) the defendant did not exercise reasonable diligence in bringing the evidence before the Court in a timely fashion;

(b) the evidence would not change the outcome of the trial;

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3 (27 April 1992), Calgary 8901-02090; 8901-13976 (Alta. Q.B.).

4 (1992), 2 Alta. L.R. (3d) 157 (Q.B.).

5 R.W. Block, P.W. Burgess & F.R. Foran, "Recent Judicial Developments of Interest to Oil and Gas Lawyers" (1993) 31 Alta. L. Rev. 153 at 157.

(c) the evidence was available at trial; to allow its introduction now would be an abuse of process; and

(d) the evidence was not incontrovertible.

D. *R.N. STINE* v. *MARATHON OIL COMPANY*[6]

The Texas Court of Appeals considered a Joint Operating Agreement excluding liability for "gross negligence or wilful misconduct." The exculpatory clause provided that the operator

> shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties ... except such as may result from gross negligence or wilful misconduct.[7]

"Liability" was defined as including "legal responsibility" and "responsibility for torts." The Court held that the protection of the exculpatory clause extended not only to "acts unique to the operator," but also to any acts done under the authority of the Joint Operating Agreement "as Operator" including breaches of the agreement and acts performed "as Operator" that amounted to tortious interference with contracts with third parties. Therefore, the exculpatory clause protected Marathon from liability arising out of mere negligence for any act taken in its capacity "as Operator" under the agreement, except for gross negligence or wilful misconduct.

The plaintiff alleged that the operator, Marathon, had breached duties owed to it under the Joint Operating Agreement in connection with testing and completion of wells; these alleged breaches included not delivering operation of the wells before plugging and abandoning them, not furnishing information, and not completing wells. The plaintiff also alleged that the operator had tortiously interfered with its gas sale contract and that by failing to drill certain exploratory wells, the operator had abandoned a substantial portion of the lease acreage.

Because the Court held that the exculpatory clause in the Joint Operating Agreement excused Marathon for "any liability for any act taken in its capacity as Operator" if authorized by the agreement, except for gross negligence or wilful misconduct, the operator was not liable for these actions. The allegation of tortious interference with the gas sale contract related to the operator's actions in notifying the gas purchaser to forward directly to the operator funds that the operator was owed by the plaintiff. The Court noted that in collecting the funds from the gas purchaser, Marathon was still acting as operator under the Joint Operating Agreement.

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6 976 F.2d 254 (5th Cir. 1992).

7 *Ibid.* at 259.

E. *DOHENY* v. *WEXPRO COMPANY*[8]

The issue in this case was whether there would be balancing in kind or cash balancing in the absence of an agreement. The plaintiffs were minority interest holders in certain oil and gas leases, commonly referred to as the "Trail Unit." The defendant Wexpro was the operator of the gas wells. Wexpro shut down the wells in the summer of 1989. In October, Wexpro resumed production for the Trail Unit working interest owners, other than the plaintiffs, because the others had contracts to sell their gas. The plaintiffs asserted that it was not economically feasible to sell their gas themselves to a third party due to the costs involved in transporting gas. The plaintiffs commenced a lawsuit asserting that they were entitled to cash balancing to cure the underproduction in the Trail Unit. The plaintiffs contended that the imbalance should be corrected through cash balancing while other working interest holders contended that balancing in kind was appropriate. The lower Court determined that as a matter of law, balancing in kind was the appropriate method.

The Court noted that balancing in kind allows an underproduced party to take a designated percentage of the overproduced parties' gas until a balance is reached. Cash balancing, on the other hand, requires the overproduced party to compensate the underproduced party in cash to effectuate a balance. The payment is based on the price the overproduced party received for the gas.

The Court held that balancing in kind was the preferred method for gas balancing in the industry. It rejected cash balancing, stating that an inability to market gas at a price that the underproduced party deemed satisfactory is not an equity that dictates cash balancing. Cash balancing, if universally and automatically applied, would force persons like the plaintiffs to sell their gas at a price they might deem unacceptable. Cash balancing, as an after-the-fact option for interest owners like the plaintiffs, would give them a speculative advantage, to take in kind in a rising price market and to take the cash in a declining market.

The plaintiffs also asserted that the language in the unit operating agreement created a joint ownership between the parties to the agreement. The Court noted, however, that Article 6.3 of the Unit Operating Agreement provided that "each party shall currently as produced take in kind or separately dispose of its share of production."[9] The plaintiffs argued that Article 6.1.B allocated production according to the parties' respective acreage holdings. The District Court reconciled the two provisions by holding that the allocation-by-acreage provision related to overall production, rather than the character of the interest created. The Appeal Court held that the Unit Operating Agreement was not ambiguous and, when read as a whole, the construction that the District Court placed on the particular articles was consistent with the plain meaning of the remaining contract terms. Article 28 of the Unit Operating Agreement explicitly stated that the agreement did not create a partnership, and that the liabilities of the parties "shall be several and not joint or

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8 974 F.2d 130 (10th Cir. 1992).

9 *Ibid.* at 134.

collective." Read together, these contract provisions supported a conclusion that the working interest owners were not co-tenants in the leases.

The plaintiffs also asserted claims based on unjust enrichment and conversion against the other working interest owners, and a claim for breach of fiduciary duties against Wexpro. The plaintiffs argued that Wexpro's alleged fiduciary duty obligated it to shut down the wells and obtain a formal balancing agreement once the plaintiffs' gas purchase agreement was terminated. The Court noted that these were not duties outlined in the contract, nor were they duties that would naturally arise as corollaries to the obligations set forth in the agreement. Because the plaintiffs made no showing that Wexpro breached a specific duty encompassed by the operating agreement, they also failed to raise a question of fact concerning breach of an implied covenant of good faith and fair dealing.

F. *COLBURN* v. *PARKER AND PARSLEY DEVELOPMENT COMPANY*[10]

This case involved a dispute over the contractual provisions of a salt water disposal agreement and an oil and gas lease. Based on the wording of the agreement, the Court held that it required a payment not only for salt water produced from other lands, but also from the salt water produced on the premises of the lease. Two experienced oil operators testified that it was the custom and practice of the oil industry not to pay for the disposal of on-premises water. However, agreements produced by the experts specifically provided that disposal of off-premises water would be compensated, while disposal of on-premises water would not. The Trial Court found that notwithstanding the fact that Rupe (to whom the plaintiff had granted the oil and gas lease) might have had the right to dispose of on-premises water without payment, he negotiated a salt water disposal agreement which gave him an additional valuable right to dispose of off-premises water to his economic benefit and in return therefore agreed to pay the plaintiff. The Trial Court applied a rule of strict construction to the salt water disposal agreement and found that the agreement required the lessee to pay the lessor for all water of which it disposed.

The Court of Appeals of Kansas held that although no express right to dispose of salt water was granted by the oil and gas lease in issue, the right to dispose of salt water was created by implication and by statutory law. This right arose by the reasonable application of implied covenants to oil and gas leases long recognized by Kansas courts. The production of salt water from the plaintiff's wells was a necessary and unavoidable result of the production of oil from that property. The Court noted that in other states, the drilling and operating of a salt water disposal well was an implied covenant of an oil and gas lease, and could locate no case in which the standard oil and gas lease had been construed to require payment by the lessee to the lessor for disposal of leased premises salt water. The Court also noted that in order to avoid pollution of fresh water, the Kansas legislature had provided for control over the disposal of salt water by statute. The Court held that the granting clause in an oil and gas lease includes an implied covenant to dispose of the salt water produced during operations by utilizing a salt water disposal well drilled on the leased premises without additional compensation to the lessor.

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[10] 842 P.2d 321 (Kan. App. 1992).

The Court held that when the salt water disposal agreement was considered as a whole, it agreed with the lower Court that the agreement contained ambiguities requiring evidence of intent concerning the manner of payment. Although the lessee under an oil and gas lease has the implied right to dispose of salt water on the leased premises without payment to the lessor, that right may be bargained away by agreement.

G. *ALLIED-SIGNAL INC.* v. *DOME PETROLEUM LTD.*[11]

Although overturned on appeal, this case raises interesting issues about implied novation. Home Oil Company, Kern County Land Company and Allied-Signal were named as third parties in two related actions. They brought a motion to strike out these notices on the basis that they no longer had any obligations under the agreement in suit but that there had been an implied novation.

In 1959, Canada Southern and two others (the "C-M-O Group") held certain oil and gas permits covering lands in the Yukon. In 1959, the C-M-O Group assigned a 50% working interest to several companies referred to as the H-S Group (Home Oil Company, Kern County Land Company, Signal Oil and Gas Company (now Allied-Signal), Alminex Limited and United Oils, Limited). The H-S Group therefore included the third parties.

On November 22, 1961, the H-S Group assigned half of its 50% interest to Pan American Petroleum (now Amoco). In so doing, Pan American agreed to accept half of all other obligations of the H-S Group. In addition, it agreed to indemnify each of the members of the H-S Group for any liability arising out of the assumed obligations. Pan American gave notice to the C-M-O Group of both the assignment and the fact it had agreed to be bound by the terms of the 1959 agreement.

Between 1962 and 1965, all of the members of the H-S Group, except Alminex, assigned their remaining interests in the 1959 agreement to Dome. In each case, Dome undertook in writing to perform all of the obligations of these parties under the 1959 agreement to the extent of the interest assigned. In 1987, Canada Southern, part of the C-M-O Group, commenced an action in Florida against H-S Group member Allied-Signal, alleging a failure to comply with a covenant in the 1959 agreement. Allied-Signal had not held a working interest in the lands and had had no dealings with them for some 25 years prior to the Florida action. In the Florida action, Canada Southern expressly took the position that there had been no novation of this obligation.

In response, Allied-Signal commenced an action in Calgary against, *inter alia*, Dome and Amoco pursuant to indemnities it received when it assigned its interests to Dome and Pan American. In the same action, Amoco issued third party claims against Home and Kern as well as a counterclaim against Allied, Home and Kern seeking declaratory relief.

In 1988, Medhurst J. granted an Order in the Allied action restraining the C-M-O Group from continuing the Florida action and holding that Alberta was *forum conveniens*.

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[11] (1992), 122 A.R. 321 (Q.B.).

In 1990, Canada Southern commenced a second action against Amoco and other current working interest owners alleging breach of the same covenant. Curiously, Canada Southern did not name Allied or any members of the H-S Group except Mobil Oil Canada Ltd. (as successor to Alminex). Again, Amoco issued third party notices against Allied, Home and Kern claiming contribution and claiming that the third parties had continuing liability under the marketing and development covenant.

O'Leary J. granted the application and dismissed the third party claims. One basis for dismissing the third party claims was that there had been an implied novation of the 1959 agreement. The judge held that the facts supported the existence of an implied novation whereby Canada Southern accepted the Amoco group as a party in substitution for the original H-S Group members. He cited the authority of *National Trust Co.* v. *Mead*[12] wherein Wilson J. stated at 19 the following:

> Because assent is the crux of novation, it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. The courts have established a three part test for determining if novation has occurred. It is set out in *Polson* v. *Wulffsohn* (1890), 2 B.C.R. 39, as follows:
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> 1. The new debtor must assume the complete liability;
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> 2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
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> 3. The creditor must accept the new contract in full satisfaction and substitution for the old contract.

The judge held that there was an implied novation because:

(a) A subsequent agreement had been entered into in 1966 without consulting the third parties; it included changes as significant as the conversion of the Canada Southern interest to a carried interest;

(b) In 1969, government leases were taken in the names of Canada Southern, Pan American and Dome without consultation with the Third Parties;

(c) In 1977, a farmout to another party, Columbia, was entered into without consultation with the third parties; and

(d) From the mid 1960s to 1987, none of the third parties had anything to do with the lands as Canada Southern had the written undertakings of Pan American

[12] (1990), 112 N.R. 1 (S.C.C.).

and Dome to be bound by and to fulfil the obligations once held by the third parties under the 1959 agreement.

The finding of implied novation was reversed by the Court of Appeal.[13] The reasons are brief and turn on the technical point of what notice of the motion had been given to Canada Southern. Canada Southern had not participated in the motion to strike the third party notices and took the position that it was not bound by the decision involving novation and limitations. The Court held that the judge's conclusions in respect of the implied novation and the limitation period were wrong because both were allegations against the plaintiff as well as the defendants.

H. *ALBERTA ENERGY CO.* v. *CANADIAN WESTERN NATURAL GAS CO.*[14]

The plaintiff sought a declaration of the price the defendant should pay for natural gas it bought from the plaintiff. The price for gas was to be established either by agreement between the parties or by arbitration. Either party could give written notice requiring a price redetermination prior to the expiry of each contract year. Where they could not agree, the matter went to arbitration. If the arbitration concluded that no price revision was required, the previous price would continue.

In 1988, the seller sought a redetermination and when the parties could not agree the matter went to arbitration. Prior to the conclusion of the arbitration, the seller sought a declaration that the price that should be paid in the meantime was the previously existing price. The chambers judge held that the redetermination notice terminated the previously existing price. To impose an interim price would mean that the Court was essentially amending the contract.

The Court of Appeal held that the chambers judge was mistakenly adding a provision to the contract which said that the giving of notice for a price redetermination was effective to terminate the pre-existing price. This would lead to a commercially unreasonable result in that no price at all would be payable after a notice of redetermination until such time as the parties agreed or the arbitrator directed. Accordingly, the Court of Appeal held that the previously existing price would be in effect until such time as the arbitrator decided. The Court placed emphasis on the fact that the arbitrator could conclude that the previously existing price was the appropriate price in any event.

I. *GULF CANADA RESOURCES LTD.* v. *AROCHEM INTERNATIONAL LTD.*[15]

A stay of proceedings was granted pursuant to s. 8 of the *International Commercial Arbitration Act*,[16] which states:

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13 [1992] 5 W.W.R. 377 (Alta. C.A.).
14 (1993), 5 Alta. L.R. (3d) 250 (C.A.).
15 (1992), 66 B.C.L.R. (2d) 113 (C.A.).
16 S.B.C. 1986, c. 14.

Stay of legal proceedings

8(1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.

Gulf agreed to sell oil to the Arochem companies. The agreement contained a clause requiring arbitration of disputes in accordance with the rules of arbitration of the International Chamber of Commerce. Prior to delivery, the price of oil dropped and the defendants repudiated the contract. Gulf accepted the repudiation and commenced an action claiming substantial damages. The defendants made an application for stay of proceedings which was granted.

J. *PEMBINA RESOURCES LTD.* v. *SASKENERGY INC.*[17]

In this case, the chambers judge refused an application for a stay of a pending arbitration. The appellant argued that court was a more appropriate forum than an arbitration. This, too, was rejected on the basis that the court cannot change prices in a contract. It similarly noted that support for such a position could not be found in s. 47 of the *Arbitration Act.*[18] This section allows the Court to declare an arbitration invalid. However, it does not permit the court's assessment of the merits of what is the appropriate forum.

K. *PETRO-CANADA* v. *ALBERTA GAS ETHYLENE CO.*[19]

In this case, the parties decided to resolve a contractual dispute by an arbitration pursuant to the federal *Commercial Arbitration Act.*[20] As required by the legislation, the parties entered into an agreement which, among other things, gave each party certain rights if the tribunal did not render its decision within a certain time. On the day before the arbitration tribunal was to issue its decision, the applicant seller moved to:

(i) terminate the mandate of the tribunal;

(ii) quash the decision of the tribunal that it continued to have jurisdiction notwithstanding the lapse of time; and

(iii) enjoin the tribunal from rendering its decision.

The chambers judge granted the relief sought and enjoined the tribunal from rendering its award. The Court of Appeal rejected the argument of the appellant that no recourse could be had to the courts once the tribunal made an award holding that its mandate was not terminated. While it acknowledged that the basis of the legislation is to minimize

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17 (13 January 1993), Calgary 92-13425 (Alta. C.A.).

18 S.A. 1991, c. A-43.1.

19 (1992), 1 Alta. L.R. (3d) 380 (C.A.).

20 R.S.C. 1985 (2nd Supp.), c. 17.

recourse to the courts, the applicant acted consistently by first asking the tribunal to rule in its mandate. Having done so however, the applicant was not precluded recourse to the court. Accordingly, the Court of Appeal dismissed the appeal except with respect to the injunction which it vacated as it saw no valid reason for its issuance.

III. TORT

A. *B.G. CHECO INTERNATIONAL LTD.* v. *BRITISH COLUMBIA (HYDRO AND POWER AUTHORITY)*[21]

In this case the Supreme Court of Canada was faced with the issue of concurrent liability in contract and tort.

In 1982, B.G. Checo ("Checo") was the successful tenderer to the British Columbia Hydro and Power Authority ("B.C. Hydro") for a project involving the erection of electrical transmission towers and the stringing of transmission lines. The final contract incorporated the tender documents which stated that right of way clearing was not included in the contract but was the responsibility of others. The evidence showed that B.C. Hydro knew at the time of tendering that the clearing had not been done properly.

Because of the poor clearing, it was difficult for Checo to complete the job in time. In order to do so, it incurred substantial additional costs and sued the defendants in contract and tort. At trial, B.C. Hydro was found liable for fraudulent misrepresentation.[22] The Court of Appeal rejected the finding of fraud but instead found negligent misrepresentation which induced Checo to bid the contract at a lower price than it would have had it known that the right of way clearing had not been properly carried out.[23]

The Supreme Court of Canada dismissed the appeal and held B.C. Hydro liable for breach of contract. In addition, the Court chose to comment that the contract did not preclude an action in tort. It found that B.C. Hydro's duty of care in tort was co-extensive with its contractual duties. It reasoned that B.C. Hydro's representations as to there being a clear right of way were akin to an express contractual warranty.

The Court began from the premise first enunciated in *Central Trust Co.* v. *Rafuse*[24] in which it held that where a given wrong *prima facie* supports an action in both contract and tort the party may sue in either or both subject to any limits set out in the contract. In other words, if the tort duty is not contradicted by the contract, it may be sued upon.

The Court looked at three situations:

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21 (28 January 1992; 21 January 1993), Supreme Court File Nos. 21939, 21955 (S.C.C.).

22 (10 June 1988), Vancouver C864116 (B.C.S.C.).

23 (1990), 44 B.C.L.R. (2d) 145 (C.A.).

24 [1986] 2 S.C.R. 147.

1) Where a contract stipulates a higher obligation than that imposed by tort law. In such a case, one would not generally sue in tort as recovery would be unlikely in the face of the higher standard.

2) Where the contract stipulates a lower duty than that imposed by tort law, as in cases of exclusion of liability clauses. However, the Court cautioned that the duty imposed by tort can only be nullified by the clearest of terms.

3) Where contractual and tort duties are co-extensive and where the tort duty is not negated by the contract. The Court held this was such a case and that B.C. Hydro's obligation not to negligently misrepresent that it would have the right of way clearing done by another party was not negated by the contract. In fact, the contract stipulated such an obligation.

The Court noted further that it would seem anomalous to award different amounts for damages for what is essentially the same wrong merely because of the remedy chosen. However, it noted that in some situations, policy may so dictate. In tort, Checo would be entitled to be compensated for all reasonably foreseeable loss caused by the tort. Here, Checo would have increased its tender by an amount equal to the additional clearing costs. However, the Court further held that the damages must go beyond direct costs because to limit them would suggest that the only tort was a failure to clear. Hence, such damages would include accelerated costs and other indirect costs expended to meet the completion date. The Court held that these were arguably foreseeable.

In contract, Checo would be put in the position it would have been in had the work site been properly cleared and, therefore, would be entitled to all expenses incurred as a result of the breach. Such damages would include direct expenses resulting from the lack of clearing as well as consequent indirect costs such as acceleration costs due to construction delays.

B. *CANADIAN NATIONAL RAILWAY CO.* v. *NORSK PACIFIC STEAMSHIP CO.*[25]

The issue in this case was whether there should be tort liability for loss of contractual relations suffered by a plaintiff as a result of damage caused by a defendant to the property of another.

The defendants negligently damaged a railway bridge which was owned by Public Works Canada but which was used extensively by the plaintiff. The plaintiff incurred economic loss when it had to reroute its traffic during the repair period. The railway was the principle user of the bridge, accounting for approximately 80% of its traffic and owned the track leading to each end of the bridge. It was widely known, including to the defendant, that the plaintiff was the primary user. The Federal Court Trial Division held the defendants liable for the loss claimed. An appeal to the Federal Court of Appeal was dismissed and a further appeal to the Supreme Court of Canada was similarly dismissed.

[25] (1992), 91 D.L.R. (4th) 289 (S.C.C.).

The Supreme Court of Canada approached the case as one which required it to "confront squarely the vexed question of the extent to which damages for pure economic loss may be recovered in tort at common law."[26] The majority decision, written by McLachlin J., starts from the fundamental proposition of tort law that a person who by his or her fault causes damage to another may be held responsible. Where there is negligence, the duty extends to all those to whom the tortfeasor may foreseeably cause harm.[27]

The Court reviewed the law in various jurisdictions, including the United Kingdom, where the decision in *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*[28] was cited. There, a defendant negligently made a statement which the defendant should have known would be relied on by others such as the plaintiff, who did so to its financial detriment. Now a firmly fixed exception in the law of tort, at the time it represented a departure from the role which restricted recovery of the economic loss to cases where the plaintiff had suffered physical damage. The Court also cited the decision of the House of Lords in *Anns* v. *Merton London Borough Council.*[29] There, Lord Wilberforce suggested recovery should not depend on the category of case but should be permitted wherever there was foreseeability in sufficient proximity between the negligent act and the loss. McLachlin J. noted that the House of Lords has retreated from this view and "returned to the old proposition that economic loss could be recovered in negligence only where the plaintiff had suffered physical damage or in the reliance situation of *Hedley Byrne.*"[30]

McLachlin J. noted that historically there has been no attempt by the Supreme Court of Canada to formulate an all inclusive rule of application to cases involving claims by third parties for economic loss. Rather, the decisions show an evolution. For example, in *Rivtow Marine Ltd.* v. *Washington Iron Works,*[31] the Court allowed recovery of economic loss in the absence of physical damage. The majority awarded damages from the loss of the use of a defective crane during its repair, holding that the loss was the proximate result of the breach of a duty to warn. In *Kamloops (City)* v. *Nielsen,*[32] the Court confirmed that claims for economic loss in negligence were not restricted to cases of reliance or physical damage. In that case, the negligence by public authorities causing financial loss to third parties was found sufficient to permit recovery.

On this basis, McLachlin J. held that the approach used by the Court in *Kamloops* should be confirmed. Where new categories of claims arise, the Court should consider the matter first from the doctrinal point of view of duty and proximity as well as from the pragmatic perspective in terms of the purposes served and the dangers associated with the extensions sought.

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26 *Ibid.* at 358.
27 *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L.).
28 [1964] A.C. 465 (H.L.).
29 [1978] A.C. 728 (H.L.).
30 *Supra* note 25 at 361-62.
31 [1974] S.C.R. 1189.
32 [1984] 2 S.C.R. 2.

The doctrinal view addresses the fact that before the law can impose liability it must find a connection between the wrongdoer's conduct and the plaintiff's loss, which makes it just for the defendant to indemnify the plaintiff. In this context, the Court characterized proximity to be like the relationship in contract and fiduciary obligation in trust. McLachlin J. stated,

> In summary, it is my view that the authorities suggest that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance (*Hedley Byrne*); where there is a duty to warn (*Rivtow*), and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (*Kamloops*).[33]

However, McLachlin J. went on to state that the categories are not closed and that over time it is inevitable that there will be further definitions of what factors give rise to liability for pure economic loss.

The pragmatic considerations address the issue of whether or not there are practical reasons why recovery of economic loss should be confined to cases of physical damage, property damage or negligent misstatement. In other words, would the extension of recovery open the floodgates of liability.

McLachlin J. concluded that it had not been shown that the approach by the Supreme Court of Canada in *Kamloops* threatened to open the floodgates of undetermined liability, undue uncertainty or an unfair economic allocation of risk. She further indicated that even if the courts were to extend liability too far, it would also be open to the legislatures to impose limits.

The Court applied its reasoning to the case, stating that in the context of the *Kamloops* approach the plaintiff's right to recovery depended on whether it could establish sufficient proximity and whether extension of recovery to the type of its loss would be desirable from a pragmatic point of view. In reviewing the decisions of the lower Courts, McLachlin J. accepted that there were both physical and circumstantial closeness sufficient to establish proximity. She further held that such a characterization brought the situation into the joint or common venture category which has been recognized in the United Kingdom and in the United States as an appropriate head for the recovery of economic loss. The reasoning behind such a doctrine is that where the plaintiff's operations are so closely allied to the operations of the party suffering physical damage to its property that it can be considered a joint venturer with the owner of the property, it can recover its economic loss even though it has suffered no physical damage to its own property. She stated,

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33 *Supra* note 25 at 369-70.

To deny recovery in such circumstances would be to deny it to a person who for practical purposes is in the same position as if he or she owned the property physically damaged.[34]

McLachlin J. held that such an approach is practical because it permits recovery for a plaintiff whose position for practical purposes vis-a-vis the tortfeasor is indistinguishable from the owner of the property. In other words, the injured party is permitted to recover what the actual owner could have recovered. In so holding, McLachlin J. suggested that this would not open the floodgates of unlimited liability. Liability in this instance would not embrace casual users of the property or those secondarily affected by damage to it.

The basic rule which comes from this decision is stated thus:

If the evidence establishes that having regard to the entire relationship between the owner of the damaged property and the plaintiff, the plaintiff must be regarded as standing in the relation of joint or common venturer (or a concept akin thereto) with the property owner with the result that in justice his rights against third parties should be the same as the owner's, then I would not interfere. Here, as elsewhere in the law of tort, the question is where the balance between certainty and flexibility should be struck. It is my conviction, based on the development of the law relating to recovery of economic loss thus far, that the balance must be struck this side of rigid categorization which denies the possibility of recovery in new cases which may not meet the categorical test.[35]

It is interesting to note that the Court was not unanimous in its approach. A minority view, concurred in by three others (as was McLachlin J.'s majority view) held that in general there should be no liability for economic loss. In this specific instance, the facts did not support a finding that the plaintiff and the owner of the bridge were engaged in a joint venture. There was no profit sharing, loss sharing or other indicia of joint venture. In addition, the minority appears to favour the economic view that as between the parties, the plaintiff was in a better position to predict and bear the loss.

The tie was broken by Stevenson J., who held that the defendant was liable for the economic loss because it could reasonably foresee and actually foresaw a specific party, as opposed to a general class, who would suffer financial loss as a consequence of its negligence. A specific victim appears to have been sufficient to allay any fears of indeterminate liability.

IV. ENVIRONMENTAL REGULATION

A. *BANK OF MONTREAL* v. *LUNDRIGANS LTD.*[36]

The defendant owed the plaintiff bank $24,500,000. The bank sought an order appointing Coopers and Lybrand ("Coopers") as receiver and manager. Coopers would not accept the appointment unless the bank agreed to indemnify it against any claims arising out of its performance as receiver. The bank would not go so far as to give the receiver

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34 *Ibid.* at 376.

35 *Ibid.* at 377-78.

36 (1992), 92 D.L.R. (4th) 554 (Nfld. S.C.T.D.).

an open guarantee against any environmental orders, with respect to any of the properties coming into the receiver's possession.

The bank sought an order that the receiver's liability for environmental damages be limited to the amount realized on the sale of the particular asset. This was not an immunity from earlier caused damages but rather an order essentially enabling the receiver to do its job. The Attorney General of Canada and the Province intervened on the grounds that such an order would infringe existing legislation and would restrict enforcement and discharge of orders.

The Court held that the principles of vicarious liability for prior environmental damage could not be extended to a receiver charged with the responsibility of controlling or realizing on the assets of an essentially bankrupt company. This is because a potential receiver, before it is appointed, must learn what risks it is assuming. The same applies to the creditor agreeing to indemnify the receiver.

The Court discussed the arguments made by the intervenors and held that none of the legislation provided that a receiver shall be personally liable for environmental damage to property that comes into its hands. Legislation intended to impose such liability would have to say so in clear and unmistakable language.

The Court distinguished the decision of the Alberta Court of Appeal in *Panamericana de Bienes y Servicios S.A.* v. *Northern Badger Oil and Gas Ltd.*[37] In that case, the ERCB ordered that an undertaking was required from the receiver that the wells would continue to be operated in accordance with the conditions of the licenses and that the wells be abandoned when production was complete. The receiver failed to comply. The Court of Appeal held that the liability for the abandonment of the wells passed to the receiver and it would have to comply notwithstanding that the expense of doing so meant less money for the creditors.

The Court's basis for the distinction is that in *Panamericana* liability was with respect to obligations incurred by the receiver in carrying out its duties, as it had taken control of and operated the business and had contributed to the contamination.

B. *ONTARIO (ATTORNEY GENERAL)* v. *TYRE KING TYRE RECYCLING LTD.*[38]

In this case, the issue was whether a mortgagee not in possession, or otherwise having power, control or management of the property owes a duty of care in negligence or has a statutory responsibility for a fire which results in environmental damage. The damage claim brought by the province was originally for $100 million but was later reduced to the amount of the mortgage on the lands, which was $187,000.00. The Court held that the mortgagee had no knowledge as to the use being made of the property nor any possession or control and therefore dismissed the claims in negligence and nuisance.

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[37] (1991), 81 D.L.R. (4th) 280 (Alta. C.A.).

[38] (1992), 24 R.P.R. (2d) 63 (Ont. Ct. (Gen. Div.)).

The Province alleged liability pursuant to statute. The *Environmental Protection Act*[39] provides for claims against "the owner of a pollutant and the person having control of a pollutant." The Court held that a mortgagee could not meet the definition of a person having control of the pollutant. Similarly, the *Emergency Plans Act*[40] provides a right of action against a person who causes the implementation of an emergency plan. The mortgagee never caused such implementation and could therefore not be liable. Finally, the *Fisheries Act*[41] provides for claims against a party who "owns" or has the "charge, management or control" or can be found to "cause or contribute to the causation of the deposit" of any deleterious substance. Clearly, this was not the case.

C. *KING (TOWNSHIP)* v. *ROLEX EQUIPMENT CO.*[42]

The owner of land permitted waste to be dumped illegally. When the owner defaulted on its mortgage and abandoned the property, the mortgagee refused to take possession and remove the waste because there was insufficient equity to cover the costs of removal. But with the waste on site, the lands had no market value. The township, having obtained default judgment against the owner, was reluctant to remove the waste as the costs of doing so would rank in priority after the mortgage. It brought an action for an order appointing a receiver who would have authority to remove the waste and sell the property. In addition, it sought a declaration that the costs of removal would rank in priority ahead of the mortgage.

The Court acknowledged the general rule that expenses of a receiver do not rank ahead of prior encumbrances. However, it held that they will rank ahead where such expenses are incurred for the preservation or improvement of the property and if there are issues of public interest where the public benefit outweighs any detriment to the security holder. In this instance, the Court decided that it was against the public interest that a community must continue to contend with a garbage dump because a secured creditor with the greatest interest refused to deal with the problem. Accordingly, the Court held that the mortgagee had 30 days within which to remove the garbage. If it did not, then an order would follow appointing a receiver whose costs for the removal would stand ahead of the mortgage.

D. *R.* v. *AMOCO FABRICS AND FIBERS LTD.*[43]

This is a case which shows the basics of the defence of due diligence in the environmental context. Amoco was charged with an offence pursuant to the *Ontario Water Resources Act*[44] and the *Environmental Protection Act*[45] for allegedly polluting ground

39 R.S.O. 1990, c. E.19.
40 R.S.O. 1990, c. E.9.
41 R.S.C. 1985, c. F.14, s. 42.
42 (1992), 90 D.L.R. (4th) 442 (Ont. Ct. (Gen. Div.)).
43 (1992), 73 C.C.C. (3d) 558 (Ont. Ct. (Prov. Div.)).
44 R.S.O. 1990, c. 0.40.
45 *Supra* note 39.

water and natural environment from its manufacturing site for a period from 1989 to 1991.

The Court held that the offence was in the nature of a continuing offence. As a continuing offence was found, the defence of due diligence was available where an accused had taken all reasonable steps to avoid the event, which in this case was the continuing leakage during the charge period of contaminants placed in the ground many years before. Amoco had exercised due diligence in that, in 1988, it had discovered the contamination, had advised the Ministry of the Environment and had undertook a clean-up program involving a large number of people, the hiring of experts and the expenditure of large sums of money.

This case suggests that subsequent clean-up activities can amount to due diligence. However, it is important to remember that Amoco may have benefited from the fact that it could not be liable in respect of the original contamination because of limitation periods and because the information filed against it was limited to a particular period.

E. *R.* v. *McCARTHY TÉTRAULT*[46]

The defendant law firm was retained by Lafarge Canada Inc. In 1991, a member of the firm attended a meeting with, among others, the environmental director for Lafarge Canada's American parent. The purpose of the meeting, according to the lawyer's affidavit, "was to receive confidential information and provide legal advice concerning the compliance of the Bath facility with applicable environmental statutes, regulations and policies."[47] The lawyer further deposed that during the meeting discussions took place regarding potential prosecution regarding a coal storage settling pond at the Bath facility. The only notes were those taken by the lawyer who refused, on the basis of solicitor and client privilege, to produce them.

The Court held that merely characterizing a meeting as an environmental audit does not in itself answer the issue of whether or not the information is privileged. The Court recognized the concern that companies may wish to conceal the "environmental sins from the eyes of regulatory agencies"[48] by attempting to cloak their audits with privilege by claiming they were meeting to obtain legal advice. Nevertheless, the Court felt that this concern was met by the high duty upon a lawyer who gives evidence to establish privilege to disclose any other purpose for which the meeting was held. The result was that the notes were held to be privileged.

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46 (1992), 9 C.E.L.R. (N.S.) 12 (Ont. Ct. (Prov. Div.)).

47 *Ibid.* at 14.

48 *Ibid.* at 23.

F. *INTERNATIONAL MINERALS & CHEMICALS CORP.* v. *CANADA (MINISTER OF TRANSPORT)*[49]

The issue in this case was whether or not a creek is considered a navigable waterway pursuant to the *Navigable Waters Protection Act*[50] and if so, whether crossing it requires an environmental assessment. The applicant sought to ensure that all applicable environmental reviews were completed prior to the commencement of its project which included the construction of two trestles carrying pipeline conveyor systems at two locations across Cutarm Creek. The applicant sought an order in the nature of *mandamus* compelling the Minister of the Environment to conduct an environmental assessment and review as described under the Environmental Assessment Review Process Guidelines Order.[51] The applicant had done its own assessment and had received approval from the Province of Saskatchewan under its *Environmental Assessment Act*.[52]

The Court held that the Act did not fully define "navigable waters." In fact, the definition in s. 2, while stating that navigable water includes a canal or any body of water created or altered as a result of any work, is stated to be a definition for administrative purposes only "and is not to be construed as a legal definition of navigability." The Court held further that the purpose of Part I of the Act is to protect navigation and the public's right to use navigable waters for non-commercial purposes. Navigable waters implicitly suggest the concept of an aqueous highway. As a result, the waters must be more than a small pond or lake in isolation and must include waters that connect places which would ordinarily facilitate travel. Thus, the undertaking of the applicant was not a work requiring approval of the Minister and, as a result,

> If there is no affirmative regulatory duty imposed by statute on the Minister, he has no responsibility, or authority, to initiate an environmental review under the Guidelines Order. (*Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.)[53]

G. *CARRIER-SEKANI TRIBAL COUNCIL* v. *CANADA (MINISTER OF THE ENVIRONMENT)*[54]

Alcan Aluminium Limited constructed and operated facilities in British Columbia. Part of their operation controlled the flow of two rivers pursuant to a provincial licence. In the late 1970s the federal government (Fisheries and Oceans) commenced an action to force Alcan to maintain certain water flows. In 1987, the action was settled with the federal government issuing certain orders in council, one of which directed the Minister of Fisheries and Oceans to act consistently with the agreement.

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49 (26 November 1992), Federal Court T-1354-92 (F.C.T.D.).
50 R.S.C. 1985, c. N-22.
51 SOR/84-467.
52 S.S. 1979-80, c. E-10.1.
53 *Supra* note 49.
54 (1992), 93 D.L.R. (4th) 198 (F.C.A.).

In the meantime, Alcan had obtained provincial approval to complete its "Kemano Completion Project." In 1988 and 1989, a series of exemption orders and an approval, pursuant to the *Navigable Waters Protection Act*[55] were issued by the federal Minister of Transport. The Carrier-Sekani Tribal Council Group brought a motion to:

(i) quash the 1987 settlement and the related orders in council;
(ii) quash the exemptions and approval under the *Navigable Waters Protection Act*; and
(iii) compel compliance with the EARP Guidelines Order.

The next day, the Governor in Council issued an order exempting the project from the EARP Guidelines Order.[56]

The Federal Court of Appeal held that none of the Minister's actions required the previous application of the EARP Guidelines because none was the result of a decision of a Minister in his or her decision-making capacity. The decision to settle the earlier litigation was an executive decision taken by the federal government. The Minister acted on behalf of the government but exercised no independent decision-making authority.

The Court also held that the declarations of exemption were not made in discharging a regulatory duty, but rather stated the conditions under which the Minister would not consider it his duty to intervene. Reference was made to subsection 22(3) of the *Fisheries Act*.[57]

The Court also held that the provisions of the *Navigable Waters Protection Act* do not confer regulatory power upon the Minister if the proposed work does not interfere substantially with navigation. Finally, the Court held that even if its analysis was wrong, the matter was settled by the exemption order made the day after the motion was commenced. The Court rejected the argument that the order was passed in contravention of the intentions of Parliament.

V. LEASES AND TITLES

A. *SCURRY-RAINBOW OIL LTD.* v. *GALLOWAY ESTATE*[58]

This is the long-awaited decision on whether Gross Royalty Trust Agreements ("GRTAs") are interests in land. In the late 1940s and 1950s there developed a practice whereby freehold mineral owners would assign their royalty or potential royalty interests to trust companies under GRTA's. Doubt was cast upon whether such agreements were merely contractual rights enforceable against the mineral owners or interests in land enforceable against successors in title.

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55 *Supra* note 50.
56 *Supra* note 51.
57 *Supra* note 41.
58 (1993), 8 Alta. L.R. (3d) 225 (Q.B.).

Actions were brought by three plaintiffs, each of whom were royalty certificate holders. In the first action, the owner leased the lands before entering into the GRTA, but production occurred subsequent to the GRTA. In the second case, the GRTA was made during an initial lease which expired. Two subsequent leases were entered into both of which expired without production. In the third case, the GRTA was made during an initial lease. After its expiry, new leases were made during which production occurred. These three situations are thought to encompass the majority of types of GRTAs.

In some cases the royalty clause would reserve an interest to the lessor, while others did not. In addition, the certificates were transferable. The Court directed that the three matters be treated as test cases.

All three cases raised the issue of whether the interest created by a GRTA is an interest in land and whether they offend the rule against perpetuities. In addition, the Court addressed the issue of whether a GRTA would apply to royalties under leases coming into effect after the GRTA.

Hunt J. made the following determinations:

1. Is the lessor's royalty under the oil and gas lease an interest in land?

While acknowledging that this was an underlying issue, Hunt J. said a lessor's royalty interest under an oil and gas lease can be an interest in land akin to a rent or profit à prendre. In spite of the fact that at common law an assignment of rent could not form such an interest, royalties could still be treated as analogous to rents or a profit à prendre. She stated,

> In my mind the lessor is granting the lessee certain rights to his land, IN RETURN for several kinds of compensation, including the bonus payment, the delay rentals, and the royalty payments upon production. Viewed from this vantage, the notion that all these payments are compensation for the use of the land is compelling. Such compensation is exactly the nature of rent. Thus to classify the lessor's royalty as a species of or akin to rent is to give credence to the true functions of the oil and gas lease.[59]

If the royalties were not interests in land, a lessor nevertheless retained the right to transfer an interest in the future based on his or her reversionary rights. If it was the intention that the GRTA would apply to future leases then the lessor could assign it as an interest in land. Hunt J. held that the language of the agreements suggested an intention to create an interest in land.

2. Are the trustees' interests under the GRTAs interests in land?

Hunt J. applied the reasoning set out above and held:

59 *Ibid.*

> As I have said above, in considering a lessor's royalty under an oil and gas lease, I am satisfied that, at law, it can be an interest in land, taking the form of a species of rent, akin to rent, or a profit-à-prendre. Even if at common law an assignment of rent cannot be an interest in land, the interest under consideration here can be treated as analogous to rent or as a profit-à-prendre. There was no argument before me that a profit cannot be assigned (indeed, the lessee's interest under an oil and gas lease is often assigned). And if the interest is akin to rent, it is the analogy that is persuasive, not a technical barrier arising from the common law concept of rent and its non-assignability as an interest in land.[60]

She held that the clear intention of the parties was to create an interest in land.

3. In respect of cases two and three, what are the effects of the agreements on royalties arising under the subsequent lease agreements?

The language of the second and third GRTAs was inconsistent with an intent to create contractual relations only. The second agreement contemplated the cancellation or termination of the existing lease and provided that any new leases were to reserve the royalty. In other words, the GRTA was intended to apply to future leases. Similarly, the third GRTA provided that the interest conveyed represented "at all times" an interest in the substances produced "whether under the said lease or otherwise."

4. Do the trust agreements offend the rule against perpetuities?

GRTAs do not offend the rule against perpetuities. First they operate as a transfer of an interest to the trustee which becomes vested on the date of the agreement. Just because the enjoyment of the visit may be postponed due to there being no production does not prevent the right from vesting. Moreover, there is nothing in the agreement which prevents the development and utilization of the lands.

It is interesting to note that this decision is somewhat contrary to the decision of O'Leary J. in *Guaranty Trust Company of Canada* v. *Hetherington*.[61] He held that the language used by the parties demonstrated an intention to assign only a contractual right to receive payment of a royalty and did not create an interest in land necessary to support a caveat. The Court of Appeal in that case held that with respect to the specific lease before it, the draftsman could have shown a clear intention that the GRTA would attach to royalties so long as minerals were produced, thereby creating a caveatable interest, had it so wanted.

B. *WHITE RESOURCE MANAGEMENT LTD.* v. *DURISH*[62]

The issue in this case was whether or not an interest in land disclosed in a lapsed caveat can be assigned and enforced against later acquired interests.

In 1968, Vold and the registered owner of the lands in question entered into an agreement for the sale of all the owner's interest, including the mines and minerals. In

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60 *Ibid.*

61 [1987] 3 W.W.R. 316 (Alta. Q.B.), aff'd (1987), 95 A.R. 261 (C.A.).

62 (1992), 5 Alta. L.R. (3d) 372 (C.A.).

1969, Vold filed a caveat to protect this interest. In 1970, the registered owner died. In 1971, the executrix gave a mineral lease to Pawnee who filed a caveat. In March 1978, the registrar removed the Vold caveat for failure to respond to a notice to take proceedings. However, in May 1978, Vold assigned his right to work the minerals to the respondent White, who immediately filed a caveat to protect this interest. Approximately one year later Vold also assigned all his interest in the land, including the same right to work the minerals, to the appellant Durish, who filed a caveat. Durish also took an assignment of the Pawnee interest from the current assignee and filed another caveat based on that. Finally, in 1980, the then registered owner honoured the original agreement for sale to Vold by transferring title to surface and minerals to Durish, but subject to the White caveat. Durish sought a declaration of priority for his interest against White. Durish's claim was dismissed at trial, and Durish appealed.

The Alberta Court of Appeal held that an interest in land disclosed in a lapsed caveat can, in Alberta, be validly assigned if it is just in the circumstances to permit it, and it can be enforced against an interest acquired and registered after the registration of the caveat claiming an interest by virtue of the assignment.

Kerans J.A. stated that Durish could not make a valid claim to priority based upon his assignment from Vold because it came after the interest given by Vold to White, and the White caveat was on the title when Durish dealt with Vold. Therefore, Durish's claim to priority was based upon his assignment of the Pawnee interest. Kerans J.A. noted that it was indisputable that the Vold interest was first in time, and it was an easy inference that Durish knew of it when he took over the Pawnee interest. Therefore, in the absence of the *Land Titles Act*[63] the equities in favour of White would defeat Durish unless he could invoke the protection of the Act.

Kerans J.A. did not agree with the trial judge who held that only those dealing with the registered owner directly could invoke the rule in s. 195 of the Act. That section provides that persons acquiring new interests in lands can rely on the state of the prior existing certificate of title, and need not make any further inquiries about competing claims or title defects. Mason J. had used this reasoning in dismissing the Durish claim. To say that the rule applied only to direct dealings with registered owners would be to limit dramatically the scope of the Torrens system. Kerans J.A. stated, however, that even on the assumption that Durish could invoke s. 195, he could not succeed because he could not offer a reason for which the Vold interest could not be assigned to, and enforced by, White. The White caveat would defeat him because it was on the title when he acquired his interest. A caveat by Vold was not essential to the White claim, and it could be advanced even if Vold had never filed a caveat. A person who takes an assignment of an unregistered interest can, by registration of a caveat, protect that interest from claimants not yet on the title.

Therefore, in order for Durish to defeat the priority created by the White caveat, he would have to prove that the Vold interest, when his caveat lapsed, ceased to exist and

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

could not be assigned. Kerans J.A. cited *Passburg Petroleums Ltd.* v. *Landstrom Developments Ltd.*[64] for the proposition that Alberta has explicitly rejected the notion of a "cleansing" of title by removal of a caveat such that the interest protected by the caveat ceases to exist as a matter of law. Therefore, in Alberta the indefeasibility rule protects only new interests who rely on the display of interests on the certificate of title at the time when the new interest was created.

Kerans J.A. also noted the second rule in *Passburg*, stating that the discharge of one caveat does not erase the other, which in fact remains after discharge and might be enforceable. In the present case, that rule applied to permit White to enforce its interest even though it proceeded from an interest secured by a lapsed caveat. The lapsed caveat, while it opened the Vold interest to defeat by a new interest, did not erase the Vold interest from the purview of the law. That interest could be assigned, and the assignee could, as White did, protect that interest anew by a caveat. In that event, all holders of future interests, including Durish, would take subject to the caveated interest.

Kerans J.A. recognized that the *Passburg* rule could produce an unjust result in different circumstances. Further, Kerans J.A. noted that in *Passburg* the Court permitted enforcement of the now unregistered interest by invocation of the "immediate parties" rule. That doctrine provides that an unregistered interest can be enforced against a registered interest if it was created by direct dealings between the holders of the two interests. The basis for the obligation was the fact of privity. Kerans J.A. stated that there probably was no privity between White and Durish, although he qualified this opinion because Durish did, afterwards, become registered owner on a transfer from Vold. Durish as a transferee would covenant by statute to perform all the obligations of the transferor (see s. 62 of the *Land Titles Act*).

As between Vold and White, Vold was obliged to honour his covenants to White in the assignment instrument. Durish, apart altogether from the White caveat, might be obliged to perform that obligation, particularly because he was well aware of it when he took title. However, Kerans J.A. did not rely on this argument, on the basis that it would not avail in a case where a now unregistered interest sought enforcement against a newly registered interest created in reliance on the state of the current title.

Kerans J.A. concluded that the Vold interest was not extinguished when the Vold caveat lapsed. He also relied on the fact that Durish himself later took an assignment of the same interest from Vold and relied on it to become registered owner. Kerans J.A. invoked the rules of estoppel against Durish.

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64 (1984), 53 A.R. 96 (Alta. C.A.) (leave to appeal to S.C.C. refused (1984), 54 A.R. 160).

C. *PRISM PETROLEUM LTD.* v. *OMEGA HYDROCARBONS LTD.*[65]

This case concerns the issue of ownership of solution gas. The solution gas was produced by Omega Hydrocarbons Ltd. ("Omega"), who was entitled to the oil. A claim was brought by Prism and others, claiming entitlement as owners of the natural gas rights.

The Court held that Omega obtained its oil interest after the execution of the Gas Unit Agreement relied on by the plaintiffs. Therefore, Omega's ownership was limited to those rights remaining to be disposed of after the dedication of rights to the Gas Unit. The interpretation of the Gas Unit Agreement was therefore the key issue to be decided. Were the parties to the Gas Unit Agreement entitled to the solution gas?

The Gas Unit Agreement was structured so as to give the Gas Unit all petroleum substances excepting only those that qualified under the definition of oil. "Oil" was defined as follows:

> 'Oil' means crude oil and all other hydrocarbons regardless of gravity that are or can be recovered in liquid form from the Unitized Zone through a well by ordinary crude oil production methods.[66]

If that definition is broken into its component parts, the issues in this case become clearer:

(1) "all other hydrocarbons regardless of gravity": Omega argued that these words must include solution gas since solution gas is lighter than crude oil. If this were not so, then the words "regardless of gravity" would have no meaning. Egbert J. held that the evidence indicated that there were hydrocarbons produced from the wells on the land in question which were neither crude oil nor true natural gas and which were in a liquid phase at the surface. These hydrocarbons have different specific gravities than do either crude oil or natural gas. Egbert J. held that the words "regardless of gravity" have a meaning without reading them as referring to solution gas in the reservoir.

(2) "that can be recovered": the trial judge stated that the question of when a hydrocarbon is "recovered" was the focal point of the case. Omega submitted that recovery was to be looked at "in the reservoir"; the plaintiffs submitted it was "at the surface." The plaintiffs argued that the word "recovered" referred to the actual gaining of control and possession of the hydrocarbon which can occur only at the surface of the land overlying the reservoir and not in the reservoir itself. Therefore, what is a liquid when recovered at the surface by ordinary production methods is oil and what is not recovered as a liquid are petroleum substances other than oil which would include any and all natural gas flowing from the well head at the surface. Egbert J. agreed with the plaintiffs on this point; he concluded that the intention of the parties

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[65] (1992), 130 A.R. 114 (Q.B.). This decision has recently been overturned on appeal. In an unreported decision in Appeal 13559, issued March 24, 1994, the Alberta Court of Appeal held that Omega, as the owner of the oil, is also entitle to the solution gas. The Court of Appeal held that one looks to reservoir conditions and not to surface conditions as to the "point of recovery" for the solution gas.

[66] *Ibid.* at 119.

to the Gas Unit Agreement in using the word "recovered" in the definition of "oil" was that the word was and is to be related to surface and not reservoir conditions. Egbert J. was of the view that the words of the Gas Unit Agreement were an unambiguous, although obviously unclear, expression of the parties' intentions, and therefore, evidence of subsequent conduct was not admissible. He seemed to equate the meaning of the word "recovered" with that of the word "produced." He held that the Gas Unit Agreement indicated that the interests of the parties to it were to be based on the substances which were or could be produced from the Viking Zone and not on the substances as they originally existed. The interests of the parties to the Gas Unit Agreement were not frozen as of the date of execution.

(3) "in liquid form from the Unitized Zone [Viking]": Omega submitted that reservoir conditions were the determining factor. If the gas was liquid under the initial reservoir conditions, it was solution gas and must be classified as oil such that under the definition of petroleum substances in the Gas Unit Agreement, the plaintiff would have no right to it as the definition excludes oil. Omega submitted that the Gas Unit Agreement was to be interpreted as of its date. The expert evidence, which included computer modelling and simulations, proved that the gas in the Viking Zone was initially all in solution with the oil in the reservoir and that it was therefore initially in liquid form. The expert evidence as to the nature of the gas was accepted by the Court leaving no doubt that the gas was solution gas.

(4) "through a well": the Court accepted Omega's argument that these words do not in themselves refer to the surface. Rather, they refer to the means by which recovery of oil takes place and can be equated with the words "by means of a well." The words are not definitive of the point at which the determination of the nature of the hydrocarbon is to be made.

(5) "by ordinary crude oil production methods": the judge held that the gas could not have been produced except by the oil wells which were drilled by Omega. This was the basis for his finding of unjust enrichment.

Omega also submitted that the title to the petroleum and natural gas was derived from a Crown lease of those substances and that subsection 148(3) of the *Mines and Minerals Act*[67] applied and limited the meaning of natural gas to what was produced from wells, which, in the opinion of the ERCB, initially had a gas/oil ratio of 10,000 cubic feet per barrel or higher. Egbert J. stated that that section clearly confined its application to disposition of natural gas owned by the Crown, and could not govern the terms of the Gas Unit Agreement. The purpose of that section was to define, for conservation purposes, what is a gas well and what is an oil well. In any event, he held that there was no evidence presented concerning what leases, if any, were granted by the Crown in the period governed by s. 148 of the Act, so there was nothing that he could rule on.

[67] R.S.A. 1980, c. M-15.

Omega argued that if the plaintiffs were entitled to ownership, they were estopped from asserting their rights to the solution gas by the operation of the doctrines of "estoppel by deed" and "estoppel in pais or by conduct." The primary agreement upon which Omega relied in support of its submission was the Gas Processing Agreement dated June 30, 1980 between Acroll Petroleums Ltd. (which was then operator of the Gas Unit) and Omega. In the recital, the agreement stated that Omega owned and controlled a working interest in, and had the right to produce, natural gas from the wells on the lands in question. The trial judge held that the rights and obligations arising under this agreement did not relate to the plaintiffs' ownership under the Gas Unit Agreement and that the ownership claim made by Omega in the recital could not be attributed to the plaintiffs. In the gas processing agreement the parties agreed for the purposes of that particular transaction to state certain facts as true. This was not a case which had been brought to enforce any rights arising under the Gas Processing Agreement, and an estoppel would only arise in respect of claims made under that agreement. Omega also relied on the terms of a subsequent novation agreement and a later gas processing agreement with the plaintiffs to advance its argument with respect to estoppel by deeds. Egbert J. stated that as the new agreement and the novation agreement were entered into after this action was commenced, he could not accept Omega's submission.

Omega argued that the claims for solution gas were barred by reason of limitation periods. Egbert J. held that the interest of the plaintiffs in the solution gas produced was an interest in land. The limitation period for bringing an action for the recovery of land is set forth in s. 18 of the Act, namely ten years. The action was commenced on March 16, 1989, within ten years of the first production of solution gas by Omega.

The findings in favour of the plaintiffs on the previous three issues raised a question by the judge as to whether the plaintiffs were required to bear all or any part of the costs incurred by Omega in the production of solution gas from the reservoir. To allow the plaintiffs to recover from Omega the gross amount received by Omega from the sale of the solution gas without bearing their proportionate cost of producing it would unjustly enrich the plaintiffs. The plaintiffs were entitled to be paid for their solution gas produced by Omega from the wells on the land in question, but pursuant to the counterclaim of Omega, the plaintiffs were directed to pay their share of the production costs. The cost of drilling and completing the wells and gathering and preserving the solution gas must be included in the total cost. Without the wells there would have been no production of solution gas from the wells for the sole benefit of the plaintiffs. If the plaintiffs were to receive a benefit, they were also required to share all the costs involved in producing the benefit. Egbert J. stated that the share or proportion of the total cost that must be borne by the plaintiffs was 26.8%, which was the proportion of revenue from solution gas to the total revenue of the sale of oil and gas received by Omega. The costs that were to be paid by the plaintiffs to Omega as to their share of the costs involved in producing the solution gas over the years were greater than the proceeds of sale of the solution gas. Egbert J. noted that he would term this a "pyrrhic victory" for the plaintiffs in the lawsuit.

The case is presently under appeal by Prism. Although no cross-appeal has been filed, the appeal is as to the entirety of the judgment; thus all issues are potentially open to be reconsidered.

D. *PADDON HUGHES DEVELOPMENT CO.* v. *PANCONTINENTAL OIL LTD.*[68]

One issue in this case was the validity of a lease referred to as the Bishop lease. Pancontinental's predecessor obtained the Bishop lease by exercising its option, which was accepted, on August 28, 1984. However, the option expired on August 17, 1984. Rooke J. held that

> [the] purported unilateral exercise of the option became a bilateral agreement by virtue of the acceptance of the purported exercise by the Bishops on August 28, 1984.[69]

Rooke J. noted that the plaintiff was challenging the validity of the Bishop lease at the same time as it was claiming an interest in it pursuant to the assignment through which it obtained it.

The other issue in the case was the validity of a Pooling Agreement. The judge held that the defendant had the onus of establishing that there was a pooling agreement to allow drilling and production to occur within the primary term of the leases prior to June 20, 1989. Rooke J. held that there was such a Pooling Agreement in place. The evidence showed that all of the terms for a written agreement had been agreed upon by June 19, 1989 and that it was executed by Pancontinental on June 20, 1989 and sent to Amoco for execution on that date. Alternatively, Rooke J. held that the parties had reached an oral pooling agreement in April 1989 based on the evidence. The oral agreement remained in effect until replaced by the formal agreement.

Finally, Rooke J. held that in this instance the pooling agreement did not amend any leases and thereby create a new encumbrance. It did not have to be registered against title as the plaintiff argued.

E. *JACKSON ESTATE* v. *ANDERSON ESTATE*[70]

The plaintiff estate brought an action to recover mines and minerals underlying four legal subdivisions in Saskatchewan which had erroneously been transferred to Anderson in 1960. The sale agreement reserved to Jackson all mines and minerals. When the agreement was paid out, the transfer was executed but it included a conveyance of all the mines and minerals. Ten years later, Jackson filed a caveat which noted the erroneous transfer. Anderson made no attempt to remove the caveat.

The Court granted the application, citing the Supreme Court of Canada in *Bel-Aire Estates Ltd.* v. *Anjulin Farms Ltd.*[71] as authority for the proposition that where an agreement for sale is followed by a conveyance, the provision of the agreement will not always be merged with the conveyance. In addition, the Court held that it must find the true intentions of the parties and that, in this case, the circumstances dictated that the

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68 (1992), 2 Alta. L.R. (3d) 343 (Q.B.).

69 *Ibid.* at 351.

70 (10 November 1992), Regina 2507/89 (Sask. Q.B.).

71 [1973] S.C.R. 268.

transfer should be rectified since, in every other case, Jackson had always retained mines and minerals. Moreover, due to the error, a trust resulted. Anderson did nothing to clear his title, meaning that laches would not apply.

F. *PRO-CHEM, INC.* v. *LASSETTER PETROLEUM INC.*[72]

The Court considered the meaning of the term "reworking." There was a cessation of production clause in a lease that stated that the lease expired after production ceased in the secondary term unless drilling or reworking operations were begun within sixty days.

The Court of Appeals of Kansas held that "reworking," when considered in the context of oil and gas leases, is a term of art and whether any particular operation falls under that definition depends upon the facts peculiar to that operation. Under the present facts, the well was shut down because the salt water disposal well being used by the operator was no longer available. It was not disputed that the construction began within sixty days of cessation of the oil production. The clause in question only required that reworking operations be started within sixty days, but not completed within that time. Re-routeing the salt water disposal line constituted "reworking." The construction was actual work done in a good faith attempt to restore oil production in paying quantities. The salt water disposal line connected with the well and the well could not be operated without disposing of the salt water. The Court of Appeals noted that although Lassetter could have used a truck to carry the salt water away from the oil well, the Trial Court found that Lassetter began to seek a permanent solution within a reasonable period of time.

G. *GRACE PETROLEUM CORPORATION* v. *THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA*[73]

The Court of Appeals of Oklahoma held that owners of overriding royalty interests are not owners as defined by pooling statutes and are not "a person who has a right to drill and to produce from any common source."[74] The owner of an overriding royalty interest has no assertible right in the oil and gas leasehold prior to the time when hydrocarbons are reduced to possession. Since overriding royalty owners are not owners under the pooling statutes, they cannot file an application to increase the number of wells on the unit. In this case, an applicant had applied to drill an increased density well. Other parties contended that the applicant did not have standing to apply for an increased density well. The Court of Appeals held that the applicant had elected not to participate in the drilling of the well, but chose instead to receive a one-eighth overriding or excess royalty. By choosing not to participate in the well, but instead to receive the overriding royalty, a party effectively exchanged its exploratory rights for the rights to receive the royalty. The property rights of non-participating interest owners are transferred to the unit operator by operation of law and are vested and it would not be fair or just to alter the positions of the interest owners after the initial well was drilled.

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72 837 P.2d 823 (Kan. App. 1990).

73 841 P.2d 1172 (Okl. App. 1992).

74 *Ibid.* at 1174.

VI. CORPORATIONS, OFFICERS AND DIRECTORS

A. *SUN SUDAN OIL CO.* v. *METHANEX CORP.*[75]

In this case the Court found that there was no practice in the international petroleum industry for parent corporations to be responsible for the debts of their subsidiaries. The plaintiff commenced an action against the defendant and its parent corporation for sums owing under a joint operating agreement.

The plaintiff argued that there existed in the international petroleum industry a practice whereby a parent company is responsible for the debts of its subsidiary. The plaintiff cited its own practice whereby it used subsidiaries for its foreign operations to protect itself from liability to the host jurisdiction, rather than to limit its responsibility for the debts of its subsidiaries vis à vis other external joint ventures. Alternatively, the plaintiff argued that this was an appropriate case in which to pierce the corporate veil on the basis of an implied principal/agent relationship between the defendant and its parent.

Hunt J. held that the plaintiff failed to establish an industry practice so notorious that the parties could be bound by it. Sun further suggested that the relationship between a parent and a subsidiary might be determined by having regard to six factors:[76]

(i) Were profits treated as profits of the company?
(ii) Were persons conducting business appointed by the parent?
(iii) Was the parent the head and brain of the venture?
(iv) Did it govern the venture?
(v) Did it make profits through its control and direction?
(vi) Was it in constant and effectual control?

Notwithstanding that this case met the foregoing criteria, Hunt J. held that the defendant's parent used the defendant subsidiary for legitimate business reasons and that the sanctity of separate corporate entity could not be displaced in these circumstances.

B. *SUNCOR INC.* v. *CANADA WIRE AND CABLE LIMITED*[77]

Successor tort liability may be a growing exception to the rule that a corporation is a legal entity separate and distinct from its shareholders. The Court's reasoning in this case may be instructive as to the potential liability for companies seeking to reorganize affairs where, for example, environmental liability may exist.

The action by Suncor involved a fire allegedly arising out of negligence in the procurement and supply of materials and the construction of the expansion to the Suncor plant in Fort McMurray. The defendants included several engineering firms. This was an application for summary judgment brought by one of the defendant engineering firms. The

[75] (1992), 5 Alta. L.R. (3d) 292 (Q.B.).
[76] *Ibid.* at 309-10.
[77] (19 January 1993), Calgary 8901-14522 (Alta. Q.B.).

applicant, hereinafter referred to as AEGL, was incorporated in 1983. Another related defendant, 111467 Alberta Ltd., was a predecessor company. It was incorporated in 1950 as AESL (it assumed numbered company status in 1985). Essentially, the applicant argued that it could not be held responsible for actions of this predecessor company.

As early as 1974, AESL began considering corporate reorganization. In 1978, it was a participant in a joint venture with two other defendants for the procurement and construction of an expansion project for the Suncor plant. The corporate reorganization eventually took place in 1983 when the directors of AESL became directors of AEGL and AESL's owners undertook a share exchange with AEGL whereby AEGL became 100% owner of AESL.

In 1984, AEGL formed three subsidiaries which took over all clients and files of AESL. The employee owners of AESL were dismissed and simultaneously hired by AEGL maintaining full benefits and privileges. AEGL used AESL in all of its promotional material and presented itself as successor to AESL. While AEGL assumed AESL's debts to its shareholders, it did not assume any third party liability of any kind.

AEGL denied any liability for the fire at the Suncor plant, which occurred after AESL's involvement in the joint construction venture, and argued that, based on the doctrine of limited liability of corporations, it could not be held liable for contractual or tortious liability incurred prior to its existence.

The plaintiff argued that the engineers employed by AESL knew or ought to have known of the risk giving rise to the fire and accordingly had a duty to warn. It then argued that in the circumstances the Court should either pierce the corporate veil or treat AEGL as a successor corporation as a means of getting by the rule in *Salomon* v. *Salomon & Company Ltd.*[78]

In arguing successor tort liability, the plaintiff relied on emerging American authority that there are new exceptions to the general rule in certain kinds of cases. These exceptions were enumerated in *Ramirez* v. *Amsted Industries Inc.*,[79] two of which Forsyth J. considered:

(a) where the transaction for the transfer of assets amounts to a consolidation or merger of the two corporations;
(b) where the transferee is a mere continuation or reincarnation of the transferor.

In the *Ramirez* case, the Court rejected the traditional approach, suggesting it was confined to the issue of form as opposed to the real effect of a particular corporate transaction. Forsyth J. seemed persuaded by the following excerpt found in the *Ramirez* decision at 815:

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78 [1867] A.C. 22 (H.L.).

79 431 A.2d 811 (N.J. Supt. Ct. 1981) [hereinafter *Ramirez*].

> the successor corporation, having reaped the benefits of continuing its predecessor's product line, exploiting its accumulated good will and enjoying the patronage of its established customers, should be made to bear some of the burdens of continuity, namely, liability for injuries caused by its defective products.

Forsyth J. concluded that there was a triable issue:

> The law of successor corporate liability developed as the result of criticism that the traditional approach was inconsistent with the "rapidly developing principles of strict liability in tort" (*Ramirez* at 815). It was necessary to reexamine the principles underlying the traditional approach. In Canada, as in the U.S., the law of negligence has changed rapidly in recent years and the evolution in the case law on the duty to warn, another possible issue in this case, is evidence of that change. How the traditional approach to the corporate liability of successor corporations will adapt to that change remains an open question in this country, and it would be wrong to conclude, as the Applicant Group submits, that the law is settled in this area. I am obliged to acknowledge that there exists a real possibility that Courts in Canada will adopt the reasoning of the successor liability cases in the U.S. and will adapt it to suit our law of negligence.[80]

C. *CANADIAN JOREX LTD.* v. *477749 ALBERTA LTD.*[81]

In this case, the Alberta Court of Appeal held that the directors of a federal corporation have the power to cancel a special meeting called by them. The action had been brought by shareholders who had obtained an order that the cancellation was of no force and effect.

The shareholders argued that unless the *Canadian Business Corporations Act*[82] or the by-laws contained an express power on the directors' part to cancel meeting, this power does not exist. They argued that the *CBCA* contains extensive provisions dealing with shareholders' meetings which were intended to be exhaustive on the question of shareholders' meetings, most of which are designed for the protection of a corporation's shareholders. They claimed that if the Jorex directors were permitted to cancel special meetings, the shareholders would lose the right to examine the auditors under s. 168 of the *CBCA*.

Fraser J.A. determined that the shareholders were correct on this latter point, but held that the shareholders' loss of the right to examine the auditors at a particular meeting was not, by itself, sufficient reason to conclude that the directors lack the power to cancel the scheduled meeting. She noted that in the corporate model adopted by the *CBCA*, the residual power to manage the corporation's affairs rests with the directors and that this power is given by statute and is not derived by the delegation of powers by the shareholders. Shareholders are not deprived of any meaningful protection if the directors cancel a scheduled meeting and the shareholders lose the right to examine Jorex's auditors as they are entitled to do under s. 168, in that several avenues remain open to the shareholders: they have oppression remedies under the *CBCA*; they can requisition the

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80 *Supra* note 77.

81 (1992), 85 Alta. L.R. (2d) 313 (C.A.).

82 R.S.C. 1985, c. C-44 [hereinafter *CBCA*].

calling of a meeting; they have the right to apply to the court under s. 144 of the *CBCA* for an order directing that a meeting proceed even though cancelled by the directors; the directors' power to cancel a general meeting is limited by the statutory requirement that an annual general meeting be held no later than fifteen months after the preceding general meeting; they may remove the directors; and, they retain the right to eliminate the directors' power to cancel meetings called by them by including a provision to this effect in the by-laws or a unanimous shareholders' agreement.

D. *R.* v. *VARNICOLOR CHEMICAL LTD., SEVERIN ARGENTON AND TRI-UNION OF ELMIRA INC.*[83]

Severin Argenton, a director of Varnicolor Chemical Ltd., which was in the business of reprocessing and disposal of industrial wastes, pleaded guilty to several offences under the *Environmental Protection Act*[84] (Ontario). Due to the disposal of industrial waste on the corporation's site, toxic substances had migrated into the underground water and were moving towards a creek which flows into the Grand River. This river was used by a number of communities as drinking water. Although Argenton was not the only director or officer of Varnicolor during the time when the offences were alleged to have occurred, he was the only officer and director to take an active part in the operations and actual management of the company and was the sole directing mind of the company.

The issue was the length of sentence to be imposed. With regard to the nature of the environment affected, the Court found that the environment in question was not one of unique significance. However, the area supported the usual amount of indigenous flora and fauna and the pollutants discharged from the site may eventually find their way into the Grand River which is used extensively for recreational purposes and as a source of municipal water supply for a number of communities along the river. Therefore, the nature of the environment affected, both actually and potentially, was considered to be an aggravating factor.

Although there had been no reports of any adverse effects related directly to the presence of these chemicals, the extent of the damage which had already occurred, and its resultant effects, were unknown. The Court found that there had been extensive actual harm inflicted on the natural environment, and that the potential for harm may prove to be of greater significance.

As to the deliberateness of the offence, the Court found that Argenton was involved on site in the operations of the company and was involved in the negotiations which preceded the issuance of the certificate of approval by the Ministry of the Environment. He was therefore aware not only of the upkeep, inventory and procedures of the business itself, but the requirements of the Ministry in respect of the continued operations of the business as governed by the certificate of approval. The Court held that Argenton had acted in defiance of the requirements of the certificate of approval and suggested that

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83 (1993), 9 C.E.L.R. (N.S.) 176 (Ont. Ct. (Prov. Div.)).

84 *Supra* note 39.

such violations are in effect a breach of trust on the part of a person to whom such a certificate has been granted and, as such jail terms are an appropriate penalty to ensure compliance with the law by both the person being sentenced and society in general.[85]

Woodworth J.P. stated that, "It was apparent ... that Mr. Argenton had knowledge of the violation for a considerable period of time"[86] and found that there was some indication of deliberateness or at least recklessness on the part of Mr. Argenton:

He was involved in a 'hands-on' capacity with the company, and yet he permitted the upkeep of the site to deteriorate and the operations to continue in such a manner as to permit the discharge of pollutants from the site.

At the very minimum, there was an indication of wilful blindness on the part of Mr. Argenton in respect of the situation which persisted at the site.[87]

The Court also found that there was nothing to indicate that Argenton exhibited a co-operative or helpful attitude with officials from the Ministry and he had not taken any action to rectify the problem at the site or to initiate clean-up of the site.

Finally, the Court held that the evidence showed that the profits which can be realized from the disposal or a reprocessing of industrial waste are substantial and that as a result, "the Courts must be firm and punitive in sentencing such an offender in order that the penalties imposed will act as a real deterrent to persons in a similar situation."[88] Woodworth J.P. commented that where the possibility of financial gain is substantial, "sentences must be imposed which will send a clear signal to others inclined to act in the same manner that this kind of crime will not be allowed to pay."[89] Accordingly, an eight month sentence was imposed.

VII. CREDITORS' RIGHTS

A. *370105 ALBERTA LTD.* v. *BRAZOS PETROLEUM CORP.*[90]

The plaintiff, 370105 Alberta Ltd., brought an action to enforce a promissory note for $100,000. The plaintiff argued that the note was given as consideration for the assignment of a passive interest in proceeds payable in respect of a farmout. The defendant argued that as the note was given as consideration for an interest held by the plaintiff in production from a farmout, and that since under the farmout agreement, an interest in the production was never earned because the initial well was never drilled or paid for, that there was as a result a total failure of consideration for the note.

85 *Supra* note 83 at 181.
86 *Ibid.*
87 *Ibid.*
88 *Ibid.* at 183.
89 *Ibid.*
90 (1992), 6 Alta. L.R. (3d) 441 (Q.B.).

Fraser J. held that there was no evidence which would support an argument that the assignment by the plaintiff was conditional or dependent in any way on the earning of an interest under the farmout agreement. He held that the answer to the issue required an interpretation of the contracts involved and noted that the participation agreement between the plaintiff and defendant stated that "[t]he participation offered by the [Option Agreement] has been assigned ... to [the defendant]."[91] It was clear that the note which the plaintiff sought to enforce was delivered by the defendant as consideration for the agreement of the plaintiff in the participation agreement that the right of participation described existed, and had been assigned to the defendant. The Court held that adequacy of consideration is not measured, in terms of adequacy of value so long as value in a business sense does exist. The value of the interest in the farmout which was the subject of the assignment must be measured not by its value ultimately found to exist following the drilling, but by the state of the knowledge of the parties who, at the time the assignment was made, had to judge the value.

At that time, the initial well to be drilled under the farmout was considered to have had enormous potential. The assignment of a right to share in the profits from the well must therefore, even though "unearned" at the time, have been considered to have had real business value. The assignment itself must accordingly be held to have been valid consideration for the note. The value of the assignment under consideration was not necessarily dependent in the initial analysis on the value of the interest in the farmout being assigned. The former had a value separate and apart from the value of the interest and that value (of the assignment) was adequate consideration for the note.

B. *CANADIAN IMPERIAL BANK OF COMMERCE* v. *TWIN RICHFIELD OILS LTD.*[92]

Amoco was a former mineral rights owner of Crown-acquired lands. The Crown, having acquired the oil and natural gas rights of such mineral rights owners, provided a scheme for compensation. Lessees of the lands forwarded royalty payments calculated under a certain formula to the former mineral rights owner. Twin Richfield was a lessee. When natural gas prices rose, the royalties payable exceeded the compensation called for under the formula. The Deputy Minister of Saskatchewan, Energy & Mines, directed the lessees to stop paying the former owners directly and to pay the full lease rate to the Crown as of August 1987. The Crown would be responsible for paying the former owners.

In March 1989, Twin Richfield informed Amoco that it had been paying Amoco in error and should have been paying the Crown. Twin Richfield asked for a refund of over $88,000 covering the period from January 1987 to February 1988. Amoco refunded the money. Twin Richfield subsequently sold its interest in the wells associated with Amoco claims.

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91 *Ibid.* at 445.

92 (1992), 11 C.B.R. (3d) 103 (Alta. Q.B.).

In January 1991, Amoco discovered that an error had been made and wrote to Twin Richfield to inform it that the direction of the Deputy Minister had been effective as of August 1987, not January 1987. Amoco requested the reimbursement of over $67,000 for the period from January 1987 to June 1987.

In February 1991, a receiver was appointed for Twin Richfield. Amoco informed the receiver of its claim. The receiver told Amoco that it was an unsecured creditor and that because the secured creditors would take all the funds of Twin Richfield, Amoco and the other unsecured creditors would be left with nothing. Amoco took the position that the over-payments were the subject of a trust and that Twin Richfield still had the responsibility to refund the money. Further, Amoco stated that it would set off any future revenues owed to Twin Richfield against the trust fund held on its behalf. When Amoco set-off amounts owing to Twin Richfield, the receiver applied to the Court for directions.

The Court held that no right of set-off existed but that a trust relationship was established. The Court found that Amoco did not satisfy the condition that the debts must be cross-mutual. It found that the appointment of the receiver and the subsequent assignment of production payments by Twin Richfield to the receiver destroyed the mutuality of the parties and of their rights. Accordingly, legal set-off was not available to Amoco.

Hutchinson J. observed that there was no difference of opinion between counsel that the existence of a trust is predicated on the presence of three certainties being certainty of intention to create or impose a trust obligation, certainty of subject-matter, and certainty of object. He stated that he was of the view that all three certainties had been met, having regard to the conduct of the parties and to the import of the letters from Saskatchewan Energy & Mines to the former owners of mineral rights. He equated the certainty of the subject-matter of the trust to the amount paid in error by Amoco, representing the royalties accruing from the production months of January to July of 1987, and determined that the sums were the object of the trust. He found that the fact that a mutual mistake was made by the parties as to the commencement date of the change of government policy did not change the expressed intention of the parties as to the application of the money received by Twin Richfield.

He classified the moneys as a trust obligation which remained outstanding by Twin Richfield to Amoco as at the date of the receivership and not an ordinary debt or unsecured claim. He referred to *Chase Manhattan Bank NA* v. *Israel-British Bank (London) Ltd.*,[93] as authority for the proposition that in equity a beneficiary is entitled to trace the trust property into, and even through, a joint fund into property purchased with that fund and has a charge upon the assets purchased for the amount of the trust. He held that the funds mistakenly paid by Amoco to Twin Richfield were trust moneys which could be traced into the assets of Twin Richfield which were subsequently taken over by the receiver. Accordingly, Amoco was held to be a secured creditor.

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93 [1979] 3 All E.R. 1025 (Ch. D.) at 1031, 1033-34.

C. *TRANSGAS LTD.* v. *MID-PLAINS CONTRACTORS LTD.*[94]

This case deals with the legislation empowering the Minister of National Revenue to collect taxes over the claims of secured creditors. As the authors of last year's paper noted,[95] subsection 224(1.2) of the *Income Tax Act*[96] has been before the courts on many occasions with mixed results. That section provides:

> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment ...
>
> (b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision ... and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

The matter came before the Saskatchewan Court of Queen's Bench[97] as a priority contest between Revenue Canada, lien holders and the Workers' Compensation Board. The Court held that Revenue Canada had priority, but subsection 224(1.2) was *ultra vires* of Parliament on the basis that it impinged upon provincial laws relating to ownership of property. This decision was overturned on appeal; the Saskatchewan Court of Appeal held that the section was within the powers of Parliament and therefore constitutionally valid. The Court held that the position was an integral and essential part of the collection scheme of the Act. Similarly, it rejected an argument that the provision infringed s. 8 of the Charter holding that s. 8 did not apply to purely economic interests that did not impinge on privacy interests.

VIII. TAX

A. *JENNER & LOMOND LTD. PARTNERSHIP* v. *ALBERTA (MINISTER OF ENERGY)*[98]

The applicant was a limited partnership registered to carry on oil and gas exploration in Alberta. The general partner, on behalf of the limited partner, entered into an agreement

94 (8 May 1992), Regina 1047; 1054 (Sask. C.A.).
95 *Supra* note 5 at 196.
96 S.C. 1970-71-72, c. 63, as am. by S.C. 1987, c. 46, s. 66(1) and S.C. 1990, c. 34, s. 1.
97 (1991), 86 D.L.R. (4th) 251 (Sask. Q.B.).
98 (1992), 1 Alta. L.R. (3d) 38 (Q.B.).

with the principal of the general partner whereby the general partner purchased seismic data from the principal, in accordance with the Alberta Petroleum Incentives Program, for $7,840,000. At all material times, 91% of the shares of the seismic contractor who undertook the programs under the agreement were held by or in trust for the principal of the general partner. The seismic programs were completed and the principal of the general partner received geophysical incentives totalling $2,176,000 under other government legislation. The general partner, on behalf of the limited partnership, applied to the respondent minister for an incentive pursuant to the *Petroleum Incentives Program Act*[99] based on total eligible expenses of $7,040,000. The position of the minister was that the limited partnership did not acquire the seismic data in an arm's length transaction. Nevertheless, and apparently in error, the department paid the total amount of the claim, $2,464,000, to the general partner several weeks later, and the monies were in turn paid to the seismic contractor pursuant to a promissory note for the purchase price of the seismic data.

Subsequently, the minister determined there had been an overpayment of $1,612,836 and sent a letter to that effect to the limited partner's solicitors. Two years later, after some confusion over the amount owing and the issuance by the department of a statement of claim apparently based on the purpose test, the Minister reviewed the matter and decided that no determination had yet been made under s. 15 of the Act. He then issued a determination stating that the costs were excessive and that the incentive overpayment was $1,613,000. The limited partnership issued an originating notice seeking to set aside that determination.

The first argument advanced on behalf of the applicants was that the respondent had no jurisdiction to make the determination because he was estopped as a result of his earlier conduct in granting the incentive to the applicants. The applicant submitted that the granting or paying over of original incentive to the limited partnership represented an exercise by the respondent under s. 15 of the Act, and that having exercised this statutory discretion, the Minister was estopped and without authority to reconsider his determination of the law.

Forsyth J. held that this argument failed on the basis that even if a payment of the incentive could be deemed to be a representation, though as to what was being represented there may well be some doubt, it could not be of a nature to induce and made with the intention, even presumed, of inducing the party raising the estoppel to alter his position on the faith thereof to his detriment.

The applicants submitted that the respondent was wrong in his determination that the incentives received on June 9, 1983 were greater than those incentives statutorily available. The error which the applicant alleged was that the respondent, in exercising his discretion, took the position that the limited partnership's eligible expense was the cost to the alleged connected parties, minus any geophysical incentives receivable by those parties. The applicants argued that this approach had no basis in the Act or regulations or

[99] S.A. 1981, c. P-4.1.

otherwise. The applicants further argued that rather than using a cost basis for calculating expenses, the fair market value was the appropriate measure of eligible expenses for the acquisition of property. The applicant stated that an interpretation of the Act and the regulations thereunder made it clear that the term "cost" in reference to calculations necessary for petroleum incentives relates to fair market value. In that regard, reference was made to subsection 9(2) of the regulations, where eligible cost was referred to in terms of exceeding fair market value.

Forsyth J. noted that the legislation and regulations, in particular s. 15 of the Act, provided that the respondent may, *inter alia*, determine that the amount of the incentive received was improperly, artificially, or unduly increased and should be reduced accordingly. The regulations raised a criterion to be considered in making that determination. Forsyth J. held that, under the Act and the regulations, the Minister erred in law in arriving at his determination under s. 15 of the Act and s. 52 of the regulations, in proceeding on the basis of costs of acquisition of the seismic information rather than fair market value of the seismic information or property as contemplated under subsection 9(1) of the regulations. Subsection 9(1)(i) specifically deals with a non-arm's length transaction and the method of dealing with it. The interpretation of costs or expenses in that section clearly relates to fair market value of the property after it has been acquired. The information before the Minister clearly related to original acquisition costs and not the value of that property, or the market value of the property after it had been acquired. Therefore, the Minister erred in law by proceeding on a cost basis rather than a market value basis in making his determination.

Forsyth J. further held that he was not satisfied that the Minister erred in law when he considered it unreasonable for the applicant to receive two incentive grants for the same work. Forsyth J. stated that he did not suggest that subsection 9(2)(e) of the regulation could be read as an open-ended invitation to the Minister to deem, for whatever reason, an expense as unreasonable and subject to reduction. However, he could see no error of law in a minister relying on that regulation and finding that under these particular circumstances it was appropriate to deduct from the incentive grant otherwise payable the amount of the geophysical incentive grant already paid in effect to the same party. In the result, Forsyth J. directed that the matter be referred back for a further determination based on criteria before him as to the market value of the seismic information owned by the limited partner at the time of the application for the incentive grant.

B. *NUGAS LTD.* v. *CANADA*[100]

The plaintiff sought a declaration that it incurred "eligible expenses" within the meaning of the *Canadian Exploration and Development Incentive Program Act*[101] ("*CEDIP*") with respect to phase 3 and phase 4 of its gas well drilling program. The *CEDIP* was enacted in 1987 to provide an incentive for exploration and development for the production of hydrocarbons. The legislation provided for payments to those incurring

[100] (9 November 1992), Calgary T-1692-90 (F.C.T.D.).

[101] R.S.C. 1985 (3rd Supp.), c. 15.

eligible expenses but the program was cancelled without warning on April 27, 1989. At the date terminating incentive payments, the plaintiff had formed an arrangement with lessors, farmors, suppliers and contractors to proceed with the drilling of phase 3 and phase 4 wells and had incurred obligations to third parties of over $2,000,000 with respect to both of these phases. On May 3, 1989, the plaintiff sought eligibility to qualify under grandfathering provisions of the *CEDIP*. The defendant refused reimbursement on the basis that the leases entered into between the plaintiff and Pan Canadian Petroleum Limited were outside the definition of written agreement because they were freehold leases. The plaintiff argued that the defendant was estopped from refusing to pay, due to the information given by the defendant to the plaintiff.

Strayer J. rejected the estoppel argument as the plaintiff was not induced to act to its detriment after April 26, 1989. From the evidence, Strayer J. was satisfied that planning and preparations for the phase 3 and phase 4 drilling by April 26 were such that the plaintiff would have gone ahead with the drilling even if no subsidies were available under the *CEDIP*.

The second issue was whether the lease entered into between the plaintiff and Pan Canadian fell outside the definition of a written agreement because it was a freehold lease. The definition of written agreement required, *inter alia*, that the agreement be among parties who are either interest holders in the land or who incur an expense in relation to the "activity" to which the agreement is related. In determining what is meant by the term "freehold lease," Strayer J. took a somewhat restricted view. Section 4 of the Act states that there is an entitlement to incentive payments where one meets the requirements of the Act and regulations. Strayer J. noted that but for the intervention of the budget announcement of April 27, 1989, the plaintiff would have been entitled to reimbursement of 25% of his expenses incurred in phase 3 and phase 4 drilling prior to June 30, 1989.

Strayer J. held that it was well established that a petroleum and natural gas lease is not strictly speaking a lease but rather a profit à prendre or a licence which permits the "lessee" to explore for and remove petroleum and natural gas from lands with respect to which the "lessor" owns the relevant mineral rights. Had the drafters of the regulations wished to exclude agreements of profits à prendre or licences for the finding and removal of petroleum and natural gas it would have said so and not have resorted instead to terminology which is not legally descriptive of such agreements. Further, Strayer J. was satisfied from the evidence that the form of the natural gas lease in issue was more than a normal oil and gas lease. The document had many provisions which were more typical of farmout agreements. Farmors under such agreements are not confined to a mere passive role of receiving rents and royalties, instead they require that they be provided with a variety of technical data with respect to drilling and production undertaken and they have specific rights of inspection and the right to have samples of cores, mud, *et cetera*. In short, farmout agreements provide for an operational and technical agreement between the farmor and the farmee. The agreement entered into between the plaintiff and Pan Canadian in respect of phase 3 contained many of these elements. Strayer J. concluded that even if the standard oil and gas lease elements of the agreements could be found to fall within the meaning of freehold lease in the regulations, the agreements in question in respect of phase 3 had other elements which clearly would not. Therefore the expense incurred by the plaintiff in respect of phase 3 constituted eligible investments for the purpose of the *CEDIP*.

Strayer J. noted that the expenses incurred by the plaintiff during the same period with respect to phase 4 could not be eligible expenses unless the plaintiff had an unconditional obligation to incur those expenses in respect of seismic field work under a written agreement. Strayer J. accepted that a written agreement could be found in an informal document or in two or more related documents signed by all the parties in which there was a clear meeting of the minds expressed in writing with respect to the essential terms of the agreement. He noted, however, a distinction between an agreement and a written agreement. Binding agreements can be made orally, by conduct, in writing or by a combination of all of these. The essential requirements are that there be a meeting of the minds and an intention to enter into contractual obligations. Strayer J. accepted the expert evidence that, by the practice of the petroleum industry, the plaintiff and its associates would have considered themselves committed to the farmout agreement at the time of termination of the program. He was unable to find, however, that there was a written agreement in existence at that time, as required by the *CEDIP* regulations. Therefore, as of the determination date as prescribed by the regulations, one could not have described the correspondence among the four parties as adding up to a "written agreement." Although there may have been a consensus and a common understanding of the respective roles such as to warrant the plaintiff proceeding, there was no document or series of documents setting out that agreement in writing and that is what the regulations require.

Strayer J. stated that the requirement that there be a written agreement was clear and excluded the arrangement which existed among the plaintiff and the Chevron associates as of budget day. Strayer J. therefore held that the expenses incurred in respect of phase 4 by the plaintiff were not eligible expenses.

C. *ST. IVES RESOURCES LTD.* v. *HER MAJESTY THE QUEEN*[102]

In this case, the taxpayer bought an interest in certain resource properties and gave the seller a promissory note for $3,500,000. The seller later demanded immediate payment. The two parties entered into a Price Rectification Agreement under which a new promissory note for $4,750,000 was substituted for the original one. The Minister reassessed the taxpayer and reduced its cumulative Canadian Development Expense on the basis that the $1,250,000 adjustment in the purchase price was not referable to the cost of the taxpayer's interest but rather was referable to the refinancing of the original note and the sellers forbearance from suing the taxpayer.

The Tax Court and Federal Court Trial Division dismissed the taxpayer's appeal. The Federal Court held that the adjustment was not a cost incurred to preserve its interest, or, a preservation cost. The Court held that there was no threat to the taxpayer's interest in the resource properties. Accordingly, the taxpayer could not take advantage of provisions

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[102] (1992), 46 D.T.C. 6223 (F.C.T.D.).

in the *Income Tax Act*[103] which permit the inclusion in the calculation of Canadian Development Expense any costs incurred to preserve a taxpayer's rights in respect of a Canadian resource property.

D. *HARVARD INTERNATIONAL RESOURCES LTD.* v. *ALBERTA (PROVINCIAL TREASURER)*[104]

Harvard claimed a royalty tax credit for crown royalties for the years 1984 and 1985, pursuant to subsection 26.1 of the *Alberta Corporate Income Tax Act.*[105] That section limits the aggregate amount of royalty shelters among associated corporations. The respondent reassessed Harvard on the basis that it was associated with Centipede Holdings Ltd. ("Holdings").

During the relevant time period, Holdings had 150 preferred shares outstanding, all of which were owned by Centipede Energy Ltd. ("Energy"). It also had 100 common shares outstanding, 99.3% of which were owned by Harvard.

In addition, there was a partnership agreement among Harvard, Energy and a numbered company under which Energy would provide certain management services to the partnership and Holdings. A further agreement among Harvard, Holdings and Energy gave Holdings the right to redeem all of Energy's shares in it if the management services agreement was terminated, a right which was never exercised by Harvard. On this basis, the respondent argued that Harvard was associated with Holdings because it had real control over it in that it could terminate Energy's management services and cause Energy to have to redeem its preferred shares or sell its common shares in Holdings. Harvard would then control Holdings on the basis of being the majority owner of the common shares.

Hutchinson J. held that the test for control is *de jure* control and not *de facto* control. When *de jure* control can be found through the incorporating documents and by-laws there is no need to determine *de facto* control by looking outside agreements among shareholders.

In this case, *de jure* control of Holdings was held by Energy because it owned the 150 preferred shares. The argument that Harvard had control over Holdings through its unexercised right to force Energy to have its shares redeemed went to the issue of *de facto* control. Consequently, Harvard's appeal was allowed.

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103 *Supra* note 96.

104 (1992), 6 Alta. L.R. (3d) 42 (Q.B.).

105 R.S.A. 1980, c. A-17.

IX. GOVERNMENT REGULATION

A. *ESSO PETROLEUM CANADA* v. *PRINCE EDWARD ISLAND (PUBLIC UTILITIES COMMISSION)*[106]

In this case, the Prince Edward Island Public Utilities Commission had statutory authority to regulate the distribution and sale of petroleum products within the province as well as the power to determine the price and any price changes in respect to heating and motor fuel. In 1990, the commission decided that it need not hold further public hearings to grant price increases if the applications for such increases in question were based on fact or were similar to those that it had considered at hearings just completed. In March 1991, the commission ordered a decrease in price for five wholesalers, one of which was the appellant, in spite of the fact that the appellant had not applied for a price change, that there had been no public hearing and that the appellant had received no notice and no opportunity to make submissions.

The Court held that the commission had a statutory duty to notify the appellant and to give the appellant a reasonable opportunity to be heard. Because this duty was not complied with, the appellant was denied natural justice. While the Court held that the commission had the jurisdiction under the *Petroleum Products Act*[107] to grant an order affecting the appellant, it lost that jurisdiction by failing to observe the statutory requirements of the Act. Accordingly, the appeal was allowed.

B. *MURPHY OIL CO.* v. *SASKATCHEWAN (MINISTER OF RURAL DEVELOPMENT)*[108]

Murphy Oil hauled petroleum products on roads within the rural municipality to the extent that additional maintenance costs for the upkeep of the roads were necessary. After lengthy negotiations, Murphy Oil adamantly refused to enter into a road maintenance agreement. Accordingly, the regional municipality, pursuant to s. 190 of the *Rural Municipality Act*,[109] requested that the Minister make an order. The Minister ordered that Murphy Oil pay a certain amount per tonne kilometre, which amount was considerably lower than figures previously discussed during the course of negotiations. Murphy Oil challenged the application of the Act and argued that the Minister violated the principles of natural justice or procedural fairness by failing to conduct a hearing and that the Minister was predisposed on the issue on the basis of a reasonable apprehension of bias.

The Court held that the section under which the municipality proceeded was not limited to transporters who were not municipal taxpayers and held that it was applicable to anyone who put unusual demands on municipal roads. Moreover, it held that the section was within the Minister's jurisdiction and that, in this instance, the Regional Municipality and Minister acted reasonably.

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106 (1992), 88 D.L.R. (4th) 647 (P.E.I.C.A.).

107 R.S.P.E.I. 1988, c. P-5, as am. by S.P.E.I. 1990, c. 43, s. 68.

108 (22 November 1992), Q.B.M. 716 (Sask. Q.B.).

109 S.S. 1989-90, c. R-26.1.

The Court then considered whether or not the Minister was required to hold a hearing, noting that the statute did not provide for procedures and that the common-law threshold of fairness would have to be met. As to whether or not there was a duty to hold a hearing, the Court held that from the very earliest stages of the dispute, all parties were well aware of the circumstances which existed throughout, and right up to, the issuance of the Minister's order. The Court accordingly asked rhetorically what purpose holding a hearing would have had after the order was requested where all of the parties were fully aware of all of the circumstances.

Finally, the Court held that there was not a scintilla of evidence to the effect that the Minister favoured one party over the other throughout the negotiations. In fact, the order the Minister ultimately made was more favourable to Murphy Oil than what had been tentatively negotiated prior thereto.

X. LEAVE TO APPEAL TO THE SUPREME COURT OF CANADA

A. *MOHAWK OIL CO.* v. *CANADA*

Leave to appeal was denied July 2, 1992. Bulletin of Proceedings of the Supreme Court of Canada 9 July 1992 at 1776.

B. *DOOLAEGE* v. *SOLID RESOURCES LTD.*

Leave to appeal was denied October 8, 1992. (1993), 131 A.R. 386.

C. *MATCHETT* v. *BLUE GOLD DRILLING LTD.*

Leave to appeal was denied November 19, 1992. [1993] A.W.L.D. 139.

D. *EASTMAIN* v. *CANADA (FEDERAL ADMINISTRATION)*

Application for leave to appeal filed January 19, 1993. Bulletin of Proceedings of the Supreme Court of Canada 19 January 1993 at 177.

E. *GRAND COUNCIL OF THE CREES* v. *QUEBEC (ATTORNEY GENERAL)*

Leave to appeal granted June 12, 1992. Appeal is currently scheduled during Fall 1993 session.

F. *AIR CANADA* v. *M & L TRAVEL LTD.*

Appeal was heard April 26, 1993.

Judgment reserved.

G. *MOBIL OIL CANADA LTD.* v. *CANADA (OFFSHORE PETROLEUM BOARD)*

Leave to appeal granted October 1, 1992. Bulletin of Proceedings of the Supreme Court of Canada (1992) at 2194.

Notice of appeal filed October 21, 1992. Bulletin of Proceedings of the Supreme Court of Canada (1992) at 2363.

Appeal is currently scheduled during Fall 1993 session.