

## The proof of the pudding: ALSA and the Draft Lower Athabasca Regional Plan

By Nigel Bankes

### Cases Considered:

[\*Desoto Resources Limited v. Encana Corporation\*](#), 2011 ABCA 100

In this decision the Court of Appeal set aside lower court decisions (Master and the Court of Queen's Bench) granting the lessor summary judgement in an oil and gas lease validity case.

At issue in this case is the validity of certain petroleum and natural gas leases granted by PanCanadian (Encana's predecessor in title) in 1974 to Desoto's predecessor in title. The fact pattern was complicated by Jofco's (Desoto's previous corporate name) bankruptcy in 1999. As part of the judicially approved bankruptcy settlement it appears that PanCanadian was prepared at that time to forego its position that the leases had terminated.

Fast forward 12 years or so and a Desoto well drilled in 2003 (which Encana argued that Desoto had no right to drill, see "[The ERCB asserts its jurisdiction to determine the validity of an oil and gas lease](#)") following which Encana sent Desoto a notice to commence proceedings on its caveats. Desoto commenced this action seeking a declaration that the leases were in good standing. After pleadings closed Encana applied for summary judgement. Master Mason granted summary judgement: 2009 ABQB 337. At that time I expressed some surprise that it was possible to give summary judgement in a case where the pleadings raised issues of estoppel: see "[Successful application for summary dismissal in an oil and gas lease validity case](#)". Justice Tilleman declined to interfere with that conclusion: 2010 ABQB 448 (blogged as "[Estoppel arguments fail once again in an oil and gas lease case](#)") and hence this appeal.

On appeal, the Court of Appeal (Fraser CJA and McFadyen and Slatter JJA) set aside the summary judgement against the lessee. The Court noted that summary judgement is not available when the record discloses genuine issues of fact that must be resolved at trial. And the Court identified several issues that met this test and in particular a set of issues with respect to the terms of the 1999 bankruptcy arrangement, the interpretation of that arrangement, and the possible interaction of estoppel and reliance arguments with the terms of the bankruptcy arrangement. As the Court pointed out (at para. 28):

While the summary judgement application has been argued largely based on estoppel, it may turn out that the real issue is the scope of the 1999 bankruptcy arrangement .... The real issue may be how far the 1999 bankruptcy arrangement went, or the extent to which Desoto could reasonably rely on it.

The Court went on to offer a number of possible interpretations of the 1999 arrangement that might be available in order to illustrate that there were genuine issues for trial.