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Recent Developments in Oil and Gas Law

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Executive Summary

The paper covers cases handed down during 1998 that will be of interest to the oil and gas industry. The cases are treated under three general headings: doctrinal development, litigation against the Crown or the regulator, and aboriginal oil and gas litigation. The paper concludes with a review of recent legislative developments in Yukon and British Columbia.

Acknowledgements

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1.0 Introduction

In this paper I seek to outline some recent developments in oil and gas law. The focus happens to be the 1998 calendar year but I try to set my comments in a broader context. I make no claim that the paper is comprehensive or exhaustive of recent developments.[1] Instead I have chosen to focus on four different themes or areas.

The first part of the paper deals with several cases that I have grouped under the general heading of miscellaneous doctrinal developments. In this section I pay most attention to four cases: first, the *Anderson* case[2] which deals with split titles in oil and gas and the ownership implications of phase changes during the course of producing a reservoir; second, *Taylor* v. *Scurry Rainbow (Sask.) Ltd.*[3] which raises an interesting and long-standing perpetuities question in Saskatchewan arising under the Freeholders' standard form lease and grant; third, the *Paddon Hughes* case[4] which deals with the application of the postal rule to payment of a delay rental under an oil and gas lease; and, fourth the *Durish* decision[5] which raises a number of important lease questions and some useful points of conveyancing practice.

There is no evidence of a trend here but the cases do support three negative observations. First, we did not see much fiduciary duty litigation in the oil and gas field. The decision of the Supreme Court of Canada in *Hodgkinson* v. *Simms*[6] notwithstanding, two decisions from the Alberta Court of Appeal, *Luscar Ltd. and Norcen Energy Resources Ltd.* v. *Pembina Resources Ltd.*[7] and *Erehwon Exploration Limited* v. *Northstar Energy Corporation*[8] seem to have dampened enthusiasm for costly litigation in this area. Second, and thankfully, the last year has been almost, but not quite, devoid of that sterile field of "proprietary

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1 For example, I have not reviewed relevant developments in constitutional law and in particular the decision of the Supreme Court of Canada in *Westcoast Energy Inc.* v. *Canada (National Energy Board)* (1998), 156 D.L.R. (4th) 456 (S.C.C.).

2 *Anderson* v. *Amoco et al.*, [1998] A.J. 805 (Q.B.).

3 [1998] S.J. 586 (Q.B.).

4 [1998] A.J. 1120 (C.A.).

5 [1998] A.J. 1041 (Q.B.).

6 [1994] 9 W.W.R. 609 (S.C.C.). I say "notwithstanding" because in *Hodgkinson* the majority of the court found a fiduciary duty even through the parties were also governed by a contractual relationship. However, I think that it is apparent, even on the test that emerges from *Hodgkinson*, that it will be difficult in many circumstances for a joint operator to establish that it was reasonable for it to have the expectation that the operator would owe an undivided duty of loyalty either to the joint operator or to the joint account.

7 [1995] 2 W.W.R. 153 (Alta. C.A.).

8 (1993), 15 Alta. L.R. (3d) 200, aff'd unreported decision of the Court of Appeal, 17 April 1997.

characterization litigation": i.e., is this royalty etc. an interest in land?[9] Third, the year saw virtually no litigation on the operating agreement.[10]

In the second part of the paper I deal with a group of cases concerned with litigation against the Crown or the regulator. I think that we are seeing an increased appetite for this type of litigation especially where it involves payments to the Crown or the regulator, whether in the form of royalties or clean-up expenses. In this section I look at three recent royalty cases including two dealing with First Nation royalties: *Imperial Oil Resources Ltd. Canada (Minister of Indian Affairs and Northern Development)*[11] and *Shell Canada Ltd.* v. *Canada (Attorney General)*.[12] A fourth case is *ERCB* v. *Sarg Oils*[13] which deals with an unsuccessful attempt by the Energy Resources Conservation Board (ERCB) to recover abandonment costs. This is the first case of its kind under Canadian oil and gas conservation legislation. The case raises important questions as to the effect of a breach of a procedural obligation on a statutory debt and the circumstances under which a party may plead estoppel against the Board.

There is some overlap between this group of cases and a third group of cases that I discuss under the general heading of First Nation oil and gas litigation. This is an area in which we are seeing an explosion of litigation. The *Stoney Tribal Council*[14] case deals with the application of provincial laws on reserve, while the *Mount Monteith*[15] case deals with the Crown's obligation to consult prior to issuing a well authorization.

The final part deals with legislative developments. Here I focus on two significant structural changes in Yukon and British Columbia. In 1998, Yukon obtained a transfer from Canada of the administration and control of oil and gas resources in the Territory[16] and

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9 The notable exception is Justice McIntyre's decision in *Chiniki and Wesley Bands* v. *PanCanadian Petroleum Ltd.*, [1998] A.J. 381, 218 A.R. 210 (Q.B.) application for a stay dismissed [1998] A.J. 889 (C.A.) to the effect that the Stoney's interest in the Crown reserved royalty under an Indian oil and gas lease is an interest in land and therefore falling within the "lands reserved" head of s. 91(24) of the *Constitution Act, 1867* at paras. 53-64.

10 There was one case dealing with compliance with the notice provisions of a right of first refusal clause: *Home Oil Co. Ltd.* v. *Northridge Exploration*, [1998] A.J. 519 (Q.B.).

11 [1997] F.C.J. 1767 (T.D.).

12 [1998] F.C.J. 1525 (C.A.).

13 [1998] A.J. 1039 (Q.B.).

14 (1998), 218 A.R. 201 (Q.B.).

15 *Kelly Lake Cree Nation* v. *British Columbia*, [1998] B.C.J. 2471 (S.C.).

16 *Canada-Yukon Oil and Gas Accord Implementation Act*, S.C. 1998, c. 5; the actual transfer of administration and control occurred on November 17, 1998.

thus the *Yukon Oil and Gas Act*,[17] first enacted in late 1997, will finally have something to bite on. In the case of British Columbia I highlight the adoption of the *Oil and Gas Commission Act*[18] establishing a new single-window quasi-independent regulator for upstream oil and gas activities.

2.0 Doctrinal Developments

2.1 Phase Ownership of Oil and Gas

A substance may occur in different phases. For example, H_20 may exist as a liquid, as steam or as solid matter (ice). Phase is dynamic; a substance may change from one phase to another, water may change into steam and condense back to water. Similarly, hydrocarbons occur in different phases as a liquid or as a gas or even as a solid and may go through phase changes. These changes may occur during production or they may occur in the reservoir. Phase changes are induced by changes in temperature and pressure.

That the same substance may occur in different phases and change phase during the course of production gives rise to two distinct types of legal problems. The first type of problem occurs when we split title to the different phases. Who owns what? What if the substance in its different phases is intermingled? We can think of this problem as a first-generation legal problem. It is exemplified for us by *Borys* v. *CPR*.[19] The Privy Council in *Borys* decided a number of things but it did not directly deal with the second type of legal problem which relates to the dynamic aspect of phases: i.e., what are the ownership implications of a change in phase in the course of production? That question is the subject of the recent decision of Justice Fruman in *Anderson* v. *Amoco et al.*[20] However, before looking at the law, we need to know a little bit more about the facts and the science.

Hydrocarbon accumulations occur in three forms, oil pools, gas pools and mixed pools. Temperature and pressure are greater in the pool than at the surface. Once production commences, pressure and temperature change. In a mixed pool, or an oil pool, as pressure declines gaseous hydrocarbons emerge from liquid hydrocarbons and are known as evolved gas or secondary gas cap gas. In a mixed pool, the evolved gas intermingles

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17 S.Y. 1997, c. 16.
18 S.B.C. 1998, c. 39.
19 (1953), 7 W.W.R. 546 (P.C.).
20 *Supra*, note 2.

with and is indistinguishable from the free gas or primary gas cap gas. In addition, under some conditions, changes in pressure will cause hydrocarbons dissolved in gases to condense and be produced as liquid hydrocarbons. Some of these phase changes occur within the reservoir and others occur while the hydrocarbons move up the well bore.[21]

I said above that *Borys* decided the first set of split title questions. What did Borys decide? CPR had conveyed title to certain lands reserving to itself the coal and petroleum. It leased the petroleum rights to Imperial and while Imperial was in the course of drilling Borys brought an action to restrain Imperial from continuing with its operations on the grounds that Imperial's activities would interfere with Borys' rights to the gas. At the time of the action Imperial had not commenced production.

The Privy Council decided that petroleum and natural gas were two separate substances.[22] Borys owned the gas cap gas[23] and CPR owned the petroleum and any natural gas dissolved in the petroleum.[24] The Privy Council also decided that Imperial could continue its drilling operations and could produce Borys' gas cap gas as an incidental part of its operations provided that it was acting reasonably or in accordance with standard oil field practices.[25] All this of course was decided against a background regulatory framework that has consistently prohibited the concurrent production of an oil pool with its associated gas cap.[26] In the interests of maximizing recovery, the Alberta Energy and Utilities Board and its predecessors will only permit the production of the gas cap once recoverable reserves of oil have been produced.

What then of evolved gas? *Borys* did not decide issues related to evolved gas but it did suggest that in construing the CPR reservation one should do so under reservoir conditions and not surface conditions.[27] Thus in the *Anderson* case all parties seem to have accepted that it was not open to the plaintiffs to argue that petroleum and natural gas

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21 This paragraph is based on paras. 15-18 and 27-35 of *Anderson*, *ibid.*

22 *Borys*, *supra* note 19 at 552.

23 *Ibid.* at 552.

24 *Ibid.* at 556.

25 *Ibid.* at 559-560.

26 See the *Oil and gas Conservation Act*, R.S.A. 1980, c. O-5, s. 26(1)(e) and the historical antecedents noted by Justice Fruman at note 35 of her judgement in *Anderson*, *supra* note 2.

27 Lord Porter indicated in *Borys*, *supra* note 19 (at 556) that their Lordships must construe "the meaning which the word "petroleum" bears when the substance referred to is in situ in a container below ground." In earlier dicta Lord Porter seemed to contemplate division depending upon phase at the surface(at 554) but Justice Fruman in *Anderson*, *supra* note 2 at para. 66 dismissed these comments as hypothetical and *obiter*.

might be divided between the split title holders on the basis of the phase of the substance at the surface.[28]

That option precluded, it was left to the plaintiffs in *Anderson* to argue that ownership of the gas and oil should not be decided under *original* reservoir conditions but should be decided *from time to time* with ownership divided based on the phase of the hydrocarbons as they entered the bottom of the well bore. Justice Fruman rejected that argument holding in effect that either Lord Porter had already decided to the contrary in *Borys*[29] or at the very least that any other conclusion would be inconsistent with *Borys* as well as the Court of Appeal's earlier decision in *Prism Petroleum Ltd.* v. *Omega Hydrocarbons Ltd.*[30]

Justice Fruman also went on to decide some ancillary matters. First, she decided that the plaintiffs' entitlement to gas cap gas (decided by *Borys*) also included any gas cap gas produced through the well bore on the plaintiffs' lands that might have migrated from adjoining lands. By the same token, the plaintiffs were not entitled to any evolved gas that might migrate from the adjoining lands.[31] Second, the plaintiffs were not entitled to any gas that might evolve from connate water.[32] Third, the plaintiffs were entitled to condensate and natural gas liquids that were dissolved in the primary gas cap gas under initial reservoir conditions but which emerged at the surface as liquids. They were not entitled to such substances if they emerged from the secondary gas cap gas; these substances belonged to the petroleum owner.[33]

While the decision clarifies *Borys* there are still some difficult issues. First, it is evidently not easy to determine with any precision the entitlement of the respective parties. While it would be a simple matter to effect this division if title were allocated on the basis of phase at the surface, this option has been ruled out and title must be divided on the basis of initial reservoir conditions.[34]

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28 *Anderson*, *supra* note 2 at para. 66. This concession follows from *Borys*. If the allocation were made at the surface the gas owner will take solution gas as well as gas cap gas.

29 *Ibid.* at para. 80.

30 (1994), 18 Alta. L.R. (3d) 225 and discussed in *Anderson*, *supra* note 2 at paras. 81-89.

31 *Anderson*, *supra* note 2 at para. 161.

32 *Ibid.* at paras. 162-165.

33 *Ibid.* at para. 166.

34 Justice Fruman deals with these difficulties at *ibid.* paras. 137-141 and simply concludes that "evaluators can make reasonable engineering estimates of the amount of gas which existed in a primary gas cap, the amount of gas which existed in solution and the amount of gas which evolved from solution in a pool." It might be more accurate to describe these as *guess*timates. The quality of

Second, the court provide very little guidance as to how the parties should account for the consequences of the division of ownership which it has confirmed. The court does confirm that the rule of capture is not relevant to oil and gas ownership in split title cases.[35] If one agrees with the court's characterization of the rule of capture as a "no-liability rule"[36] then it follows that the petroleum owners cannot hide behind the rule of capture and argue that they owe no liability[37] or that they have acquired ownership of the primary gas cap gas by virtue of capturing it and producing it. But is there a duty to account? Justice Fruman has effectively postponed these issues:[38]

> . . . It is unclear to me whether any duty to account arises.
>
> I leave the issue open and permit the parties to readdress it should a duty to account be relevant in the context of my decision. I note that some additional issues have been raised in argument, including the applicability of the *Limitations of Actions Act*, R.S.A. 1980, c. L-15, to limit the obligation to account . . . and whether an obligation to account may be reduced by the costs incurred in production and marketing . . . . At this time I make no determination as to whether these issues are relevant.

Evidently, Justice Fruman is a sceptic but if A is producing B's gas, selling it, and making a profit why should A not owe B a duty to account even if B is unable to restrain A from producing its gas?

2.2 *The Rule Against Perpetuities*

In 1949, Mr. Taylor granted a 10-year primary term lease to Imperial.[39] The habendum

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the estimates would be improved if the petroleum owner carried out appropriate tests before commencing production. Can the gas owner argue that there is a duty on the petroleum owner to conduct such tests? If the petroleum owner fails to do so what inferences might the gas owner be entitled to draw?

35 *Ibid.* at 136.

36 *Ibid.* at paras. 130-136.

37 We must accept however on the basis of *Borys* that the gas owner cannot restrain production of gas cap gas provided that the petroleum lessee is acting reasonably. *Dicta* in *Borys supra* note 19 may go beyond a no-restraint rule however insofar as Lord Porter at 567 states that ". . . some of the gas in the gas cap emerges with the petroleum and the gas owner is thereby deprived of some of the unreserved property." Justice Fruman refers to this passage in *Anderson*, *supra* note 2, at paras. 79-80 of her judgement but does not consider it in the context of the duty to account. In weighing Lord Porter's judgement it would be nice to know if Lord Porter were operating on the assumption that any gas produced would be flared. If it were to be saved and sold why should Borys be deprived of his property?

38 *Ibid.* at para. 169.

39 *Taylor and Maxx Petroleums* v. *Scurry-Rainbow Oil (Sask.) Ltd., and Tarragon Oil and Gas et al.*, [1998]

allowed the lease to continue beyond the end of the primary term "for so long thereafter as the leased substances were produced from the lands." The lease expired at the end of the primary term but long before that happened Mr. Taylor granted a document entitled "Assignment and Conveyance of Petroleum and Natural Gas Royalty and Lease of Minerals" to Freeholders Oil. The agreement is in a form that is familiar to those practising oil and gas law in Saskatchewan and indeed attracted significant litigation in the 1950s as grantors in the position of Mr. Taylor sought to set the agreements aside on the basis of *non est factum*.[40]

The agreement did a number of different things but for present purposes it is sufficient to focus on paragraph 2 of the agreement titled "Lease to Grantee". The precise language is important and I therefore quote the relevant sections of the clause:[41]

> UPON AND IN THE EVENT OF the termination, cancellation, avoidance or expiration of the said drilling lease [the Imperial lease] . . . the GRANTOR DOTH HEREBY GRANT AND LEASE UNTO THE GRANTEE all the mines, minerals and mineral rights, . . . TO HAVE AND TO ENJOY the same for a term of ninety-nine (99) years from the date hereof, renewable at the option of the GRANTEE . . .

Taylor entered into further agreements for the lands with both Imperial and Freeholders and while the trial judge refers to those agreements as an aid to the construction of paragraph 2 of the 1950 agreement[42] mention of them here will only serve to cloud the primary issue. That issue of course is whether or not the 1950 Freeholders Agreement was void by reason of the common law rule against perpetuities? The interest of Freeholders had become vested in Tarragon Oil and Gas. Maxx Petroleum top-leased the lands in 1993 and in 1994 launched an application to have the Freeholder-Tarragon caveats vacated.

Saskatchewan has yet to amend or replace the basic common law rule against perpetuities. Thus the rule applies with full vigour. The rule requires that one be able to determine at the outset that a contingent interest will vest (if at all) within the perpetuity

S.J. 589 (Q.B.).

40 *Meyers and Lee* v. *Freeholders Oil Co. Ltd. and Canada Permanent Trust Co.*, [1960] S.C.R. 761.

41 The Preamble to the agreement indicated that the lease would only be triggered in the event that the Imperial lease expired or was terminated within 42 years. That provision was not included in the operative part of the agreement but nothing turns on the point.

42 *Taylor*, *supra* note 39 at paras. 45-48. Justice Gerein states that he would have had resort to these subsequent agreements had he found the 1950 agreement to be ambiguous. In act he did not but his lordship does refer to these subsequent agreements to support his conclusion on the construction of para. 2.

period. The perpetuity period is 21 years plus the lives of relevant lives in being (if any). If the rule is breached the disposition is void.

In the present case there were no relevant lives in being and it was fairly obvious that the rule was breached *if it applied at all*. Tarragon offered several arguments to lead to the conclusion that the rule did not apply. First, said Tarragon, its interest under paragraph 2 was not a contingent interest at all. It was vested in interest from the outset. Second, said Tarragon, the policy behind the rule was not frustrated by this type of agreement and therefore the rule should not apply. Both arguments failed, the disposition was held to be void from the outset and since it was void it could not be saved by subsequent ratification and neither was Taylor's personal covenant to grant a lease enforceable.[43]

2.2.1 Contingent or Vested

Tarragon seems to have presented its arguments under this head on two different grounds. The first was a construction argument. The second argument claimed that Freeholders' estate could not be contingent since any estate that is prevented from taking effect in possession only by the existence of a prior particular estate is, by definition, vested.

2.2.1.1 The Construction Argument

Tarragon argued that paragraph 2 was ambiguous. Its preferred interpretation was of a present grant of an interest qualified only by the term (i.e., duration) of the interest taken up by Imperial.[44] In the event of ambiguity the courts should prefer an interpretation that favours early vesting. Maxx of course argued that on its face the opening words of paragraph 2 created a condition precedent behind which Tarragon's interest had to be contingent. Justice Gerein rejected Tarragon's arguments on this point and I think correctly given the opening language of paragraph 2 which dominates the words of grant later in that same clause.

2.2.1.2 Vested as a Matter of Law

The more interesting argument was whether or not the interest was vested as a matter of

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43 These last two points are dealt with *ibid.* at paras. 59-60. See *Harris* v. *MNR*, [1966] S.C.R. 489.

44 On this view Freeholders' 99 year term simply had carved out of it the Imperial interest however long it might turn out to be.

law. An interest is vested (in interest) if the person to take the interest is identifiable *and* if that person is prevented from enjoying the interest in possession merely by the existence of a prior particular estate or estates. Did the Freeholders' interest fall within that second exception? Justice Gerein held that it did not but his reasoning is, with respect, far from convincing. Justice Gerein devoted just two paragraphs to dismissing this point and I quote the relevant sections:[45]

> I have not forgotten the submission that "Contingencies which trigger the operation of the Rule against Perpetuities are contingencies other than the termination of the prior estate however and whenever they may occur." . . . I do not quarrel with that statement as a general proposition. If a grantor gives to A with a remainder to B . . . there is no condition and there is an immediate vesting.
>
> However that does not mean that a grantor cannot impose a condition based upon termination of a prior estate. In the instant case, had the parties not used the particular opening terminology, there would be no condition or contingency and the submission would have merit. However, they did not do that, but rather chose to use terminology which created a situation of contingency and futurity.

I think that the most serious doctrinal question for Justice Gerein was one that he never posed, namely, was the Imperial interest a prior particular estate within the meaning of the vesting rule? He seems to assume that it was, but the literature generally works on the basis that the prior estate must be some form of life estate because one cannot have a remainder after a fee and it is no longer possible to create an estate tail.[46]

The oil and gas lease may be a hybrid form of interest but nobody would suggest that it is a life estate. We know that it is not a true lease, and is, as a matter of law, a *profit à prendre*,[47] but it still has to be granted for some estate known to the law.[48] Given the uncertainty of its duration it cannot be a lease and it is most likely some form of determinable fee. What does the common law say about a disposition that follows a determinable or conditional fee? Megarry and Wade are clear, remainders that follow a determinable or conditional fee will be contingent. They give the following example and

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45 *Taylor*, *supra* note 39 at paras. 43-44.

46 A disposition after a fee tail was treated as vested: Oosterhoff & Rayner, *Anger and Honsberger Law of Real Property*, 2d ed. (1985) at 489.

47 *Berkheiser* v. *Berkheiser*, [1957] S.C.R. 387.

48 The same is true of other incorporeal interests. For an amusing example see *Miller* v. *Emcer Products Ltd.*, [1956] Ch. 304 (Eng. CA) dealing with a lease of an easement to use a lavatory. But see also the discussion in *Berkeiser*, *ibid.*, and Justice Laskin's judgement in *Saskatchewan Minerals* v. *Keyes*, [1972] 2 W.W.R. 108 esp. at 118-121 (dissenting but not on this point) (S.C.C.).

explanation:[49]

> . . . if the gift had been –
>
> > "To A (a bachelor) for life, remainder to his eldest son (if any) in fee simple, remainder to B in fee simple,"
>
> B's remainder would have been contingent, for there was a rule that no interest which followed a contingent fee simple could be vested. This was because although a grantor can create any number of successive life interests or entails (limited interests) and vest them in living persons, he can part with the fee simple (an absolute interest) only once; so that any two limitations of the fee simple are not successive but alternative, and if one is contingent the other must depend on the converse contingency. For somewhat similar reasons a gift which follows a determinable or conditional fee simple is regarded as contingent, as for example B's interest in a limitation –
>
> > "to A in fee simple until he ceases to reside in the family home, remainder to B in fee simple".

Thus, notwithstanding the well-known exception that the possibility of reverter is a vested interest that is not subject to the rule, the purported disposition of the remainder after the determinable interest is treated as contingent. In the present case, Taylor did not grant Freeholders his possibility of reverter, he granted Freeholders' an estate that could only take effect on the determination of the prior estate, an event that might never happen.

2.2.2 Public Policy

In addition to these technical arguments, the defendants also made the case that the type of agreement at issue here did not offend the policy behind the rule and therefore should not offend the rule. Top-leases of this sort do not remove land from the market and productive economic activity, in fact, they encourage development of the property.[50] Justice Gerein seemed quite prepared to accept the substantive claim underlying this argument but took the view that he would be exceeding his judicial authority if he were to set aside the rule. This was especially the case in Saskatchewan given that the Law Reform Commission had recommended abolition in 1987, but legislation introduced into the Legislature to give effect to that recommendation had died on the order paper.[51]

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49 Megarry & Wade, *The Law of Real Property*, 4th ed. (1975) at 175-176 (references omitted).
50 *Taylor*, *supra* note 39 at paras. 53-54.
51 *Ibid.* at paras. 52, 55-56.

2.3 The Lease Cases

The continuing adventures of the oil and gas lease apparently have no end. The same seems to be equally true of some litigants whose cases keep returning for the trial of new issues. Thus we have a new decision involving Mr. Victor Durish[52] as well as the Court of Appeal's decision on the second aspect of the *Paddon Hughes* v. *Panco* saga.[53]

The cases show that parties who use the unless form of lease continue to run into difficulties with the prompt payment of delay rentals, but we also have new authorities dealing with the manner of payment clause (with some interesting dicta on entirety clauses), what constitutes fulfilment of a drilling obligation, and the proper construction of the royalty clause.

2.3.1 The Manner of Payment Clause

The Court of Appeal handed down its split decision in *Paddon Hughes Development Co.* v. *Pancontinental Oil Ltd.*[54] in October. The primary issue was the construction of the manner of payment clause.

Panco held three leases to the southeast quarter each as to an undivided one third interest. Each of the leases was an unless lease for a primary term of five years with an anniversary date in the case of the Bishop lease of August 17, and in the case of the Thatcher lease August 19. Paddon Hughes had acquired the interest of the original lessors. The lands in question were pooled with other lands in the section and a well was drilled on the northwest quarter. The question in the first *Panco* case was whether or not there was a valid pooling agreement in effect by the end of the primary term of each of the SE quarter leases. Justice Rooke held that the pooling was in place and accordingly that ground of attack failed.[55]

By the time that the case reached the Court of Appeal the issue had narrowed to the legal effect of the tender of a delay rental that had been made under the Thatcher lease during

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52 *Durish* v. *White Resource Management Ltd. et al.*, [1998] A.J. 1041 (Q.B.).

53 *Supra* note 4. For the earlier litigation raising pooling issues see: *Paddon-Hughes Development Co.* v. *Pancontinental Oil Ltd.* (1992), 2 Alta. L.R. (3d) 343, [1992] 5 W.W.R. 106 (Q.B.). I commented on the earlier case in N. Bankes. "Pooling Agreements in Canadian Oil and Gas Law" (1995) 33 Alta. L. Rev. 945.

54 [1998] A.J. 1120, aff'g (1995), 33 Alta. L.R. (3d) 7, [1995] 10 W.W.R. 656 (Q.B.).

55 *Supra* note 53.

the first year of the primary term (1985). The parties conceded that if there were a late payment of a delay rental on either of the Bishop or Thatcher leases, that would cause the entire pooling arrangement to unravel.

The facts relevant to this issue were as follows. Thatcher lived in California. He had insisted on a change to the manner of payment clause in the Panco lease form. The clause in Panco's standard form provided that a payment to the Lessor: (1) might be paid or tendered either to the lessor or the named depositary; (2) by cheque or draft of the lessee; (3) mailed or delivered; and (4) in Canadian funds. Most important of all, the clause had a deeming provision to the effect that: "In the case of payments which are mailed, such payments shall be deemed to be received by the Lessor as of the date of mailing . . . ."

The clause was revised by striking out certain words and by inserting handwritten additions. As a result of the changes the Thatcher clause ultimately read as follows:

> 21. Manner of Payment
>
> All payments to the Lessor provided for in this Lease shall be paid to the Lessor at the address specified in Paragraph 24.

Paragraph 24 was the lease clause specifying how notices were to be delivered under the lease. It provided that:

> 24. Notices
>
> All notices to be given hereunder may be given by registered letter addressed to . . . the Lessor at San Francisco, California, USA 94110 507 Peralata Avenue, or such other address as the Lessor . . . may . . . from time to time appoint in writing, and any such notice shall be deemed to be given to and received by the addressee seven (7) days after the mailing thereof, postage prepaid.

The trial judge concluded that a cheque to each of Stevens and Thatcher was mailed by regular mail on August 9, 1985. The evidence on the point was somewhat equivocal[56] but both the majority and the dissent in the Court of Appeal found that there was no palpable or overriding error in this determination and therefore no basis on which to overturn the

56 Bishop's designated depositary acknowledged receipt August 26 while Thatcher acknowledged receipt September 4. There was evidence from Bishop's depositary that the cheque would have been received August 25 or 26 and evidence from Canada Post that average delivery between Edmonton and Calgary for that time was between 2 and 3 days.

trial decision.[57] Beyond that, the evidence of payment was that while there was no evidence of the usual time required for deliveries between Calgary and San Francisco, there was evidence to the effect that other payments sent by mail by Panco to Thatcher took less than 11 days.

Panco's argument was therefore three-fold. First, as a matter of construction of the lease as amended, the lease contemplated use of the mails for payment of delay rental. Second, given that mailing was contemplated, payment should be deemed to have been made when posted. Third, and in the alternative, there was evidence on which it could be inferred that if the cheque were posted on August 9 it would have been received by Thatcher before August 20.

There was a preliminary issue to deal with before the Court of Appeal could consider these three arguments and that was: what use was the court entitled to make of the struck-out portion of the manner of payment clause? On that issue Justice O'Leary for the majority was clear. In the absence of ambiguity it was not appropriate to refer to the deleted words to establish the meaning of the words actually used by the parties. There was no ambiguity here so "the words deleted from the Thatcher lease are to be ignored and treated as if they never existed."[58]

That issue disposed of, what did clause 21 contemplate? First, the majority took the view that the clause certainly contemplated payment by mail. This interpretation was consistent with the incorporation by reference of the Notice clause of the lease with its stipulation of a zip code. The interpretation was also consistent with commercial reality given the small sums involved and the distance between the parties. The court, said Justice O'Leary, should attribute to contracting parties a businesslike intention. To permit payment by mail was not to imply a term into the contract, it was merely finding the proper interpretation of the agreement between the parties.[59]

The distinction was an important one given the inclusion of the standard entirety clause in the lease. An entirety clause prevents a court reading additional terms into the lease but it does not prevent the court from determining what the entire agreement means. In particular, it cannot preclude a court from determining what the words "paid to the Lessor

57 *Supra* note 54 at paras. 21 and 75.
58 *Ibid.* at para. 34.
59 *Ibid.* at paras. 38-41. Consistently with this approach see *Merger Restaurants* v. *Lakeview Development of Canada*, [1990] 5 W.W.R. 489 (Man. C.A.).

at the address specified" actually mean.[60] Justice O'Leary summarizes the point well:[61]

> The conclusion that the Thatcher lease contemplates payment of the delay rental by mail is not based on extrinsic evidence of the parties' intentions, and therefore does not offend the parole evidence rule. Even if clause 23 of the Thatcher lease [the entire agreement clause] is broader than the parole evidence rule, the conclusion does not amount to "an implied covenant or liability of any kind". Construing the Thatcher lease as evincing a contractual intention that Pancontinental may pay the delay rental by mail does not amount to finding a collateral agreement over and above the written lease, nor does it impose any obligations beyond those already contained in the agreement.

But if the agreement contemplated payment by mail when is such a payment received? Following an analysis of the authorities, Justice O'Leary held that where a lease permits payment by mail, payment is made when posted. The authorities analysed included a US oil and gas case and two Canadian lease authorities: *Texas Gulf Sulphur Co.* v. *Ballem*[62] and *Paramount Petroleum and Mineral Corporation* v. *Imperial Oil Ltd.*[63] In each of these cases clauses that contemplated payment by mail were held to contemplate that payment occurred upon mailing. The *Pashke* case[64] which, on the face of it, apparently supported Paddon Hughes' position was distinguished on the basis that in that case the lease in question had already expired before the cheque was mailed.[65]

The majority was also prepared to dismiss the appeal on the alternative grounds that the evidence justified an inference that a cheque mailed in Calgary on August 9 would have arrived "well before the anniversary date."[66] All parties conceded that it was enough if the cheque were delivered to the specified address. Proof of personal receipt by Thatcher was not necessary.[67]

Justice Cote offers a vigorous dissent and I think one must conclude that he has dissented both on the grounds that mailing a cheque does not constitute delivery but also on the grounds that the lease should not be interpreted as permitting payment by mail.

I say this for two reasons. First, if Justice Cote contemplated that payment by mail

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60 *Ibid.* at para. 46.
61 *Ibid.* at para. 45.
62 (1970), 72 W.W.R. 273 (Alta. S.C.A.D.), aff'd [1971] 1 W.W.R. 560 (S.C.C.).
63 (1970), 73 W.W.R. 417 (Sask. Q.B.).
64 *Canadian Fina Oil Ltd.* v. *Paschke* (1957), 21 W.W.R. 260.
65 *Panco*, *supra* note 54 at para. 60.
66 *Ibid.* at para. 62.
67 *Ibid.* at para. 56.

delivered at Thatcher address was acceptable he needed to consider Panco's alternative argument prior to allowing the appeal. On the interpretation of the evidence offered by both the trial judge and Justice O'Leary, Panco didn't need to establish that payment occurred on posting. Second, although his primary target is the proposition that mailing equals delivery, some of Justice Cote's comments speak more broadly:

> To hold that the Thatcher lease intended or permitted the payment to be mailed would be an error of law . . .[68]
>
> . . . the Thatcher lease does not mention mailing payments. It says that the money shall be paid to the Lessor at the address specified. How can one then hold that the contract called for mailing, and not any other means of delivery.[69]

Justice Cote does score some important points on the postal rule. He questions the commercial reality of those who assert that mailing equals payment even if there is never a delivery and he argues that the offer and acceptance cases are not relevant since this is a case of payment and not an acceptance case.[70]

But even if one applies the offer and acceptance cases it is clear that the postal rule will not always be incorporated. The point is well made in the decision of the English Court of Appeal in *Holwell Securities Ltd.* v. *Hughes*.[71] In that case Holwell had an option to renew a lease. The agreement provided that "The said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof . . .". The parties agreed that the plaintiff purported to accept the offer by mailing a letter to the defendant some four or five days before expiry of the six-month period.[72] The letter

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68 *Ibid.* at para. 85.

69 *Ibid.* at para. 88.

70 But, if one characterizes the delay rental clause in an unless lease as an option (as the courts have: *East Crest Oil Co.* v. *Strohschein*, [1952] 2 D.L.R. 432 (Alta. S.C.A.D.)), tendering payment is an acceptance of the option. This point was actually taken by Justice Cairns in *Texas Gulf*, *supra* note 62 at 283: "An option is nothing more than an offer and the manner of acceptance is stated therein and when it is specified how it may be accomplished, namely, by mail, then the date of posting is the date of acceptance. *That is to say, in this case the posting of the letter containing the cheque is acceptance of the offer contained in the option*" (emphasis supplied).

71 [1974] 1 All E.R. 161. This case was drawn to my attention by my colleague Nick Rafferty. It is not cited in either the trial judgement ([1995] 10 W.W.R. 656) or in the court of appeal. However, Justice Cote does refer to the Supreme Court of Canada's decision in *Saskatchewan River Bungalows Ltd.* v. *Maritime Life Insurance Co.*, [1994] 7 W.W.R. 37. There, the Supreme Court proceeded on the basis that the Court of Appeal was correct in its holding that a contract term making monies "payable . . . at the Head Office of the Company" was sufficient to displace the postal rule. In reaching that conclusion the Court of Appeal had relied on *Holwell Securities*.

72 The letter was mailed on the 14th of the month right at the end of the 6 month period; the lease was

went astray and was never delivered although a copy of the letter was delivered that same day to the defendant's solicitor.

The Court of Appeal agreed that the postal service could be used to communicate acceptance of the offer (by exercise of the option) but the Court also concluded that the parties did not contemplate application of the postal rule. Instead, the words used indicated that they expected actual communication. Lord Justice Russell emphasised that the option used the words "notice . . . to" and that this was "language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance be constituted by the act of posting referred to by Anson as 'acceptance *without notification*'."[73]

Lord Justice Lawton was even more direct. It was clear to him that the postal rule would not apply in all circumstances where the parties would have expected the post to be used as the means of accepting an offer.

> First, it does not apply when the express terms of the offer specify that the acceptance must reach the offeror. . . . Secondly, it probably does not operate if its application would produce manifest inconvenience and absurdity.[74]
>
> [Examples follow]
>
> In my judgement the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other.[75]

In *Panco* the language of the clause to which the parties agreed is even more compelling. Thus the parties agreed that all payments "shall be paid" at a prescribed address. *Holwell Securities* suggests that a court will not need much convincing that the parties had intended to reject the mailing rule even where they contemplated use of the mails. *Holwell Securities* involved a mere notice and not payment. It seems hard to reach the conclusion that the terms of an option that requires a payment have been fulfilled, even

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dated on the 19th. Presumably the six months expired either on the 19th or at midnight on the 18th.

73 *Panco*, *supra* note 54 at 164, emphasis in the original, reference omitted.

74 *Ibid.* at 166.

75 *Ibid.* at 167.

if payment is never received by the lessor. That was not this case since all parties acknowledged that payment was ultimately received, but implicitly Justice O'Leary must also be taken to have decided the harder case as well.

2.3.2 The Royalty Clause of the Lease

Justice Hart's decision in *Acanthus Resources Ltd.* v. *Cunningham*[76] is a useful recent authority on the interpretation of the royalty clause of the lease. It does not contain any surprises. The lease in question was typical and reserved a gross royalty based upon "the current market value at the wellhead." Now it is well understood in the natural gas business that since the first point of sale is usually at the outlet valve from the processing plant, lessees should be entitled to netback from that point to the wellhead, the point at which market value must be determined for royalty purposes. Thus, a lessee can deduct the reasonable costs of transportation and processing between those two points, usually calculated on the basis of the Jumping Pound Formula or a variation thereof.[77]

In *Acanthus*, and contrary to industry practice, the lessee, who had taken its interest by assignment, sought to apply the same methodology to oil processing charges. The oil in question was moved from various wellheads to a central battery, treated by the removal of water and then stored in tanks before being trucked from the battery to the pipeline inlet, the first point of sale. Previous lessees had deducted transportation costs but not treatment costs and the current lessee sought a declaration that it was entitled to deduct processing costs.

The court found for the lessee and rejected an estoppel plea (on the basis of the past practice of previous lessees).[78] The lessee failed to get the specific relief it sought ($8 per cubic metre) since it had failed to adduce evidence as to its actual costs. The burden was on the lessee and the court had no statutory mandate to fix just and reasonable rates.[79]

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76 (1998), 213 A.R. 375, [1998] A.J. 25 (Q.B.).

77 For discussion of the Jumping Pound Formula see Bennett Jones Verchere and Nigel Bankes, *Canadian Oil and Gas*, vol. 1, editor's note accompanying Digest 72, *Re Shell Canada Ltd.*, and authorities cited there and Ballem, *The Oil and Gas Lease*, 2d ed. (1984) at 139 and *Resman Holdings Ltd.* v. *Huntex*, [1984] 1 W.W.R. 693 (Q.B.). In this last case the court allowed a working interest owner to make deductions based on the Jumping Pound Formula even though there was arguably a contrary intention displayed by the actual words used in the instrument creating the royalty.

78 Not surprisingly the court held that there was no detrimental reliance and that the forbearance of the plaintiff in not claiming processing costs did not amount to a representation (*Acanthus*, *supra* note 76 at paras. 24-25).

79 *Ibid.* at para. 28.

Justice Hart did provide some guidance to the parties and stated that:

> At a minimum the court would have expected cogent evidence on the specific facilities used for gathering, treating and storage, their original capital cost and their current depreciated value. In addition, actual operating costs should have been provided.[80]

In the result, the plaintiffs ended up with $1 per cubic metre.

2.3.3 The Lease Questions in Durish

2.3.3.1 The Facts

White Resource Management (WRM) and Durish maintained competing titles to a quarter section of land. For the purposes of the lease issues it seems enough to say that Durish claimed an interest under the Pawnee/Haida lease (granted November 25, 1971) which was prior in time to the Vold-White lease (granted May 27, 1978) under which White claimed. Lobell, a company controlled by Durish, drilled a well on the lands in 1979. The well was successful although it was shut-in for lack of a market until 1982. Lobell acquired its interest in the Vold-White lease by way of a farmout from White to Durish (October 25, 1978) which Durish assigned to Lobell before the well was drilled. After Lobell had successfully drilled the well, White, through WRM Resources expressed an interest in re-acquiring Lobell's 50% interests as well as Durish's freehold interest. The parties entered into two purchase and sale agreements and proceeded to simultaneous completion of the two agreements. White and Lobell closed the sale for the working interest in June 1981 but the sale of the freehold title fell through. As a result, Durish maintained on title a caveat protecting the Pawnee/Haida lease. WRM paid the proceeds of production from the well to the Royal Bank pursuant to a section 177 *Bank Act* security.

Durish acquired a personal interest in the competing Pawnee/Haida lease in May 1979 when he became aware of Pawnee's competing interest shortly before Lobell was to drill the well. He had also taken steps in April 1979 to acquire the freehold interest in the lands.

Upon Durish's refusal to affirm WRM's working interest title, White commenced the original action seeking a declaration as to the validity of its petroleum and natural gas interest. Durish defended and counterclaimed. Durish based his claim on the

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80 *Ibid.* at para. 32.

Haida/Pawnee lease and named the Royal Bank as a defendant on the grounds that the Bank had full knowledge of his interest by virtue of his caveat and was therefore liable to account to him for all of the proceeds.

The first matter to proceed was Durish's counterclaim and at the close of Durish's case the defendants moved a non-suit. The defendants succeeded before Justice Mason[81] and the Court of Appeal[82] but lost before the Supreme Court of Canada.[83] The Supreme Court of Canada held that, in principle, Durish's claim to priority under the Pawnee/Haida caveat was superior to that claimed by the White interests. However, since a caveat is only notice of an interest, the matter was sent back to trial to determine the validity of the lease and also to determine whether, if the lease was valid what claim Durish and other parties might have to the production revenue.[84]

Upon trial of the remaining issues, Durish's counterclaim was comprehensively dismissed[85] for two different types of reasons. First, Durish failed on the basis that any priority based on the Pawnee/Haida lease was doomed because that lease had in fact expired in accordance with its own terms for failing to drill or alternatively, having drilled, for failing to make a timely shut-in royalty payment.

Second, Durish failed because even if the Pawnee/Haida lease had survived he could not enforce his claim for production revenue under that lease against either White Resource Management or the Royal Bank. This conclusion is based upon several alternative grounds.[86] I shall deal with two in the next section of the paper under the heading "cases of abuse of relationship". In summary they were as follows. First, in acquiring the Pawnee/Haida lease in his personal capacity, Durish was capturing a corporate opportunity that should have flowed to Lobell, a corporation of which Durish was a director. Durish held any benefits he acquired as a constructive trustee for Lobell. WRM was the successor in title to Lobell and succeeded to any right of action that Lobell might have based upon Durish's breach of fiduciary duty. Second, when Lobell conveyed its

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81 (1990), 77 Alta. L.R. (2d) 131 (Q.B.).
82 [1993] 1 W.W.R. 752 (Alta. C.A.).
83 (1995), 26 Alta. L.R. (3d) 155 (S.C.C.).
84 *Ibid.* at para. 40 (S.C.C.).
85 [1998] A.J. 1041 (Q.B.).
86 There were two other issues that I do not comment upon here. First, Justice Mason held that the release signed by Haida could be relied upon not only by Durish but also by WRM. As a result, Durish could not resurrect the Haida/Pawnee lease and assert it against WRM. Second, even if Durish might have a claim against White or WRM it had no claim against the bank for the bank was not an express trustee and had not knowingly assisted in a breach of trust by another party.

working interest in the subject lands back to WRM, Durish signed a certificate in which he represented in his personal capacity that, to the best of his information, knowledge and belief, he was unaware of any adverse claims or interests relating to the property. Having made that representation he was estopped from denying its validity once it had been relied upon by WRM in completing the transaction.

2.3.3.2 The Drilling Obligation

In maintaining his claim under the Pawnee/Haida lease, Durish faced the obstacle that the persons beneficially entitled under the Pawnee/Haida lease had never drilled a well on the lands. Could Durish claim that a well drilled on the same lands, but by another party (Lobell) and under a competing lease, could satisfy the drilling obligation for the primary term? Durish's lease did not state (as some leases do) that the lessee or a person authorized by the lessee must drill the well. Nevertheless, Justice Mason ruled that the result was the same because this conclusion was most consistent with the underlying purpose of the lease. Relying exclusively upon American authority, Justice Mason concluded that the lease is intended to secure the exploration of the property by the lessee. Any other construction allows the lessee to hold the property for speculative purposes. Rival lessees could enter into an agreement that might satisfy the requirements of more than one lease, but passivity was insufficient. "Durish would have had to contribute to the expense of drilling, or have some kind of formal arrangement which he did not."[87]

2.3.3.3 Late Payment of Shut in Royalty

Even if Durish could rely on drilling operations under a competing lease, he faced the further obstacle that the well was subsequently shut-in during the primary term and there had been no payment of a shut-in royalty. Durish sought to argue that a shut-in royalty was not necessary because of the language of the third proviso.

The third proviso began with the words "AND FURTHER ALWAYS PROVIDED THAT if *at the end of the said . . . term*". A further sub-proviso within that clause (separated by a semi-colon) went on to state that if a well on the lands or the pooled lands was "shut-in, suspended or otherwise not produced as the result of a lack of or an intermittent market,

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87 *Ibid.* at para. 47. Note that even if one could argue that there was an informal arrangement between Durish and Lobell (which Durish controlled) that might not have helped Durish given the fiduciary argument considered in the next section of this paper.

or of any cause whatsoever beyond the lessee's reasonable control, *the time of such interruption or suspension or non-production shall not be counted against the Lessee*, anything hereinbefore contained or implied to the contrary notwithstanding" (emphasis supplied). The shut in well clause provided that in the event of a shut-in well the lessee may pay a royalty in an amount equal to the delay rental, and, upon timely payment the well would be deemed to be a producing well.

Relying on *Re McLean Oil Properties*[88] Durish argued that time should not run against him and that therefore the lease could not have terminated under its own terms.[89] Justice Mason chose to rely on the opening language of the clause and pointed out that the third proviso spoke only to the situation at the end of the primary term. It must have been his view (although he does not expressly deal with the point), that the opening words must control the sub-proviso notwithstanding the semi-colon separating that sub-clause. This conclusion is re-enforced by the "option" language of the shut-in clause which also speaks to the circumstances under which a well is deemed to be a producing well for the purposes of continuing the lease. Justice Mason did not need to rely on that clause as an aid in interpreting the third proviso and did not do so. In his view the third proviso was simply not engaged; the shut-in wells clause governed and had not been complied with.[90]

These findings were actually sufficient to dispose of Durish's claims but Justice Mason went on to deal with the other arguments of the defendants. Even if Durish's lease were invalid, he still had to establish that he was entitled to the fruits of the well. Justice Mason decided that he could not do so.

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88 *Re McLean Oil Properties Ltd. et al. and Kissinger Petroleums et al.* (1984), 13 D.L.R. (4th) 542 (Alta. C.A.).

89 There is, I think, another argument that might have been available to Durish. This is the claim that once you have drilled a well there is nothing in the habendum or the provisos that requires you to do anything more before the end of the primary term in order to keep the lease in force. In particular, the lessee is not required to make a shut-in payment to maintain the lease in force. The argument must turn on the specific language of the lease but in this case one can make the following points: (1) the habendum provides for a ten year primary term subject to sooner termination under the three provisos; (2) the first proviso requires drilling or payment (for present purposes assume drilling); (3) the second proviso deals with the abandonment of a well drilled during the primary term (not this case, the well was capable of production and subsequently proved it); and (4) the third proviso deals with the situation at the end of the term (not this case). *Ergo* the lease was not subject to sooner termination. Durish had done all that was necessary to keep this lease in force, *all on the assumption that he could rely on the Lobell well*. In the present case the argument is weakened somewhat by the language of the shut-in wells clause since that clause purports to apply both during and after the primary term.

90 *Durish*, *supra* note 85 at para. 53.

2.4 Three Cases on Abuse of Relationship

In this section I shall examine three cases. Two deal with the use of information gained during pre-acquisition discussions, negotiations or title examinations. We have already discussed one of the cases, the *Taylor* decision and the other is the *Cinabar Resources* case. The abuse of corporate opportunity discussion in *Durish* completes the trilogy.

2.4.1 Taylor

In *Taylor*, Tarragon argued that by acquiring a top-lease to the property and then seeking to lapse the top-lease on perpetuities grounds, Maxx had breached a duty of confidentiality and a fiduciary duty that it owed to Tarragon. To understand the argument we need a few more facts than those presented above in the context of the perpetuities issue.

In 1993 Maxx expressed an interest in acquiring the Taylor lands. Accordingly, Tarragon prepared a farmout agreement and Maxx's lawyer attended at Tarragon's office to review the documentation. A month later, and after Maxx had top-leased the lands, Maxx advised Tarragon that it would not be proceeding with the farmout because of a perpetuities problem with Tarragon's title.[91] At all relevant times the form of the Freeholders lease was on file with the Corporations Branch of Saskatchewan Justice, and the Freeholders caveat "largely" set out clauses 1 and 2 of the Freeholders lease.[92]

Under these circumstances Justice Gerein concluded that Maxx's conduct fulfilled the three elements required for establishing a breach of confidence as laid down by Justices Sopinka and La Forest in *Lac Minerals* v. *International Corona Resources Ltd.*[93] Thus, Justice Gerein held that: (1) the information conveyed was confidential; (2) the information was communicated in confidence in the course of joint venture or farmout negotiations; and (3) the information was given to Maxx to allow it complete its due diligence title investigations, and it was misused by Maxx for its own account.

Justice Gerein invited further argument on an appropriate remedy observing that the usual remedy would be to restore the injured party either through a constructive trust or an accounting. Justice Gerein also noted that he expected to receive further argument as to

91 *Ibid.* at paras. 14-17.
92 *Taylor*, *supra* note 39 at para. 63.
93 [1989] 2 S.C.R. 574 at 608 *per* Sopinka J. and at 636 *per* La Forest J.

the scope of the constructive trust. Should it be confined to the interest that Tarragon would have had if the farmout had proceeded (presumably a 50% interest plus a well or some similar arrangement), or should it be the entire lease?

Although Justice Gerein speaks somewhat loosely at times of a breach of trust[94] it seems apparent that he did not deal with Tarragon's second argument of a breach of a fiduciary duty. This is a little unfortunate since while Maxx no doubt acted in an underhand way, it seems hard to square the conclusion of breach of a duty of confidence with the public knowledge of the document. However, if one could establish a fiduciary duty the acquisition of a competing title is surely a breach of the fiduciary's undivided duty of loyalty. There might be public knowledge of the contents of the agreement, but, as a fiduciary, Maxx might be the one person in the world who could not take advantage of Tarragon's vulnerability. Could Maxx be a fiduciary in light of the majority decision in *Lac* v. *Corona*? Clearly one would need more facts but in this case negotiations were at a more advanced stage than those in *Lac* and Maxx obtained the documentation purely for the purposes of checking title. That said, given the way the case is argued, one assumes that there was no express confidentiality agreement binding the parties and it is clear that Justice Sopinka considered that to be an important issue in deciding for the majority in *Lac*. In that decision it will be recalled that Justice Sopinka for the majority held that there could be no fiduciary relationship between the parties since Corona was not vulnerable. Corona could have protected itself by negotiating a confidentiality agreement.[95]

2.4.2 Cinabar

The second case is *Cinabar Enterprise Ltd.* v. *Richland Petroleum Corp.*[96] Cinabar was peddling some properties including leases on sections 15 and 21. The leases were for 10 year primary terms and continued thereafter by production or deemed production. A well would be a deemed producer if non-production was "a result of a lack of or an intermittent or uneconomical or unprofitable market or any cause whatsoever beyond the Lessee's reasonable control." A publicly available plat for the area showed two wells on section 21: one labelled "abandoned gas well" and the other labelled "dry and abandoned". There was a gas well on section 15 and this was labelled "gas well". In fact, the section 15 well had long-since been shut-in and suspended and the formerly producing well on section 21 was a poor producer that had ultimately been abandoned

94 *Taylor*, *supra* note 39 at para. 66.
95 *Lac*, *supra* note 93 at 607 *per* Sopinka J.
96 [1998] A.J. 891.

because of a casing leak that discharged gas from the surface casing vent.[97]

Richland entered into negotiations for the purchase of the Cinabar properties and in the course of doing so had the opportunity to review the Cinabar files. The negotiations were unsuccessful. Sometime later, Richland top-leased the properties and gained a good title when Cinabar's caveats were discharged by the registrar. Cinabar had failed to take action to maintain the caveat after having been served with a notice to do so. Cinabar then alleged that Richland had used confidential information to acquire the properties and that it therefore held them on trust for Cinabar. Justice Romaine held that the information imparted to Richland by Cinabar did not have the necessary quality of confidentiality. Information as to the status of the wells was available from both the conservation board and vendors such as the supplier of the plat. Furthermore, there was little indication that Cinabar viewed any information that may have been imparted to Richland, either as to the status of the wells or as to its own plans, as confidential in nature.

Thus, in *Taylor* a public source of information was sufficient to deprive the information of the quality of confidentiality while in *Cinabar* it was not. The cases may be irreconcilable but the difference may be that in *Cinabar* there was evidence that Richland had the publicly available information before attending the show and tell, while Justice Gerein's judgement in *Taylor* tells us nothing of the Maxx's prior knowledge as to the contents of the documents on title except to state that Maxx had made unsuccessful attempts to obtain copies of the Freeholders lease.[98]

2.4.3 Durish

As stated above, Durish assigned his farmout agreement with White to Lobell. Only after the transfer did Durish become aware of the title problems and set acquire the Pawnee/Haida lease and the Vold reversionary interest.[99] The evidence showed that Durish acquired the interests to protect Lobell's investment but that Durish never offered Lobell the opportunity to acquire the lease. The evidence also showed that there was limited if any disclosure of Durish's actions to his fellow directors of Lobell and, to the extent that there was disclosure to other directors, "their understanding was that all was done to protect Lobell and guarantee Lobell's title to the working interest. They never

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97 The court did not have to decide whether a well abandoned for environmental reasons rather than for its inability to produce could still be deemed to be a producing well upon tender of appropriate shut-in payments.

98 *Taylor*, *supra* note 39 at para. 64.

99 *Durish*, *supra* note 85 at para. 131.

consented to Durish using his interest in a way that would be adverse to Lobell."[100]

Those facts were sufficient to establish liability. As a director of Lobell, Durish owed Lobell the utmost duty of loyalty. By taking a corporate opportunity that rightly belonged to Lobell, Durish breached that duty. It did not matter that at the time Lobell suffered no loss, Durish had a duty "to urge the corporation to purchase the lease when he learned that the Haida lease could have had an adverse impact on Lobell's interest."[101] Even if mere acquisition were not a breach, by prosecuting his claim against his claim against WRM, Lobell's successor in title, Durish was certainly in breach.

There appear to be two methods of reaching this last part of the conclusion. The first is to say that WRM must be the successor in interest to whatever claim Lobell might have had against Durish. Justice Mason seems to have used this argument for two purposes. First, he used the argument to decide that WRM had standing to raise the issue. WRM was not a mere busybody, it had a contractual interest in the matter. Under the terms of its agreement with Lobell it purchased Lobell's "Right, title, estate and interest of any nature and kind" in the property. By that agreement:[102]

> Lobell assigned to WRM the working interest rights it owned under the Vold lease . . . It also assigned its beneficial interest to WRM which had to be claimed by way of legal action. The right of action to realize the beneficial title was therefore incidental to the rights to the working interest which was being transferred.

The point seems to be that even though the Pawnee/Haida lease was not included in the Lobell-WRM conveyance, any claim that Lobell might make to trump the priority of the Pawnee/Haida lease must also have passed to WRM.

Second, Justice Mason also used the argument to shore-up WRM's entitlement to benefit from the constructive trust that Justice Mason imposed. If Durish got to keep the proceeds of production by virtue of the Pawnee/Haida lease, he would be unjustly enriched:[103]

> Correspondingly, Lobell and subsequently WRM as Lobell's lawful assignee, has been deprived of the profits of the stolen opportunity by reason of Durish's breach of his fiduciary duty as Lobell's director. WRM has a legitimate need for seeking the remedy of constructive trust, because although Durish has legal title to the proceeds of the well, WRM is the beneficial and

100 *Ibid.* at 116.
101 *Ibid.* at 133.
102 *Ibid.* at para. 106.
103 *Ibid.* at para. 138.

rightful owner of the proceeds.

The second method of argumentation reaches the same conclusion a little more indirectly.

> By asserting the claim against WRM, which is an assignee of Lobell, Durish has placed Lobell in a situation of potential liability for breach of contract, which is obviously not in its best interests. This is clearly a breach of his fiduciary duty to the corporation.[104]

The point seems to be that notwithstanding the fact that the agreement pursuant to which Lobell agreed to convey title did not contain a warranty as to title, Lobell might still be in breach of some of its representations in the event that Durish's claim based upon the Pawnee/Haida lease were to succeed.[105]

In the result therefore Justice Mason found that Durish was a constructive trustee of any profits accruing under the Pawnee/Haida lease. Lobell was the original beneficiary of this trust but its beneficial interest had been transferred to WRM and WRM was therefore entitled to the profits.[106]

2.5 Oil and Gas Conveyancing Practice

2.5.1 Durish and Estoppel by Representation

On the assumption that the Haida/Pawnee lease was valid, and on the further assumption that for some reason Durish was not a constructive trustee of the profits for Lobell and WRM, Justice Mason went on to hold that in any event Durish was estopped from asserting the priority of the Pawnee/Durish title against WRM by reason of certain representation made by Durish, in his personal capacity, at the time of closing the sale of

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104 *Ibid.* at para. 136.

105 The representations are reproduced at *ibid.* para. 153 and included a representation that, to the best of the Vendor's knowledge, information and belief there are no charges, claims or actions in existence, contemplated or threatened against or with respect to the said Properties or the interest of the Vendor therein.

106 The subject matter of the trust seems to be the profits and not the lease itself. It is not clear why this is so unless it is simply that the lease had expired (see the companion case *White Resource Management Ltd.* v. *Durish* (1988), 63 Alta. L.R. (2d) 265 C.A.)) or because there was a concern for other contingent liabilities, clean-up for example. It is hard to see how WRM could avoid these anyway but surely it would be inequitable to allow WRM to cherry pick. It would need to take the accompanying burdens. See *LAC* v. *Corona*, *supra* note 93 and especially the judgements at trial (1986), 53 O.R. (2d) 737 and in the court of appeal (1987), 44 D.L.R. (4th) 492 dealing with Corona's obligation to compensate LAC for improvements to the Williams property.

the working interest from Lobell to WRM.

What were those representations? As noted above, there was no warranty as to title in the WRM/Lobell working interest sale agreement, but under clause 7 Lobell was required to represent, to the best of the knowledge, information and belief of the Vendor, that:[107] (1) there were no royalties or other encumbrances other than those disclosed; (2) it is the holder of at least the identified working interest and that the properties will be free of encumbrances except through instruments by which the Vendor derives title; (3) there are no charges, claims or actions in existence, contemplated or threatened; and (4) there are no outstanding rights of first refusal. In addition, by letter setting up the closing meeting, Durish's solicitor represented that discharges for three caveats had been prepared and in the event that one was not registered by closing there was an undertaking to discharge the caveat forthwith.[108] Durish's interest in the Haida lease was disclosed on title by caveat but counsel for WRM testified that he did not consider the caveat further since he assumed that it could not be material in light of the discontinuance of the action that Haida had commenced in response to a notice to take proceedings on a caveat that had been initiated some time previously by White.

Although the agreement pertaining to the sale of the working interest was the only agreement to close, there was a second agreement pursuant to which Durish agreed to sell his interest in the freehold estate. This agreement did not close but the original intent was that both agreements would close at the same time.[109]

In the course of closing the sale of the Lobell working interest, counsel for WRM insisted that Durish execute a certificate. In that document "I . . . Durish, the President of [Lobell]" certified *inter alia* that:

> 4. To the best of my knowledge, information and belief the Vendor has full right, title and beneficial interest in and to the said Properties . . . and I am unaware of any adverse claims or interests therein or relating thereto.[110]

On the basis of these and other facts, Justice Mason concluded that Durish was estopped from claiming title.

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107 *Durish*, *supra* note 85 at para. 153.
108 *Ibid.* at para. 160.
109 *Ibid.* at para.160.
110 *Ibid.* at para. 164.

Several issues proved to be contentious but were largely resolved on the basis of findings of fact adverse to Durish. First, Durish contended that WRM either knew that he had an interest in the Pawnee/Haida lease or should have known since WRM had conducted a title review and knew of the caveats protecting the Pawnee/Haida lease. The court held that WRM had no knowledge of Durish's interest and while WRM's lawyer "may not have been completely thorough"[111] by failing to look behind the caveats since he assumed that the underlying interests had been dissolved by the discontinuance of action, it was not unreasonable for him to have failed to do so. These findings were important because they were an effective response to Durish's claim that there could not be a misrepresentation if WRM knew the true facts.[112]

Second, Durish claimed that at the relevant time, the time of closing, the representations were true. Durish fully intended to discharge the Haida/Pawnee caveats and it was only after the twin agreement dealing with the freehold mineral title went sour that Durish changed his mind. That argument did not sit well with the court. In Justice Mason's view, at some time during the closing meeting (if not before), it became apparent that both deals would not close simultaneously as had originally been contemplated. Consequently, Durish should have qualified his statements accordingly.

Third, Durish argued that he executed the certificate on behalf of Lobell and not in his personal capacity. On that argument Justice Mason ruled that the drafting was clear and other evidence tended to establish that he had been asked to sign in his personal capacity.

In sum, all the elements of an estoppel were present:[113]

> In the certificate Durish clearly stated that within his own personal knowledge, that he was not aware of any adverse interests on title. WRM acted on that representation by proceeding to close the deal with Lobell and, subsequently, it continued to drill on the lands. Having made that representation, Durish must now abide by the consequences which is that he is now estopped from asserting a claim which contradicts the representation made in the certificate. It is equitable to apply the doctrine of estoppel to prevent him from befitting from his inequitable behaviour.

The case offers several lessons. First, it shows the risks associated with simply assuming that a caveat protects such and such an interest and that the interest has somehow expired

111 *Ibid.* at para. 185.

112 See *Conmac Western Industries etc.* v. *Robinson*, [1993] 6 W.W.R. 375 (Q.B.) discussed *ibid.* at para. 168.

113 *Ibid.* at para. 195.

or is no longer relevant. The cases establishes that the only prudent course of action is to have the vendor discharge the caveat before closing.[114] Having failed to ascertain precisely what the caveat was protecting, WRM's lawyer was fortunate that his client suffered no loss in the final analysis. Second, the case is a nice illustration of the value of obtaining representations from both the corporate entity and the individuals if there is any risk of a dual interest in the property. Had Durish executed the representation simply on behalf of Lobell this argument would have been lost.

2.5.2 Trust Conditions

The issues in *Sarg*[115] (the facts of which are dealt with in more detail below) included the potential liability of the two solicitors who were involved in the Sarg-Sundial transaction. On the assumption that the ERCB could recover its abandonment costs from Sarg, could Sarg recover from Naimish (Sarg's solicitor on the sale to Sundial) on the basis of alleged negligence or from Dent, Sundial's solicitor on the basis of a breach of trust conditions?

The relevant facts for these issues were as follows. On April 29, pursuant to the sale agreement, Naimish wrote to Dent enclosing a series of documents including transfers of well licences. These documents were forwarded for execution by Sundial and were forwarded in trust on the condition that no use be made of the documents until after Dent returned to Naimish executed copies of the documents along with the balance of the purchase price. It was understood that once executed Dent would submit the transfers to the ERCB for its approval. Dent responded May 11 with some of the executed documents and the balance of the monies. The executed documents cannot have included the well licence transfers. Dent reminded his client of the need to forward copies of the filed transfers and on May 27 Naimish confirmed that he was disbursing the purchase monies to Sarg and reminding Dent of the need to get filed copies of the documents.

Counsel for Sarg alleged that Dent had breached the trust conditions because he had made use of the documentation before providing Sarg with filed copies of the transfers. Dent argued that Sarg's claim to copies of filed documents was a post-closing, post-trust matter.[116]

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114 An alternative might be to take an assignment of the caveat as permitted by s. 135.1 of the *Land Titles Act*, R.S.A. 1980, c. L-5.

115 *ERCB* v. *Sarg Oils Ltd. et al.*, [1998] A.J. 1039 (Q.B.).

116 *Ibid.* at paras. 214-215.

Justice Lutz agreed with Dent:

> The interpretation suggested by counsel for Sarg is not reasonable because it would have been unreasonable for Naimish to have attempted to impose on Mr. Dent an obligation to obtain consent to the ERCB to the transfer. A lawyer cannot guarantee the future consent of a third party and Naimish would have known this.[117]

Furthermore, given the ERCB's practice as known to the parties at the time, there was no reason for the lawyers to have imposed such a trust condition. The trust conditions were imposed to prevent Sundial from taking title without paying, and not for the broader purpose now asserted by Sarg.

2.5.3 The Negligence Issue

The evidence showed that Naimish proceeded in accordance with normal conveyancing practice at the time.[118]

> It was the normal practice in the industry to deal with the licence transfers in due course. Refusals by the ERCB for well licence transfers were practically unheard of in cases where the paperwork was in order and the fees had been paid; therefore, there was little perceived risk in proceeding by normal practice.[119]

The agreement contained an indemnity clause designed to protect Sarg from liability for future clean-up expenses.

The court concluded that in order to escape liability a professional must show not only that he or she followed general practice in the industry but also that the general practice reflects reasonable and diligent conduct.[120] In answering that second element Justice Lutz applied the three-fold test articulated by the Privy Council in *Edward Wong Finance Co. Ltd.* v. *Johnson Stokes*[121]: (1) does the practice involve a foreseeable risk in the particular case?; (2) if yes, could the risk be avoided?; and (3) was it negligent to fail to take avoiding action?

In the instant case it was clear that there was a foreseeable risk, although the parties

117 *Ibid.* at para. 218.
118 *Ibid.* at para. 207.
119 *Ibid.* at para. 206.
120 *Ibid.* at para. 209 and referring to *Roberge* v. *Bolduc* (1991), 78 D.L.R. (4th) 666 (S.C.C.).
121 [1984] 1 A.C. 296 (P.C.).

undoubtedly assessed the risk as small. But the crux was that there was no way for Naimish to avoid the risk.

> The ERCB has no mechanism for pre-approving an applicant for a well licence transfer. The *Oil and Gas Commission Act* requires that an applicant for a well licence transfer be the owner of the wells in question. Consequently, the sale of the wells from Sarg to Sundial had to be completed before the licence transfer process was undertaken. Naimish proceeded in the best way possible under the circumstances and his conduct certainly did not fall below the standard of care a solicitor owes to his client. The Sarg to Sundial well sale turned out badly for Sarg; however, it is not for a solicitor to make good his client's bad business deals.[122]

The Board's practice has changed somewhat since the events described by Justice Lutz. In particular, the Board now screens both the transferor and a transferee of a well licence to determine if both parties will meet the "well-screening ratio".[123] Under the well screening ratio the Board examines the ratio of active versus inactive wells. If the ratio of active to inactive wells for the transferor or transferee is less than one, the Board will proceed to a more detailed review. The standards are described in the Board's information letters and interim directives and they can be self-applied. As a result it is perfectly reasonable for the vendor and purchaser each to represent that they have reviewed the Board's rules and applied the well screening ratio and that they believe themselves to be in compliance. This of course could not be a representation that the Board will approve the transfer, but it does provide additional certainty and protection to the parties. Other possible mechanisms include the use of an escrow agent to hold the title documents pending approval of the licence transfers and the execution of re-transfer documents but both of these mechanisms are complex and create difficult accounting problems for production that occurs in the interim if the deal fails.

3.0 Litigation Against the Crown or the Regulator

3.1 Introduction

Historically, the bulk of oil and gas litigation in Canada has been concerned with private rights: disputes as to lease termination; the relationship between the operator and the

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122 *Sarg*, *supra* note 115 at para. 213.

123 ERCB, ID 93-2, Requirements for the Issuance of a Well Licence or Approval of Well Licence Transfers, 2 July 1993.

joint operator; the construction of contractual terms; and, the characterization of royalty interests. There has been some third party litigation against the Crown (and we shall refer to more of that below) but relatively little litigation by lessees against the Crown, notwithstanding its dominant position. The reasons for this are speculative on my part but I offer the following:

- The Crown occupies a dominant position in the market for resource rights in Canada.

- The Crown's powers under its lease terms and in the relevant statutes are often highly discretionary and framed in subjective language.

- Administrative law remedies that may be available against the Crown often seem impotent since the Crown usually gets to correct its errors by remaking the decision in a procedurally proper manner.

- In a province in which the oil and gas industry is the only or a dominant industry the Crown may well be captured and as a result can be trusted to exercise its discretionary powers in a manner that respects the short and long term interests of the industry.

In general, the limited case law that does exist by and large confirms these somewhat speculative observations. Consider for example the 1977 case of *R.* v. *Industrial Coal and Minerals*[124] or the significant discovery litigation on the east coast between 1990 and 1994.[125]

There are of course exceptions but the exceptions often arise from disposition legislation that departs from the norm and does not confer broad discretionary powers on a Minister of the Crown. Justice Barry's decision in *Petro Canada* v. *Canada-Newfoundland Offshore Petroleum Board*[126] is a case in point. With the adoption of the *Canada Petroleum Resources Act*[127] in 1986 the industry was determined to do all that it could to limit the Minister's discretionary powers. Discretionary powers that were tolerable in Alberta by

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124 [1979] 5 W.W.R. 102 (Alta. C.A.), aff'g [1977] 4 W.W.R. 35; *Alberta Energy Co.* v. *Canada*, [1997] F.C.J. 1582 hearing an appeal from the Tax Court of Canada (1994, Can.Tax Ct. LEXIS 104).

125 *Mobil Oil Canada Ltd.* v. *Canada (Minister of Energy, Mines and Resources)* (1990), 74 Alta. L.R. (2d) 97, 35 F.T.R. 50 (T.D.); *Mobil Oil Canada Ltd.* v. *Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1.

126 (1995), 127 D.L.R. (4th) 483 (Nfld. T.D.).

127 S.C. 1986, c. 45, now R.S.C. 1985 (2nd Supp.), c. 36.

dint of a captured government were intolerable in the context of newer petroleum producing jurisdictions and in the context of a government that had delivered the National Energy Program. In response to political pressure, considerable care was taken to limit the Crown's discretionary powers in the *Canada Petroleum Resources Act*. Thus the *Canada Petroleum Resources Act* and the subsequent Accord legislation provides a review mechanism that requires written decisions supported by reasons at all the key decision-making points in the evaluation and development of a petroleum prospect.

3.2 Sarg Oils: Recovery of Abandonment Costs[128]

The facts, somewhat simplified, were as follows. Sarg had acquired certain Crown leases on which were located a number of non-producing or poorly producing wells. Sarg decided to sell these properties and entered into an agreement with Sundial. Title was conveyed and Sarg also executed well licence transfers that the transferee undertook to submit to the ERCB for its approval.[129] Sundial subsequently sold the lands to Petenco and 3D who scavenged the sites and disposed of salvageable material. The Crown leases expired and the Board directed Sarg to abandon the wells located on the cancelled leases. Sarg was still the licensee of record since the Board, after sitting on the well licence transfers for a period of time, had declined to approve them. The Board ultimately procured an Order in Council ratifying a Board order requiring Sarg to abandon the wells.[130] Upon Sarg's failure to do so the Board abandoned them itself and submitted the bill to Sarg. In doing so, the Board relied on section 93 of the *Oil and Gas Commission Act* which creates a deemed statutory indebtedness where the Board carries out an operation upon the failure of a party to abandon a well in accordance with a Board order. The Board sued Sarg on the statutory debt and failed at trial before Justice Lutz.

Much of Justice Lutz's judgement is concerned with the question of collateral attack.[131]

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128 *Sarg*, *supra* note 115. For collateral proceedings dealing with Sarg's obligations under the *Environmental Protection and Enhancement Act,* S.A. 1992, c. E-13.3 see *Sarg Oils Ltd.* v. *Alberta (Environmental Appeal Board)* (1996), 185 A.R. 118, 36 Admin. L.R. (2d) 134 (Q.B.). This case involved a successful judicial review application to quash a "decision" of the Environmental Appeal Board confirming an environmental protection order for the reclamation of certain well sites. The Environmental Appeal Board's rehearing of that matter *Sarg Oils Ltd.* v. *Alberta (Department of Environmental Protection)* is available at [1996] A.E.A.B.D. 15 (QL).]

129 See s. 18 of the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5 prior to amendment by S.A. 1994, c. 26.

130 See ss. 7 and 8 of the *Oil and Gas Conservation Act*. The Board's power to order abandonment is clarified by S.A. 1994, c. 26 adding s. 20.2.

131 *Sarg*, *supra* note 115 at paras. 111-146.

Should Sarg be able to question the validity of the abandonment orders in a civil debt action when Sarg had failed to pursue its full range of internal and judicial remedies including an application for a hearing and the statutory appeal provided under the *Energy Resources Conservation Act*?[132] My own view is that Justice Lutz misapplies the *Maybrun* decision of the Supreme Court of Canada[133] and that as a result the decision is open to attack. Here I propose to concentrate on the grounds on which Justice Lutz denied relief to the Board, assuming that this was a case in which Justice Lutz should have exercised his discretion to consider the merits of Sarg's objections to its indebtedness.

I think that Justice Lutz offers two separate grounds for denying recovery. The grounds are doctrinally distinct but conceptually linked. The first ground is the jurisdictional principle of administrative law and the linked ideas of procedural fairness and legitimate expectations. The second ground, estoppel, is more commonly associated with private actions.

Justice Lutz held that the Board committed certain *procedural* errors in its treatment of the application to transfer the well licence to Sundial. These errors constituted breaches of both the common law rules of procedural fairness and the Board's statutory obligations under section 29 of the *Energy Resources Conservation Act*[134] and under sections 3 and 4 of the *Administrative Procedures Act*.[135] The Board's procedural errors lay in its failure to provide Sarg with notice of the adverse decision that it was about to make. As a result, Sarg was also deprived of the opportunity to make submissions with respect to that decision. These omissions were particularly critical because there was evidence to the effect that the Board was going through a change in its policies for the treatment of well licence transfer applications which it had not yet communicated to the industry.[136] Absent communication as to this change of policy in the usual form of a Board Information Letter or Interim Directive, Sarg was entitled to assume (or had a reasonable or legitimate expectation[137]) that its transfer application would be approved by the Board in the ordinary course of its business.

But allowing for the accuracy of this analysis how should this prevent the Board from

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132 R.S.A. 1980, c. E-11, ss. 42-44.

133 See *R.* v. *Consolidated Maybrun Mines Ltd.* (1998), 158 D.L.R. (4th) 193 (S.C.C.); *R.* v. *Al Klippert Ltd.* (1998), 158 D.L.R. (4th) 219 (S.C.C.).

134 *Supra* note 132.

135 R.S.A. 1980, c. A-2.

136 *Sarg*, *supra* note 115 at para. 157.

137 *Ibid.* at para. 169.

suing on the statutory debt? What is the connection between the licence transfer matter and the statutory indebtedness? On this crucial point Justice Lutz relies on assertion and rhetoric rather than reasoning:[138]

> The procedure followed by the ERCB involved unnecessary delay, it involved hidden policies and it involved adverse decisions being made unbeknownst to the affected party. In a word the procedure was unfair. It was unfair according to the statutory standard of procedural fairness and according to the common law construction of procedural fairness. Consequently, the ERCB should not be permitted to enforce the statutory debt that arose as a result of the unfair procedures. The ERCB's claim must therefore be dismissed.

What is missing here is some reasoning directed at establishing that Sarg is no longer the licensee of record and therefore cannot be compelled to abandon the well. The real problem for Sarg is that the usual result of a jurisdictional error (voidness of the decision) does not put Sarg in the position it wants to be in. After all, Sarg wants rid of the licence. It needs a remedy that will divest it of the continuing responsibilities of a licensee. There may be several routes to this conclusion. One route is undoubtedly estoppel and we shall deal with that momentarily.

A second route might be based upon the presumed availability of mandamus. The argument must be that the Board can be compelled to approve a transfer application provided that the application is in proper form and meets all the requirements that the Board has historically imposed on applicants. This way of putting the case draws most directly on Justice Strayer's decision in the *Aurchem*[139] case cited and relied upon by Justice Lutz in the context of his estoppel discussion. The analogy is not precise however because Sarg is raising the issue collaterally. It is also noteworthy, I think, that while Justice Strayer granted the certiorari application in *Aurchem* he declined to grant

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138 *Ibid.* at para. 175.

139 *Aurchem Exploration Ltd.* v. *Whitehorse Mining Recorder* (1992), 7 Admin. L.R. (2d) 168 (F.C.T.D.). The plaintiff was endeavouring to acquire open ground between existing recorded claims. Following standard practice in Yukon at the time in order to stake land without inadvertently leaving open ground, he located his two post claims on land that was already staked and made an application to record claims of standard size rather than staking and recording fractional claims. The mining recorder following an inspection on the ground but without giving the applicant an opportunity to make submissions, rejected the application. Justice Strayer granted certiorari:

> . . . I do not believe that the procedure followed meets the common law requirements of fairness. Substantial interests of the applicants for the recording of claims are at stake in such a process. There is no ready means for seeking review of the refusal to record once that decision is taken. Therefore it was incumbent upon the . . . Recorder here to give the applicant Aurchem or its representative an opportunity to know what concerns were raised by the inspection report and to respond to those concerns if possible.

mandamus.[140] The collateral nature of the attack also tends to divert attention away from the elements of mandamus that Sarg would have had to have established had it been the plaintiff. The usual statement of the elements that a plaintiff must prove for mandamus is that of the Ontario Court of Appeal in *Karavos* v. *Toronto*.[141] In summary an applicant must show: (1) a clear legal right; (2) the duty must be actually owed at the time of the application; (3) the duty must be purely ministerial in nature; and (4) there must be a demand and a refusal. It is not clear that Sarg could meet these tests, but the court never considered the question since it effectively grants mandamus by the back-door.[142]

A third route is perhaps based on the idea that a procedural error will render void not only the particular decision (not really the issue here because, as noted above, Sarg needed more) but all subsequent steps in the chain. This alternative way of putting the argument is also not without its difficulties. What are the elements of the chain? What subsequent decisions are so linked to the earlier decision that they are tainted by it? Can an earlier error ever be cured in the manner that a decision-maker is usually able to cure procedural errors? Does it matter that Sarg did not launch a direct attack on any of the subsequent decisions in the chain?

Justice Lutz does not deal with any of these difficulties. He simply contents himself with the flat statement that the Board cannot recover because of the unfair procedure. In my view this is too simplistic an analysis especially when combined with Sarg's reliance on a collateral attack rather than a direct attack. At one level there is an obvious nexus between the transfer application and the subsequent indebtedness (certainly at the "but for" level of causation) but as a policy matter this way of analysing the problem makes it much too easy for Sarg to escape its liability.

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140 *Ibid.* at para. 14.

141 *Karavos* v. *Toronto*, [1948] 3 D.L.R. 294; recently cited with approval in *St. John's (City)* v. *Canada-Newfoundland Offshore Petroleum Board*, [1998] N.J. 233 a case not without interest here since it involves an attempt by the City to enforce a term of the benefits plan approved by the Board for an oil and gas development project.

142 Perhaps another way to think of the case is that Sarg has actually recovered damages for the negligent exercise of a statutory authority, again by the back door. If Sarg would have faced difficulties in succeeding on a mandamus application, it would have faced at least as difficult a task making a counterclaim based upon either negligence or misfeasance. See for example: *Rowling* v. *Takaro Properties Ltd.*, [1988] A.C. 473 (P.C.), *Wellbridge Holdings Ltd.* v. *The Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957; *Dunlop* v. *Woollhara Municipal Council*, [1982] A.C. 159 (P.C.); *X (Minors)* v. *Bedfordshire CC*, [1995] A.C. 633 (H.L.), *Comeau's Sea Foods Ltd.* v. *Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 and see especially the judgements in the court of appeal at 123 D.L.R. (4th) 193 (F.C.A.); *Dorman Timber Ltd.* v. *British Columbia* (1997), 152 D.L.R. (4th) 271 (B.C.C.A.).

Justice Lutz dealt with the estoppel argument as an alternative.[143] Thus the two grounds are kept distinct but at the same time there is a clear connection between procedural fairness arguments based upon legitimate expectations and arguments based on estoppel.[144] The analysis is interesting but once again there is something missing between the presentation of the argument and the conclusions that Justice Lutz seeks to draw, and, by omitting some of the links in the chain of reasoning, Justice Lutz is able to avoid some of the key difficulties with the estoppel analysis.

The gap in the analysis is, I think, revealed in the following quotations from Justice Lutz's judgement in which he is summarizing Sarg's argument as well as stating his own conclusions.

> . . . counsel for Sarg argues that the ERCB should be estopped from applying the more stringent criteria to the Sarg to Sundial transfer application.
>
> Finally, counsel for Sarg argues that if the claim for estoppel is successful, the statutory debt ought not to be enforced because it was a direct result of the failure of the licence transfers to get approval because of the stricter criteria applied to the application.[145]
>
> In the absence of notification to the contrary, Sarg should be entitled to rely on the long-standing conduct of the ERCB. This is not an instance where the law of the land is being overruled – only the application of the law by the Board is being overruled.[146]

But what precisely was the substance of the estoppel?[147] In my view the estoppel claim needs to go so far as the claim that the Board is estopped from denying that the licence transfer application had been approved. How else can estoppel help Sarg avoid liability?[148]

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143 This is made clear in *Sarg*, *supra* note 115 at para. 176. Note that in *Imperial Oil*, discussed *infra*, s. 3.3.1.1, there were arguments as to estoppel and acquiescence put to the court that the court found it unnecessary to deal with (at para. 38).

144 See for example *Sarg*, *supra* note 115 at para. 178. We can also see these links in Lutz's treatment of the elements of the two different grounds of attack. For example, while discussing the procedural fairness issue at paras. 156 *et seq.* Justice Lutz was at pains to establish the nature of the damage suffered by Sarg. He does this to establish the nature of Sarg's interest in the matter and the seriousness of the issue for Sarg. These facts equally establish detriment for the purposes of the estoppel.

145 *Ibid.* at paras. 178 and 179.

146 *Ibid.* at para. 189.

147 As to the importance of being precise as to scope of the estoppel claim see *Voyager Petroleums Ltd.* v. *Vanguard Petroleums Ltd.*, [1983] 5 W.W.R. 622 (Alta. C.A.), aff'g [1982] 2 W.W.R. 36 where the court held that the lessor was estopped from denying that it had executed a unitization agreement in its dual capacities as both the lessor and as a majority points holder under a royalty trust agreement.

148 Equally effective might be an estoppel aimed at estopping the Board from denying that the

If the estoppel is put on those grounds it brings into focus the real difficulty with estoppel arguments in a statutory context. This difficulty is usually stated in the form that "estoppel cannot override the law of the land."[149]

Now Justice Lutz had already acknowledged that the Board had a broad discretion with respect to licence transfer applications[150] but he does not draw attention to the prescriptive language of section 18 of the *Oil and Gas Commission Act* to the effect that "A license shall not be transferred without the consent in writing of the Board."[151] By failing to be precise as to the substance of the estoppel and the effect of the estoppel Justice Lutz made it easier to reach the conclusion that his decision has not overridden the law of the land. But if the estoppel argument is to have any bite here the effect of the judgement must be that the licence has been transferred notwithstanding the fact that the Board never consented to the transfer.

Not only does Justice Lutz avoiding dealing directly with the effect of the estoppel he also fails to discuss the elements of estoppel. Traditionally, not only must there be a representation but there must also be reliance.[152] In a private law context this will be a question of fact but in a public law context there may also be a question of public policy. In the present context that might be put in these terms: should Sarg be able to rely on the ERCB's past practice? Should it not have dealt with the issue of licence transfers more cautiously in its private law dealings with Sundial its purchaser? Should we make it easy to transfer the risk to the regulator? In my view to pose this question is to answer it on the specific facts of this case. There was evidence as to conveyancing practice. Sarg seems to have acted appropriately. Drafting cannot anticipate all possibilities and all possible changes in policy. Had the Board communicated its change of policy one could reasonably expect the drafting to evolve to cope with the new procedures. Thus my point here is that there were relevant questions that Justice Lutz should have asked. He failed to do so, but on this specific point that is not of great moment.

Are there any practical differences between the estoppel analysis and the administrative

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abandonment order was actually directed at the transferee, Sundial. There's only one problem with that claim here: it doesn't fit the facts at all!

149 *St. Ann's Fishing Club* v. *The King*, [1950] S.C.R. 211; *Joliffe* v. *R.*, [1986] 1 F.C. 511 at 524, a judgement of Justice Strayer.

150 *Sarg*, *supra* note 115 at para. 153. This in itself is surely an admission that Justice Lutz would not have granted mandamus.

151 *Oil and Gas Conservation Act*, *supra* note 129.

152 There is some limited discussion of this element in *Sarg*, *supra* note 115 at para. 184.

law analysis?

The *Oil and Gas Commission Act* has been amended since the facts arose upon which this litigation was based.[153] Specifically we should take note of the following points. First, the basic licensing section (s. 18) has been amended to confirm and amplify the Board's discretionary powers to approve or refuse to approve licence transfers (s. 18(1.1)). The section has also been amended to state that no transfer is effective until approved (s. 18(6)). This may make it more difficult for a party to claim to take advantage of the estoppel argument for it will force a court to confront more directly the question of whether or not it is flying in the face of the express statement of legislative intent. Second, the amendments have added a new group of sections (ss. 20.1-4) dealing expressly with abandonment and creating statutory liability for a number of persons. While the precise relationship between these new sections and the older remedies of the Board found in sections 92 to 95 of the *Oil and Gas Commission Act* is not completely clear, the Board should be able to avoid the need for the special order in council that seems to have been required to authorize the Board's action in the instant case. Third, the Board has acquired a new range of remedies to assist it in recovering the costs of a Board abandonment (s. 93.1).

That said, the decision is still of considerable interest. It confirms the application of both common law and statutory rules of procedural fairness to Board decisions and confirms the entitlement of persons affected to advance notice of decisions that may affect their ultimate liability. Failure to adhere to these requirements may cost more than delay; it may force the Board to eat the costs of expensive abandonment operations. More generally, the decision also emphasises the duty of a regulator to communicate accurately with its regulated industry. At its most general, the case stands for the following proposition.

> Where a regulator has an important discretionary power and where the regulator has communicated to its industry the manner in which it will exercise that power, the industry will be entitled to assume (on the basis of estoppel, legitimate expectation or procedural fairness) that the regulator will continue to exercise that power in the manner communicated unless and until the regulator communicates its changed expectations to the industry.

3.3 Crown Royalty Litigation

The last year has seen a surprisingly large amount of Crown royalty litigation. Three of the cases concern Indian oil and gas royalties, and a fourth deals with Alberta Crown royalties.

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153 S.A. 1994, c. 26.

3.3.1 *Indian Oil and Gas Royalties*

Under the Indian Oil and Gas Regulations,[154] a lessee dissatisfied with a decision of the Executive Director of Indian Oil and Gas may seek a review of that decision by the Minister. The Minister's decision is subject to judicial review in the ordinary course by the Federal Court, Trial Division. While the Minister's decision is described as "final",[155] it is not protected by a privative clause. Section 2 of Schedule I of the regulations deals with allowable deductions for processing costs.

> (2) The royalty . . . shall comprise the basic royalty of 25 per cent of the gas . . . plus the applicable supplementary royalty . . . all quantities to be calculated at the time and place of production free and clear of any deduction whatever except as provided in subsection (4).
>
> . . .
>
> (4) Where gas is processed by a method other than gravity, the royalty of the gas obtained therefrom shall be calculated on the actual selling price of that gas, but such costs of processing as the Manager may from time to time consider fair and reasonable, . . . shall be allowed.

Section 42 of the Regulations allows the Manager, at any reasonable time, to "examine the records of an operator".

3.3.1.1 The Imperial Oil Case

The first case, *Imperial Oil Resources Ltd.* v. *Canada (Minister of Indian Affairs and Northern Development)*[156] involved "deductions" made by Texaco, Imperial's predecessor in title, in the form of a marketing fee. The circumstances were as follows. Texaco sold gas products from the Bonnie Glen field (part of which underlies Pigeon Lake IR No. 138A) to an affiliated company TCI. Under the terms of an agreement between Texaco and TCI, TCI undertook to market gas products acquired from Texaco and TCI agreed to pay Texaco 95% of TCI's downstream sale price netted back to Bonnie Glen. Texaco calculated its royalty obligation on the 95% netted-back price for the period in question, August 1979 to the end of 1985.

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154 C.R.C. 1978, c. 963; replaced by Indian Oil and Gas Regulations, 1995, SOR/94-753 [hereinafter the 1995 Regulations]. The substantive rights of the parties in all three cases are governed by the earlier regulations; the procedure is governed by the new regulations, *Shell Canada Ltd.* v. *Canada (Attorney General)*, [1998] 3 F.C. 223 (T.D.) at 242, note 3.

155 1995 Regulations, *ibid.*, s. 57.

156 [1997] F.C.J. 1767 (T.D.).

In 1994, the Executive Director of Indian Oil and Gas Canada (IOGC) formed the opinion that the 5% deduction was impermissible and decided to audit the pre-1986 Texaco records. The Minister confirmed this decision on an application for review. The Minister's written reasons referred to his special (fiduciary) responsibilities to First Nations as a reason for eliminating the deduction. In reaching his decision the Minister treated TCI and Texaco as if they were a single entity.[157] This allowed him to treat TCI's selling price as Texaco's selling price and therefore, self-evidently, an impermissible deduction. A further reason for the decision relied on the fact that the provincial Crown did not allow similar fees although there was evidence before Justice Rothstein that this was the result of negotiations between the relevant parties.

Justice Rothstein ruled that the Minister committed an error of law in treating Texaco and TRI as a single entity. There was nothing in the *Indian Oil and Gas Act*[158] or the regulations to permit this and thus the common law rule to the effect that a corporation is a separate and distinct legal entity from its shareholders prevails. There were no clear or compelling reasons to displace the normal rule.[159] Certainly it was not displaced on the basis of the Crown's fiduciary obligations to First Nations.[160] This argument similarly failed to move Justice Rothstein in construing the scope of IOGC's right to audit.[161] On that issue Justice Rothstein made two points. First, IOGC's right to audit under the regulations did not extend to auditing affiliates. Second, the power to inspect the records of an operator under section 42 of the Regulations did not accord a right to conduct a formal audit.[162]

The case is on appeal and the Federal Court of Appeal has rejected an application from the Samson Cree Nation either to be added as a party appellant or as an intervener.[163] Chief Justice Isaac gave two reasons for rejecting the application. The first was that the Samson Cree were aware of the proceedings at trial and could have applied to be added at that

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157 This is Justice Rothstein's characterization, *ibid.* at 10.

158 S.C. 1974-75-76, c..15.

159 *Imperial Oil*, *supra* note 156 at paras. 18-21. Rothstein also notes at para. 25 that the Minister was not without a remedy since under s. 21(7) of the Regulations he had the authority to deem a price where of the opinion that a sale occurs at less than market value. This section, notes Rothstein, was perhaps not invoked either because IOGC was out of time or on the basis that the price received did in fact represent fair market value (at 26). There was some evidence to support this in the form of transactions by other parties structured along similar lines.

160 *Ibid.* at para. 24.

161 *Ibid.* at para. 34.

162 *Ibid.* at paras. 31-36. The formal order of the court is in fairly broad terms and is set out in *Imperial Oil Resources Ltd.* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1998] F.C.J. 1708 (application of the Samson Cree to intervene on the appeal).

163 *Ibid.*

stage. The second was that the memorandum filed in support by the Samson Cree broadened the scope of matters under review, "will range too far from the issues under review", will be unfair to the parties and will delay the proceedings. This would not, in Justice Isaac's view, cause any prejudice to the Samson Cree for the First Nation was entitled to look to the Crown "as trustee to protect the interests of the Samson Cree Nation."[164]

3.3.1.2 The Shell Oil Case

In 1982, in order to provide industry with some guidance on permissible gas processing deductions, Indian Minerals promulgated "Guidelines for the Calculation and Reporting of Gas Cost Allowance for Natural Gas and Associated By-Products on Indian Land". The second case, *Shell Canada Ltd.* v. *Canada (Attorney General)*[165] deals with the issue of gas processing deductions or Gas Cost Allowance.

Shell had been producing gas from the Stoney Reserve. Between 1983 and 1988, and following the Guidelines for calculating its gas cost allowance, Shell included an item for relevant capital assets in determining the scope of its royalty obligations. The Guidelines explicitly stated that they had no legislative sanction and were not binding upon the government or the Department. Shell did not deduct the value of investment tax credits earned by it under the *Income Tax Act*. The Guidelines were silent on this question and it was not until 1991 that IOGC informed industry that it would require lessees to deduct investment tax credits. In 1995, the Manager decided to claim additional royalty from Shell for the period from 1983 to 1988 on the basis that investment tax credits should be deducted. Shell appealed that decision to the Minister who confirmed the Manager's decision. Shell was successful on its judicial review application and the trial decision has recently been confirmed.

The Federal Court of Appeal gave two reasons for confirming the trial decision. First, the Court held that the Manager and the Minister had no authority to apply the Regulations retrospectively, yet this was what they had done:[166]

> A statute is said to be retrospective not only when it takes away or impairs a vested right, but also when it creates a new obligation, imposes a new duty or attaches a new disability with regard to events already past.

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164 *Ibid.* at para. 13.
165 [1998] F.C.J. 1525 (C.A.), aff'g [1998] 3 F.C. 223 (T.D.).
166 *Ibid.* at paras. 13 and 14.

> From 1983-1988, Shell's royalty returns were filed according to the known guidelines. By adding a new component to those suggested by the guidelines for the purposes of computing GCA [Gas Cost Allowance], the Manager imposed a new liability on Shell which neither the Act nor the Regulations contemplated.

Although the Act required lessees to pay royalty in accordance with the regulations "as amended from time to time", and although the Schedule (quoted above) allowed deductions for such processing costs as the Manager "from time to time" considers reasonable, both provisions should be interpreted as prospective in nature.[167]

In making their decisions both the Manager and the Minister had before them a report from Peat Marwick advising Indian Minerals as to the proposed treatment of investment tax credits. Shell was not provided with a copy of that report and neither was it informed as to the contents of IOGC's submission to the Minister. The court ruled that this was a major procedural error and would have quashed the decision on this ground as well.[168]

The Court of Appeal did not have to deal with a couple of other arguments that had been addressed to Justice Gibson at trial. At trial, Shell had contended that to the extent that the Minister took into account the Crown's fiduciary obligations to First Nations it was taking account of an irrelevant consideration. Justice Gibson rejected that contention in a couple of passages that are considerably more nuanced than those of Justice Rothstein in the *Imperial* case:

> If the IOGC's fiduciary duty was the sole basis on which the Manager here chose "to change the meaning of relatively clear legislation", I would conclude that the decision of the Manager that underlies the decision of the Minister here under review, and therefore the decision of the Minister itself, would be suspect at the very least. But that is not the case here. IOGC's fiduciary obligation was only one of a number of different considerations taken into account. I conclude it was an appropriate consideration. The obligations of the IOGC, the Manager and the Minister in relation to First Nations in circumstances such as those before me are obligations that should never be lost sight of. That being said, it is an appropriate concomitant of that obligation that it be borne in mind that in determining what are fair and reasonable costs of processing. I can only assume that the applicant, a major corporation with extensive experience and sophisticated staff, was conscious of the implications of entering into the leases in question where the lessor had such a fiduciary obligation.[169]

By the same token, Justice Gibson also concluded that neither the Crown's fiduciary

167 *Ibid.* at para. 15 relying on *Alberta (Attorney General)* v. *Huggard Assets Ltd.*, [1953] A.C. 420 (P.C.).
168 *Ibid.* at para. 20.
169 *Ibid.* at para. 29 (T.D.).

obligations nor its use of an accounting firm that had also done work for the Stoney Tribe, could amount to an unlawful fettering of discretion.[170] This conclusion seems consistent with other authority that asserts that liberal rules of construction applicable to statutes affecting Indians are no less applicable when the litigation involves third parties.[171]

3.3.2 Provincial Royalties: The Chevron Canada Resources Case

There is a common theme to the *Sarg* and *Shell Oil* cases. Regulators should not apply changes in policy retrospectively. *Shell Oil* comes to that conclusion by a very traditional route, the reasoning in *Sarg* is less conventional. The theme is continued in *Chevron Canada Resources* v. *Alberta (Minister of Energy)*,[172] a case dealing with the pre-1994 Natural Gas Royalty Regulations (NGRRs) under the *Mines and Minerals Act*.[173]

Under those regulations (which have since been replaced[174]), the royalty client (to borrow a term from the new regulations) could deduct certain permissible costs of processing (not exceeding 95% of the gross royalty payable) and the client was entitled to group multiple producing entities for these purposes, thereby allowing a client to reduce its royalty liability by combining entities that were less profitable with those that were more profitable. The regulations also included a general provision that allowed a client to request a recalculation for past years. In 1996 Chevron made two grouping requests that conformed to the formal requirements of the regulations. It expected to realize gains of $5.4 million, plus interest if allowed. One grouping request covered the years 1992 and 1993 and the other was confined to 1992.

The applications were rejected and various reasons were communicated to Chevron. Thus it was said that there could be no grouping between a unit and non-unit wells, and that retroactive grouping was only permissible in the case of error. Chevron was able to demonstrate many examples in which the Minister had allowed grouping applications from other parties that flatly contradicted each of these reasons. In the formal decision rejecting the application, the Deputy Minister adduced the further reason that the grouping provision was designed for reasons of administrative convenience in reporting requirements: "it was not intended as a device that would allow royalty clients to trigger

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170 *Ibid.* at para. 39 (T.D.).
171 *Stoney Creek Indian Band* v. *British Columbia*, [1998] B.C.J. 2468 (B.C.S.C.) at para. 57.
172 [1998] A.J. 661.
173 R.S.A. 1980, c. M-15.
174 See Acorn & Ekelund, "An Overview of Alberta's Recent Legislation on Natural Gas Royalty Simplification and Natural Gas Storage" (1995) 33 Alta. L.R. 342.

any increased financial benefits or withdrawals."[175] In sum, Chevron was using the grouping provision for an unintended purpose.[176]

Chevron sought judicial review. As with the Indian Oil and Gas Regulations, the NGRRs did not contain a full privative clause but they did contain a finality clause that was in somewhat stronger terms than the IOGRs' finality provision:

> 30. Where any question arises pertaining to the interpretation or application of this Regulation, the Minister is the sole judge of the question and there shall be no appeal from his decision.

The court decided that a high degree of curial deference (but something less strict than the patent unreasonableness test) was owed to the Minister's decision *on this particular issue*. It was a decision entirely within the Minister's jurisdiction, and while not a technical decision requiring great expertise, it was a decision that could involve policy considerations.[177]

Notwithstanding the high standard of review, Justice Marshall still found that the Minister had erred. Justice Marshall characterized the decision in various ways. It was incorrect or unreasonable to rule that the regulations could not be used to confer a financial benefit.[178] For the Minister to take account of the financial benefit to Chevron (or the loss to the Crown) was to take account of an irrelevant consideration, or to render her decision for an improper purpose or an ulterior motive.[179] It was an incorrect or unreasonable interpretation of the regulations to insist that they could only be used to foster administrative convenience and therefore to reject the application on the grounds that this purpose could hardly be fostered in the present case if Chevron were allowed to go back and re-calculate its liability.[180] Part of the reason why this was unreasonable was that the Minister had, as a matter or practice, allowed re-calculations at the request of other clients.

This is, I think, the connection back to *Sarg* and to *Shell Oil*. The establishment of a practice communicated to industry may prevent the Minister from changing that practice on a retrospective basis because it is unreasonable to re-interpret a discretionary power

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175 Decision quoted in *Chevron*, *supra* note 172 at para. 10.
176 *Ibid.* at para. 10.
177 *Ibid.* at paras. 14-23 and 43.
178 *Ibid.* at paras. 33 and 39.
179 *Ibid.* at para. 39.
180 *Ibid.* at paras. 35 and 39.

in this way. In support of this claim consider the following. Suppose that this question been put to the Minister as a first case: “can a client seek a re-determination of a royalty based upon a retrospective re-grouping of facilities in order to reduce that client’s royalty liability?” Clearly, the Minister would have been in a much stronger position to support her decision as a reasonable interpretation of the statute at the outset. Thus the Minister might argue that “it is true that a client has the right to seek a re-determination of the royalty, but that need not extend to a re-consideration of grouping and I am entitled to consider the financial consequences for the Crown.” While a court might disagree with this interpretation it is hard to think that a court would characterize the position as unreasonable. It only becomes unreasonable as a result of an interpretive practice communicated to the industry.

3.3.3 Other Indian Royalty Litigation

In addition to this group of four cases there are at least two other important Indian royalty cases that are locked in protracted interlocutory proceedings. One case involving the Samson and Ermineskin Indian Bands involves a breach of trust allegation against the federal Crown.[181] That action is proceeding in the Federal Court. The claims involve a claim that Indian royalties should have been calculated on the basis of world prices and not regulated prices during the 1975-1985 period.[182] The second claim, involving the same pool, is an action commenced by Chevron[183] seeking recovery for royalty overpayments that it claims were made by mistake. The Indian bands involved have filed a counterclaim alleging that the underlying leases are invalid and seeking damages far in excess of the original claim made by Chevron.[184]

181 The list of preliminary rulings includes: *Ermineskin Indian Band* v. *Canada*, [1997] F.C.J. 1111; *Samson Indian Nation and Band* v. *Canada*, [1995] 2 F.C. 762 (the trust principle for the disclosure of documents to the beneficiary of a trust could not apply to Crown trusts without amendment); *Samson Indian Nation and Band* v. *Canada*, [1998] 2 C.N.L.R. 199 (F.C.A., 27.10.1997), aff’g [1997] 1 C.N.L.R. 180 (issues of privilege in the production of documents, First Nation entitled to access to any legal advice relating to the surrenders of oil and gas and mineral resources and royalties).

182 *Ibid.*

183 For some of the preliminary proceedings see *Chevron Canada Resources* v. *Canada (Executive Director of Indian Oil and Gas Canada)* (1997), 53 Alta. L.R. (3d) 153 (application by Chevron to pay future royalties into court or into a trust account dismissed).

184 *Chevron Canada Resources* v. *Canada (Executive Director of Indian Oil and Gas Canada)*, [1998] A.J. 1202 (application by the federal Crown to strike out the Indian counterclaim as against the Crown was dismissed).

4.0 Aboriginal Oil and Gas Litigation

4.1 Introduction

The past decade has seen an explosion in litigation involving aboriginal peoples. Much of that litigation has involved hunting and fishing rights, treaty entitlement claims, and the Crown's fiduciary obligations to aboriginal peoples. The *Lubicon* case in Alberta in the early 1980s served as an early indicator of how that litigation might affect the oil and gas industry and the Crown's claims to beneficial title.[185] The *Apsassin*[186] decision of the Supreme Court gave the Crown an unpleasant reminder of the large financial liability that might flow from ignoring its fiduciary obligations with respect to the oil and gas rights accruing to reserves, while the dramatic decision last year in *Delgamuukw*[187] suggests that claims of aboriginal title include oil and gas rights and casts further doubt on the application of provincial disposition laws in areas of a province subject to a title claim. Even more recent decisions, especially in the Treaty 8 area of British Columbia (and to a lesser extent in Alberta[188]), have had to consider the extent to which the Crown has met its fiduciary and constitutional obligations prior to disposing of Crown resources or issuing regulatory approvals.

4.2 Application of Provincial Laws on Reserve[189]

Provincial laws of general application apply on reserve. But what if those provincial laws

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185 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

186 [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193.

187 (1997), 143 D.L.R. (4th) 193.

188 See *Athabasca Tribal Council* v. *Province of Alberta*, [1998] A.J. 1154 and 1157. This action was commenced as an application for judicial review of a decision by an official within the Department of the Environment to issue a geophysical exploration approval to Rio Alto Exploration Ltd. under the terms of the *Mines and Minerals Act* and the regulations. The first judgement referred to here represents Justice Medhurst's reasons for decision on a successful application from the province to convert the application from a judicial review application to a trial. Three days later Justice Dixon handed down reasons for judgement in the same matter granting an intervention application from Canadian Association of Petroleum Producers. In addition, in Yukon, see *Vuntut Gwitchin Tribal Council* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1997] F.C.J. 1459, aff'd [1998] F.C.J. 755 (environmental assessment issue in relation to re-entry of a well in the Eagle Plains area).

189 On the general question see *Delgamuukw*, *supra* note 187 at paras. 174 *et seq.* and also Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317 and *Stoney Creek Indian Band* v. *British Columbia*, [1998] B.C.J. 2468 (B.C.S.C.) *per* Justice Lysyk.

affect that which is core to the federal head of subsection 91(24)? What is part of the core of subsection 91(24)? Is a provincial law that affects the royalty payable to a First Nation *applicable* on reserve? These were some of the questions that Justice McIntyre had to consider in *Bearspaw, Chiniki and Wesley Bands* v. *PanCanadian Petroleum Ltd.*[190]

The Stoney Tribe surrendered certain mineral rights on its Treaty 7 reserve west of Calgary to the Crown in trust for the purpose of leasing for the benefit of the tribe. PanCanadian acquired interests in two leases by assignment. Lease A was granted in 1973 and renewed in 1982; Lease B was granted in 1975 and renewed in 1985. The leases were granted under the Indian Oil and Gas Regulations passed pursuant to the *Indian Act*[191] and renewed under the terms of the regulations[192] passed under the *Indian Oil and Gas Act*.[193] The Stoneys claimed that PanCanadian had underpaid its royalty obligations by making two types of deductions, first, a deduction for TOPGAS financing charges that were chargeable to and paid by PanCanadian, and second, operating, marketing and administration charges (OMAC) that were paid by PanCanadian to TransCanada Pipelines (TCPL) to whom PanCanadian sold the gas produced on reserve.

The original leases both provided that the royalty was to be payable "free and clear of all rates and taxes and assessments and from all manner of deductions whatsoever." The lease renewals both provided that the lessee shall pay the lessor the royalty from time to time prescribed by the regulations. As already noted above (see Section 3.3.1), the regulations post-1977 provided that a lessee must pay a basic and a supplementary royalty with "all quantities to be calculated at the time and place of production free and clear of any deduction whatsoever except as provided under subsection (4)." Subsection (4) went on to provide that:

> Where gas is processed by a method other than gravity, the royalty of the gas obtained therefrom shall be calculated on the actual selling price of that gas, but such costs of processing as the Manager may from time to time consider fair and reasonable, ... shall be allowed.[194]

Lessees are required to sell royalty production unless and until the Crown elects to take in kind.

190 [1998] A.J. 381 (Q.B.).
191 Now R.S.C. 1985, c. I-5.
192 See *supra* note 155.
193 See *supra* note 158.
194 *Supra* note 155.

The Crown had not elected to take in kind and the gas was of course processed by a method other than gravity. "The Manager did not allow costs relating to TOPGAS or OMAC, which costs are not, in any event costs of processing."[195] Evidently, PanCanadian had to rest its defence on some other, more substantial, ground.

The heart of PanCanadian's case was that TOPGAS and OMAC were not processing charges or other deductions but were simply necessary components for determining price.[196] In order to examine that claim we need to understand a little more about the origins of the two types of charges.

In common with many other producers, PanCanadian sold its gas to TCPL under a long term contract. At the time, TCPL served as an purchaser, aggregator, shipper and seller of gas and its contracts included take-or-pay clauses that required TCPL to take certain minimum volumes, or to pay even if it did not take. In the event that TCPL was forced to pay it was entitled to recover the paid-for gas at a later time. While the take-or-pay clauses seemed prudent at the time, the move to regulated prices in the period from 1975 to 1986 depressed demand for gas and TCPL found itself burdened with massive take-or-pay payments.[197] It borrowed money to make those payments. For reasons that are not clear, TCPL apparently treated the PanCanadian-TCPL contract as a 100% take contract.[198] TCPL always called for the maximum daily quantity. The Stoneys no doubt benefited from this, but, equally clearly, PanCanadian had no contingent liability to deliver prepaid gas to TCPL under this contract, for there was no such liability.

Regulated prices worked on a netback formula starting with either a regulated Toronto City Gate price or a regulated Alberta border price and then deducting back the cost of service to arrive at a regulated field price. This occurred pursuant to federal-provincial agreements supported by federal[199] and provincial statutes. In Alberta, the Alberta cost of service component was determined by the Alberta Petroleum and Marketing Commission under the terms of the *Natural Gas Pricing Agreement Act*.[200] The Alberta Petroleum and Marketing Commission allowed TCPL to include its financing charges for its take-or-pay

195 *Bearspaw*, *supra* note 190 at para. 15.
196 *Ibid.* at para. 86.
197 For a similar scenario see *Petrogas Processing Ltd.* v. *Westcoast Transmission Co. Ltd.*, [1989] 4 W.W.R. 272, aff'g [1988] 4 W.W.R. 699.
198 *Bearspaw*, *supra* note 190 at paras. 29, 41 and 103.
199 *Petroleum Administration Act*, S.C. 1974-75, c. 47.
200 S.A. 1975, c. 38.

payments in the Alberta cost of service component:[201]

> It decided that this was appropriate because it considered the financing charges to be a cost attributable to the acquisition of gas. TCPL had been prudent in incurring the obligations. The charge applied to all producers, not just those who had benefited from take-or-pay payments. All producers had to share the costs because it was an industry-wide problem. In other words, interest charges on TCPL's borrowing costs were part of the ACOS [Alberta cost of service component]. The ACOS was netted back in calculating the Regulated field Price, upon which royalty calculations were based. Thus the royalties were calculated on an after take-or-pay financing charges basis.

As the problem compounded for TCPL, TCPL and the producers entered into the TOPGAS Agreement. Under the terms of that agreement TCPL created a holding company, TGH, to which it transferred some of its rights and obligations for take-or-pay gas. TGH paid $2.3 billion to the producers and the producers in turn paid TCPL $1 billion to erase their liability for prepaid gas. The producers kept the balance of $1.3 billion but, in turn, owed $1.3 billion in prepaid gas.[202] The plan was for them to pay this off over time with gas and cash. A second iteration of the agreement, TG2, expanded the scope of the original plan. As a result of these arrangements, the producers had effectively assumed significant financing charges. The Alberta Petroleum and Marketing Commission allowed these costs as well to be included within the Alberta cost of service component, and, in a series of decisions, apportioned a greater share of these costs to those contracts that bore greater responsibility for the take-or-pay problem.[203] On that basis, the PanCanadian TCPL contract that included Stoney gas was in Category A which bore the highest allocation of TOPGAS financing charges. TCPL effectively collected these financing for TGH and TG2.

This arrangement was placed on a firmer footing (with the deregulation of gas prices and the unbundling of TCPL's functions) when the Alberta legislature passed the *Take-or-Pay Costs Sharing Act*[204] following a recommendation of the National Energy Board.[205] The Board characterized the TOPGAS charges as being related more to gas acquisition than to transportation. This provincial statute "essentially legislated the collection of TOPGAS financing charges."[206] The PanCanadian-TCPL contract remained in Category A.

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201 *Bearspaw*, *supra* note 190 at para. 34.
202 *Ibid.* at para. 38.
203 *Ibid.* at para. 40.
204 S.A. 1986, c. T-0.1.
205 RH-5-85.
206 *Bearspaw*, *supra* note 190 at para. 45.

At no time did Indian Oil and Gas or the Stoneys participate in or consent to the above arrangements and the IOGRs were not amended to accommodate the Alberta Petroleum and Marketing Commission's practice of including these charges as part of the Alberta cost of service component. Finally, although the Alberta Petroleum and Marketing Commission did divide gas into certain categories as described above, at no time did the Alberta Petroleum and Marketing Commission or the legislation instruct a producer how to allocate those costs.[207]

That was the picture for the TOPGAS charges, what about OMAC? The picture here is far less complicated. Upon deregulation of prices, TCPL had to negotiate a price with its producers. TCPL did this by entering into an agreement with its producers, the Netback Pricing Agreement, pursuant to which all gas sold by TCPL was pooled. OMAC and various other amounts were then deducted with the balance remaining divided by the total amount of gas sold, thereby yielding the netback price. Under a later netback pricing agreement OMAC took the form of an amount incurred by Western Gas Marketing for operating, marketing and administrative services. Western Gas Marketing was the gas marketing subsidiary of TCPL.[208]

Of the two issues, OMAC and TOPGAS, it was the latter that was much the more significant in financial terms. The central question for Justice McIntyre therefore was this. Was the scheme for collecting TOPGAS charges (whether incurred by TCPL or the producers) a mechanism for determining price, or was it a deduction from price, and, in any event, was this mechanism which was authorized under provincial law, opposable against Indian royalties?

Justice McIntyre began with the latter part of the question and, I think correctly, broke it down into two components. First, assuming that the provincial law was applicable to Indian royalty gas, did section 88 of the *Indian Act* prevent it from applying. Second, even if section 88 prevented the law from applying through referential incorporation could it apply of its own force or was it prevented from doing so, since, insofar as it purported to apply to Indian royalty gas, it trenched upon a core area of the "lands reserved" head of

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207 *Ibid.* at para. 80: "It does not purport to decide how that fee is to be apportioned among various parties." See also *Petro Canada Oil and Gas Corp. Ltd.* v. *Consolidated Gathering Systems Ltd.* (unreported memorandum of judgement of Justice Rooke, aff'd by the Court of Appeal, December 7, 1995 and Digest 394, *Canadian Oil and Gas*. The case is authority for the proposition that the role of the Alberta Petroleum and Marketing Commission is limited to determining equities as between TCPL and its producers and not as between a purchaser and seller of gas.

208 *Ibid.* at paras. 46-50.

federal jurisdiction? As part of this second question, Justice McIntyre needed to know whether the Stoney royalty interest was an interest in land and therefore part of the lands that were reserved to Indians under subsection 91(24) of the *Constitution Act, 1867*.[209] That question was also relevant to the limitations issues raised in the case.

4.1.1 Section 88 of the Indian Act

Section 88 of the *Indian Act* makes provincial laws of general application apply to Indians even if they would not apply to Indians as part of general constitutional doctrine because they touch or impair a core federal jurisdiction. However, the opening and closing phrases of the section also act as a shield. Thus provincial laws will not apply to Indians if that provincial law: (1) conflicts with the terms of a treaty; (2) conflicts with any other Act of Parliament; (3) conflicts with the *Indian Act*, or any order regulation or by law made thereunder; or (4) *makes provision for any matter for which provision is made* under the *Indian Act*. The last clause is perhaps the most significant for it is generally acknowledge to state a form of the paramountcy doctrine that is broader than the operational conflict doctrine espoused by the Supreme Court of Canada over the last number of decades.[210]

Was there a conflict then between the "free and clear of any clear of any deduction whatever" language of the regulations and the TOPGAS scheme? Could the Stoney's succeed simply by showing the provincial scheme was making provision for a matter already covered by the *Indian Oil and Gas Act?*[211] To a great extent the answer to that question depends upon how one characterizes the TOPGAS scheme. Is it simply part of

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209 Actually, Justice McIntyre effectively began the analysis part of his judgement with this question (*ibid.* at para. 53) once he had decided that the Stoneys (and not just the Crown) had the right to bring the action (at para. 52).

210 *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161. See Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations" (1991) 36 McGill L.J. 308.

211 The point is not straightforward. Section 88 of the *Indian Act* extends the federal paramountcy rule to those matters for which provision is made by "this Act" i.e., the *Indian Act*. It does include the *Indian Oil and Gas Act* and regulations under this broad protective umbrella; they may only be protected by the more specific conflict rule contained in the opening words of s. 88. My preliminary view is that s. 88 would probably be interpreted as according the *Indian Oil and Gas Act* the same status as the *Indian Act* for this purpose. I say this for the following reasons: (1) the *Indian Oil and Gas Act* has evolved out of the *Indian Act* (see Appendix A to the judgement); (2) the leases in question were originally granted under the old regime; (3) under the present regime there is still a requirement for a surrender under the Indian Act before lands can be leased under the regulations; and (4) any ambiguity will be resolved in favour of the Indians: *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29. Perhaps Justice McIntyre thought that he did not have to answer this question for he seems to have found what he described as a "direct conflict" (*Bearspaw*, *supra* note 190 at paras. 87-88).

price determination, in the same way as true cost of service charges form a legitimate part of a net-back pricing scheme, as PanCanadian and Alberta contended? Or is it an attempt to force royalty holders to bear certain costs that they would not otherwise bear? Is it an attempt to *deem* certain industry costs to be part of a net-back pricing mechanism? Justice McIntyre preferred the interpretation developed by the Stoneys:[212]

> I do not accept [the PanCanadian and Alberta] characterization. The federal regime requires royalties to be calculated based on the price. It sets the price to the extent that it allows no deductions to be made. The provincial regime also attempts to set that price by requiring certain deductions. A party cannot comply with both. Moreover, there is a direct connection between the royalties and the price. It is not tenable to say that price-directed legislation attempts to determine the price upon which the royalties are calculated. Thus there is a conflict between the federal and provincial legislation.

I think that this conclusion is correct. On the facts of this case Stoney gas benefited from TCPL's 100% take policy on this particular contract. In the absence of a common law duty to proration the available market amongst all producers, the policy decision of the Alberta Petroleum and Marketing Commission (and subsequently of the provincial legislature) to force a sharing of the down-side risks of TCPL's contracting policies was simply that, a political policy decision. It was not one mandated by deep-seated principles of the common law. The provincial government could not directly deem a price for Indian royalty gas (or even gas on which a royalty were payable) and neither should it be able to do so indirectly. The *Enchant* case holds that the province had the capacity to do this for non-Indian production,[213] but that should come as no surprise. I think that Justice McIntyre was correct in concluding that *Enchant* was irrelevant to the issue before him. This was sufficient to decide the case but Justice McIntyre went on to consider the yet more radical claim that the legislation was inapplicable to Indian lands, absent incorporation by section 88.

4.1.2 TOPGAS Legislation Inapplicable as Legislation in Relation to Lands Reserved

The claim here is that while the TOPGAS legislation is clearly *intra vires* the province, it is inapplicable to the extent that it touches or impairs the core subject matter of subsection 91(24) (in this case the lands reserved head) and is not otherwise saved by referential

212 *Ibid.* at para. 87.

213 *Enchant Resources Ltd.* v. *Dynex Petroleum Ltd.* (1991), 123 A.R. 81 (Q.B.). See also *Petro-Canada*, *supra* note 207.

incorporation via section 88 of the *Indian Act*.

The first step in the argument, as noted above, was to determine the proprietary status of the Stoney interest in the royalty. In Justice McIntyre's view,[214] the Crown's reserved royalty interest was an interest in land, either on the basis that a reserved royalty was akin to a rent, or on the basis that the Crown's reversionary interest was an interest in land, or on the basis that the lessor's right "is a right held in common with the lessee to participate in the development of the lessor's minerals and ... an interest in land appurtenant to the lessor's reversionary interest." The latter finding is based upon the Court of Appeal's decision in *Scurry-Rainbow Oil Ltd.* v. *Kasha*.[215]

While I think that the conclusion on this point is correct I prefer to reach that conclusion either on the basis of the language of reservation and the rent analogy, or on the basis of the reserved royalty as a *sui generis* interest in land. The characterization of the lessor's royalty interest as a right held in common with the lessee is, in my view, a dangerous fiction. The lessor does not hold an undivided interest in the exclusive profit a prendre held by the lessee[216] and has no present right of possession.[217] It is simply false to say that the lessor has a right "in common" with the lessee.

Not only was the Crown's interest an interest in land, so too was the Stoneys' interest. Their interest was a beneficial interest in the Crown's legal interest in the land.[218]

All of this allowed Justice McIntyre to conclude that the Stoney interest in the royalty was a proprietary interest and therefore within the scope of the lands reserved head of subsection 91(24). Did the provincial legislation in question here affect an integral part of the primary federal jurisdiction?[219] While Justice McIntyre wasted little time contemplating the scope of subsection 91(24), he went on to hold that provincial legislation that required a producer to charge TOPGAS financing costs to Indian royalty gas was legislation in relation to Indian land use and inapplicable. It was not saved by section 88 of the *Indian*

214 *Bearspaw*, *supra* note 190 at paras. 53-62.
215 (1996), 184 A.R. 177 (C.A.) and quoted here *ibid.* at para. 58.
216 See *St. Lawrence Petroleum Ltd.* v. *Bailey Selburn Oil and Gas Ltd.*, [1963] S.C.R. 482, aff'g 41 W.W.R. 210, aff'g 36 W.W.R. 167.
217 The right of possession is the only unity required for a tenancy in common.
218 *Bearspaw*, *supra* note 190 at para. 64 following *Re Stony Plain Indian Reserve* (1981), 35 A.R. 412 at 440 (C.A.) noting that in the case of a lease by the Crown of surrendered lands in perpetuity "The Band still retains its interests as beneficial landlord ...".
219 The question is posed *ibid.* at para. 89.

Act[220] and it was not saved by section 4 of the Indian Oil and Gas regulations which required operators to comply with provincial laws "relating to the environment and the exploration for, development, treatment, conservation and equitable production of oil and gas."[221] The *Take-or-Pay Costs Sharing Act* was not such a law.[222]

4.1.3 Defences

On the basis of the above, PanCanadian was liable to the Stoneys for additional royalties. Were there any defences available to PanCanadian? Other than the partial limitations defence,[223] Justice McIntyre dismissed all of PanCanadian's other arguments. Thus he held that PanCanadian could not defend: (1) on the basis that TCPL made the deductions and not PanCanadian;[224] (2) on the basis that the Stoneys benefited from TCPL's 100% take under the TCPL/PanCanadian contract (this did not constitute an unjust enrichment of the Stoneys by PanCanadian);[225] (3) on the basis that the Stoneys could have taken their royalty in kind;[226] (4) on the basis that it would be inequitable to allow the Stoneys to recover since PanCanadian was still liable to TCPL (that was PanCanadian's problem);[227] or (5) on the basis of estoppel (the Stoneys never made any representations to PanCanadian or acquiesced in its deductions).[228]

As to the limitations issue, Justice McIntyre held that since the Stoneys had failed to provide notice of an attack on the constitutional applicability of the provincial *Limitation of Actions Act*,[229] they were subject to the terms of that Act. However, while their arguments of breach of trust and fiduciary obligations against PanCanadian had failed on the basis that PanCanadian (as distinct from the Crown) owed no such to the Stoneys,[230]

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220 Justice McIntyre does not specifically address the point. There is of course a long-standing dispute as to whether or not s. 88 is confined to the Indians head of s. 91(24). See *Stoney Creek Indian Band*, *supra* note 171 concluding that the balance of authority favours the view that s. 88 is confined to Indians and does not apply to lands reserved.

221 *Supra* note 145.

222 *Bearspaw*, *supra* note 190 at para. 97.

223 See below.

224 *Bearspaw*, *supra* note 190 at para. 101.

225 *Ibid.* at para. 103.

226 *Ibid.* at paras. 105-106.

227 *Ibid.* at para. 108.

228 *Ibid.* at para. 111.

229 R.S.A. 1980, c. L-15; see the *Stoney Creek Indian Band* case, *supra* note 171.

230 The issue is discussed in *Bearspaw*, *supra* note 190 at paras. 65-74 and 117-118. I think that the conclusion is correct. Justice McIntyre reached that conclusion having applied the test based upon Wilson J's judgement in *Frame v. Smith,* [1987] 2 SCR 99. I think that the conclusion is even more compelling if one asks whether it is reasonable for the Stoneys to have formed the conclusion that

the Stoneys were still entitled to the benefit of a ten year limitation period on the basis that their action was an action that was a proceeding to recover an interest in land.[231]

4.2 Provincial Seismic and Drilling Licences

4.2.1 Introduction

A couple of years ago, two decisions of the British Columbia Supreme Court revealed just how difficult it was for different line ministries of government to take account of a range of resource and environmental values when making decisions about oil and gas projects without transgressing some basic rules of administrative law. The decisions were *Koopman* v. *Ostergaard*[232] and *Chetwynd Environmental Society* v. *Dawson Creek Forest District (District Manager)*.[233] These decisions are significant partly because they represent some of the very few examples of third party attacks on oil and gas operational decisions, but also because they provide a warning as to the difficulties that government decision-makers face in trying to accommodate a set of non-traditional and non-technical values in making oil and gas regulatory decisions. While recognizing that the First Nation litigation raises questions of constitutional law that are unique to the position of First Nations we should not ignore the fact that some of the First Nation litigation has also been firmly grounded in standard principles of administrative law. To the extent that that is the case the *Koopman* and *Chetwynd* decisions present a useful introduction to this topic.

In *Koopman* Imperial Oil proposed to drill a well in a remote alpine area. It sought a well authorization under section 97 of the *Petroleum and Natural Gas Act* (PNGA),[234] a licence to cut under section 47 of the *Forest Act*[235] and, it appears, a temporary permit under the *Land Act* to permit the use of Crown lands for the well site and access road. Imperial sought access to the area via a 25 km road that it proposed to construct over Crown lands. The Department of Energy Mines and Petroleum Resources referred Imperial's application to Forests and to Environment for comment. Forests recommended rejection of the

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PanCanadian would reasonably owe a duty of undivided loyalty to the Stoneys, a test that seems more consistent with the court's judgement in *Hodgkinson* v. *Simms*, *supra*, note 6.

231 *Bearspaw*, *supra* note 190 at para. 122. The reasoning is thin on this point. A royalty is a non-possessory interest. Is an action for additional royalties so self-evidently a claim to recover land just because a royalty is an interest in land? See *Canadian Pacific Railway* v. *Turta*, [1954] S.C.R. 427 esp. *per* Estey J. and Rand J. and *Re Panther Resources* (1984), 29 Alta. L.R. (2d) 220.

232 (1995), 12 B.C.L.R. (3d) 154.

233 (1995), 13 B.C.L.R. (3d) 338.

234 R.S.B.C. 1979, c. 323.

235 R.S.B.C. 1979, c. 140.

application on the grounds that the proposed site was located in a prime alpine wilderness area and on the basis that the access road would convert the area from primitive to motorized access. Forests recommended helicopter access instead. Environment also objected to the operation. Notwithstanding this opposition, Ostergaard, the Assistant Deputy Minister in Energy, decided to grant the well authorization as well as the right (under section 7 of the PNGA) to use Crown lands for access and for the well site. Despite their opposition to the project, Forests and Environment followed suit with the relevant approvals under their own legislation. Koopman, a guide outfitter and angling guide challenged all three sets of authorizations.

Koopman's attack on the PNGA authorizations failed. Ostergaard's reasons for decision showed that he had taken account of environmental, forestry and recreation values in reaching his decision. These matters were all relevant and resulted in a number of terms and conditions designed to address concerns. His decision was not patently unreasonable.[236]

Koopman's attack on the licence to cut succeeded. The evidence showed that Forests had failed to exercise independent judgement in the matter. Notwithstanding its opposition to the operation, Forests took the view that if Energy granted the well authorization Forests would have to grant the licence to cut and did so. The court held that this was an unlawful fettering of discretion by Forests and an abdication of its statutory responsibilities.[237]

The net effect of this was that Imperial lost its access rights to the well until and unless the decisions could be re-taken in a lawful manner. Imperial applied afresh for a new licence to cut which was granted whereupon the Chetwynd Environmental Society commenced the second action. In this second action the Society not only maintained that the permit to cut was unlawful, it also took the position that the temporary permit issued under section 10 of the *Land Act* was unlawful. The little evidence that there was suggested that section 10 permits were issued by Environment as a matter of course following a section 7 authorization to use Crown land issued under the PNGA.[238] Under those circumstances Justice Holmes quashed the *Land Act* decision[239] but went on to hold that a section 10 permit was not necessary to permit Imperial's surface access given its authorization under

236 *Koopman*, *supra* note 232 at 164.
237 *Ibid.* at 167.
238 *Chetwynd*, *supra* note 233 at 343.
239 *Ibid.* at 343-344.

section 7 of the PNGA.[240] That left the licence to cut. Could Forests justify granting the licence when previously it had been so adamantly opposed to the operation? The answer was yes.

In making its decision the new decision-maker took a fresh view of what was relevant to the exercise of his discretion. On this second pass, Forests narrowed its focus and took the view that Forests' broad concerns as to the degradation of the alpine area were not relevant to a decision to issue a licence to cut. The only relevant question was whether or not the timber on the right-of-way could be harvested in accordance with various legislative requirements and without causing damage to the environment. Justice Holmes held that Forests was entitled to narrow its focus when considering an application for a Licence to Cut. It did not need to take account of a broad range of environmental values. These values had already been considered by Ostergaard under the PNGA.[241] The operation in question was a petroleum exploration and development project. The focus on the right-of-way was not inappropriate.[242] Finally, the court held that the new decision-maker had not fettered his discretion by simply following Energy's decision.[243]

4.2.2 The Remington Decision

The more recent attacks on PNGA authorizations in British Columbia have come not from environmental organizations but from First Nations. Even before the decision of the Supreme Court of Canada in *Delgamuukw*, it was clear that the Crown's duty to consult[244] provided a powerful tool with which to attack the Crown's decision to dispose of resources or the regulator's decision to grant certain regulatory authorizations. The *Halfway River First Nation* case,[245] a forestry case, is perhaps the best known of these decisions, but it was soon followed in a case involving Remington Energy.[246] The Ministry of Employment and Investment (MEI) had granted geophysical authorizations to Remington to carry out a 3D seismic operation in the traditional territory of the Blueberry River First Nation, an area within which the First Nation claimed both aboriginal and treaty rights. In addition, the Ministry of Forests had granted a licence to cut timber for the

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240 *Ibid.* at 344.
241 *Ibid.* at 347.
242 *Ibid.* at 349.
243 *Ibid.* at 349.
244 *Sparrow* v. *R.*, [1990] 1 S.C.R. 1075.
245 [1997] 4 C.N.L.R. 45 (B.C.S.C.).
246 *Blueberry River Indian Band* v. *British Columbia (Ministry of Employment and Investment)*, [1997] B.C.J. 2864.

operation. The Blueberry River First Nation sought judicial review of these decisions as well as a stay pending the hearing of the application. The brief oral reasons for decision on the stay application reveal that an agreement between the parties had been reached as a result of which the stay application was adjourned on terms. The terms provided that Remington would cease work immediately (subject to some necessary safety measures) but would be free to reapply for new permits. Upon receipt of any new application, Forests and MEI and the petitioners were to engage in good faith consultations forthwith.

4.2.3 The Mount Monteith Decision

Given the interlocutory nature of the *Remington* decision and the apparent settlement between the parties, it is difficult to give the case much weight, but it does demonstrate one potential avenue for questioning government's resource regulation activities. More useful guidance is provided by the October 1998 decision of Justice Taylor in *Kelly Lake Cree Nation* v. *British Columbia (Minister of Energy and Mines)*.[247]

In that case, two First Nations, the Kelly Lake Cree First Nation and the Salteau First Nation (SFN) sought judicial review of a well authorization issued by the Ministry of Energy and Mines as well as cutting permits issued by Forests. The cutting permits authorized the felling of timber necessary for the well site and access road. The area in question (known as Mount Monteith) was immediately adjacent to the Twin Sisters. The area was described by the trial judge as being one of "undeveloped splendour". The Twin Sisters area was regarded by both applicant First Nations (as well as a First Nation intervening in support of the authorizations, the West Moberly First Nation[248]) as an area of significant spiritual importance. The applicant First Nations argued that the Crown had breached its administrative and constitutional law obligations to consult with them prior to granting the authorizations. The Crown defended on the basis that it had fulfilled its obligations and, in the case of one of the First Nations (Kelly Lake Cree First Nation), denying that it owed a constitutional obligation to consult.

Amoco and its predecessors had a long-standing interest in this area and Ministry of Energy and Mines had also developed an appreciation of the importance of the area to the First Nations. The evidence presented showed that extensive studies had been carried out over a number of years. Some of these studies were developed co-operatively with the

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247 [1998] B.C.J. 2471 [hereinafter *Amoco*].

248 In addition, another First Nation, the Halfway River First Nation had an interest in the area but seems to have taken the same position in the matter as the West Moberly First Nation.

Treaty 8 Tribal Association. My overall impression of the material is that the application and indeed the entire area was treated as an exceptional case and that the extent and quality of consultation was commensurate with the significance of the area to the First Nations. As a result of the studies and consultations, part of the area was set aside from development.

4.2.3.1 Administrative Law Considerations

Amoco already held Crown oil and gas rights. It was seeking approval to drill a well under a different part of the PNGA. The case for the First Nations seems to have been put on the basis that the application involved a dispute between parties that required a high degree of procedural protection in the form of a full oral hearing. Justice Taylor rejected that contention.[249]

> The decision here is not one made by a tribunal that decides upon evidence tendered before it, but rather by a statutory authority charged with the responsibility of issuing permits for forms of economic activity pursuant to the provisions of [the PNGA and the *Forests Act*].

The First Nations were not "parties", they were "interested persons". There were no litigants and no hearing was required.[250] The process required procedural fairness but this could be discharged in the present circumstances by offering the First Nations an opportunity to make representations either in person or in writing. That opportunity had been accorded to all the First Nations affected here and thus that duty had been discharged.[251] The fact that some efforts at consultation were thwarted by the refusal of a First Nation to participate could not taint the process.[252] At a purely administrative law level I think that this decision is correct. However, Justice Taylor went on to support his decision by noting that the interest of the First Nations' was not that significant anyway since their primary interest here was in the spiritual significance of the area and not the importance of the area for ensuring livelihood.[253] This is a dangerous step in the reasoning for it is openly eurocentric and ignores both the First Nation perspective as well as the strictures of the Supreme Court in *Delgamuukw*[254] to the effect that doctrinal rules may

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249 *Amoco*, *supra* note 247 at paras. 168 and 239.
250 *Ibid.* at para. 170.
251 *Ibid.* at paras. 170-176.
252 *Ibid.* at para. 243.
253 *Ibid.* at 174. Justice Taylor is attempting to distinguish Justice Dorgan's decision in *Halfway River*, *supra* note 245.
254 *Supra* note 187 at paras. 84 *et seq.*

need to be modified to take adequate account of the aboriginal perspective.[255]

The duty was discharged notwithstanding the fact that the consultations here were conducted by someone other than the final decision-maker, and notwithstanding the fact that the First Nations had no opportunity to make submissions directly to that person.

> The duty to consult ... is not that of any individual but rather the state in its dealings with aboriginal people. I know of no authority that requires the decision-maker to personally inquire and receive the information upon which the decision is made or to personally engage in consultation. That is not a requirement of law ... and would be a physical impossibility.[256]

This comment applied not only to the well authorization decision but also to the cutting permit decision. In fact, the official responsible for the cutting permits had not conducted any independent consultations but had simply relied upon the consultations conducted by Energy.[257] There was no duty on Forests to duplicate the process. The First Nations' concerns were the same with respect to both aspects of the process. Forests could not blindly follow Energy's decision[258] (and Justice Taylor held that they had not done so[259]) but they could use the information collected by Energy in making their own decision.

In addition to alleging breach of the "hearing" aspect of the rules of procedural fairness, both applicant First Nations alleged bias. The generalized allegation of bias from the Kelly Lake Cree was dismissed out of hand by Justice Taylor.[260] The SFN argument was more sophisticated although in the end equally unsuccessful. SFN pointed to a number of features of the decision-making that it alleged amounted to bias. First, SFN noted that while in the ordinary course the decision would have been made by a person in the region, in the end the decision was made by German in the Victoria office of the Ministry. SFN was not provided with notice of this change of plan and hinted that the decision was pulled from the region because of concerns that the application for an authorization might be rejected at that level. Second, SFN argued that German in his decision subordinated the

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255 It is possible to support the decision in any event on the basis that even if the First Nation interest were acknowledged as being more important, it would still not entitle the First Nation to a formal oral hearing where the Crown had already carried out extensive and intensive consultations which would likely be better suited to gaining an appreciation of the First Nation perspective than would an adversarial hearing.

256 *Amoco*, *supra* note 247 at para. 241.

257 *Ibid.* at paras. 129-133.

258 See the *Ostergaard* and *Chetwynd* decisions *supra* notes 232 and 233.

259 *Amoco*, *supra* note 247 at paras. 128-133.

260 *Ibid.* at para. 177.

interests of SFN to those of West Moberly First Nation. He ignored the spiritual significance of the area to SFN, refused to provide specific information to SFN and was more concerned with loss of industry confidence. In short, German had prejudged the application, was determined to grant it and would not wait for further studies and consultations with SFN. For Justice Taylor all of this was either factually incorrect or did not give rise to a reasonable apprehension of bias. We need mention only some of Justice Taylor's more important conclusions.

First, he noted that the PNGA accorded the authority to make the decision to the Director (German before he was appointed acting Assistant Deputy Minister) or to a person appointed by him. There was no direct evidence to support the conclusion that the decision was pulled from the region to avoid a negative result and such a conclusion could not be inferred from these facts. Second, there was no requirement that the actual decision-maker (German) carry out the consultation personally. This responsibility could be discharged through other members of the civil service.[261] Third, where the decision-maker makes its decision notwithstanding evidence that one party wants to continue negotiations or consultations or to await the results of further studies, that does not itself constitute pre-determination of the matter at least where there is an adequate information base for the decision and the desire to continue studies seems to be motivated more by a desire to delay than by a desire to find common ground.[262]

Justice Taylor also dismissed various arguments based upon fettering of discretion, errors of fact and taking account of irrelevant considerations and the failure to take account of relevant considerations. The First Nations had argued that German's decision showed that he was concerned about the effect that the long delay in dealing with this application would have on industry perceptions of the province and as to its ability to resolve First Nation issues. The court held that there was no fettering here. In fact, the decision-makers

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261 See comments *ibid.* at para. 122 and at para. 203:

> "... there is no requirement that the decision-maker be the one who consults personally. Such a requirement, given the complexity of issues and interested parties such as here, would be a practical impossibility."

and at para 207:

> "There is no requirement at law for a decision-maker to personally involve him or herself in the process of consultation for it is a duty of the state to consult with those who may be affected. This as a matter of practical and common sense is done through the civil service."

and at para. 232.

262 *Ibid.* at paras. 220-222. Contrast the finding here with one of the conclusions in *Halfway River*, *supra* note 245. In that case Justice Dorgan found evidence of pre-determination when permits were issued without awaiting the outcome of agreed studies. The cases are distinguishable on the facts.

had exhibited considerable flexibility by postponing the making of the decision on a number of occasions; the time had come for a decision.[263] This was not a case in which German had simply applied in rote manner a provincial policy of not halting resource developments in the face of treaty land entitlement claims.[264] Equally, concerns as to irrelevant considerations were unfounded. First, these considerations were actually relevant when looked at in the overall history of this matter[265] and taking account of the various studies that had been conducted. It was time for the decision to be made. Secondly, and if wrong on the first point, taking account of an irrelevant consideration would only go to jurisdiction if the decision were founded upon that consideration and without that factor the decision could not have been made.[266] That was not the case here.

The applicants obverse argument on relevant considerations also failed on the facts. SFN argued that German failed to take account of the impact of the decision on SFN's treaty rights. Justice Taylor noted that while section 93 of the PNGA (unlike the *Forest Act* by virtue of its incorporation of the *Forest Practices Code*[267]) did not direct German to take account of aboriginal and treaty rights, an examination of his decision established that he had in fact done so.[268] Presumably, the obverse is also true. Thus, had German decided to deny the authorization on treaty grounds, an attack on the decision by Amoco on the basis of irrelevant considerations would also have failed.

4.2.3.2 Constitutional Issues

The court held that the Crown had no constitutional duty to consult the Kelly Lake Cree. This conclusion was based on a couple of factors. First, the Kelly Lake Cree First Nation had not shown that it had established treaty or aboriginal rights in the area.[269] The *Delgamuukw* and *Sparrow*[270] duty to consult was premised on established rights. Second, the area in question was relatively remote to the Kelly Lake Cree First Nation and at the

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263 *Ibid.* at para. 184.
264 *Ibid.* at paras. 235-238 and on this again the case was distinguishable from Justice Dorgan's decision in *Halfway River*, *supra* note 245.
265 *Ibid.* at 183-184.
266 *Ibid.* at 181.
267 *Ibid.* at para. 130.
268 *Ibid.* at para. 234.
269 The court made it difficult for the First Nations to get over this threshold since the court (*ibid.* at para. 27) declined to consider extrinsic evidence of the applicants' treaty entitlement on the grounds that an application for judicial review was an inappropriate forum for determining these issues. On this point see *Athabasca Tribal Council*, *supra* note 188.
270 *Supra* note 244.

same time closer to the Halfway, West Moberly First Nation and SFN. In the alternative, the court found that if there were a duty to consult, the Crown had fulfilled its obligations when the Kelly Lake Cree First Nation failed to express any interest in the project until relatively late in the day.[271] There was a duty to consult SFN with respect to possible infringements of its treaty rights but Justice Taylor held that on the facts this duty had been discharged.[272] The duty to consult involves a correlative obligation on the First Nation to participate. In the absence of the latter, the Crown cannot be charged with failing to consult.[273]

In deciding whether or not the Crown has fulfilled its obligation to consult, a court is entitled to look at the entire record including consultations carried out by Amoco, at least where those consultations were known to the Crown:[274]

> The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations peoples, including any discussions between resource developers such as Amoco and First Nations people.

I think that this represents a realistic approach that recognizes that in many cases it may be much easier and much for convincing for an applicant to satisfy First Nation concerns. Any endorsement should I think be subject to two caveats. First, I think that the Crown will not be able to delegate all of its consultation requirements to industry. After all, the honour of the Crown is at stake and some matters (in relation to government policy for example) can only be dealt with by government. Second, I am not sure that it is enough that the Crown simply know of the consultation. For it to be relevant should not the Crown go the extra step of showing that the consultation was actually *required* by it as well as reported to it?

Neither was there an interference with the First Nations' freedom of religion. For there to be a breach of subsection 2(a) of the Charter there must be some interference with the freedom as a result of some coercion or restraint. In the present case Justice Taylor concluded that there was no evidence of interference with actual practices[275] (such as the

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271 *Amoco*, *supra* note 247 at paras. 164-165.

272 *Ibid.* at para. 249.

273 *Cheslatta Carrier First Nation* v. *British Columbia (Environmental Assessment Act, Project Assessment Director)*, [1997] 3 C.N.L.R. 1 (B.C.S.C.) and in this decision *ibid.* at paras. 164-165, 243, and 248.

274 *Amoco*, *supra* note 247 at para. 154.

275 This part of Justice Taylor's judgement (*ibid.* at para. 192) provides another example of eurocentric reasoning when he dismisses the First Nation sense of "sanctuary" in relation to the area as follows: "It is not that in fact anyone can be said to have actually gone there on any consistent basis, as might

Sundance)or even hunting and gathering activities.[276] While it might be true that the activity by its mere presence might "defile an image of sanctuary" "s. 2(a) does not protect a concept of stewardship of a place of worship under the protection of religious freedom."[277] What the evidence did show was that the central area of the Twin Sisters had been protected and that further steps had been taken to minimize the impact of the activity surrounding the protected area.[278]

5.0 Legislative Developments

I shall focus on two developments. The first in Yukon and the second in British Columbia.

5.1 Yukon

In 1993 Yukon and Canada entered into the Yukon Accord.[279] Under the terms of that agreement Canada agreed to transfer to Yukon the administration and control of Crown oil and gas resources. It also agreed to extend Yukon's legislative powers over oil and gas matters and to vacate the legislative field. That devolution process came to fruition this year with the passage of the *Canada-Yukon Oil and Gas Accord Implementation Act*[280] and the actual transfer of administration and control of oil and gas resources to the Commissioner for the benefit of Yukoners. Although lacking the same constitutional foundations, the *Accord Act* serves the same function as the Natural Resources Transfer Agreements of 1930 for the Prairie provinces. In addition Yukon also obtained the legislative powers conferred on the provinces by the 1982 resources amendment to the *Constitution Act, 1867* which added section 92A to the statement of provincial powers.

In turn, Yukon has passed its own *Oil and Gas Act* (YOGA)[281] and has been developing

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one visit a temple, shrine or church."

276 *Ibid.* at para. 192: "there is simply a dearth of evidence as to any practices being carried out in any of the areas"; at para. 197: "the [plaintiffs] do not point to any actual deprivation or incursion of the right to religious freedom as a consequence" of the activity, and at para. 250: "the area is still open for religious exercise that involves the use of the area for food and medicinal hunting and foraging; likewise it does not restrict trapping and fishing other than in a marginal and minimalistic way."

277 *Ibid.* at paras. 192 and 195.

278 *Ibid.* at para. 198.

279 Accord between the Government of Canada and the Government of Yukon on Oil and Gas Revenue Sharing and Resource Management.

280 S.C. 1998, c. 5.

281 S.Y. 1997, c. 16.

accompanying regulations. I shall mention three features of the Act that merit attention.

First, YOGA purports to be comprehensive. The Act will be the only piece of Yukon oil and gas legislation. It will serve as the functional equivalent of Alberta's *Mines and Minerals Act*,[282] the *Pipeline Act*,[283] the *Gas Resources Preservation Act*[284] and the *Oil and Gas Conservation Act*.[285]

Second, the Yukon has chosen not to create a separate, arms length regulator like Alberta's Energy and Utilities Board. Instead, the Crown leasing functions will be fulfilled by the Division Head[286] and the conservation functions fulfilled by the chief operations officer.[287] In this YOGA resembles the model created by British Columbia, a model that British Columbia happens to have abandoned this year with the adoption of the *Oil and Gas Commission Act*.

Third, the two stage disposition regime is familiar and is something of a cross between the Alberta leasing regime and the leasing regime under the *Canada Petroleum Resources Act*.[288] YOGA provides for an exploration tenure in the form of a permit[289] with a maximum term (including any renewal) of ten years, and a production tenure in the form of a lease. A lease is valid for a ten year term subject to renewal for further ten year terms for productive zones.[290]

Fourth, the Yukon government has been struggling mightily with the First Nations of Yukon to develop what Yukon calls "a common regime". Ideally, this would be a disposition and regulatory regime that would apply to both Yukon lands and First Nation lands. This is not the place to explore that complex topic in any detail. Suffice it to say for present purposes that the regulatory aspects of YOGA constitute a law of general application that will apply throughout Yukon unless "backed out" by a Yukon First Nation that elects to occupy the field (as it assuredly can) under the terms of its self government agreement.[291] The proprietary aspects of YOGA cannot apply of their own force to Yukon

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282 *Supra* note 173.
283 R.S.A. 1980, c. P-8.
284 R.S.A. 1980, c. G-3.1.
285 *Supra* note 129.
286 YOGA, Part 2, ss. 15 *et seq.*
287 YOGA, Part 3, ss. 62 *et seq.*
288 *Canada Petroleum Resources Act*, *supra* note 127.
289 YOGA, s. 31.
290 YOGA, s. 39.
291 The Yukon Self Government Agreements have a fairly standard form. See, for example the *First Nation*

First Nation oil and gas lands but YOGA creates a mechanism by which a First Nation can adopt the Yukon law as its own.[292] Still, it will not be easy sailing. Although the template for settling claims is in place in the form of the Umbrella Final Agreement,[293] only six of the fourteen First Nations have Final Agreements. In the southeast, the area that is perhaps of most interest to the industry because of the proximity of the Westcoast pipeline, both Liard and Ross River First Nations are still negotiating and the Kaska Nation (based partly in Yukon and partly in the Northwest Territories and British Columbia) has an unresolved and overlapping claim within Yukon.

5.2 The British Columbia Oil and Gas Commission

While Yukon was aping the British Columbia model, Premier Clarke was giving instructions to his key policy advisors to make things easier for the oil and gas industry which was the one bright spot (this was before the price declines of the middle of the year) on an otherwise dismal economic horizon in that province, with weak base metal prices and a debilitated forestry sector. The policy response was the creation of the British Columbia Oil and Gas Commission as a single regulatory window for the industry.[294]

The British Columbia Oil and Gas Commission works like this. First, the proprietary aspects of Crown oil and gas matters will continue to be dealt with by the Ministry under the terms of PNGA. Second, most oil and gas regulatory matters of the kind handled in Alberta by the Energy and Utilities Board will now be dealt with by the British Columbia Oil and Gas Commission rather than by Ministry staff. This result is achieved by extensive amendments to the PNGA[295] and the *Pipeline Act*.[296] Third, dispositions of Crown owned resources (other than oil and gas) and other regulatory approvals for water, timber, waste disposal, required for surface access and operational reasons will all be made by the British Columbia Oil and Gas Commission. This result is achieved by giving the

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of Nacho Nyak Dun Self Government Agreement, 1993. Each agreement recognizes that First Nations have exclusive and concurrent legislative powers and that while territorial laws of general application continue to apply to settlement lands, (s. 13.5.1) such laws may be rendered inoperative (s. 13.5.3) " to the extent that it provides for any matter for which provision is made in a law enacted by the First Nation ...". The agreements are ratified by federal and territorial legislation; see *Yukon First Nations Self Government Act*, S.C. 1994, c. 35.

292 YOGA, s. 11.

293 Ratified by the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.

294 *Oil and Gas Commission Act*, S.B.C. 1998, c. 39. The British Columbia Oil and Gas Commission's web page is at http://www.ogc.bc.ca/.

295 R.S.B.C. 1996, c. 361 and ss. 27-58 of the *Oil and Gas Commission Act*.

296 R.S.B.C. 1996, c. 364 and ss. 59-69 of the *Oil and Gas Commission Act*.

Commission the power and discretion to make decisions under the "specified enactments" with respect to "oil and gas activities". The "specified enactments" comprise a list of some 45 powers under the *Forest Act*, the *Forest Practices Code*, the *Land Act*, the *Waste Management Act* and the *Water Act*. Herein lies the real innovation. The British Columbia Oil and Gas Commission will combine within a single body all regulatory and non-oil and gas disposition decisions. The single window is probably not complete. The British Columbia Oil and Gas Commission's powers are only engaged with respect to "oil and gas activities" and with respect to "pipelines". Both terms are defined either in the *Oil and Gas Commission Act*, or in the case of "pipeline", in the PNGA. As a result it seems that not only will federally regulated pipelines continue to be governed by the National Energy Board (an obvious point[297]) but the provincial land requirements of such a pipeline may also fall outside the purview of the Commission and continue to be handled by the line agencies.

297 See *Westcoast Energy*, *supra* note 1.

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