

Action No.: 0601-05052
E-File No.: CVQ09CANPAR
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

CANPAR HOLDINGS LTD. and
PETROVERA RESOURCES

Plaintiffs
Defendants by Counterclaim

and

PETROBANK ENERGY AND RESOURCES LTD.
and GENTRY RESOURCES LTD.

Defendants
Plaintiffs by Counterclaim

PROCEEDING
(Reasons for Judgment)
EXCERPT

Calgary, Alberta
October 9, 2009

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2

3 October 9, 2009 Afternoon Session

4

5 The Honourable Court of Queen's Bench of
6 Mr. Justice Miller Alberta

7

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10 S.S. Smyth For the Defendant/Plaintiff by Counterclaim

11 Petrobank Energy and Resources Ltd.

12 C.O. Heisler For the Defendant/Plaintiff by Counterclaim

13 Petrobank Energy and Resources Ltd.

14 (Student-at-Law)

15 D. Cleland Court Clerk

16

17

18 THE COURT CLERK: Order in court, all rise.

19

20 THE COURT: Good afternoon.

21

22 MR. BILLINGTON: Good afternoon, My Lord.

23

24 MR. SMYTH: Good afternoon, My Lord.

25

26 MS. MORIN: Good afternoon, My Lord.

27

28 THE COURT: Please be seated.

29

30 **Reasons for Judgment**

31

32 THE COURT: This is a dispute between Canpar Holdings
33 Ltd., an original lessor, along with its fellow lessor and assignee Petrovera Resources as
34 plaintiffs, and Petrobank Energy and Resources Ltd. as lessee and defendant.

35

36 The lease in question is a petroleum and natural gas lease, dated April 4, 2000, and
37 prepared by Hank Riggelson, Alberta land negotiator for Canpar and related companies.

38 The original lease was between Canpar as an undivided 62.61 percent lessor and
39 Canadian Natural Resources Ltd., or CNRL, as to an undivided 37.39 percent lessor.

40 Monolith Oil Corp. was the original lessee and the lease is in relation to lease
41 substances within, upon or under three-quarter sections of land described as the South

1 half and Northwest quarter of Section 26, in Township 39, Range 16, West of the 4th.

2
3 Monolith Oil Corporation, through its various reiterations, assigned 75 percent of its
4 interest as lessee of the lease to the defendant Petrobank, to take effect January 1, 2004,
5 but it had already been affected as of September 19, 2003, through a share acquisition.

6
7 The other 25 percent of Monolith's lease had been assigned to Gentry Resources Ltd.,
8 effective July 2001. Gentry Resources was a defendant in this action, but settled with
9 the plaintiffs in late 2006.

10
11 CNRL assigned its share of the lease as lessor to Petrovera Resources effective the 10th
12 of March, 2005. CNRL is not a party to this action and advances no claim through its
13 assignee.

14
15 This lease covers two wells known as Well 13-26 and Well 7-26. Almost a year after
16 Petrobank took over Monolith's interest, Canpar performed what is known as a desk
17 audit of its dealings with Petrobank. As a result of this audit, several deficiencies were
18 identified by Dale Richardson, audit manager of Canpar. These deficiencies were
19 identified in the letter dated December 1, 2004 to Petrobank. Each of the two wells were
20 subject to the December 1 letter. The letter covered five different deficiencies noted by
21 Mr. Richardson.

22
23 Petrobank replied to this deficiency letter on July 26, 2005 in relation to each well. Of
24 the various deficiencies first identified by Canpar, some were resolved to Canpar's
25 satisfaction, but there remained two outstanding issues between the parties. These
26 remaining issues resulted in Canpar issuing a default notice to Petrobank for each well,
27 on January 18, 2006.

28
29 This default notice led to a meeting held in February 2006 between at least two
30 representatives of Canpar and two representatives of Petrobank. Hank Riggelson and
31 Dale Richardson of Canpar attended the meeting and both testified at trial for the
32 plaintiff. Doreen Scheidt and Richard Hess attended the February 16th meeting for
33 Petrobank and Doreen Scheidt testified for the defendant at trial.

34
35 After the exchange of correspondence and after the February 16, 2006 meeting, it is
36 clear that the parties agreed to disagree over these two issues. Those issues are, first, the
37 pricing of the natural gas produced by the lessee and thereby the amount of royalty
38 payments under paragraph 3 of the lease, and secondly, whether "fuel gas" is an
39 appropriate deduction resulting in payment of royalties based on gas sold or gas
40 produced. These two differences between the parties resulted in Canpar issuing a revised
41 notice of default, dated February 21, 2006, to Petrobank, with a deadline of noon, March

1 3, 2006. The deadline passed with no change in the defendant's position and the
2 plaintiffs take the position that the lease is terminated as of that date.

3
4 The issue before me is the interpretation of the lease with respect to the price of gas in
5 clause 3 and whether fuel gas is a permitted deduction by the lessee. While the issues to
6 be determined are relatively straightforward, the consequences, depending on the answer,
7 have numerous and significant implications.

8
9 First of all, the plaintiffs argue that because the lease is terminated as a result of its
10 notice of default, certain damages have accrued to the date of termination, March 3,
11 2006. The plaintiffs also claim damages after that date in the form of proper payments
12 of royalties according to the lease. This means the highest price for gas, according to the
13 plaintiffs' interpretation of the lease, and no deduction for fuel gas.

14
15 The plaintiffs also claim "harsh" or "restitutionary" damages, according to the
16 authorities.

17
18 In addition, the plaintiff is claiming an accounting and asking this Court for an order
19 directing the defendant to deliver up and an injunction restraining the defendant from
20 operating the wells on the land in question.

21
22 The plaintiff also asks for an order of exemplary or punitive damages.

23
24 The defendants, on the other hand, argue that this lease between the parties should be
25 treated like any other contract, the words should be given their ordinary meaning, the
26 contract needs to be interpreted as a whole and one term should not be used to make
27 other terms meaningless.

28
29 Finally, the defence asserts that this lease was drafted by Canpar and as such, Canpar is
30 faced with the burden of *contra preferendum*. In other words, if there is any ambiguity
31 or lack of clarity in the lease, it should be resolved against the plaintiff Canpar.

32
33 Using the rules of legal interpretation, the defence argues that the plaintiff's position in
34 relation to the two issues cannot be a logical consequence in interpreting the lease. As
35 well, the defence asserts that in assisting the interpretation of the contract, the Court
36 should look at the past practices of the parties and the prevailing customs of the
37 industry. Some of the cases cited referenced the industry custom on these points.

38
39 This Court is of the view that the two issues facing it, that of determining the price on
40 which the royalty is based and on whether fuel costs are deductible, must be resolved
41 with reference to the four corners of the lease of April 2000.

1
2 I appreciate the rules of interpretation of documents referenced by both counsel. The
3 part of the agreement that is of concern in this dispute is clause 3, dealing with royalty.
4 The preamble to that clause reads as follows: (as read)

5
6 Subject to adjustment pursuant to the operation of clauses 16 and
7 17, the lessor reserves to itself and the lessee shall pay or cause to
8 be paid to the lessor a royalty in cash of 17 1/2 percent of the
9 greater of the actual price received, including payments received
10 from any source whatsoever in respect thereof, or the current
11 market value at the time and place of sale of all these substances
12 produced from the lands, all without any deductions, provided that
13 the lessor shall only bear its proportionate share of actual costs of
14 transportation beyond the point of measurement to the point of
15 delivery of crude oil.
16

17 Given this term of the lease, I now turn to the two issues before me:

18
19 1. The Royalty Price
20

21 It is clear to me that this term requires Petrobank to pay the greater of two possibilities,
22 "the actual price received," or "the current market value at the time and place of sale of
23 all these substances produced from the lands." In my view, this issue is relatively simple
24 to resolve. Of these two options, actual price, on the one hand, versus greater market
25 value, on the other, which is the greater? On a plain and unambiguous reading, it seems
26 to me that you set out the two options and the greater number is the price on which
27 royalties are paid.
28

29 Ms. Scheidt testified that Petrobank used the corporate averaging price or corporate
30 pooling price on basing its royalty payment. This was also pled by the defendants.
31 Notwithstanding counsel for the defendant's valiant attempt to persuade this Court, I
32 cannot find an alternative answer to the question: What is the price on which the royalty
33 payment is to be made? Upon a plain and unambiguous wording of clause 3, it is simply
34 the highest of the actual price received or the current market value. Accordingly, on the
35 issue of pricing, I accept the methodology used by Dale Richardson, audit manager of
36 Canpar. The corporate practice of Petrobank or what they say is industry standard is,
37 quite frankly, irrelevant.
38

39 The Court is faced with deriving meaning from words that the parties agreed to. If the
40 defendant just learned about the terminology for pricing in December 2004, that is
41 unfortunate. They are deemed to be cognizant of the instruments that they have

1 acquired. I find no ambiguity in relation to this issue.

2
3 2. Deductibility of Fuel Costs

4
5 Another way to describe this issue is that Canpar complains it is receiving royalty
6 payments on gas sales, rather than gas production. Canpar says this is a no-deduction
7 lease and they have specifically included in the royalty clause, right after the pricing
8 formula, the term, "all without any deductions."

9
10 Petrobank, on the other hand, says clause (d), which reads: (as read)

11
12 Notwithstanding anything herein contained, the lessee shall be
13 entitled to use free from the payment of the royalty payable under
14 this clause 3 such part of the lease substances from the lands as
15 may be acquired and used by the lessee in the operations on the
16 lands or lands pooled or unitized therewith.

17
18 The defendant says this gives them an exemption and allows them to use fuel gas as
19 part of its operation. Again, Ms. Scheidt testified that this first came to her attention
20 when Petrobank received the December 1, 2004 letter. Petrobank has pled and argued
21 that Canpar's past practice and the tradition in the industry is to allow "fuel costs," that
22 is to say, gas used for compressors both on the land in question and off the land to be
23 deducted.

24
25 In order to solve this interpretive puzzle, the agreement as a whole must be considered.
26 It is clear that clause 3 says that the royalties on all leased substances should be paid
27 "all without any deductions." But what is the impact of clause 3(d)? "Operations" is a
28 defined term in the lease, according to section 1(I): (as read)

29
30 'Operations' shall mean any of drilling, testing, completing,
31 re-working, completing, deepening, or re-completing, deepening,
32 plugging back or repairing of a well in search for or in an
33 endeavour to obtain or increase production of the leased
34 substances, or any of them.

35
36 Again, taking a look at the agreement as a whole, while there is a clear exemption in
37 clause 3(d) for operational expenses, the definition of operation expenses does not allow
38 for fuel gas to be deducted. Again, I find in favour of the plaintiff in that the lease does
39 not allow fuel gas to be deducted. If it was the intention of the parties to allow it to be
40 deducted, they could easily have had it included in the definition of "operations."

41

1 Accordingly, I find in favour of Canpar on both issues as to pricing and deductibility. I
2 also agree with the methodology used by Canpar and the start date is the date that
3 Petrobank acquired the shares of Monolith, being September 19, 2003.

4
5 However, I do note that the predecessor to Petrovera, namely CNRL, did not advance a
6 claim in these proceedings, nor am I convinced that the assignment of CNRL's interest
7 to Petrovera as of March 10, 2005, included this right of action. By going back to
8 September 19, 2003, with the plaintiff's calculation for 100 percent would, in my view,
9 provide a windfall for which they cannot expect, nor is Petrovera entitled to it.

10
11 Accordingly, the recalculation of royalty rates and the amounts in favour of the plaintiff
12 Canpar shall commence at September 19, 2003, using the methodology outlined by
13 Canpar for 62.61 percent share of the royalties, being Canpar's undivided interest in the
14 lease. Those calculations should continue until March 10, 2005, the effective date of the
15 assignment from CNRL to Petrovera. Then, at that point, on March 10, 2005, the
16 plaintiffs shall then combine to recover 100 percent of the revised royalties as found by
17 this Court, being the combination of Canpar's undivided 62.61 percent and Petrovera's
18 37.39 percent.

19
20 The calculation of the royalties should, according to this method, run from September
21 19, 2003, for Canpar, and for both Canpar and Petrovera from March 10, 2005, until
22 noon March 3, 2006.

23
24 The plaintiffs then argue that the lease is terminated as of March 3, 2006, any actions of
25 the defendant after that date constitute a trespass and the defendant is guilty of
26 conversion. In addition to declaratory relief, Canpar asks this Court for a damage award
27 from March 3, 2006, that has come to be known as the "harsh" or "restitutionary"
28 approach. This approach is outlined in the *Freyberg v. Fletcher Challenge Oil and Gas*
29 *Inc.* case. The theory behind an award in restitution is that a trespasser, such as
30 Petrobank, should not profit from its own wrong. According to this theory, the damage
31 award should act to remove any benefit or gain from the trespasser.

32
33 Effectively in this case, the plaintiff is asking the Court not for an award of damages
34 based on its interpretation of the 17.5 percent royalty but effectively the plaintiff is
35 asking for 100 percent of the royalty less any transportation costs. Justice Kent
36 succinctly describes both the "harsh" rule and the "mild" rule at paragraphs 99 and 100
37 of her judgment, cited to me by the plaintiff, and I quote:

38
39 Courts awarding a remedy based in restitution would often draw a
40 distinction between [. . .] 'mild' and 'harsh' [. . .] rules of damage.
41 In instances where a defendant knowingly commits a trespass or

1 otherwise acts with *mala fides*, the harsh rule may be applied.
2 Under this rule, the courts will award a remedy based on the value
3 of the material [. . .] with the only allowable deduction being that
4 expended to transport the materials to market. Alternatively, where
5 the trespass in question is an innocent one and there are no other
6 indicia of poor conduct or *mala fides*, then the 'mild' rule will
7 apply, meaning that the remedy will be based upon the value of
8 the material taken, less any costs incurred by the trespasser for
9 severance, production and marketing.

10
11 The second approach awards damages on a compensatory basis. It
12 does not focus on stripping the benefit of a trespass away from a
13 wrongdoer, but rather on placing the plaintiff back into the
14 position he or she would have been in but for the commission of
15 the tort. Under this approach, in a case such as this, it may be that
16 the plaintiff receives damages equivalent to the substance
17 converted less the costs of production ([or] the mild rule [. . .]) or
18 something less. It depends upon the facts.

19
20 Having found in favour of the plaintiff on the two issues in dispute in this lawsuit, I
21 must now turn to remedy. I find that the notice of February 21, 2006, sent from Canpar
22 to Petrobank is a valid notice under clause 19 of the lease. Accordingly, in view of the
23 fact that the default was not remedied by March 3, 2006, the lease is therefore
24 terminated as of that date and I issue a declaration accordingly.

25
26 I have already ordered damages according to methodology used by Canpar, given my
27 comments, as to the dates up to March 3, 2006. That then leaves the issue of damages
28 after March 3, 2006.

29
30 I have reviewed the *Freyberg* case and I note that throughout that case, and others,
31 damage awards are very fact specific. As well, the overriding principle is that the
32 quantum of damages awarded should be in an amount that puts the injured party in the
33 same position as they would have been had the tort not occurred.

34
35 I note that in *Freyberg* damages for the tort of conversion were awarded on a
36 compensatory model or approach. As has been said, the aim of the Court is to do equity
37 between the parties. The labelling of the rule for damages as "harsh" or "mild" is merely
38 an expression of the Court's doing equity. Facts of the case should drive the result.

39
40 In this case, the conduct of the defendant is, in my view, far less egregious than some of
41 the defendant's in the *Freyberg* case, and in that case, Justice Kent applied the "mild" or

1 compensatory approach. Had the dispute not arisen in this case, what would the
2 plaintiffs have received from the defendants since March 3, 2006? It appears clear that
3 they would have received royalty payments at the 17.5 percent, according to the greater
4 of the two options in clause 3, and that there be no deduction for fuel gas.

5
6 The defendants, while mistaken in their interpretation of clause 3 in the lease, were not
7 high-handed or abusive. They simply agreed to disagree and appear to have done that in
8 a somewhat reasonable fashion.

9
10 Accordingly, in my view, the appropriate award for damages in this case is that of the
11 compensatory model from the date of termination, March 3, 2006, to the date the
12 defendant vacates the lands and stops producing subject to the lease and this order. In
13 other words, the damages ordered are those amounts that have been calculated by the
14 plaintiff using its methodology from the date of termination of the lease to the date of
15 the defendant vacating the premises.

16
17 In that regard, I am granting an order directing that the defendants provide an
18 accounting and deliver up premises -- deliver up these premises within 30 days of
19 today's date. Thereafter, the defendants are enjoined and restrained from being on the
20 property and exercising any rights that it had pursuant to the lease.

21
22 The defendant may exercise the rights under clause 5 of the lease, but those must be
23 exercised within 30 days of today's date.

24
25 The plaintiff also asks this Court for an order of exemplary or punitive damages under
26 the authority of *Whiten v. Pilot Insurance Co.* My understanding is that these types of
27 awards are reserved for those cases where the defendant's conduct is so outrageous that
28 it calls for a denunciation of that conduct in punitive terms. I do not classify the conduct
29 of Petrobank in that category. There will be no award for exemplary or punitive
30 damages.

31
32 The defendant argues with respect to remedy that it should be entitled to relief from
33 forfeiture and cites authority from the Supreme Court of Canada. I do not find the
34 principles outlined in that case particularly applicable or persuasive to the facts of this
35 case, notwithstanding that the equitable remedies available to this Court and section 10
36 of the *Judicature Act* gives broad discretion. However, while the conduct of Petrobank
37 was not high-handed or particularly difficult in their actions, in that they did disagree
38 with the plaintiffs agreeably, however, they did have other options to voice their
39 disagreements over the royalty payments. They could have paid under protest and come
40 to court for an interpretation of clause 3. They did not do that. Relief from forfeiture is
41 not readily granted in this industry for late payment of delay rentals and it cannot be

1 granted in such a case as this, where there has been a purposeful underpayment both
2 before and after notice of default has been given.

3
4 Finally, Petrobank argues that the plaintiffs are estopped from succeeding in this claim
5 because of words or conduct which would cause the defendant to think the plaintiffs had
6 acquiesced in the defendant's conduct. In reviewing the authorities supplied I can find
7 no basis in any conduct of the plaintiff to say that they acted in such a way. They
8 proceeded after the December 1st letter with reasonable speed to make it clear to the
9 defendant their position and when it was clear that Petrobank's position was firm, the
10 plaintiffs almost immediately proceeded with this litigation. Accordingly, there is no
11 relief from forfeiture and the plaintiffs are not estopped.

12
13 In conclusion, there will be:

- 14
15 1. A declaration that the lease in question is terminated as of noon, March 3, 2006.
- 16
17 2. There will be a damage award, starting from September 19, 2003, in favour of the
18 plaintiff Canpar Holdings, using the plaintiff's methodology; and a damage award in
19 favour of Petrovera from March 10, 2005, using the same formula, up to the termination
20 of the lease of March 3, 2006.
- 21
22 3. Petrobank is ordered to give a full accounting of all its production from the wells in
23 question.
- 24
25 4. Petrobank is enjoined from producing on the lands and shall terminate its operations
26 on the lands within 30 days of today's date.
- 27
28 5. There will be a compensatory damage award consisting of the same formula used by
29 the plaintiffs from the -- from the termination of the lease to the end of the production,
30 whenever that shall be, within the next 30 days, again using the formula of the plaintiff.
- 31
32 6. The defendant's counterclaim is dismissed.

33
34 I have refrained from giving specific amounts in my award for damages because of my
35 concern with respect to the calculation of interest on the part of the plaintiffs. In my
36 view, the lease in paragraph 33 specifically deals with interest. It is silent on the issue of
37 compounding. It appears to me that the clear wording of the interest "at the lessor's
38 bank's prime rate, plus 2 percent per annum" should be the rate. I see nowhere in the
39 lease where the issue of compounding and the rate of compounding is identified. If the
40 lessor is entitled to have the rate compounded monthly, it must expressly set that forth
41 in the lease. Accordingly, all interest will accrue at the rate in clause 33 of the lease and

1 it shall be compounded annually.

2
3 I realize that in my decision on damages I, first of all, made adjustments with respect to
4 the start date relative to Petrovera and I have not allowed the rate of compounding
5 monthly interest. As a result, the numbers will be different from that which was
6 originally presented by the plaintiff. If there is any dispute or problem in resolving the
7 calculation, counsel can arrange to contact me for further hearing.

8
9 Of course, all payments already made by the defendant according to its incorrect
10 interpretation are to be credited in its favour.

11
12 If costs cannot be agreed upon, counsel can contact me to arrange to speak to that issue
13 at a reasonable time.

14
15 Anything further?

16

17 **Submissions by Mr. Billington (Costs)**

18

19 MR. BILLINGTON: Thank you, My Lord. My Lord, if I may, I
20 just wish to understand a little bit more in respect to Your Lordship's direction about the
21 calculation of damages since March 3, 2006, please. You have said, the "same
22 calculation as the plaintiff's." There is some room for interpretation in respect to that.

23

24 THE COURT: Well, using the plaintiff's methodology, from
25 March 3, damages will accrue till the last production is expended on this lease within 30
26 days, but with the proviso of the calculation of interest - I am not allowing monthly
27 compounding of interest.

28

29 MR. BILLINGTON: The --

30

31 THE COURT: So, the charts that you had presented --

32

33 MR. BILLINGTON: Yes.

34

35 THE COURT: -- and those assumptions used are what
36 governs.

37

38 MR. BILLINGTON: Mr. Richardson had produced a calculation
39 which was fundamentally all of the revenue which was derived by the defendant less
40 certain costs, and I want to be clear whether that's the methodology that you're referring
41 to. That was the one which on its own resulted in a calculation of roughly \$2.4 million,

1 and I know Your Lordship had cautioned against ascribing a -- a particular monetary
2 figure at this point.

3
4 THE COURT: Right, so I think that's Tab -- or Exhibit 5 --

5
6 MR. BILLINGTON: Yes.

7
8 THE COURT: -- you're referring to. That's the -- that's the
9 formula I'm referring to.

10
11 MR. BILLINGTON: Thank you, My Lord.

12
13 MR. SMYTH: Then --

14
15 THE COURT: Okay.

16
17 MR. SMYTH: Then may I ask for some clarification, My
18 Lord, just so that we don't have to necessarily come back --

19
20 THE COURT: Right.

21
22 MR. SMYTH: -- before you?

23
24 **Submissions by Mr. Smyth (Costs)**

25
26 MR. SMYTH: At Exhibit 5, Tab 1, there was a calculation
27 the plaintiffs presented. It had certain expenditures calculated within it. At Exhibit 5,
28 Tab 6, were set forth the actual operating costs, capital costs, and expenditures actually
29 expended by Petrobank from March 2006 to July, I believe it was, 2009, and when
30 Ms. Scheidt had performed a calculation, that is found in Exhibit 5, Tab 9, there were
31 matters such as operating expenses, actual out-of-pocket -- actual out-of-pocket expenses
32 for capital expenses, actual out-of-pocket expenses for freehold mineral taxes, and such,
33 and I'm wondering, when you had said an accounting, whether that was to be part of the
34 accounting or excluded from the amounts you wish Petrobank to pay to the plaintiffs?

35
36 THE COURT: Well, what -- (UNREPORTABLE) What was
37 paid in the past? What was the -- you only had two disputes before me, two issues.

38
39 MR. SMYTH: Yes.

40
41 THE COURT: I resolved that.

1
2 MR. SMYTH: Yes.
3
4 THE COURT: So --
5
6 MR. SMYTH: Up till --
7
8 THE COURT: So, what does the lease say with respect to
9 those other issues?
10
11 MR. SMYTH: Well, it wouldn't say anything about those
12 things, Sir, because, firstly, it's terminated on March 3, 2006, but in any event, it would
13 pay a royalty on a different amount than that which would be actually -- what I -- let
14 me stop.
15
16 THE COURT: Yeah.
17
18 MR. SMYTH: What I understand you want to have happen is
19 to have Petrobank essentially disgorge its actual profit from this production since March
20 3, 2006, am I correct in -- in that?
21
22 THE COURT: No, I am saying your client pays damages that
23 the plaintiff would have received had this dispute not arisen. So, they continue to pay
24 the 17.5 percent according to the plaintiff's formula, definition.
25
26 MR. SMYTH: Up to March 3, 2006?
27
28 THE COURT: From March 3.
29
30 MS. MORIN: It's basically from March 3rd until they leave.
31 It's calculated as though the -- as it was before. There's no deduction.
32
33 MR. SMYTH: As a royalty, My Lord?
34
35 THE COURT: Yes.
36
37 MR. SMYTH: I quite understand now. That's --
38
39 THE COURT: Well --
40
41 MR. SMYTH: I had --

- 1
2 THE COURT: -- as a damage award.
3
4 MR. SMYTH: I thought you were going somewhere entirely
5 different and I understand now, Sir, thank you.
6
7 MR. BILLINGTON: And I, too, My Lord, thought you were going
8 somewhere entirely different.
9
10 MR. SMYTH: (UNREPORTABLE)
11
12 MR. BILLINGTON: Particularly in relation to Your Lordship's
13 comment on the delivery up aspect, not trying to re-argue at all, we have Exhibit 5, Tab
14 2(b), which was the main calculation by Mr. Richardson after March 3, 2006, and he
15 calculated the total value of the substances severed from the land - this is after the
16 period of time which we now know the lease was no longer applicable - and that figure
17 came down to approximately -- it was 2(c) actually, that the final figures were
18 \$2,357,000. Am I to understand, Sir, that there is to be only 17.5 percent of that amount
19 effectively paid to our client, or in keeping with the order for delivery up, is it
20 effectively all of the production less the costs and expenses incurred by Petrobank,
21 which are to be deducted from that?
22
23 THE COURT: Well, you presented me, or you argued -
24 please - two different approaches for damages.
25
26 MR. BILLINGTON: Yes, My Lord.
27
28 THE COURT: Okay. I did not take what has come to be
29 known as the "harsh" approach --
30
31 MR. BILLINGTON: Yes.
32
33 THE COURT: -- but rather the "mild" approach --
34
35 MR. BILLINGTON: Yes.
36
37 THE COURT: -- okay. So, under that approach, what has
38 your client lost since March '06 had the tort not occurred?
39
40 MR. BILLINGTON: And -- and this gives rise to had the tort not
41 occurred, we would -- we would not have had the lease not vacated, which, to me -- and

1 I'm -- I'm trying to guard against engaging in any argument once Your Lordship has
2 fundamentally rendered the judgment. However, if the lease has been found to be
3 invalid, the evidence which I haven't heard Your Lordship directly comment on is that
4 our client would have been in a position to produce from the land and so what I'm --
5 and effectively it would have been 100 percent of all revenues less certain costs, of
6 course --

7

8 THE COURT: Right.

9

10 MR. BILLINGTON: -- at that point.

11

12 THE COURT: Right, and I'm not ordering that.

13

14 MR. BILLINGTON: I see.

15

16 THE COURT: I --

17

18 MR. BILLINGTON: Thank you.

19

20 THE COURT: Yeah.

21

22 MR. BILLINGTON: So, I -- I take it then, My Lord, that we are
23 deeming that the provisions of the lease would have continued up until effectively the
24 present time, and then, in respect to Your Lordship's direction on disgorgement, that
25 would -- that would apply for all substances produced since the time of the last
26 statement until 30 days from now, or whenever --

27

28 THE COURT: Whenever.

29

30 MR. BILLINGTON: -- it is that --

31

32 THE COURT: Yeah.

33

34 MR. BILLINGTON: -- Petrobank can quit the land?

35

36 THE COURT: Yeah. Yeah. And --

37

38 MR. BILLINGTON: Thank you.

39

40 THE COURT: -- I will tell counsel, in relation to fine tuning
41 and in relation to costs, I can alert you to the fact I will be back in this jurisdiction

1 December 7th week --

2

3 MR. BILLINGTON: Yes.

4

5 THE COURT: -- if you wish to arrange a time with me then;
6 otherwise, you can reach me, and you know how to reach me, in Lethbridge --

7

8 MR. BILLINGTON: Okay, thank you, My Lord.

9

10 THE COURT: -- if you need me in the meantime.

11

12 MR. BILLINGTON: Okay.

13

14 THE COURT: Thank you.

15

16 MR. SMYTH: Thank you very much, My Lord.

17

18 THE COURT CLERK: Order in court, all rise.

19

20

21 PROCEEDINGS CONCLUDED

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1 Certificate of Record

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3 I, Diane Cleland, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench held in courtroom 1601, at Calgary, Alberta, on
5 the 9th day of October, 2009, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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I, Danica Dolenc, certify that

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Order No. 10183-09-1	
Page Statistics	
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Transcript Pages:	17
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Action No.: 0601-05052
E-File No.: CVQ09CANPAR1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

CANPAR HOLDINGS LTD. and
PETROVERA RESOURCES

Plaintiffs
Defendants by Counterclaim

and

PETROBANK ENERGY AND RESOURCES LTD. and
GENTRY RESOURCES LTD.

Defendants
Plaintiffs by Counterclaim

PROCEEDING
(Reasons for Judgment)
EXCERPT

Calgary, Alberta
December 11, 2009

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2

3 December 11, 2009

Morning Session

4

5 The Honourable

Court of Queen's Bench of Alberta

6 Mr. Justice Miller

7

8 R.N. Billington, Q.C.

For the Plaintiffs

9 S.S. Smyth

For the Defendants

10 S. Andrews

Court Clerk

11

12

13 **Reasons for Judgment**

14

15 THE COURT:

Counsel have sought my assistance in

16 clarifying my reasons for judgment of October 9th, 2009, for the purposes of settling the
17 minutes of the judgment roll.

18

19 In my reasons for judgment I had concluded the following. Number 1, that a
20 declaration that the lease in question is terminated as of noon, March 3, 2006. Number
21 2, there will be a damage award starting from September 19th, 2003, in favour of the
22 plaintiff, Canpar Holdings using the plaintiffs' methodology and a damage award in
23 favour of Petrovera from March 10, 2005, using the same formula up to the termination
24 of the lease, March 3rd, 2006. Number 3, Petrobank is ordered to give a full accounting
25 of all its production from the wells in question. Number 4, Petrobank is enjoined from
26 producing on the lands and shall terminate its operations on the lands within 30 days of
27 today's date. Number 5, there will be a compensatory damage award consisting of the
28 same formula used by the plaintiffs from the termination of the lease to the end of the
29 production, whenever that shall be and within the next 30 days, again using the formula
30 of the plaintiff. Number 6, the defendants' counterclaim is dismissed.

31

32 I also stated throughout my reasons that I agreed with, "the methodology used by
33 Canpar," page 6, line 2; "using the methodology outlined by Canpar," page 6, line 12;"I
34 have ordered damages according to the methodology used by Canpar," page 7, line 26.
35 And I did specifically order an accounting by the defendant after the termination of the
36 lease. I specifically denied the plaintiff's request for exemplary or punitive damages
37 under the authority of *Whiten v. Pilot Insurance Company*. It appears that my reasons
38 for judgment were ambiguous and thus the request of counsel for me to settle the
39 minutes of this judgment roll.

40

41 It is clear that after March 3rd, 2006, there was no contract, it is clear that the defendant

1 committed trespass and conversion thereafter, and it is clear that I ordered an
2 accounting. It is also clear that the plaintiff could produce from the wells themselves.
3 Accordingly, given my order for an accounting by the defendant and given my reference
4 throughout my reasons of a finding that I accept the plaintiffs' methodology, the
5 plaintiffs submit information of post trespass production based on the defendant's
6 figures. These amounts are as follows. Number 1, in favour of Canpar, 984,203.99.
7 Number 2, in favour of Petrovera 587,755.14. These amounts are arrived at using the
8 mild approach that I referenced from the *Freyberg* decision on based on the information
9 from the defendant.

10
11 In conclusion, in terms of the ultimate resolution and in clearing up any ambiguity, I
12 find that the judgment roll as presented by the plaintiff produced as a result of this
13 hearing properly accords with my reasons for judgment and I have signed that judgment
14 roll accordingly. Thank you, gentlemen.

15
16 MR. SMYTH:

Thank you, M'Lord.

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19 PROCEEDINGS CONCLUDED
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1 **Certificate of Record**

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3 I, Susanne Andrews, certify that this recording is the record made of the evidence in the
4 proceedings of Queen's Bench Court, held in courtroom 1402, at Calgary, on the -- on
5 the 11th day of December, 2009, and I was in charge of the sound-recording -- and I
6 was the court official in charge of sound-recording machine during the proceedings.

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I, Debbie Bell, certify that

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