RECENT CASES OF INTEREST TO OIL AND GAS LAWYERS

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This paper reviews significant decisions rendered over the past year.

Over the past year the continued escalation of legislated law affecting the oil and gas industry has overshadowed recent court decisions. But while there have been no dramatic judicial decisions, there have been many of potential significance.

The Supreme Court of Canada has continued to delineate the constitutional position in regard to resource jurisdiction. As well, there have been a number of decisions that deal with administrative law, reflecting the increasing pervasiveness of government regulation of the oil and gas industry. Finally, there has been the usual smattering of cases dealing with surface rights acquisitions, oil and gas and mineral contracts and land titles problems. This paper is divided into these five broad areas. Decisions in the income tax area have been deliberately excluded as they are the subject matter of another article.

An alphabetical list of the cases is attached as Appendix A.

I. THE SUPREME COURT AND THE CONSTITUTION

There are two recent constitutional cases of interest to oil and gas lawyers. These two cases do not establish any new principles of law but continue the trend of the Supreme Court of Canada to restrict the power of the provinces to regulate resources.

A. *Central Canada Potash Company Ltd.* v. *Government of Saskatchewan et al.* (1978) 88 D.L.R. (3d) 609 (S.C.C.)

In this case the Supreme Court of Canada considered the constitutional validity of certain regulations enacted by the government of Saskatchewan for the purpose of regulating the Saskatchewan potash industry. The facts in the case and the court's decision are similar to the CIGOL case.[1] The case involved a consideration of the Potash Conservation Regulations,[2] enacted pursuant to the Mineral Resources Act.[3] These regulations made provision for the pro-rationing of production from potash mines in the province of Saskatchewan. The pro-rationing was to be determined on the basis of the productive capacity of the mine in question and on the basis of the estimated world market for the potash produced from that mine. Central Canada Potash objected to the quota allocated to certain of its mines and sought an order of mandamus to force the government of Saskatchewan to increase its quota. The order of mandamus was refused by the Supreme Court of

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1. *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan et al.* (1977) 6 W.W.R. 607 (S.C.C.).
2. Sask. Reg. 2879/69.
3. R.S.S. 1965, C.30, as am.

Canada.[4] In the present action, the appellant sought an order that the regulations were *ultra vires* the province on constitutional grounds and damages based on the tort of intimidation.

The Supreme Court found that the regulations were *ultra vires* the province and therefore unenforceable, but dismissed the appellant's action for damages.

The court (per Laskin, C.J.C.) stated that production controls and conservation measures with respect to natural resources within a province are, ordinarily, matters within provincial legislative authority. However, that legislative authority does not extend to fixing the price to be received or charged in the export market. The court found as a fact that virtually all potash produced in Saskatchewan was and is exported. Accordingly, the impugned regulations were aimed directly at the production of potash destined for export. The regulations therefore had the effect of regulating the export price, as a producer was effectively compelled to obtain that price on the sale of his product. Since the regulations were primarily aimed at the export market, they were *ultra vires* the provincial legislative powers.

The action for damages based upon the tort of intimidation was dismissed. It was held that the Saskatchewan government had not threatened to use an unlawful act or unlawful means against the appellant, since it had honestly and reasonably believed that the regulations were valid and subsisting.

In contrast, the Saskatchewan Court of Appeal had found the regulations to be *intra vires*.[5] It had refused to consider extrinsic evidence and had based its conclusion solely upon the content of the regulations themselves. Both the trial court[6] and the Supreme Court of Canada emphasized the fact that most of the potash produced in Saskatchewan was destined for the export market. It would seem that if most of the potash had been used within Saskatchewan the regulations would have been *intra vires*. It is submitted that this is not a proper test for determining the constitutional validity of legislation. One problem it raises is that legislation which is initially *intra vires* may become *ultra vires* by virtue of a change in circumstances. A logical extension of this case and the CIGOL case is that certain provisions of the Alberta Oil and Gas Conservation Act[7] may be *ultra vires* the province since most of the oil and natural gas produced in Alberta is exported. Thus the statute affects the export market.

It is also of interest that the regulations were admitted to be beneficial to the potash industry in Saskatchewan since there was an over-supply of potash on the world market. Chief Justice Laskin stated at 631:

> There is no accretion at all to federal power in this case, which does not involve federal legislation, but simply a determination by this court, in obedience to its duty, of a limitation on provincial legislative power.

B. *The Saskatchewan Power Corp. et al.* v. *Trans Canada Pipe Line et al.* (1978) 88 D.L.R. (3d) 289 (S.C.C.)

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4. *Re Central Canada Potash Co. Ltd.* and *Minister of Natural Resources for Saskatchewan* (1973) 2 W.W.R. 672 (S.C.C.).
5. [1977] 1 W.W.R. 486 (Sask. C.A.).
6. [1975] 5 W.W.R. 193 (Sask. Q.B.).
7. R.S.A. 1970, C. 267, as am.

The decision of the Federal Court of Appeal has been discussed in the past.[8] The Supreme Court of Canada sustained the decision of the Federal Court of Appeal and ruled that s.51(2) of the National Energy Board Act[9] is *intra vires* the federal government. This section provides that any company subject to the Act must file all contracts for sale of its gas with the National Energy Board, so that the Board may make orders relating to tolls and tariffs. The decision of the Supreme Court of Canada is basically the same as the decision of the Federal Court of Appeal. The Supreme Court rejected the constitutional argument on the ground that the federal government has jurisdiction to regulate a company having authority to construct or operate a pipeline connecting one or more provinces; such a company falls within the class defined in s. 92 (10) (a) of the British North America Act[10] and s. 91 (2)[10] empowers the federal government to regulate such a company. The scope of the federal government's jurisdiction over an interprovincial undertaking depends on the character of that undertaking. In the instant case, the character is such that the federal government has jurisdiction and therefore may make provision for the filing of contracts entered into by such company. The Supreme Court expressly stated that it would not comment on the authority of the federal government to regulate such contracts.

C. *Canadian Industrial Gas and Oil Ltd.* v. *Province of Saskatchewan* (1978) 23 N.R. 257 (S.C.C.)

Aspects of this case have been previously commented on at length.[11] The decision referred to herein relates to the application by CIGOL to recover interest on the judgment for damages awarded to it by the Supreme Court of Canada. Although the decision is not of relevance with respect to the day-to-day practice of an oil and gas lawyer, it is comforting to note that the Supreme Court of Canada (per Ritchie, J.) ruled that CIGOL was entitled to interest on the tax which it had paid to the province of Saskatchwan under the Act which had been held *ulta vires,* calculated from the date that such payments were made by CIGOL to the government.

II. ADMINISTRATIVE REGULATION OF THE OIL AND GAS INDUSTRY

The role of regulatory bodies in the oil and gas industry has continued to increase geometrically in the past year. Undoubtedly this is at least partly due to the increased public focus on energy matters. But as well, because it is often politically expedient to transfer the resolution of difficult issues to administrative tribunals, we encounter hearing after hearing and board decision after board decision. Almost all parties involved in these public hearings are beginning to recognize that greater definition as to the use of hearings and tighter and more rational procedural rules would be beneficial to everybody.

Public intervenors are finding it increasingly difficult to participate effectively in the myriad of decisions which they feel affect their interests.

8. [1977] 3 W.W.R. 254 (Fed. C.A.), discussed in J. Moss, "Recent Cases of Interest to Oil and Gas Lawyers" (1979) 17 *Alta. L. Rev.* at 10.
9. R.S.C. 1970, C. N-6, as am.
10. R.S.C. 1970, Appendices.
11. J. Moss, *Supra* n. 8 at 2. *See also* W. Elliott, "Jurisdictional Dilemmas in Resource Industries", (1979) 17 *Alta. L. Rev.* 91.

Moreover, recent decisions such as the *Green Michaels* appeal,[12] discussed *infra,* in their view may have rendered their participation in many hearings totally impossible. On the other hand, for the first time the Alberta Energy Resources Conservation Board recently appointed a "public advocate" to represent interested regional intervenors at one of its licensing hearings. Subsequently, the Energy Resources Conservation Board Act[13] was amended to formally allow the Board to make use of such a person. It is anticipated that in many future hearings there will be public advocates participating. This, coupled with the recent trend toward the "fairness doctrine"[14] and away from the emphasis on characterization, should broaden participation at many hearings.

Even the major oil and gas producers are beginning to despair of the time and costs devoted to regulatory matters. The Canadian Petroleum Association is presently in the process of formulating suggestions and recommendations of a general nature for presentation to the various boards with which its members are involved. As well, the Economic Council of Canada has commissioned the Faculty of Law at the University of Calgary to commence a study on environmental regulation and its effect on northern development. It is anticipated that the results of these studies may have some general application to administrative law practice.

A. *Northwestern Utilities Ltd.* v. *City of Edmonton* (1978) 23 N.R. 565 (S.C.C.)

This case was an appeal of an Alberta Public Utilities Board (PUB) decision fixing and approving utility rates. At issue was whether the Board could take into account losses of Northwestern incurred prior to the application for the rate increase, and whether the order on appeal set out the fact findings and reasons on which the Board's decision was based, as required by s. 8 of the Administrative Procedures Act:[15]

> Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out a) the findings of fact upon which it based its decision, and b) the reasons for the decision.

Mr. Justice Estey held that, in fixing rates pursuant to the Gas Utilities Act,[16] the Board must act prospectively; it may not award rates which will recover expenses incurred in the past but not recovered under rates established for these past periods. He held that a determination of what is or is not a "past loss" is a question of law that may go to the jurisdiction of the Board, although the Board's order was so narrow in scope and of such extraordinary brevity that he was unable to determine the basis upon which the awarded rates were established. Mr. Justice Estey stated:[17]

> The test is not whether the "new tentative rate base includes an amount for revenue losses" but rather the question is whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue short-falls which have occured [sic] prior to the date of the application in question, whether or not those "short-falls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, ...

12. (1979) 2 W.W.R. 481 (Alta. S.C. App. Div.).
13. S.A. 1971, C. 30, as am.
14. *See Campeau* v. *Council of the City of Calgary,* (1978), 7 Alta. L.R. (2d) 294.
15. R.S.A. 1970, C. 2.
16. R.S.A. 1970, C. 156, as am.
17. (1978) 23 N.R. 565 at 580.

He went on to discuss s. 8 of the Administrative Procedures Act:[18]

> The appellants are not assisted by the decision of the Appellate Division of the Supreme Court of Alberta in *Dome Petroleum Ltd.* v. *Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.*(1977), 2 A.R. 453; affirmed by this Court at (1977), 2 A.R. 451, to the effect that under s. 8 of The Administrative Procedures Act the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor can the Board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. Brevity in this area of prolixity is commendable and might well be rewarded by a different result herein but for the fact that the order of the Board reveals only conclusions without any hint of the reasoning process which led thereto. For example, none of the factors which the Board took into account, in reaching its conclusion that the amounts contested were not "past losses" are revealed so that reviewing tribunal cannot with any assurance determine that the statutory mandates bearing upon the Board's, process have been heeded.

He held that it is not enough to assert the fact that evidence and arguments lead by the parties have been considered. The order of the Board revealed only conclusions without any hint of the reasoning process which lead thereto. The matter therefore was referred back to the Board for further determination:[19]

> It is not for a court to usurp the statutory responsibilities entrusted to the Board, except insofar as judicial review is expressly allowed under the Act. It is, of course, otherwise where the administrative tribunal oversteps its statutory authority or fails to perform its functions as directed by the Statute.

If sufficient reasons for the Board's order had been given and had shown that the Board had considered matters beyond its jurisdiction, it may have been open to the court to vary the Board's order without referring the matter back to the Board.

Mr. Justice Estey also had a few comments on the impropriety of the Public Utilities Board appearing as an appellant in an action involving an appeal of one of its own decisions:[20]

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two Appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance . . .. Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question . . .. In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions . . ..

The case is in direct contrast to *Re Eurocan Pulp & Paper Co. Ltd.* and *British Columbia Energy Commission et al.*,[21] where the British Columbia Court of Appeal held that the British Columbia Energy Commission had the power to set gas utility rates on a retroactive basis. Chief Justice Farris stated:[22]

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18. *Id.* at 584.
19. *Id.*
20. *Id.* at 585.
21. (1978) 87 D.L.R. (3d) 727 (B.C.C.A.) at 732.
22. *Id.* at 732.

> There is no question of constitutional rights involved in the present case; nonetheless, if the Commission does not have the power contended for, a utility would be deprived of a proper return on its investment capital for the period between the date of an application to have the rates reviewed and the date of a consequential commission order. As in the present case this period could be lengthy. It is unreasonable to assume that the Legislature intended such a result.

He distinguished the various Alberta and New Brunswick decisions on the basis that the statutes in those provinces were "clearly prospective and did not permit an interpretation authorizing retroactive effect".

B. *Green, Michaels & Associates Ltd. et al.* v. *The Public Utilities Board* (1979) 2 W.W.R. 481 (Alta. S.C. App. Div.)

This case concerns costs awarded to intervenors for their participation in an Alberta Public Utilities Board (PUB) rate hearing. Prior to the hearing the Board had issued guidelines and had stated that the costs of consultants who did not give evidence would not be awarded to intervenors. The intervenors complained to the Board that this would cause them financial hardship. The Board subsequently revised the guidelines to state that the costs of intervenors' consultants who did not provide necessary and useful services in the proceedings would not be awarded. Later the board disallowed a portion of the intervenors' applied-for costs, but in general did not give itemized reasons for these disallowances. The grounds of appeal were that the Board had erred in law in the exercise of its statutory discretion to award costs under the Public Utilities Board Act,[23] and that reasons for the disallowances were not given, as required by s. 8 of the Alberta Administrative Procedures Act.[24]

Speaking for the Court, Mr. Justice Clement held that there was no indication that the Board had erred in the exercise of its discretion. He held that it had acted in good faith, it was entitled to establish guidelines, and it had not prejudiced the issue or acted arbitrarily or capriciously. Although the degree to which the Board had departed from its past practices was in dispute, the Board had left no doubt of its intention to exercise its discretion as to costs more amply than in the past. Mr. Justice Clement found the Board's guidelines to be an unobjectionable imposition of self-discipline on the intervenors:[25]

> It is not in the public interest to have intervention merely for the sake of intervention: there should be some perceptible value to it, and the board has left open for consideration in any given case whether the services of the consultant were in some way or to some extent of value and not merely misconceived or frivolous.

He felt that such guidelines had a useful purpose and were within the discretion of the Board as long as they did not have the effect of predetermining the exercise of its discretion.

In dealing with s. 8 of the Administrative Procedures Act, Mr. Justice Clement cited the Appellate Division's own decision in the *Northwestern Utilities* case.[26] He held that the Board was exercising a discretion specifically given to it. The exercise of such discretion was the exercise of a statutory power under s.2(c) of the Administrative Procedures Act, requiring proper, adequate and intelligible reasons. The order should have stated clearly the

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23. R.S.A. 1970, C. 302, as am.
24. R.S.A. 1970, C. 2.
25. [1978] 2 W.W.R. 481 at 496 (Alta. S.C. App. Div.).
26. (1977) 2 A.R. 317 (Alta. S.C. App. Div.) At the time, the Supreme Court of Canada's decision had not yet been rendered. *See* (1978) 23 N.R. 565 (S.C.C.), discussed *supra*.

finding of fact in respect to each particular item of the costs claimed and should have expressed adequate and intelligible reasons for the Board's decision. Mr. Justice Clement referred the matter back to the Board for redetermination in accordance with the Administrative Procedures Act.

This decision confirms the relatively broad power of a regulatory tribunal to exercise its discretion in awarding costs. As mentioned earlier, some public interest groups feel that the PUB's exercise of this discretion will decrease their abilities and influence in the regulatory process. It remains to be seen how other administrative boards will exercise this discretion in the coming years.

Additionally, the Alberta and Supreme courts' interpretation of s. 8 of the Administrative Procedures Act renders the statutory right of appeal under the Public Utilities Board Act much more effective, as it forces the PUB to include its reasons as part of the record. The *Northwestern Utilities* and *Green Michaels* decisions may be contrasted with *Caribe Holdings Ltd.* v. *The Alberta Energy Resources Conservation Board.*[27] In that case, Mr. Justice Morrow refused leave to appeal the Board's decision concerning a geological zone designation on the ground that the Board's adoption of its examiners' reasons as its reasons was sufficient compliance with s. 8 of the Administrative Procedures Act. Nevertheless, Mr. Justice Morrow granted leave to appeal on other grounds. The actual appeal has yet to be heard and may not proceed at all.

C. *The Alberta Gas Trunk Line Company Limited* v. *Amoco Canada Petroleum Company Ltd. et al.*

The Alberta Gas Trunk Line Company Limited (AGTL) is presently appealing a number of decisions of the Alberta Public Utilities Board (PUB) dealing with its rate structure. Without going into the substantive areas of disagreement ("flow-through" versus "normalized" taxation), the grounds for the appeal should be mentioned:

1) That the PUB did not have jurisdiction to make a determination with respect to the justness and reasonableness of income taxes collected or paid by AGTL;
2) That the question before the Board was not whether to adopt a particular method of handling income taxes for the purpose of AGTL's cost of service, but rather to determine whether AGTL's present method of handling taxes was unjust and unreasonable;
3) Whether the Board's findings of fact were wholly unsupported by the available evidence in regard to AGTL's competitive position relative to attracting capital, and in regard to legislation which provides specific authority to collect and record deferred income taxes;
4) Whether the Board erred in making a retroactive order;
5) That the Board did not give AGTL a reasonable opportunity to furnish relevant evidence and failed to provide a written statement setting out the findings of fact upon which it based its decisions and the reasons for its decision, all contrary to the Administrative Procedures Act; and
6) That neither the Alberta Gas Trunk Line Act[28] nor the Public

27. (1979) 13 A.R. 132 (Alta. S.C. App. Div.).
28. S.A. 1954, C. 37, as am.

Utilities Board Act[29] gives the PUB jurisdiction to make an interim order.

Although the outcome of this litigation may have great implications for the oil and gas industry, from a legal point of view it should be kept in mind that AGTL is governed by its own statute, many portions of which are unique. Thus the implications of any decision rendered remain to be seen.

D. *Rozander* v. *The Energy Resources Conservation Board and Calgary Power Ltd.*# 1 13 A.R. 461, #2 13 A.R. 479 (Alta. S.C. App. Div.)

These two cases arose out of the grant of a permit by the Alberta Energy Resources Conservation Board (ERCB) to Calgary Power Ltd. to construct and operate a steel tower transmission line across irrigated farmland. The Board had given its approval after commissioning and considering its own report on the safety aspects of power lines and irrigation systems. The parties involved did not learn of the report commissioned by the Board until after its decision was handed down. Rozander had already been refused leave to appeal under the statutory appeal provisions of the Energy Resources Conservation Act.[30]

The #2 decision dealt with Rozander's appeal of this refusal of leave to appeal, which had been made on the grounds that the application for leave to appeal was not commenced within the time period set out in section 42 of the Energy Resources Conservation Act:

> 42 (2) Leave to appeal shall be obtained from a judge of the Appellate Division upon application made within one month after the making of the order, decision or direction sought to be appealed from, or within such further time as the judge under special circumstances may allow, ...

Mr. Justice Clement claimed an inherent jurisdiction to hear the matter and then held that the time for appeal commenced to run with the issuance of the Board's report and not with the subsequent administrative act of issuance of the permit. He confirmed the chambers judge's refusal of leave and held that there were no special circumstances sufficient to warrant an extension of time for appeal; a mere delay in seeking professional advice is not enough.

In *obiter dicta,* Mr. Justice Clement discussed the substantive issues of the case. He stated that the *audi alteram partem* principle would have applied, and at 485 quoted Lord Hodson in *Official Solicitor to the Supreme Court* v. *K. and Another:*[31]

> It is said with force, as Russell L. J. remarked, that it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticising or controverting because he or she does not know what they are: moreover, the judge may (without the inestimable benefit of critical argument) arrive at a wrong conclusion on the undisclosed material. Even worse, the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based on false premises.

He held that the purpose of the hearing was not just to determine whether there was a need for the transmission line and if so what should be its route. Rather, he took the broader view that generalities in the report in regard to hazards and safety precautions were not merely peripheral to the purpose of the hearing and non-prejudicial, thus excluding application of the rule to the

29. R.S.A. 1970 C. 302, as am.
30. S.A. 1971, C. 30 as am.
31. [1965] A.C. 201.

report, but of particular interest to Rozander and possibly prejudicial to him.[32]

> Hazards and safety precautions are of direct concern to Rozander and while this subject is dealt with in generalities by the Wacker Report, nevertheless those generalities contributed to the location of the line on a route affecting his land. Thus the generalities on hazards and safety precautions became of particular interest to him. I think that the Board in the exercise of its judicial function might well have acceded to Rozander's request.

It will be interesting to see if the ERCB will heed these views of Mr. Justice Clement in its hearings procedures in the future and if so, what limits it will attach to his words.

The #1 decision dealt with Rozander's application for a writ of certiorari to quash the Board's decision. The grounds were that there had been a denial of natural justice, in that the Board improperly considered the report it had commissioned, in contravention of the *audi alteram partem* rule. Mr. Justice Clement held that certiorari did not lie where there was a statutory appeal available, notwithstanding that leave to appeal was required. The privative provisions of the statutory right of appeal in the Energy Resources Conservation Act did not limit the supervisory jurisdiction of the Court in respect of administrative law, but only directed it to a well-provided and rational procedure. The report commissioned by the Board was part of the record and could be examined under the statutory appeal provisions. Concerned with expediting the matter, it bothered Mr. Justice Clement that the statutory time period for appeal was one month whereas for certiorari it would be six months. He felt that to allow certiorari would defeat the intent of the legislature in expediting appeals. As for the fact that an appeal was conditional upon leave, he stated:[33]

> . . . that the due operation of a statutory provision of general application does not create a special circumstance for a particular case. To hold otherwise would undermine the legislative purpose which recognizes the necessity of a supervisory jurisdiction in the court in respect of administrative law and provides rational and adequate procedures for its exercise.

Subsequent to these decisions, an application for an order of prohibition was also denied.

E. *Crestbrook Pulp and Paper Ltd.* v. *Columbia Natural Gas Limited* (1978) 5 W.W.R. 1 (B.C.C.A.)

Crestbrook had a contract with Columbia for the delivery of natural gas which had been approved by the British Columbia Public Utilities Commission. Columbia took delivery from its suppliers at 14.73 pounds per square inch pressure and delivered it to Crestbrook at 13.63 pounds per square inch at the same price as it paid for the gas at 14.73 pounds per square inch. As the price under the contract was a function of the original purchase price paid by Columbia, Crestbrook claimed that it had overpaid Columbia and claimed for monies had and received. Columbia argued that the court had no jurisdiction; as the dispute related to the interpretation and application of a utility rate, it argued that the British Columbia Energy Commission, the successor to the Public Utilities Commmission, had jurisdiction.

The relevant portions of the British Columbia Energy Act[34] are:

> 37. No energy utility shall, without the consent of the commission, directly or indirectly, by any

32. (1979) 13 A.R. 479 at 486 (Alta. S.C. App. Div.).
33. (1979) 13 A.R. 461 at 468 (Alta. S.C. App. Div.).
34. S.B.C. 1973, C. 29, as am.

> device whatsoever or in any way charge, demand, collect, or receive from any person a greater, less, or other compensation for any service rendered, or to be rendered, by the energy utility than that prescribed in the subsisting schedules of the energy utility applicable to that service and filed in the manner provided in this Act and the regulations, nor shall any person, without the consent of the commisssion, receive or accept any service from an energy utility for a compensation greater, less, or other than that prescribed in those schedules.
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> 87. The commission has jurisdiction to inquire into, hear, and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating, or having the control of an energy utility service, within the meaning of this Act, or charged with the performance of a duty, or the exercise of a power, in relation to that service, has done, is doing, or has failed to do any act, matter, or thing required to be done by this Act, or any other general or special Act, or by any regulation, order, by-law, or direction made thereunder.
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> 125.(1) The commission has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act, or by any other Act.
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> (2) Except as otherwise provided in this Act, no order, decision, or proceeding of the commission shall be questioned, reviewed, or restrained by injunction, prohibition, or other process or proceeding in any court, or be removed by certiorari or otherwise into any court.

Based on an interpretation of the Act, Mr. Justice Robertson held after an extensive examination that he was unable to find:[35]

> any jurisdiction in the commission to adjudicate between persons with a view to granting or refusing relief of the sort sought here. The essence of what Crestbrook seeks is a judgment for money paid under a mistake of fact, or for money paid for the use of Crestbrook, or for damages for breach of contract. The claims all sound in contract: . . . In order to make out its case Crestbrook does not have to rely on the Act. It founds upon the contract, and relies upon the common law.

He stated that s. 37 was prohibitory only and that although s. 87 dealt with positive requirements, it did not deal with this situation. In *obiter dicta,* he stated that if jurisdiction did exist it would be exclusive to the Commission and that the jurisdiction of the courts to entertain actions such as this would be ousted.

This case is another example of strict judicial construction of a statute to ensure that the courts' jurisdiction is not lessened. The same sections of the British Columbia Energy Act construed strictly here to oust the jurisdiction of the British Columbia Energy Commission in favour of the courts, were interpreted broadly in the *Eurocan* case, *supra,* to increase the jurisdiction of the British Columbia Energy Commission. In the latter case, however, a lessening of the courts' own jurisdiction was not at stake.

III. SURFACE RIGHTS

The test which the courts are to apply when hearing an appeal from a decision of the Surface Rights Boards of Alberta or Saskatchewan has been clearly established in the cases of *Caswell v. Alexandra Petroleums Ltd.*[36] and *Lamb v. Canadian Reserve Oil & Gas Ltd.*[37] That test is as follows: the presiding judge ought not lightly to disturb the findings of the Surface Rights Board; if the decision of the Board is to be varied, there must be cogent evidence to establish where the Board was wrong and why its award should be varied. Three cases decided in the last year have attempted to apply that test with varying success.

A. *Livingston* v. *Siebens Oil and Gas Ltd.* (1978) 3 W.W.R. 434 (Alta S.C. App. Div.)

Siebens had obtained an order allowing entry to Livingston's land for the

35. [1978] 5 W.W.R. 1 at 7 (B.C.C.A.).
36. [1972] 3 W.W.R. 706 (Alta. S.C. App. Div.).
37. [1977] 1 S.C.R. 517.

purposes of drilling and operating four wells. Livingston appealed the compensation award granted to him by the Surface Rights Board. The judge of the District Court who heard the appeal varied the order of the Board by increasing the award of compensation. The Surface Rights Board had refused to consider evidence of the amount of compensation paid by oil companies to other local landowners pursuant to voluntary agreements. Siebens appealed to the Appellate Division because the District Court had overruled the Board's ruling on that matter and had considered the evidence of the voluntary agreements.

The Appellate Division dismissed Siebens' appeal.

The Court stated that expropriation principles should be applied in determining compensation to be awarded pursuant to the Surface Rights Act.[38] It is a well-established expropriation principle that the price at which neighbouring land has been sold in an arms-length transaction is relevant to compensation. It is true that one isolated agreement as to compensation should probably be ignored, but the Court stated that a pattern established by a number of agreements constitutes cogent evidence within the meaning of the test laid down in the *Lamb* and *Caswell* cases. However, the Court also found that the District Court erred in that it should have examined the effect of the voluntary agreements on each heading of damages awarded by the Surface Rights Board, rather than substituting one lump sum. The proper procedure for the District Court is to examine the Board's award and not to conduct a *trial de novo*. Nevertheless, the Court felt that the lump sum awarded by the District Court was ultimately correct.

The decision is significant in that previously the courts have held that offers made by oil companies to landowners for surface rights were not good evidence of fair market value of the property to be taken, since the circumstances influencing how much such companies would be willing to offer are unknown, e.g. a company's desire for quick entry onto the land. The case has thus altered this principle somewhat.

B. *Hanen* v. *Imperial Oil Enterprises Ltd.* (1978) 7 Alta. L.R. (2d) 331 (Alta. D.C.)

A right-of-entry order was granted by the Surface Rights Board to the defendant in respect of land owned by the plaintiff which she used for cattle ranching. The well for which the order was granted was a sour gas well located near the residence of the plaintiff. The defendant had placed a warning device on the wellhead which caused a red light to flash when there was danger. The defendant cautioned the plaintiff that she should contact the defendant when the red light flashed. Apparently the red light did flash from time to time. Hanen contended that the presence of a sour gas well on her land reduced its value considerably and that the constant presence of danger reduced the value as well.

The District Court (per Judge Feehan) varied the order of the Surface Rights Board so as to increase the compensation awarded to the plaintiff.

The Court reiterated the tests laid down in the *Caswell* and *Lamb* cases. He pointed out that the appeal from the Surface Rights Board was not a *trial de novo* but that the appeal judge was permitted to hear evidence which had not been introduced before the Surface Rights Board. He held that since the Sur-

38. S.A. 1972, C. 91, as am.

face Rights Board has more experience in matters of compensation and since the Board's function was principally to evaluate the decrease in value resulting from the granting of the right-of-entry order, the decision of the Board ought not to be lightly disturbed. However, in the present case the Surface Rights Board did not consider any reduction in value due to the presence of the red light and the danger implied thereby. The Court considered that this was cogent evidence affecting the value of the lands and, accordingly, it was in order to vary the award of damages.

The Court felt that the mere presence of a sour gas well did not materially reduce the value of the land since there were many sour gas wells located on neighbouring lands.

C. *Libra Holdings Ltd.* v. *Westhill Resources Ltd.* (1978) 14 A.R. 529 (Alta. D.C.)

The surface rights owner appealed the damage award granted by the Surface Rights Board for compensation resulting from the granting of a right-of-entry order to Westhill. The surface owner contended that the compensation granted by the Board should have been based upon the highest use for which the land would be used. Although the land was currently being used as agricultural land, it was near the city of Edmonton and the landowner claimed that the land would be developed and subdivided. Westhill, on the other hand, contended that the surface owner should not have been granted an award under the heading "Return on Investment", which had been calculated by the Board as an annual percentage of the price paid by the surface owner to purchase the lands.

The District Court (per Legg, J.) allowed the appeal by Westhill but not by the surface rights owner. He varied the compensation order by deleting the award made under the heading "Return on Investment".

The Court stated that its function was not to review the decision of the Board but rather to conduct a new hearing and decide the amount of compensation on the basis of the evidence before it. (This appears to be wrong, see *Livingston* case, *supra*). The test for compensation is that the compensation must be based on the highest and best use to which the land would reasonably have been put during the period of expropriation. The surface owner is not to be compensated for the loss of the fee simple interest, but consideration must be taken of the reversionary interest which remains vested in him. The Court found as a fact that the land would not likely be subdivided and developed during the period of expropriation (being the life of the well located on the lands) and adopted the Board's finding that the highest and best use would be agricultural. The Court adopted the Board's finding on compensation, and expressly deferred to the Board's wider experience in such matters. The Court could find no grounds for awarding the surface owner a return on his investment. It stated that since the test for compensation is the basis of loss of the leasehold interest, nothing should be awarded to the surface owner under the heading "Return on Investment". The Court stated that if its finding as to the timing of the development of the land should prove inaccurate so that land could be developed prior to the well being plugged and abandoned and the right of entry order expiring, then the surface owner would be entitled to apply for a review of the order pursuant to s. 35 (b) of the Surface Rights Act.

D. *Russ Burns Petroleum Consultants Ltd.* v. *Union Oil Company of Canada Limited et al.* (unreported) (Alta. S.C.T.D.)

Although not specifically in regard to surface rights, a recent Alberta decision dealt with an important aspect of oil and gas land dealings. It appears to be established law in Alberta that an unlicenced agent cannot maintain an action for a commission in respect of the sale of oil and gas properties, since such a sale constitutes a "trade in real estate" within the meaning of the Real Estate Agents Licencing Act.[39] The authority for this proposition is *Arkansas Fuel and Minerals Ltd.* v. *Dome Petroleum Limited.*[40] That case has now been distinguished in relation to geologists.

The plaintiff was a company incorporated by a geologist who had previously been an employee of Union. Union offered to farm out certain lands to the plaintiff. The plaintiff contacted UV Industries Inc. and advised it of Union's proposal. Subsequently an agreement was entered into between Union and UV, under which UV earned an interest in the lands and the plaintiff was granted an overriding royalty by UV.

There was little evidence as to the exact services which had been provided by Mr. Burns to UV since Mr. Burns had died prior to the case being heard. UV denied the validity of the overriding royalty, claiming that it constituted a commission in respect of a trade in real estate. Therefore the plaintiff's action was barred by the Real Estate Agents Licencing Act.

The Court held that the plaintiff was entitled to the royalty.

Since Burns was a geologist and had previously provided geological expertise to UV, he was doing so in this case rather than acting as a real estate agent. The fact that Burns was not licenced under the Real Estate Agents Licencing Act was irrelevant. It is important to note that the Court acknowledged that, other than the fact that Burns was a geologist, there was no evidence that the services provided by Burns were geological in nature. This case is presently under appeal.

IV. OIL & GAS CONTRACTS

Oil and gas lawyers devote considerable time to contracts. In the past year there have been no decisions which depart significantly from existing law. Certain recent decisions are of general interest, but the majority are restricted by their specific fact situations. Nevertheless, such cases may be of significance to a lawyer confronted with a dispute involving a similar fact situation.

A. *Rockland Industries Inc.* v. *Amerada Minerals Corporation of Canada Ltd.* (1978) 14 A.R. 97 (Alta. S.C. App. Div.)

This case involves the authority of an employee of a company to bind his employer. It discusses and applies the general laws of agency.

Two representatives of Rockland entered into negotiations with an employee of Amerada for the purchase of sulphur produced as a byproduct of Amerada's natural gas production in Alberta. The employee was sent from the head office of Amerada in New York City to enter into the negotiations. The negotiations took place during the month of August and on September

39. R.S.A. 1970, C. 311, as am.

40. (1965) 54 W.W.R. 494 (Alta. S.C. App. Div.).

3rd the employee made a written report to his superior officer. On that date the superior officer instructed the employee that any contract negotiated with Rockland must be approved by Amerada's executive operating committee. On September 5th the employee agreed, on behalf of Amerada, to sell sulphur to Rockland. The agreement was never ratified by the executive operating committee and Amerada refused to sell the sulphur to Rockland. Rockland sued for breach of contract. At trial, Rockland was successful and this case is Amerada's appeal.

The Appeal Court allowed the appeal and dismissed Rockland's action.

In order for Rockland to succeed in its action, there must have been a contract between Rockland and Amerada for the sale of sulphur. Since the employee was not an officer having the power to bind Amerada, there could be a contract only if the employee was the agent of Amerada and if the entering into of the contract was within the scope of the employee's actual, or apparent or ostensible authority.

The Court distinguished between the two types of authority. It stated that actual authority is the authority which the principal (Amerada) has in fact given to the agent (the employee); and that authority arises strictly out of the relationship between the principal and the agent. The third party (Rockland) with whom the agent deals on behalf of the principal need not be, and is not ordinarily, privy to that relationship. It is well established that if an agent acts within the scope of his actual authority, the principal will be bound regardless of the third party's knowledge or lack of knowledge of the scope of the agent's actual authority.

Apparent authority is identical to ostensible authority. It is the authority which the principal represents to the third party that it has given to the agent. Apparent authority arises solely out of the relationship between the principal and the third party. The statements or representations of the agent to the third party and the knowledge of the agent in respect of the scope of the ostensible authority are irrelevant with respect to the question of the binding effect on the principal of the agent's acts.

The agent cannot increase the scope of his actual authority by his representations and statements to the third party. Thus, in the absence of any representation by the principal to the third party, the agent has no power to bind his principal other than within his actual authority. The third party who seeks information from the agent regarding this authority relies on the agent for the accuracy of that disclosure and the principal will not be prejudiced thereby.

The Court found that in the present case the employee did not have actual authority to enter into the contracts on September 5th, the date of the contract, since his actual authority had been removed on September 3rd. Therefore, entering into the contract was beyond the scope of his actual authority and the alleged contract was not enforceable on that basis.

The Court further found that there had been no representations as to the scope of the agent's authority made by any person at Amerada having the actual authority to bind the company. In the absence of such representations, the agent had no ostensible or apparent authority. Thus, the agreement was not enforceable on that basis either.

This case is of considerable importance to lawyers in the oil and gas industry since it is common practice for employees of oil companies, such as

landmen, to enter into contracts on behalf of their company. Although this case does not establish any new law it does point out the problem raised by this practice. It is submitted that a prudent lawyer will obtain confirmation that a contract has been entered into by the proper agent of a company. Such confirmation should be obtained from a person who, according to the company's articles of incorporation, has the authority to bind the company. It is further submitted that there are a plethora of contracts circulating in the oil patch which have not been approved by such a person and are open to challenge on the grounds discussed in the *Rockland* case. Nevertheless, comfort may be taken from the fact that the agent may have ostensible authority to bind his principal. Ostensible authority may be created by implication or by failure by the principal to negative common practice.

B. *Hidrogas Limited* v. *Great Plains Development of Canada Limited* (1978) 5 W.W.R. 22 (Alta. S.C.T.D.)

In March 1973, the plaintiff contracted to purchase from the defendant supplies of propane and butane at fixed prices on a yearly basis with a 60-day termination provision. In September 1973, the plaintiff wrote to the defendant and voluntarily offered to pay a higher price, but subject to the condition that, "this increase is voluntarily offered on the understanding that we will be able to renegotiate a new contract for the contract year beginning April 1st, 1974 based on economic value at that time." The defendant did not return the second copy of this letter with its acceptance endorsed thereon as requested by the plaintiff, but subsequently the defendant's invoices to the plaintiff for propane reflected the price increase. In accordance with the original contract, the defendant terminated the contract at the end of the year. The plaintiff claimed for breach of contract and, in the alternative, claimed that the defendant received the excess payments in trust to the use of the plaintiff.

Mr. Justice Quigley held that no binding contract ever came into existence. He stated at 25 that the phrase "based on economic value" had a different meaning for the plaintiff and the defendant:

> Looking at the evidence objectively, I cannot say what agreement was reached between the parties because a fundamental term of the offer was couched in a phrase having no clear meaning. While the evidence of Bodrug and Earle [witnesses for the defendant and plaintiff respectively] may be said to be subjective and therefore not to be taken into account when determining whether or not a mutual mistake occurred, the evidence of these witnesses was directed more to what the meaning of the term was when used in the industry, and so, in that sense, it may be said to be objective. In any event, such evidence serves to accent the misunderstanding of the parties as to the meaning of the term.

In result, the plaintiff was entitled to recover from the defendant only the difference between the price paid for the products before September and the price paid thereafter.

C. *Norcen Energy Resources Limited* v. *Oakland Petroleums Limited* (unreported) (Alta. D.C.)

This unreported decision involves the enforceability of a contract made among more than two parties which has not been executed by one of such parties.

Oakland and three other parties were the working interest owners of a gas field. One of the other working interest owners entered into a letter agreement with Norcen for the sale of natural gas to Norcen. That letter agreement purported to be made on behalf of all four working interest owners. Natural gas was, in fact, purchased by Norcen and payments were made to

one working interest owner who made distributions to the others. Subsequently a formal agreement was prepared and a draft was circulated by Norcen to the four working interest owners for their comments. Two of the working interest owners, including Oakland, executed the draft agreement and returned it to Norcen. Subsequently Oakland acquired all of the interests of the other three working interest owners. In February 1974, Oakland advised Norcen that it was not prepared to continue to sell gas to Norcen. Norcen replied that it considered the draft formal agreement to be binding between the parties, and that Oakland was obligated to sell gas for the whole of the term specified in the draft contract. Norcen then executed the draft contract which had been previously executed by Oakland. In October, 1977 Oakland stopped supplying gas to Norcen. Norcen brought the present action alleging a breach of contract.

The District Court found in favour of Oakland and dismissed Norcen's action.

The Court held that a joint promise executed by only some of the joint promisors is ineffective and does not constitute a binding contract. It appeared to find that the formal draft agreement would have been a joint contract in that it provided for a common stream for the gas of all of the working interest owners and provided for one payment to the operator, who was to distribute that payment to the other working interest owners. The Court rejected Norcen's contention that the conduct of Oakland in continuing to sell gas after the draft agreement had been circulated amounted to an affirmation of that contract. The original letter agreement contained the basic terms of the contract, and the gas was being sold under the letter agreement and not undethe formal agreement. Since the letter agreement did not specify a term, it was for an indefinite term and could be terminated by either party.

The Court said that the draft circulated by Norcen constituted an offer which would only be bidning if it were accepted by all of the offerees. Since one of the offerees did not accept, there was no binding contract. At best, the execution of the draft agreement by Oakland could be considered a counter offer which was not accpeted by Norcen until after it had been revoked by Oakland. The Court implicitly found that the termination of the letter agreement by Oakland constituted a revocation of any counter offer which may have existed.

It is of interest to note that the Court held that the subsequent acquisition by Oakland of the other working interests did not affect its finding with respect to the existence of a joint contract.

The case is of importance since it is common in the oil industry to encounter contracts among three or more parties. For example, if a farmout agreement involves multiple farmors and not all of the farmors execute the agreement, is the agreement still enforceable against the executing farmors? Of course, it is always arguable that part performance would result in a binding contract.

It is also relevant to note that the Court held that the gas contract runs with the lands. It would appear that this contention was not argued at any length before the court. However, if correct, it coudl have broad implications (see *McFarland* v. *Hauser* and *Masai Minerals* v. *Heritage Resources*, discussed *infra*).

D. Goldstein et al. v. *Grant* (1978) 82 D.L.R. (3d) 236 (O.S.C. App. Div.)

This case involves the interpretation of a contractual term respecting the giving of notices.

The defendant had leased certain lands to the plaintiff. The lease contained a right of first refusal clause pursuant to which the defendant agreed that it would ot sell the premises "without first submitting to the lessees" any bona fide offer to purchase which it received. The lease further provided that the plaintiff would have the right "within the period of 48 hours from the time when the said offer to purchase is submitted to the Lessees, to purchase the leased premises at the same place". Also, "if the Lessees do not notify the Lessor that they exercise their right to purchase the leased premises within the forty-eight hour period provided for above, then the Lessor shall be at liberty to sell . . . ". The right of first refusal clause contained a provision which stated, "In calculating the period of forty-eight hours referred to in the immediately preceeding two paragraphs of this lease, the periods of Sundays and statutory holidas shall be excluded". A general provision in the lease dealt with notices and stated, in part, "Any notice so mailed shall be conclusively deemed to have been received by the addressee on the business day immediately following the date upon which it is so mailed." The lessor mailed a notice to the lessee in respect of an offer to purchase which it had received on a Friday. The lessee received the letter on the following Monday. On Tuesday he hand delivered a letter to the lessor stating that he wished to purchase the property on the same terms and conditions. The lessor decided not to accept the original offer and the lessee sued the lessor for specific performance of the preferential purchase clause contained in the lease. The trial judge dismissed the action and this is an appeal from his decision.

The Appellate Division of the Ontario Supreme Court made an order for specific performance.

The Court held that the submission of the offer to purchase by the lessor to the lessee pursuant to the preferential right of purchase clause constituted the giving of a notice within the meaning of the contract. Reliance was placed upon the dictionary definitions of the words "notify" and "submit" and also on the fact that the lease did not contain any mechanism for "submitting" the offer. Further, the notice provision related to the giving of "any notice" and the word "any" is sufficiently broad to encompass a submission. Thus, the notice provision governed the submission of the offer and the offer must be deemed to have been received by the lessee in accordance with it.

It was contended that Saturday did not constitute a business day and should not be considered in determining when the submission of the offer was deemed to have been received by the lessee. The court rejected that contention, stating that in the absence of any definition in a document the word "business day" in such a document means a day other than a Sunday, public or statutory or civic holiday. Therefore, the offer to purchase was deemed to have been received by the lessee on the Saturday.

It was contended that the forty-eight hour period commenced to run on the date upon which the notice was received. Thus, since the notice was received on a Saturday, the forty-eight hour period would consist of Saturday and Sunday and would end on midnight Monday. The Court rejected this contention and held that the context in which the words were used in this contract was such that the clause must be interpreted as excluding the business day on which the notice was deemed to have been received.

One Justice of the Appellate Division dissented on the ground that the forty-eight hour period should include the day on which the notice was deemed to have been received. Since time is of the essence in respect of a real estate transaction, the notice period should be construed as being as short as possible.

This case is of interest to oil and gas lawyers since virtually every agreement with which we are involved contains a notice provision. The problems arising from vague notice provisions were alluded to in a paper delivered at last year's seminar.[41]

E. *MacFarland* v. *Hauser et al.* (1978) 88 D.L.R. (3d) 449 (S.C.C.)

Hauser had leased certain lands to MacFarland. The lease contained the following right of first refusal clause:

> Both parties hereby agree that in the event of the land being sold, the lease will terminate at the end of the term then in progress, being further agreed that the lessee shall at all times have the first option to meet or decline the purchase offer.

Hauser granted a third party an option to purchase the lands, expressly stated to be subject to "lease on land held by Barry MacFarland". The third party was given a copy of the lease.

MacFarland learned of the granting of the option and filed a caveat against the lands claiming an interest pursuant to his right of first refusal. On March 26th, Hauser's lawyer wrote to MacFarland's lawyer stating the purchase price to be paid under the option agreement and stating that MacFarland could exercise the option by paying a deposit on or before March 29 and by closing the transaction on April 1.

MacFarland sought a declaration that he was entitled to be the registered owner of the lands upon payment of the purchase price. The Trial Division granted MacFarland an order of specific performance againt Hauser. The Alberta Appellate Division reversed the decision of the Trial Division and this is an appeal from that decision.

The Supreme Court of Canada restored the Trial Division's decision.

Hauser et al. made the following contentions:

1. MacFarland had waived his rights under the right of first refusal clause;
2. The right of first refusal was void for uncertainty;
3. MacFarland did not duly exercise his right of first refusal;
4. The remedy of specific performance was not available to MacFarland as against the third party.

The Supreme Court of Canada (per Martland, J.) rejected all of these contentions. The court adopted the language of the Alberta Appellate Division with respect to the first three contentions:[42]

> The covenant does not stipulate detailed intricacies as to exercise of the right conferred. It is a clear and unambiguous covenant and must be construed with reason. McFarland should be given a reasonable time or opportunity to meet the terms of the offer. Hauser's solicitor attempted to impose unreasonable conditions on McFarland by not only insisting on the funds in a shorter period of time than that required of Sunderland, but in also insisting on an indemnity.
>
> McFarland stated through his solicitor that he was prepared to purchase the property, and that is in my mind a proper exercise of the right of first refusal.

Accordingly, the first three contentions of Hauser et al. were disposed of.

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41. *See* A. Kovach, "Some Standard Clauses in Petroleum Industry Agreements — An Inquiry" (1979) 17 *Alta. L. Rev.* 108 at 115 *et seq.*

42. (1978) 88 D.L.R. (3d) 449 at 453 and 454 (S.C.C.).

The court held that the contention in regard to specific performance was irrelevant since the lands were registered in Hauser's name and not in the name of the third party. Accordingly, it was possible for the court to make an order of specific performance. MacFarland had priority over the third party in equity because the option to purchase granted to the third party was expressly stated to be subject to MacFarland's lease.

The significance of the case arises not from the decision of the Supreme Court of Canada, but rather from the decision of the Alberta Appellate Division. Of particular note is the decision of the Chief Justice McGillivray who attempted to reconcile the decision of the Supreme Court of Canada in the *Canadian Long Island* case[43] with earlier Canadian and English decisions. It is clear from Chief Justice McGillivray's decision that he had difficulty doing so. However, Martland J., in *obiter dicta,* affirmed his own decision in the *Canadian Long Island* case and stated, "While MacFarland's right of purchase was, initially, a contractual right, it was converted into an option to purchase upon Hauser having received an offer which he was prepared to accept. MacFarland thereupon had an equitable interest in the land."[44] Although this comment was not required by Martland J. in order to reach his conclusion, it clearly indicates that the Supreme Court of Canada considers the decision in the *Canadian Long Island* case to be correct. In both the *Canadian Long Island* and the *MacFarland* cases, the third party had notice of the right of first refusal clause. Assuming the correctness of Mr. Justice Martland's comment that the right of first refusal became an option and therefore an equitable interest in land, serious problems could be created. If a bona fide purchaser for value acquires an equitable interest in land without notice of a right of first refusal affecting those lands, it would follow from Martland J.'s comment that the holder of the right of first refusal would have a prior interest, since first in time is first in right when the equities are equal. It is conceivable that such a situation could arise in oil and gas practice since interests are commonly held in trust and not registered (especially in respect of Crown leases).

The problem of how diligent a prospective purchaser should be in searching for rights of first refusals also arises. Is the prospective purchaser in a better position if he does not have knowledge of the rights of first refusal? Will the prospective purchaser be deemed to have knowledge if he has not made a reasonable and prudent search?

The *Goldstein* case *(supra)* also deals with a right of first refusal. It illustrates that once a notice has been given pursuant to a right of first refusal clause, that notice is treated as an irrevocable offer to sell to the holder of the right of first refusal. In the *Goldstein* case, the lessor received an offer to sell to a third party which he initially wished to accept. Accordingly, he gave notice to the holder of the right of first refusal. The lessor later changed his mind and decided not to accept the offer to sell to the third party. Nevertheless, he was bound to sell to the holder of the right of first refusal.

F. *Glen Oil Exploration Ltd. et al.* v. *Dekalb Petroleum Corporation* (unreported) (Alta. S.C.)

It would appear to be settled law that in the absence of any other language,

43. *Canadian Long Island and Sadim* v. *Irving Industries,* [1974] 6 W.W.R. 385 (S.C.C.).

44. *Supra* n. 42 at 461.

a gross overriding royalty is to be calculated free and clear of all deductions and a net overriding royalty is to bear a proportionate share of all deductions.

In this case, an agreement provided that a royalty, stated to be a "net overriding royalty", was granted to the plaintiffs. The agreement specifically stated that the net overriding royalty was to be calculated after deduction of all royalties, other overriding royalties and all other burdens against production. The second clause in the agreement stated: "The net overriding royalty is free and clear of any and all deductions and costs of any kind or nature". In calculating the royalty, the defendant had been deducting processing and transportation costs, presumably on the basis that the royalty was a "net royalty". The plaintiff sought to recover the portion of the royalty which they alleged had not been paid to them.

The Court found in favour of the plaintiffs.

Mr. Justice Kirby stated:[45]

> Were the terms in paragraph 2(b) not used there, there is no question but the qualification of that overriding royalty by the word "net" would certainly imply certain deductions as distinguished from gross which implies no deduction.

The Court quoted *Williams* and *Meyers* for the following definition of a royalty:[46]

> A variety of interests not enjoying operating rights may be severed from the working interest, but granted a reservation.

Based upon that definition, the Court concluded:[47]

> You can't construe "all other burdens" as including other costs because then that would include costs of transportation and it seems to me that that must be construed in a sense of non-operating interests that I referred to in *Williams* and *Meyers*.

G. *Sunlite International Inc.* v. *Trans Canada Resources Ltd.* (1978) 5 W.W.R. 345 (Alta. S.C.T.D.)

The plaintiff and defendant were involved in a joint venture with the object of developing certain mining properties in Nevada. A letter agreement was entered into whereby the plaintiff purported to sell its interest in these properties to the defendant. The agreement was conditional upon obtaining the approval of the Vancouver Stock Exchange and the boards of both companies and upon the assignment and quit-claim deed being placed in escrow until the defendant paid the purchase price. Although both boards and the Vancouver Stock Exchange gave their approval, the assignments were not placed in escrow. The defendant also claimed that the vendor did not have good title since there was no evidence that a required consent of a receiver had been obtained by a predecessor to the vendor's title. Thus the defendant refused to pay the purchase price. The plaintiff then sued for damages for breach of contract.

After holding that the Alberta Court had jurisdiction and that British Columbia law was the correct law to apply to the construction of the agreement, Mr. Justice Moore held that the defendant was under no obligation to tender funds until the assignment and quit-claim deed were placed in escrow as the placing of them in escrow had clearly been intended as a condition precedent.

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45. *Glen Oil Exploration Ltd. et al.* v. *Dekalb Petroleum Corporation* (unreported) (Alta. S.C.) at 8.
46. H. Williams & C. Meyers, *II Oil & Gas Law,* 339 (1959).
47. *Supra* n. 45 at 10.

He held that it was not usual in Nevada to make any payments prior to documents being placed in escrow and that it was part of the vendor's conveyancing obligations to place the documents in escrow. He further held that it was necessary that the vendor be capable of transferring good title to the purchaser. It was not sufficient to deliver documentation lacking proper evidence of a valid chain of title. Mr. Justice Moore considered the whole of the document in order to determine the intention of the parties. He quoted Chitty on Contracts where it was said that "greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent".[48] Mr. Justice Moore held that the defendant had not breached the letter agreement, but rather that the plaintiff had breached the letter agreement by failing to place the documents in escrow. The defendant was ready, willing and able to complete its obligations once the plaintiff had placed documentation evidencing good title in escrow. The plaintiff's actions could not be construed as anticipatory repudiation.. The property was deemed to be still held for both parties. The defendant was awarded judgement for one half of its expenditures in maintaining the interest for the joint account since taking over management of the properties at the time of execution of the letter agreement.

The case is presently under appeal. The portion of the judgement dealing with the vendor's failure to prove its title can be treated as *obiter dicta* since the case turns on the plaintiff's failure to place the conveyancing documents in escrow. However, that portion of the judgement is noteworthy since it implies that the vendor was either warranting title or that the purchaser's obligation to complete the transaction was conditional on title verification, even though the agreement of purchase and sale was silent on those matters.

H. *Masai Minerals Limited et al.* v. *Heritage Resources Ltd., Texas International Co.* (1979) 2 W.W.R. 352 (Sask. Q.B.)

The plaintiff, Masai, and the defendant, Heritage, had agreed that Heritage would assign to Masai a gross overriding royalty of 5% with respect to a particular oil and gas property. Heritage and the defendant, Texas International (Tipco), then entered into an agreement for the development of the property. Tipco had full knowledge of the agreement between Masai and Heritage. The petroleum and natural gas lease obtained was subsequently surrendered by Heritage and then re-obtained by Heritage at public sale. Tipco then brought an action against Heritage to which the plaintiff, Masai, was not made a party; Tipco was declared the owner of the lease subject to any existing overriding royalties. In the present action Masai sought a declaration that it was the beneficial owner of the entire lease.

The plaintiff's application was denied.

The basis for Masai's claim was a surrender and assignment clause in the original agreement between Masai and Heritage whereby if Heritage "desired" to surrender the lease it first had to offer it to Masai. At issue were the circumstances of the surrender of the lease by Heritage. It was argued by the defendants that the surrender was accidental and that Heritage had not "desired" to surrender the lease. However, Mr. Justice Hughes rejected this finding of fact. He stated that the effort and expense put out by Heritage to acquire the new lease subsequent to the surrender proved its state of mind

48. *Sunlite International Inc.* v. *Trans Canada Resources Ltd.* (1978) 5 W.W.R. 345 at 357.

many months later, but not that existing at the critical time of the original surrender. On the other hand, Mr. Justice Hughes stated unequivocally that there was no doubt that if Heritage had offered the lease to Masai at the time of the original surrender, Masai would have taken it. It is curious how he determined the state of mind of Masai retroactively to the time of the surrender when he was unable to find the state of mind of Heritage at the time of the surrender.

At the commencement of the trial, Mr. Justice Hughes had allowed an amendment to the defence by which Tipco admitted that its beneficial ownership in the lease was subject to a gross overriding royalty of 5% in favour of Masai and that the right of assignment upon surrender in the original agreement still applied to it. Consequently, Tipco pleaded that the parties were in exactly the same position as they would have been if the first lease had not been surrendered and that the original surrender of the lease should be treated as a clerical error. Since Mr. Justice Hughes held that the surrender was not unintentional, he also held that the relevant assignment provisions of the Masai-Heritage agreement applied to the surrender.

By purporting to follow *Canadian Long Island and Sadim* v. *Irving Industries,*[49] Mr. Justice Hughes stated that in the event the royalty owner knows that the other party is about to surrender the lease, the royalty owner would have an action in specific performance or damages and perhaps injunction. However, once the lease has been surrendered the royalty owner's rights to royalty are gone and he would be limited to an action in damages against the other party. He held that the new lease acquired by Heritage and now held by Tipco was subject to the same royalty as the first lease; he seems to have implied a constructive trust in favour of Masai. The point was academic, since the defence had earlier been amended by Tipco, recognizing that it was still subject to the royalty to Masai.

Mr. Justice Hughes then exercised his discretion in refusing to grant a declaration or specific performance:[50]

> The purpose of the document in which the re-assignment clause was contained was to create the royalty. By reason of the reinstatement of the lease, the royalty is payable, and by the amendment to the defence, admittedly so. Therefore, Masai cannot on any award of damages based on royalty get any less than its entitlement according to the contract. Equity will not grant specific performance where the common law remedy is adequate. If the result is exactly what the contract provides, it must be adequate.

He thus interpreted the Masai-Heritage agreement to the effect that its sole purpose was to protect the royalty and that it was not the intent of the parties that Masai obtain the entire lease. This conclusion is difficult to accept, as what is the purpose of the surrender and assignment clause other than to obtain the entire working interest upon surrender of the lease? If the clause were intended to merely protect the royalty, it could have been so phrased. Clearly it was the parties' intention that this clause do much more than merely protect the royalty. Mr. Justice Hughes, however, felt that it would be unjust to grant Masai more rights in view of the fact that Heritage had done its duty and recovered the leasehold. While this may appear to be a just result, the decision would have been more satisfactory had the issues been thoroughly examined. For instance, no attempt was made to characterize the royalty, including the surrender and assignment clause, as either an interest *in rem* or merely an interest *in personam.*

49. *Supra* n. 43.

50. (1979) 2 W.W.R. 352 at 368 (Sask. Q.B.).

V. LAND TITLES

Three recent cases involve applications of the Alberta Land Titles Act[51] to mineral interests and are relevant to oil and gas lawyers. One of the issues in the *MacFarland* case, referred to above, related to priority between caveats. The *Re Lowden* case, discussed *infra,* involves an improper mineral reservation in a certificate of title. Neither of these cases involve new developments, but merely apply existing law. The *A.V.G. Management Science* case, discussed *infra,* clarifies the applicability of an old common law rule.

A. *MacFarland* v. *Hauser et al. (Supra)*

The facts of this case are discussed above. The case involved a right of first refusal clause. The third party purchaser registered a caveat against the lands claiming an interest under his agreement of purchase and sale. In an action by MacFarland, the holder of the right of first refusal, for specific performance of his right of first refusal, the third party contended that he had priority over MacFarland by virtue of the prior registered caveat. The third party contended that the priority arose from ss. 152 and 203 of the Land Titles Act.

The Supreme Court of Canada (per Martland, J.) rejected the argument advanced by the third party and found that the holder of the right of first refusal had priority.

Sections 152 and 203 of the Land Titles Act give priority to a caveator over any unregistered interest (excepting cases of fraud), regardless of actual or constructive notice of an interest existing prior in time to the caveator's interest. The Court stated that the third party had more than mere notice in this case since his rights under the agreement of purchase and sale were expressly stated to be subject to the lease containing the right of first refusal. The third party could not obtain a greater interest by having registered a caveat than he had under the agreement creating the interest. The purchase agreement was made expressly subject to MacFarland's lease and, therefore, to the right of first refusal. Thus, notwithstanding the caveat, the third party's interest was subject to MacFarland's right of first refusal.

B. *Re Lowden* (1978) 14 A.R. 265 (Alta. S.C.)

This was an application to discharge a Registrar's caveat registered against a mineral title. The facts were as follows:

1. Clark was the fee simple owner of certain lands and the certificate of title issued in his name contained no mineral reservations;
2. Clark transferred the lands to Lowden, the transfer containing the following reservation, "reserving unto His Majesty, His Successors and assigns all mines and minerals". The certificate of title issued to Lowden contained the reservation, "excepting thereout all mines and minerals";
3. Lowden transferred the land to James and Donald MacEachern by means of a typed transfer. A reservation was added in ink in writing to the transfer, "Except Mines and Minerals". The written addition was not initialled. The certificate of title issued to the MacEachern's contained the reservation, "excepting thereout all mines and minerals";
4. The successors in interest to Lowden sought to remove the Registrar's caveat against their mineral title. The successors in interest to the MacEacherns were served with notice of the application but did not appear.

51. R.S.A. 1970, C. 198, as am.

The Registrar appeared and argued that Lowden was not entitled to the relief claimed.

Mr. Justice Laycraft granted the application and made an order for removal of the Registrar's caveat.

The Court reasoned that the reservation to the Crown contained in the original certificate of title issued to Lowden was mere surplusage and should be ignored since the Crown had no interest to be reserved. Thus, when the first certificate of title was issued to Lowden, he was entitled to be the holder of the mines and minerals. In this respect, the Court followed the law as previously established.[52]

The Registrar contended that the Court could not give effect to the written reservation added to the typed transfer. The Registrar argued that the onus was on Lowden to show that the rectification of the transfer was appropriate before effect could be given to the written reservation. The Court rejected this argument, stating that the mere fact that part of a document is written and part is typed is not evidence that the transfer was altered. Thus there is a presumption that the original contained the reservation. In fact, the onus would be on the MacEacherns to show that the written portion of the transfer should be deleted. This onus was not removed since no evidence was led to that effect.

C. *A.V.G. Management Science Ltd.* v. *Barwell Developments Ltd. et al. (1979) 1 W.W.R. 330, (S.C.C.)*

In this case the Supreme Court of Canada held, in *obiter dicta*, that the rule in *Bain* v. *Fothergill* should no longer be followed in respect of land transactions in those provinces which have a Torrens system of title registration or a similar system. The rule in *Bain* v. *Fothergill* is a common law rule which limits the damages to be awarded to a purchaser for breach of contract for the sale of land. Under the Torrens system, the usual rules relating to damages for breach of contract are applicable.

52. *See Public Trustee for Alta.* v. *Pylypow*, [1973] 6 W.W.R. 673 (Alta. S.C.T.D.).

APPENDIX A

1. *The Alberta Gas Trunk Line Company Limited* v. *Amoco Canada Petroleum Company Ltd. et al.*
2. *A.V.G. Management Science Ltd.* v. *Barwell Developments Ltd. et al.*, [1979] 1 W.W.R. 330 (S.C.C.).
3. *Canadian Industrial Gas and Oil Ltd.* v. *Province of Saskatchewan*, (1978) 23 NR 257 (S.C.C.).
4. *Caribe Holdings Ltd.* v. *The Alberta Energy Resources Conservation Board*, 13 A.R. 132.
5. *Caswell* v. *Alexandra Petroleums Ltd.*, [1972] 3 W.W.R. 706 (Alta.).
6. *Central Canada Potash Company Ltd.* v. *Government of Saskatchewan et al.*, (1978) 88 D.L.R. (3d) 609 (S.C.C.).
7. *Crestbrook Pulp and Paper Ltd.* v. *Columbia Natural Gas Limited*, [1978] 5 W.W.R. 1 (B.C.C.A.).
8. *Glen Oil Exploration Ltd. et al.* v. *Dekalb Petroleum Corporation*, (unreported) (Alberta S.C.).
9. *Goldstein et al.* v. *Grant.* (1978) 82 D.L.R. (3d) 236 (S.C.O. App. Div.).
10. *Green, Michaels & Associates Ltd. et al.* v. *The Public Utilities Board*, [1979] 2 W.W.R. 481 (Alta. S.C. App. Div.),
11. *Hanen* v. *Imperial Oil Enterprises Ltd.*, (1978) 7 Alta. L.R. (2d) 331 (Alta. D.C.).
12. *Hidrogas Limited* v. *Great Plains Development of Canada Limited*, [1978] 5 W.W.R. 22 (Alta. S.C.T.D.).
13. *Libra Holdings Ltd.* v. *Westhill Resources Ltd.*, (1978) 14 A.R. 529 (DC).
14. *Livingston* v. *Siebens Oil and Gas Ltd.*, [1978] 3 W.W.R. 484 (Alta. S.C.T. App. Div.).
15. *Re Lowden* (1978) 14 A.R. 265 (Alta. S.C.)
16. *MacFarland* v. *Hauser et al.*, (1978) D.L.R. (3d) 449 (S.C.C.).
17. *Masai Minerals Limited et al.* v. *Heritage Resources Ltd., Texas International Co.*, [1979] 2 W.W.R. 352 (Sask. Q.B.).
18. *Norcen Energy Resources Limited* v. *Oakland Petroleums Limited*, (unreported) (Alta. D.C.).
19. *Northwestern Utilities Ltd.*, v. *City of Edmonton*, (1978) 23 N.R. 565 (S.C.C.)
20. *Rockland Industries Inc.* v. *Amerada Minerals Corporation of Canada Ltd.*, (1978) 14 A.R. 97 (Alta. S.C. App. Div.).
21. *Rozander* v. *The Energy Resources Conservation Board and Calgary Power Ltd. #1*, 13 A.R. 461 and #2 13 A.R. 479 (Alta. S.C. App. Div.).
22. *Russ Burns Petroleum Consultants Ltd.* v. *Union Oil Company of Canada Limited et al.*, (unreported) (Alta. S.C.T.D.),
23. *The Saskatchewan Power Corp. et al.* v. *Trans Canada Pipe Lines et al.*, (1978) 88 D.L.R. (3d) 289 (S.C.C.).
24. *Sunlite International Inc.* v. *Trans Canada Resources Ltd.*, [1978] 5 W.W.R. 345 (Alta. S.C.T.D.).