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Limitations Issues in Oil and Gas Royalty Litigation

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Case commented on: *Canadian Natural Resources Limited v Jensen Resources Ltd.*, [2013 ABCA 399](#)

This case involves a geologist's gross overriding royalty (GORR). The principal issue at trial (see earlier post [here](#)) was the question of whether or not the royalty continued as against the property in question when the Crown issued oil sands leases for the oil sands rights in place of the earlier petroleum natural gas leases which were in force when the royalties crystallized. The trial judge held that the royalty did continue against these new leases and the Court of Appeal has confirmed that part of the award.

The Court of Appeal has varied the judgment at trial in relation to the limitations issue. While Justice Strekaf at trial held that the two year limitation period did not begin to run until the plaintiff had clear information to the effect that the defendant was not paying royalty on the encumbered lands, the Court of Appeal in an unanimous memorandum of judgment concluded that that was not the relevant test and that Jensen (through its principal, Gowertz, the geologist) ought to have known long before that that the royalty was payable. Accordingly, Jensen could only recover the unpaid royalty back to two years before its Originating Notice was issued.

In reaching the conclusion that she did Justice Strekaf at trial had relied heavily on the judgment of the Court of Appeal in *Meek (Trustee of) v San Juan Resources Inc.*, 2005 ABCA 448 where the Court held that:

[33]. . . A royalty interest holder is entitled to expect the royalty payor to honour its obligations. Absent clear information to show improper payment, royalty interest holders are not obliged to take positive steps aimed at ensuring that they are being correctly paid.

...

In this case the Court of Appeal emphasized the importance of returning to the language of the statute and the facts. Since discoverability relates to issues of fact and not questions of law the crucial question was when Gowertz ought to have known that there was production on the sections 1 and 4 lands as well as the section 32 lands (on which Jensen *was* receiving royalties). Noting that Gowertz became aware that there was oil sands production on the section 32 lands sometime between 1997 and 1999, and given Gowertz's experience and knowledge that heavy oil production was increasing in the Cold Lake area, a reasonable person in his position would have made inquiries as to whether there was also production from the other two sections especially since these lands were reasonably proximate to the section 32 lands. By his own admission Gowertz failed to make those inquiries. The Court concluded as follows:

[48] On this record, Gowertz had sufficient information to put him on inquiry sometime after 1999. If he had made reasonable inquiries at that time, he would have discovered that there was already oil production on section 4, and it would have alerted him to the possibility of future production on section 1. The respondent ought to have known, in this time frame, that it had a claim for royalties against the holder of the oil sands leases. The precise date need not be ascertained, because this is well before the limitation cutoff date, two years before the issuing of the Originating Notice. In the result, the respondent is entitled to an accounting for royalties on oil production on sections 1 and 4, but only from and after September 18, 2007.

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