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Case Comment: *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*

1997 N.J. No. 223, Docket: 97/124, Judgment of the Newfoundland Supreme Court Court of Appeal, Filed September 22, 1997

*by David S. MacDougall**

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This case arose out of the Appeal of the Decision of the Supreme Court of Newfoundland, Trial Division, 1997 St. J. No. 1793 dealing with the environmental assessment of the Voisey's Bay Mining Project. The Voisey's Bay discovery is one of the world's largest nickel/copper/cobalt finds. The proposed development is a keystone to the future economic growth of the Province of Newfoundland and Labrador. Complicating its development is the fact that it is situate in an area of Labrador which is home to both the Labrador Inuit Association (LIA) and the Innu Nation.

The LIA commenced an action against the Newfoundland Government on the basis that it incorrectly accepted for registration under the *Newfoundland Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA) a proposal by the mines developer, Voisey's Bay Nickel Company Limited (VBN), for the construction of certain infrastructure, including a road and airstrip at the proposed mine site. In so doing, the Newfoundland Government treated those undertakings as separate works from the overall mining development which is the subject of a joint environmental assessment process to be conducted pursuant to an agreement previously entered into among the Governments of Canada and Newfoundland, the LIA, and the Innu Nation.

The Appeal raised questions relating to the integrity of, and the role to be played by, environmental assessment processes in the context of the massive mining development proposed at Voisey's Bay. It is apparent from the Court's decision that this case will have ramifications for environmental assessment processes throughout the Canadian mining sector.

The Court highlighted the interaction between environmental considerations and the economic and social benefits that flow from the production of resources. Although noting that the importance of the development of resources to the lives of people should not be understated, they concluded that these considerations could not be allowed to control the agenda without regard to competing environmental interests.

The Court determined that one of the primary initiatives taken by governments in rationalizing economic activity with environmental imperatives, has been the enactment of statutes providing for environmental

Résumé

La décision de la Cour d'appel de Terre-Neuve dans la cause *Labrador Inuit Association* c. *Gouvernement de Terre-Neuve* traite de questions relatives à l'intégrité et au rôle des processus d'évaluation environnementale dans le contexte du développement du projet de mine de nickel/cuivre/ cobalt de Voisey's Bay. La cour a souligné le rapport qui existe entre les aspects environnementaux et les bénéfices économiques et sociaux qui découlent de la production des ressources. Les gouvernements du Canada et de Terre-Neuve ont conclu un protocole d'entente en vertu duquel un processus unique d'évaluation environnementale a été instauré. Les promoteurs du projet ont obtenu du ministre projet ont obtenu du ministre provincial une exemption en vue de la construction d'une route d'accès et d'une piste d'atterrissage temporaires. La Cour d'appel a jugé que le ministre avait outrepassé sa compétence législative en prétendant traiter la route et la piste d'atterrissage ainsi que certaines activités connexes comme n'étant pas comprises dans la définition du terme "entreprise" en vertu du protocole d'entente. À l'avenir, il est indispensable qu'en négociant des ententes relatives à des évaluations environnementales conjointes, toutes les parties, gouvernements et autres, définissent clairement ce qui doit être évalué et ce qui est exclu de l'évaluation environnementale.

assessment, including the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, and the NEAA. They stated that if such legislation is to do its job, it must be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. Such legislation must be regarded as something more than a mere statement of lofty intent, it must be a blueprint for protective action.

On September 26, 1996, the project's proponents submitted to the Canadian Government, and on October 25, 1996, to the Newfoundland Government, a document entitled "The Voisey's Bay Mine Mill Project, Project Description Report", which identified major elements of the development as including "permanent site roads" and a "permanent airstrip". This report triggered environmental assessments under the environmental statutes of both Governments. In an effort to avoid duplication resulting from the project's overlapping jurisdictional impact, the Canadian and Newfoundland Governments entered into a Memorandum of Understanding dated January 30, 1997, along with the LIA and the Innu Nation, recognizing these additional parties' special interest and concern affecting the lands where the discovery was made and where the mine and mill are proposed to be developed. The MOU established a single process of environmental assessment and constituted a single panel to conduct the necessary joint public reviews.

In the final draft of the agreement, the definition of "undertaking" and the description of the project included the words "mine site roads" and "airstrip".

In April 1997, the project proponents submitted to the Newfoundland Government for registration under Section 6 of the NEAA, a document entitled "Exploration Support Works" at the Voisey's Bay site, which included a proposal to construct a "temporary access road" and "temporary airstrip" in the same locations as identified in the Project Description Report and the MOU. This document was subsequently replaced on May 22, 1997 by a document entitled "Exploration Support Works" which essentially contemplated similar construction. The works were described as "temporary" and "supportive of exploration".

On July 2, 1997, the provincial Minister declared the works described in the May 22 document as "a separate undertaking from the mine/mill development undertaking that was exempted from the NEAA in favour of the MOU". This decision, would render the Exploration Support Works susceptible to assessment under the Provincial statute, bringing them outside the ambit of the MOU. This action precipitated applications to the Trial Division by both the LIA and the Innu Nation, seeking judicial review to quash those decisions. The Trial Judge concluded that it would be a distortion of the words "mine site roads" and "an airstrip" in the MOU, to interpret them to include a temporary road or a temporary airstrip which were required only for exploration activities. He found that the works in question were a separate undertaking from that committed to assessment under the terms of the MOU and that these works were necessary to support the ongoing exploration activity. Following the Trial Judge's decision, the Minister purported to make a determination under Section 7 of the NEAA that no further assessment of the road or airstrip was required. The affect of that ruling was that no environmental impact statement was required and no public hearings would be held with respect to the works in question. The degree of assessment they received was limited to a detailed review of the proposal by the Minister's technical staff in light of requests for public input.

In interpreting the words of the MOU, the Court of Appeal was unwilling to follow the Trial Judge's reasoning in separating exploration from development and noted that:

> The location of the road and airstrip have been chosen, at least in part, so that they can be incorporated as part of the infrastructure for the mine proper. In that sense, the construction of the road and airstrip, even though they may be used to support exploration, might well be said to be connected to the "development" of the mine.

The Court concluded that the definition in the MOU was intended to be accorded a wide construction and they focused on activities that would have affects on the environment, more so than on the purpose of those activities. They stated that:

> Any doubts as to whether the phrase "mining development" encompasses more than the work on the actual proposed mine are dispelled by the fact that the undertaking is expressed to include "associated activities".
>
> It matters not whether the construction of a particular piece of infrastructure, such as a road or an airstrip, is intended to exist for one year or 21 years; is labelled "permanent" or "temporary"; or, is described as being for "exploration" or for "mining". If the infrastructure is identified as being the type brought within the assessment umbrella and is to be constructed in the environmental area to which the assessment relates, **it will, in the absence of demonstrable exclusion, be caught by the assessment regime.** [emphasis added]

The question to be asked was not whether the identified activity was exploratory or not, but whether the specific activity was within the umbrella of the development as contemplated by the broad activity-based concept of "undertaking" in the MOU, as infused with the corresponding meanings used in the governing legislation. In the result, the Court of Appeal concluded that the Minister exceeded his statutory authority in purporting to treat the road, airstrip and certain related activity as not encompassed by the MOU.

The overriding principle to be drawn from the Court's decision is that if parties agree that a certain activity is to be the subject matter of an environmental assessment, particularly a joint inter-jurisdictional environmental assessment, any activities which are not considered by the parties to be associated with the undertaking which is the subject matter of the environmental assessment should be specifically determined at the outset. The practice in Canada prior to this decision was that exploratory activity could well exist outside the ambit of the various provincial and federal environmental assessment schemes. By the nature of the wording in the MOU, the Court concluded that the activities described by the project proponents as temporary and exploration oriented in nature were in fact within the activities contemplated for assessment under the MOU. This will have to be kept in mind by all parties, governmental and otherwise, in negotiating agreements for joint environmental assessments in the future.

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On June 1 and 2, 1998 the Institute will present a Contract Law course at the Ramada Hotel (downtown). It is aimed at non-lawyers in the energy industry who deal extensively with contracts.

The course examines such issues as how a contract is formed and terminated, the concepts of consideration and privity, judicial approaches to the interpretation of contracts, and damages. In addition, the course scrutinizes a number of clauses commonly found in energy industry contracts (for example, force majeure, independent contractor, choice of laws, liability and indemnity and confidential information). The course is geared for industry personnel at all levels whose jobs require them to understand the basics of contract law. Materials prepared for the course draw primarily upon Canadian cases involving energy the industry.

The course is conducted by Professor Nicholas Rafferty of the University of Calgary Faculty of Law and Institute Research Associate John Donihee. The course involves lectures by the instructors, as well as individual and group problem-solving sessions.

The registration fee is $425 and includes all materials and coffee both days. If you are interested in registering for this course please contact Pat Albrecht at:

Phone: (403) 220-3974 or
E-mail: palbrech@acs.ucalgary.ca
as soon as possible since space is limited.

Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

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Obligations reserved under a surface lease merge when the current lessee acquires the fee simple title

In *Canadian Crude Separators Inc. v. Mychaluk* (1998), 53 Alta. LR (3d) 218 the Alberta Court of Queen's Bench confirmed the application of some basic propositions of property law in the context of a surface lease. The lease in question was executed in 1952. Upon subsequently transferring his interest in the surface, the original lessor reserved out the lease rental payments. The right to these payments devolved by will to the lessor's wife and then by her will to the respondents, the sons of the original lessor. The lessor purported to protect its rights under the assignment by filing a caveat and the sons also filed a caveat although at the time their mother was the person entitled to receive payments under the assignment of rents. The lease ultimately became vested in CCSI and, several years later, CCSI purchased the reversion. In the meantime, the respondents had persuaded the Alberta Surface Rights Board (SRB) on two occasions to exercise its statutory jurisdiction to review and raise the original lease rental that had been reserved. The plaintiffs commenced this action as a statutory appeal of the SRB's decision contending that the Board had no jurisdiction to entertain the review application since the lease had died upon merger with the reversion and, even if the lease were enforceable, the assignment of rents was not enforceable against CCSI in the absence of privity because (1) an assignment of rents was not an interest in land, and (2) even if statutory reforms had retroactively deemed this to be an interest in land, the caveats filed to protect the interest were ineffective.

The court held, following *Canada Trustco Mortgage v. Skoretz* [1983] 4 WWR 618 (Alta. Q.B), that at the relevant time an assignments of rent created only a personal obligation and did not amount to an interest in land. In any event, neither caveat was effective to protect the interest. The first caveat was ineffective because validity must be judged at the time of filing and at that time there was no interest in land to support the caveat. The 1985 amendment to the *Law of Property Act* (SA 1985, c.48, now *LPA* s.59.1) did not breathe life into a dead caveat: *Northland Bank v. Van de Geer* (1986), 34 DLR (4th) 156 (Alta. C.A.) but see *dubitante, Scurry Rainbow Oil Ltd v. Galloway Estate* (1993), 8 Alta. L.R. 225 at 266, aff'd on other grounds (1994), 23 Alta. L.R.(3d) 193 (CA). The second caveat was ineffective both for this last reason, but also because at the time that it was filed the caveators had no interest in the assignment.

On the main argument, the court held that there had been a merger upon CCSI's acquisition of the fee simple. There was nothing express or in the conduct of the relevant parties to indicate an intention that merger should not occur. Finally, the court confirmed that there had been no novation so as to impose a contractual obligation upon CCSI to pay rent to the respondents.

Since the issue was jurisdictional in nature, it is not clear why this action was commenced as a statutory appeal rather than as an application for judicial review. A judicial review application would have avoided the anomalous costs provisions of the *Surface Rights Act.*

An application for leave to appeal to the Court of Appeal was denied: unreported memorandum of judgement of Madam Justice Hunt (in chambers) February 24, 1998. Justice Hunt accepted that leave should only be granted if there is a reasonable prospect of success and that success would have a significant impact on the parties, or if a question of law or procedure important to the operation of the Act had been raised. Justice Hunt noted that even if *Northland Bank* could be distinguished on the basis that this case dealt with a reservation and not an assignment of rents, and even if it could be contended that s.59.1 might have a retrospective or retroactive effect, there was nothing in the relevant instrument (it referred to "compensation" and "moneys payable") to suggest an intention to create an interest in land.

Gas contract litigation; Court converts plaintiffs' action to a representative action on the application of the Defendant.

In *Anderson Exploration et al v. Pan Alberta Gas Ltd* (1998), 53 Alta. LR 204 the court confirmed that it had the jurisdiction under R. 42 of the Alberta Rules of Court to convert an action to a representative action at the instance of the defendant. The plaintiffs were some but not all of a group of producers that dedicated gas to a PAG pool. PAG aggregates and markets this pool and each producer receives a share of the profits. The plaintiffs alleged breach of fiduciary duties.

On application by PAG, the court held that the case met the standard requirements for a representative action and that this was an appropriate case to make a representative action order. The class would be composed of all producers that dedicated gas to the

pool except those producers that had entered into specified transactions that might make them a party to any breach of fiduciary duty by PAG. Granting the order would avoid multiplicity of actions as well as the delay attendant upon other producers applying to join the action throughout the course of the litigation.

Vertical pooling; allocation of production between formations, the role of the courts and the conservation board.

The facts of *Gulf Canada Resources Limited v. Ulster Petroleums Ltd* [1997] AJ 887 (Alta. CA) are unique but the case raises broad questions as to the effect of Board designation orders and the respective roles of the Board and the courts.

Gulf farmed out a Crown lease reserving a royalty. The lease covered oil and gas rights down to the basement but the rights below the Muskeg formation subsequently reverted to the Crown. The Crown re-leased the deep rights initially to a third party but subsequently re-acquired those deep rights and re-leased them to the successors in title to the farmee, the defendants. The defendants subsequently drilled two wells both of which were classified by the Board as Keg River or deep rights wells. Subsequently the Board redesignated one of the wells (the 12-36 well) as a Muskeg or shallow rights well. The second well, the 4-36 remained classified as a Keg River well but the Board recognized that the formations could not be differentiated reliably and that the Muskeg and Keg River constituted a continuous carbonate reservoir in the well. The defendants paid royalties to Gulf on 12-36 production after the redesignation but took the position that Gulf was not entitled to royalties on 12-36 production prior to redesignation and paid no royalties on 4-36 production. Gulf commenced an action alleging breach of contact and fiduciary duty. The defendants brought a motion to strike all or a portion of the statement of claim arguing that the issues raised were under the exclusive jurisdiction of the Board and that this was in effect a collateral attack on a Board that was fully protected by finality and privative clauses. In the alternative, the defendants asked for summary judgement and the parties asked for determinations on a series of questions designed to explore the relationship between Board orders and the jurisdiction of the Court.

In its decision the Court of Appeal, following both a master's decision and a chamber's decision, refused the applications to strike and for summary judgement on several grounds. First, the case raised issues of contract interpretation properly matters for the courts to decide and certainly not within the exclusive jurisdiction of the Board. Second, the allocation of production between the deep rights and shallow rights might prove to be moot in the event that a trial court were to determine that a royalty was payable on both deep rights and shallow rights production. Third, the factual matrix within which the court was being asked to determine the effect of Board designation orders was inadequate. Finally, the parties and the court agreed that the Board had no jurisdiction to make a retroactive order apportioning production from the two wells; by contrast, a court could.

The matter will now proceed to trial. It remains to be seen how a trial court will characterize the legal effect of a Board order that designates a well as producing from a particular formation. In my view such a determination should be a constitutive fact that a court has no jurisdiction to review except on a properly constituted application for judicial review of the Board's original decision. That said, the effect of such a constitutive fact on the proper interpretation of the royalty clause of the farmout agreement is clearly an issue for the court.

The jurisdiction of the BC Surface Rights Board Extends to Damages Resulting from Geophysical Operations

In *Ranger Oil Ltd. v. Huk* [1997] BCJ 1433, the BC Court of Appeal overturned the trial judgement and held that the Mediation and Arbitration Board established pursuant to the Petroleum and Natural Gas Act had the jurisdiction to consider applications from owners for surface damages caused by licensed geophysical operations. The Court observed that it would be anomalous if this category of activities and damages were to be excluded from the Board's jurisdiction given that all other forms of surface damage were within the Board's jurisdiction.

Contractor must bear the loss of its rig destroyed during wild well blow-out

In *Brinkerhoff International Inc v. Numac Energy Inc.* (1997), 53 Alta. L.R.(3d) 4, the Alberta Court of Appeal reversed the judgement at trial discussed in *Resources* # 57 Winter 1997 at 7 -8. The case involved the interpretation of the Standard Daywork Contract of the Canadian Association of Oil Well Drilling Contractors. The well blew out and the resulting fire destroyed Brinkerhoff's rig causing both physical loss and associated economic losses.

As explained by the Court of Appeal, the contract provided a general regime for the allocation of losses and then varied that regime in a number of particulars. The general regime was that each of the contractor and operator agreed to indemnify the other for losses

suffered as a result of negligent or wilful acts or omissions. In addition, the contract established (cl. 12.1) that the contractor (subject to a number of exceptions) would be liable for its equipment while it was above ground (regardless of fault or negligence) and that the operator (cl. 12.2) would be liable for the contractor's equipment while it was down-hole (regardless of fault or negligence). Finally, a very specific clause headed "wild well" apportioned liability to the operator for: (1) the costs of gaining control of a wild well, and (2) the removal of any debris and the operator agreed to indemnify the contractor for all its losses *thereby* suffered or incurred. Questions of liability and economic loss were referred to the court for the determination of preliminary questions of law.

The Court of Appeal held that the physical loss of the rig was covered by cl. 12.1 which allocated liability to the contractor for the loss of equipment above ground. Although there was some inconsistency in the way that the contract used the term "equipment", it was clear in cl. 12.1 that the term included the rig itself. The more specific wild well indemnity clause did not apply. The situation of a wild well was not included as one of the exceptions to cl. 12.1 and the indemnity itself was limited to the costs of gaining control of the well and the removal of debris. For the same reasons, the contractor must also bear responsibility for the economic losses flowing from loss of the rig unless the contractor could demonstrate negligent or wilful act or omission on the part of the operator. Issues of negligence could not be considered as part of the determination of preliminary points of law.

No recovery for contractual relational economic loss

The oil and gas industry should be interested in parts of the recent decision of the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. et al v. Saint John Shipbuilding Ltd* [1997] SCJ 111 dealing with recovery for economic losses in tort. SJS agreed to build a rig for BVHB. Equipment was supplied by Raychem which turned out to be ill-suited for its purpose. A fire resulted and the rig had to abandon its operations and was towed to port where it was out of service for several months. The rig was under contract to Bow Valley (BV) and Husky (HOOL) and under the terms of that contract BV and HOOL were required to pay day rates to BVHB while the rig was out of service. BV and HOOL sought to recover these losses as well as related expenses. The court held that Raychem owed a *prima facie* duty of care to BV and HOOL but policy considerations negatived that duty. Contractual relational economic loss should only be recoverable in special circumstances. BV and HOOL could not fit themselves within any of the existing categories where recovery was permitted since: (1) they had no possessory or proprietary interest in the rig (BVHB was a separate corporate entity created by BV and HOOL), (2) this was not a general average case, and (3) there was no joint venture between BV and HOOL on the one hand and BVHB on the other.

A promise to give a lease of oil sands rights is enforceable against the Crown

There are so few cases that deal with the relationship between the Crown and its oil and gas lessees that a new case is always welcome even when it explores that relationship somewhat tangentially. Such was the case in the recent decision of the Federal Court of Appeal in *Alberta Energy Co. v. Canada* [1997] FCJ 1582 hearing an appeal from the Tax Court of Canada (1994 Can. Tax Ct. LEXIS 104). In 1978 AEC entered into the Acquisition Agreement with the Crown in right of Alberta. By that agreement, Alberta agreed to lease the petroleum and natural gas rights of the Fisher Creek Block within the Primrose Lake Air Weapons to AEC. At that time, the *Mines and Minerals Act* (pursuant to which the province leased the rights) provided for the reservation of oil sands from the grant of petroleum and natural gas rights. However, cl. 8 of the Acquisition Agreement provided that where AEC discovered bitumen in the course of drilling for conventional oil and gas "AEC shall thereupon be accorded the right to acquire, without the payment of a cash purchase price, explore for and develop said bitumen under such terms and conditions as the Minister may decide...". Subsequently, AEC entered into a farmout agreement with Esso pursuant to which Esso was entitled to earn an interest in AEC's petroleum and natural gas rights and its oil sands rights. The farmout agreement purported to attribute the $9 million cash consideration equally between the two categories of rights. The question for the tax court was whether or not monies received by AEC for the oil and gas rights were proceeds from the disposition of a Canadian resource property. The answer to that question depended upon whether or not AEC's oil sands "rights" were simply too contingent to constitute an interest in a "right, licence or privilege to ... prospect, explore, drill or mine for minerals in a mineral resource" within the meaning of the *Income Tax Act (ITA)*. The Tax Court had held that while AEC's interest was contingent and was only a right to have issued to it a grant of oil sands rights *if* the Minister decided to grant the oil sands rights, this was, at the very least, a privilege within the meaning of the *ITA*. The Federal Court of Appeal affirmed that decision but on the somewhat broader grounds that cl. 8 of the Acquisition

Agreement, supported by subsequent correspondence between AEC and Alberta, accorded AEC the *right* to acquire further oil sands rights if oil sands were encountered in the course of exploration. This was more than a mere expectancy and more than a mere right to negotiate. Unfortunately, the judgement is very brief and does not provide much guidance as to the precise legal significance of the subsequent correspondence between AEC and Alberta.

Lessee can deduct a *pro rata* share of the costs of processing oil as well as a share of the costs of transporting oil to market.

In *Acanthus Resources Ltd. v. Cunningham and Sullivan* [1998] AJ 25, the Alberta Court of Queen's Bench has confirmed that a lessee is entitled to deduct a proportionate share of processing and transportation fees from gross royalty payments. The lease in question reserved to the lessor a gross royalty of produced substances but calculated the royalty payable on the current market value at the wellhead of substances produced, saved and marketed from the lands. Predecessors in title to Acanthus had always deducted the costs of trucking the produced oil to a nearby pipeline terminal (the point of sale) but they had not deducted the cost of treating the oil (removing associated water and re-injection of the water) and Acanthus now sought to deduct $8 per cubic metre for these processing costs. The court held that the lessee could make pro rata deductions for all costs incurred downstream of the wellhead to the point of sale notwithstanding that the royalty was framed as a gross royalty. However, evidence as to the actual processing costs was lacking and the trial judge reduced the charge to $1 per cubic metre. Cogent evidence to support a higher charge would include evidence as to the specific facilities used for gathering, treating and storage, original capital costs and depreciated value, and actual operating costs. The court also held that Acanthus was not estopped from charging for processing costs just because its predecessors in title had failed to do so. There was no representation that the lessees would not insist on their rights and there was no detrimental reliance by the lessors. Evidence as to an alleged custom in the industry that lessees charged for transportation costs but not processing costs was not admissible since the royalty clause was not ambiguous.

On a separate point, the court held that the lessee's caveat was adequate to protect its interest in the property even though the caveat did not lay out the chain of title leading from the original lessee to the current lessee.

The decision is clearly correct on both grounds although it should be emphasised that deductions of costs downstream of the well head will always turn on the specific language of the royalty clause. An earlier case relied on here (*Resman Holdings v. Huntex* [1984] 1 WWR 693 (QB)) seems to have treated the point as giving rise to a question of law rather than a question of interpretation; this is clearly the wrong approach but the present decision follows the correct methodology.

Covenants for further assurances and to support subdivision applications unenforceable against covenantor in the absence of privity. Specificity of caveat no problem provided that additional rights are claimed within the same clause.

Although not an oil and gas law case, practitioners should be interested in the Alberta Queen's Bench decision in *Carruthers v. Tioga Holding Ltd.*(1998), 54 Alta. LR (3d) 95. The facts were simple. C and X entered into agreement for sale. X the (purchaser) granted C an option to repurchase a portion of the property (cl.8(a)) and also covenanted for further assurances and to support a subdivision application if and when brought by C (cl.8(b) and (c)). C promptly filed a caveat claiming an interest in the lands "by virtue of an option to purchase *more particularly described in paragraph 8(a)* .... ". The property passed through several transactions for value before being purchased by T. T purchased and registered its interest after its solicitor had obtained a copy of the original agreement for sale. T took the view that it was not bound by the positive covenants on the basis that the caveat was defective, or on the basis that it could not be bound by the burden of positive covenants (further assurances and to support the subdivision application) in the absence of privity. T also made another argument based on the subdivision rules that I will not deal with here.

C was successful on the caveat issue but was unable to enforce the positive covenants against T. Justice Dyell held that although the caveat only referred to the option clause the subsequent covenants were found in the same paragraph and were related to the option. Furthermore, a purchaser upon seeing the caveat would surely examine the document and even a cursory examination of the clause would reveal the subsequent covenants. In short the case was more akin to *Calford Properties v. Zellers,* [1972] 5 WWR 714 (Alta. CA) than *Ruptash v. Zawick,* [1956] SCR 347 and more akin to *Canadian Superior Oil and Gas Ltd. v. Worldwide Oil and Gas (Western) Ltd.* (1990), 72 Alta. LR (2d) 191 (CA) than *Esso Resources Canada Ltd v. Pacific Cassiar Ltd.* (1986), 45 Alta. LR (2d) 1 (CA).

The positive covenants, although related to the option, were unenforceable because of long-standing doctrine to the effect that in the absence of privity of estate, a covenantee cannot enforce the burden of a positive promise against the covenantor: *Rhone v. Stephens,* [1994] 2 All ER 65 (HL) On this point the case reaffirms basic propositions and would hardly be notable but for recent judgements such as that of Justice MacLeod in *Harris v. Nugent* (1995), 32 Alta. LR (3d) 126 (QB) in which the court held it could extend the dictum of Justice Martland in *Canadian Long Island Petroleums Ltd v. Irving Industries (Irving Wire Products Division) Ltd* [1975] 2 SCR 715. In *Irving* the court enforced a right of first refusal (which as a matter of common law is not an interest in land) against a purchaser with notice on the basis that the right was akin to a *negative* covenant. *Harris* purported to extend the dictum to cover the burden of *positive* covenants. *Harris* was reversed on appeal (1996), 141 DLR (4th) 410 (CA) but on a different point.

Justice Dyell rejected C's argument to the effect that the positive covenants were so closely related to the option as to be enforceable. I think that this is correct. If C's argument on this point were sustained it would support an argument that all covenants contained in a lease would be enforceable regardless of whether they touched and concerned or were real covenants relating to the tenancy (*Law of Property Act*, RSA 1980, c. L-8, s.59.02) That is manifestly not the case and the court will always engage in an analysis of whether or not a *particular* covenant will touch and concern and therefore bind as to benefit and burden where there is no longer privity of contract between the parties. For a recent Alberta example see *Devon Estates Ltd v. Royal Trust Co.* (1994), 24 Alta. LR (3d) 401 (QB).

More detailed versions of these digests may be found in *Canadian Oil and Gas* published by Butterworths.

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