RECENT CASES OF INTEREST TO OIL AND GAS LAWYERS

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This contains the annual review of cases dealing with matters pertinent to the work of oil and gas lawyers.

I. INTRODUCTION

The purpose of this paper is to draw attention to cases arising over the past year which appear to be of interest to oil and gas lawyers. The cases are briefly summarized and in no sense intended to be a substitute for a reference to the full reports.

In the past, the manner of presenting the cases has varied from year to year. In some years there has been merit in arranging the cases under certain groupings of subject matter, for example constitutional law. Although many recent or pending constitutional cases are still of immense importance, the main decision under that heading this year is the well-known CIGOL case which is the subject of a separate article. In consequence it will need but brief attention here. It appears that alphabetical order is the most convenient way in which to arrange the cases this year. For the purpose of convenience, a table of cases is set out in Appendix A.

II. DISCUSSION OF RECENT CASES

Canadian Export Gas & Oil Ltd. v. *Flegal [1978] 1 WWR 185*

The defendants were successors in title to a lessor who had granted to the plaintiff's assignor a petroleum and natural gas lease containing a right of renewal on terms that the renewal included a further covenant for renewal. Thus the lease appeared to grant the lessee or his successor a perpetual right of renewal. The Trial Division of the Alberta Supreme Court decided that the petroleum and natural gas lease in question was indistinguishable from the lease considered in the leading decision of the Supreme Court in Canada in *Berkheiser* v. *Berkheiser* [1957] S.C.R. 387. While acknowledging that such a transaction had, for some purposes, been treated as a lease, the Court concluded that for the purposes of the case it was to be regarded as creating either a profit à prendre or an irrevocable licence to search for and win the substances named in the lease. The Court pointed out that if the perpetual renewal of the oil and gas lease were permitted (which renewal would only become necessary if there was no development) the result would be to encourage sterilization of the property, whereas the policy behind the rule against perpetuities is to favour free alienation and full use of property. The rule is designed to achieve a balance between freedom of disposition and stagnation. The plaintiff pointed out that the first two renewals (which would arise at the end of the tenth and twentieth years from the commencement of the initial term) would occur within the perpetuity period; but the Court refused to treat

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the first two renewals as separate from the covenant as a whole and held the right of renewal to be void as contrary to the rule against perpetuities.

It is noted that the Court's conclusion appears to differ from the tentative views expressed by the authorities of Lewis and Thompson.[1] It does not appear to be an easy matter to treat the effect of the rule on an oil and gas lease in a different way from its effect on a conventional lease.

There may be an alternative view of the case whereby the rule against perpetuities would apply to the lease, but because of the particular terms of the transaction the right of renewal would not be contrary to the rule. The rule is that the grant of an interest in land is void if, under the terms of the grant, it will not vest within the perpetuity period, namely, a life or lives in being and/or 21 years.

In this case there was a lease which granted an interest in land for 10 years with a right of renewal. Such a right, being an option which must be exercised at the end of the 10 year term, is therefore within the period of 21 years and valid. The right to renew the lease on the same terms, including the option of renewal, would, of course, give the lessee, (in the event of his exercising the first option) a lease with a further right of renewal. But the second right of renewal will not be granted until the first renewal lease is granted, and accordingly will be exercisable within 10 years of the grant. Thus each successive right of renewal must be judged from the time when it is granted. Viewed in this way, the whole series of transactions fall within the limits of the rule. It is thought that the rule is applicable in the same way to a conventional lease and that it is not correct to regard a covenant for renewal in a conventional lease as an exception to the rule.

Canadian Industrial Gas & Oil Ltd. v. *Government of Saskatchewan et.al.* [1977] 6 W.W.R. 607 (S.C.C.)

This Supreme Court of Canada decision is undoubtedly the most significant judgement of the year in the oil and gas field. Unfortunately, the problem of the oil companies has not disappeared, since the Saskatchewan legislature has now passed The Oil Well Income Tax Act, 1978, still to be proclaimed. This legislation is intended to have the effect of collecting retroactive taxation in approximately equal amounts to the taxation which has been disallowed. The Supreme Court has, however, reversed the judgements below and held that the mineral income tax and royalty surcharge under The Oil and Gas Conservation, Stabilization and Development Act, 1973,[2] are *ultra vires*. Further comment on the case in this paper is unnecessary since it is the subject matter of another article.[3] The Supreme Court of Canada has recently heard argument as to whether or not the plaintiffs should collect interest on the invalid taxes already paid, but that decision has been reserved.

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1. Lewis & Thompson, 1 *Canadian Oil & Gas*, 105, 171.
2. S.S. 1973-74, c. 72.
3. Elliott, *Jurisdictional Dilemmas in Resource Industries*, (1979) 17 Alta. L. Rev.

The judgement of the Supreme Court of Canada is still awaited in the case of *Central Canada Potash Co. Limited and A.G. Canada* v. *Government of Saskatchewan* [1977] 1 W.W.R. 487. Although dealing with potash rather than oil and gas, it is so closely related in its constitutional aspects to the *CIGOL* case that the judgement, when handed down, will undoubtedly be of great interest to oil and gas lawyers.*

Carmel Holdings Ltd. v. *Atkins et.al.* [1977] 4 W.W.R. 655 (B.C. S.C.)

The defendant Atkins converted his furnace from one using heavy oil to one using light oil, after the defendant Birnie Ltd. inspected and tested his under-ground fuel storage tank and concluded it was usable. The tank was filled with light fuel oil which subsequently leaked and seeped underground to the plaintiff's hotel property. The seepage damaged shrubs and trees and filled the base of the hotel elevator shafts, resulting in a nauseous smell which permeated the hotel. The plaintiff sued the defendant Atkins for trespass and nuisance and the defendant Birnie for negligence. The British Columbia Supreme Court held that the defendant Birnie Limited had not been negligent and the action against him was dismissed. The defendant Atkins was liable on the basis of the rule in *Rylands v. Fletcher*, and also in nuisance. This case is interesting on the facts and useful as a reminder of the hazards of storing oil. Since it appears to be well in accordance with established legal principles, it requires no particular comment.

Re The Coloured Gasoline Tax Act [1977] 4 W.W.R. 436 (B.C. S.C.)

This judgement was given by way of supplemental reasons to an earlier judgement in the same case.[4] Mr. Justice Craig in Chambers in the British Columbia Supreme Court affirmed an assessment of the B.C. Minister of Finance under the provisions of The Coloured Gasoline Tax Act.[5] The Chambers Judge held that the Act as first enacted was *ultra vires* as imposing an indirect tax, because it was a tax imposed upon the purchaser, and "purchaser" was defined as one who purchased gasoline "when sold for the first time after its manufacture or in importation into the Province." By a later amendment, the definition was revised to define "purchaser" as one who purchased or received delivery of gasoline for "his own use or consumption." As thus amended, the tax ceased to be an indirect tax and the Act was declared *intra vires*. One further problem arose because under the original Act, the definition of "gallon" was repugnant to the federal definition in the Canadian Weights and Measures Act.[6] A revision of the federal Act, effective 1 August 1974, changed the definition of "gallon" so that the provincial definition was no longer repugnant and cured any problem of "paramountcy" which arose under the original Act.

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* On October 3, 1978, the Supreme Court of Canada handed down judgements both on the interest issue in CIGOL and on the *Central Canada Potash* case. Both rulings were against the Government of Saskatchewan.

4. Reported at [1976] 6 W.W.R. 315.
5. R.S.B.C. 1960, c. 63, as amended.
6. R.S.C. 1970, c. W-7.

In the earlier judgement, the learned Chambers Judge held that the provincial legislature had power to amend an *ultra vires* statute so that it became *intra vires* notwithstanding Canadian authorities referred to at pages 325 and 326 of the judgement, which had held that an *ultra vires* statute could not be amended, being a nullity.

The most interesting point in this case is whether as the Chambers Judge held, an *ultra vires* statute can be amended and thus rendered *intra vires*, or whether, as held in other cases, such amendment is impossible. The decision is under appeal.

Golden Eagle Canada Limited v. *St. Romuald d'Etchemin* [1977] 2 S.C.R. 1090

This decision is really a municipal tax case. Golden Eagle had five oil tanks under construction and various related works which were completed. The municipal assessor assessed the tanks at eighty percent of the replacement cost at the time of his visit. The company, appealing against the assessment, argued that the real value of the partially completed tanks was nil and remained nil so long as the construction was uncompleted and the tanks were not in operation. The Supreme Court upheld the view of the Court of Appeal that the tanks, although not completed, were identifiable with the function they were to perform, and that their real value was proportional to their partial completion.

Gustavson Drilling (1964) Limited v. *M.N.R. [1977] 1 S.C.R. 271*

The Supreme Court of Canada dismissed the appeal of Gustavson Drilling (1964) Limited and disallowed drilling and exploration expenses which the taxpayer sought to deduct from income earned in subsequent years. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960. At that time its parent company acquired substantially all of its property in consideration of a cancellation of a debt due. Entitlement to claim the undeducated drilling and exploration expenses did not accrue to the parent company as the transaction had not been carried out in the manner required by the 1956 Act to enable a successor company to claim the deductions of its predecessor. The deducations were therefore left with the predecessor company (the appellant.)

After the disposal of its property in 1960, the appellant company remained inactive until 1964, when all of its outstanding shares were purchased by Mikas Oil Co. Ltd. from the parent company, then liquidated. Under the new management, the appellant company recommenced business and then attempted to deduct the accumulated drilling and exploration expenses, which had been incurred in the period prior to its disposition of property in 1960. The Minister of National Revenue denied the deduction, contending that by a statutory amendment of 1962 it was the parent company which qualified as a successor company to claim the undeducted drilling and exploration expenses for the years 1962 and thereafter, even though it did not so qualify in 1960 when the acquisition was made and in 1961. Although the application of the statute to the circumstances seemed somewhat unfortunate, the majority of the Supreme Court upheld the Minister's contention because the language of the statute was unambiguous and clear and could have no other result.

Henuset Bros. Ltd. v. *PanCanadian Petroleums Ltd.* [1977] 5 W.W.R. 681 (Alta. T.D.)

The plaintiff was a contractor in the business of excavating pipeline trenches. It contracted with the defendant, PanCanadian Petroleums Ltd., (P.C.) to excavate a pipeline trench for a natural gas gathering system. PanCanadian contracted with the defendant, Shawinigan-Pryde Flavin Company (S.P.F.) to provide engineering services and construction supervision for the project. S.P.F. sent out letters to all other pipeline owners in the area enclosing maps of its proposed systems and requesting they mark on the maps their existing lines. A defendant, Alberta Eastern Gas Limited (A.E.G.) returned the map with its low-pressure lines showing, but neglected to show a six inch high-pressure line. E. was designated as S.P.F.'s field representative and gave instructions to P., the foreman of the plaintiff's ditching crew. E also gave daily instructions to the plaintiff's ditching crew. E. and P. went over the ground looking for foreign lines and consulted maps provided by foreign owners. Although E. had in his possession small-scale survey maps which showed all lines, P. did not receive them despite his repeated request for better maps. It was clear that P. relied on E. to inform him of the presence of foreign lines. At one point P. and E. found an A.E.G. high-pressure line that was not on the map A.E.G. had returned. P. and E. later informed H., an employee of A.E.G., who both pointed out to E. and reported to the company's Calgary office that all high-pressure lines did not appear to be marked on the map. Neither E. nor A.E.G. did anything more. On 14th November 1973, the plaintiff's ditching machine struck a six inch high-pressure line belonging to A.E.G. and was destroyed by fire. P. had not been forewarned of the line's existence and claimed there were no surface indications of the line. The plaintiff claimed damages from the defendant P.C. in contract, and from S.P.F. and A.E.G. in tort. P.C. was held liable to the plaintiff in contract because it was bound to see that the plaintiff knew of all foreign lines. There was also a breach by S.P.F. of its agreement with P.C. to perform P.C.'s obligations to the plaintiff. P.C. was therefore entitled to indemnity from S.P.F.

Both S.P.F. and A.E.G. were found negligent and were liable in tort. As P. had known that at least one A.E.G. pipeline was not on the map, P. was negligent in not making direct contact with A.E.G. Since P. was the foreman of the plaintiff's ditching crew, the plaintiff was negligent. Liability was apportioned as follows: Plaintiff — 25%, S.P.F. — 50% and A.E.G. — 25%.

There could not be contribution between those liable in contract and those liable in tort. However, the same effect was achieved as the plaintiff was entitled to its full damages in contract as against P.C.; when that judgement flowed through to S.P.F. by virtue of its indemnity to P.C., S.P.F. (also liable in tort) could claim contribution from A.E.G. and the plaintiff.

Hi-Ridge Resources Ltd. v. *Noble Mines & Oils Ltd.* [1977] 4 W.W.R. 393 (B.C. S.C.)

The plaintiff was granted specific performance for the transfer by the defendant of one-half of its interest in certain farmout lands.

The plaintiff and defendant had an option agreement whereby the transfer could be obtained after the plaintiff served the defendant with a "proposal notice" for drilling a further test well under the terms of the farmout agreement, and paid the defendant all its share of the cost of drilling the test well as defined by the operating agreement. The plaintiff negotiated for the test well to be drilled, served the required notice, and paid the defendant's costs. When the well was completed the plaintiff requested transfer of the defendant's half interest. The defendant refused on the grounds that certain requirements of the operating agreement, such as daily reports and complete Nikanassen testing, had not been met. In granting specific performance, the Court held that the plaintiff had done the two things required by the option agreement. As it was not a party to the operating agreement, it had no means of controlling or influencing anything under it. Further, because the defendant had not objected or taken any steps at the time, it was estopped from not completing the option agreement. The decision is under appeal.

Imperial Oil Ltd. v. *Nova Scotia Light and Power Company Limited* [1977] 2 S.C.R. 817

The parties entered into an agreement whereby Imperial was to supply the respondent, Nova Scotia, with its entire requirements of bunker fuel oil for the years 1970 to 1976. The agreement provided for appropriate increase or decrease in respect of any "tax, duty, charge or fee applicable to the product or its manufacture, sale or delivery." Imperial sought to pass on, under the terms of the agreement, certain new taxes imposed by the Government of Venezuela. The trial judge, the Appeal Division and the Supreme Court of Canada all decided that the agreement contemplated only Canadian taxes on the product borne by Imperial and not by any other company in the Exxon Group. Imperial also claimed payments which it was required to make in respect of the Maritime Pollution Claims Fund levy under the Canada Shipping Act.[7] This claim was upheld by the trial judge. On appeal, Nova Scotia cross-appealed in respect of such levy on imports of crude oil by Imperial to its refinery. It conceded the validity of the claim in so far as it related to the transportation of "the product" bunker fuel oil to Nova Scotia's plants from the Dartmouth refinery. The Appeal Division allowed the cross-appeal. This decision was upheld by the Supreme Court of Canada, although it disallowed one minor item.

Re Interprovincial Pipeline Ltd. and National Energy Board (1977) 78 D.L.R. (3d) 401 (Fed. C.A.)

The issue in this case arose during a hearing convened by The National Energy Board under Part IV of the National Energy Board Act[8] for the purpose of determining whether the tolls charged by Interprovincial are just and reasonable. During the hearing, the Board ordered Interprovincial to file financial information relating to the operation of Lakehead, a wholly owned subsidiary of Interprovincial which operates the connecting portion of Interprovincial's oil pipeline in the United States. The question on this appeal from

7. R.S.C. 1970, c. S-9.
8. R.S.C. 1970, c. N-6.

the Board's order was limited to whether or not the Board had jurisdiction to order the filing of financial information not already in existence. The Ontario Energy Ministry and the B.C. Energy Commission presented arguments on the appeal in support of the Board order.

Interprovincial pointed out that to comply with the order it would have to request Lakehead staff to make estimates of future costs, make allowances and adjustments to annualize and normalize existing data and prepare schedules of financial information not already in existence. The Board argued that without the power to demand such information, the complexity of energy questions would make it impossible for it to discharge its statutory responsibilities. While conceding that the information could be obtained by *viva voce* evidence, the practicality of such a solution was questioned.

The court was unable to point to legislative provisions sufficiently broad to give the Board the clear authority it claimed. However, it held that there was a practical necessity for such power, and found it to exist by implication from the nature of the regulatory authority that has been conferred on the Board. To hold otherwise would defeat the purpose of the statute.

Therefore, the appeal was dismissed.

Reference by Master of Titles to a Judge in Re Minerals NW 23-47-21 W2 unreported, 8 May 1978, Judicial Centre of Regina, #249Q.B.M. (Sask.).

This decision arose from a reference by the Master of Titles requesting the Court to determine the ownership of mines and minerals in the NW 23-47-21 W2.

The facts of the case are complex. The Winnipeg Western Land Corporation Limited was shown by an existing Certificate of Title No. 233 KO, dated August 24, 1922, to be the registered owner of the mines and minerals. By another existing Certificate of Title No. 77PA05506 dated March 18, 1977, Olaf Marinius Nelson and Marjorie Lorraine Nelson were also shown to be the registered owners thereof. Under a Crown grant of 6 November 1902, ownership to several sections of land, including the said NW 23, passed from the Government of Canada to the Winnipeg Western Land Corporation Limited. Title issued on the 14th of February 1903. On the 24th of August 1922, a new Certificate of Title, No. 233 KO, was issued by the Registrar in the name of the Winnipeg Western Land Corporation Limited to the whole of Section 23-47-21 W2. It appeared that the original title, No. 233 KO, as it appeared in the registry at Prince Albert, was not identical with the record of the title as shown on the duplicate Certificate of Title No. 233 KO. The title was cancelled as to NW 23 and a new certificate, No. 46 LS, issued to Freferick W. Warren pursuant to a transfer dated 15 August 1924, registered on 10 September 1924. The transfer to Mr. Warren excepted and reserved all mines and minerals, including oil and natural gas. His title issued on the 10th of September 1924 as No. 46 LS making no reference to mines and minerals other than a notation in the upper right hand corner reading, "Subject to the mineral exceptions, reservations and conditions contained in Instrument registered as Nol AO 3021" (that being the transfer to Mr.

Warren). Mr. Warren executed a transfer of the NW 23 to Albert Olaus Farden on 3 October 1936, without specific mention of mines and minerals. Mr. Farden apparently held his transfer for nearly 10 years, since it was not until 18 June 1946 that title No. 66 XN issued to him. The certified certificate of title before the Court showed that the words "minerals included" were stamped in the upper right hand corner.

On 5th August 1946, Mr. Farden transferred all his estate and interest in the land to The Director, Veterans' Land Act without specific mention of mines and minerals. The Court held that the Director, and the Nelsons after him, were bona fide purchasers for the value of the entire quarter section including mines and minerals. It was held that the Director took title from one whose title had clearly indicated that minerals were included. "Minerals included" was stamped in the right hand corner of the title, but that stamp was crossed out. Immediately above, a stamp appeared, "Subject to the mineral exceptions, reservations and conditions contained in an Instrument registered as No. AO 3021". A line then appeared through that stamp, presumably purporting to strike it out. The words, "See note" appeared with an asterisk. The asterisk directed one to the location lower down on the title where the following appeared:

> The within Title issued showing "Minerals Included" contrary to LTO records since Transfer AO3021 by Wpg. Western Land Corpn. reserved the minerals. Title No. 46 LS issued from said Transfer showed no mineral reservations and Titles following through to within Title.
>
> Cancellation memo on Title No. 23 K.O. was amended to show the reservation after the six year period mentioned in Section 182 L.T. Act H. de la Gorgendiere, Registrar, 24 September 1952.

On January 18, 1977, the Director, Veterans' Land Act brought an application before Mr. Justice Sirois of the Queen's Bench of Saskatchewan under s. 194 of The Land Titles Act.[9] Mr. Justice Sirois issued the following fiat on 28th January 1977:

> The Registrar is hereby ordered to delete the memorandum placed upon the Director's Certificate of Title on the 24th of September A.D. 1952, and to show the said Certificate of Title as 'including minerals.' A.L. Sirois, J.

On March 18, 1977, a transfer from the Director, Veterans' Land Act, dated 5th February 1970, was registered in favour of Olaf Marinius Nelson and Marjorie Lorraine Nelson. The transfer, in recording the legal description of the land, stated "minerals included". Title No. 77AO5506 issued to Mr. and Mrs. Nelson on 18th March 1977, showing "minerals included".

The Winnipeg Western Land Corporation Limited had no further interest in the matter since, by transfer dated March 1, 1978, it had transferred its interest to Her Majesty the Queen in right of Saskatchewan. The transfer was sent to the Department of Mineral Resources in the month of March, 1976; up to the point of the judgement, it had never been registered. The Court had to decide whether the ownership of Her Majesty in right of Saskatchewan or the ownership of Mr. and Mrs. Nelson should prevail, each claiming under an existing mineral title. The Court found itself unable,

9. R.S.S. 1965, c. 115.

without some doubt and uncertainty, to reconstruct the events that had occurred. The Court cited a decision of the Saskatchewan Court of Appeal in *Hudson's Bay Company* v. *Shivak et. al.*[10] This case held that the cancellation of a title by the Registrar amounted to an effective cancellation (notwithstanding that the duplicate certificate of title was not called in or cancelled) and that in consequence another title issued during the period of cancellation was valid, inasmuch as the cancelled title could not then rank as a pre-existing title even though the cancellation was an error. The case thus held that the state of the certificate of title was the determining factor, and not the state of the duplicate certificate.

The Court concluded that at some point in time, Title No. 233 KO, at least as it pertained to NW 23-47-21 W2, was cancelled through administrative error. It was held that the Minister of Mineral Resources had not been able to show by preponderance of evidence that an alive and uncancelled title to the mines and minerals in NW 23-47-21 W2 in fact existed to the date that title to such mines and minerals issued to The Director, The Veterans' Land Act as a bona fide purchaser for value of those mines and minerals.

The case concluded in complexity and uncertainty. It appears that the decision is in accordance with previously stated law since, on the uncertain facts, the Court concluded that at the time of the issue of the Nelson title no prior certificate of title existed. It is understood that the matter is not likely to be appealed.

Regina v. *Industrial Coal and Minerals Ltd.* (1977) 4 W.W.R. 35 (Alta. T.D.)

The Crown in right of Alberta granted a petroleum and natural gas lease dated 26th October 1965 which was transferred to the applicant, Industrial Coal and Minerals Ltd. On 31 August 1975, approximately two months before the lease was to expire, the applicant wrote the Director of Minerals stating that the lease was to be continued under s.s. 126 (1)(a) and (b) of The Mines and Minerals Act[11] because of an abandoned well on the property which the applicant considered to be capable of producing. The Supervisor of Leases replied on 26 September, but did not address himself to the issue. The applicant wrote again. It was not until 17 October that the Supervisor replied that a rent reduction would not be granted "until a well capable of producing natural gas in commercial quantity is drilled on the location". On an application by way of notice of motion, the applicant contended that the rights in the abandoned well passed to him under the lease, that the well was capable of production of gas in paying quantities and that the lease should have been continued after its ten years term pursuant to s. 126. The applicant's first contention failed as there was nothing in the lease to show the lessor granted the abandoned well. On the second contention it was held that the Minister was under a duty to act fairly. As he had not given a reply to the issue until a few days before the lease expired, he had not given the applicant reasonable notice of

10. [1965] 53 W.W.R. 695.

11. R.S.A. 1970, c. 238.

the Department's requirements and an opportunity to satisfy them. His actions were manifestly unfair. A declaration was granted which stated that the lease was in full force and effect and that the parties were restored to the legal positions they occupied as of 7 September 1975. This date was selected as a reasonable period of one week from the applicant's letter of 31 August 1974, to allow the Minister to respond.

The case is of interest as the legal obligation to act fairly in the course of exercising administrative functions is not at present precisely or well-defined in our jurisprudence. A declaration of such a policy may be useful in these days when so much in the oil and gas industry depends upon the way in which government officials carry out administrative functions.[12]

Saskatchewan Power Corporation v. *TransCanada Pipelines Limited* (A.G. of Can. Intervener) [1977] 3 W.W.R. 254 (Fed. C.A.)

The parties signed a contract in 1969 which provided for delivery of gas by Saskatchewan Power Corporation (S.P.C.) to TransCanada Pipelines between 1969 and 1974 and for the redelivery of gas by TransCanada to S.P.C. between 1974 and 1981. In 1974 S.P.C. gave TransCanada notice of the amounts it required and TransCanada filed the contract according to s. 51(2) of the National Energy Board Act,[13] requesting approval of rates and tolls. S.P.C. applied by notice of motion for a special hearing before the National Energy Board, separate and apart from the rate hearing, as to the validity of the filing. The ground was that the transaction was an exchange and not a sale. On appeal from the National Energy Board, the Federal Court of Appeal held that the Board did have broad enough powers to make a decision of a declaratory nature, apart from the exercise of its rate-making jurisdiction. In determining the transaction as a sale, the Board was correct in considering only the terms of the contract and not evidence relating to the background of the transaction. Both the delivery and redelivery aspects of the contract contemplated the transfer of property for a price in money and thus excluded the concept of exchange. The fact that the transaction may have been intraprovincial rather than interprovincial did not render the legislation *ultra vires*. The Act regulated interprovincial pipelines and the transmission here would be through an interprovincial pipeline. The legislation, which came into force in

12. Upon presentation of the paper at the Seminar, it was pointed out that the trial judgement had been reversed in the Appellate Division, as yet unreported. The Appellate Court took the view that the letter of 31st August 1975 did not constitute a request by the lessee for a ruling as to whether or not the abandoned well was a producing well entitling the company to continue the lease under s. 126 of the Act. The trial judgement was reversed and the appeal allowed. The Appellate Court allowed the appeal on the basis that the lessee is free to take such proceedings as it deems advisable if it is of the view that there was a delay on the part of either the Department or the Minister which gave rise to a right to have the 1965 lease continued or a new lease granted. It would seem that the Appellate Court has not expressly or implicitly overruled the trial judgement's view of the law that the Minister had an obligation to act fairly and avoid unfair delays in the course of exercising his functions. It is to be hoped that when another case arises in which the facts are more favourable, the principle of law proclaimed by the trial judge will again be declared.

13. R.S.C. 1970, c. N-6.

1970, was not retrospective in operation as the transaction did not become a sale until 1974 when S.P.C. gave notice to TransCanada of the quantities of gas required.

Leave to appeal to the Supreme Court of Canada has been obtained.

Seymour Management Limited and the Queen in right of British Columbia v. *Kendrick et. al. and Princeton (Third Party)* [1978] 3 W.W.R. 202 (B.C. S.C.)

The Village of Princeton leased to Kendrick certain lands, subject to the reservations expressed in the Crown grant, which read in part, "to raise and get thereout any minerals, precious or base". The Village covenanted in the lease that it held title "to the tailings materials presently situate" on the said land. The plaintiff entered into agreement with Kendrick and advanced to him $22,000. The plaintiff then refused to make further payments asserting that title to the minerals in the tailings was in the Province of British Columbia and not in the defendant, Kendrick. The plaintiff claimed rescission.

The British Columbia Supreme Court held there was a valid lease as the Village was the owner of the tailings materials, including the minerals therein. The intention of the parties to the Crown grant could not have been to reserve the Crown's title to minerals in tailings which at the time of the Crown grant were regarded as of no practical value. The case appeared to turn upon the true construction of the reservation clause in the Crown grants. This, in turn, raised the question of fact as to what the words "minerals, precious or base" meant in the vernacular of the mining world, the commercial world and the landowners, at the time they were used in the Crown grants.

Texaco Canada Limited and Manson v. *Clean Environment Commission* [1977] 6 W.W.R. 70 (Man. Q.B.)

The Clean Environment Act[14] established a Clean Environment Commission, empowered by s. 14(14) to determine the liability for and the costs involved in a restoration after the Province has paid for clean-up and restorative operations resulting from damage to the environment. The applicants, who were the vendor, owner and lessor of a gas station, contended that the powers given the Commission to fix liability and costs were in conflict with s. 96 of the B.N.A. Act and were *ultra vires*. The Manitoba Queen's Bench held that the powers were *ultra vires* as they were not complementary to the administrative duties of the Commission and not necessary to support the precepts of the legislation. The identification of fault and the finding of liability fell within s. 96 of the B.N.A. Act. The declaration that the legislation was *ultra vires* extended only to s. 14(14) leaving the remainder of the statute unimpaired.

It is presumed that a section of such far-reaching practical effect may be the subject of a further appeal.

Western Decalta Petroleum et. al. v. *The Public Utilities Board of the Province of Alberta*, unreported, 30 March 1978, Judicial District of Edmonton, Appeal #10741 (Alta).

14. S.M. 1972, c. 76.

Mr. Miles H. Patterson, Q.C. has brought this case to the attention of the members of The Canadian Petroleum Law Foundation.

On 28 November, 1975, the appellants made an application to the Public Utilities Board pursuant to s. 6 of the Gas Utilities Act[15] for an increase in field prices of gas as fixed by a previous Board order. A public hearing was held in May 17, 1976. On May 27, 1976 the Alberta legislature amended the Gas Utilities Act. The amendments stated that the Board was not to proceed with any application under certain sections, including s. 6, unless authorized by Order-in-Council. On July 14, 1976 O.C. 799/76 issued authorizing the Board to proceed with the application of the appellants. The Board considered the application and made its decision on November 4, 1976. The issue raised on the appeal was whether the Board is authorized to make a retroactive order, that is, one that takes effect on or after the date of *application* rather than on the date of the *order* or some date thereafter.

The Appellate Division of the Supreme Court of Alberta held that the Board could only make prospective orders. It was pointed out that s. 52(1) of the Public Utilities Board Act[16] authorizes the Board to make orders that "come into force at a future fixed time or upon the happening of any contingency," and that s. 6(1) of the Gas Utilities Act authorizes the setting of "prices to be paid."

This decision is of considerable interest inasmuch as it is understood that orders have been issued in the past which are retrospective in effect and which appear to be in conflict with this judgement.

APPENDIX A – TABLE OF CASES

Canadian Exports Gas & Oil Ltd. v. *Flegel* [1978] 1 W.W.R. 185 (Alta. T.D.)

Canadian Industrial Gas & Oil Ltd. v. *Government of Saskatchewan et. al.* [1977] 6 W.W.R. 607 (S.C.C.)

Carmel Holdings Ltd. v. *Atkins et. al.* [1977] 4 W.W.R. 655 (B.C. S.C.)

Coloured Gasoline Tax Act, Re The., [1977] 4 W.W.R. 436 (B.C. S.C.)

Golden Eagle Canada Limited v. *St. Romuald d'Etchemin* [1977] 2 S.C.R. 1090

Gustavson Drilling (1964) Limited v. *MNR* [1977] 1 S.C.R. 271

Henuset Bros. Ltd. v. *PanCanadian Petroleums Ltd.* [1977] 5 W.W.R. 681 (Alta. T.D.)

Hi-Ridge Resources Ltd. v. *Noble Mines & Oils Ltd.* (1977) 4 W.W.R. 393 (B.C. S.C.)

Imperial Oil Ltd. v. *Nova Scotia Light and Power Company Limited* (1977) 2 S.C.R. 817

Re Interprovincial Pipeline Ltd. & National Energy Board (1977) 78 D.L.R. (3d) 401 (fed. C.A.)

15. R.S.A. 1970, c. 158, as amended.
16. R.S.A. 1970, c. 302, as amended.

Reference by Master of Titles to a Judge in Re Minerals NW 23-47-21 W2, unreported, 8 May 1978, Judicial Centre of Regina, #249 Q.B.M. (Sask.).

Regina v. *Industrial Coal and Minerals Ltd.* [1977] 4 W.W.R. 35 (Alta. T.D.)

Saskatchewan Power Corporation vs. *TransCanada Pipelines Limited* (A.G. of Can. Intervener) (1977) 3 W.W.R. 254 (Fed. C.A.)

Seymour Management Limited and the Queen in right of British Columbia v. *Kendrick et. al. and Princeton (Third Party)*, (1978) 3 W.W.R. 202 (B.C. S.C.)

Texaco Canada Limited and Manson v. *Clean Environment Commission* (1977) 6 W.W.R. 70 (Man. Q.B.)

Western Decalta Petroleum Ltd. et. al. v. *The Public Utilities Board of the Province of Alberta*, unreported, 30 March 1978, Judicial District of Edmonton, Appeal #10741 (Alta.).