

2,1953

In the Privy Council

No. 17. of 1952

18

ON APPEAL

FROM THE SUPREME COURT OF ALBERTA
(APPELLATE DIVISION)

BETWEEN

MICHEAL BORYS

(Plaintiff) Appellant

AND

CANADIAN PACIFIC RAILWAY COMPANY and
IMPERIAL OIL LIMITED

Defendants (Respondents)

RECORD OF PROCEEDINGS
VOLUME 1

Pages 1 - 212.

CHARLES RUSSELL & CO.,
37 Norfolk, The Strand, London,

for the Appellant.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.,

for the Respondent

CANADIAN PACIFIC RAILWAY COMPANY.

LAWRENCE JONES & CO.,
Winchester House, Old Broad St. London, E.C.2.,

for the Respondent

IMPERIAL OIL LIMITED.

1

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In the Privy Council

No. 17. of 1952

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IN THE PRIVY COUNCIL

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(Respondents)

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117	Figure Showing Effect of Pressure on Shrinkage,		521	829
118	Figure Showing Separation of Condensate from Well Stream from Gas Phase,		528	830
119	Figure Showing Retrograde Conden- sation from Gas Phase,		528	831
120	Figure of Flow Sheet of Extrac- tion Plant for Natural Gas,		535	832
121	List of Publications of Dr. George H. Fancher,		581	833
122	Brief of Dr. George H. Fancher, "The Relation of the Meaning of the word Petroleum to the Production of Oil and Natural Gas", Selected Bibliography on the Origin and Geology of Petroleum, Chiefly Prior to 1900 (following page 33),		581	833
123	Annual Report, Geological Survey of Pennsylvania, 1886. Part II, Report on the Oil and Gas Regions in Pennsylvania and New York, by John F. Carll,		585	834
124A	Document prepared by Dr. Fancher showing list of titles refer- ring to Gas from the Biblio- graphy of Petroleum; see Exhibit 123,		614	834

No.	Description of Document	Date	Filed at	Printed at
124B	Document prepared by Dr. Fancher showing titles referring to The Canadian Petroleum Industry (see Exhibit 123),		615	834
125	Photostatic Copy of "The Oil-Well Driller, A History of The World's Greatest Enterprise, The Oil Industry", by Charles A. Whiteshot,		588	834
126	List, "Composition of Some Petroleum Gases of Alberta", submitted by Dr. Fancher,		600	835
127	List, "Physical Properties of Some Crude Oils of Alberta", submitted by Dr. Fancher,		600	835
128	Photostatic Excerpts from "Second Geological Survey of Pennsylvania, 1875 to 1879", by John F. Carll,		611	835
129	Photostatic Excerpts from "Technical Paper 51, Department of the Interior, Bureau of Mines, 'Possible Causes of the Decline of Oil Wells and Suggested Methods of Prolonging Yield', by L.G. Huntley",		611	835
130	Figure No.1 prepared by Dr. Fancher,		621	836
131	Figure No. 2 prepared by Dr. Fancher,		625	837
132	Figure No. 3 prepared by Dr. Fancher,		628	838
133	Figure No. 4 prepared by Dr. Fancher,		630	839
134	First Annual Report on the Mineral Resources of Alberta, by Dr. John A. Allan,	1920	663	840

No.	Description of Document	Date	Filed at	Printed at
<u>PART II - PLAINTIFF'S EXHIBIT</u>				
135	Photostatic Copies of passages from "Alberta Facts and Figures of 1950",		674	840
<u>DEFENDANTS' EXHIBIT</u>				
136	Interim Order of The Board of Arbitration, Right of Entry Arbitration Act, between Imperial Oil Limited and Micheal Borys,	Nov.28,1949	700	840
: : : : : : : : :				

Statement of Claim.

IN THE TRIAL DIVISION OF THE
SUPREME COURT OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

B E T W E E N :

MICHEAL BORYS,

10

Plaintiff

- and -

CANADIAN PACIFIC RAILWAY COMPANY

- and -

IMPERIAL OIL LIMITED,

Defendants.

20

.....

STATEMENT OF CLAIM

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1. The Plaintiff is a Farmer residing in the vicinity of Leduc, in the Province of Alberta. The Defendant Imperial Oil Limited is a body corporate having its head office at the City of Sarnia, in the Province of Ontario, and registered and carrying on business in the Province of Alberta and having a residence at the City of Calgary, in the said Province aforesaid. The Defendant Canadian Pacific Railway Company is a body corporate carrying on business as a common carrier in the Province of Alberta and throughout the Dominion of Canada, and has a residence at the City of Calgary aforesaid.

40

2. The Plaintiff is the owner of and registered as such pursuant to the Land Titles Act of the Province of Alberta, being R.S.A. 1942, Chapter 205 and amendments thereto of an estate in fee simple of all mines and minerals except gold, silver, coal and petroleum and valuable stone within, upon or under the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, in the Province of Alberta, containing 159.50 acres more or less, all as more particularly described in Certificate of Title of record in the Land Titles Office for the North Alberta Land Registration District as No. 165-N-120. The Defendant Canadian Pacific Railway Company is the owner of the pet-

Statement of Claim.

roleum reserved from the Plaintiff's title as aforesaid.

3. Natural gas is a mine and mineral and the Plaintiff as owner of the mines and minerals as aforesaid is likewise the owner of the natural gas.

10 4. By a lease in writing presently of full force and effect the Defendant Canadian Pacific Railway Company did grant and lease unto its co-defendant Imperial Oil Limited all of the petroleum owned by the said Defendant which may be found within, upon or under the lands described in paragraph 2 hereof together with the exclusive right and privilege to explore, drill for, win, get, remove, store and dispose of the said petroleum.

20 5. The Defendants and each of them assert and insist and contend that the natural gas within, upon or under the lands described in paragraph 2 is owned by them or one of them and is embraced within the reservation of the word "petroleum" and have threatened and continue to threaten to use, remove, waste, interfere with or otherwise dispose of the said natural gas, and to conduct operations relative to the said lands having the effect of or resulting in the use, removal, waste, interference and disposal of the Plaintiff's natural gas without the agreement of the Plaintiff and without compensation of any kind to him and which will lead eventually to the dissipation of the Plaintiff's said natural gas. In the further result the Plaintiff has been unable to dispose of his interest in the said lands at its true value nor has he been able to make proper and adequate arrangements to explore, drill for, win, get, remove, store and dispose of the natural gas contained in such lands.

30

40 6. The said natural gas is of immense value and may greatly exceed the value of any petroleum to be produced and in point of fact natural gas pipe lines are being projected to serve the City of Vancouver and the Pacific North West area of the United States of America, some 800 miles distant from the Province of Alberta, and Alberta's neighbors on the East, that is to say, Saskatchewan and Manitoba.

7. Petroleum by definition, reservation, custom, usage and in fact, is an oily inflammable liquid or mineral oil usually of a dark brown or greenish hue, and under the facts and circumstances existing herein does not

Statement of Claim.

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embrace or include natural gas, the said natural gas in its physical properties being very different from petroleum and the said natural gas being in fact a separate and distinct substance from petroleum.

8. The Plaintiff proposes that this action be tried at the Court House, in the City of Calgary, in the Province of Alberta.

10 WHEREFORE THE PLAINTIFF CLAIMS:

- (a) A Judgment declaring that the Plaintiff is the owner of the natural gas within, upon or under the said lands;
- (b) An interlocutory and a permanent injunction restraining the Defendants and each of them and each of their servants, agents, contractors, successors and any one on their behalf from using, removing, wasting, interfering with or otherwise disposing of in any manner the said natural gas;
- (c) In the further alternative judgment for damages against the Defendants in the sum of \$500,000.00;
- (d) Such further and other order as to this Honourable Court may seem meet and just;
- (e) Costs of this action.

DATED at the City of Calgary, in the Province of Alberta, this 16th day of November, A.D. 1949, AND DELIVERED by Messrs. Fisher, McDonald & Fisher, Solicitors for the Plaintiff whose address for service is in care of said Solicitors, 201 Lancaster Building, Calgary, Alberta.

40 ISSUED out of the office of this Honourable Court at Calgary, this 16th day of November, A.D. 1949.

"W. K. JULL"

(AED)

A/Clerk of the Court

(SEAL)

(SEAL)

Statement of Defence of
Canadian Pacific Railway Company.

4

STATEMENT OF DEFENCE
of
CANADIAN PACIFIC RAILWAY COMPANY

1. The Plaintiff is not the owner of and is not registered as such pursuant to The Land Titles Act, or otherwise, of an estate in fee simple of all mines and minerals except gold, silver, coal, petroleum and valuable stone within, upon or under the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, in the Province of Alberta, as more particularly described in Certificate of Title 165-N-120 or otherwise or at all. The Defendant Canadian Pacific Railway Company is now and at all times material has been the owner of an estate in fee simple of all coal, petroleum and valuable stone within, upon or under the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, and by virtue of Certificate of Title No. C.P.R. 2687 issued by the Registrar of Land Titles for the North Alberta Land Registration District on the 2nd of September, 1910, this defendant was then and still is registered as such owner.

2. This defendant admits that natural gas (so called) is a mineral. The plaintiff is not by reason of his alleged ownership of the mines and minerals referred to in paragraph 2 of the Statement of Claim or otherwise the owner of the natural gas (so called).

3. By a Lease in writing dated the 21st day of September, 1949, this defendant leased to the defendant, Imperial Oil Limited, the petroleum which may be found within, upon or under the lands described in paragraph one hereof together with the right to work, win and carry away the same subject to the terms and conditions set forth in the said lease.

4. This defendant says that by virtue of its ownership of and title to petroleum, as set out in paragraph 1 hereof, it is the owner of any natural gas (so called) within, upon or under the lands described in paragraph one hereof, and is entitled in the proper exercise of its rights to drill for, work, win, carry away, use, remove, recover and otherwise dispose of any natural gas (so called), and this defendant has the right, by virtue of the lease referred to in the immediately preceding paragraph hereof, to grant to the defendant Imperial Oil Limited the right to work, win, carry away, and otherwise dispose

Statement of Defence of
Canadian Pacific Railway Company.

5

10 of the said natural gas. The plaintiff is not entitled to require either of the defendants to make any agreement with him, nor is he entitled to any compensation of any kind whatsoever in respect of the use, removal or other disposition of the said natural gas. If the plaintiff has been unable to dispose of his interest in the said lands at its true value, or otherwise, this has not been the result of any act or omission of this defendant, but is the result of the fact that he has no ownership of the natural gas referred to.

5. Petroleum is not by definition, reservation, custom, usage or in fact an oily inflammable liquid or mineral oil usually of a dark brown or greenish hue. Under the facts and circumstances existing herein and any other circumstances petroleum embraces and includes natural gas (so called). Petroleum and natural gas are not separate and distinct substances.

20 6. In answer to the whole of the Statement of Claim this defendant repeats the allegations contained in paragraphs 1 to 5 hereof inclusive, and says that this defendant is the owner of all the petroleum within, upon or under the lands in question, and that the defendant Imperial Oil Limited is by virtue of its lease entitled to work, win and carry away the said petroleum, and this defendant further specifically says:

- 30 (a) Petroleum includes natural gas (so called) and this defendant is therefore the owner of all natural gas within, upon or under the said lands.
- (b) This defendant is the owner of all petroleum in its gaseous phase which may be within, upon or under the lands in question.
- 40 (c) This defendant is the owner of the natural gas (so called) which may be contained in solution in the petroleum in its liquid phase which may be within, upon or under the said lands.
- (d) This defendant has the right without any compensation to the plaintiff to remove, appropriate, convert and dispose of the natural gas (so called) or any other substances necessary to work, win and carry away the petroleum in its

Statement of Claim of
Canadian Pacific Railway Company.
Counterclaim of Canadian Pacific Railway Company.

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liquid phase within, upon or under the lands in question, and this defendant has the right to grant and convey to the defendant Imperial Oil Limited the same rights, and has in fact done so by virtue of the lease referred to in paragraph 3 hereof.

7. This defendant will object that the Statement of Claim discloses no cause of action fit and proper to support the pleas set out in paragraphs "b" and "c" of the plaintiff's prayer for relief.

8. This defendant says that this action including the counterclaim hereinafter set forth should be tried at the City of Calgary in the Province of Alberta.

20

COUNTERCLAIM

B E T W E E N :

CANADIAN PACIFIC RAILWAY COMPANY,

Plaintiff by
Counterclaim,

- and -

30

MICHEAL BORYS,

Defendant by
Counterclaim.

This defendant repeats the allegations contained in paragraphs 1 to 6 inclusive of this defence and claims as follows:

40

- (a) a declaration that petroleum includes natural gas and that this defendant is therefore the owner of the natural gas (so called) within, upon or under the lands in question, and that this defendant has the right to grant to the defendant Imperial Oil Limited the right and privilege to work, win and carry away the said natural gas.

Counterclaim of Canadian Pacific Railway Company.
Statement of Defence of Imperial Oil Limited.

7

- (b) a declaration that this defendant is the owner of all petroleum in its gaseous phase which may be within, upon or under the said lands;
- (c) a declaration that this defendant is the owner of the natural gas (so called) which may be contained in solution in the petroleum in its liquid phase which may be within, upon or under the said lands:
- 10 (d) a declaration that this defendant has the right without any compensation to the plaintiff to remove, appropriate, convert and dispose of the natural gas (so called) or any other substances necessary to work, win and carry away petroleum in its liquid phase within, upon or under the lands in question, and that this defendant has the right to grant and convey to the defendant Imperial Oil Limited the same rights, and has in fact done so by virtue of the Lease dated 20 the 21st day of September, 1949.

DATED at the City of Calgary, in the Province of Alberta, this 30th day of November, 1949, and DELIVERED by D. W. Clapperton, Solicitor for the Defendant CANADIAN PACIFIC RAILWAY COMPANY, whose address for service is at the office of the said D. W. Clapperton in the Department of Natural Resources Building of the Canadian Pacific Railway Company, Corner 9th Avenue and 1st Street East, 30 Calgary, Alberta.

STATEMENT OF DEFENCE
of
IMPERIAL OIL LIMITED

1. In answer to Paragraph 2 of the Statement of Claim the Defendant Imperial Oil Limited admits that the 40 Defendant Canadian Pacific Railway Company is registered as owner of the petroleum in, or under, the North East Quarter of Section nineteen (19) in Township fifty (50) Range twenty-six (26) West of the 4th Meridian, in the Province of Alberta, containing approximately one hundred and sixty (160) acres more or less, all as more particularly described in Certificate of Title of record in the Land Titles Office for the North Alberta Land Registration District as No. C.P.R. 2687.

Statement of Defence of
Imperial Oil Limited,

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2. In further answer to paragraph 2 of the Statement of Claim this Defendant says that the Plaintiff is the owner of an estate in fee simple of and in the North East Quarter of Section nineteen (19), Township fifty (50) Range twenty-six (26) West of the 4th Meridian, in the Province of Alberta containing approximately one hundred and sixty (160) acres more or less, reserving thereout all coal, petroleum and valuable stone within, upon or under the aforesaid lands, all as more particularly described in Certificate of Title of record in the Land Titles Office for the North Alberta Land Registration District as No. 165-N-120.

3. In answer to paragraph 3 of the Statement of Claim the Defendant Imperial Oil Limited denies that the Plaintiff is the owner of the mines and minerals except gold, silver, coal and petroleum and valuable stone or is the owner of the natural gas as alleged or otherwise.

4. In answer to paragraph 4 of the Statement of Claim the Defendant Imperial Oil Limited says that by a lease in writing dated the 21st day of September, 1949, and made between the Defendant Canadian Pacific Railway Company as lessor and the Defendant Imperial Oil Limited as lessee the lessor leased to the lessee all the petroleum which may be found within, upon or under the aforesaid lands, together with the exclusive right and privilege to work, win and carry away the same for a period of ten (10) years, subject to a right of renewal and the covenants, provisions, conditions, restrictions and stipulations all as in the sale lease contained.

5. In answer to paragraph 5 of the Statement of Claim this Defendant admits that it asserts and insists and contends that natural gas within, upon or under the lands described in paragraph 2 is embraced within the reservation of the word "petroleum" but otherwise and in all other respects denies the allegations contained in paragraph 5 of the Statement of Claim.

6. This Defendant does not admit any of the allegations contained in paragraph 6 of the Statement of Claim.

7. In answer to paragraph 7 of the Statement of Claim this Defendant denies each and every allegation contained in the said paragraph.

Statement of Defence of
Imperial Oil Limited.

8. In answer to the whole of the Statement of Claim this Defendant says that under and by virtue of the lease dated the 21st day of September, A.D. 1949, and made between the Defendant Canadian Pacific Railway Company and the Defendant Imperial Oil Limited as set out in paragraph 4 hereof, the Defendant Imperial Oil Limited has the right to work, win and carry away petroleum in any or all of its forms of occurrence, including its gaseous phase or so-called natural gas, which may be found within, upon or under the said lands.

9. In the alternative and in further answer to the whole of the Statement of Claim this Defendant says that, if it has not the right to work, win and carry away the natural gas which may be found within, upon or under the lands mentioned in the said lease dated the 21st day of September, A.D. 1949, it has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase which may be found within, upon or under the said lands.

10. In the further alternative and in further answer to the whole of the Statement of Claim, this defendant says that if it has not the right to work, win and carry away the said natural gas it has the right to work, win and carry away the natural gas that may be contained in solution in the petroleum in its liquid phase which may be found within, upon or under the said lands.

11. In the further alternative and in further answer to the whole of the Statement of Claim this Defendant says that if it has not the right to work, win and carry away the said natural gas it has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands.

12. This Defendant says that the action of the Plaintiff should be dismissed with costs.

13. This Defendant says that this action, including the Counterclaim hereinafter set out, should be tried in the City of Calgary, in the Province of Alberta.

Counterclaim of Imperial Oil Limited.

10

COUNTERCLAIM

B E T W E E N :

IMPERIAL OIL LIMITED,

Plaintiff by
Counterclaim

10

- and -

MICHEAL BORYS,

Defendant by
Counterclaim.

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1. The Plaintiff by Counterclaim, Imperial Oil Limited, repeats paragraphs 1 and 4 and 8 to 11 inclusive of the Statement of Defence of the Defendant Imperial Oil Limited.

WHEREUPON THE PLAINTIFF BY COUNTERCLAIM CLAIMS:

30

(a) A Judgment declaring that the Plaintiff by Counterclaim, Imperial Oil Limited, has the right to work, win and carry away petroleum in any or all of its forms, including its gaseous phase or so-called natural gas, which may be found within, upon or under the said lands.

40

(b) A Judgment declaring that the Plaintiff by Counterclaim, Imperial Oil Limited, has the right, without compensation to the Defendant by Counterclaim, to remove, appropriate, convert, use and dispose of such natural gas as may be necessary or incidental to work, win or carry away the petroleum within, upon or under the said lands.

(c) In the alternative a Judgment declaring that if the Plaintiff by Counterclaim, Imperial Oil Limited, has not the right to work, win and carry away the natural gas, it has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase, within, upon or under the said lands.

Counterclaim of Imperial Oil Limited.
Joinder of Issue and Reply to the Defence of
the Defendant, Canadian Pacific Railway Company.

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- (d) In the further alternative a Judgment declaring that if the Plaintiff by Counterclaim Imperial Oil Limited has not the right to work, win and carry away the natural gas, it has the right to work, win and carry away the natural gas contained in solution in the petroleum in its liquid phase within, upon or under the said lands.
- 10 (e) Such further and other order as to this Honourable Court may seem meet and just.
- (f) The costs of this action.

20 DATED at the City of Calgary, in the Province of Alberta, this 29th day of November, A.D. 1949, and DELIVERED by Messrs. Nolan, Chambers, Micht, Saucier & Peacock, solicitors for the Defendant Imperial Oil Limited, whose address for service is care of said Solicitors, 600-603 Lancaster Building, Calgary, Alberta.

JOINDER OF ISSUE AND REPLY TO THE
DEFENCE OF THE DEFENDANT, CANADIAN
PACIFIC RAILWAY COMPANY.

- 30 1. The Plaintiff joins issue with the Defendant, Canadian Pacific Railway Company, on paragraphs One (1), Two (2) except with regard to the Defendant's admission therein that natural gas is a mineral, and Seven (7) of the Defendant's Statement of Defence.
- 40 2. In reply to paragraph Four (4) of the said Defendant's Statement of Defence the Plaintiff denies each and every allegation contained in the said paragraph and in particular denies that the Defendant is the owner of any natural gas within, upon or under the lands in question and further denies that the Defendant is entitled to drill for, work, win, carry away, use, remove, recover and otherwise dispose of any of the said natural gas and further denies that the Defendant has the right by virtue of the lease referred to, or otherwise, to grant to the Imperial Oil Limited the right to work, win, carry away, and otherwise dispose of the said natural gas. The Plaintiff further denies that he is not entitled to request either of the Defendants to make any agreement

Joinder of Issue and Reply to the Defence of
the Defendant, Canadian Pacific Railway Company.

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with him nor that he is not entitled to any compensation in respect of the use or other disposition of the said natural gas or that the said Defendant is entitled to use or otherwise dispose of the said natural gas. He further denies that his failure to dispose of his interest in the said lands at its true value is not the result of any act or omission of the said Defendant.

10 3. In answer to paragraph Five (5) of the Statement of Defence, the Plaintiff joins issue with the Defendant in his denial that the petroleum is not by definition, reservation, custom, usage or in fact an oily inflammable liquid or mineral oil usually of a dark brown or greenish hue. The Plaintiff denies that under any circumstances petroleum embraces and includes natural gas and joins with the said Defendant in his allegation that petroleum and natural gas are not separate and distinct substances.

20 4. In reply to paragraph Six (6) of the said Statement of Defence the Plaintiff denies each and every allegation contained therein except the aforesaid admission contained in paragraph Two (2) referred to, and the allegations contained in paragraph Three (3) referred to therein, and the Plaintiff particularly denies that:

- 30 (a) Petroleum includes natural gas (so-called) and this Defendant is therefore the owner of all natural gas within, upon or under the said lands.
- (b) This Defendant is the owner of all petroleum in its gaseous phase which may be within, upon or under the lands in question and he further denies that petroleum exists in a "gaseous phase".
- 40 (c) This Defendant is the owner of the natural gas (so-called) which may be contained in solution in the petroleum in its liquid phase which may be within, upon or under the said lands and he further denies that natural gas exists "in solution" with petroleum, or in a "liquid phase".
- (d) This Defendant has the right without any compensation to the Plaintiff to remove, appropriate, convert and dispose of the natural gas (so-called)

Joinder of Issue and Reply to the Defence of
the Defendant, Canadian Pacific Railway Company.

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or any other substances necessary to work, win and carry away the petroleum (or that petroleum exists in a "liquid phase") in its liquid phase within, upon or under the lands in question, and this Defendant has the right to grant and convey to the Defendant, Imperial Oil Limited, the same rights, and has in fact done so by virtue of the lease referred to in paragraph Three (3).

10 5. In the further alternative and in further reply to paragraph four (4) and the whole of the Statement of Defence of the Defendant, Canadian Pacific Railway Company, the Plaintiff says that if the Defendant "has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands" and if the said Defendant is entitled to a judgment of
20 this Honourable Court so declaring (which is not admitted but denied) the Plaintiff says that he has a co-relative, corresponding and similar right, without compensation to the Defendants, to remove, appropriate, convert, use and dispose of such petroleum in any of its phases, or any other substances as may be necessary or incidental to work, win or carry away the natural gas in any of its phases which may be found within, upon or under the said lands, and does hereby ask for a judgment of this Honourable
30 Court so declaring.

6. In the further alternative and in further answer to the said Statement of Defence the Plaintiff denies that the Defendant, Canadian Pacific Railway Company, has the right to drill for, use, remove, waste, interfere, or otherwise dispose of in any manner or attempt to so do any of the natural gas under the said lands, no matter from what reservoir, in what form, or in conjunction with what other mineral it may be found, or to what use its disposal may be incident to.

40 7. In further reply to the whole of the Statement of Defence the Plaintiff says that having regard to the time at which the Defendant, Canadian Pacific Railway Company, reserved the coal, petroleum and valuable stone within, upon or under the lands in question and the facts and circumstances then existing it was not the intention of the parties to the said reservation including the Defendant Canadian Pacific Railway Company as revealed by the language used to reserve the natural gas.

Defence to Counterclaim of the Defendant
Canadian Pacific Railway Company,

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DEFENCE TO COUNTERCLAIM OF THE DEFENDANT
CANADIAN PACIFIC RAILWAY COMPANY

10 1. The Defendant by Counterclaim denies each and every allegation contained in paragraphs One (1) to Six (6) inclusive of the Statement of Defence of the Canadian Pacific Railway Company as referred to in the Counterclaim of the said Defendant, except the admission in paragraph Two (2) thereof that natural gas is a mineral and paragraph Three (3) thereof.

20 2. In the further alternative and in further answer to the whole of the said Counterclaim the Defendant denies that the Plaintiff by Counterclaim, Canadian Pacific Railway Company, has the right to drill for, use, remove, waste, interfere, or otherwise dispose of in any manner or attempt to so do any of the natural gas under the said lands, no matter from what reservoir, in what form, or in conjunction with what other mineral it may be found, or to what use its disposal may be incident to.

30 3. In the further alternative and in further answer to the whole of the said Counterclaim the Defendant by Counterclaim says that if the Plaintiff by Counterclaim, Canadian Pacific Railway Company, "has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands and if the said Plaintiff by Counterclaim is entitled to a judgment of this Honourable Court so declaring (which is not admitted but denied) the Defendant by Counterclaim says that he has a co-relative, corresponding and similar right, without compensation to the Plaintiff by Counterclaim, to remove, appropriate, convert, use and dispose of such petroleum, in any of its phases, or any other substances as may be necessary or incidental to work, win or carry away the natural gas in any of its phases which may be found within, upon or under the said lands, and does
40 hereby ask for a judgment of this Honourable Court so declaring.

4. In the further alternative and in further answer to the whole of the Counterclaim of the Canadian Pacific Railway Company the Defendant by Counterclaim says that having regard to the time at which the Canadian Pacific Railway Company reserved the coal, petroleum and

Defence to Counterclaim of the Defendant
Canadian Pacific Railway Company.
Joinder of Issue and Reply to the Defence of the
Defendant, Imperial Oil Limited.

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valuable stone within, upon or under the lands in question and the facts and circumstances then existing it was not the intention of the parties to the said reservation including the Canadian Pacific Railway Company as revealed by the language used to reserve the natural gas.

WHEREFORE THE DEFENDANT BY COUNTERCLAIM prays that the Counterclaim be dismissed with costs.

10 DATED at the City of Calgary, in the Province of Alberta, this day of December, A.D. 1949, and DELIVERED by Messrs. Fisher, McDonald & Fisher, Barristers and Solicitors, Solicitors for the Plaintiff, whose address for service is in care of the said Solicitors, 201 Lancaster Building, Calgary, Alberta.

20 JOINDER OF ISSUE AND REPLY TO THE
DEFENCE OF THE DEFENDANT, IMPERIAL
OIL LIMITED.

1. The Plaintiff joins issue with the Defendant, Imperial Oil Limited, on paragraphs Two (2), Three (3), Five (5), except with regard to the admission contained therein, Six (6) and Seven (7), of the Statement of Defence of the Defendant, Imperial Oil Limited.

30 2. In reply to paragraph Eight (8) of the said Defendant's Statement of Defence the Plaintiff denies that the Defendant, Imperial Oil Limited, by virtue of a lease dated the 21st day of September, A.D. 1949, made between itself and the Canadian Pacific Railway Company, or otherwise, "has the right to work, win and carry away petroleum in any or all of its forms of occurrence, including its gaseous phase or so-called natural gas, which may be found within, upon or under the said lands", and the Plaintiff further denies that petroleum exists
40 in a "gaseous phase" known as natural gas.

Joinder of Issue and Reply to the Defence of
the Defendant, Imperial Oil Limited.

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3. In reply to paragraph Nine (9) of the said Statement of Defence, the Plaintiff denies that the said Defendant "has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase which may be found within, upon or under the said lands", and the Plaintiff further denies that natural gas occurs in the same reservoir with petroleum or occurs in a "liquid phase".

10 4. In reply to paragraph Ten (10) of the said Statement of Defence the Plaintiff denies that the said Defendant "has the right to work, win and carry away the natural gas that may be contained in solution in the petroleum in its liquid phase which may be found within, upon or under the said lands", and the Plaintiff further denies that natural gas is contained in solution in petroleum or that it occurs in a "liquid phase".

20 5. In reply to paragraph Eleven (11) of the said Statement of Defence the Plaintiff denies that the said Defendant "has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands".

30 6. In the further alternative and in further reply to paragraph Eleven (11) and the whole of the Statement of Defence of the Defendant, Imperial Oil Limited, the Plaintiff says that if the Defendant "has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands" and if the said Defendant is entitled to a judgment of this Honourable Court so declaring (which is not admitted but denied) the Plaintiff says that he has a
40 co-relative, corresponding and similar right, without compensation to the Defendants, to remove, appropriate, convert, use and dispose of such petroleum, in any of its phases, or any other substances as may be necessary or incidental to work, win or carry away the natural gas in any of its phases which may be found within, upon or under the said lands, and does hereby ask for a judgment of this Honourable Court so declaring.

Joinder of Issue and Reply to the Defence of
the Defendant, Imperial Oil Limited.
Defence to Counterclaim of the Defendant
Imperial Oil Limited.

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7. In further reply to the whole of the Statement of Defence the Plaintiff denies that the Defendant, Imperial Oil Limited, has the right to drill for, use, remove, waste, interfere, or otherwise dispose of in any manner, or attempt to so do, any of the natural gas under the said lands, no matter from what reservoir or in conjunction with what other mineral it may be found or to what use its disposal may be incident to.

10 8. In further reply to the whole of the Statement of Defence the Plaintiff says that having regard to the time at which the Defendant Canadian Pacific Railway Company reserved the coal, petroleum and valuable stone within, upon or under the lands in question and the facts and circumstances then existing it was not the intention of the parties to the said reservation including the Defendant Canadian Pacific Railway Company as revealed by the language used to reserve the natural gas.

20

DEFENCE TO COUNTERCLAIM OF THE DEFENDANT
IMPERIAL OIL LIMITED.

1. The Defendant by Counterclaim, Micheal Borys, admits paragraphs One (1) and Four (4) of the Statement of Defence of the Defendant, Imperial Oil Limited, as pleaded in paragraph One (1) of the said Counterclaim.

30 2. The Defendant by Counterclaim denies each and every allegation contained in paragraphs Eight (8) to Eleven (11) inclusive of the Statement of Defence of the Defendant, Imperial Oil Limited, and as pleaded in paragraph One (1) of the Defendant's Counterclaim, and in particular the Defendant by Counterclaim denies that:

40 (a) The Plaintiff by Counterclaim has the right to work, win and carry away petroleum in any or all of its forms, including its gaseous phase or so-called natural gas, which may be found within, upon or under the said lands, and he further denies that petroleum exists in a "gaseous phase" known as natural gas.

(b) The Plaintiff by Counterclaim has the right, without compensation to the Defendant by Counterclaim, to remove, appropriate, convert,

Defence to Counterclaim of the Defendant
Imperial Oil Limited.

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use and dispose of such natural gas as may be necessary or incidental to work, win or carry away the petroleum within, upon or under the said lands.

10 (c) The Plaintiff by Counterclaim has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase within, upon or under the said lands, and he further denies that natural gas occurs in the same reservoir with petroleum or occurs in a "liquid phase".

20 (d) The Plaintiff by Counterclaim has the right to work win and carry away the natural gas contained in solution in the petroleum in its liquid phase, within, upon or under the said lands, and he further denies that natural gas is contained in solution in petroleum or that it occurs in a "liquid phase".

30 3. In the further alternative and in further answer to paragraph Two (2) (b) of the Counterclaim and to the whole of the Counterclaim of Imperial Oil Limited, the Defendant by Counterclaim says that if the Plaintiff by Counterclaim, Imperial Oil Limited, "has the right, without compensation to the Plaintiff, to remove, appropriate, convert, use and dispose of such natural gas or any other substances as may be necessary or incidental to work, win or carry away the petroleum in its liquid phase which may be found within, upon or under the said lands" and if the said Plaintiff by Counterclaim is entitled to a judgment of this Honourable Court so declaring (which is not admitted but denied) the Defendant by Counterclaim says that he has a co-relative, corresponding and similar right without compensation to the Plaintiff by Counterclaim, to remove, appropriate, convert, use and dispose of such petroleum, in any of its phases, or any other substances as may be necessary or incidental to work, win or carry away the natural gas in any of its phases which may be found within, upon or under the said lands, and does hereby ask for a judgment of this Honourable Court so declaring.

40 4. In the further alternative and in further answer to the whole of the said Counterclaim the Defendant denies that the plaintiff by Counterclaim, Imperial Oil

Defence to Counterclaim of the Defendant

Imperial Oil Limited.

Reply of Imperial Oil Limited to Defence to Counterclaim.

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Limited, has the right to drill for, use, remove, waste, interfere, or otherwise dispose of in any manner or attempt to so do any of the natural gas under the said lands, no matter from what reservoir or in conjunction with what other mineral it may be found or to what use its disposal may be incident to.

10 5. In the further alternative and in further answer to the whole of the Counterclaim of Imperial Oil Limited, the Defendant by Counterclaim says that having regard to the time at which the Defendant Canadian Pacific Railway Company reserved the coal, petroleum and valuable stone within, upon or under the lands in question, and the facts and circumstances then existing, it was not the intention of the parties to the said reservation including the Defendant Canadian Pacific Railway Company, as revealed by the language used, to reserve the natural gas.

20 WHEREFORE THE DEFENDANT BY COUNTERCLAIM PRAYS that the Counterclaim be dismissed with costs.

DATED at the City of Calgary, in the Province of Alberta, this 7th day of December, A.D. 1949, and DELIVERED by Messrs. Fisher, McDonald & Fisher, Barristers and Solicitors, Solicitors for the Plaintiff, whose address for service is in care of the said Solicitors, 201 Lancaster Building, Calgary, Alberta.

30

REPLY OF IMPERIAL OIL LIMITED
TO DEFENCE TO COUNTERCLAIM.

1. In reply to the Defence to Counterclaim the Plaintiff by Counterclaim, Imperial Oil Limited, joins issue.

40 DATED at the City of Calgary, in the Province of Alberta, this 14th day of December, A.D. 1949, and DELIVERED by Messrs. Nolan, Chambers, Might, Saucier & Peacock, Solicitors for the Defendant, Imperial Oil Limited, whose address for service is care of said Solicitors, 600-603 Lancaster Building, Calgary, Alberta.

Reply of Canadian Pacific Railway Company
to Defence to Counterclaim.

20.

REPLY OF CANADIAN PACIFIC RAILWAY COMPANY
TO DEFENCE TO COUNTERCLAIM.

In reply to the Defence to Counterclaim the Plaintiff by Counterclaim, Canadian Pacific Railway Company, joins issue.

10 DATED at the City of Calgary, in the Province of Alberta, this 19th day of December, A.D. 1949, and DELIVERED by D. W. Clapperton, Solicitor for the Defendant Canadian Pacific Railway Company, whose address for service is at the office of the said D. W. Clapperton in the Department of Natural Resources Building of the Canadian Pacific Railway Company, Corner 9th Avenue and 1st Street East, Calgary, Alberta.

20

Opening of Case.

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THE COURT: Mr. Steer and Mr. Riley for the
Plaintiff?
MR. STEER: And Mr. Fisher, my lord, Mr. Rae
Fisher.
THE COURT: Mr. Nolan, anyone with you?
MR. NOLAN: Mr. Chambers is with me, my lord,
Mr. E. J. Chambers.
THE COURT: For?
MR. NOLAN: Imperial Oil.
10 THE COURT: Imperial Oil?
MR. NOLAN: Yes, my lord.
THE COURT: Mr. Helman and Mr. Mitchell?
MR. HELMAN: Yes, we are appearing for the
Canadian Pacific Railway. I should say that Mr. Clapper-
ton was to appear, but he is ill in the hospital, so that
we are representing the Canadian Pacific Railway.
THE COURT: And has the C.P.R. an application?
MR. NOLAN: My lord, the Imperial Oil has an
20 application, and I understand that the C.P.R. has too.
We served a Notice of Motion returnable before your lord-
ship at 10:00 o'clock this morning and, as it is a pre-
liminary matter, I would respectfully suggest that it be
disposed of before proceeding with the trial proper.
MR. STEER: The matter, my lord, arises by
reason of a Notice which we served on Mr. Mackenzie of
the Imperial Oil and on Mr. Munro of the Canadian Pacific
to attend as witnesses and to produce certain documents.
Certainly, in my submission, we have a right to subpoena
Mr. Mackenzie and Mr. Munro to attend as witnesses.
30 Whether or not they are obliged to produce the documents
which have been called for, in my submission, is a
question that should await the calling of these witnesses.
If we call them the question arises; if we do not call
them the question does not arise. And it is my suggest-
ion that the trial should proceed to the point where
those witnesses are called.
MR. NOLAN: My lord, we have a Motion before
the Court returnable at 10:00 o'clock this morning and,
if your lordship has had an opportunity to examine the
40 Notice to the witness to attend at the trial, if your
lordship has been able to see the mass of documents
which I require to be produced, it will, of course, be
understood that it takes a lot of time and a lot of
trouble to gather them together. We want to do every-
thing to facilitate the trial of the action, and I think
it would facilitate if we now knew whether or not we were
to be ordered to produce the documents set out in the

Opening of Case.

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Notice to Attend. I think it is only fair to the witness who will come before your lordship, if he is called, to know whether or not your lordship desires that he should make production of those documents when he takes his place in the witness box.

10 THE COURT: I think I will hear all of the Motions now. I have not seen the Motion. I have not read the Notice of Motion, and I know nothing about this action. I have not even read the Pleadings, so I know nothing about this action any more than any other gossiper on the street.

20 MR. NOLAN: Well, my lord, I do not intend to usurp the role of my learned friend and attempt to make an opening, but in view of what your lordship has just said, I think it incumbent upon me in a few words to outline to your lordship what this action is about, because it will depend largely on the nature of the issue as to whether your lordship determines whether we should produce or whether we should not.

30 The plaintiff, my lord, is Micheal Borys. The defendants are Imperial Oil Limited and the Canadian Pacific Railway Company. The evidence will disclose, and it has been pleaded, that the Canadian Pacific Railway Company is the owner of the lands in question, which are more particularly described as the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, in the Province of Alberta. That is in the Leduc District, sir. These lands were granted to the Canadian Pacific Railway Company by the Crown years and years ago reserving to the Crown only precious metals, and nothing turns on the question of precious metals.

Now, in the year 1906 the Canadian Pacific Railway Company sold this land to Simon Borys, reserving unto themselves -

40 THE COURT: You mean Micheal?
MR. NOLAN: No, I mean Simon, the father, my lord. Micheal is the plaintiff.
THE COURT: Yes?
MR. NOLAN: Simon was the original purchaser from the C.P.R.
THE COURT: All right.
MR. NOLAN: The Company sold to Simon Borys, this land, reserving unto themselves all coal, petroleum

and valuable stone, and there was a chain of title which I need not go into. The land by a series of transfers now finds itself transferred to the present owner and plaintiff, Micheal Borys. I remind your lordship that the reservation under which Simon Borys purchased from the Canadian Pacific Railway was all coal, petroleum and valuable stone. And then, my lord, as recently as the 21st of September, 1949, the Canadian Pacific Railway Company leased to the Imperial Oil Limited all petroleum that might be found within, upon or under the said lands, together with the exclusive right to work in and carry away the same for a period of 10 years, subject to the right of renewal thereof.

Then, my lord, in November of last year the plaintiff, Micheal Borys, issued a Statement of Claim against the Imperial Oil Limited and Canadian Pacific Railway Company asking for a judgment declaring that the said plaintiff, Micheal Borys, was the owner of the natural gas within, upon or under the said lands, and by paragraph 7 of that Statement of Claim, and this is a paragraph which will be mentioned on a number of occasions throughout this trial, the plaintiff alleged that petroleum by definition, reservation, custom, usage and in fact, is an oily inflammable liquid or mineral oil usually of a dark brown or greenish hue, and under the facts and the circumstances existing herein does not embrace or include natural gas, the said natural gas in its physical properties being very different from petroleum and the said natural gas being in fact a separate and distinct substance from petroleum.

In its defence the Imperial Oil, and counterclaim, the Imperial Oil asks for a judgment of the Court declaring that it, Imperial Oil, had the right to work, win and carry away petroleum in any or all of its forms, including its gaseous phase or so-called natural gas, which may be found within, upon or under the said lands. And Imperial further asks for a judgment declaring that it have the right, without compensation, to remove, appropriate, convert, use and dispose of such natural gas as may be necessary or incidental to work, win or carry away the petroleum within, upon or under the said lands.

And in the alternative, Imperial asks for a judgment declaring that if it had not the right

to work, win and carry away the natural gas, it had the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase within, upon or under the said lands.

10 And finally, in the further alternative, Imperial asks for a judgment declaring that if it had not the right to work, win or carry away the natural gas, it had the right to work, win and carry away the natural gas contained in solution in the petroleum in its liquid phase within, upon or under the said land. And the pleadings of the Canadian Pacific Railway Company are to the like effect.

Well, my lord, in a word, what we are concerned with here today is, does this reservation of the words "all petroleum" embrace natural gas? The plaintiff says it does, the defendants say it does not.

20 Now, my lord, we were served with a Notice to Attend as a witness. That document was dated the 9th of November, A.D. 1950, and it is addressed to W. D. Mackenzie, Esq., Imperial Oil Limited, Calgary, Alberta. It is very short and I think I would like to read it, my lord.

" NOTICE TO WITNESS TO ATTEND AT TRIAL.

30 TAKE NOTICE that you are hereby required to attend at the trial of this action at the Court House, Calgary, on Thursday, November 16th, 1950, as a witness on behalf of the plaintiff and that you are required to produce and show to the Court at the said Trial the following:-

- 40 (a) Any and all agreements, leases, licenses, correspondence and documents passing between the defendants Canadian Pacific Railway and Imperial Oil Limited relating in any way to rights in Alberta to petroleum, natural gas and related hydrocarbons or any of them bargained, sold, granted, leased, assigned or conveyed by the defendant Canadian Pacific Railway to Imperial Oil Limited.
- (b) A specimen of each printed or otherwise multi-graphed form of lease or license or agreement granted or made by the defendant Imperial Oil

- " Limited to or with anyone relating to petroleum, petroleum products, natural gas and natural gas products, or any of them, used in Alberta.
(c) The letters patent by which the defendant Imperial Oil Limited was incorporated and all letters-patent supplementary thereto. "

10 And upon receipt of that Notice of Motion, the proposed witness, Mr. W.D. Mackenzie, and the defendant, Imperial Oil Limited, moved that the portion of the Notice to the witness insofar as its requirements for the production of documents is concerned is improper, invalid and null and void, and does not have to be complied with on the following grounds:

1. It is too vague in that the actual documents required to be produced are not identified sufficiently.
- 20 2. It is too general in its terms, is oppressive, exceeds the necessities of the Plaintiff and is an abuse of the process of court.
3. It requires said Mackenzie to decide upon the relevancy of the documents.
4. The documents in question, if they exist, are not in the possession or under the direction and control of the said Mackenzie.
5. The said documents are, in any event, irrelevant and inadmissible in evidence.
- 30 6. The said Notice is not given to a party to these proceedings as required by Rule of Court No. 340.
7. The production of such documents is res judicata in these proceedings.
8. Upon such other grounds as may appear in the Hearing of this said application.

The pertinent and relative Rules of Court, my lord, are Rules 340, 341 and 342.

THE COURT: 340, 341 and 342.

40 MR. NOLAN: Thank you, my lord. Rule 340 reads as follows, my lord:

" Whenever a party desires to call any person as a witness at the hearing or trial of any action or proceeding he may serve him with a notice requiring him to attend thereon, stating the time and place at which he is required to attend and the documents, if any, which he is required to produce,

"but such notice shall not be effective unless at the time of such service or prior thereto or within a reasonable time prior to the time at which he is required to attend, he is paid the proper amount of conduct money. "

In this case, the conduct money was paid, and nothing turns on that, my lord. 341 reads:

10 " Upon proof to the satisfaction of the judge
presiding at the sittings of any court of the
service of a notice upon any witness who fails to
attend or to remain in attendance in accordance
with the requirements of the notice and that a
sufficient sum for conduct money as a witness has
been duly paid or tendered to him and that the
presence of such witness is material, the judge
may by his warrant directed to any sheriff or
20 other officer of the court or to any constable,
cause such witness to be apprehended and forthwith
brought before him or any other judge who may
thereafter preside at such sittings, to give
evidence; and, in order to secure his presence
as a witness, such witness may be taken on such
warrant before the presiding judge and detained
in the custody of the person to whom the warrant
is directed or otherwise as the presiding judge
may order until his presence as such witness is
30 required or, in the discretion of the said judge,
he may be released on a recognizance (with or
without sureties) conditioned for his appearance
to give evidence. "

And Rule 342 reads, my lord:

" Any person wilfully disobeying any order
requiring his attendance for the purpose of being
examined or of producing any document shall be
deemed guilty of contempt of court and may be
40 dealt with accordingly."

THE COURT: Don't you think I should have
a copy of that Notice now, Mr. Nolan?
MR. NOLAN: The Notice to Attend, My lord?
THE COURT: Yes.
MR. NOLAN: Yes, I do, my lord, I am
sorry we haven't got it. I am sure it is filed.

THE COURT: I ought to have it. I have the Notice of Motion but I haven't got it, and I ought to have it. I have your Notice of Motion but I have not the Notice to the witness.

MR. NOLAN: Was it filed?

THE COURT: I do not suppose it was.

MR. RILEY: I would not think it would be, my lord.

10 MR. NOLAN: It is mentioned in the Notice of Motion as material upon which we rely, so that surely your lordship should have it before you.

THE COURT: We will mark it Exhibit "A" in this Motion.

MR. NOLAN: Thank you, my lord.

THE COURT: All right, you may mark it in this Motion as Exhibit "A".

NOTICE TO WITNESS TO ATTEND
MARKED EXHIBIT "A".

20

MR. NOLAN: Thank you, my lord.

THE COURT: I am putting it in as Exhibit "A" in my notes. All right.

30 MR. NOLAN: I am going to contend, my lord, that this Notice should have been addressed to a party in the action, namely, Imperial Oil Limited. I am going to contend, in the second place, that the documents demanded are not under the control of the witness Mackenzie. In the third place, I am going to contend that the Notice is too general in its terms; and in the fourth place, that the matter is res judicata.

My lord, Wigmore at paragraph 2200, sub-section 6, - that work, my lord, has paragraphs rather than pages, at the top left and the top right.

THE COURT: Paragraph 2200?

40 MR. NOLAN: Paragraph 2200, sub-sections 6 and 7. In Wigmore, paragraph 2200, sub-section 6, reads as follows, my lord:

" The requirement to produce assumes that the document is within the control of the witness. One who is dumb cannot be in default for not testifying orally, and one who has no lawful control over a document cannot properly be liable to produce it. Whether the witness has such a control depends upon the facts of each case.

"(7) When the documents desired are those of a corporation, it would seem that the subpoena may be directed to the corporation, but its officer who is their custodian is the proper person to hold liable for non-production."

10 Now, my lord, this Notice to Attend is not directed to Imperial Oil. It is directed to Mr. Mackenzie. I am well aware of the fact that Imperial Oil can not come into your lordship's court other than through one of its officers or servants, but my submission is that the proper course for the plaintiff to have taken would be to direct the corporation to produce these documents, and that they would then be compelled, if it is a proper case, to send one of their officers to your lordship's court with the documents in his possession in order that the Notice or subpoena might be satisfied. But, as I say, there is no mention at all in the Notice to the witness to attend, and, as is quite 20 evident, Mr. Mackenzie is not a party to this action. I do not know whether anything turns on it or not, but the Notice itself is merely signed: "Fisher, McDonald and Fisher, per D.R. Fisher". I take it that they were acting as solicitors for the plaintiff when they issued that Notice.

30 Now, there are a number of cases which say that a servant can not without the authority of his master produce a thing which is under the control and is the property of the master, and it is perfectly obvious from the Notice to Attend that all of these documents could not possibly be under the control of anyone within the jurisdiction of this Court because you will see, Sir, under (a) it says:

"All agreements, leases, licenses, correspondence and documents passing between the defendants, Canadian Pacific Railway and Imperial Oil Limited",

40 and of course, it follows that many of these agreements, leases, licenses, correspondence and documents must be without the jurisdiction of the court and not within the control or the legal possession of the proposed witness, Mackenzie.

THE COURT: Well, in short, you are saying this, that Mackenzie has not possession of these documents, never had?

MR. NOLAN: No, my lord, may I interrupt? I can not go that far. He has possession of some, because this is, of course, a branch of Imperial Oil. He has some, but the Notice tells us to produce all, and, if my contention is right, we can not do that because they are not under our control and in our possession. And in respect to that, my lord, may I read to your lordship what the Lord Chancellor, Cottenham, had to say in the case of Reid v. Langlois, 41 E.R. at page 1411:

10

"It is clear that what the Defendant means by possession is not a legal possession, but an actual corporeal possession, just as a man may have in his own desk or in his own house property of which he is only part owner. In one sense it is in his possession but when possession for the purpose of production is spoken of, that is to say a right and power to deal with it, actual corporeal possession is not meant, but legal possession in respect of which the party is authorized to deal with the property in question; but I have no doubt but that, on this answer, the Defendant does state that his father is in the joint legal possession with himself; and that the books, therefore, are not under his direction or control, not being in his sole possession, that is, in his sole legal possession, although they may be corporeally in his actual possession."

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And in Chapman & Sons v. Stoddart, a British Columbia case, reported in 1930, 4 D.L.R., at page 1013, Mr. Justice Fisher at page 1014 says:

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" The fact that in the Crowther case there had been a direct refusal, and in the present case only an absence of consent or authority, it was thought, did not in itself make the decisions any less binding. It was argued that the principle of the decisions referred to is not applicable to a case where the master is outside the jurisdiction of the Court. Phipson on Evidence, 6th ed., pp. 442-3, has stated the principle as applicable without apparently qualifying the statement in any way."

Now, there can be no argument about the fact that the

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Head Office of Imperial Oil is not in the Province of Alberta because the plaintiff in his Statement of Claim says:

" The plaintiff is a farmer - - "

10 " 1. The plaintiff is a farmer residing in the vicinity of Leduc, in the Province of Alberta. The defendant Imperial Oil Limited is a body corporate having its head office at the City of Sarnia, in the Province of Ontario, and registered and carrying on business in the Province of Alberta and having a residence at the City of Calgary, in the said Province aforesaid."

And then the plaintiff says:

20 "The defendant Canadian Pacific Railway Company is a body corporate carrying on business as a common carrier in the Province of Alberta and throughout the Dominion of Canada, and has a residence at the City of Calgary aforesaid."

Now, my lord, I turn now to the question of the generality of the subpoena, or Notice to Attend. And I read again from Wigmore at paragraph 2200, more particularly volume 8 of that work on evidence, page 116, and I am reading from sub-section 4. The learned author says, my lord -

30 THE COURT: What paragraph is it again?
MR. NOLAN: It is paragraph 2200 to be found in volume 8 at page 116, and I am reading from sub-section 4. The learned author has this to say, my lord:

40 "A peculiarity of a subpoena 'duces tecum' is that, in the nature of things it must specify, with as much precision as is fair and feasible, the particular documents desired; because the witness ought not to be required to bring what is not needed, and he can not know what is needed unless he is informed beforehand. It is at this point that most disputes arise; for the specification is often so broad and indefinite that the demand is oppressive and exceeds the demandant's necessities. Courts are constantly called upon to scrutinize and control the scope of these specifications."

I refer now, my lord, to an English case, Lee vs. Angas, to be found in Law Reports, II Equity, at page 59. Lee v. Angas, Law Reports, II Equity, at page 59. That was a subpoena 'duces tecum', my lord, in a suit concerning a mortgage, and the demand for production was:

10 "and all other books, accounts, letters, papers, and documents in your possession or power, in any wise relating to the affairs and concerns of the said plaintiffs, or either of them, or the said Hannah Lee, and all books, accounts, letters, papers, and documents received by you from H.E. Silvester, as solicitor of Mary Conyers."

It was held that that was too broad, and the Vice Chancellor W. Page Wood has this to say:

"He must speak the truth within his knowledge, but he is not bound to make this burdensome search for evidence at his own expense."

20 Now, turning, my lord, to Phipson at page 436, Phipson at page 436, 8th Edition:

" The production of documents in the possession either of strangers or of parties.....may, in general, be secured by subpoena duces tecum, which must specify, and be confined to, the particular documents in the witness's possession of which production is required."

And then there is a reference to the case of Newland v. Steere, 13 Weekly Reports, at page 1014:

30 "A general direction - - "

The learned author says:

"- - is bad as amounting to a bill of discovery against the witness. Thus, a subpoena describing particular documents and then directing the production of 'all documents' relating to the questions in issue' is not enforceable, unless the witness admits their possession; nor is a subpoena to produce 'documents relating to the case if he has any', as this requires the witness to decide upon their relevancy."

40 And at page 442, the learned author, Phipson, says:

" Every Court has inherent power to prevent an abuse of its process, e.g., service of a subpoena when the cause cannot be tried in the current sittings, or of one which is oppressive as to the number or nature of the documents required, or the expense entailed, or when the object is not

"bona fide to obtain relevant evidence, or when attendance is required merely for confrontation." In the Attorney General v. Wilson, reported in 59 English Reports, at 461, the Vice Chancellor, Sir. L. Shadwell, says - that is, the Attorney General against Wilson, 50 English Reports, at page 461, reading from the Vice Chancellor, Sir. L. Shadwell:

10 " In my opinion this subpoena is much too large and vague to enable the Court to act upon it; for it extends, not by any particular description, but by a general description, to all books and accounts in the possession or power of Mr. Blayds which relate to the matters in question in the cause."

And then the Vice Chancellor goes on:

20 " Now I think that, if a subpoena duces tecum is issued for a vast variety of documents, it can not be an objection to the conduct of the party who refuses to produce them, that there were some which he might have produced, and others which he could not produce: because he is not called upon to produce some of the documents, but he is called upon to produce all of them.

30 I never remember to have seen a subpoena duces tecum in this form: and it strikes me that it would be very singular if this Court should take upon itself to order the witness to produce these documents, when, if it were called upon to order a Defendant to produce documents (though he had admitted every one of them to be in his possession and to be material to establish the plaintiff's case) it would not make an order for the production of any of them, if they were merely described in the manner in which they are described in this subpoena duces tecum."

40 Now, my lord, that brings me to my last point, and that is the question of whether or not this matter has received judicial determination. In the course of preparing this action for trial Mr. W.D.C. Mackenzie, the gentleman who is named as a witness in the Notice to the witness to attend at the Trial, was examined on discovery as an officer submitted for that purpose by the defendant, Imperial Oil Limited. In the course of the proceedings we were served with a notice on the 25th of February of the year 1950 to this effect - -

THE COURT:
MR. NOLAN:

"We"?
We, being the defendants,

Imperial Oil and also Canadian Pacific Railway Company.

THE COURT: Yes.

MR. NOLAN: The notice was served:

"Take notice that the plaintiff hereby requires each of the defendants to discover by affidavit the documents which are or which have been in its possession or power relating to all matters or questions in this cause."

10 " And further take notice that the plaintiff hereby demands that each of the defendants select an officer to be examined for discovery pursuant to the Consolidated Rules of this honourable Court in that behalf."

The examination for discovery was proceeded with, my lord, and, amongst other questions directed to the witness Mackenzie, the officer of the company, was the following, and I am reading now from question 140, which was as follows:

20 "140 Q MR. RILEY: Now, Mr. Mackenzie, is this document, Exhibit No. 1, the only lease you have with Canadian Pacific Railway?"

Objection was taken to that question and it was not answered.

30 "141 Q MR. RILEY: Now, I note this lease, Exhibit 1, is dated the 21st of September, 1949. Have the Imperial Oil Limited an agreement, or at least, an understanding with Canadian Pacific Railway Company with respect to Canadian Pacific Railway Company's petroleum rights and natural gas rights in Leduc?"

And that question was objected to.

"143 Q Now, have Imperial Oil Limited titles with respect to natural gas alone? "

Objected to.

"144 Q MR. RILEY: Have Imperial Oil Limited titles for petroleum?"

Objected to.

40 "145 Q MR. RILEY: Have Imperial Oil Limited titles for petroleum and natural gas?"

Objected to.

"146 Q MR. RILEY: Is it fair to say that you have many, many leases with Canadian Pacific Railway?"

That was objected to.

"147 Q MR. RILEY: And when I say many, many leases I am referring to either petroleum or natural gas or both."

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That was objected to.

"148 Q MR. RILEY: Now, has Imperial Oil a printed form of lease which is used in reference to acquiring the petroleum and natural gas from freehold owners?"

And that was objected to.

"149 Q MR. RILEY: That is fine. Has Imperial many, many leases with His Majesty the King in the right of the Province of Alberta?"

10 That was objected to.

"151 Q MR. RILEY: Now, does Imperial occasionally make farmouts of petroleum and/or natural gas rights?"

That was objected to.

"152 Q MR. RILEY: Now, in cases where Imperial have the petroleum rights alone, have they made any arrangements to acquire from any other person any other mineral?"

Objected to.

20 "163 Q MR. RILEY: Very good, sir. Now, sir, did your company enter into a contract with Northwest Natural Gas Company Limited, a gas contract?"

That was objected to.

And then, in the Notice of Motion, which sets out those questions and asks the Court to compel an answer, there is also contained this paragraph -
THE COURT: There was an appeal to the

Appellate Division?

30 MR. NOLAN: My lord, first of all the witness refused to answer on discovery, and then it went before Mr. Justice McLaurin.

THE COURT: Yes?

MR. NOLAN: That was on an application to compel him to answer, and eventually it went to the Appellate Division, but I, perhaps, will come to that later, but at the moment we are on the way from the Examination for Discovery to Mr. Justice McLaurin, because this Notice of Motion which I am now reading was
40 returnable before him, and those questions which I have just read are set out in the Notice of Motion, but paragraph 2 of it reads as follows:

" That the defendant, Imperial Oil Limited, do within 10 days from the date of such Order make and file a further and better affidavit of documents stating what documents are, or have been, in its possession or power relating to the matters

"in question in this action, including all documents with respect to or dealing with 'petroleum' or 'natural gas', and particularly those relative to the definition, custom and usage (or either of them) of petroleum and/or natural gas; and in particular and without restricting the generality of the foregoing, all documents in which the words 'petroleum' and/or 'natural gas' may appear .

- (a) Duplicate certificates of title.
- 10 (b) All leases with the Crown in right of the Dominion or in the right of the Province of Alberta.
- (c) All leases with free-hold owners.
- (d) All farm-out and other agreements including those with the defendant Canadian Pacific Railway Company.
- (e) All documents and/or correspondence relative to these products, or either of them, and particularly to the exploration, drilling for or production thereof, or their marketing. "

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And paragraph 3:

" That the said William D.C. Mackenzie do attend for a continuation of the said examination for discovery on a date to be fixed by the Clerk of the Court and answer the questions set out in paragraph two (2) hereof, and produce all relevant documents thereto, and answer all questions arising out of the said questions and/or documents, and all other questions relevant to the issues in this action and/or such further documents as may finally be produced."

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"4. That in default the Statement of Defence filed herein by the said Defendant, Imperial Oil Limited, be struck out. "

Well, my lord, it came before the Honourable Mr. Justice C.C. McLaurin, who delivered a written judgment in the matter. It is one only a page or two, and I will read it.

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" In this suit Micheal Borys, the plaintiff, against defendants, Canadian Pacific Railway Company and Imperial Oil Limited, attacks the right of the Imperial Oil to proceed with drilling on the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, on the ground that he is the owner of the natural gas within,

"upon or under the said lands. The original owner of this land was the Canadian Pacific Railway Company, and in conveying to the plaintiff's predecessor in title that corporation reserved all coal, petroleum and valuable stone.

The Imperial Oil obtained a lease of the petroleum rights from the Canadian Pacific Railway Company and a short time ago, under the terms thereof, proceeded to drill on said lands until operations were arrested by an injunction in these proceedings.

10

By paragraph 7 of the Statement of Claim the plaintiff alleged that:

'Petroleum by definition, reservation, custom, usage and in fact, is an oily inflammable liquid or mineral oil usually of a dark brown or greenish hue, and under the facts and circumstances existing herein does not embrace or include natural gas, the said natural gas in its physical properties being very different from petroleum and the said natural gas being in fact a separate and distinct substance from petroleum.'

20

That paragraph, I believe, substantially defines the issue presented by this litigation. As I apprehend it, the plaintiff will ultimately succeed if he can establish that the word 'petroleum' in its proper technical construction does not embrace natural gas.

An officer of the Imperial Oil Limited, Mr. William D.C. Mackenzie, assistant manager of the company at Calgary, was produced for examination for discovery by that defendant. On such examination Mr. Mackenzie was asked a great number of questions, of which the following are merely illustrative:

30

'Is it admitted that the petroleum is a mineral?
Is crude oil a hydrocarbon?
Is petroleum a hydrocarbon?
Is petroleum a liquid?'

There were many other questions along the same line of inquiry, and without exception counsel for Imperial Oil objected to Mr. Mackenzie answering. Then there was another set of questions, also consistently objected to, as to the nature of other transactions that the Imperial Oil may have had. For example, he was asked, 'Have Imperial Oil Limited titles with respect to natural gas alone?' Another question was, 'Has Imperial many leases with His Majesty the King in the right of the Province of Alberta?'

40

" In view of the position adopted by the Imperial Oil throughout this examination, the same was adjourned, and an application was made to me to order that such questions be answered, and also that the Imperial Oil file a further and better Affidavit of Documents. The Notice of Motion demanded the production of all leases with the Crown, all leases with freehold owners, all farm-out agreements, all documents and correspondence relative to such titles, or leases, or agreements. 10 It would be an intolerable task for the Imperial Oil to produce all these documents, but counsel for the plaintiff suggests that it would be practicable if representative documents were produced, which should not result in his demand for a better affidavit running into too voluminous a collection of material.

I think it is desirable that I dispose of this application forthwith, since it is highly likely that the opinion of a higher tribunal may be sought. As I view this litigation, the issue is really a narrow one, 20 namely, Is the word 'petroleum' less comprehensive than contemplated by Imperial Oil Limited, with the result that it does not include natural gas? That is the question that finally must be decided by the Courts, and will, no doubt, be achieved by the Court having the opinion of technicians qualified to express opinions on this subject. Accordingly, I am in some doubt as to whether Mr. Mackenzie's own opinion would necessarily, in the last analysis, greatly advance the final determination of the question, even if it 30 were proper for him, merely as an officer of a corporation, to be asked to express a belief or an opinion. In my best consideration of the matter, following helpful argument of all counsel, I am strongly inclined to the conclusion that the application should be dismissed, which I so do."

The Order was taken out, my lord, and it reads, in part, as follows:

" IT IS ORDERED that the application of the plaintiff to compel William D.C. Mackenzie, the officer 40 produced by the defendant Imperial Oil Limited, to answer the questions which he refused to answer on his Examination for Discovery held on Thursday, the 6th day of April, A.D. 1950, and for a further and better Affidavit of Documents, be and the same is hereby dismissed."

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Then, my lord, there was - as my friend, Mr. Riley points out to me, my lord, the judgment of Mr. Justice McLaurin may be found conveniently in 1950 1 W.W.R. at page 1093. 1950, 1 W.W.R., 1093.

And then, my lord, there was an appeal taken from that judgment, and some of the grounds of appeal are of interest. The document itself is on record, of course, and is dated the 19th day of April, 1950. Ground of appeal number 6 is:

"That the learned Chamber Judge should have held that the questions should have been answered pursuant to the Consolidated Rules of Court and particularly Rule 240 as questions 'touching the matters in question in this litigation'."

And then ground number 7:

"That the learned Chamber Judge should have held that documents, representative of the class demanded, should be produced by the Defendant (Respondent) Imperial Oil Limited as relating to the matters or questions in this litigation pursuant to the Rules of Court and particularly Rule 225 thereof."

"(12) That the learned Chamber Judge erred in holding that the question and/or the documents were opinion questions or that the officer was asked to express a belief or an opinion, or that they were questions or documents as to the nature of other transactions which were irrelevant."

And then the matter came before the Court of Appeal, and there was an oral judgment delivered by Mr. Justice Frank Ford, speaking on behalf of the Court, and it is not reported in the law reports. Mr. Justice Frank Ford, my lord, said this, and it is very short, and I would ask permission to read it:

" We are of the opinion that the appeal should be dismissed. We agree with the conclusion arrived at by the learned Judge appealed from. It may be, however, that more than he intended has been taken out of his reference to the decisiveness of the opinions of technicians, and anything we say must not be taken as hampering the trial Judge in trying what is undoubtedly a very important and perhaps difficult case. In our view, the questions to which we are asked to compel answers are either matters of opinion or are not sufficiently relevant to the issues in the action to be permitted on Examination for Discovery. The appeal will, therefore, be dis-

"missed with costs to the respondent in the cause.

Nothing we now say is to affect the rights of the plaintiff and the C.P.R."

And I might mention, my lord, that similar proceedings were taken arising out of the Examination for Discovery of Mr. Munro, and once again the matter got to the Court of Appeal, but I won't deal with that now. I will confine myself only to the matters in which I was personally interested on behalf of my client, Imperial Oil Limited.

10

Now, my lord, from what I have read, and perhaps I have read too much, you will see that what is now being asked to be produced is substantially the same as what was asked to be produced by us on a further and better Affidavit of Production, or through the answers to the questions directed to Mr. Mackenzie. Your lordship will have seen that all of those questions and the matter of a further and a better Affidavit came before the Appellate Division, the learned Chamber Judge was upheld, and we were told at that time that it was unnecessary for us to answer the questions or to produce other documents, because the questions were matters of opinion, and they were both irrelevant to the issue in the action.

20

My lord, an argument will doubtless be made that what is being attempted to be done here today is something quite different from what was attempted to be done on the Examination for Discovery, and I think I can anticipate that argument to a certain extent at least. It is quite true Mr. Mackenzie was appearing before the Clerk of the Court as an officer selected to be examined on discovery on behalf of Imperial Oil to answer certain questions and to make production of certain documents. Mr. Mackenzie today is being called as a witness and is being asked to produce those or substantially the same documents which were required from him by reason of the questions and the Notice of Motion which was directed to him on the Examination for Discovery. My lord, in my submission, this is the same matter, arising out of the same proceedings, between the same parties, and you can not get now indirectly what you could not get directly, and you can not clothe Mr. Mackenzie with the mantle of a witness and bring him into your lordship's court and say to him, "Now, Mr. Mackenzie, you produce for me those documents which the Court of Appeal said you did not

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wider and vaguer in its language, and I would like to hand in to your lordship the copy of the notice that was addressed to Mr. Munro.

THE COURT: That will be Exhibit "A" in the motion re Munro.

NOTICE TO ATTEND IN QUESTION
PUT IN AND MARKED EXHIBIT "A".

10 MR. HELMAN: I would like to say that Mr. Munro is an official of the C.P.R. at Calgary, the manager of the Natural Resources Department, but he is not a director, nor an officer of the executive, in the sense of being a member of the Executive Board. This notice to him reads as follows:

20 " TAKE NOTICE that you are hereby required to attend at the Trial of this Action at the Court House, Calgary, on Thursday, November 15th, 1950, as a witness on behalf of the plaintiff, and that you are further required to produce and bring with you and show to the court at the said trial the following:

(a) A specimen of each form of agreement for the sale of land used in Alberta by the defendant Canadian Pacific Railway in each of the years from 1890 to 1918, both years inclusive."

30 My lord, that task in itself covering a period of 28 years, examination of files of the company, would involve, I would think, the necessity for asking for an adjournment of this trial, 28 years of forms or agreements used by the Canadian Pacific Railway Company, whether in printed form or typewritten or otherwise, is a vast undertaking. But the plaintiff, in giving this notice, was not content to say that there could be any restriction on that because in paragraph (b) the plaintiff continues to say:

"In particular and without restricting the generality of the foregoing for each of the said years, a specimen of each of the following:"

40 Now, your lordship will see that that general clause that is contained in paragraph (a) has been left standing deliberately and has left Mr. Munro, of course, in the position that it can not be properly interpreted, having regard to the cases which my friend, Mr. Nolan, has read to your lordship. Then he goes on that they want in particular, and without restricting the generality of the foregoing:

- "(i) The form in which first the defendant Canadian Pacific Railway reserved, and (or) excepted to it in agreements for the sale of land in Alberta inter alia petroleum.
- (ii) the form in which first the defendant Canadian Pacific Railway reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia petroleum and natural gas.
- 10 (iii) the form in which first the defendant Canadian Pacific Railway reserved and excepted to it in agreements for the sale of land in Alberta inter alia petroleum, natural gas and related hydro-carbons.
- (iv) the form in which first the defendant Canadian Pacific Railway reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia natural gas. "

And then we come to paragraph (c), and I will come back to deal with these various items, my lord, in due course.

- 20 "(c) The wording of the various reservations and exceptions from transfers of lands granted by the defendant Canadian Pacific Railway in each of the years 1890 to 1918 both years inclusive."

Now, my lord, you will see the impossibility of even remotely complying with that request,

- 30 "The wording of the various reservations and exceptions from transfers of lands granted by the defendant Canadian Pacific Railway - "

your lordship will observe -

"in each of the years 1890 to 1918 both years inclusive."

That is a period of some 28 years in the lifetime of this corporation extending, as we know, from coast to coast, and we are asked to produce the wording of all the various reservations and exceptions that this company had during that period of 28 years used anywhere.

- 40 "(d) All inter-office and other correspondence of the defendant Canadian Pacific Railway relating in any way to the form of reservation and (or) exception from transfers of lands granted by the said defendant,"

Here again, my lord, communications between an official in Nova Scotia with his head office in, say, Halifax, is something that we are required to look into and to get, and there, again, the form of notice with regard

to what is asked to be produced is, of course, in such a vague form and involves so much work that no court is going to ask any witness to be burdened with the job of getting these documents.

Then, section (e):

10 " A specimen of each form of lease or license granted by the defendant Canadian Pacific Railway in each of the years 1890 to the present time entitling the lessee or licensee to petroleum, natural gas and related hydrocarbons or any of them from the lands of the said defendant and (or) from any mines and minerals reserved by the said defendant from lands previously conveyed away by it."

Now, there, my lord, there is completely no limitation or indeed, at that point, we have not even got the 28 years limitation, because it says:

20 "in each of the years 1890 to the present time."
Your lordship will see that they are there comprehending a period of 60 years that they want this witness to examine the files of the Canadian Pacific Railway Company and produce specimens of each form or lease or license and to make up his mind whether it comes within the subsequent phraseology in the last part of that demand.

And, lastly, we are asked for:

30 " Any agreement or agreements between the defendant Canadian Pacific Railway and the defendant Imperial Oil Limited giving to the defendant Imperial Oil Limited rights to petroleum, natural gas and related hydrocarbons or any of them in lands and (or) mines and minerals owned by the defendant Canadian Pacific Railway."

Here again it is in the widest form of language and requires the witness to come to a conclusion.

40 Now, the first point - I am not going to repeat to your lordship the authorities which Mr. Nolan has collected - this application that is being made is being made, not only on behalf of Leslie Munro, the witness to whom this is addressed, but also on behalf of the defendant Canadian Pacific Railway Company. And your lordship will see that the first point that we wish to make is that it is too vague and that the actual documents required to be produced are not identified sufficiently.

Now, the authorities are quite clear that you can not have a blanket subpoena of this kind. If it was sent to the C.P.R., "we want you to produce your transfer on the North East quarter of Section so-and-so, dated such-and-such a date," assuming that it was not in the Land Titles Office, where it is already available as an original, that might be something that could be considered by the witness; but to ask a witness to go through this vast array of documents, and carefully reserving the generality of the whole application, quite clearly makes it a demand for the production of documents which can not be reasonably complied with. And I submit that we are entitled to come to your lordship before the witness has to go into the box, where your lordship might say to him that he has disobeyed a notice to produce, and to ask your lordship to rule that this vast array of documents can not be asked for in that way.

Now, the next point that we have raised, and it is the point that is mentioned by Mr. Nolan in connection with his witness, is that the documents in question, if they exist, are not in the possession of the said Munro. Munro is given a notice to produce certain documents, and these are documents that belong to the Canadian Pacific Railway Company and they are not in his possession. It is true that he may be in a department where some of them are contained, not all of them by a long way, but perhaps a small portion of them are contained, but they are not his documents, my lord, and if my learned friend wished to have this evidence introduced, I submit that he had to subpoena an executive officer of the Board of Directors of the C.P.R. and ask him for the production of the documents that he wished. In any event, they are not in Mr. Munro's possession. And, again, I take the same point that my friend has taken, namely, that all of these documents that have been asked for are irrelevant and inadmissible in evidence.

Now, my learned friend launched a very similar application to the one that he launched with regard to the Imperial Oil to compel the witness to answer questions, and the questions were very similar in tenor to the questions that had been asked of the Imperial Oil, and the motion that he launched set out these questions and they, generally, were questions that related to the production of documents almost identical

with the ones that he is now asking for. And in the Notice of Motion Mr. Riley, or rather, the firm of Fisher, McDonald & Fisher, not only asked that the Examination for Discovery be continued but that the witness produce all relevant documents thereto and answer all questions arising out of the said questions and/or documents and that other questions relevant to the issue in this action and/or such further documents as may be finally be produced. Now, Mr. Riley, before the Judge before whom this motion came, Mr. Justice Hugh John Macdonald, argued very strenuously that the previous motion that had been made with regard to the Imperial Oil did not bar him from getting this type of document from the C.P.R. He said the C.P.R. was in a different position, the C.P.R. had had some dealings with the predecessor in title, Mr. Simon Borys, and, therefore, he could enter into a wider examination for discovery and wider production of documents.

20 One of the documents that he urged very strenuously that he was entitled to get, some of them were some documents between the Imperial Oil and the C.P.R. of quite recent date. Now, Mr. Justice Hugh John Macdonald decided that motion against the plaintiff, and the plaintiff appealed to the Appellate Division, and your lordship will remember that in the judgment that Mr. Nolan read the Appellate Division had made an express reservation of the rights of the plaintiff insofar as the Canadian Pacific Railway was concerned, but when the matter came before the Appellate Division and they saw the nature of the questions and the documents that were being asked for they, once again, held that they were irrelevant, and they dismissed the appeal from Judge Hugh John Macdonald. And so I say here, once again, the matters are completely res judicata.

40 Now, I think those three grounds, my lord, without going into the authorities that my friend has already given you, are sufficient to show to your lordship that this notice to attend to Munro should not be complied with. First of all, it involves a laborious undertaking of a nature which can not be complied with at this stage, my lord. If your lordship were to direct that this notice to attend had to be complied with, we must, of necessity, ask for an adjournment of the trial for an examination in extenso of the files of the C.P.R. But, I submit, no witness

10 is ever asked to make an examination of this kind, no witness has ever been asked to make an examination of this kind. If my friend wants a particular document, he notifies us which document he wants. He says specifically, "I want transfer such-and-such of such-and-such a piece of land". He says, "I want an agreement respecting such-and-such land". The records of the Land Titles Office are open to him for his examination. He can search them. I assure your lordship that it is no
10 easier for Mr. Munro to search the records of the C.P.R. than it is for my friend to look into the records of the Land Titles Office and locate these transfers for himself. If he wants any particular transfer, if he states it with particularity, then the position will be the witness will be in a position to comply with that, but whether it is to be admissible in evidence is another problem.

20 Then, the second point is that the documents are not Mr. Munro's documents, and he can not produce. And, lastly, I submit to your lordship that this is a trial, if you will look at the pleadings, this is a trial about the meaning of a title relating to the North East Quarter of a particular section of land, and that is what the issue is, and that is what your lordship has to try, and it is the documents relating to that piece of land, and that piece of land alone, to which your lordship should direct your attention, and all of this other material is clearly irrelevant.

30 And I should say that the C.P.R. has produced those documents. We have filed an Affidavit of Production in this case. It was not the subject of attack. My friends did not suggest that the affidavit was not in itself sufficient, or that it did not produce all the documents which were properly producible in this lawsuit, and I, therefore, submit that the Notice to Attend should not be complied with, and that
40 your lordship should direct that the part of it which relates to the production of documents is something that we do not have to comply with.

I went too far in saying that the Notice to Attend does not have to be complied with. Mr. Munro has to attend. He has been given notice to attend as a witness. But that part which relates to the production of documents should not be complied with.

Now, I was going to give your lordship one authority on this question of what is admissible in a lawsuit of this kind, and it is a judgment of the Appellate Division in Manitoba in Rex vs. Thomas, which your lordship will find reported in 1948, 2 W.W.R. at page 444. Now, that, my lord, was a very similar lawsuit to this one. In that case, the Crown had given to Mr. Thomas a deed to certain, a certain fractional part of a section of land, and it became important for the Court to determine what the word "fractional" meant, and it appearing that the Crown had given another piece to Mr. Thomas immediately adjacent to this particular piece of land in which the word "fractional" was also used, and the correspondence and dealings between the parties with regard to this other piece was sought to be put before the court, and every one of the judges in the Appellate Division said that the evidence was not admissible in dealing with this particular quarter section, and there, of course, they were dealing with the word "fractional". Here your lordship is dealing with the word "petroleum". And Mr. Justice Richards says,

" In the case at bar many letters were submitted and oral testimony was given by the plaintiff in regard to the purchase of another parcel of land by the defendant from the plaintiff, and were admitted in evidence by the learned trial Judge in spite of objections taken by counsel for the defendant. Such letters and testimony evidence should not have been admitted and should be disregarded.

In my opinion, all the evidence received at the trial does not prove in any certain or positive way that the intention or actual agreement of the plaintiff was in any way different to that expressed in the Order-in-Council, and most certainly does not show the intention of the defendant to be as alleged in the Statement of Claim."

And he goes on:

"The case for the defendant is even stronger if only the evidence admissible is considered."

And Mr. Justice Adamson said in dealing with the use of the word "fractional" in these two adjoining pieces of land, he said:

"I am, therefore, of the opinion - "

he says:

"what was done in respect of the South East Quarter

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"of Section 6 is not evidence in this case and should not have been admitted as such."

And Mr. Justice Dysart came to a similar conclusion.

10 I say, my lord, that having regard to that, and the rulings that our Appellate Division has already given with regard to this type of testimony, that at this stage your lordship should state that this vague, general requirement addressed to Mr. Munro, so far as the documents are concerned, does not have to be complied with.

MR. STEER: My learned friend, Mr. Nolan, my lord, has quite adequately stated the issues involved in this case up to a point. The issue is quite clear and it is that the court has to decide what was the meaning of the word "petroleum" as used in this agreement with Simon Borys, dated September 13th, 1906, and an agreement which was followed by a transfer in which the reservation was in the same words as in the agreement in 1918. And, 20 as I say, the issue is, What is the meaning of the word "petroleum"? Does it or does it not include natural gas?

My learned friend, Mr. Helman, finished on this note, that what your lordship is concerned with is the documents in this case and those documents alone, and that the plaintiff is not entitled to look at the course of business followed by these two defendants in dealing in this Western country with petroleum and natural gas. That proposition we on this side dispute 30 as vehemently as it is possible to do it.

The issue having been stated as to the meaning of this word, I should like now to refer your lordship to two cases where it is set out that such an issue is an issue of fact, and however it may be that the Appellate Court in its judgment in the Imperial Oil appeal came to say that "the questions to which we are asked to compel answers are either matters of opinion or are not sufficiently relevant" - that is not the passage. 40 There is a passage in which they say that the matter called to be decided on the evidence of technical men, in other words, that it is a matter of opinion. Now, that is a proposition that I would like to put as clearly as I possibly can before your lordship at the very outset. It is not a question of opinion; it is a question of fact.

And the first case which I would ask your lordship to look at is the case of the Lord Provost and Magistrate of Glasgow against Fairie. It is in 13 Appeal Cases, and the passage I would like to refer to is at 659. What they were dealing in this case with, my lord, was the meaning of the words "mines and minerals" and at page 659 - I am sorry, I have the wrong page reference - at page 673, no, at page 669, I beg your pardon, Lord Halsbury says, my lord:

10 " I cannot help thinking - "
no, at page 668, Lord Halsbury says:

20 " My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire, therefore, to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated as to whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847.

30 I can not help thinking that the true test of what are mines and minerals in a grant was suggested by James, L.J., in the case of Hext v. Gill, which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of 'mines and minerals' is a question of fact 'what these words meant in the vernacular of the mining world, the commercial world, and landowners', at the time when they were used in the instrument."

40 And the Privy Council in dealing with what was the meaning of the words "springs of oil", and in deciding the question as to whether "springs of oil" reserved in a grant carried with them the natural gas applied the rule that Lord Halsbury stated in the Fairie case. The case I refer to, my lord, is Barnard-Argue vs. Farquharson, and it is found in 1912 Appeal Cases, 864. And the reference to the passage from Fairie, the Lord Provost and Fairie, page 869, where Lord Atkinson says:

"As Lord Watson said in Lord Provost and Magistrates of Glasgow v. Fairie, 'the words "mines" and

" "minerals" are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used.' "

He goes on to say:

10 "It is clearly established by the evidence that this gas is not volatilized rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words 'springs of oil' cover this natural gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum."

20 So I say at the outset, my lord, what we are dealing with here is a question of fact, and the examinations for discovery, as the passages quoted by my learned friend, Mr. Nolan indicate, was directed to getting from these defendants documents which would indicate, as a matter of fact, the way in which this word "petroleum" was used by these defendants at various times and, as we say, the important question is, In what way did these defendants use the word "petroleum" in the first decade of this century, and if we can establish that today they used the word in the same way, well and good. If, on the other hand, there is evidence to show that that word is used in a different way today, that, in my submission, is a matter entirely irrelevant, because what we have got to determine is, What was the meaning, as a matter of fact, of the word "petroleum" in the year 1906 when it was first used in the transactions which give rise to this lawsuit?

40 Now, as I say, my learned friend attempted on discovery to get what we are seeking now, and they failed because of a refusal to produce what, in my respectful submission, are among the most relevant documents in this case. And, having little knowledge of the details of the business as it is conducted by these defendants, we draft a notice to produce which specified with as much particularity and precision as is possible, and the authorities cited by my learned friends do not go any further, we describe with as much precision as it is possible what it is we want. My learned friends know what it is we want. My learned friend, Mr. Nolan,

says that Mr. Mackenzie has in his possession certain of the things we want. And we are met here with the proposition, unsupported by any affidavit as to fact, we are met here by the proposition that there is so much work involved that this relevant evidence will not be produced.

10 Well, let us see, my lord, how much work is involved. But before I come to that, my lord, I would like to refer you to a couple of passages in the earlier stages of this Barnard-Argue case because, to understand that case, I suggest that one has to go back to these early decisions and the evidence before the court in that case as appeared in the report of Chancellor Boyd's judgment in 22 Ontario Law Reports at 332

THE COURT: 22?

MR. STEER: 22 Ontario Law Reports.

THE COURT: Yes.

MR. STEER: 332.

THE COURT: Yes.

20 MR. STEER: This passage appears:

" That the Canada Company had given great consideration to the subject of oil in their lands in Western Ontario is shewn by the long letter, already referred to, written by the then Chief Commissioner to the London Board of Governors, of date the 24th March, 1866. I extract some pertinent passages."

30 In other words, inter-office correspondence between the parties in this case was regarded as relevant evidence. As my friend, Mr. Riley, points out, thirty years after the date of reservation.

Well then, in the Court of Appeal in Ontario in 25 Ontario Law Reports, at page 98, we have this passage:

40 " Throughout the correspondence with the solicitors and the principal officers of the company in London, there was no suggestion of anything but a reservation of definite rights or interests. The intention was, that the grantee should be the purchaser and holder of the fee, and that, if deemed advisable, certain defined rights should be reserved to the grantors."

Now, this language, my lord, is perfectly general. It does not deal with any one specific transaction.

MR. HELMAN: Why do you say that, Mr. Steer?

MR. STEER: Because of the language that

is used.

"The defendants must rely upon the words of reservation for their rights, for only to the extent of the proper meaning to be attached to them is the absolute grant of the title to the land to be deemed to be derogated from."

10 Now, my learned friend, Mr. Helman, suggests that this language does not extend to transactions other than the particular transaction. I suggest that you can not read it without coming to the opposite conclusion.

" Throughout the correspondence with the solli-
itors and the principal officers of the company in
London, there was no suggestion of anything but a
reservation of definite rights or interests. The
intention was, that the grantee should be the
purchaser and holder of the fee, and that, if deemed
advisable, certain defined rights should be re-
served to the grantors. The defendants must rely
upon the words of reservation - "
20 and so on.

Now, I propose to ask your lord-
ship if you will look in the light of all the circum-
stances, and perhaps I should say this to your lordship,
that my instructions are that on the appeal with respect
to the C.P.R. application it was stated specifically
that nothing in that judgment was to bind the hands of
the trial judge upon the admission of relevant testimony.
And I notice that Mr. Justice Ford, in the application
30 of the Imperial Oil, which was before him, said this:

"The appeal will, therefore, be dismissed with
costs to the respondent in the cause."

And then Mr. Justice Ford said:

"Nothing we now say is to affect the rights of the
plaintiff and the C.P.R."

40 So that, I take it, that on both applications it was
left open to your lordship, if it could be established
to your satisfaction that this evidence that we are
seeking is relevant, it remained open to you, open to
your lordship, to accept it and the question of res
judicata does not arise.

Now, dealing with these appli-
cations in the order in which they are made. In the
Imperial Oil, you will notice we ask for this,

"any and all agreements, leases, licenses, corres-
pondence and documents passing between the defendants

"Canadian Pacific Railway and Imperial Oil Limited relating in any way to rights in Alberta to petroleum, natural gas and related hydrocarbons or any of them bargained, sold, granted, leased, assigned or conveyed by the defendant Canadian Pacific Railway to Imperial Oil Limited."

10 I do not know, but I suspect that the documents and correspondence referred to there have occurred in very limited numbers over a comparatively recent period. We do not know. We have got broad statements made here as to the difficulties involved, but we have got no facts. And I think, my lord, it is safe to say that all of us here are sufficiently well acquainted with the way in which both these companies carry on their business to realize that it is a matter of a very short time for the people in charge of those documents to find exactly what is referred to in that paragraph (a).

20 And the second is, in my submission, simplicity itself.

"(b) A specimen of each printed or otherwise multigraphed form of lease of license or agreement granted or made by the defendant Imperial Oil Limited to or with anyone relating to petroleum, petroleum products, natural gas and natural gas products, or any of them, used in Alberta."

30 A specimen of the forms. Those forms do not change so often. We have all seen those printed forms, and we have seen the classifications of the form in small type up at the top of the form, and we ask for a specimen of each one of them. And again, I would say, that in half an hour the responsible official of the Imperial Oil could get out those specimens and comply with this notice.

40 And, of course, there is no difficulty whatever about Imperial Oil producing its letters patent. And your lordship will recall that Imperial Oil, while it is a Canadian company, is registered in this Province, and your lordship will recall that Mr. Mackenzie, to whom this notice is addressed, and I may point out in passing that it may also be said to be addressed to Imperial Oil Limited, although I am not pressing that, Mr. Mackenzie, to whom this notice is addressed, is produced as the responsible officer of this corporation to be examined for discovery.

Mr. Munro is produced as the responsible officer of the Canadian Pacific to be examined for discovery. And Mr. Nolan has admitted in so many words that so far as Mr. Mackenzie is concerned, he has got control of such documents as are in this Province, and I have not the slightest doubt that the greater number of the documents that we want are in this Province. So that, in my submission, there is no difficulty whatever with the Imperial Oil complying.

10

And with regard to the Canadian Pacific, the same thing:

"(a) A specimen of each form of agreement for the sale of lands used in Alberta by the defendant Canadian Pacific Railway in each of the years 1890 to 1918, both years inclusive."

20

What difficulty is there about that, my lord? It is 28 years, it is true. We have got no affidavits from anybody here to tell us how many forms, how many printed forms of agreements of sale of land the C.P.R. used in those 28 years.

MR. HELMAN: I do not know that the word "printed" is in there.

30

MR. STEER: It is well known to us all here, my lord, that these forms are printed, and I suggest that the number of cases in which a special typewritten form of agreement was used would probably be limited. But if the fact was that there were agreements other than these printed forms, then, surely, that ought to be established before your lordship. We do not know that it is so.

Then (b), again this is simplicity itself,

"(b) In particular and without restricting the generality of the foregoing for each of the said years, a specimen of each of the following."

40

It is a specimen, my lord. We have made certain searches. We have found as the result of those searches that reservations made by the Canadian Pacific Railway were in different wordings at different times. We all know that the Canadian Pacific uses the printed forms. And we have asked for a specimen of the form:

"in which, first, the Canadian Pacific Railway reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia petroleum."

I am free to say this to your lordship, that in the course of this trial, and I intended to say this in my opening, we are going to establish that in these early days the Canadian Pacific Railway in some cases made no reservations; Canadian Pacific in other cases made a reservation of mines and minerals; in other cases they made the reservation of coal and petroleum and valuable stone; in other cases they made a reservation of coal, petroleum and natural gas. Your lordship will

10 realize that it is a very simple matter for the officials of the Canadian Pacific to obtain for us compliance with sub-section (i), the form in which, first, the defendant, Canadian Pacific Railway reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia petroleum.

THE COURT: Those reservations would not at all be likely to be in print, would they?

MR. STEER: Oh, I think so, my lord. Well, now, perhaps not.

20 THE COURT: Wouldn't they fill in in typing the description of the land?

MR. STEER: That might well be, or it might be printed, I do not know.

THE COURT: Well, if they filled the description of the land in typing, it would not be so simple as you would like me to believe.

MR. STEER: Perhaps not, my lord; perhaps not.

30 THE COURT: However, there is nothing before me. I am only just thinking of what I have seen in 40 years.

MR. STEER: Yes, and I quite appreciate that too. Then next,

"A specimen of each of the forms in which first the defendant, Canadian Pacific Railway, reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia petroleum and natural gas."

40 "The form in which first the defendant, Canadian Pacific Railway reserved and excepted to it in agreements for the sale of land in Alberta inter alia petroleum, natural gas and related hydro-carbons."

I need not say to you, my lord, you appreciate this, that our case is that in the decade 1900 to 1910 no attention was paid to natural gas,

petroleum was the word that was used, and petroleum was sufficient, and then later on, as the importance of natural gas in the business world, and as the importance of natural gas in the working of petroleum properties came to be realized, then more care was taken in these reservations, that is our case.

10 "The form in which first the defendant, Canadian Pacific Railway, reserved and (or) excepted to it in agreements for the sale of land in Alberta inter alia natural gas."

I submit that there ought to be no difficulty in complying with that part of the notice.

My friend, Mr. Riley, tells me, and perhaps we could have the agreement in this case, could we? It was produced on the discovery, the agreement between Canadian Pacific and Borys. My friend, Mr. Riley, thinks that the reservation is in printed words in that agreement.

20 MR. HELMAN: I haven't got it. We will look for it.

MR. RILEY: It was produced on discovery.

MR. STEER: My friend tells me that he has not been given any notice to produce documents. I take it that we are going to have at least the documents here that were produced on discovery.

MR. NOLAN: It takes a minute or two to put our hands on it.

30 MR. STEER: Quite so. I am not suggesting that there is anything wrong with your conduct of the case, Mr. Nolan. I am suggesting that the documents produced on discovery should be here.

MR. NOLAN: Thanks. It is here.

MR. STEER: It is here?

MR. HELMAN: That is a document printed in Winnipeg, printed by Tupper, Phippen & Tupper.

40 MR. STEER: Who were the solicitors for the Canadian Pacific at that time. I would like to file that, my lord. I would like to have this document marked.

MR. HELMAN: Just what are we doing, marking documents before the trial?

THE COURT: We are hearing an application, and if we were in chambers we would have the documents marked. The only difference, Mr. Helman, is that in chambers you would have affidavits.

MR. HELMAN: I have no objection to him putting

it in.

THE COURT: I quite appreciate your criticism of the way that I am conducting the case.

MR. HELMAN: I am not criticizing.

THE COURT: You wanted to know what we were doing.

MR. HELMAN: I was asking Mr. Steer what he was doing.

THE COURT: Well, it is all right.

10 MR. STEER: In this case, my lord, it is in the printed form of agreement, and I would ask your lordship to have it marked.

20 "If the purchaser, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually at the several times above fixed and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then he, his heirs or assigns approved as hereinafter provided, upon request at the Land Office of the Company, at the City of Winnipeg, and the surrender of this contract, shall be entitled to a deed or patent conveying the said premises in fee simple, freed and discharged from all encumbrances, but subject to the reservations, limitations, provisos and conditions expressed in the original grant from the Crown, and reserving all coal, petroleum, and valuable stone on or under the said land, and also reserving a strip or strips,"
30 etc. I have a pencilled mark in the margin where that is to be found and ask that to be marked on the motion.

THE COURT: Exhibit "B" on this motion.

LAND CONTRACT BETWEEN C.P.R.
AND SIMON BORYS MARKED
EXHIBIT "B".

MR. STEER: Well, then, my lord, we asked for:

40 "(c) The wording of the various reservations and exceptions from transfers of lands granted by the defendant Canadian Pacific Railway in each of the years 1890 to 1918, both years inclusive."

The Canadian Pacific Railway Company got those lands in Western Canada, they sold lands in Western Canada under the printed forms of agreement, and there ought to be no difficulty there.

"(d) All inter-office and other correspondence of the defendant Canadian Pacific Railway relating in any way to the form of reservation and (or) exception from transfers of land granted by the said defendant." That is consistent with the Barnard-Argue case. And notwithstanding what is suggested as to the amount of work involved, I would suggest that the correspondence between this office and head office of the Canadian Pacific as to the form which a reservation should take in a form agreement would be very, very simply provided and would not constitute a great volume of correspondence, and if it would constitute a great volume of correspondence there is no objection to that, in my submission, so long as we have given with the greatest precision possible what it is that we want. Now, they relied on that sort of thing, my lord, in Barnard-Argue, and, in my submission, we are entitled to have it produced and relied on.

Then we ask for:

"(e) A specimen of each form of lease or license granted by the defendant Canadian Pacific Railway in each of the years 1890 to the present time entitling the lessee or licensee to petroleum, natural gas and related hydrocarbons or any of them from the lands of the said defendant and (or) from any mines and minerals reserved by the said defendant from lands previously conveyed away by it."

And then,

"(f) Any agreement or agreements between the defendant Canadian Pacific Railway and the defendant Imperial Oil Limited giving to the defendant Imperial Oil Limited rights to petroleum, natural gas and related hydrocarbons or any of them in lands and (or) mines and minerals owned by the defendant Canadian Pacific Railway."

Again I submit it is obvious there would be no difficulty on the part of the Canadian Pacific in complying with that.

I submit, my lord, that having in mind this is fundamentally a question of fact that every act in the course of its business by these defendants in the period that we have got to examine is an act which is relevant evidence in this case, and it is only by a careful examination of the conduct of these defendants that this question of fact, which your lordship has to determine, can be resolved.

THE COURT: Anything further on these two applications?

MR. NOLAN: No, thank you, my lord.

THE COURT: I will reserve my decision on the two applications, and I think we might just as well go on; and I presume you, Mr. Steer, either you or Mr. Riley, desire to open your case, or have you told me sufficient?

10 MR. STEER: Well, now, I had an opening which I had proposed to give, but my learned friend, Mr. Nolan, has practically covered it. It will take a moment and perhaps I had better review it.

THE COURT: Very well.

MR. STEER: Our case, my lord, is this. We say that by original grant from the Crown, without reservation which affects us, the C.P.R., among other lands, got the title to the North East of 19-50-26-4, which is the land in question in this case. The second point is -

THE COURT: One second, please. What are the lands?

20 MR. STEER: North East of 19-50 - -

THE COURT: All right, I have it, Mr. Steer.

MR. STEER: -- 50-26-4.

THE COURT: Yes.

30 MR. STEER: Now, the second point is that the plaintiff is the registered owner of these lands, having got his title from the original purchaser, Simon Borys. The title of Simon Borys, the original purchaser, which descended to Micheal Borys, the plaintiff, was a title which reserved, pursuant to the agreement of September 13th, 1906, coal, petroleum and valuable stone to the Canadian Pacific. Then by an instrument dated September 21st, 1949, which will be produced to you here, the defendant C.P.R. leased to its co-defendant, Imperial Oil,

"the petroleum hereinafter referred to as the leased substance underlying the lands and the right to work, win and carry away the same," so that, so far as the title is concerned, the facts are very simple.

40 Well, then, the plaintiff pleads claims made by the defendant to the natural gas prevent him from dealing with his property, and that he has suffered damage. And I want to say here and now that we abandon any claim for damages. The basis on which that claim was made was that the development of the export business in natural gas was so imminent that the threats made by the defendant, Imperial Oil, the contention,

perhaps I should say, made by the defendant, Imperial Oil, that it was entitled to this gas was going to cause this plaintiff damage in that he could not deal with his land. However, as I say, we abandon that claim.

10 Then the plaintiff alleges that the defendants both contend that the reservation of the petroleum to the defendant C.P.R. and the lease to the defendant Imperial Oil Limited gives to Imperial Oil Limited the right to win petroleum and also natural gas which may underly the said lands. In other words, the plaintiff alleges that the C.P.R. and Imperial Oil both claim that they are entitled or that their right to the petroleum also gives them a right to the natural gas, and that claim is made perhaps quite conclusively in the Statement of Defence of each of the defendants, which I shall now refer to.

20 The Statement of Defence of Imperial Oil Limited sets up four different claims, and it counterclaims for declarations as to these rights which it claims.

30 It claims, first of all, it has the right to petroleum in any or all of its forms of occurrence, including its gaseous phase or so-called natural gas. Then the defence says if it has not the right set out in the first paragraph, that is the one I have just mentioned, it has the right to the natural gas occurring in the same reservoir in which the petroleum in its liquid phase is found. And, in the third place, if it has not the right set out in 1 and 2, it has a right to the natural gas that may be contained in solution in the petroleum in its liquid phase.

40 Now, your lordship sees there that the contention is that petroleum is petroleum in the liquid phase and that natural gas is petroleum in a gaseous phase. I am going to suggest to your lordship before the trial is over that that is a misconception, and what they are talking about here is hydrocarbons. Hydrocarbons in a liquid phase equals petroleum. Hydrocarbons in a gaseous phase equals natural gas. And it is difficult, in my submission, it is difficult to follow this business of petroleum as petroleum in a liquid phase and petroleum as a natural gas or, at least, natural gas as petroleum in a gaseous phase. It is much

simpler, in my respectful submission, that we look at it as hydrocarbons in one phase or another.

MR. NOLAN: I wonder if Mr. Steer would permit me to interrupt for just a moment. You did not refer to our declaratory judgment where we said we had the right without compensation.

MR. STEER: I am going to refer to that.

MR. NOLAN: You are?

MR. STEER: Yes.

10 MR. NOLAN: All right.

MR. STEER: Well, then, if it has not the rights set out in 1, 2, 3 and 4, then it has the right, without compensation to the plaintiff to remove, appropriate, convert, use and dispose of such a natural gas, or any other substances, as may be necessary to incidental to work, win or carry away the petroleum in its liquid phase.

20 Now, the meaning of that, my lord, will appear as we introduce our evidence. Perhaps I ought to say this, the evidence will be that natural gas occurs in certain dry gas fields with little or any of what are called liquid petroleum parts in it. It occurs in dry gas fields, natural gas does; it occurs in condensate fields, such, for example, as, I believe, Turner Valley, Jumping Pound and Pincher Creek. In addition to that, it occurs dissolved in oil and in coming to the surface it carried oil with it and at surface temperature and pressure the greater part of the natural gas comes
30 out of solution.

Now, then, the contention of the defendant is:

"We are entitled to the natural gas because it is a part of the petroleum; in the second place, if that is not so, if the natural gas occurs in the same reservoir as the liquid, we are entitled to that; in the third place, we are entitled to the natural gas which is dissolved in the petroleum liquid; and
40 in the fourth place, if we are wrong on all three of those, these defendants say: 'We are at least entitled to use the gas for the purpose of lifting the oil to the surface.' "

That is their claim. And then they counterclaim, as I have remarked, for declarations which will give effect to some or all of those claims which they have set out.

I need not, I think, perhaps, go over the Canadian Pacific defence. It is practically identical, although worded in a little different way.

The plaintiff in reply sets up this, he says:

"Petroleum does not exist in a gaseous phase known as natural gas."

He says, first,

10 "Petroleum does not exist in a gaseous phase known as natural gas."

He says in the second place that if, as alleged in paragraph 11 of the defence of the Imperial Oil, the defendant has the right to use the plaintiff's natural gas without compensation, the plaintiff has a corresponding right to use the defendants' petroleum without compensation.

20 Now, my lord, if these are two separate substances, and we say they are, and if one person has the right to work, win and carry away natural gas, and the other has a right to work, win and carry away petroleum, those rights are co-relative, and all the rights that "A" has with respect to petroleum, I have got with respect to gas. And if I go, and my friends claim is correct, if I go and drill first and get gas, and in the course of getting gas the petroleum comes up, then, according to my friends' contentions, I am entitled to the petroleum because I got it along with the gas, and I can not help it. So that the proposition there is
30 simply that the rights are co-relative rights, and the right that one has with respect to the petroleum, the other has with respect to the natural gas.

40 And then the third point and, perhaps, the important one, is that having regard to the time at which the reservation of coal, petroleum and valuable stone was made, and the facts and circumstances then existing, it was not the intention of the parties to the said reservation, including the Railway, to reserve natural gas.

Now, as I pointed out to your lordship on the argument on the motions, the issue on the authorities is an issue of fact, and the issue, in my submission, can be stated in these words: What was in common speech, what was in the vernacular among people who were interested, mining men, business men,

land owners, what was the meaning of this word? What was the meaning in common speech? We are not talking here, in my submission, we are not talking about technical matters, or scientific matters, we are talking about the vernacular of the English language, what in common speech among men who are interested did that word "petroleum" convey. And I refer you to the cases, my lord, and I perhaps need not repeat them, except if you would like to take a reference to them at this point, if you do I will repeat them again, or perhaps it is not necessary.

10

MR. HELMAN: May I rise to simply ask my friend the question, What is the date that he says that this reservation should be interpreted?

MR. STEER: I think perhaps that will be a point reserved for my argument.

MR. HELMAN: Still I contend that we are entitled to know after my friend's opening just precisely what is the point at which he says the word "petroleum" is to be taken at. He read from his reply where he used the words "then existing", "the facts and circumstances then existing", he said. If your lordship will remember, it is in paragraph 8 of his reply.

20

THE COURT: Paragraph what?

MR. HELMAN: Paragraph 8 of his reply. My friend read that in his opening. It is his Joinder of Issue and Reply to the Defence of the Imperial Oil, and he has the same thing in the C.P.R., in paragraph 7 of the C.P.R., of the Reply to the C.P.R., and I think, my lord, for the purpose of restricting this case to its proper confines that my friend should now give us particulars of the date at which he says, or the dates at which he says, this word should be taken in the vernacular. Is it today? Is it 1918? Is it 1906? Or when is it? Or is it the first decade that he mentioned several times in the course of his dealing with the problems relating to the production of the documents? But I think, my lord, I think without any question, that in a case of this type that the parties are entitled to know what is the moment at which he says the word "petroleum" should be interpreted.

30

40

THE COURT: Anything further you wish to say, Mr. Steer?

MR. STEER: That is a most amazing proposition to me, my lord, that, having opened a case, I can then be asked to particularize what my argument is going to be.

Opening of Case.

65

MR. HELMAN: It is not an argument, it is a question of fact. You are giving facts.
THE COURT: Is there anything further you want to say in connection with the case, Mr. Helman?
MR. HELMAN: No, my lord.
THE COURT: Mr. Nolan?
MR. NOLAN: No, thank you.
THE COURT: All right. Court will stand adjourned until 2:00 o'clock.

(Court adjourned and resumed at 2:00 P.M.)

Entry of Exhibits by Plaintiff.

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AFTERNOON SESSION,
November 16th, 1950.

THE COURT: All right, start the plaintiff's case.
MR. STEER: Yes, my lord. I should like to tender certified copies from the Land Titles Office of the patent from the Crown to the Canadian Pacific Railway of certain lands, including the lands in question.
10 THE COURT: Any objections?
MR. NOLAN: No, my lord.
THE COURT: Exhibit 1.

CERTIFIED COPY OF PATENT
FROM THE CROWN TO CANADIAN
PACIFIC RAILWAY COMPANY
MARKED EXHIBIT 1.

MR. STEER: Then, my lord, I should like to
20 tender the agreement between Simon Borys and the Canadian Pacific Railway which was marked this morning as an exhibit on the application of the Canadian Pacific.
THE COURT: Any objection?
MR. NOLAN: No, my lord.
THE COURT: Exhibit 2.

AGREEMENT BETWEEN SIMON BORYS
AND C.P.R. MARKED EXHIBIT 2.

30 THE COURT: I wonder if anybody at noon took the two notices of motion and the exhibits that were put in on the hearing of those motions? Were they taken away for any reason?
MR. STEER: Not by me.
MR. NOLAN: No, my lord, but I think we should endeavour to replace them. I have the Notice of Motion of my own.
MR. STEER: One of the documents is the land contract between the C.P.R. and Borys.
40 THE COURT: I have not the Notices of Motion of the two applications that were made this morning and I do not appear to have either of the plaintiff's notices to Munro and Mackenzie, and I do not appear to have the Exhibit "B" that was marked this morning and that was a document given by Mr. Helman to you.
MR. STEER: Yes, my lord.
MR. RILEY: The Court Reporter, sir, was

Entry of Exhibits by Plaintiff.

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using them on a transcript.

THE COURT: There is one other Notice of Motion that has not been returned. The Notice of Motion to Mr. Mackenzie is not here.

MR. MITCHELL: To Mr. Munro?

THE COURT: Mr. Munro's is here but Mackenzie's. However, I presume that it is downstairs.

MR. NOLAN: I have a Notice of Motion, my lord. It is the original, if that will suffice.

10 THE COURT: That will do. All right.

MR. STEER: Then I was going to call your lordship's attention to the wording of that reservation in this document which is now marked Exhibit 2. It is an agreement between the Canadian Pacific Railway Company and Simon Borys to sell to Simon Borys the North East Quarter of 19-50-26-4, the lands in question herein, for \$1,280.00, that is \$3.00 an acre. And there are annual payments to be made and then a covenant to convey, and I read to your lordship this morning the reservation,

20 "Freed and discharged from all encumbrances, but subject to the reservations, limitations, provisos and conditions expressed in the original grant from the Crown and reserving all coal, petroleum and valuable stone on or under the said land, and also reserving a strip....."

etc. I think that is the only thing to which I need make reference at the moment, my lord. Then I would like to tender a certified copy of a transfer of that land by the Canadian Pacific Railway Company to Simon Borys, dated January 17th, 1918.

30 THE COURT: What is the date?

MR. STEER: January 17th, 1918, my lord.

And the operative part of the transfer reads:

"transfer to the said Simon Borys all their estate and interest in the said piece of land, excepting and reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal, petroleum and valuable stone which may be found to exist within, upon or under the said land."

40 That transfer being dated, as I said, January 17th, 1918, was registered November 19th, 1920, and I think Mr. Thom, the registrar at Edmonton, has a certified copy of the title, which was issued pursuant to that transfer.

(Certified copy of title produced.) Then I tender, my lord, a certified copy of a title issued - -

THE COURT: The transfer first.

MR. STEER: Well, I did tender the transfer,

Entry of Exhibits by Plaintiff.

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my lord, and I read to your lordship the reservation.
THE COURT: Mark that Exhibit 3, please.

TRANSFER PUT IN AND MARKED
EXHIBIT 3.

THE COURT: All right, now.

10 MR. STEER: And I tender, my lord, a certified copy of the Certificate of Title that was issued to Simon Borys pursuant to that transfer, Exhibit 3. The title is dated November 19th, 1920. It is number 243-M-50, and it certifies that Simon Borys is the owner of the North East Quarter of 19, reserving unto the Canadian Pacific Railway Company all coal, petroleum and valuable stone.

THE COURT: Exhibit 4.

20 CERTIFIED COPY OF CERTIFICATE
OF TITLE PUT IN AND MARKED
EXHIBIT 4.

MR. STEER: Then, my lord, I tender a certified copy of Title No. 165-N-120, dated December 18th, 1947, in the name of Micheal - - and it is spelled M-i-c-h-e-a-l, my lord - - Micheal Borys, for the North East Quarter of 19, etc., with an exception of .50 acres, the land described containing 159 and 51/100ths acres more or less, reserving thereout all coal, petroleum and valuable stone.

30 THE COURT: Exhibit 5.

CERTIFIED COPY OF TITLE
No. 165-N-120 PUT IN AND
MARKED EXHIBIT 5.

MR. STEER: Now, I wonder if my learned friend will produce for me the lease from the Canadian Pacific Railway to the Imperial Oil?

MR. HELMAN: That is the C.P.R. copy?

40 MR. STEER: And I would tender, my lord, a lease called a petroleum lease, Canadian Pacific Railway Company to Imperial Oil Limited, 21st September, 1949. Canadian Pacific Railway Company - - perhaps I should have it marked, my lord, and there are one or two passages I would like to refer your lordship to.

THE COURT: Exhibit 6.

Entry of Exhibits by Plaintiff.

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PETROLEUM LEASE FROM CANADIAN
PACIFIC RAILWAY COMPANY TO
IMPERIAL OIL LIMITED PUT IN
AND MARKED EXHIBIT 6.

MR. STEER:

10 " CANADIAN PACIFIC RAILWAY COMPANY, hereinafter
called the 'Lessor', being registered or entitled
as owner, subject, however, to such encumbrances,
liens and interests as are notified by memorandum
underwritten of the petroleum in, upon or under:-
The North East Quarter of Section Nineteen
(19),"

etc.,

20 "as the said estate is described in Certificate of
Title registered in the Land Titles Office for the
North Alberta Land Registration District as No.
C.P.R. 2687, DOES HEREBY LEASE to IMPERIAL OIL
LIMITED, of the City of Sarnia, in the Province of
Ontario, hereinafter called the 'Lessee', the
petroleum (hereinafter referred to as the 'leased
substance') which may be found within, upon or
under the said land, and the right to work, win
and carry away the same."

The space of 10 years, and that is on page 1 of the docu-
ment, my lord. Then on page 2, paragraph 1, is an agree-
ment to pay rent, and on page 9, paragraph 11, -

30 " The Lessee shall and will pay to the Lessor
(in addition to the rental hereinbefore reserved)
a royalty in cash of twelve and one-half per cent
(12½%) of the current market value at the place
of measurement, at which are situated the separators
or tanks of meters by or through which production
is measured, of all of the leased substance saved
and sold out of the leased area,"

etc. I think those are the only clauses today I need
call your lordship's attention to.

40 Now, my lord, I would like to
put in certain questions and answers from the examinations
for discovery, first, of Mr. Mackenzie, the officer pro-
duced on behalf of Imperial Oil Limited, and it will
perhaps be more convenient if I give in advance the
questions which I am going to put in in one group. Mr.
Mackenzie's questions 11 to 17; 30 to 33; 34 to 53; 79
to 81; 83 to 87; 110 to 111; 112 to 126; 127 to 128;
133; 139 to 156.

" Examination for Discovery of William Donald Mackenzie as an officer of the Defendant, Imperial Oil Limited, taken before W. K. Jull, Esq., K.C., Acting Clerk of the Supreme Court of Alberta, at the Court House, Calgary, on the 6th day of April, A.D. 1950.

WILLIAM DONALD COSSAR MACKENZIE

having been first duly sworn, examined by Mr. Riley, testified as follows:

10 11 Q Now, I should like you to tell me, if you can, the ownership first of the surface with respect to the northeast quarter of Section 19, Township 50, Range 26, West of the 4th Meridian, in the Province of Alberta? A. I would like to look at some documents here. The northeast quarter of Section 19, Township 50, Range 26, West of the 4th, the ownership of the surface, Simon Borys.

12 Q Simon or Micheal? A. Micheal Borys is correct.

13 Q Micheal Borys now, Simon originally, I believe?
20 A That is correct.

MR. NOLAN: That is M-i-c-h-e-a-l?

14 Q MR. RILEY: Now, will you tell me if you can when Simon Borys acquired that land?

A Well, it is not clear to me here but I shall inform myself.

15 Q All right. Now, will you tell me the ownership with respect to the mines and minerals within, upon or under that land? A. Canadian Pacific Railroad.

30 16 Q Own what? What I want is an admission as to the mineral reservation, Mr. Nolan, if I could have that.

MR. NOLAN: Well, looking at Abstract of Title which is dated the 21st November, 1949, which certifies that on the 19th day of November, 1920, the mines and minerals other than coal, petroleum and valuable stone in the north east quarter of Section 19-50-26, West of the 4th Meridian, comprising 159 acres more or less, it stood in the name of Simon Borys of Clydehurst, Alberta.

40 17 Q Well, do I take it from that that Mr. Simon Borys owned all the estate save coal, petroleum and valuable stone?

MR. NOLAN: Well, you can take it from this Abstract of Title that it says the mines and minerals other than coal, petroleum and valuable

" stone are in the name of Simon Borys. That is what the document says. "

"30 Q Is the word 'petroleum industry' something which is used in everyday parlance?

MR. NOLAN: Of course, we are getting in again to the whole question of the issue in this case. That is not a proper question, I submit, for this witness. You are asking him an opinion.

10 MR. RILEY: No, I am asking for a fact as to whether or not the word 'petroleum industry' are words of common, ordinary, every-day parlance. I am not asking him what they mean or anything else, I am asking for that fact.

MR. NOLAN: That is all right.

A THE WITNESS: I do not believe that term is used as widely as the term oil industry, but it is used to some extent.

20 31 Q MR. RILEY: Well, is there a difference between the term 'petroleum industry' and 'oil industry'? A. Since there is such loose colloquialism I do not think I would care to express an opinion.

32 Q All right, sir. Is the term 'natural gas industry' one that is frequently used? A. Yes, it is used.

30 33 Q What do the words 'natural gas industry' mean, if you know? A. My impression of the use of that term is a transporting and marketing of a gaseous domestic fuel. "

"34 Q All right, sir. Now you are familiar with various fields -- we won't call them oil fields or petroleum fields or gas fields, or anything else, for the moment -- in the Province of Alberta, that is correct, sir? A. Quite a few of them.

35 Q Where is the Viking-Kinsella area? A. Generally east of Edmonton.

40 36 Q In the Province of Alberta? A. In the Province of Alberta.

37 Q Approximately 100 miles east? A. Yes.

38 Q And how is that area designated by Imperial Oil?

A That area is considered a gas field.

39 Q Where you use gas, do you mean natural gas?

A Yes.

40 Q All right, sir. Now, are you familiar with the Medicine Hat-Redcliff field? A. I know

- " its location and the general Medicine Hat area.
- 41 Q How is that field classified by Imperial?
A We would consider it the same as the Viking-Kinsella.
- 42 Q That is, a natural gas field? A. Yes.
- 43 Q Are you familiar with Bow Island area?
A Generally.
- 44 Q How is that area classified by Imperial?
A The same.
- 10 45 Q That is, a natural gas field? A. Yes.
- 46 Q Are you familiar with the Foremost area?
A Generally familiar with it.
- 47 Q How is that area classified by Imperial?
A The same as the others you mentioned.
- 48 Q That is to say, a natural gas field? A. Yes.
- 49 Q Are you familiar with the Jumping Pound area?
A Generally.
- 50 Q How is that area classified by Imperial?
A Imperial would not classify the Jumping Pound
20 area at the moment inasmuch as one or two wells
have been drilled there and it would be difficult
to classify it in any particular type of
field at the moment.
- 51 Q Well, what options are there open to classify
it as? A. An oil field or condensate field.
- 52 Q And what is meant by condensate field? A. It
30 is an expression used to describe an underground
reservoir that has more than average amount of
condensable hydrocarbons at pressures and temperatures
usually used for separation at the surface."
- Then, my lord, if I may go to 79.
- THE COURT: You did not read 53 but you put
it in.
- MR. STEER: Oh, I beg your pardon.
- "53 Q How does Imperial classify the Pincher Creek
area? A. Much the same problem there, although
the presence of crude oil is probably more apparent."
- 40 Then 79 to 81, my lord:
- "79 Q MR. RILEY: Now, on drilling a well in the
Leduc field, does one encounter what is called
the Viking sands?
A THE WITNESS: Yes.
- 80 Q Is it dry gas that comes from the Viking sand?
A Mr. Riley, in regards to the two occurrences
in drilling Leduc, I would prefer to have an

- " expert answer all questions.
- 81 Q Well, the only trouble about that is, you are supposed to inform yourself a bit, but you refuse to tell me whether or not gas is produced in the Viking sand, do you? A. No, gas is produced in the Viking sand."
- 83 to 87:
- "83 Q No gas from there. What about the D-1 formation? A. No.
- 10 84 Q D-2? A. Oil and natural gas are produced from the D-2.
- 85 Q The D-3? A. The same.
- 86 Q Now, in the D-3 formation, is there a relatively large gas cap on the crest of the structure? A. Yes.
- 87 Q And is there as well gas in solution with the liquid, call it what you may, as far as the liquid goes? A. Yes."
- 110 and 111:
- 20 "110 Q MR. RILEY: Now, sir, does the composition of natural gas vary from field to field in the Province of Alberta? A. THE WITNESS: Yes.
- 111 Q Does the composition vary in the same field in the Province of Alberta? A. In some instances."
- 112 to 126:
- "112 Q What is pentane? A. It is a hydrocarbon. I have forgotten the formula.
- 30 113 Q Is it C 5 - H 12? A. I can not remember, Mr. Riley.
- 114 Q Is it a part of natural gas? MR. NOLAN: We object to that.
- 115 Q MR. RILEY: Let us come on now to hexane. What is hexane? A. A hydrocarbon.
- 116 Q Do you remember the formula? A. No.
- 117 Q Is it C 6 - H 14? A. I still don't remember.
- 118 Q Is it a part of natural gas? MR. NOLAN: We object to that.
- 40 119 Q MR. RILEY: What is heptane? A. THE WITNESS: A hydrocarbon, I think.
- 120 Q Is the formula C 7 - H 16? A. I can not remember.
- 121 Q Is it part of natural gas? MR. NOLAN: Object on the same ground.
- 122 Q MR. RILEY: What is octane? A. THE WITNESS: I don't know.

"123 Q Well, is it a hydrocarbon? A. I don't know.

124 Q Have you any way of informing yourself? A. Yes,
I can consult.

125 Q Will you also at the same time check to see if
the formula is C 8 - H 18? Now, is it fair to
say that these gases which I have discussed
with you, namely, pentane, hexane, heptane,
and octane, are the heavy ends of hydrocarbon
gas? A. Yes.

10 126 Q In natural gas? A. Yes. "

Now, the witness was asked to inform himself, my lord, and
we have a letter from my friend, Mr. Nolan:

" Questions 102 to 125, what is octane, is it a
"hydrocarbon?"

and the answer in the letter is given as:

"Octane is a hydrocarbon and its formula is C 8 - H 18."
127 and 128, my lord:

"127 Q How many feet of natural gas does it take to
lift a barrel of oil in the Leduc field?

20 A I don't know.

128 Q Can you inform yourself as to that? A. Extreme-
ly difficult, Mr. Riley. That varies consider-
ably. "

Then we have got an answer as to that:

" How many feet of natural gas does it take to
lift a barrel of oil in the Leduc field?"

This is Mr. Nolan's same letter:

30 " The gas-oil ratio in the Leduc field is 680 cubic
feet per barrel in the D-2 zone and 733 cubic feet per
barrel in the D-3 zone, as determined from one sample
by flash liberation to zero point gauge pressure. We
have not had any occasion to calculate the number of
cubic feet of natural gas required to lift a barrel
of oil in the Leduc field."

133, my lord:

40 "133 Q Well, you say that you can not get that know-
ledge from within your own company, Imperial
Oil? A. Our company is a manu-
facturer and refiner of petroleum and
petroleum products. "

Then 139 to 156, my lord:

"139 Q Yes, that would be all right. Now, you have
produced in your Affidavit of Documents a
lease from the Canadian Pacific Railway?
MR. NOLAN: I think I should explain, we
are not producing the original lease, which
happens to be in the possession of the head

" office in Toronto. We are producing an executed duplicate of the lease.

MR. RILEY: Well, that is first rate.

MR. NOLAN: At trial, if you so desire, we can have the original here, but that is an executed duplicate copy.

MR. RILEY: I ask that that be marked as Exhibit 1.

LEASE IN QUESTION
MARKED EXHIBIT 1. "

10

That is already in, my lord.

MR. HELMAN:
in, Mr. Steer.

No, it is our copy that is

MR. STEER:

Question 140:

"140 Q MR. RILEY: Now, Mr. Mackenzie, is this document, Exhibit No. 1, the only lease you have with Canadian Pacific Railway?

20

MR. NOLAN: I object to that question because it is of no concern with these proceedings whether we have other leases with Canadian Pacific Railway or whether we have not. The action is limited to a question as to who owns the petroleum and/or natural gas under certain lands set out in the Statement of Claim and referred to in the Statement of Defence. I object to my learned friend going beyond the confines of the issue.

30

MR. RILEY: Of course, one of the things, Mr. Nolan, that is very specifically set forth in the Pleadings is that petroleum by definition, by reservation, by custom, by usage, and by fact is an oily, inflammable liquid. Now, surely what Imperial have done in a documentary form may have some very, very close bearing on the issues in this lawsuit.

40

MR. NOLAN: But we did not draw paragraph 7 of the Statement of Claim. We drew paragraph 7 of the Statement of Defence in which we deny each and every one of the allegations contained in the said paragraph 7 of the Statement of Claim.

MR. RILEY: Surely, then, we have an issue that I am entitled to find out something about.

MR. NOLAN: We can not divide the issue here. That is for the Court to say and I submit that you are not entitled to enter into

- " any discussion with this witness of the dealings of Imperial and Canadian Pacific Railway outside and beyond this lease.
- MR. RILEY: Well, that is fine. My position, of course, is this, that I am entitled to fully explore Imperial's customs and usage and particularly with the C.P.R. But, however, you say I am going to be stopped on that, do you?
- 10 MR. NOLAN: Oh, yes.
- 141 Q MR. RILEY: Now, I note this lease, Exhibit 1, is dated the 21st of September, 1949, Have the Imperial Oil Limited an agreement, or at least, an understanding with Canadian Pacific Railway Company with respect to Canadian Pacific Railway Company's petroleum rights and natural gas rights in Leduc?
- MR. NOLAN: Do not answer that, Mr. Mackenzie. It is beyond the scope of this litigation and is irrelevant.
- 20 142 Q MR. RILEY: All right, sir. Now, Mr. Mackenzie, under our system of holding land in this Province, we have what is called the Torrens system under our Land Titles Act whereby certificates of title are issued to registered owners for the estate owned. You have seen those titles?
- A THE WITNESS: Yes.
- 143 Q Now, have Imperial Oil Limited titles with respect to natural gas alone?
- 30 MR. NOLAN: I think that is objectionable. I think you should ask the witness what titles we have. You see, you are putting that in such a way that it is argumentative.
- MR. RILEY: Well, I prefer not to change.
- MR. NOLAN: Well, I would prefer that the witness did not answer, but we will produce to you any titles and all titles that we have.
- 40 144 Q MR. RILEY: Have Imperial Oil Limited titles for petroleum?
- MR. NOLAN: I object to that on the same ground.
- 145 Q MR. RILEY: Have Imperial Oil Limited titles for petroleum and natural gas?
- MR. NOLAN: The whole issue in this case is what do we have under and by virtue of the lease which we hold from the C.P.R. What we

- " have elsewhere is of no concern at all.
MR. RILEY: Well, that is objected to
too, I take it?
MR. NOLAN: Yes.
- 146 Q MR. RILEY: Is it fair to say that you
have many, many leases with Canadian Pacific
Railway?
MR. NOLAN: I object to that on the
ground that it is not relevant to this.
- 10 147 Q MR. RILEY: And when I say many, many
leases I am referring to either petroleum or
natural gas or both.
MR. NOLAN: We object to it.
- 148 Q MR. RILEY: Now, has Imperial Oil a
printed form of lease which is used in refer-
ence to acquiring the petroleum and natural
gas from freehold owners?
MR. NOLAN: That, again, I submit has
no bearing on the issue in this case. We
20 produce our lease with the C.P.R. That is as
far as we are prepared to go at this stage.
What the Imperial did with anybody else can
not be relevant to what the Imperial has done
with respect to the C.P.R. on these lands.
- 149 Q MR. RILEY: That is fine. Has Imperial
many, many leases with His Majesty the King in
the right of the Province of Alberta?
MR. NOLAN: I object to that on the
same ground.
- 30 150 Q MR. RILEY: Mr. Nolan, instead of me
identifying petroleum and/or natural gas every
time, it is this kind of lease only that I am
questioning with respect to.
MR. NOLAN: Oh, yes.
- 151 Q MR. RILEY: Now, does Imperial occasion-
ally make farmouts of petroleum and/or natural
gas rights?
MR. NOLAN: There is no allegation in
these Pleadings as to whether Imperial does or
does not make farmouts, and I object to it.
- 40 152 Q MR. RILEY: Now, in cases where Imperial
have the petroleum rights alone, have they made
arrangements to acquire from any other person
any other mineral?
MR. NOLAN: That is objectionable on the
same ground. What Imperial does with any other

" person for any other reason is no concern of
ours here today.

153 Q MR. RILEY: Mr. Mackenzie, there is in
force in this Province the Oil and Gas Wells
Act passed by the Government of the Province
of Alberta.

10 A THE WITNESS: That is right. I think you
might be slightly out of date. I believe an
Amendment to the Oil and Gas legislation by
the Province of Alberta has been effected just
recently, and I do not know just whether that
Act is now incorporated in some other Act.
Certainly it was up until a few days ago.

154 Q MR. RILEY: Well, certainly up until a
few days ago that Act was in force, and are
there regulations issued under that Act?

A Correct.

155 Q I show you now a document which purports to be
20 the regulations passed pursuant to that Act,
the original Order-in-Council being 706 number
45, dated the 1st of May, 1945, as amended by
an Order-in-Council dated the 16th of October,
1945, and number OC-1690-45, and further amend-
ed by Order-in-Council dated the 2nd day of
December, 1947, numbered OC-1261-47, and by
Order-in-Council dated the 20th day of April,
1949, and numbered OC-440-49, and by Order-in-
Council dated the 11th of October, 1949, and
30 numbered OC-1204-49. Can you tell me whether
or not you admit that those are the regulations
which were in force up until the last few days,
let us say? A. Yes.

156 Q And that is Exhibit No. 2. "
My learned friend, Mr. Riley, tells me that I have that in
my possession, my lord, and I would like, with your lord-
ship's permission, to locate it and give it a number. It
is marked on the discovery. I also put in in addition to
what I have put in through Mr. Mackenzie, my lord, as
questions 26 and 27:

40 " 26 Q MR. RILEY: What precisely is the bus-
iness of Imperial Oil Limited?

A THE WITNESS: Producer, refiner, manu-
facturer and marketer of petroleum and
petroleum products.

27 Q Are Imperial in the business of supplying
natural gas to consumers? A. Generally, no."

Now, my lord, I would like to put in from Mr. Munro's discovery these questions, 3 to 25; 33; 40 and 41; 52 to 58; 64 to 70; 80 to 82; 91 to 94; and 97 to 99.

" Examination for Discovery of Leslie Munro, an officer of the defendant Canadian Pacific Railway Company, taken before W. K. Jull, Esq., K.C., Acting Clerk of this Court, at the Court House, Calgary, the 26th day of June, 1950, pursuant to appointment.

10 LESLIE MUNRO, having been duly sworn, examined by Mr. Riley, testified:

3 Q MR. RILEY: Now, Mr. Munro, the first document produced in that Affidavit is Duplicate Certificate of Title, Canadian Pacific Railway Company number 2687. Have you that document? (Document produced by Mr. McCaig.)
MR. RILEY: I ask that document Duplicate Certificate of Title C.P.R. number 2687 be marked as an exhibit. "

20 MR. HELMAN: My lord, this title covers a great deal of other property that the C.P.R. is dealing with daily and I would not like to have it tied up as an exhibit here. May I have permission to put in a copy of it?

MR. STEER: I am quite satisfied with that, my lord, a certified copy.

MR. HELMAN: It covers a tremendous amount of land that the C.P.R. is dealing with constantly and we do not want to tie it up as an exhibit.

30 MR. STEER: Mr. Thom has a certified copy. May I tender that, my lord. Would your lordship make that 8 and reserve 7 for the document that I have to locate?

THE COURT: Very well, it is 8.

DUPLICATE CERTIFICATE OF
TITLE CANADIAN PACIFIC
RAILWAY COMPANY NUMBER
2687 MARKED EXHIBIT 8.

40

MR. STEER:

" 4 Q The next document produced in the Affidavit of Documents is a lease dated 21st September 1949 between Canadian Pacific Railway Company and the Defendant Imperial Oil Limited. Have you that document? A. Yes.
(Document produced.) "

That has already been marked, my lord.

- " 5 Q Mr. Munro, is Exhibit 3 the only document which Canadian Pacific Railway Company has with Imperial Oil Limited relating to this land?
MR. McCAIG: Which land?
MR. RILEY: The North East quarter section of Section 19-50-26, West of the 4th Meridian.
MR. McCAIG: The only lease?
MR. RILEY: The only document.
- 10 A What I am thinking now as to another form of lease. This is the only lease we have issued.
- 6 Q MR. RILEY: My question was not that now. I asked if it was the only document you have with Imperial Oil Limited which could be said to relate to this land? A. We have a document with Imperial Oil Limited which lists various lands in respect of which they are entitled to apply for a lease.
- 20 7 Q Now the further document is not produced, so I do not know what is in it, but in that further document is there any differentiation made between petroleum and natural gas?
MR. McCAIG: I object to that question. Do not answer.
A I therefore must decline to answer.
- 8 Q MR. RILEY: Can you give me the date of the further document?
A No, I cannot at the moment.
- 30 9 Q It is something you can get by looking it up?
A Yes.
- 10 Q Will you look it up?
MR. McCAIG: You want the date of that?
MR. RILEY: Yes.
- 11 Q Why is not the further document produced?
MR. McCAIG: Well, I can give you the reason, Mr. Riley, because so far as this land is concerned that lease wipes out the other one. The other agreement is no longer active.
- 40 12 Q MR. RILEY: The other agreement is still in force? You say with reference to other lands but not to this particular parcel of land?
A Yes.
- 13 Q I should like to see the other document.
MR. McCAIG: Well, we object to produce that.
MR. RILEY: You refuse to produce it on

" the advice of counsel? A. Yes, sir.
14 Q Now, the third document produced or referred to
in your Affidavit of Documents is a contract
dated the 13th September 1906 between Canadian
Pacific Railway Company and Simon Borys?

MR. MITCHELL: Now, we would like to make
sure of this. We have the vendor's copy and
the purchaser's copy.

10 MR. RILEY: And I take it from the
remarks made by counsel that with respect to
that document you have the vendor's counterpart,
that is the Canadian Pacific Railway Company's
counterpart, and the purchaser's counterpart,
that is to say, Simon Borys' counterpart?

A I believe they are both there.

MR. RILEY: Mr. McCaig, can you tell me
which is which, which is the vendor's and which
is the purchaser's?

20 MR. McCAIG: I think the vendor's copy
is this one with the typewriting here and that
is the purchaser's. Except for that they are
identical.

MR. RILEY: I tender now as Exhibit 4
the vendor's counterpart of that agreement or
Land Contract possibly I should say. "

That has already been marked, my lord.

" And as Exhibit 5 the purchaser, Simon Borys'
counterpart of the said Land Contract."

30 That is marked as an exhibit, and I think they both need
not go in, my lord.

"15 Q How does it come to pass that you have the
purchaser's copy or counterpart of the Land
contract? A. It has been customary for
the Company to require that the purchaser's
copy of the contract be surrendered before
transfer is issued.

16 Q By the way, when did the transfer issue?

A I think I can get you the date.

17 Q Approximately, I do not want to tie you down.

40 A It was early in 1918.

18 Q Early in 1918? A. I would say so.

MR. McCAIG: The transfer is a matter
of record in the Land Titles Office.

19 Q MR. RILEY: I show you now what purports
to be the duplicate Certificate of Title number
165-N-120 relevant to the lands in question
standing in the name of Micheal Borys, the

- " plaintiff in this action. You might tell me whether or not that document is admitted.
- MR. McCAIG: It does not need to be admitted. It is a matter of public record and if you are going to prove the title to the land you have to prove it through the Registrar and not through this witness. His evidence would be purely secondary.
- 10 MR. RILEY: All right, I mean the title is not admitted.
- MR. McCAIG: Well, it is not admitted by this witness.
- MR. RILEY: Very good then.
- 20 Q Is it fair to say that in the transfer to Simon Borys Canadian Pacific Railway Company reserved all coal, petroleum and valuable stone?
- MR. McCAIG: Just one minute. I object to that. The transfer is in the Land Titles Office and that is the best evidence.
- 20 MR. RILEY: Well, that may be all very well, but Canadian Pacific Railway Company did transfer that land? A. Did transfer the land.
- 21 Q Will you tell me what the Canadian Pacific Railway Company reserved out of that land, if anything?
- MR. McCAIG: I object again. That is a matter of record in the Land Titles Office.
- 22 Q MR. RILEY: You refuse to tell me what the Canadian Pacific Railway Company reserved?
- 30 A Yes.
- 23 Q The Canadian Pacific Railway Company did reserve something, I take it?
- MR. McCAIG: That is a matter of record.
- MR. RILEY: Have you no information as to what was reserved?
- MR. McCAIG: Well, I object to the witness answering that.
- 40 24 Q MR. RILEY: Now, the next document produced in your Affidavit of Production is styled "Memorandum re sale to Simon Borys". What is that memoranda? A. Possibly I can best answer your question by showing you the document itself. It is an inter-office document if you are interested in seeing it.
- 25 Q MR. RILEY: Well, the document in any event that you produce is identified by the

" words, Contract Number 30531, and I will ask the Reporter to mark that as Exhibit 6. "

MR. MITCHELL: It will take a minute just to locate that, Mr. Steer. It is here.

MR. RILEY: That is the one.

MR. STEER: May I tender this, my lord.

CONTRACT NO. 30531 PUT
IN AND MARKED EXHIBIT 11.

10

MR. STEER: Request for the issue of transfer pursuant to the contract dated 31-12-17. And would your lordship be good enough to turn to question 33.

THE COURT: 33 alone?

MR. STEER: Yes.

"33 Q Very good. The next document produced is Statutory Declaration of Simon Borys declared at Leduc the 5th September, 1907?

20

A I have it here."

THE COURT: Exhibit 10.

STATUTORY DECLARATION OF
SIMON BORYS DATED 5th
SEPTEMBER 1907 PUT IN AND
MARKED EXHIBIT 10.

MR. STEER:

30 " I, Simon Borys of Leduc, Alberta, do solemnly declare:

1. That I am the purchaser of the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian from the Canadian Pacific Railway.
2. That I went into actual residence on South West Quarter of Section 30, Township 50, Range 26, West of the 5th Meridian, on about May 1st, 1901, and have resided continuously thereon since.
- 40 3. That I have made the following improvements on the land I am purchasing under the above contract:

10 acres under cultivation.

Fence all around part with wire and part with good rail fence.

SWORN at Leduc 5th of September, 1907. "

MR. NOLAN: Is it the 5th or 15th? The transcript says the 5th.

MR. STEER: It looks like 5th. Then questions 40 and 41, my lord.

"40 Q MR. RILEY: Very good. Now the next document you produced in the Affidavit of Production is said to be a memorandum re issuing of transfer to Simon Borys. Will you let me see that document, please?

10 A That also is an office form prepared within the land branch on completion of a contract and as a result of which the transfer clerk was authorized to issue the transfer itself.

41 Q I tender the memorandum produced as Exhibit 8."

MR. MITCHELL: It is attached to the Statutory Declaration.

MR. STEER: The top document ought to be detached then. There is some mistake here, my lord. That document which we have now marked as Exhibit 11 and

20 which is said to be the authority for the issue of the transfer is not an authority for the issue of a transfer it is an authority for the sending out of the agreement, I take it.

MR. HELMAN: Well, what exhibit was it marked?

MR. STEER: Marked Exhibit 8 on the discovery.

MR. HELMAN: Well, is this marked

30 MR. STEER: Marked Exhibit 6, and this is dated 1906. I think there is confusion here. Now, this Exhibit 9 which we have marked Exhibit 9 really ought to be Exhibit 11, and this Exhibit 11 which we have now marked ought to be Exhibit 9.

THE COURT: Will you have that changed right now, Mr. Steer.

MR. STEER: Now, Exhibit 11 is the authority for the issue of the transfer dated 31-12-17, and Exhibit 9 is the authority, as I understand it, for

40 the sending out of the contract dated December 27th, 1906.

AUTHORITY FOR SENDING OUT
CONTRACT DATED DECEMBER
27th, 1906, PUT IN AND
MARKED EXHIBIT 9.

MR. STEER: 52 to 58, my lord:
"52 Q MR. RILEY: Well now, when did the
Canadian Pacific Railway Company commence to
make reservations as to minerals in any form?
A That is something I have tried to find out
without too much success. I have literally
hundreds of documents searched. I am speaking
of these slips, transfer slips described as
Exhibit 8 and have not as a result of that
search been able to come to any definite con-
10 clusions.
53 Q Well, can you give me an approximate date?
A No, I am afraid I cannot.
54 Q Was it after the turn of the Twentieth Century?
A I will say that reservations were commenced
well before the turn of the Twentieth Century.
55 Q And were those reservations so commenced always
in the same terms? A. No.
56 Q The terms varied? A. Yes.
20 57 Q Sometimes you would reserve all mines and
minerals and the right to work? A. It was
in an endeavour some two or three years ago -
it was in an endeavour to ascertain whether or
not there was any order to these reservations
that I had the search made.
58 Q Now, getting back to my question about the
variation in the form of the reservation.
Sometimes the reservations were in the form of
all mines and minerals and the right to work
30 the same? A. Yes."
64 to 70, my lord:
"64 Q MR. RILEY: Did you reserve natural
gas in any case?"
MR. HELMAN: My lord, I am going to rise
to object to my friend putting on the record questions
to which the answer was refused and which was the subject
matter of an appeal to the Appellate Division in which it
was said that the answer was properly refused. I submit
my friend can not proceed to put in such a question and
40 the refusal answer. That is not part of the discovery,
as I understand it. May I just say, these specific
questions were the subject of the appeal to the Appellate
Division.
THE COURT: And when the Appellate
Division gave its decision, what did it say?
MR. HELMAN: It said that these questions
did not have to be answered.

THE COURT: Didn't it say that their judgment was not to be binding on the trial Judge?
MR. HELMAN: I beg your pardon?
THE COURT: Didn't they say that their decision was not to be binding on the trial Judge?
MR. HELMAN: Well, I think one of the judges made that remark as they were leaving the bench but that has nothing to do, my lord, with the question as to discovery. This is the very discovery.
10 THE COURT: Didn't the judge who gave the judgment for the Court - -
MR. HELMAN: I will ask my friends here, I did not hear it.
THE COURT: I have never seen it, it is not printed, but I was told that this morning a couple of times.
MR. HELMAN: Well, I am in your lordship's hands as to that, because I did not hear the remark, but I was told a remark was made and I think it was made by - -
20 THE COURT: Did I not hear that this morning?
MR. STEER: You did, my lord.
THE COURT: More than once?
MR. STEER: Yes, my lord. My friend, Mr. Riley, was on that appeal and he will tell your lordship what his understanding is and my friend, Mr. Nolan, was there and he will confirm or not, one or the other.
MR. HELMAN: Just let me make my point, my lord, if you will permit me to do so.
30 THE COURT: I have never refused you.
MR. HELMAN: All I want to say, my lord, this is a question and an answer on discovery, the answer to which was refused, and the right to refuse to answer that question was the subject of that appeal. Now, so far as the discovery is concerned, I mean, setting aside all other problems which may arise before your lordship as to evidence, as far as discovery was concerned it was determined that that question and answer and the refusal to answer it was proper. Now, I submit
40 that that can not be put in as part of the discovery.
MR. STEER: My lord, all I have to suggest is this, that an examination for discovery, as I understand it, is a cross-examination of the witness who is produced on all issues, and the rules are specific that in examination for discovery can be tendered in evidence, and on the weight to be attached to their evidence, not to say on the credibility of witnesses,

that evidence in my respectful submission is just as admissible taken from an examination for discovery as it is on cross-examination in the box.

10 THE COURT: If the Appellate Division has said that this question and answer can not go in, I am bound by that. If the Appellate Division has said that their judgment is not binding upon the trial Judge, then it won't be binding on the trial Judge. Now, I want to know whether the Appellate Division said that or did not say it.

MR. RILEY: Now, my lord, it was said orally from the bench by the Honourable, The Chief Justice - and I do not want to be tied to the exact words, but they said that nothing they did in that decision was to tie the hands of the trial Judge or restrict him in any way from allowing in any evidence which he thought proper. Now, that is the effect of their statement.

20 MR. NOLAN: I think that is substantially correct, my lord, and that is in accord with my memory of it. The idea, I think, which was intended to be conveyed was that these questions and these answers were not to be put in as evidence on an examination for discovery, but that the conduct of the trial and the evidence other than this which the learned trial Judge might consider relevant would be dealt with by the learned trial Judge as he saw fit, but I think they brought an end and a finality to any questions arising out of the admissibility of these questions and these answers.

30 THE COURT: Well, Mr. Riley, you and Mr. Nolan do not agree.

MR. NOLAN: Well, I think we do, don't we? Surely, my lord, the court did not intend to say, "We refuse to allow this witness to make these answers", but they said the learned trial judge will conduct his case in his own way. What they meant to infer, I suppose, was that if there was any other way of making proof of these sort of things it was quite open to the plaintiff to make it.

40 MR. RILEY: I think we are losing sight, sir, of the nature of the proceedings on discovery. In this case I sought from the Court of Appeal an order compelling Mr. Munro to attend and answer questions. Now, that is what I sought. That order was refused to me but that does not mean that I can not put in the record at this stage the questions I asked on discovery and the answers I got, even though they take the form of a refusal. My friend, Mr. Helman, has made his point when

he says the questions were asked and dealt with by the Court of Appeal and the Court of Appeal said, "You need not attend and answer further." That is all the Court of Appeal ruled, but that does not mean, surely, that I can not put before your lordship the questions I asked on discovery and the refusals I got to answer them. All the Court of Appeal said to Mr. Munro was, "You need not attend further and answer the questions."

10 THE COURT: Very well, the question and answer as it is will go in.

MR. STEER: I was reading, my lord, from 64 to 70:

"64 Q MR. RILEY: Did you reserve natural gas in any case?

MR. McCAIG: The witness will not answer that question.

65 Q MR. RILEY: When did you commence to reserve natural gas?

20 MR. McCAIG: The witness also will not answer.

66 Q MR. RILEY: Were the various types of reservations used by Canadian Pacific Railway Company found in a printed document named 'Land Contract'?

MR. McCAIG: The witness will also refuse to answer.

67 Q MR. RILEY: Were there different types of land contracts?

30 MR. McCAIG: That, also, the witness will refuse to answer.

68 Q MR. RILEY: You will appreciate in all these questions I am speaking of the period immediately prior to the thirtieth (thirteenth) day of September, 1906? A. Yes.

69 Q The thirteenth, I am sorry. Now, sir, I believe the Canadian Pacific Railway Company has taken a part in the natural gas development in this Province. Is that correct?

40 MR. McCAIG: Would you make that question a little more specific, 'have taken part in', what does that mean?

MR. RILEY: Has the Canadian Pacific Railway Company drilled wells on its own for natural gas?

MR. McCAIG: Has it drilled - would you repeat that?

'Q Has the Canadian Pacific drilled wells on its

" 'own for natural gas?' A. I am informed that the company has drilled gas wells on its own right-of-way.

70 Q MR. RILEY: When did the company drill its first well for natural gas? A. I do not know specifically. Conceivably I could find out. I suspect it was back before the, or near the, turn of the Century. As to the date, I have not any information."

10 80 to 82, my lord:

"80 Q MR. RILEY: Is it a fact that in recent years there has been a tremendous growth in the consumption of natural gas in the Province of Alberta for domestic, commercial and industrial consumption?

MR. McCAIG: You can answer that. Everybody knows.

A My answer to that would be I think that is a matter of public record and information.

20 81 Q MR. RILEY: But, unfortunately, I do not know what the public records and information says. The answer I take it is, yes, there has been a tremendous growth? A. Yes, I take it to be so.

82 Q And that is a fairly recent development in the last twenty years? A. Yes."

91 to 94, my lord:

"91 Q MR. RILEY: Now, sir, Exhibits numbers 4 and 5 which are counterparts, - "

30 that, of course, is the sale agreement - "

" that document first of all was drafted by the Canadian Pacific Railway Company's solicitors, Messrs. Tupper, Phippen and Tupper? A. As far as I know, that is correct. You are dealing, you remember, with dates long before I entered the company's service.

92 Q You have no doubt about that though, have you, sir? A. I believe that to be so, yes.

93 Q Now, at a later date was the printed document -

40 MR. McCAIG: A later date than what?

94 Q MR. RILEY: Thirteenth day of September, 1906, was the printed document changed with reference to the reservations?

MR. McCAIG: Do not answer that. "

97 to 99, my lord:

"97 Q MR. RILEY: Has Canadian Pacific Railway Company leased petroleum alone?

- "
- 98 Q MR. McCAIG: Well, do not answer that.
MR. RILEY: Has Canadian Pacific Rail-
way Company leased natural gas alone?
MR. McCAIG: The same answer.
- 99 Q MR. RILEY: Is the practice of Canadian
Pacific Railway Company invariably to lease
petroleum and natural gas?
MR. McCAIG: I object to that question
and instruct the witness not to answer."
- 10 Now, my lord, we will call Mr. Borys.
MR. RILEY: My lord, perhaps I should
say to you this, that I have attended on Mr. Borys and
I attempted to brief his evidence in English. Some
English he understands and some he misunderstands, and
I had to call in an interpreter in order to get his story.
The interpreter which I used was his son, or one of his
sons, Andrew. Now, I have asked Mr. Kilarski to be here
today. He has acted for a number of years as interpreter
in this and other courts, and I ask that Mr. Borys'
20 evidence be taken through the interpreter.
THE COURT: Which language does he
speak?
MR. RILEY: He comes from Austria. I
understand he speaks three languages, Polish, Russian
and Ukrainian.
THE COURT: And what language are you
going to speak today? No, what language do you under-
stand best?
MR. BORYS: I think Ukrainian.
30 THE COURT: Well, swear the interpreter.

(John Steve Kilarski, sworn as interpreter in the Ukrain-
ian language.)

- SIMON BORYS, having been
first duly sworn, through the medium of the interpreter
examined by Mr. Riley, testified as follows:
- 40 Q Mr. Borys, sir, how old are you? A. 75, sir.
Q Where do you live? A. I live at Leduc.
Q Where were you born? A. In Austria.
Q What year did you come to Canada? A. 1897.
Q When you arrived in Canada, where did you settle?
A Near Leduc.
Q Why did you go to Leduc? A. My friends were
there before me and they asked me to go there as
they think I would like to live there.

- Q What did you plan to do in Leduc? A. I came to farm.
- Q Did you buy any land? A. I bought a piece of land from a widow. Her husband died and he bought land from the C.P.R. and I took it over from her.
- Q Had that land been paid out to the C.P.R.? A. I paid to her the sum of two payments and the rest I paid to C.P.R.
- 10 Q When did you buy that land? A. 1898, about March.
- Q 1898? A. I came in 1897.
- Q 1897? A. 1897, and I bought the year after, a few months after I came.
- Q That would be 1898 when you bought the land first? A. In 1898.
- Q Did you ever acquire a homestead? A. Yes, the same year, about 8 miles away from the place I bought.
- Q Does he live on the homestead today? Do you live on the homestead today? A. Yes, sir.
- 20 Q Can you give me the legal description of the homestead? A. Section 30, the south west quarter.
- Q The south west quarter of 30, Township? A. 50.
- Q Range 26? A. 26.
- Q West of the 4th meridian? A. Yes.
- Q Did you have any land dealings with the C.P.R.? A. Two years afterwards I sold that and I bought another place from C.P.R. near my homestead.
- 30 Q What year were your first dealings with the C.P.R.? A. 1901.
- Q 1901. And what land did that deal refer to? A. Section 19, Township 50, Range 26, West of the 4th.
- Q How much land, a quarter section? A. A quarter, sir.
- Q Which quarter? A. North west quarter.
- Q What was the name of the man you saw about buying that land from the C.P.R.? A. It was a C.P.R. agent who lived in Leduc and I had the dealing with him.
- 40 Q What was his name? A. McKay.
- Q In the year 1901, were there a number of people settling in Leduc, in the Leduc area, and buying land? A. There were a lot of people getting a homestead there, also bought from C.P.R. land, yes.
- Q Did you sign a land contract with reference to the 1901 deal? A. When I purchased that land, he made out a contract and I sign, I think,

- once or twice on something, that is all.
- Q Was any interpreter present? A. Yes, there was.
- Q And what was his name? A. Peter Dublenko.
- Q Did you read over the first contract? A. I didn't read because I can not read.
- Q Was the contract read over to you? A. All they said to me, "This land will cost you \$3.00 an acre, you have ten years to pay," that is all that was said.
- 10 Q Did the C.P.R. keep anything out of that land?
A He says, "Well, I bought the land to farm," that is all I know.
- Q Was there any reservation to the C.P.R. of any substance? A. They told me something about C.P.R. is going to keep the coal and some kind of stone and the rest you keep.
- 20 MR. HELMAN: My lord, I am objecting to any verbal testimony being given as to the form and nature of the contract which he made with the C.P.R. and who told him anything about it, and I am objecting particularly to the last question that was asked by my friend.
- THE COURT: Can Mr. Riley not ask him questions about what happened leading up to the contract?
- MR. HELMAN: Yes, my lord, but he can not ask him to interpret verbally what was told him about a document that apparently existed in writing and get the witness's interpretation as to what it contained.
- 30 MR. RILEY: I am not seeking to vary any documents, sir. It is plain this man did not read a contract, he could not read a contract, and I think it is perfectly permissible. This is evidence to show what he understood at the time.
- THE COURT: All right, go ahead.
- Q MR. RILEY: Now, later did you buy more land from the C.P.R.? A. 1906 I bought another quarter.
- 40 Q What quarter? A. North east quarter from me.
- Q North east quarter of 19? A. Yes, Section 19, Township 50, Range 26, West of the 4th.
- Q I wonder if I might have Exhibit 2. I show you now Exhibit 2. Is that your signature? A. Sure,

that is my signature.

Q Was any interpreter present when that contract was made? A. Yes, the same man that was on the first place.

Q Pete Dublenko? A. Yes.

Q How did Peter Dublenko happen to be there? A. He lived near Leduc and we go to the same church and I told him I am going in and he accompany me too.

10 Q Did you read Exhibit 2, this contract? A. I did not because I can not read.

Q Was it read over to you? A. No, sir. Dublenko could not read neither, see, he could speak but he could not read.

Q What, if anything, did Mr. McKay - - was Mr. McKay still the agent? A. Yes, sir.

Q What did he say, if anything? A. When he gave me the contract he says, "There is little bit difference in this one from the other one."

20 Q "Little bit difference between this one and the other one"? A. Yes.

Q In what way?

MR. HELMAN: Before the witness answers this question, I want to object once again to any verbal conversation with relation to what the contract said or what it meant. The rule of law is quite plain that the parties are bound by the express language used in the contract, and surely my friend can not say, "What did Mr. McKay say about it?" This is clearly inadmissible evidence and I object

30 to it.

MR. RILEY: I take this position, my lord, one of the principal issues in this case is, what did the parties intend when they signed this document? That is one thing. Now, ordinarily you have a case where a person can read and you can gather his intention and the other man's intention from the words used in the document, but that is not this kind of a case and surely I am entitled to find out something that was in McKay's and this man's

40 mind at the time. That is all I am doing. I am not varying any contracts. And as my friend points out, there is another ground to put it on, what McKay may have told this man with reference to any substance might very well be the C.P.R. idea at the time of the meaning of the word.

MR. HELMAN: Just a minute. That has not been demonstrated in the lease, that McKay was

an agent of the C.P.R. He happened to be a real estate agent who was selling land and amongst other people that he sold land for he was selling it for the C.P.R., but surely nothing he could say or did on that occasion could in any way be relevant evidence with regard to the document itself.

THE COURT: I am going to hear the question and the answer, and I am going to hear any evidence that will assist me in understanding the word that has to be interpreted.

10

BY THE REPORTER (reading)

"Q. Little bit difference between this one and the other one?

A. Yes.

Q. In what way? "

Q MR. RILEY: In what way was it different to the last? A. The present he said the oil belongs to C.P.R. on this quarter, the rest he said the same as the other one.

20

Q Was the price the same? A. And the price of the land was \$8.00 per acre.

MR. NOLAN: I am wondering, sir, in a case of this kind where so much turns on the meaning of a word whether we around here who are not able to understand the Ukrainian language are at a disadvantage so far as the interpreter is concerned, and I am wondering if there are two words in the Ukrainian language, one of which means petroleum and one of which means oil, does one include the other or does the other include the one, and it is of some importance because your lordship has just said that you want all the evidence that you can get to assist you, but it would be unfortunate if any of us were misled by a wrong interpretation of the question that is put to the witness or in the wrong interpretation of the answer that the witness may give. I think your lordship will understand what I am getting at. It is sometimes difficult even in our own tongue just to have that proper shade of meaning, and it is, of course, the shade of meaning in this case which is all important and I hope that no misunderstanding has taken place as between counsel and the witness by using this word "oil".

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40

THE COURT: Have you any suggestion by which you would be better satisfied than you are at the moment?

MR. NOLAN: No.
THE COURT: If you have, I would be very glad to hear it.
MR. RILEY: Perhaps my friend would like to ask Mr. Kilarski whether or not there are several words of that nature in the Ukrainian language?
MR. NOLAN: No, thank you, I would not like to ask him.
THE COURT: Go ahead. I am giving both sides the opportunity of saying that they are not satisfied with this interpreter or that they are not satisfied with his interpreting, and I am giving them the opportunity of getting their own interpreter to interpret for them if they so desire, each side, in any case, has to provide his own interpreter.
MR. RILEY: I did not understand, sir, that my friend had any quarrel with the interpreter.
MR. NOLAN: Oh, not at all.
MR. RILEY: He is used by my friends,
I understand.
THE COURT: I am not saying he did say so. All I am saying is, I want to be extraordinarily fair to both sides and I do not want them to go to the next Court and say they raised an objection to the interpreter and did not receive any attention.
MR. RILEY: Very good, sir. Just answer my learned friend.
MR. HELMAN: My lord, we did not expect that Mr. Borys would require an interpreter and we would like to have our own interpreter present to know just exactly what the witness is saying in fact for our own benefit.
THE COURT: How long will it take you to get him?
MR. HELMAN: I haven't any idea, my lord.
THE COURT: A month?
MR. HELMAN: It may take a day.
THE COURT: If you can give me some idea I will tell you how long I will give you. I will give you time to get one.
MR. HELMAN: My mind is a complete blank on the subject, my lord. I have made no enquiries about interpreters and I can not give any assistance to your lordship.
THE COURT: Is there no other man in Calgary who can speak the Ukrainian language except Mr. Kilarksi, who is an experienced court interpreter?

MR. NOLAN: We could have someone here tomorrow morning, my lord, at the opening of the court who is conversant with the language, and as far as my client is concerned, we will be able to understand the shades of meaning of the words. And, of course, may I say again, my lord, I have no quarrel with Mr. Kilariski, he is a very old friend of mine and in whom I have great confidence. It is just a question of the shades of meaning and the niceties of speech in that we would like to be quite sure.

THE COURT: Court will stand adjourned until 10:00 o'clock tomorrow morning.

(The Court then adjourned until 10:00
o'clock 17th November, A.D. 1950.)

Morning Session
November 17th, 1950.

10 THE COURT: Are you ready, Mr. Nolan,
MR. NOLAN: Yes, my lord. I have been
able to obtain the services of a man who, I understand,
is quite conversant with the Ukrainian language, and
all I propose to do, my lord, with your permission,
is have him in Court to advise me during the examin-
ation as to any matters that I should bring up in
cross-examination, and it will in no way delay the
proceedings, my lord.

THE COURT: That is all right.

MR. NOLAN: Thank you, sir.

THE COURT: That is your right, Mr.
Nolan, All right, Mr. Riley.

20 MR. STEER: Before your lordship com-
mences, I have now the document which I wanted to hand
in yesterday, which should be marked Exhibit 7. The
number was reserved for it, my lord. It is called
"The Oil and Gas Wells Act and Drilling and Production
Regulations", and it was put in with Question 155
of Mr. Mackenzie's discovery, my lord.

THE COURT: Exhibit 7?

MR. STEER: Yes, my lord.

30 THE OIL AND GAS WELLS ACT AND
DRILLING AND PRODUCTION REGU-
LATIONS MARKED EXHIBIT 7.

THE COURT: Mr. Riley?

MR. RILEY: Mr. Borys and Mr. Kilarski,
please.

40 SIMON BORYS, recalled,
already sworn, examined by Mr. Riley through the
medium of an interpreter, testified as follows:-

MR. RILEY: Simon Borys, sir? A. Yes.

THE CLERK OF THE COURT: Explain to him, Mr. Kilarski,
he is still under oath.

THE INTERPRETER: Yes, he understands.

Q MR. RILEY: Mr. Borys, yesterday you
were talking about McKay? A. Yes.

Q Who was McKay? A. He was a station agent sel-
ling tickets and selling farms.

- Q Where did Mr. McKay live? A. In the same building where the office was.
- Q Whose office? A. At the C.P.R. building.
- Q Where did you sign this agreement, Exhibit 2?
A In the station, in the building that he lives.
- Q Whose station? A.C.P.R. station.
- Q And whereabouts in the station? A. In the place where they sell tickets.
- Q Just answer my friend.

10

CROSS-EXAMINATION BY MR. NOLAN:

- Q I have a few questions that I would like to put to you, Mr. Borys, most of them of a general character?
A Yes.
- 20 Q And my cross-examination, of course, my lord, is reserving to me the right, all the rights and all the objections that have been made by my learned friend, Mr. Helman, as to the relevancy of it, and its admissibility. Mr. Borys, you were born in Austria?
A. Yes, sir.
- Q You were born on a farm? A. On a farm. It was in the village.
- Q And your father was a farmer before you? A. Yes, sir.
- Q And you came to Canada in 1897? A. Yes, sir.
- 30 Q For the purpose of acquiring farm lands in this country?
A. Yes, sir.
- Q And through friends of yours farming in the Ledue District prior to your arrival? A. Yes, sir.
- Q And after you arrived here you purchased some land that had been under an agreement for sale by a deceased whose widow was unable to keep up the payments?
A. That is true.
- Q It was a farm? A. Yes.
- Q And then you took up a homestead? A. Yes, sir.
- 40 Q And in 1901 you bought another farm from the C.P.R. near your homestead?
A. Yes, sir.
- Q And during these years, after the turn of the century, there were a great number of Europeans coming to Canada for the purposes of settlement in this country?
A Yes, and some came the same year as I am and some came later.
- Q Yes. It was during those years that the country was opening up, as we say? A. Yes. There was no

Simon Borys-For Plaintiff-Cross-examination
by Mr. Nolan.

99

road there then.

- Q And in addition to raising crops, I suppose you went in for mixed farming and had horses, cows, pigs and chickens? A. Yes, it was all mixed farming.
- Q And when did you retire from active farming, Mr. Borys? A I am working until now on the farm.
- Q Mr. Borys, you transferred the land in question in this action to your wife, did you not? A. I did, sir.
- 10 Q And that was in July of 1923? A. Yes, sir.
- Q And when did you lose your wife, Mr. Borys? A In August, in 1938, sir.
- Q And you and John Borys were the executors of the estate of the late Mrs. Borys? A. Yes, sir.
- Q And you, Mr. Borys, and John Borys, executed a transfer of the land in question in this action to the plaintiff, Micheal Borys? A. Yes, sir.
- Q Who was John Borys? A. My son.
- Q Your son? A. Yes.
- 20 Q When was this transfer made? A. About three years past.
- Q All right. I should say and, perhaps your lordship will permit me to say, to the interpreter that I am anxious that he should put this question very precisely to the witness. What is the word in Ukrainian, Mr. Borys, for petroleum? A. I don't understand it.
- Q What is the word in Ukrainian for oil? A. The oil that we use for machines and other things?
- 30 Q Beg pardon? A. The oil that we use for machines, that I know as oil.
- Q That he knows as oil? A. Yes.
- Q What did you use in your lamps, Mr. Borys? A Naphtha in Ukrainian.
- Q And what is the word in Ukrainian, what is the word, or what is your word in Ukrainian for natural gas? A That I don't know the words, never heard of it.
- Q Just one other thing. Your son, Micheal Borys, is contending that he is the owner of the natural gas on the lands in question in this action? A. Well, we pay for the land, we pay the tax, so that he thinks it belongs to him.
- 40 Q This Mr. Borys, the witness, does he know whether his son has alienated any of his rights to the natural gas which he claims to possess? A. If it didn't belong to him why do they ask him to pay the tax on it?
- Q Does he know whether or not his son has alienated or

disposed of any of his rights to the natural gas which he claims he owns? A. He says, "All I know is that it must belong to him or something because he is paying taxes on the minerals there, so it must be his gas", that is the answer he gives me.

Q Well, I won't pursue it any further. Thank you, very much, Mr. Borys.

THE COURT: Is that all?

10 MR. HELMAN: I have some questions, my lord.

THE COURT: Yes?

MR. HELMAN: My lord, I am asking these questions subject to and reserving the objections which I made to your lordship yesterday with regard to the evidence of this witness and the inadmissibility of certain parts of it.

20 CROSS-EXAMINATION BY MR. HELMAN:

Q When you signed the Agreement to Purchase, you say there was a Mr. Dublenko present, Peter Dublenko?

A He was interpreting for me.

Q And is he still alive? A. No, he is not.

Q And do you know whether Mr. McKay is alive?

A No, McKay died quite a while ago.

Q Now, you could neither read nor write nor speak English in 1906? A. I am sign my name.

30 Q You could sign your name? A. Yes.

Q But further than that you could not understand anything that was said to you? A. No.

Q Mr. Dublenko was of what nationality? A. The same as me.

Q Which is what, Austrian or Ukrainian? A. He was Ukrainian.

Q Ukrainian? A. Yes.

Q How long had he been in the country at that time?

A He was a year before me in this country.

40 Q And he could not read nor write, but he could understand English apparently? A. That is true.

Q And did you know about what Mr. McKay said, do you know whether what Mr. McKay said is what Mr. Dublenko told you? A. Yes, he tell to Dublenko and Dublenko told me.

Q After you had paid up for the land, Mr. Borys, you got a transfer from the C.P.R.? A. Yes, I was given a title.

- Q You received a transfer, because it is Exhibit 3 here?
A I am answering what he said, Mr. Helman.
Q Would you show the witness Exhibit 3 please? This is a copy, it is a certified copy, my lord, of the registrar, so that perhaps I will show that to the witness. Is that the original, which is the original of a certified copy, Number 3, is that the document which you actually obtained from the C.P.R. Mr. Borys? A. It is the same, but my name is not on it, he said.
- 10 Q Well, I would just like you to point out to the witness here his name in the centre there. Bring it to his attention, will you, Mr. Interpreter?
A But not my writing, he says. This is mine here.
Q Yes, I am coming to that in a minute. This document is a transfer that has been produced from the Land Titles Office by the Registrar in Edmonton, and what I want to know is whether or not that is the transfer to the piece of property which you received from the C.P.R.? A. I will take a look at the number. I think it is the same.
- 20 Q And attached to this document is an affidavit. Is that your signature, Mr. Borys? A. That is my writing.
Q And I notice that this transfer is dated the 17th day of January, 1918, but that your affidavit is dated the 17th of November, 1920. What did you do with the transfer in the meantime, for nearly two years?
A I don't think that was my responsibility or my fault that it wasn't transferred before.
- 30 Q All I am asking the witness at this time is what he did with the transfer for the period of two years from its date until the date that it was registered? What he did physically with it? A. Because I didn't have no money, it costs money to get it registered.
Q Well, I understand. Then he kept it at home?
A It was in the bank.
Q In the bank? A. Yes.
- 40 Q And after you had kept it for some time in the bank you then finally had it registered? A. Yes.
Q Did you have a lawyer do that for you? A. There was no lawyer did it for me. It was a man that was filling in forms, a man who was dealing in farms and other things named Carl, and he did that for me, registered it.
Q Some man dealing in farms in Leduc, was he?

A In Leduc. He had a real estate office.

Q Real estate? A. Yes.

MR. HELMAN: I would like to mark that as an exhibit, my lord, the original transfer.

THE COURT: Exhibit 12.

ORIGINAL TRANSFER CANADIAN PACIFIC RAILWAY COMPANY TO SIMON BORYS MARKED EXHIBIT 12.

10

Q MR. HELMAN: Now, do you remember when you transferred this property to your wife? A. 1923, sir.

Q Is that your signature to this transfer which has been produced to me by Mr. Thom, the Registrar of the North Alberta Land Registration District?

A That is my signature.

Q And there is an affidavit here purporting to be signed by you; is that your signature? A. That is my signature.

20

MR. HELMAN: I would like to tender that as an exhibit, my lord.

TRANSFER FROM SIMON BORYS TO AHAFIA BORYS MARKED EXHIBIT 13.

MR. NOLAN: What is the date of it for the record, Mr. Helman? There is nothing to identify it.

30

MR. HELMAN: Perhaps I should read it. Exhibit 13, my lord, is a transfer which is dated the 16th day of July, 1923, and was registered in the North Alberta Land Registration District at Edmonton at 3 o'clock - it is a little obscure - on the 19th day of July, 1922, no, 1923. It is the 19th of July, 1923. And it describes the land which is transferred, my lord, as the North Half of Section 19, in Township 50, Range 26, West of the 4th Meridian, containing 159 acres more or less, reserving unto the C.P.R. all coal as to the Northwest quarter, and all coal, petroleum and valuable stone as to the Northeast quarter.

40

Q Did you have any reason for transferring this property to your wife? A. It is quite a long story as to that, sir.

MR. STEER: I wonder if we are interested in it, my lord. He transferred it. I would suggest that we are not interested in the motive that led this gentleman to transfer this land to his wife.

MR. HELMAN: I think I am entitled to the answer, my lord.

THE COURT: You can ask it and get the answer if you want. The other side is not interested, but you may be.

MR. HELMAN: I want to know what the reason was if he can tell me in a few words?

A It will take five minutes to explain that.

Q Well, can he give me the fundamental cause of it?

10 Q THE COURT: Just ask him why he wanted his wife to have it and see if that will shorten it.

A Oh, O.K.

Q You had better stop him. Now, what did he say up to date? A. My lord, after fifteen years

I had been here in this country with my wife and so we decided that we should have some school, and he says he was picked as a trustee and there was about to pay \$2000.00, because I wanted, and my wife too, to teach my children, given them an education so they would not be as illiterate as we are, so that they could go to school. And that is what is leading up to it, my lord.

Q Well, do we want to go on now?

MR. HELMAN: As a school trustee, my lord, I sympathize with him.

Q In any event, after your wife's death, you and the other executor signed a transfer of this property to the present plaintiff? A. Yes.

30 Q And is this your signature on this document, Mr. Borys? A. Yes, that is my signature and my son's.

Q And attached to this document that we are looking at is a certificate of the Department of Lands and Mines, addressed to Mr. R. McLaren of Leduc, Alberta. Do you know anything about that? A. He is a lawyer of Leduc. He is the one that had that transfer made.

Q He was looking after having the property transferred?

A Yes.

40 Q And did you and the other executor, John Borys, discuss the values of those things that are in this affidavit of the transferor and the affidavit of the transferee? The affidavit of the transferee is by Micheal and the affidavit of the transferor is by John. Let us stop and look at the affidavit of the transferor? Did you and John Borys discuss the values that are contained in that affidavit?

A We did talk but I forget what the value were put on it.
MR. HELMAN: I tender this, my lord, as
an exhibit. It is dated the 29th day of November,
1947, my lord.
THE COURT: Exhibit 14.

TRANSFER SIMON BORYS AND JOHN
BORYS TO MICHEAL BORYS DATED
29 NOVEMBER, 1947, MARKED
EXHIBIT 14.

10

MR. HELMAN: Exhibit 14, the transfer,
was registered in the Land Titles Office at 10.46
A.M. on the 18th of December, 1947.

Q Why did the executors transfer that property to Micheal?
A When my wife was still alive she made a will which
was that Mike was to get one part of the land, and
the other boy some other.

Q Is it a will in writing? A. Well, she was
20 in the hospital at the time, and it was a will that
was made and signed by her with two witnesses.

Q Now, you have naturally been interested in this law-
suit, and you have discussed it with your son Micheal?
A Just as well I am interested, just the same as he
would be.

Q As he would be? A. Yes.

Q And did Micheal sell or lease any of his rights in
this land to any other company? A. That I
don't know, sir, if he leased or sold to anybody.

30 Q There is a caveat filed against this property in
which there is reference to a lease given to the
Model Oils Limited. Has he heard about that?

A I don't know.

MR. SMITH: I would submit, my lord,
the question is quite improper. Whether Mr. Borys
has heard of any such transaction or not cannot
possibly be evidence. If he knows about it, then
my learned friend may, on cross-examination, get his
40 knowledge. Any rumour that this man has heard, even
if he were to answer yes, cannot be relevant, in my
respectful submission, here.

THE COURT: I think he said he didn't know
anything about it.

MR. STEER: He know about it?

THE COURT: I think he said he didn't
know anything about it.

MR. STEER: I think so, too, my lord.

- Q MR. HELMAN: You do not know? I want to make it quite clear that it is about a caveat that has been filed by the Model Oils Limited against this land in which it is set out that Micheal has given them a lease to the natural gas, to the mines and minerals, let us put it that way? A. I don't know.
- Q You mean Micheal has never discussed with you what he has done with the property which is the subject matter of this litigation?
10
- MR. STEER: My lord, I object. Discussions between this man and his son as to his son's business are not admissible evidence here.
- MR. HELMAN: This is cross-examination after all, Mr. Steer.
- MR. STEER: Still you must abide by the Rules of Evidence.
- THE COURT: What is your question, Mr. Helman?
20
- MR. HELMAN: May the Court Reporter read it, please?
- BY THE REPORTER: "You mean Micheal has never discussed with you what he has done with the property which is the subject matter of this litigation?"
- THE COURT: I do not think there is any reason why you should not have the answer. All you are asking is, did Micheal ever discuss it? That is a different thing to asking what Micheal told you.
- MR. HELMAN: Well, just get an answer to that question first, will you, Mr. Interpreter?
30
- MR. RILEY: Mr. Kilarski does not seem to understand that he should ask the question now.
- THE INTERPRETER: I will ask him.
- A All Micheal told me was that he paid income tax on the minerals.
- Q MR. HELMAN: Income tax on the minerals?
A Mineral tax.
- Q Now, I want to be quite clear of this, witness, because I think it is important. You had no discussion with your son, Micheal, about a lease of the mines and minerals other than coal, petroleum and valuable stone that he made on these lands with the Model Oils Limited?
40
- A He did not tell me that.
- Q All right.
- MR. RILEY: No questions, my lord.
- THE COURT: Anybody else have any questions from this witness? Or to put to this witness? All

right, thank you, Mr. Borys. A. Thank you, my lord.
THE COURT: Next?
MR. RILEY: I will call Mr. Fedor.
THE COURT: Fedor?
MR. RILEY: It is my friend's interpreter,
my lord.

10

SIMON FEDOR, having been first duly sworn, examined by Mr. Riley, testified as follows:-

Q Mr. Fedor, sir, where do you live? A. I live in Edmonton.

Q I see. And what do you do in Edmonton? A. I am employed by Imperial Oil.

Q In what capacity, sir? A. As a Claims and Land Agent.

20

Q I see. And you have been present in Court guiding the Imperial's solicitors on the interpretation of the evidence of the previous witness, Simon Borys?
A That is why I came here today.

Q Now, sir, in your employ in the Claims Department, do you have occasion to visit areas, lands where damage has been caused by the products of wells?

A Yes.

Q I suppose that occasionally happens? A. A little too often.

30

Q I see, sir. And are some of the lands damaged owned by people who are Ukrainians? A. Can you broaden on the word "damage"?

Q Let me come at it this way. I take it that some of the product of wells damages some lands sometimes, is that right? A. Yes, I believe it does.

Q All right. And in your capacity as a Claims' man you go and inspect the damage and make settlement, is that the idea? A. That is right.

40

Q All right. Now, some of the persons you visited, do they talk the Ukrainian language, sir? A. Yes, they do, sir.

Q And you have to talk to them in Ukrainian? A. Yes.

Q What term do you use for the product that has caused the damage when you are talking to them?

A Do you want me to give the Ukrainian version of it?

Q Yes? I want to know what word you used in talking to Ukrainians with regard to the damage from the product, what name do you use for the product?

- A The word we usually use is "oliva".
Q "Oliva"? A. Yes.
Q Will you spell it for me, please? A. Well, it is O-l-i-v-a, more or less. That word is derived from the olive tree, I believe.
Q And "oliva" in Ukrainian means oil? A. Yes.
Q THE COURT: Did you say the olive tree?
A That is right.
Q And it is "oliva" then?
10 MR. NOLAN: Yes, my lord.
MR. RILEY: That is right, my lord.
Q The term means what, sir? A. Now, in the dictionary this "oliva" makes reference to the olive tree.
Q No, I won't restrict it to that. Would you like to look at a Ukrainian-English dictionary, and direct your mind to the word that I am showing you there? Do you find the word "oliva", the third from the bottom? A. Yes, that is right.
20 Q What definition is given? A. The definition of the word "oliva" here is oil.
Q Is that the sense in which you used the word in talking to the Ukrainians on damage claims?
A That is right, I believe.
Q Yes. Just answer my friend.

-
- 30 CROSS-EXAMINATION BY MR. NOLAN:
Q Mr. Fedor, what relation are you to the plaintiff in this action? A. Mr. Simon Borys or Micheal Borys?
Q Mr. Micheal Borys? A. Micheal Borys is an uncle of mine.
Q And what relation are you to Mr. Simon Borys?
A That is my grandfather.
Q You were born in this country, Mr. Fedor? A. That is right.
40 Q And you are thoroughly familiar with the Ukrainian language? A. Use it every day.
Q Yes? What is the Ukrainian word for petroleum, Mr. Fedor? A. I don't believe that the word has ever been used or defined in our own discussions about the oil business, or oil itself in Canada.
Q Is there a word for it in your own language, in Ukrainian?
A Not to my knowledge.

Q What is the word for oil in the Ukrainian language?
A We call it oliva.
Q You call it oliva? A. Yes.
Q And what are the words for natural gas in the Ukrainian language? A. Well, for gas we use the word "has", gas or "has".
Q How do you spell it? A. Well, more or less h-a-s.
Q H -a-s? A. Yes, if you translate it into the English language.
10 Q All right.
MR. STEER: Did the witness spell the word for natural gas?
MR. RILEY: Yes, h-a-s.
A I could further add that the Ukrainian alphabet is different to the English alphabet. I just made an English version of it. I could spell it in Ukrainian, if anybody wishes me to.
MR. HELMAN: No questions.
20 MR. RILEY: No further questions, sir.
THE COURT: All right, thank you, you may sit down.
MR. STEER: Call Mr. John Harvie, my lord.

30 JOHN HARVIE, having been first duly sworn, examined by Mr. Steer, testified as follows:-

MR. STEER: My lord, I think I should call your attention, before examining Mr. Harvie, to certain statutory provisions, because I am going to ask about the early Dominion land regulations, and also the regulations that were in force in this Province after 1930 when the Borys agreement was signed. The first statute is that of 43 Victoria, Chapter 26, Section 6. That statute amended Section 47 of the Dominion Lands Act and brought that section into conformity with the wording of Section 47 that is found in the Revised Statutes of Canada, 1886, Chapter 54, Section 47. Revised Statutes of Canada, 1886, Chapter 54, Section 47. That section reads this way:

40

"Lands containing coal or other minerals,
whether in surveyed or unsurveyed territory,

"shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council, by regulations made in that behalf."

And that Section 47 was amended in 1892, Chapter 15 of the Statutes of Canada, 1892.

10

And it was amended by that 1892 statute to read:

"Lands containing coal or other minerals, included lands in the Rocky Mountain Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor General in Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing, or other disposal thereof. Provided, however, that no disposition of mines or mining interests in the said park shall be for a longer period than twenty years, renewable, in the discretion of the Governor in Council, from time to time, for further periods of twenty years each, and not exceeding in all sixty years."

20

Now, this Section 47, as amended in 1892, was carried forward into the revision of the Canadian Statutes of 1906, Chapter 55, as Sections 159 and 160, and those Sections 159 and 160 read together as the Section 47 which I have read to your lordship reads.

30

Well, then, in 1908, by Chapter 20, Section 37, there was an alteration in the wording of the section, and the section with which we are concerned was altered to read this way:

40

"Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the Governor in Council; and those regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as

"to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, in so far as they may be affected under these regulations."

10 I give your lordship those references because the Orders-in-Council and regulations which I must now go through with Mr. Harvie were passed as of the date of those regulations, under the particular provision of the Dominion Lands Act which was in force at that time.

Q MR. STEER: Mr. Harvie, your present occupation is? A. Deputy Minister of Lands and Forests.

Q Deputy Minister of Lands and Forests? A. Yes.
Q And you have held that position for what length of time? A. Since the 1st of April, 1949.

20 Q 1st of April, 1949? A. Yes.

Q Prior to that what was your occupation?
A From December 1930 to 31st of March in '49 I was Deputy Minister of Lands and Mines. Prior to that I was with the Department of the Interior.

Q I will come to that in a moment. It is a little difficult to hear, Mr. Harvie. If you will speak up, please? A. Yes, sir.

30 Q In 1949 is it true to say that the Department which had hitherto been known as the Department of Lands and Mines was severed? A. Was severed.

Q And made into two departments? A. That is right.

Q And you became Deputy Minister of Mines and Forests?
A Yes.

Q And prior to that time you were the Deputy Minister of Lands and Mines for the Province, from the time the resources agreement came into effect?

A Well, from December of 1930.

Q Of 1930? A. Yes.

40 Q Yes. And then you say that prior to that time in 1930 you were with the Dominion Government? A. Yes.

Q In what capacity? A. Well, I rose from - I went with the Government in 1905.

Q In what department? A. In the Department of the Interior and I was with the Department of the Interior until I came to Edmonton.

Q And you came to Edmonton when? A. On the 17th of September, 1930.

- Q And when you came to Edmonton what position did you occupy in the Department of the Interior?
- A I was just a clerk in the Deputy Minister's office. I was the Chief Clerk in the Deputy Minister's office, and I was transferred and I was the director of the Department of Ordinance, Admiralty and Public Lands.
- Q Director of.....? A. Ordinance, Admiralty and Public Lands.
- 10 Q Ordinance, Admiralty and Public Lands? A. Yes, at the time of my transfer.
- Q And in the various capacities which you filled in the Department of the Interior from 1905 on, until 1930, did you acquire a familiarity with all the rules and regulations with regard to mining in that Department? A. Yes, sir.
- Q Now, then, have you a certified copy of an Order of the Privy Council, Number 948, dated the 25th of April, 1883? A. Yes.
- 20 Q What is that document, Mr. Harvie? A. Those are the regulations which were set up for the administration of mines and minerals.
- Q At that time? A. Yes.
- MR. NOLAN: What is the date?
- MR. STEER: 25th of April, 1883. May I mark that, my lord?
- THE COURT: Exhibit 15.

REGULATIONS OF 1883 MARKED
EXHIBIT 15.

- 30 MR. STEER: Perhaps I should, as I go along, call your lordship's attention to just some of the important aspects of these regulations, and with respect to this one I would like to call your lordship's attention to paragraph 1, which reads,
- 40 "These regulations shall be applicable to all Dominion Lands containing mines of gold, silver, cinnabar, lead, tin, copper, iron, or other mineral deposit of economic value, with the exception of coal."
- Q Then, Mr. Harvie, you have an Order No. 443 of the 7th of March, 1884? A. Yes.
- Q And what is that? A. Those are regulations which were established again on the 7th of March, 1884.

Q New regulations? A. Yes, new regulations for
mines and minerals.
MR. STEER: May I have that marked?
THE COURT: Exhibit 16.

REGULATIONS DATED 7th MARCH,
1884, MARKED EXHIBIT 16.

10 MR. STEER: No reference having been
made in the previous regulations, my lord, to petro-
leum, paragraph 1 of these regulations reads:-

"These Regulations shall be applicable to all
Dominion Lands containing gold, silver, cin-
nabar, lead, tin, copper, petroleum, iron, or
other mineral deposit of economic value, with
the exception of coal."

20 Q Then you have an Order Number 939, May 14th, 1887?
A Yes.
Q Which I think perhaps we should put in?
A That is the consolidation of claims for development.
MR. STEER: May I have that marked, my
lord?
THE COURT: Exhibit 17.

ORDER NUMBER 939, 14th MAY,
1887, MARKED EXHIBIT 17.

30 MR. STEER: There is a passage here, it
is very short,-

"On a Memorandum dated 3rd May, 1887, from
the Minister of the Interior, recommending
that for the present year prospectors who
have filed applications for mining locations
based on supposed Petroleum discoveries on
the Vermilion River, Manitoba, as shown on
the plan of survey, on file in the Department
of the Interior."

40

Q And then an Order of the 31st of October, 1887, Mr.
Harvie?
MR. MITCHELL: Number?
MR. STEER: Number 1070.
A That is the reservation of mines and minerals.
Q MR. STEER: This is a most important

Order from the point of view of the general history of this company, in that it is the Order which directs that as from this date mines and minerals are to be reserved in grants from the Crown.

THE COURT: Exhibit 18.

ORDER NUMBER 1070, DATED 31st
OCTOBER, 1887, MARKED EXHIBIT
18.

10

Q MR. STEER: Then you have got, Mr. Harvie,
Order Number 2240 of November 9th, 1889?

A Those are regulations again.

Q A new set of regulations? A. Yes, a new set of
regulations.

MR. STEER: Could I tender that, my lord?

THE COURT: Exhibit 19.

ORDER NUMBER 2240, DATED NOVEM-
BER 9th, 1889, MARKED EXHIBIT
19.

20

MR. STEER: These regulations, paragraph
1 again,-

"These regulations may be cited as 'The Dominion
Mining Regulations', and shall be applicable
to all Dominion lands containing gold, silver,
cinnabar, lead, tin, copper, petroleum, iron
or other mineral deposit of economic value,
with the exception of coal, and in British
Columbia with the exception of gold and silver."

30

And I should refer your lordship to section 13,-

"The Minister of the Interior may grant a
location for the mining of iron or petroleum
not exceeding 160 acres in area, which shall
be bounded by due north and south and east and
west lines, and its breadth and length shall
be equal: Provided, that should any person
making an application purporting to be for the
purpose of mining either iron or petroleum...."etc.

40

Q Then you have Number 2774, December 18th, 1890? A. Yes.

THE COURT: Exhibit 20.

ORDER NUMBER 2774, DATED
DECEMBER 18th, 1890, MARKED
EXHIBIT 20.

MR. STEER:

"Whereas it is provided by clause 2 of the Regulations governing the disposal of Dominion Lands containing minerals other than coal, established by the Order in Council of the 9th day of November, 1889.....

10 And whereas it is thought that this provision may" -

I have omitted a few words -

"And whereas it is thought that this provision may operate to retard the developments of lands supposed to contain petroleum;

20 Therefore His Excellency, under the authority conferred upon him by 'The Dominion Lands Act', Chapter 54 of the Revised Statutes, and by and with the advice of the Queen's Privy Council for Canada, is pleased to order that the said Section as well as Section 2 of the Order in Council of the 5th day of October, 1887, establishing Regulations governing the disposal of Mineral Lands other than coal lands, shall be and the same are hereby amended so that an applicant, who has otherwise complied with the requirements of the regulations, may be able
30 to obtain an entry for a location upon his making affidavit that from indications he verily believes that petroleum exists on the location applied for, the location however not to be sold to the applicant within the period of five years," etc.

Q Mr. Harvie, and then you have number 2020, August 25th, 1891?

A. Yes, sir.

40 THE COURT: Exhibit 21.

ORDER NUMBER 2020, DATED
AUGUST 25th, 1891, MARKED
EXHIBIT 21.

MR. STEER:

"His Excellency, being of opinion that the

10 "provisions of the regulations for the disposal of Dominion Lands containing minerals other than coal established by the Order in Council of the 9th day of November, 1889, Chapter 99 of the Consolidated Orders in Council of Canada, and amended by the Order in Council of the 18th of December, 1890, are not applicable to the disposal of petroleum locations and are preventing the development of the same, is pleased to order, under the authority conferred upon him by 'The Dominion Lands Act', Chapter 54 of the Revised Statutes, and by and with the advice of the Queen's Privy Council for Canada, that the provisions of the said Regulations which apply to petroleum lands shall be, and they are hereby cancelled, save and except as to locations for which leases have heretofore been executed."

20 Q Then you have Number 2090, 7th September, 1891?

A Yes, a consolidation.

THE COURT: Exhibit 22.

ORDER NUMBER 2090, DATED
SEPTEMBER 7th, 1891, MARKED
EXHIBIT 22.

30 MR. STEER: This is an Order, my lord, which indicates the early interest the Imperial Oil had in the development of oil in this country. It is very short.

40 "On a Report dated 28th August, 1891, from the Minister of the Interior, stating that Mr. J. A. Grant, of Sarnia, Ontario, representing the Imperial Oil Company of Canada, has proved satisfactorily that he and his associates have made an arrangement with certain persons who have obtained entries from the Department of the Interior for petroleum locations in Townships 1 and 2, Ranges 29 and 30 West of the 4th Meridian, to acquire by assignment their rights to the locations in question, and Mr. Grant now applies for a modification of the Mining Regulations which require a yearly expenditure of \$100. on each location, and for other concessions.

"The Minister submits that it is most desirable in the public interest that the question of whether coal oil is to be found in paying quantities in the section of the North-West Territories affected by this application should be tested by responsible and experienced parties at the earliest possible moment,"

10 and with that end in view he recommends that Mr. Grant have certain concessions. Noteworthy in there, my lord, is the reference to coal oil, which, of course, some of us know was the common substance used for lamps in those days.

Q Number 2434, 16th October, 1891? A. That is an extension of time.

THE COURT: Exhibit 23.

20 ORDER NUMBER 2434, DATED OCTOBER 16th, 1891, MARKED EXHIBIT 23.

MR. STEER:

30 "On a Report dated 8th of October, 1891, from the Minister of the Interior, stating that representations have been made by Mr. J.A. Grant, of Sarnia, Ontario, that, owing to the lateness of the season, the time fixed by the Order in Council of the 7th of September, 1891, within which Mr. Grant and his associates shall have at least one oil-well in operation, namely, the 1st of January, 1892, is too short, and he asks for an extension thereof.

40 The Minister is of opinion that this application is deserving of consideration, and he therefore recommends that the time within which Mr. Grant and his associates shall have at least one oil-well in operation, producing oil in paying quantities, be extended to the 1st day of August, 1892."

Q And then you have got Order Number 2286, Mr. Harvie, of the 27th of August, 1892? A. Yes, that is a further extension.

ORDER NUMBER 2286, DATED AUGUST 27th, 1892, MARKED EXHIBIT 24.

MR. STEER:

10 "On a Report dated 12th August, 1892, from the Minister of the Interior stating that on the 7th September, 1891, for the purpose of encouraging exploration for Petroleum in Townships 1 and 2, Ranges 29 and 30 West of the 4th Meridian, an Order in Council was passed authorizing the making of a free grant of one section of land to Mr. J.A. Grant, of Sarnia, Ontario, and his associates, upon the condition that they should have, on or before the 1st January, 1892, at least one well in operation producing oil in paying quantities."

Q And then they give certain concessions to Mr. Grant. And then you have got Order Number 1391, July 18th, 1905? A. Yes.

20 THE COURT: Exhibit 25.

ORDER NUMBER 1391, DATED JULY 18th, 1905, MARKED EXHIBIT 25.

MR. STEER: I will just read part of this Order, my lord.

30 "The Minister, therefore, recommends that he be authorized to issue leases of School Lands for the purpose of boring for petroleum, the lease to be issued for a term of ten years and to be subject to a rental of thirty cents per acre, payable yearly in advance, and also to a royalty of five per cent on the oil sold, the lessee to furnish sworn statements to the Department of the Interior at such time and in such form as the Minister of the Interior may prescribe, as to the quantity of oil sold."

40 Q Well, then, Mr. Harvie, for your purposes you have had prepared this collection? A. Yes.

Q For you? A. Yes.

Q And that is a collection of what? A. These are the regulations that were made under the Dominion Lands Grant.

Q From what date? A. From 1898 to as long as they were administered by the Dominion.

Q By the Department of the Interior? A. Yes, sir,

by the Department of the Interior.

Q And what you have just put in is a collection of Orders in Council which differ from the ones that are found in this book? A. Yes.

Q And overlap them in time to some extent? A. That is right.

MR. STEER: Could I tender that, my lord?

THE COURT: Exhibit 26.

10

VOLUME CONTAINING REGULATIONS
ISSUED UNDER DOMINION LANDS ACT,
DATED FEBRUARY, 1942, MARKED
EXHIBIT 26.

MR. STEER: They are all to be found in the Gazettes. They are all published in the Gazettes.

MR. NOLAN: How do they differ?

MR. STEER: They overlap to some extent.

20

MR. NOLAN: But you said they differed some?

MR. STEER: I mean they are different Orders. I am not putting anything in this set that repeats what we have already put in.

MR. NOLAN: Yes.

MR. STEER: There are certain Orders here, my lord, which I should like to direct your attention to. There is, first of all, an Order 1822, of August 6th, 1898,-

30

"On a Report, dated 28th June, 1898, from the Minister of the Interior, stating that applications have been received at the Department of the Interior to prospect for Petroleum on lands in Southern Alberta, North-West Territories.

40

The Minister recommends, as it is most desirable in the public interest that the question as to whether petroleum is to be found in paying quantities in the North-West Territories should be ascertained, that he be authorized to reserve for an applicant for a period of six months an area not exceeding 640 acres of land to prospect thereon for petroleum, and that if oil is found in paying quantities to sell the land to the applicant at the rate of one dollar per acre, with a provision that a royalty of two and one-half per cent upon the sales of the petroleum be paid to the Crown."

Q I think you might sit down, Mr. Harvie, because I will be some time going through these? A. Thank you.

MR. STEER: And the second one is Order in Council Number 893 of May 31st, 1891....

MR. CHAMBERS: 1891?

MR. STEER: Did I say 1891?

MR. CHAMBERS: Yes.

MR. STEER: I am sorry, it is May 31st, 1901.

10 MR. CHAMBERS: Yes.

MR. STEER:

"Whereas by an Order of the Governor General in Council dated the 6th day of August, 1898,"

that is the one that I referred to,

20 "provision was made for the reservation for an applicant for a period of six months of an area not exceeding 640 acres of Dominion Land for the purpose of prospecting thereon for petroleum, and for the sale of such land at the rate of \$1.00 an acre, provided oil has been discovered thereon in paying quantities, subject, however, to the payment of royalty at the rate of two and a half per cent upon the sales; and

30 Whereas it is deemed no longer advisable in the public interest to reserve for an applicant any particular area of land for the purpose of prospecting thereon for petroleum:

40 Therefore the Governor General in Council is pleased to order and it is hereby ordered that the provisions of the above mentioned Order in Council of the 6th August, 1898, shall be and the same are hereby rescinded, and the following substituted therefor:

All unappropriated Dominion Lands in Manitoba, the North West Territories and within the Yukon Territory shall on and after the first day of July, 1901, be open to prospecting for petroleum by any individual or company desiring to do so. In case there should arise any dispute as to whether lands are or are not unappropriated, the

"question shall be decided by the Minister whose decision shall be final.

10 Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including and surrounding the land upon which the discovery has been made, will be sold to the person or Company making such discovery, at the rate of \$1.00 an acre, provided such lands are available at the time application therefor is made.

20 A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum, and it will be necessary for the person operating the location to furnish the Agent of Dominion Lands"...

and so on.

30 And then Number 1899, December 22nd, 1902, which rescinds the first two paragraphs of the preceding set of Regulations, and which sets up new regulations with regard to prospecting for petroleum, and provides that should oil in paying quantities be discovered then there can be a sale of 640 acres.

And then Order Number 513, March 23rd, 1904, again amends the first two paragraphs of the Order of 1901, which, at this time can be regarded as the controlling set of regulations, and there are references here again to petroleum and to the discovery of oil in paying quantities.

40 Then there is an Order Number 1638, dated October 1st, 1904, which I am going to put in for the sake of completeness, and I have no comment to make on it at the moment.

And then there is an Order Number 1393, of July 22nd, 1905, and again I make no comment on it. It does not seem to require any.

And then there is Order "

Number 2287, an Order of the 26th of December, 1906.

10 "The Governor General In Council is pleased to Order that the Regulations governing the reservation and sale of lands in Manitoba, what was formerly the North West Territories, and in the Yukon Territory, established by Order in Council on the 31st May, 1901, as amended by subsequent orders in Council, shall be and the same are hereby amended by adding the following provision thereto:

The Minister may, upon application, make a preliminary reservation of an area of 1920 acres for a period of four months for the purpose of allowing an applicant sufficient time to install on the land the required machinery."

20 In order to get one of the reservations he had to get his machinery on the ground. He had to go ahead and prospect and establish the existence of oil in paying quantities. Now, this enables him to get a preliminary reservation for a period of 4 months, to get his machinery on the ground that he wanted to work and then proceed. The important part of the Order is the last paragraph, which reads:

30 "The Governor General in Council, is further pleased to Order that the Regulations established by Order in Council for the reservation and sale of petroleum lands shall apply also to the reservation and sale of lands for natural gas purposes."

40 That the regulations established by Order in Council shall also apply, the regulations established by Order in Council for the reservation and sale of petroleum lands shall also apply to the reservation and sale of lands for natural gas purposes. And the date of that, my lord, I should remind you again, is the 26th day of December, 1906.

And then the next one is Number 414, March 11th, 1910. Up to this time, my lord, a man who wanted reservations for petroleum was permitted to buy; from this time forth the system of leases was established. And these are the first Reg-

ulations which set out that an applicant has to get a lease.

"His Excellency in Council is pleased to order and doth hereby order that the Regulations governing the disposal of petroleum and natural gas rights,"...

10 and I point out that the Order of 1906, the 26th of December, is the first reference there is to natural gas, and subsequently we always talk in these Regulations about petroleum and natural gas,-

"...the disposal of petroleum and natural gas rights"....

20 and the reason for the insertion of "natural gas" is by reason of the December Order. And the Order goes on,-

"...the property of the Crown in Manitoba, Alberta, Saskatchewan, the North West Territories and the Yukon Territory, established by Orders in Council dated the 31st of May, 1901, the 22nd of December, 1902, the 23rd of March and the 1st of October, 1904, the 22nd of July, 1905, and the 26th December, 1906, be rescinded, and the annexed Regulations substituted therefor."

30 Now, I am not going to go through all these regulations. I call your lordship's attention to the fact that while up to this point we have been talking about petroleum alone, from this time forward in all Regulations, whether of the Dominion or of the Province, we are talking about petroleum and natural gas.

I will just read one or two passages.

40 "The petroleum and natural gas rights, which are the property of the Crown, in Manitoba," etc. can be leased for terms of twenty-one years, etc.

"No applicant shall be allowed to lease the petroleum and natural gas rights under an area of more than 1920 acres."

And so on throughout, it is "petroleum and natural gas."

And then I would like to call your lordship's attention to 23 and 24, Sections 23 and 24 of these Regulations.

10 "23. No royalty shall be charged upon the sales of the petroleum acquired from the Crown under the provisions of the Regulations, up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever regulations in respect of the payment of royalty may then or thereafter be made.

24. A royalty at such rate as may from time to time be specified by Order in Council may be levied and collected on the natural gas products of the leasehold."

20 Then Order Number 1951, the 12th day of October, 1910. This, in my submission, again is an important regulation to have in mind.

"His Excellency in Council is pleased to Order and it is hereby ordered that the following provision be inserted in all leases issued by the Crown of lands for petroleum purposes."

30 With reference to petroleum, sir, namely, - and this is the insertion that is to be made, -

40 "That if in the opinion of the Minister the said petroleum or its products or any portion thereof should at any time during this demise be required for the use of His Majesty's Canadian Navy, the Minister shall have a right of pre-emption of all crude petroleum or its products gotten or won under this demise for such use as aforesaid, the price to be agreed on between the Minister and the lessee, or in case of difference to be fixed by the Exchequer Court of Canada."

Then Order Number 417, March 11th, 1911. This is an amendment of a previous Order. And again, as I say, it refers to petroleum and natural gas.

And then 1787, of August

admissible before your lordship. Your lordship will find the date in the actual transfer that was given to this land. That is why I asked my learned friend yesterday to state what was the time with regard to these matters. He said he did not want to put forward his argument, but it is not in argument. It is a question of particulars, my lord, so that we know what case we have to meet. However, I submit, in any event, that this evidence is inadmissible.

10 MR. STEER: I can answer my learned friend in a moment, my lord. First, I shall refer your lordship to the case of the Caledonian Railway Company against the Glenboig Union Fire Clay Company, which is in 1911 Appeal Cases, 290.

THE COURT: 1911?

MR. STEER: 1911 Appeal Cases, 290, and that was one of these cases involving the meaning of mines and minerals and in the course of the judgment Lord Loreburn says this,

20

"My lords, the evidence given as to common meaning is evidence given of the common meaning at the present day; I should assume that it was the same at the time of the sale, unless sufficient ground was given for coming to a contrary conclusion."

So that, in my submission, my lord, we are entitled to go before your lordship, and entitled to put before your lordship, evidence up to the present time showing the common vernacular meaning of this word, and that that evidence is going to be carried back to the date of the deed, if necessary, unless my friends can show me something to the contrary. So that, with your lordship's permission, I will proceed.

30

"In the event of natural gas being discovered through boring operations conducted on a petroleum and natural gas location"....

40

Your lordship understands that as from 1910 on what the Dominion Government issued ~~were~~ leases discovering both petroleum and natural gas.

"In the event of natural gas being discovered through boring operations conducted on a petroleum and natural gas location acquired under the provisions of the regulations, or in the event..."

of what I am going to interpolate and call "another foreign substance" is found,-

10 "...or in the event of water being encountered through such operations, if the escape of such gas is not prevented, or if the flow of such water is not controlled, the Minister may take such effective means as may appear to him to be necessary or expedient in the public interest to control and prevent the escape of the natural gas, or to close the well at such depth as may prevent the water from gaining access to any oil-bearing formation, or both, or to prevent water from gaining access to or escaping from such well, and to recover from the lessee of the location upon which the well was bored all costs and expenses incurred by the Crown in stopping the escape of natural gas, or the ingress or egress of water to and from the well,"

20 etc. And having that provision in mind, my lord, and having our knowledge of what happened as to the waste of gas in the early days in Turner Valley, it seems a pity that that section and that regulation was not acted on.

30 Order Number 2433, December 3rd, 1919. This is a regulation which makes a regulation uniformly applicable. I pointed out in the previous regulations that they were freeing, that they had freed petroleum from any royalty up to the 1st of January, 1930; and then they had a provision that natural gas was at all times to pay such royalty as was to be imposed by Order.

Now, this is Order Number 2433, December 3rd, 1919.

40 "WHEREAS by Order in Council dated the 11th of March, 1910, Regulations governing the disposal of petroleum and natural gas rights, the property of the Crown in Manitoba, Saskatchewan, Alberta, the Northwest Territories, the Yukon Territory, and a portion of the Province of British Columbia, were duly established, Section 23 of which Regulations reads as follows:

'No royalty shall be charged upon the sales

"of the petroleum acquired from the Crown under the provisions of the Regulations up to the 1st day of January, 1930, but provision shall be made in the leases issued for such rights that after the above date the petroleum products of the location shall be subject to whatever Regulations in respect of the payment of royalty may then or thereafter be made.'

10 AND WHEREAS by Order in Council, dated the 19th of January, 1914, these regulations were rescinded and others substituted therefor, in which the above provision was inserted as Section 38;

AND WHEREAS the Minister of the Interior reports that a modification of the Regulations would be desirable;

20 THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order that the above provision of the said Regulations shall be and the same is hereby rescinded and the following is substituted therefor:"

This is what is substituted:

30 "The sales of the products of any location acquired under the provisions of these Regulations shall be subject to the payment to the Crown of such royalty thereon as may from time to time be fixed by the Governor in Council, the royalty to be collected in such manner as may be specified by the Minister."

40 Well, that, of course, talks and talks of the location, but the curious thing about it is that having changed Section 38 so as to make royalty payable on the products of the location, they did not strike out 39, and section 39 still remained there, providing for royalty on the natural gas. I suppose that kind of a slip is made occasionally, even in the Department of the Interior, Mr. Harvie?

Then we have Order Number 105, January 29th, 1920, upon which I need make no comment.

And then we have Number 2614, 29th of October, 1920; Number 2800, 19th of November, 1920; Number 146, the 22nd of January, 1921; Number 857 of the 21st day of March, 1921; Number 4613 of the 21st day of December, 1921; 868 of the 26th of April, 1922; Number 762 of 7th day of May, '28; Number 624 of the 9th of April, 1929; and Number 1528 of the 21st day of August, 1929. And the nature of the references in this book, in Exhibit 26, I think I have sufficiently indicated to your lordship the references to which we would like to have attention paid.

10

Q Well, then, Mr. Harvie, in 1930 the Natural Resources Agreement was made? A. 1929, the agreement.

Q '29? A. Yes, December '29, but it came into force on the first of October, 1930.

Q It came into force on the first of October, 1930?
A Yes.

Q And it was given statutory effect by the statutes?
A Of 1930.

20

Q Of 1930, the Province of Alberta, the Dominion of Canada and the Imperial Parliament? A. Yes.

Q Those references, perhaps I need not stop for now. Then having acquired control of its natural resources the Province passed the first Provincial Lands Act, that is correct? A. Yes, 1931.

Q That is 1931, Chapter 43 of the Statutes of Alberta, and that Act was brought into force on the 18th of June, 1931 as shown in an extra issue of the Gazette, Mr. Harvie, is that right? A. That is right.

30

MR. STEER: I tender that, an extra issue of the Alberta Gazette, July 14th, 1931.
THE COURT: Exhibit 27.

EXTRA ISSUE OF THE ALBERTA
GAZETTE, DATED JULY 14th, 1931,
MARKED EXHIBIT 27.

MR. STEER: At pages 6 and 7 of this Exhibit 27 are Orders establishing.... A. 669

40

Q Orders establishing regulations with respect to the disposition of petroleum and natural gas?

A Yes. Pages 6 and 7, Orders in Council.

Q 669 - '31? A. Yes.

Q And with regard to school lands, 670 - '31? A. Yes.

Q And with regard to lands, the property of the Crown, and permits thereon, 671 - '31? That is correct, Mr. Harvie? A. Yes, that is correct.

Q And those regulations provided for by those Orders in Council are found at pages 101 and the following pages of this extra Gazette, Exhibit 27?
A That is right.
Q And those are the original regulations? A. Yes.
Q Laid down by the Province with respect to the disposal of petroleum and natural gas lands? A. Yes, sir.
Q Now; have you there, Mr. Harvie, the provisions either under the Dominion regulations or under the Provincial regulations with respect to royalties? A. Yes.
10 Q That is the one we will have to put in (indicating)?
A Yes; sir, that is right.
Q Contained in this book, in this bound volume, you say, are the provisions as to royalties as they existed from time to time? A. That is so, yes.
MR. STEER: May I have that marked, my lord?
THE COURT: Exhibit 28.

20 VOLUME CONTAINING ROYALTY PRE-
SCRIBED UNDER DOMINION AND PRO-
VINCIAL LANDS ACTS MARKED
EXHIBIT 28.

MR. STEER: I think at the moment I need not comment on this, my lord.
Q What position did Mr. Frank Oliver occupy in the Department of - the late Honourable Frank Oliver - occupy in the Department of the Interior on the 18th of May, 1905, Mr. Harvie? A. He was Minister.
30 Q Minister of the Interior? A. Yes.
Q And do you recognize Mr. Oliver's initials there?
A That is his initials.
Q Those are his initials? A. Yes.
Q And perhaps you will read into the record that memorandum of his?
MR. NOLAN: May I just see what it is first?
MR. STEER: Yes, yes, by all means.
40 MR. NOLAN: We object to the admission of this document, sir. There has been no foundation laid for its admission, other than the witness said he sees the initials of the Honourable, the late Frank Oliver upon it. There is nothing to indicate where it comes from, that this witness ever saw it before, or that he has any knowledge of its contents, and we also take the objection that evidence of this

kind and character is not admissible because it is of no assistance to the Court in determining the matter which we are here to decide.

THE COURT: Mr. Steer?

10 MR. STEER: Perhaps I had better go a little further, my lord, in the light of the objection. I am sorry, my lord, I have referred Mr. Harvie to the wrong document. Now, perhaps you will take a look at that? I looked at them both and decided that I did not want the one that you fellows were objecting to. You see this document, my lord, if I may say so, and in order to assist my learned friends, has reference to that Order of December 26th, 1906, and it has Mr. Oliver's instructions to see that the regulations applied to natural gas as well as petroleum.

20 MR. HELMAN: Surely, my lord, a letter written by a man who happens to be the Minister to some other party that is found on a Government file is not evidence in this case. There may be hundreds of other documents available in Government files that contradict it. We have not had the Government files available to us for examination. Apparently my learned friend has in some way received it, how I do not know, but certainly it cannot be evidence in this case.

Q MR. STEER: Would you read that document, Mr. Harvie? A. It is a document dated.....

30 Q Do not read it out loud, just read it to yourself. You understand it? A. Yes.

Q Who is Mr. Rowatt? A. He was the chief of the Mining Lands Division.

Q Then I ask you whether there was any connection between that letter and this Order in Council of the 26th of December, 1906, to your knowledge?

MR. HELMAN: My lord, surely.....

MR. STEER: I am asking him whether to his knowledge there is any connection.

40 MR. HELMAN: I just want to make an objection.

MR. STEER: Yes.

MR. HELMAN: I am objecting to the witness being asked to interpret a letter, the letter is here, and if your lordship is going to permit it to go in, we have regulations with respect to letters. Now, surely, the witness' interpretation of what it meant cannot be evidence here.

THE COURT; Subject to the objection you may go ahead, Mr. Steer.

Q MR. STEER: Is there any connection, Mr. Harvie, to your knowledge? A; I would say so.

Q What is the connection? A. A portion relating to the regulations.

Q I beg your pardon? A. A portion relates to the regulations.

10 Q What would you say was the origin of that regulation of December 26th, 1906? A. Instructions from the Government.

Q Pardon? A. Instructions from the Government.

Q Whose instructions? A. From the Minister.

Q The Minister? A. Yes.

Q Who was that? A. Frank Oliver.

Q Where are those instructions found? A. They would be verbal.

Q Pardon? A. It would be verbal, aside from what you would have on the file.

20 Q Aside from what is on the file? A. Yes.

Q Who was Mr. Rowatt? A. Mr. Rowatt was Chief of the Division in the preparation of the Regulations and the administration.

Q And it would be Mr. Rowatt's duty to carry out the instructions of the Minister? A. Certainly.

Q Certainly? A. Yes.

MR. STEER: Now, my lord, I am going to ask the witness to read the letter subject to your lordship's approval.

30 THE COURT: Well; I think we will adjourn now. Mr. Howard has been working all forenoon. I believe his arm is pretty well tired out. Court will stand adjourned until two o'clock.

(Court adjourned and resumed at 2 P.M.)

Afternoon Session
November 17th, 1950.

MR. STEER: My lord, we have decided not to pursue the question of the letter further, and I am not asking to have it marked.

THE COURT: All right.

10 Q MR. STEER: I am showing you this document, Mr. Harvie, what is that? A. That is an agreement between His Majesty the King in the right of the Province and the Northwest Utilities Limited.

Q And it is certified as being found in the Alberta Gazette? A. Yes.

MR. STEER: May I have that marked, my lord?

THE COURT: Any objection?

MR. NOLAN: I am not sure who it is between. I am sorry, I did not quite catch it.

THE COURT: Neither did I.

20 MR. STEER: The Crown and Northwestern Utilities Limited.

MR. HELMAN: I would very much like my friend, before putting in documents, if he would submit them to us and let us look at them, so that we can take any objections we would like to.

MR. NOLAN: Would you excuse me one moment, my lord?

THE COURT: Yes.

30 MR. NOLAN: My lord, this appears to be an agreement between the Government of the Province, or, rather, between His Majesty the King in the right of the Province of Alberta and Northwestern Utilities Limited, and I do not see anything in it to indicate that it refers to the land in question in this action. As your lordship knows, we take the position that dealings with other lands is not evidence that is admissible in this case. It seems to be a grant of an exclusive right to drill on certain lands that are set out.

40 THE COURT: To whom, to some other party?

MR. NOLAN: By the Crown to Northwestern Utilities Limited, my lord.

THE COURT: Yes.

MR. NOLAN: And it is dated the blank day of blank. There may be a date at the end.

A That is a copy from the Gazette.

Q MR. NOLAN: Well, it is dated in 1944,

is it, Mr. Harvie? A. Yes, I think that is the date.

MR. NOLAN: And so, my lord, we say it has no relevancy. Whatever arrangements the Crown entered into with Northwestern Utilities in that year or any other year cannot be of assistance in determining the issues in this case.

THE COURT: What do you say to that,

Mr. Steer? Why do you propose to put it in?

10 MR. STEER: I won't press it, my lord.

THE COURT: All right.

Q MR. STEER: Mr. Harvie, from your experience in the Department of the Interior from 1905 until 1930, what, during those years, was the import of the word "petroleum"?

MR. NOLAN: Now, my lord, I take it my friend is asking the witness for his opinion. It can only be that. I thought that Mr. Harvie was being brought before your lordship for the purpose of producing these documents comprising Orders in Council and Regulations, which your lordship will read, and on which your lordship will say what is the import of the word "petroleum" during the years. Surely that is not for the witness; that is for your lordship.

20 THE COURT: Perhaps the question could be put differently, and to ask the witness what the practice was - well, I do not understand your question, really. What are you trying to do?

30 MR. STEER: The issue in this case, my lord, is whether or not petroleum includes natural gas.

THE COURT: Yes.

MR. STEER: I asked this witness a broad general question. I do not want to lead him. I asked the broad general question as to what was the import of the word "petroleum" in those days. Now, having in mind the decisions which I cited to your lordship yesterday, that this question is a question of fact, our case is prepared along the line of calling a number of people who propose to tell your lordship what their understanding of the word "petroleum" was at the relevant time and subsequent times, and I emphasize again, my lord, that the authorities say that this question is a question of fact, and the only way in which facts can be brought before your lordship is to have people who know the facts in

40

those days speak about them.

THE COURT: Well, subject to your objection, Mr. Nolan, I am going to hear what Mr. Harvie has to say.

MR. STEER: Would you read the question, Mr. Howard?

BY THE REPORTER: "Mr. Harvie, from your experience in the Department of the Interior from 1905 until 1930, what, during those years, was the import of the word 'petroleum'?" A. I might say that prior to 1919 I did not have very much to do with the formation of Regulations of the Department. From 1919 up to the separation of my own department in 1949 I had considerable to do with it, and during that period of time my thoughts on the matter, my understanding was.....

MR. NOLAN: My lord. if we may interrupt the witness, we are not getting facts now, we are getting thoughts.

MR. STEER: The witness changed the word to "my understanding".

THE COURT: "My understanding" of what?

A My understanding was that petroleum was oil and natural gas was a separate entity.

Q Then what was oil? A. Petroleum was oil.

Q MR. STEER: Petroleum was oil?

THE COURT: Oh.

Q MR. STEER: And that natural gas was a separate thing? A. Natural gas was a separate entity.

Q What is the approximate area of the Province, Mr. Harvie? A. Somewhere about 163,000 square miles, I think it is, or 163,000 acres, something around there. No, 163,000 square miles, isn't it?

Q 163 million acres? A. 163 million. Yes, that is it. I am sorry.

Q 163 million acres. A. Yes, 163 million acres.

Q And what would you say was the area of the mineral rights held by the Province? A. Well, between the C.P.R. and the others, they had about 16 million acres, there is about 250,000 acres in freehold. There was about 16 million acres, 16 million, in the Parks and in the Indian Reservations, that would be 16 million, roughly, and I think that would bring it down to 132 million.

Q There would be 132 million acres of mineral lands held by the Province? A. Yes, something like that.

Q Is that it? A. Yes.
Q That is all, thank you.

CROSS-EXAMINATION BY MR. NOLAN:

10 Q Mr. Harvie, perhaps you will be good enough to tell
me that when the natural resources were transferred,
and the agreement was in '29..... A. Yes, December,
'29.
Q And our own Provincial Lands Act was in 1931?
A Yes.
Q It became necessary to formulate our own regulations?
A Yes.
Q For our own Province? A. That is true.
Q For our own resources which had been transferred
to us? A. Yes, sir.
20 Q And perhaps you had something to do with the for-
mulation of those new regulations? A. Yes.
Q Because at that time you were Deputy Minister?
A Yes, I was.
Q Of Lands and Mines? A. Yes, sir.
Q Under which department would come these resources
to which we are making reference? A. Yes.
Q I suppose, Mr. Harvie, you were guided very largely
by the regulations which were in force, Dominion
regulations which were in force at the time of the
transfer? A. To some extent I was, and
30 also by the fact that we had had committees sitting
in Ottawa dealing with the oil and gas well regula-
tions, which was only brought into force by the
Province itself afterwards, and which is applicable
to all lands, not only the Crown lands, but the free-
hold lands as well.
Q But you did say, did you not, that you were guided
to some extent by the experience of the Dominion
Government when the resources were under their control?
A That is correct, sir.
40 Q And then you say you had oil and gas well regulations?
What year did they come into force? A. 1931.
Q That same year? A. Well, I think that the
Provincial Lands Act was passed in 1931.
Q Yes. And the oil and gas well regulations flowed
from the Oil and Gas Wells Act? A. Yes, of 1931.
Q Can you give me the chapter, please, without too
much trouble? A. Yes, it is Chapter 46, 1931.

- Q Chapter 46, 1931? A. Yes.
- Q And up to that time, as I understand you, there had been reference made in our regulations, passed under our Provincial Lands Act, to the words "petroleum" and "natural gas"? A. In where?
- Q In the regulations? A. In the regulations?
- Q Yes? A. It was after that. These regulations did not come into effect until after June, 1931.
- 10 Q Let me get the chronology clear, so that we are not confused. We have the Provincial Lands Act passed in 1931? A. Yes.
- Q Was that before the Oil and Gas Wells Act?
- A No, the Oil and Gas Wells Act was March 28th, 1931, the same time, the same session.
- Q The same time, the same session? A. Yes.
- Q There were regulations passed under each of those statutes? A. Yes, there were regulations passed under each of those statutes.
- 20 Q Did the statutes under the Provincial Lands Act refer to "petroleum" and "natural gas", or both, or only one? A. Both petroleum and natural gas.
- Q Both petroleum and natural gas? A. Yes.
- Q Well, then, at the same session, and at the same time, the Oil and Gas Wells Act was passed, and is there any reference to the word "petroleum" in that Act? A. It is the Oil and Gas Wells Act.
- Q But there is no reference to petroleum in that Act, or is there? A. It is called the Oil and Gas Wells Act.
- 30 Q I know what it is called, but does it deal with the substance known as petroleum? A. You will have to give me time to read it. I do not think it does.
- Q Well, I suppose, Mr. Harvie, I could read it, or you could read it, or any one of us could read it to ascertain whether or not it does. My understanding is that it does not. Am I right in saying that under our Provincial legislation and regulations after the year 1931 petroleum is not referred to in any of them? A. Not.
- 40 MR. RILEY: Not in any Provincial legislation?
- Q MR. NOLAN: In the provincial legislation dealing with, shall I say, petroleum and its products?
- A I would have to check that. I could not speak from memory.
- MR. STEER: We can find all these things in the statutes without asking Mr. Harvie about it.

MR.NOLAN: And we can find it without taking your lordship's time.

Q What is natural gas, Mr. Harvie? A. I am not a technician

Q Neither am I, that is why I hoped you could help me. I won't ask you any more. Thank you, Mr.Harvie.

10 CROSS-EXAMINATION BY MR.HEIMAN:

Q Mr. Harvie, were you instrumental in the drawing up of the Act for the regulation of oil and gas wells in the Province of Alberta? A. I had something to do with it, yes.

Q There was, first of all, one passed in 1926, which is Chapter 6? A. That is a Provincial statute, I was not here then.

Q You were not here? A. No.

Q It was called the Regulation of Oil and Gas Wells?

20 A Yes.

Q And from my reading of it, it has not got the word "petroleum" from beginning to end of it? It deals only with oil and gas wells? A. Never effective as far as we were concerned.

Q I beg your pardon? A. It was never effective after I came here.

Q You knew it existed? A. I did, but I never bothered very much with it.

30 Q And you had something to do with it, did you, with the Oil and Gas Wells Act that was passed in 1931?

A Yes, I did.

Q And that was largely a repetition of the 1926 Act, wasn't it? A. I believe it was somewhat.

Q And then there were passed certain regulations under the Oil and Gas Wells Act? I think they were called Regulations Respecting Drilling and Production Operations of Oil and Natural Gas Wells? Have you referred to those? It is Order in Council 769-31?

A I have, yes.

40 Q I beg your pardon? A. Yes, I have.

Q Did you give Mr. Steer that this morning? A. No.

Q You did not give them to him? A. No.

Q And you will notice that this says, "These regulations apply to drilling and production operations in respect to oil and natural gas wells on all lands in the Province of Alberta?" A. That is true, yes.

Q And I do not think that the word "petroleum" is used

in those regulations. And then again there was the Act that was passed in 1938, Chapter 1, and had you anything to do with that which was called the Act for the conservation of oil and gas resources in the Province of Alberta? A. No.

Q Do you know its terms? A. Yes, I do.

Q Was it shown to you before it was passed? A. Yes.

Q And you will observe that it defines "petroleum". It says,-

10

"'Petroleum' in addition to its ordinary meaning includes any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation."

20

A Now, as I take your evidence, that definition is wrong? It is not in harmony with the opinion of the Department.

Q Of your department? A. No.

Q So that the Government of the Province of Alberta was not in harmony with your opinion, then, when it passed that? A. Not in harmony with the regulations established by the Government, possibly.

Q I am going to come to the regulations now? A. I am talking about the regulations under the Provincial Lands Act, not under the Oil and Gas Wells Act.

30

Q Not under the Oil and Gas Wells Act? A. No.

Q I am talking about the Oil and Gas Wells Act, Mr. Harvie, and do not get too rapid, please. I am talking about the Oil and Gas Wells Act, and I am saying that the definition contained in it of "petroleum" did not agree with what you understood in the Department?

A The Oil and Gas Wells Act that you referred to, that is not the Act at all, 1938. The Oil and Gas Wells Act was in 1931.

40

Q All right. The oil and Gas Resources Conservation Act? A. Yes, that is the Gas Conservation Act.

Q And that definition does not agree with what your idea is of what the word "petroleum" is? A. That is quite so.

Q And the regulations under it also have a definition of "petroleum". You are familiar with those, are you?

A Yes.

Q Will you produce them so we will have them on file here, as well as the ones that you gave to Mr. Steer?
A Which ones?
Q The regulations with regard to the drilling operations of the Oil and Natural Gas Wells Act, in Order in Council 645-39. A. You mean you want the Act?
Q No, I want the regulations.
MR. STEER: The witness will give you the answer.
10 Q MR. HELMAN: I asked for the production.
A There it is, the 11th of January, 1939, O.C. 45-39. Yes.
Q Yes. I would like to tender that as an exhibit.
A You have it there, I gave it to you.
MR. STEER: I will have my copy put in so that Mr. Harvie can take his back.
THE COURT: Exhibit 29.

20 THE OIL AND GAS WELLS ACT, 1931,
AND REGULATIONS THEREUNDER,
MARKED EXHIBIT 29.

Q MR. HELMAN: In the Oil and Gas Conservation Act there is provision for the taxing of petroleum property? A. Yes.
Q And under those provisions they have taxed properties that have both oil and gas in them? A. The same under the Mineral Taxation Act.
Q I beg your pardon? A. The same under the Mineral Taxation Act.
30 Q And the same is true under the Mineral Taxation Act?
A Yes.
Q Now, when you were telling me, or rather telling Mr. Steer, what your view was with regard to the Department's position respecting the word "petroleum", had you familiarized yourself with the many reports which the Department, the Dominion Department, had received from its various geologists that it had sent out to make reports on property? A. No, I could not say that I did.
40 Q You are not familiar with the reports of the geologists, say Mr. Dowling? A. No.
Q Or of Sterry Hunt? A. No.
Q And you never looked through that to ascertain what the report said? A. Never had reason to. We had our own committee who were also members of the Geological Department.

- Q Did you look at any books, any textbooks or encyclopedias from which you got the idea that petroleum did not include both oil and gas? A. No.
- Q Can you refer me to any authority that you had for that idea? A. Yes.
- Q That petroleum does not include oil and gas, Mr. Harvie, some written authority? A. I am not sure whether I can put my hand on the memorandum or not. There was a memorandum that was prepared by -
- 10 Q It was dealt with by the Department? A. The Department of the Interior.
- Q The Department of the Interior? A. Yes.
- Q You think there is a memorandum written by somebody? A. Yes.
- Q You do not know who it is? A. It was a committee that was formed.
- Q A committee that was formed? A. Yes.
- 20 Q And you cannot tell me the date of it? A. No, I cannot.
- Q I see. Now, I suggest to you, witness, that in the Department there were a great many books and reports of reputable geologists, most of whom said that petroleum included both oil and gas? A. In the first place the Mines Department was not in that Department.
- Q Yes? A. It was a separate department altogether.
- Q I see. And you never stepped across to look at anything in there? A. No, quite true.
- 30 Q And you never familiarized yourself with any of the books dealing with the subject? A. I had no necessity to do it.
- Q Whether you had any necessity to do so or not, witness, you did not do it, in fact, that is right? Say yes or no? A. You want an answer?
- Q Yes? A. Well, I won't answer just now, until I can find out.
- Q You won't answer until you can find out? A. Yes, I will find out. If I can find the date of the memorandum I will be very glad to bring it.
- 40 Q There is only the one memorandum. Now, was it from that memorandum.....A. There may have been more than one.
- Q Let us get away from these memoranda. Aside from that, you never looked at an encyclopedia or textbook?
- A No, there is one that I looked at.
- Q And you found in that encyclopedia that petroleum did

not include oil and gas? A. It was "an oily fluid".

Q I beg your pardon? A. Fluid oil.

Q Fluid oil? A. Yes.

Q And did not include gas. A. That is right.

Q Now, what is the name of that encyclopedia?

A. Collier's.

Q Collier's Encyclopedia? A. Yes.

10 Q What is the date of it? A. About 1932, I think it is. It is about that.

Q Did you look in the Encyclopedia Britannica?

A I do not know that I did.

Q Would you say you did? A. No, I would not say I did.

Q Wouldn't you think that the Encyclopedia Britannica would be a better book than Collier's? A. Perhaps it would be a better book.

Q Did you endeavour to read the article in the Encyclopedia Britannica? A. I never looked at it.

20 Q You never looked at the Britannica at all?

A No, I never looked at it at all.

Q And you looked at an article in Collier's and that is where you got your idea? A. Oh, no. Oh, no. It was long after the regulations were formed.

Q I know. We are not talking about the regulations. We are talking about what you had in mind. A. Oh, no, my mind was made up.

Q You said you thought they were separate substances?

30 A I understood that they were separate substances.

Q And you understood that from something you read or something the department had passed? A. It was from conversations we had as officials of the department.

Q With whom? A. With the officers in the Department of the Interior.

Q With the officials of the Department of the Interior itself? A. Yes.

Q I know, but you never went out and tried to make any independent investigation, did you, witness?

40 A Certainly.

Q You did? A. Yes.

Q Aside from Collier's Encyclopedia? A. Yes, certainly.

Q What did you look at? A. Personally, these meetings, there were those meetings we had at which those experts were speaking.

Q There were experts there? A. Yes.

Q Now, tell me about the experts that were there?

- A I cannot just remember offhand who they were. Mr. McLeish was one, Dr. John McLeish.
- Q Yes? A. And Dr. Wilson. Mr. Ross. Mr. Lerhout. Mr. Martin. I could not say who the others were.
- Q Now, are you pledging your oath, witness, that these people said that oil and gas were separate substances?
- A I am not, no, sir.
- 10 Q What are you pledging your oath to? A. I am saying that those things gave me the understanding.
- Q Those things? A. Yes.
- Q What was in those things? A. Discussions we had.
- Q Just discussions? A. Discussions we had.
- Q And you never looked up Mr. Dowling's report to the Department? A. I had no necessity to look at it.
- Q Whether you had any necessity to do it, you never saw it? A. I did not see it.
- 20 Q And you never saw Mr. Sterry Hunt's report?
- A I did not see it.
- Q Did you ever ascertain, witness, that oil and natural gas were known to be of common origin and occurrence?
- A Yes, sir.
- Q You knew that? A. Yes.
- Q So that you knew they were both of common origin and occurrence? A. Yes, both from the same source.
- Q Both from the same mother substance, Mr. Harvie?
- A But, on the other hand, we had dry gas fields.
- 30 Q You had dry gas fields? A. Yes.
- Q All right, I am not talking about dry gas fields.
- A But you were asking me questions about natural gas.
- Q I beg your pardon? A. But you are asking me questions about natural gas.
- Q I asked you the question whether oil and gas were known to be of common origin, and did you say yes or no to that, witness? What was your remark about natural gas? A. Just now I said we had natural gas fields.
- 40 Q And they did not come from the same substance?
- A Well, they were dry.
- Q I know, but they did not come from the same substance, witness? A. All I am saying, they were dry gas fields.
- Q They were dry gas? A. Yes.
- Q Well, when you are making a distinction between gas and oil, are you making the distinction between dry gas and oil? A. Oh, no, I am dealing with gas

and oil.

Q Yes? A. Gas and oil.

Q Now, just tell me where is your distinction between gas and oil that you make? A. The distinction between?

Q Yes? A. The distinction is the word "petroleum", that is the word you are asking me about.

Q No, I am asking you about oil, witness? A. Oil is fluid.

Q Oil is fluid, according to you? A. Yes.

10 Q And gas is what? A. Gas is not fluid, it is not an oil, it is a gas.

Q It is in gas form? A. Yes, it is in gas form.

Q Do you make that distinction - at what temperature and pressure do you take it? A. I think that - I could not say offhand, because we had that in different forms.

Q Now, witness, to get any distinction between oil and gas you have to take it at a certain temperature and pressure, don't you? A. I think it was 17.2, was the pressure it was taken at, or around 14, I am not quite sure of that.

20

Q Where did you get that figure from, to take that?

A I think it is. That was our technical people.

Q That is merely an arbitrary figure, isn't it?

A No, I don't think so. It is a standard figure.

Q A standard figure? A. Yes.

Q What about the gas in the ground that is dissolved in solution? A. I am not dealing with that.

I am not a technician, so that I cannot.

30

Q You are not dealing with gas in the ground at all, then? A. No.

Q You are dealing with gas at the surface, is that it?

A Yes.

Q What do you say that natural gas is again?

A Well, it is gas, that is all it is.

Q Gas at the surface. What do you say natural gasoline is, is it oil or gas? A. I would not express any opinion.

Q You would not express any opinion? A. No.

40

Q That is taken out of wet gas after it comes to the surface, after it goes through an absorption plant?

A Not the....

Q I beg your pardon? A. Not the naphtha. The naphtha goes through the separator just the same as crude oil, so you are talking now of the butanes and the other substances.

Q Yes? A. There is a difference altogether now

in the naphtha.

- Q All right, let us talk about the butane and those substances, what is extracted from an absorption plant, the natural gasoline I am talking about. Now, is that oil or gas? A. That is gas.
- Q That is gas? A. Yes.
- Q According to you? A. Yes. The reason for that is that it takes about 80%, there is a deduction on the wells of 80% for the separation of the gas,
- 10 Q You mean after it is even in liquid form? A. No, it is in a gaseous form when it goes into the plant.
- Q And even after it has been liquefied you say it is still gas? A. Yes, I would still say it is gas.
- Q Have you had any education at all in chemistry or geology? A. No.
- Q I see. Your work with the department started purely from the administrative side? A. That is so.
- Q And remained on the administrative side?
- A That is so.
- 20 Q Let us take another substance and see what you say it is? What do you say the naphtha is that is got by the separator? A. That is oil.
- Q That is oil? A. Yes.
- Q Why do you make that distinction? A. It has a different process altogether to obtain it.
- Q A different process? A. Yes.
- Q That is your idea of the separation? A. Yes.
- Q And you can give me no book as to the basis of your ideas except Collier's Encyclopedia? A. You
- 30 Q mentioned books. I told you there was a memorandum. A memorandum? A. Yes. I would like to find that. If I could possibly find it, but I haven't seen it for over 20 years.
- Q For over 20 years? A. Yes.
- Q Have you heard of any broader definition of petroleum besides the one that you are giving us here today?
- A I do not think so.
- Q You have never heard that anybody has ever said that petroleum includes natural gas? A. Not to my
- 40 Q knowledge.
- Q I beg your pardon? A. Not to my knowledge, I do not remember it. Not in my discussions. Perhaps I have heard it said from like yourself, or some other person like that, but as far as in any meetings I have not.
- Q No book that you ever read ever said that?
- A No, not that I remember.

Q I beg your pardon? A. Not that I remember.
Q Not that you remember? A. Not that I remember.
Q Not that you remember? A. No.
Q All right, thank you.
MR. STEER: That is all, thank you,
Mr. Harvie. I will call Dr. Nauss.

10 ARTHUR W. NAUSS, having been
first duly sworn, examined by Mr. Riley, testified as
follows:-

Q Dr. Nauss, sir, what is your occupation?
A I am a geologist.
Q I see, sir. Where do you live? A. In Calgary.
Q What education have you had, sir? A I had a
Bachelor of Science degree from the University
of New Brunswick in 1939 and a Master of Science
20 degree from the University of McGill, McGill
University, in 1940, and Ph.D. degree from Stanford
University in 1943.
Q I see, sir. By the way, you are here today unwill-
ingly and because of a subpoena? A. Yes, that is
correct.
Q Now, have you been employed by any major oil com-
panies? A. Yes, I was first employed by
Imperial Oil during the summers of 1940, 1941, '42 and
'43, and then by International Petroleum Company in
30 South America for the next five years and starting
with 1947 for one year and a half I was employed by
the Bear Oil Company as Chief Geologist.
Q The Bear Oil Company as Chief Geologist. That is an
Alberta company, or operating in Alberta?
A Yes, that is correct.
Q Yes? A. And since May of this year I have been
an independent consulting geologist.
Q Associated with? A. Dr. Link.
Q Now, sir, have you made a study of natural gas in the
Province of Alberta? A. Yes, I have.
40 Q Is natural gas a valuable resource in this Province?
A Yes, natural gas is a valuable resource. The Petro-
leum and Natural Gas Conservation Board are making an
investigation at the present time under the Petroleum
and Natural Gas Conservation Act to export or determine
whether there is sufficient natural gas to export out-
side of Alberta.
Q Have there been applications to export gas?

- A Yes, a number of different companies have made application to export natural gas on the outside of the Province, and they are willing to spend hundreds of millions of dollars in building pipe lines outside of the Province.
- Q And you say that investigation by the Board is presently going on? A. It is going on at the present time, yes.
- Q Have you been appearing before that Board?
10 A Yes, I have.
- Q Now, can you tell me something about natural gas as it occurs in nature? A. It is a gaseous substance which occurs in gas pools in the ground. It contains a number of hydrocarbons, methane, for example, ethane and a number of other higher hydrocarbons such as pentane and hexane, which is frequently dissolved into liquids, which, if it has a large amount of liquids dissolved in it it is wet gas; if it has a small amount of liquid dissolved in it it is a dry gas.
- 20 Q Are there any elements that go to make up natural gas that are not hydrocarbons? A. Yes, there are. Some of Alberta's natural gas contains nitrogen, carbon dioxide and hydrogen sulphide, for example. In some cases nitrogen might make as much as 20%.
- Q Tell me this, does the composition of natural gas vary as between fields in the Province of Alberta?
A Yes, it does, and it might even vary within one field.
Q It may even vary within the same field? A. Yes.
- 30 Q Which is the hydrocarbon present in natural gas in the greatest volume? A. Usually methane.
- Q Now, sir, we have heard the term mentioned in this Court of dry gas; what is dry gas? A. Dry gas is a gas in which there is a very small amount of liquid hydrocarbons dissolved in it. In fact, most of the gas is methane and ethane.
- Q All right, sir. We have heard the term wet gas used what is wet gas? A. Wet gas is a gas in which there is a high percentage of liquid or liquefiable hydrocarbons dissolved in the gas.
- 40 Q Where is wet gas located? I mean, where do we look for wet gas, and where dry gas? A. Usually, or quite commonly, wet gas is associated with an oil pool. We gas may either occur as solution gas dissolved in the oil or is in contact with the oil and overlying it in the gas cap.
- Q What, specifically, is meant by the term "solution gas"?
A Solution gas is that gas which is dissolved in the oil

Usually there is a number of hundred cubic feet of gas dissolved in each barrel of oil. For example, at Leduc there is about 800 cubic feet of gas dissolved in each barrel of oil.

Q In Leduc there is 800 cubic feet of gas in each barrel of oil? A. Yes, in Leduc there is 800 cubic feet of gas dissolved in each barrel of oil. At Redwater it is closer to 200 feet.

10 Q I see. Now, sir, is there a term "gas cap gas"?
A Yes, there is. That refers to the gas which overlies the oil body and floats on top of it in the oil reservoir.

Q Is there a classification "non-associated gas", is that term used? A. Yes, that refers to gas which is in no way associated with oil. It would be a gas pool in which there was no oil whatsoever.

Q Would a dry gas be a typical example of a non-associated gas? A. Yes, a dry gas pool would be non-associated gas.

20 Q Is there a term usually, or is there a term used by technicians called "associated gas"? A. Yes, associated gas would be that gas which is associated with petroleum.

Q Have you a map prepared by yourself which illustrates the areas in the Province of proved natural gas reserves, where they are located? A. Yes, I do.

Q Prepared by yourself? A. Yes, it was.

Q For submission to the Board you have told us about?

A Yes, that is correct.

30 Q Identified by the words "Gas Fields of the Province of Alberta", is that correct? A. Yes.

MR. RILEY: Any objection, Mr. Nolan?

MR. NOLAN: No.

MR. RILEY: Mr. Helman?

MR. HELMAN: No.

MR. RILEY: I tender that, my lord, as Exhibit 30.

THE COURT: Exhibit Number 30.

40

MAP IN QUESTION MARKED
EXHIBIT 30.

Q MR. RILEY: Now, before we come back to that exhibit, did you likewise prepare a table identified by the words "Table A", Revised to November 6th, 1950, of the Gas Reserves of the Province of Alberta?

A Yes, I did.

MR. NOLAN: That is Table "A" is it, Dr. Nauss? A. Yes, it is.

MR. RILEY: Any objection to that being marked?
MR. NOLAN: No.
MR. RILEY: Mr. Helman?
MR. HELMAN: No.
THE COURT: Exhibit 31.

TABLE "A" IN QUESTION MARKED EXHIBIT 31.

10 MR. MITCHELL: Mr. Riley, did the map go in as an exhibit?
MR. RILEY: Exhibit 30, yes.
Q Now, looking at Exhibit Number 31, and the heading is at the top of the page. First you have the word "Area"; what does that mean, sir? A. That refers to the gas area which is dealt with in the rest of the Table.
Q Well, now, "Pouce Coupe", would that be the name of an area in the Province of Alberta which identifies a gas field? A. Yes, that is right, the Pouce Coupe gas pool.
20 Q Next we have the word "formation"; what does that mean? A. That is the formation from which the, which serves, or is the reservoir. It is the name of the formation that contains the gas.
Q Next we have the heading "Proved Acreage"; what does that mean? A. That is the area of the productive gas field. My estimate of the area.
Q Your estimate? A. Yes.
30 Q The best estimate you can give? A. Yes.
Q Then we have the word "Thick"; what does that mean? A That is the thickness of the porous gas sand, or limestone as the case might be.
Q Then we have the words "Acre Feet"; what does that mean? A. That is the volume of productive gas reservoir and is obtained by multiplying the amount of the acreage by the thickness in most cases.
Q Then we have the word "Porosity"? A. Yes.
Q What does that word mean? A. Now, porosity is the percentage of the rock which has void space.
40 Q And by void spaces what do you mean? A. That part of the rock which is filled with either gas or water.
Q Next we have the language "Connate Water"; what is that? A. That is the percentage of pore space that is filled with water.
Q Next we have "Reservoir Temperature"; what is that?

- A That is the temperature of the reservoir rock as it exists down there underground.
- Q Next we have "Reservoir Pressure"; what is that?
- A That is the pressure of the gas within the reservoir.
- Q Next we have the "Deviation Factor Z"; what is the Deviation Factor Z? A. Well, it doesn't agree exactly with Boyle's Law, which states that the volume of a fixed mass of gas varies inversely as the pressure does. It does not exactly deviate from that by an amount equal to this factor Z. At the pressure of the reservoir pressure and the temperature of the reservoir, it deviates from the gas law by an amount, for example, in the first case there of .91.
- 10
- Q Next you have "Reserves MCF"; what does "MCF" mean?
- A Thousands of cubic feet.
- Q Thousands of cubic feet? A. Yes.
- Q And then you have got "Proved Reserves to 100 lbs. Billion Cubic Feet." What does "Billion C.F." mean? A. That is billions of cubic feet.
- 20
- Q And then you have the word "Marketable", "% Marketable", what does that mean? A. That is the percentage of the gas in the third from the last column which, in my estimation, would be marketable.
- Q Then we have "Marketable Gas"; what does that figure show? A. That is the amount of gas which could be produced and put into a pipeline.
- Q I see. Now, the first one you have listed is Pouce Coupe. Whereabouts in the Province of Alberta is Pouce Coupe? A. That is in the northwestern portion of the Province, west of the town of Peace River, and near the British Columbia border. It is right on the British Columbia border.
- 30
- Q Next you have got Legal, where is that? A. Legal is north of Edmonton about 60 miles.
- Q Now, I notice that in Pouce Coupe under "Formation", it has got "Gates", and under Legal it has "Viking"; what is the significance of that? Do you mean you do not find the gas in the same formation?
- 40
- A It is a different formation.
- Q It is from a different formation? A. Yes.
- Q Then Pelican, whereabouts in the Province of Alberta is Pelican? A. Pelican is about 150 miles north and a little bit east of Edmonton.
- Q And then you have the word "McMurray" under "Formation". Is that still a different formation? A. Yes, it is a different formation.

- Q In which the gas at Athabaska is found? A. Yes.
- Q I mean, at Pelican is found? A. Yes.
- Q The next one you have Athabaska; whereabouts is Athabaska? A. Athabaska is 100 miles north of Edmonton on the Athabaska River.
- Q You have the formation "Grand Rapids"; what does that mean? A. That is the name of the sand that contains the gas.
- 10 Q I see. Now, I am not going to go over all of them. What you have told me about the first few indicates the manner followed all down under the names "Area", "Formation", and so on, is that correct? A. Yes, that is right.
- Q And you have arrived at a grand total of proved reserves in the Province of Alberta, at what?
- A 6 trillion, 570 billion cubic feet.
- 20 Q I see. Now, sir, going down the list on Exhibit 31, to Leduc-Woodbend, what formations is gas found in in the Leduc-Woodbend Field? A. Gas occurs in Leduc-Woodbend in the Viking, in the Lower Cretaceous, in the D-2 as solution gas, and in the D-3 as gas cap gas, and as solution gas.
- Q I see. Approximately how much gas is there in the Leduc field? A. There is approximately, the figures are there, 874 billion cubic feet, and that is the amount that could be produced. There is approximately 1 trillion cubic feet in place altogether.
- 30 Q Yes. Now, sir, are you familiar with the northeast quarter of Section 19, Township 50, Range 26, West of the 4th Meridian? A. Yes, I am.
- Q Is there gas underneath that quarter? A. Yes, there is.
- Q I have asked you to estimate as best you can for me the gas under that quarter? What is your estimate?
- A I estimate that there is about 3 billion cubic feet of gas, more or less.
- 40 Q All right, sir. And included in that estimate is there solution gas? A. Yes, there is solution gas.
- Q That is, gas in solution with the liquid? A. Yes.
- Q And is there gas cap gas? A. Yes, there is.
- Q There are both types? A. Yes.
- Q Now, sir, does the energy which the gas contains underground serve any useful purpose in the production of the liquid? A. Well, in many instances it is responsible for bringing the gas from the centre of the formation to the well bore, and in the case of

flowing wells it is responsible for bringing the gas from the bottom of the hole to the surface.

Q What about the oil? A I mean bringing the oil from the bottom of the hole to the surface.

Q What brings the oil to the well bore? A. In a dissolved gas drive it is the energy of the gas which brings the oil to the well bore.

10 Q Has oil or itself any energy of its own, any mechanical energy? A. No, no significant mechanical energy.

MR. RILEY: My friend, Mr. Steer, draws to my attention that we have said gas where we meant oil, or you have in your answer, and I wonder if I could have the last few questions read back?

20 BY THE REPORTER: "Now, sir, does the energy which the gas contains under ground serve any useful purpose in the production of the liquid? A. Well, in many instances it is responsible for bringing the gas from the centre of the formation to the well bore and in the case of flowing wells it is responsible for bringing the gas from the bottom of the hole to the surface."

MR. STEER: That is fine. You have just heard that read back, or do you want it read back again? A. I heard it, and I meant to say oil and not gas.

Q In both cases? A. Yes.

30 Q MR. RILEY: That is, you mean to say that the gas takes the oil from the formation to the well bore and then lifts it up to the hole?

A Yes, that is correct.

Q Now, sir, are there instances where we have the liquid underground - I do not want to use the word "petroleum", perhaps I should not - where the liquid is underground and there is no gas present? Are there fields where that is known, or little gas present?

A Almost invariably there is gas present where there is oil.

40 Q What I am getting at is, where the gas is not present as a lifting power, how is the liquid recovered?

A It is recovered by pumping.

Q It is recovered by pumping? A. Yes, and during the testing of a well it can be brought to the surface by swabbing, but that is not a production practice, it is testing practice.

Q Any vacuum methods employed? A. Well, sometimes a vacuum is placed on the oil, but it is not an

important method of producing the oil.

Q Is there a unit of measurement for petroleum?

A Yes, there is.

Q What is it? A. A barrel.

Q Is there a unit of measurement for natural gas?

A Yes, there is.

Q What is it? A. A cubic foot.

Q Now, has natural gas commercial value? A. Yes.

10 Q Besides the function of moving and lifting the liquid that we have talked about? A. Yes, it has considerable commercial value.

Q Take the Province of Alberta, what do they use it for here? A. We use it for heating houses. We use it to a limited extent in lighting. For example, the street lights at Medicine Hat. We use it as a raw material. For example, at the Ammonia Plant here in Calgary. It is used as a raw material at the Ammonia Plant to make fertilizer.

20 Q In Leduc as well as the gas solution drive you have, is there any other type of drive as well. A. Yes, there is a water drive. The pressure of the water at the edge of the pool tends to exert a pressure on the oil which helps to produce oil.

Q Now, going back, sir, to Exhibit 31, being your Table A, can you mark quickly for the information of the Court those gases which would classify as wet gases and those that you would classify as dry? Do it on the lefthand side opposite the name of the area?

30 A Pouce Coupe is dry gas; Legal is a dry gas; Pelican is a dry gas; Athabaska is a dry gas; Boyle is a dry gas; La Biche is a dry gas; Picardville, Bailey Long Island, Morinville, and Bon Accord are all dry gases; Redwater contains a wet gas; Ashmont is a dry gas; St. Paul is a dry gas; Elk Point is a dry gas; Brosseau is a dry gas; Golden Spike is a wet gas; Leduc-Woodbend is a wet gas; Vermilion is a dry gas; Lloydminster is a dry gas; Blackfoot is a dry gas; Viking-Kinsella is a dry gas; Excelsior is a dry gas; Battleview is a dry gas; Dina is a dry gas; Edgerton is a dry gas; Provost is a dry gas; Stettler is a wet gas; Stettler is a wet gas both in the Cretaceous, the D-2 and the D-3. Castor is a dry gas; Hanna is a dry gas; Dunmore is a dry gas; 40 Jumping Pound is a wet gas or partially wet gas. It does not have a great deal of liquid in it. Jarvie is a dry gas; Turner Valley is a wet gas; Princess has some dry gas and some wet gas in it. Patricia

is a dry gas; Brooks is a dry gas; Foremost is a dry gas; California Standard Area is dry gas; Medicine Hat is dry gas; Pendant d'Oreille is a dry gas; Bow Island is dry gas; Manyberries, dry gas; Smith Coulee is dry gas; Black Butte and Pinhorn is dry gas. Pincher Creek is wet gas; Ranfurly is dry gas; Oyen is a dry gas; Spedden is a dry gas; Leduc, the Lower Cretaceous, that is a relatively dry gas; Brandi is dry gas; Campbell is dry gas; Chip Lake is a wet gas; Joseph Lake, I am not familiar with it, I do not know whether it is a dry gas or not for sure; North Woodbend is partly dry gas and partly wet gas; and Whitelaw is dry gas.

10

Q Now, sir, you point out in Exhibit 31 the various formations in which the gases in the various areas are found, but, unfortunately, the depth below the surface is not given, and I do not want you to give, I do not want to ask you in each case, but can you tell me the range, from how many feet below surface to what depth has natural gas been found in the Province of Alberta? A. From 800 feet to over 12,000 feet.

20

Q From 800 feet to over 12,000 feet? A. Yes.

Q Now, sir, I assume in your education and in your work you were constantly in touch with the literature of the petroleum and natural gas industries? A. Yes.

Q Can you tell me what the term "petroleum" imports to you, that is, in a technical sense? A. Well, the word came from the Latin petro, meaning rock, and oleum, an oil, so that I would define it as an oily liquid which is obtained from the rocks of the earth's crust.

30

Q Is there any difference between, that you know of, between that definition that you have given me and the popular understanding of the word?

A No, I do not believe there is any great difference.

Q Is natural gas a part of petroleum? A. I would not say so, no.

40

Q What would you classify it as? A. Natural gas is a gaseous substance which occurs in the rocks in the earth's crust.

Q What is the difference, if any, between "petroleum" and "crude oil", the terms? A. I would not say there was any particular difference.

Q There was not..... A. There was no especial difference.

Q I take it from that they are one and the same?

A Yes, I think that they are the same.
Q Very good, sir.

CROSS-EXAMINATION BY MR. NOLAN:

Q Dr. Nauss, when you were qualifying yourself I forget,
at least, I did not quite gather whether in addition
to being a geologist, and I know you are, are you a
10 petroleum engineer? A. I indulge in that.
Q You are a graduate in petroleum engineering?
A I took some petroleum engineering courses.
Q But you really hold yourself out to the public as a
practising geologist? A. That is right.
Q With some knowledge of petroleum engineering?
A That is correct.
Q There has been considerable discussion between you
and my learned friend, Mr. Riley, about dry gas and
wet gas. Well, Dr. Nauss, isn't it a fact that
20 there are liquid carbons to some extent in dry gas?
A Do you mean liquid hydrocarbons?
Q Yes? A. Yes.
Q Didn't I say that? A. No, you said carbons.
Q Any liquid hydrocarbons in dry gas? A. Yes,
there are some liquid hydrocarbons in dry gas.
Q And there are some liquid hydrocarbons in wet gas?
A Yes..
Q And what are these liquid hydrocarbons? A. They
are a complicated group of hydrocarbons which go
30 from pentanes on up.
Q Pentane being the heavy end? A. No, pentane is
the light end.
Q Pentane, did you say? A. Yes, pentane.
Q How far up does it go? A. Well, the pentane
is a paraffin with five carbon atoms in it.
Q Yes? A. And it has twice five plus two hydrogen
atoms in it.
Q Yes? A. And all paraffins have the same ratio
of carbon atoms to hydrogen atoms. It is not exactly
40 a ratio, but it is a formula.
Q Yes? A. And the paraffins, there is a long
series of paraffins which go on up to several hundred
carbon atoms, which are very complicated molecules.
Q But the fact remains, does it not, Dr. Nauss, that
there are liquid hydrocarbons in both dry gas and
wet gas? A. Yes.
Q There are fewer of them in the dry gas than there are

- in the wet gas? A. Yes.
- Q And is it fair to say that the constituents of natural gas are members of the same hydrocarbon family as the normal liquid hydrocarbons in crude oil?
- A Yes. In some cases there are crude oils which are not a paraffin base, and natural gas has to have a paraffin base. It is a paraffin.
- Q Yes? A. Whereas in some cases crude oil is not a paraffin.
- 10 Q What is it? A. There are several other compounds. It can be cyclical. It can have a base of a cyclical hydrocarbon, or it can have an asphalt base. Some of the asphaltic oils have very little paraffin in them.
- Q Don't they all belong to the same family of hydrocarbons? A. No. You said "family of hydrocarbons".
- Q Yes? A. There are several families of hydrocarbons.
- Q May I say that they are all hydrocarbons?
- 20 A They are all hydrocarbons.
- Q All right. And is it not a fact that the origin of crude oil and natural gas is the same? A. That would be an incomplete statement of it. There is a lot - there are many cases where natural gas and crude oil come from the same source material, or we believe it comes from the same source material.
- Q Yes? A. There are also many other cases where only natural gas came from the source material, and that is the reason that you will get a natural gas field without any oil associated with it.
- 30 Q But when we are talking about oil and talking about gas, we are talking about two substances which have a common origin? A. No, except in the zone of overlapping origin.
- Q What do you mean by that? A. Natural gas will form independent of oil.
- Q Yes? You mean you may have natural gas without oil?
- A Yes, that is right, or it may form without oil, you see.
- 40 Q Quite so, but that does not mean that their origins are not common, does it? A. Well, I would say it this way, that frequently it does have a common origin.
- Q Yes? A. And frequently it does not.
- Q Well, Dr. Nauss, I am afraid I do not understand you. What do the substances of oil and gas - what is the popular geological opinion of their origin?

- A They come from organic materials buried below the earth's surface.
- Q And by "organic materials" what do you mean?
- A Any substance which was derived from some type of life.
- Q It is usually supposed, isn't it, by the proponents of the organic theory, that it came from the fish, fossilized fish? A. That is a very narrow concept. We know that it can come from almost any type of organic material. I should say, we now know.
- 10 Q But marine life for the most part? A. For the most part marine life, but there is also a large group of people who believe that it comes from - that plant material may also form oil and natural gas, plant material which is brought out into the ocean by a river.
- Q Now, what about the inorganic people, what do they say? A. I think that the inorganic theories do not need to be considered.
- 20 Q That is not now looked upon as the proper theory?
- A Well, I think the only people who did not know, I think only people who did not know or who were very unfamiliar with the subject, would even consider that inorganic theory.
- Q I see. You had something to say to my learned friend about the D-3 zone of the Leduc field. That zone has a water drive, has it not, Dr. Nauss?
- A It has two kinds of drive. It has a water drive and a dissolved gas drive.
- 30 Q Yes? A. As well as an expanding gas cap drive.
- Q By that you mean that there are three motivating forces? A. There are three things that could be motivating forces.
- Q There are three things that could be motivating forces?
- A Yes.
- Q One is the gas in the gas cap? A. Yes.
- Q And, as I understand it, as the pressure is lessened, the gas in the gas cap will expand and assist in driving the oil to the surface of the well?
- 40 A That is correct. And it is complicated by the water drive. The depletion of pressure within the oil zone can allow two things to happen. The gas cap can expand and the oil/water contact can move updip, squeezing the oil up to the surface.
- Q Before we speak about the water drive, let us talk about the pressure being lessened. If we put a well down into the oil zone, into the oil reservoir, I think

- is a more correct way of speaking. That releases some of the pressure, doesn't it? A. As you gradually extract material through that well, the pressure is gradually lessened, yes.
- Q With the result that there is an opportunity given to the gas in the gas cap to expand and to assist in bringing the oil to the surface? A. Yes, that is right.
- 10 Q And then the water drive - that gas cap we are talking about floats on this oil reservoir, I think you said? A Yes.
- Q Floats upon it? A. Yes.
- Q Well, then, the water drive is down below, is it not? A The water is below and at the edge.
- Q The water is below and at the edge? A. Yes.
- Q So that it can exert a lateral and an upward force upon the oil in the reservoir? A. It exerts mainly an upward force which can be transmitted into a lateral force.
- 20 Q What you are saying in effect is up and then lateral? A Yes.
- Q Driving the oil ahead of it? A. Yes, that is right.
- Q To the surface of the well? A. Yes.
- Q Now, that is two of these possible motivating forces which we were discussing, but there is the third, and that, I take it, is the gas in solution in the oil? A. Yes.
- 30 Q What does it do, Dr. Nauss? A. Well, at the well bore you have a smaller pressure than you have farther from the well.
- Q Just explain that to us. At the well bore, what do you mean by the well bore? A. At the well itself.
- Q At the top of the well? A. No, I mean at the bottom of the well.
- Q At the bottom of the well? A. Yes.
- Q Yes? A. The pressure is smaller there than it is farther away from the well.
- 40 Q Yes? A. And when you decrease the pressure there, the gas tends to come out of solution and drive ahead of it oil, drive ahead of it oil into the well bore.
- Q And the oil and gas comes out through the well, commingled gas in solution with the oil? A. The oil comes up to the surface, partly with gas dissolved in it.
- Q Yes? A. And partly mixed with it, but not dissolved. The gas occurs, in other words, as a mixture

- of the two, small bubbles of gas in the oil.
- Q And you do not mean by that gas in solution?
A No, that is not gas in solution.
- Q That is gas in the oil? A. That is the gas mechanically mixed with the oil.
- Q Now, when you have gas in solution have you any bubbles of gas in the oil? A. Not when it is in solution.
- Q Because it becomes part of the oil, doesn't it? Well, just tell me in your own way what gas in solution is?
- 10 A Gas in solution is the gas which is, which is dissolved in the oil, yes.
- Q Dissolved in the oil? A. Yes.
- Q Well, then, has it ceased to be gas? A. It ceases to look like gas, yes. I would not say it ceases to be gas.
- Q It is still gas? A. Yes, it is still gas.
- Q In the oil? A. Yes, in the oil.
- Q All right. Now, you spoke a few moments ago about your estimate of the gas under the Borys quarter section, did you? It was the Borys quarter, was it, that you were talking about? A. Yes.
- 20 Q The Northeast quarter of Section 19, and you put an estimate on it of some billions of cubic feet?
- A 3 billion.
- Q 3 billion? A. Yes.
- Q 3 billion cubic feet? A. Yes.
- Q There is no well on the Borys section is there?
- A No completed well, I understand. I think one was started.
- 30 Q One was started? A. Yes.
- Q But there is no producing well on the Borys section?
- A No, there is not.
- Q Well, then, how do you estimate your 3 billion cubic feet? A. By projection from the surrounding ground.
- Q In other words, what you do, Dr. Nauss, is, you find out the experience of a well in an adjacent, particularly in an adjoining section or quarter section, as the case might be, and then from your knowledge you project that particular horizon of strata as between those two points? A. Yes, that is right. Actually, what we do is we determine the elevation below sea level of the top of the D-3.
- 40 Q Oh? A. In all of the surrounding wells, and we draw a contour map.
- Q Yes? A. Which tells you the position of the top of the D-3.

- Q For our information, Dr. Nauss, that is an under-ground contour map we are talking about? A. Yes.
- Q Below sea level? A. Yes.
- Q I am sorry I interrupted you. A. And then we know that the oil/water contact is relatively horizontal, and so is the gas/oil contact, so that you can tell the amount of porous reservoir which lies between the top of the reservoir and the oil/water contact or gas/oil contact.
- 10 Q Well, Dr. Nauss, I do not want to quibble about it for one moment, but you said there is 3 billion cubic feet of gas underneath that quarter. That is your opinion, isn't it? A. I do not think I said it that way. The way I wished to word that was that it is my estimate that there is approximately 3 billion.
- Q I think you put it a little more forcefully than that, and you did not intend to, because we know something about the difficulty of estimating the gas reserves.
- 20 A That is, I would not want anyone to think it was highly accurate.
- Q And you also know, Dr. Nauss, that the gentlemen who estimate natural gas reserves have on occasions divided them into categories of proven, possible and potential? A. Yes.
- Q What category would you put the Borys quarter section in?
- A I would consider it a proved gas reserve.
- Q Proved? A. Yes.
- Q And there is no well on the quarter section?
- 30 A That is correct.
- Q And how far away is the nearest well? A. Well, I would like to give you an example of that. In the application of the El Paso Natural Gas Company to take gas from the Hugoton gas field to Los Angeles...
- Q Yes? A.there were whole townships without wells on.....
- Q That is right. A.that the Federal Power Commission considered as proved gas reserves.
- Q That is right. There were only two wells in some large areas, as I remember it? A. Yes.
- 40 Q But there is no well on this particular quarter section is there? A. No.
- Q And how far away is the nearest well? A. It is a quarter of a mile.
- Q A quarter of a mile? A. It is one-eighth of a mile, as a matter of fact.
- Q And you will agree with me when it came to the

question of the gas reserves in the Leduc area in the Gas Conservation Hearings, at which you were present, there were differences of opinion between those gentlemen who were asked to make those estimates? A. Well, the only - the question is not whether or not there is gas under that quarter. There is gas under the quarter. The question is in regard to the exact quantity.

10 Q Yes? A. In other words, we can estimate gas reserves with an error of plus or minus 20% in that particular case.

Q Would you like to say whether there is any oil under the quarter? A. When I say there is gas, I am also inferring that I think there is oil.

Q The difficulty being in whether either or both are in commercial quantities? A. Well, I would say they are in commercial quantities.

Q But that is the chance you take when you drill a well? A The chance is not great.

20 Q It is a chance? A. It is a chance, but it is not great.

Q I was going to ask you, in your undergraduate days, Dr. Nauss, you told me that you took certain courses in petroleum engineering. Did you study in connection with that course the problems of natural gas?

A Yes, we did.

Q And that was put under the heading of "petroleum engineering", wasn't it? A. It came under petroleum engineering, yes.

30 Q Now, there has been, and perhaps not in this case, but there will be a good deal said before these proceedings are over about L.P.G. What is L.P.G., Dr. Nauss? A. That is low pressure gas.

Q Yes? A. Gas which is.....

Q But isn't that..... A. It is just a gas under low pressure and a liquid under high pressure.

Q Isn't that the thing that is sold under a trade name?

A Yes.

40 Q What is the trade name? A. Well, it is not a trade name. Butane and pentane.

Q What is liquefied petroleum gas? A. There are probably some trade names that I am not familiar with.

Q Isn't the L.P.G. the thing that the farmer gets at the farm? A. Yes.

Q Then you understand what I am talking about. What is this liquefied gas, or gases, I should say, perhaps? A. Well, all substances can be made into

- either gases, liquids or solids at will.
- Q In other words, it is only a matter of temperature and pressure which determine whether it is a solid, a gas.... A. A liquid or a gas.
- Q That is true of water, isn't it? A. Yes.
- Q Ice and steam? A. But in the definition we do have, we call them liquids, gases and solids, and when we say a gas we mean these substances which are a gas at atmospheric pressure and at room temperature.
- 10 Q But here we are talking about a liquefied gas, what is that? A. A liquefied gas would be a gas which is a gas at atmospheric pressure and room temperature, but which has been subjected to a pressure and is, consequently, a liquid.
- Q In other words, by changes in temperature and pressure you can change the gas into a liquid?
- A That is right.
- Q And the substance that goes out to the farmer in those cylindrical tubes is a liquid? A. It is a liquid, yes.
- 20 Q And how does the farmer use the liquid on the farm, and for what purpose? A. Well, there is an outlet from the steel chamber that the liquid is in, and there is a device for allowing the material to come out slowly, and when the pressure is released it changes into a gas,
- Q And that is done by turning this little tap? A. Yes.
- Q And when it comes out as a gas he uses that as a fuel on the farm? A. Yes.
- 30 Q That is being done in this country today, isn't it? A. Yes, that is right.
- Q And it is a very large industry, may I call it, in some of the United States? A. Yes.
- Q Depending, perhaps, on the density of population in the rural areas? A. Yes.
- Q Now, what is there in this liquefied petroleum gas? What hydrocarbons are present in it? A. Mainly pentane and butane.
- 40 Q No propane? A. I meant propane.
- Q Propane? A. Yes.
- Q Propane and butane? A. Mainly propane and some of the other. Sometimes some butane is used.
- Q And that is extracted from natural gas, is it not? A. Well, it has a number of origins. The most common origin here in Alberta will be from wet gases.
- Q That is from wet gases? A. Yes.
- Q Such as are to be found at Jumping Pound?

- A The better example would be Pincher Creek.
Q Pincher Creek? A. Yes, or Leduc.
Q Or Leduc? A. Yes.
Q Will butane be a liquid in cold weather in Alberta at atmospheric pressure, Dr. Nauss? A. I think I have something here with which I could answer that question. Did you say butane?
Q Yes. Let me make it clear to his lordship. Would you give me these components starting with methane, ethane, and so on, so that his lordship will know what we are talking about. What are these things, Dr. Nauss, methane, ethane, propane, butane, how would you describe them? A. I do not know exactly what you are driving at.
Q Supposing I said, "Have you ever heard of methane?" you would say "Yes", and I would say "What is it?" and you would say "It is a component of something", would you not? A. Well, no, not about methane. You could about the others.
Q Tell me about methane then? A. Methane is one of the substances which - these hydrocarbons usually occur in a great mixture, but methane is the one which occurs purest in nature of the whole group.
Q And it is the lightest of the whole group?
A Yes, it is the lightest of the whole group.
Q Is it the most volatile of the whole group? A. Yes.
Q And what use can be made of it commercially?
A It can be used for heating mainly.
Q But it is not a component of this L.P.G. we have been talking about? A. There would be a small amount of methane in the L.P.G., yes.
Q Why is that? A. It is because all of these substances are soluble, the one in the other.
Q Yes? A. And methane is soluble in all of the others, and, consequently, when you get L.P.G. you still have a small amount of methane dissolved in it.
Q Now, we have methane at the top of the scale, the lightest and the most volatile? A. Yes.
Q And underneath that we have? A. Ethane.
Q Ethane? A. Yes.
Q And underneath the ethane you will have a little heavier still? A. Propane.
Q Propane? A. Yes.
Q And underneath that we have the butanes?
A Yes, butane.
Q And then we get into the heavy ends, and what are they?
A Well, the next one is heptane - no, pentane, heptane,

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hexane, nonane, and they go on up until you get several hundred carbon atoms.

Q And these are all hydrocarbons that we are talking about, are they not? A. Yes.

Q Now, so far as the production of our oil wells is concerned, Dr. Nauss, is there any way that you can produce oil without producing some gas? A. No.

10 Q Why isn't there? Just expand on that a little bit, please? A. Because there is gas dissolved in the oil down there in the reservoir.

Q I understand that good drilling practice would have you produce the oil before you produce from the gas cap? A. Yes, that is right.

Q Why is that a good practice? A. Well, the thing which brings your oil to the surface.....

Q Excuse me. The gas cap is the gas in the cap floating on the oil? A. Yes.

Q Above the oil? A. Yes.

20 A I am sorry to interrupt. Will you go on, please?

A The thing that brings the oil to the surface is the reservoir energy or the pressure, and the only way to reduce that pressure is to extract materials so that consequently you want to extract as little material as possible. You want to extract as much oil as possible and as little other material as possible in order to keep the reservoir pressure up high.

30 Q I suppose there is a danger of the gas cap breaking into the oil reservoir? A. Yes, and in some cases it is difficult to prevent some gas breaking in.

Q And if you produce the gas before you produce the oil, may I say, what would happen to the oil in the oil reservoir when the gas was released? A. Well, you would still get some of the oil out, but probably would not get as much, and you would not get it as cheaply, you would have to pump it.

40 Q And the gas that comes up in solution in the oil that we have talked about, is that a gas or a liquid?

A Well, it is dissolved in the oil.

Q Well, then, it is a liquid, or is it still a gas?

A It is not still a gas, no, under pressure.

Q It has become a liquid in the oil, that is right?

A You said it has become a liquid with the oil?

Q Yes?. A. No, it is not a separate liquid in the oil.

Q It is a gas in the oil? A. Yes, it is dissolved in the oil.

- Q Now, if you produce the gas from the gas cap, what effect would that have upon your oil production?
- A I beg your pardon?
- Q If you produced the oil in the gas cap, the gas in the gas cap, I am sorry, before you had produced the oil in the oil reservoir, what effect would that have upon your ability to completely produce the oil?
- A To completely, you probably would not get as high a percentage of the oil. You would still get some, but you would not get as high a percentage.
- 10 Q When you do not go through to the gas cap, what percentage of the oil recovery would be a fair average?
- A I beg your pardon?
- Q When you have not released the gas from the gas cap, can you give me any approximation of what the average of oil recovery would be? A. Percentage of the oil?
- Q Percentage of the oil, yes? A. The amount of oil that can be recovered varies all the way, in some cases 15% in some pools, up to as much as 65%.
- 20 Q What was the figure you gave me, I am sorry?
- A The recovery of oil, of the percentage of oil, that is recovery from oil fields.....
- Q Yes? A.varies from 15% to 65%.
- Q Depending on a number of factors? A. Yes, depending on the circumstances and the manner in which it was produced.
- Q Yes, and the ability of the producer to produce?
- A Yes.
- 30 Q And all those things enter into it? A. Yes, pro-ration and everything.
- Q But it is fair to say that if the oil in the gas cap is produced there will be a smaller recovery of oil in the oil reservoir? A. You mean the gas in the gas cap?
- Q Gas in the gas cap, sorry? A. Yes, there would be a smaller percentage.
- Q It would be a much smaller percentage, wouldn't it?
- A Well, that again depends, if you have a highly efficient water drive then there would be no decrease in production.
- 40 Q Yes? A. If your water drive was 100% effective.
- Q Yes? A. Then the water would bring out all the oil, in fact you would bring out more oil than the gas could possibly bring out.
- Q But if you extracted the gas from the gas cap, isn't there a tendency for the oil to percolate into the gas cap where the gas has been and has gone?

A Well, yes, if you take - if you have a water drive and you take out all the gas...

Q Yes? A.....then the water would drive the oil up into the area where the gas cap was.

Q And you would not be able to recover it? A. Yes. And the wells that once produced gas would now produce oil.

10 Q But to go back to my thesis, to my premises, it is fair to say if you produce gas from the gas cap you will make a smaller recovery of oil? A. Yes, that is right.

Q And what about the Borys quarter section, is there a gas cap? A. It has a small gas cap, yes.

Q And if that gas were produced it would mean that there would be a smaller recovery of oil in the Borys quarter section? A. In all likelihood, yes.

Q Because, after all, we are in the realm of conjecture to an extent, aren't we? To a small extent?

20 A But if you merely produced the gas cap on the Borys quarter section, the gas from the neighbouring quarters would leak in under there and replace it.

Q The gas would leak into the gas cap? A. Would leak from the neighbouring quarter section into that one.

Q And that would be bad for the man on the adjoining quarter section? A. Yes.

Q Because he would cease to have a gas cap? A. Yes.

30 Q And the gas cap is a very valuable thing to have if you are endeavouring to produce oil? A. It is a valuable thing to have in an oil pool, and to that extent it is a good thing that Leduc has a gas cap.

Q Now, so far as gas is concerned, and oil, too, for that matter, isn't it a fair statement that gas and oil are not always found where they are formed?

A That is right. They are not always found where they are formed.

40 Q And that is because there is what is known as a reservoir bed and a source bed? A. Well, sometimes the reservoir bed is one and the same with the source bed.

Q Yes, of course. And sometimes it is not? And that is so where there has been a migration from a source bed? A. Yes.

Q And dry gas will migrate from a source bed to a reservoir bed? A. Yes.

Q So that dry gas which you might find under a particular quarter section of land may have come from

- some source bed which was productive with regard to both oil, both gas and liquid? A. Yes.
- Q Just excuse me one moment, if I may, sir, please? I spoke to you a few moments ago about the difference between wet gas and dry gas. I suppose that any distinction to be drawn between the wet gas and the dry gas must, of necessity, be arbitrary? A. Yes.
- Q And it is one of degree, I would think, rather than of kind? A. Yes, it is one of degree rather than one of kind. Yes.
- 10 Q Now, what is the difference with regard to wet gas and oil? A. One is a gas and the other is a liquid.
- Q Yes? A. Under atmospheric pressure.
- Q But if you change the atmospheric pressure and the temperature? A. All of them can be liquids or solids even.
- Q They can be, what shall I say, changed into another form of that particular substance? A. Yes.
- 20 Q And I suppose it follows that what might be oil in a reservoir today, speaking geologically by today, could by a change in temperature and pressure become gas tomorrow? A. Yes, by a change in temperature and pressure.
- Q And I suppose the converse would be so too?
- A Yes, but we should get back to the definition of a gas, and that is that which is a gas at room temperature and pressure.
- Q Yes? A. And liquid is that which is a liquid at room temperature and pressure.
- 30 Q Then, putting it another way, the difference between oil and gas is arbitrary in the sense that it is dependent upon conditions of temperature and of pressure? A. I beg your pardon?
- Q I say, the difference between oil and gas.... A. Yes.
- Qis an arbitrary affair, isn't it? A. No, I would not say so.
- Q Well, in the sense that it depends, Dr. Nauss, on temperature, pressure and reservoir conditions?
- 40 A Well, the temperature and the pressure has been fixed, Yes? A. It is not arbitrary because the temperature and pressure has been fixed as atmospheric pressure and room temperature, so that it is not arbitrary.
- Q But if there is a change in the temperature and pressure, one may become the other, or the other may become the one, because of the change in the temper-

- ature, pressure and the conditions in the reservoir?
A Yes, you can change the condition at will.
- Q When we are discussing these differences as between oil and gas, we are discussing them in the reservoir, not at the top of the well, Dr. Nauss? A. Well, it is good to think that way, but the terms have been defined, the terms have been defined as room temperature and pressure.
- Q That is an arbitrary difference, isn't it, laid down?
10 A No, that is what was decided on.
- Q Who decided upon it? A. The scientists when they decided upon the word "liquid".
- Q Yes? A. They realized that they could change that liquid into a solid, for example. For example, you can change water into ice or you can change water into a vapour at will.
- Q So that we had to have a dividing line? A. But water is very definitely a liquid, without any question, because the scientists defined the word, and stated
20 the temperature at which they would draw the line.
- Q Yes? A. As the room temperature, and the pressure is atmospheric pressure.
- Q Room temperature and atmospheric pressure? A. Is the dividing line.
- Q Is the dividing line? A. Yes.
- Q Between the oil and the gas in the reservoir?
A Well, no.
- Q Up above? A. No, atmospheric pressure does not exist in the reservoir.
- 30 Q That is at the top of the well? A. Yes.
- Q Going down in the reservoir, what is the dividing line between the oil and the gas in the reservoir? What is the difference between the liquid and the vapour down in the reservoir? A. A vapour in the reservoir, the vapour is that which can expand or contract at the pressure and temperature of the reservoir.
- Q Yes? A. And the liquid is that which is not compressible at the temperature and the pressure of the reservoir.
- 40 Q And when you change that temperature and pressure, then one may go to the other, or the other back to the one? A. Yes.
- THE COURT: You won't finish with this witness today, will you, Mr. Nolan?
- MR. NOLAN: I am afraid not, my lord, and perhaps if there were an adjournment I could go over my notes and be much shorter in the morning

than I would be if I were permitted to continue now.
THE COURT: Will the witness, Dr. Nauss,
be here on Monday?
MR. NOLAN: I will speak to Mr. Steer
about that.
MR. STEER: Yes, my lord, he will be
available on Monday morning.
THE COURT: I am sure Mr. Howard is
tired, and I am more than tired, and I think that
we will adjourn now until Monday morning at 10
o'clock. I think, perhaps, if we all have a rest
over the weekend, that we will all be in a much
better humour, at least, I hope so.
MR. NOLAN: I hope Mr. Steer is.
MR. STEER: I never have any complaints
about Mr. Nolan.
THE COURT: Well, we will adjourn until
10 o'clock Monday morning.

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(Hearing adjourned until 10 A.M. November 20th, 1950)

Ruling re Application Canadian Pacific Railway
Dr. A. W. Nauss - For Plaintiff - Cross-examination
by Mr. Helman.

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Morning Session
November 20, 1950.

10 THE COURT: Gentlemen: Before I resume
the hearing of the evidence of the witness on the
stand, I wish to dispose of the application of
Leslie Munro and the defendant Canadian Pacific
Railway Company made on the 16th instant for an
order that the notice to witness, dated the 9th
day of November, 1950, directed to Leslie Munro,
insofar as its requirements for the production of
documents is concerned, is improper, invalid and
null and void and does not have to be complied with
on the grounds set out in the Notice of Motion.
That notice is dismissed. The documents, for the
most part, are specimens and forms of agreement and
I have no doubt that the the witness can actually
do his best to fully comply with the notice given.
I have dismissed the application because I am con-
vinced also that in no other way can justice be
20 done or can a correct answer be given to the question
raised in this action.

All right, Mr. Nolan.
Dr. Nauss is still on the stand?
MR. STEER: He is, my lord.
MR. NOLAN: My lord, I have finished
my cross-examination.
THE COURT: Any more questions?
MR. HELMAN: I wish to cross-examine
30 the witness, my lord. I was going to suggest that
perhaps as a matter of convenience these expert
witnesses could sit down. Some of them have
material in front of them that they wish to look at.
THE COURT: No reason why they could
not. And they are not strong men either.

ARTHUR W. NAUSS, recalled,
already sworn, cross-examined by Mr. Helman, testified
as follows:
40 Q Dr. Nauss, at the opening of your evidence you ventured
on a technical definition of petroleum? A. Yes.
Q And, as I understand it, you went back to the Latin
and you got the etymological meaning by saying it meant
in Latin "rock oil", is that it? A. Yes.
Q I am going to suggest to you that taking the derivation
of the word is a very unhappy way in most instances of
finding out its meaning, would you agree with that?

- A I think that in many instances the original meaning of the word is in its derivation.
- Q In many instances it is not, isn't that right?
- A But usage will gradually change the meaning of the word.
- Q Now, let us take a word, or two words, that we have been using a lot. I do not know whether one or two words, "hydrocarbons." My understanding of it is that it comes first from "hyder" meaning water, that is the Greek word for water, and "carbo", the Latin word for coal. Now, you would not say that was a very happy definition of hydrocarbon? A. But doesn't it come from hydrogen and carbon?
- 10 Q Well, hydrogen in turn comes from "hyder" meaning water? A. Well, it seems to me that the origin of that word is from the two names, hydrogen on the one hand and carbon on the other.
- Q Then I am suggesting to you that the word "hydrogen", in turn, comes from the word "hyder" which is the Greek word for water? A. Yes.
- 20 Q. So that we find there that there is one instance that you cannot say it was water-coal, would you, hydrocarbon? A. But it is hydrogen and carbon.
- Q Hydrogen and carbon? A. Yes.
- Q In a sense, but you cannot go back to the original word from which it came, that is all I am getting at, Doctor?
- MR. STEER: Just a minute. The witness was thinking and was perhaps going to make an answer, and I think he should be given an opportunity.
- 30 MR. HELMAN: All right.
- A I think those Greek words gave rise in the one instance to the word "hydrogen" and in the other instance to "carbon" and then from hydrogen and carbon the word "hydrocarbon" was derived.
- Q But all I am getting at . . . A. By a second step.
- Q But by a variety of steps. You cannot go back to the original etymological root of a word and say that it necessarily has the same meaning in English today?
- 40 A No.
- Q I am going to suggest to you that there is another technical meaning of the word "petroleum" besides the narrow meaning that you have given it. Would you agree with that?
- MR. RILEY: Well, suggest what it is to him.
- MR. HELMAN: Well, I am going to in a moment.

I want the witness to say whether he agrees or not that there is another technical meaning of the word "petroleum" besides what he has given us.

A There have been other meanings.

Q And there has been a broad generic meaning that has been given to the word "petroleum", under which it has the meaning of being all of the hydrocarbons in the reservoir, whether gaseous, liquid or solid?

10 A I think in that wider meaning that you are thinking of, they usually refer to those as petroleum substances, and that the word "petroleum" is used as an adjective. The industry has found it necessary since the gas and oil and bitumens are all related substances, all related to oil, it was found convenient to get a broad generic term which would include all of those substances, and they call those "petroleum substances." In some instances they have used that, but I would not say it was general though, the use of the word "petroleum."

20 Q When you were at University of California, one of your teachers or professors was Professor Uren?

A No, I went to Stanford University.

Q You went to Stanford University? A. Yes.

Q You know Professor Uren, do you? A. No, I do not know him. I know of him.

Q You know his book? You have heard of his book, have you? A. I do not know which one you are referring to.

30 Q It is a book of Petroleum Production Engineering by Lester Charles Uren, a Professor of Petroleum Engineering of the University of California? A. Yes.

Q That is a recognized authority, isn't it? A. Yes, it is.

Q Now, he says at page 1, where he is dealing with the physical properties and chemical constitution of petroleum, he says,

40 "Varieties and Forms of Petroleum. Petroleum is a mixture of naturally occurring hydrocarbons which may assume either the solid, liquid or gaseous state."

Now, is that a correct definition, Dr. Nauss? A. It is one of the definitions that is used, and I would say it is not the most widely used one today.

Q But it is a definition that is used as well as the definition you have given us? A. That is right.

Q And then this textbook goes on to say,

"These three phases of petroleum are trans-
mutable, one into the other, by the application
of moderate changes in temperature and pressure."

Do you agree with that statement? A. Yes.

10 Q "Some of the constituents of petroleum are solids
at ordinary earth temperatures, but the appli-
cation of heat to produce a slight rise in temp-
erature will cause them to assume liquid form."

Do you agree with that statement? A. "A slight
rise in temperature", it sounds as if he has it back-
ward.

20 Q I beg your pardon? A. In order to get gases to
assume a liquid form you have to reduce the temperature.
Q He is just talking about the other. Just listen again,

"Some of the constituents of petroleum are
solids at ordinary earth temperatures . . ."

A Yes.

30 Q ". . . but the application of heat to produce
a slight rise in temperature will cause them
to assume liquid form."

Do you agree with that? A. Yes.

Q And then it goes on,

". . . and further heating to the boiling point
will convert them into gases and vapors."

A Yes.

40 Q Then it goes on,

"Other constituents are vapors at ordinary
temperatures, but earth pressures naturally
developed within the containing rocks will
cause them to condense, forming liquids."

A That is true for everything except the main constituent
of natural gas, methane.

MR. RILEY: I wonder before we go any

farther if we might have the date of the book, my lord.

MR. HELMAN: Yes, we will be glad to let my friend have the date. This particular copy is dated 1924, although the definition is identical with the 1934 edition that I read in the public library.

MR. STEER: You are using the 1924?

10 Q MR. HELMAN: The one I have in front of me is the 1924 edition, yes.

Q Then it goes on and says,

"Relief of this pressure will permit the liquid to vaporize again, providing the temperature does not change."

Do you agree with that statement? A. Yes.

Q And then it says,

20 "Liquid petroleum may also be converted into the solid or gaseous states by evaporation of the lighter and more volatile fractions, the latter forming gases or vapors, and the heavier fractions forming solids."

Do you agree with that? A. Yes.

Q "The solid and gaseous forms are soluble in the liquid forms."

30

A Yes.

Q "Chemical changes, such as oxidation of the liquid petroleum, may also be instrumental in causing solidification."

Is that right? A. Yes.

MR. RILEY: You are examining him now as a chemist, are you?

40

MR. HELMAN: I am asking the witness whether he agrees with the definition, Mr. Riley, and I am cross-examining him.

MR. RILEY: All right.

Q MR. HELMAN: Now, the textbook goes on, Doctor, and it says,

"In nature, all gradations ranging from hard, brittle, solid forms, through soft waxy sub-

"stances, viscous semi-solids, heavy viscous liquids, light volatile liquids of water-like consistency, and heavy vapors, to light, almost uncondensable gases, may be found associated in the same deposit."

A Yes.

10 Q "As pressure, temperature and other physical and chemical changes occur, there will be continual readjustment between the different phases of associated hydrocarbons."

A Yes, as you change the temperature and pressure you may increase or decrease the amount of liquid or gaseous phase.

Q "It seems probable. . . " - no, I missed a sentence here.

20 "Filtration of liquid petroleum through clays and other close-grained rocks within the earth may also bring about segregation of different constituents."

Do you agree with that? A. Yes.

30 Q "It seems probable that most mineral waxes are either oxidation products derived from liquid petroleum, or residual products resulting from evaporation or segregation of the more volatile constituents."

Do you agree with that? A. You are getting a little deep into chemistry there for me.

Q You would not know whether that is a correct statement or not? A. I imagine it is correct.

Q Well, perhaps I will give you the next sentence and see what you know about that, Dr. Nauss.

40 "Gaseous hydrocarbons, which are always associated with liquid petroleum, are in many cases derived directly from the latter by evaporation or natural distillation; or, the two, having a common origin, may accompany each other throughout their subsequent migration and accumulation."

Do you agree with that statement, Doctor? A. That is

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partially correct. They may accompany each other and they may not.

Q I see. That is the part of the sentence that you wish to criticize? A. Well, the statement is true, but it does not state that gas also occurs alone.

Q I beg your pardon? A. That gas also occurs alone.

Q Your statement is that gas may also occur alone?
10 A Yes.

Q Without any association with oil? A. With petroleum.

Q Just call it oil for me, Doctor. A. All right.

Q Without any association with oil whatsoever at any time in its history? A. Yes, that is right.

Q And I would like to get down to the Leduc reservoir. You were giving an impression about the gas and the oil in the D-3 zone, do you remember that? A. Yes.

Q Now, first of all, what do you say about gas and oil, do they have a common origin? A. I would not know
20 for sure. Those are some of the unanswered problems in petroleum geology, but my guess is that it probably did.

Q So that your opinion, then, of the Leduc D-3 zone is that the oil and gas had a common origin? After all, your guess is your opinion on it, isn't it, Doctor?

A My guess is my guess.

Q Your guess is your guess. Well, is it an intelligent guess? It is based on your study and knowledge of these matters, isn't it, Doctor? A. Yes, it is.

30 Q And, therefore, we can say with some assurance that when we have a reservoir in which we find both oil and gas, such as we have in the D-3 zone, that they had a common origin? A. The chances are they did.

Q And the same is true of the D-2 zone? A. Yes.

Q Now, I wanted to give you, before I leave this question of definition, another definition. Doctor, are you familiar with this work, The Science of Petroleum?

A Yes, I am.

40 Q And it is recognized as a comprehensive and authoritative work on the title that it says that it covers?

A Published in England, yes.

Q It is published in England, that is right. And did you observe the section in it at the commencement on the "Nomenclature of Petroleum Products"? A. Yes, I did.

Q And it is written by two professors, isn't it, of the Department of Oil Engineering and Refining, of the

University of Birmingham, England? A. Yes.

Q And you observe that in the things they looked up as part of their definition were certain definitions that had been given by the American Society for testing materials. That says so right here, and perhaps you will take my word for that. It says that included in this, it says,

10 "In the following pages is given a list of definitions for the more common terms relating to petroleum and its products, which may be encountered in the technical literature dealing with refining, testing and marketing. Included in this are the definitions for petroleum products tentatively adopted by the American Society for Testing Materials."

A Yes.

20 MR. RILEY: What date are you reading from now?

MR. HELMAN: I am reading from . . .

MR. RILEY: About 1906, I take it?

MR. HELMAN: 1938 it is dated, and, as I understood what you said the other day, we start and go backwards.

30 Q I would like to read you the definition of petroleum contained in this collection of nomenclature of petroleum products. I am reading this to you to show you that there is another usage of the word "petroleum" besides the one that you have given us. Under the heading "Petroleum" at page 12, it says,

40 "Petroleum, in its widest sense, may be considered to embrace all hydrocarbons, solid, liquid and gaseous, occurring in nature. It is more precisely defined as a material, occurring naturally in the earth, which is predominantly composed of mixtures of chemical compounds of carbon and hydrogen with or without other non-metallic elements such as sulphur, oxygen, nitrogen, etc. Petroleum may contain, or be composed of, such compounds in the gaseous, liquid, and/or solid state, depending on the nature of these compounds and the existent conditions of temperature and pressure; it may, and frequently does, contain other extraneous material, including non-hydrocarbon gases, water, and earthy matter, in admixture. That portion of

"petroleum which, under normal conditions, is
in the gaseous state, is commonly termed
'Natural Gas'."

and then in brackets it says,

10 "(although the term 'Natural Gas' may not be
restricted to this definition); but it should
be understood that, in so far as all compounds
are capable of existing in the solid, liquid,
or gaseous states, depending upon the con-
ditions of temperature and pressure, no strict
distinction can rightly be drawn between gaseous,
liquid or solid components of petroleum."

Now, what have you to say about that definition?

A You note that they said they felt it necessary to
say in the widest sense.

20 Q Yes? A. That admits that there is a narrower
sense.

Q Yes, all I am . . . A. And also once having
defined it in that manner throughout the book, they
use it in the narrow sense throughout that book.
When they talk about petroleum reserves you will
note the tables are all in barrels in that very book.

Q Now, what I am getting at, Doctor, is that there are
two senses to the word "petroleum"; one is a wide
generic sense, which is the sense I have just read
to you from this book, the Science of Petroleum, and
the other is the narrow sense? A. Yes.

30 Q Which is the sense which you gave the definition of
at the opening of your evidence?

A That wider sense is usually embraced in the term
"petroleum substances" or to "admixtures" of petroleum
compounds. I have a book by a petroleum engineer,
Mr. Muskat.

Q Yes? A. And he uses the term "Petroleum fluid"
for that wider sense that you are thinking about.

40 Q Yes. When it is used in a generic way it is used to
describe the liquid content of a reservoir, rather,
the fluid content, I should say, of the reservoir,
whether it is gaseous, liquid, or solid? A. Well,
usually when it is used in that sense it is used as
an adjective meaning oil or those substances assoc-
iated with oil

Q Yes? A. And occasionally it will be used as
was stated in that definition there.

- Q And so that we have, at least so far as you can tell us, two parallel uses of the word "petroleum"? I mean, it is used in two ways, according to you?
- A It will be defined like that, and like that book they will define it one way and in actual use, use it the other way, use it in its narrower sense.
- Q Sometimes, and sometimes used quite correctly?
- A No, I would say the more frequently - it certainly has those uses, but more frequently it is used in the narrower sense.
- 10 Q What I was going to suggest to you, Doctor, was that when you are dealing with oil after it has come to the surface you are more likely to use the word "petroleum" in the narrower sense, when refineries are dealing with it, selling it and so on, but when you are dealing with the substance in the reservoir we are more likely to use it in the broad sense? A. No, I would not agree with that.
- Q You would not agree with that? A. No.
- 20 Q Well, you will agree that there are the two uses, though? A. Yes, there are the two uses.
- Q Now, your evidence was all based on the narrow use of the word, namely, that oil and petroleum are really synonymous, that is what it came down to? A. In the field that was the most common use.
- Q And the evidence which you gave was based on that usage? A. Yes.
- Q And in order to find out if it was a liquid or a gas, you said you had to take it at room temperature and pressure, is that as I understand it? A. Yes.
- 30 Q Now, on that reasoning, if we take a lump of ice, and we were considering it, you would say that it was a liquid? A. No, I would not have.
- Q But at room temperature and pressure it becomes water, doesn't it? A. It becomes water, yes.
- Q So that the lump of ice, according to that, no matter what form you find it in - I mean, if we take a lump of ice, must be a liquid? A. No, that is not the parallel at all. You see, scientists live at room temperature and pressure, most of them do, and, consequently, when they made up their definitions of all these different compounds, they define them as room temperature and pressure. They did not define them at extremely high pressures of 1000 pounds per square inch that they were not familiar with at the time that they were making up the definition. Now, in addition to some definitions made up for substances
- 40

at room temperature and pressure, they also observed things like ice and gave them names. However, the name of that ice is still water whether it is in a liquid, solid, or gaseous state.

Q So that this definition you have given us, Doctor, if I follow you correctly, taking the way that scientists live, scientists looking at a lump of ice, according to you, will say it is a liquid?

A No, that is the solid, certainly.

10 Q That is a solid? A. Yes. But if a scientist were asked "Is water a liquid or a solid", he would say, "It is a liquid," simply because at room temperature it is a liquid.

Q But if he were asked about the ice, he would say it was a solid? A. Ice in itself - ice defines itself as being a solid, yes.

Q Now, what about steam, what would you say about that? Would you say it was a gas or a liquid? A. Steam is certainly a gas. That is not the parallel I
20 wanted to draw at all.

Q I know, but . . . A. There is no parallel in that at all. You see, according to that reasoning, there are no such things as solids, liquids or gases, and . . .

MR. HELMAN: Well, Dr. Nauss . . .

MR. STEER: Let him finish his answer.

Q MR. HELMAN: Well, go ahead, Doctor, and finish your answer. A. What is a liquid? My
30 definition of a liquid is a substance which at room temperature and pressure occupies the bottom of the container in which it is placed.

Q Now, when we get down into the reservoir we haven't got room temperature, have we, Doctor? A. No.

Q And we haven't got room pressure in the reservoir?
A No.

Q So that when you are talking about a substance at the top and in the reservoir, it will be an entirely, in an entirely different physical form? A. It will
be in a different phase, yes.

40 Q So that when you are talking about gas under the definition which you have given to us, it may in the reservoir exist as a liquid? A. Yes, it may.

Q And when we are talking about these solid substances, these hydrocarbons that you have told us about that are found in the oil, in the reservoir it may be in liquid form and at the surface it may become solid, is that it? A. Yes.

- Q So that I want to just make this clear, that when we take your definition of the distinction between gas and oil we are taking the scientist's distinction that he would make as he studies in the laboratory and has a sample in front of him at room temperature and at room pressure? A. Well, he will refer it back. He will refer it back to room temperature and pressure in a table in which he puts liquids, gases and solids.
- 10 Q Yes? A. The three classes. Methane and Ethane he is going to put into gas, although both of those can be made liquid at will, or solids, he will still call methane and ethane gas.
- Q And may exist in the reservoir as liquids? A. May exist in the reservoir as liquids.
- Q And he still would call it a gas, according to you?
- A He will call methane a gas.
- Q Yes? A. He will put that in his classification of compounds as a gas.
- 20 Q But it has nothing to do with the actual physical state of the substance in the reservoir? A. You can see that there are two things, one, there is the classification of substances into solids, liquids and gases. That is one thing.
- Q Yes? A. Then there is another thing, phase, which is the temporary state under which each substance exists at that moment, depending on the temperature and pressure.
- 30 Q Now, what I am getting at, Dr. Nauss, is that these phases are and may be entirely different from these definitions that you have given us about what happens at room temperature? A. Well, if you are talking about definitions, we had better stick to definitions; if we are talking about phases, we had better talk about phases.
- Q Well, all I want - will you go this far, Doctor, that phases and definitions do not coincide? A. No, they are two different things.
- 40 Q Now, I want to suggest to you that these definitions that you have given us, the distinction between oil and gas, of liquids and gases, are not practical so far as the production of oil and gas is concerned. First of all, we haven't got it at room temperature or room pressure in the reservoir, have we? A. Oh, yes, they are quite practical.
- Q Now, just a minute. We haven't got the substances at room temperature and at room pressure in the reservoir, have we? A. They do not have to be.

- Q But will you admit that they do not exist in that form in the reservoir? A. No. Room temperature and room pressure does not exist in the reservoir, no.
- Q Nor at the well mouth do we have room temperature and room pressure? A. No, but you can impose it at the well mouth if you wish.
- Q You can impose it at the well mouth if you wish?
- A Yes.
- 10 Q But as a practical method in operating a well have you ever seen it imposed? A. Conditions close to atmospheric have been imposed at the well head.
- Q And temperature? A. Yes.
- Q Would you think that the wells presently producing in Leduc, they are producing at room temperature?
- A No, they are not.
- Q Now, I would like to pass to one other problem. I do not know whether, even on your narrow definition of petroleum, you included the solids, the heavier hydrocarbons? A. No, I did not.
- 20 Q You did not include them as part of your definition?
- A No.
- Q Now, the evidence you have been giving here about the various fields and so on is the same evidence that you have been giving before the Conservation Board on the gas hearing, isn't it, Dr. Nauss?
- A No, it is entirely different.
- Q Well, you used the same charts, didn't you? A. There is an overlapping. Yes, I gave some of the evidence.
- 30 Q And you prepared your estimates of gas reserves and so on for use at the conservation hearing? A. Yes.
- Q And at that time you were appearing as an expert produced by the - what company was it? A. Westcoast Transmission Company.
- Q Westcoast Transmission? A. Yes.
- Q Who were anxious to show there was as much gas as possible in Alberta, so that they could export it, that is a fair thing to say? A. Yes.
- Q And the solicitors for Westcoast Transmission are Messrs. Fisher, McDonald & Fisher, aren't they, the same solicitors who are the solicitors for the plaintiff in this action?
- 40 MR. STEER: What is the suggestion, Mr. Helman? A. The solicitor was Mr. D. P. McDonald.
- Q MR. HELMAN: Mr. D. P. McDonald, who is a member of the firm of Fisher, McDonald & Fisher? A. Yes.
- Q Will you tell me something about the gas and oil industry in Alberta, Doctor, because in making this extensive

- study you must know by 1906 natural gas was known in Alberta to be of commercial value? A. Yes, in 1906 they were using gas at Medicine Hat.
- Q It had ceased to be a waste dangerous product as it was previous to that? A. Well . . .
- Q It was considered that previous to that? A. Well, it was a waste dangerous product much later than 1906.
- Q I see. A. In fact, most of the gas in Turner Valley was wasted.
- 10 Q But it was known about the commercial value of natural gas? A. It was known about the commercial value of natural gas but in Alberta here we did not take it seriously, as we should have.
- Q But it, in fact, had a commercial value and was being used in Alberta in 1906 in Medicine Hat, you have told us? A. To a very limited extent.
- Q And it was used to a large extent in Ontario, wasn't it, in 1906? A. Yes, it was.
- Q And by 1906, oil had been found in Alberta? A. They
- 20 Q knew of the presence of oil in Alberta.
- Q They knew of the presence of oil in Alberta? A. Yes. Turner Valley wasn't discovered yet.
- Q Turner Valley wasn't discovered yet, but there were other explorations that had been made going back to 1906 and before then with regard to oil itself?
- A There wasn't an oil industry in Alberta in 1906.
- Q But there was, in fact, knowledge that there was oil in Alberta? A. Yes. The tar sands were known about at that time and a few other occurrences of oil
- 30 Q were known about. There was some drilling going on in British Columbia in the Flathead Valley area, and a small amount of drilling had been done in Alberta.
- Q And in the drilling in the Flathead area in British Columbia and in Alberta there had been some oil showings? A. Yes.
- Q And there was, in fact, in Ontario a considerable production of oil in 1906? A. Yes, it wasn't a large volume. No large volume of oil has been produced in Ontario even today.
- 40 Q Yes, but they had oil wells there? A. They had quite a number of shallow oil wells in Ontario in 1906.
- Q And by 1906 it was known that gaseous constituents accompany crude oil, that is, that there was gas dissolved in the oil? A. Yes, they knew that gas accompanied crude oil in 1906, but they did not recognize its importance in producing oil.

There was a great deal that they did not know about the relationship of gas and oil.

Q Yes, but it was known that gaseous constituents accompanied crude oil in 1906? A. Yes.

Q And that gas was dissolved in oil? A. I would not say it was generally known that gas was dissolved in oil.

10 Q But it was a known fact to people who were interested in studying it? A. To a few scientists who had studied the situation it was known. I would not say it was generally known. It was not known to the industry at large.

Q It was known to geologists, wasn't it? A. Yes, it was known to geologists and chemical engineers.

Q And it was also known that oil could not be produced without producing gas? A. I do not think that that was too widely known.

20 Q Well, it was known, though, in fact, both by geologists and engineers? A. Of course, I was not here in 1906, so that I am not in a position to answer.

Q I know, but you have read a lot of these things. You have read the history of the development of the science of petroleum and you know how it developed and what was known about it in 1906? A. Yes, I know a few things about that. But it is difficult for me to know how wide some of those practices were or how widely known those principles were.

30 Q I see. Taking Ontario as an example, in 1906 in Ontario they knew of oil, that oil could not be produced without producing gas? A. I imagine they would know that because they would see whenever they had produced oil there was some gas.

Q That was perfectly evident to anybody producing oil? A. Yes.

Q Now, by 1906 it was known that you got oil from wells? A. And springs.

Q And springs. But it was known that you got oil from wells? A. Yes.

40 Q There were wells drilled for oil? A. Yes.

Q And the technique of operating wells in 1906 was to use gas as a propulsive force to bring the oil to the surface? A. That was not the general use. As a matter of fact, in 1906 a lot of those wells were pumped.

Q Well, you say a lot of the wells were pumped? A. In Ontario most of those wells were pumping wells, as I

understand it.

Q Now, wasn't there a considerable use and knowledge of the fact that you could make use of the gas for the purpose of taking the oil, or having the oil come to the surface? A. I do not know.

Q You do not know that? A. No.

Q Now, I am going to suggest that the same technique was, approximately, used in 1906 as is used today, the only difference is that we have made some improvement in the conservation of oil? A. Our practices are very different today, very much better.

Q The production practices have changed? A. Yes.

Q But the fact was that they put down casing into the ground to get oil and they made use of gas that they found in the course of that drilling for the purpose of bringing the oil to the surface? A. Probably quite unintentionally. They happened to make use of the gas in some instances without knowing that it was the gas that was bringing the oil to the surface.

20 Q And in some instances with knowing it? A. I do not know whether they knew it or not.

Q I see. A. Reservoir engineering is a very new science, only in the last 15 or 20 years has there been much developed on reservoir engineering.

Q Now, I am going to suggest to you, witness, that you do not know, you do not know what was taking place in Ontario in 1906 with regard to the drilling of wells?

A I know a few of the things that were taking place, but I do not know the amount of knowledge that was behind it.

30 Q I see. Now, you were talking yesterday about solution gas, and I take it that that was the gas dissolved in the liquid, is that it? A. Yes.

Q And the illustration has been given to me that it is like sugar dissolved in water or coffee? A. That is a good example.

Q And when the gas is in that form, that is, dissolved in the liquid, the whole thing is a liquid? A. The whole thing is a liquid, yes, but it still, as in the case of your cup of coffee, the sugar dissolved in there is still sugar.

40 Q Yes, but the whole mixture is a liquid, to take your own definition you gave, it is non-compressible?

A The whole mixture is a liquid, but it is still a mixture.

Q And it is non-compressible? A. It is non-compressible.

- Q The whole mixture? A. Of what?
Q The water and sugar in the one instance, and the oil
and gas? A. The oil and the gas is not non-
compressible.
Q You mean the oil with solution gas is not non-
compressible? A. Under certain circumstances it
is highly compressible.
Q Oil with solution gas? A. Yes.
10 Q I am not talking about anything else, Dr. Nauss, I
am talking about the oil with solution gas in the
D-3 zone in the Leduc field. A. That is relatively
uncompressible, yes.
Q Now, when you were giving us definitions, I am sorry,
when you were giving us the functions which gas played
in connection with oil, you did not mention that it
reduces viscosity? A. No, I did not.
Q That is, that the gas dissolved in the oil makes it
flow more readily? A. That is correct.
20 Q And if you take the gas from the gas cap, the sol-
ution gas out of solution, it affects the mobility of
the oil? A. If you decrease the amount - if you
produce the gas you may decrease the amount of gas
which is in solution in the oil and thereby increase
its viscosity.
Q And in turn that means it decreases its mobility?
A That is right.
Q And at the present time, taking this piece of property
that we have, which is the subject matter of this
litigation, there are changes going on in the reservoir
30 by reason of the operation of surrounding wells? A. Yes.
Q So that as we are talking even there is a constant
change of liquids and gases in the reservoir? A. There
are changes going on, yes.
Q Now, will you look for a moment at the process of
recovering gas and oil from a reservoir with me,
Dr. Nauss, and would you say that this is a correct
statement, that in the process of recovering oil and
gas from a reservoir much of the substance in the
earth changes from liquid to gas, or gas to liquid,
40 depending on the type of reservoir? A. Within
the reservoir - what was that statement again?
Q In the process of recovering oil and gas from a
reservoir much of the substance in the earth changes
from liquid to gas or gas to liquid, depending on the
type of reservoir? A. Well, that can happen.
Q And it does frequently happen? A. It sounds as
though that was written about a condensate field.

- Q Well, in the condensate field we have it changing from gas to liquid? A. Yes, or liquid back to gas.
- Q And in the D-3 field we will have the same change as the substance is coming up through the well to the separators? A. The gas will be coming out of the solution, yes.
- 10 Q So that let me put the question to you again. In the process of recovering oil and gas from the reservoir, much of the substance in the earth changes from liquid to gas or gas to liquid, depending on the type of reservoir? A. I do not understand why the statement that much of the substance changes from gas to liquid is in there.
- Q I see. A. At Leduc I do not think there is a great deal of change from gas to liquid during the producing process.
- Q You see at the end of this it says, "Depending on the type of reservoir." A. Yes.
- 20 Q Would the statement be true depending on the type of reservoir? A. Depending on the type of reservoir material, I would say.
- Q I see? A. And the conditions.
- Q And the conditions of production? A. Yes.
- Q Now, I am staying with it as the substance stays in the reservoir. I do not want to get this room pressure stuff and so on. A. Yes.
- Q I am starting with it as the substance exists in the reservoir and I am bringing it to the surface?
- 30 A Yes.
- Q Into the separator? A. Yes.
- Q And what I am saying to you is that much of the substance in the earth -- now taking it as it exists in the earth and forgetting this definition you have got -- changes from gas to liquid or from liquid to gas depending on the type of reservoir in the process of recovering it? A. I do not understand that whole statement. I would rather not answer that.
- 40 Q You do not want to answer that? Well, if you do not want to answer it I suppose there is no way I can compel you. Now, would you deal with this statement, then, Doctor, that at the well head a given constituent such as butane may be divided between liquid and gas in different proportions, depending on the type of separation, atmospheric conditions, rates of flow, etc? A. Yes.

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- Q Now, can gas be produced from the D-3 zone without producing oil? A. Yes, it can.
- Q Without producing any oil whatsoever? A. By producing from the gas cap.
- Q And you would not get a trace of oil, is that it?
A You will get the liquid hydrocarbons that are dissolved in the gas cap. You see, the gas cap is the wet gas which contains liquefiable hydrocarbons.
- 10 Q Now, let us not get back to the room temperature and stuff. I am talking about producing from the D-3 zone, and you say that there is a method that you can take out the gas without getting any oil whatsoever?
A Well, you can produce oil from the gas cap . . .
Q I see. A. . . . without getting any of the crude oil from the crude oil zone.
Q I see. How would you just go about doing that, will you tell us, please? A. You just gun perforate in the gas cap and let it flow.
- 20 Q You gun perforate in the gas cap and let it flow? A. Yes.
Q And no oil will come up? A. From the crude oil zone.
Q How about the gas cap zone? There is some oil there too. A. There are liquefiable hydrocarbons in the gas cap.
- Q Yes, all right. These liquefiable hydrocarbons will come out with the gas, will they? A. Certainly, yes.
- Q Let us put it in reverse again, can oil be produced from the D-3 zone without producing gas? A. No.
- Q So that we are quite clear we cannot produce oil from the D-3 zone without producing gas? A. No.
- 30 Q And the same is true of the D-2 zone? A. In the D-2 you cannot produce oil without producing gas.
Q Would your lordship just give me a moment? I am looking for some material here. Dr. Nauss, when you were taking your course in Petroleum Engineering, what texts did you use? A. We used a book by Professor Tickell. Tickell was the Professor.
- Q And any other texts that you used? A. Yes, we used several other texts.
- 40 Q Can you give me the names of them? A. I do not remember them at the moment.
Q Can you tell us the titles of the books so that we can go and try and find them? A. I can get you the titles, yes.
Q You can get the titles, but you do not remember them?
A No.
Q Nor the authors? A. Well, just one, Professor Tickell.

- Q Professor Tickell, that is the only one that you remember? A. Yes.
- Q Are you a member of the American Society of Petroleum Geologists? A. Yes.
- Q And were you at the meeting held in Banff last summer by that association? A. Yes.
- Q And did you write a paper on gas, I mean, did you read a paper on gas? A. Did I read a paper?
- 10 Q Or give a paper or deliver a lecture? A. No.
- Q Didn't you speak to them at all? A. Not on gas.
- Q What was the subject matter that you spoke on?
- A A cross-section across Central Alberfa,
- Q A cross-section? A. Geological cross-section across Central Alberta.
- Q Did that deal with gas, that cross-section? A. No, it did not.
- Q Not at all? A. Mr. Slipper was going to give a paper on gas but, I suppose, because it was a meeting of the Petroleum Geologists, he decided not to.
- 20 Q Isn't this cross-section - didn't this cross-section deal with gas? A. No, it did not.
- Q Not at all? A. Dealt with the rocks themselves.
- Q With the rocks themselves? A. Yes.
- Q About what? A. The correlation from one back to the other.
- Q From which the gas formations could be derived?
- A Well, the cross-section was directed towards oil rather than gas. Part of it was on the Leduc reservoir and the Redwater reservoir and it was more interesting from the point of view of oil than it was
- 30 Q That is very interesting. The Leduc reservoir is spoken of usually as an oil field, isn't it? A. Yes, it is an oil and gas field.
- Q But usually spoken of in common parlance as an oil field? A. Yes, the oil is of more importance economically at the present moment, at least.
- Q Are you a member of the American Institute of Mining & Metallurgical Engineers? A. No, I am not.
- 40 Q You are a member of that Institute? A. No.
- Q Do both the A.A.P.G.E. and the American Mining & Metallurgical Engineers publish a paper on gas? A. Yes, both of them do.
- THE COURT: Any other questions?
-

RE-EXAMINATION BY MR. RILEY.

Q Dr. Nauss, just dealing more or less in reverse order with things, you say that at the present time the oil is of more economic importance than the gas in Leduc. When you say that have you given any lifting value to the gas? A. No, I have not.

Q If you give a lifting value to the gas which is the more important economically at the present time? In other words, by "lifting value" I mean, it is usual that if you do not use the gas you pump, which is then the more important economically? A. Well, I would have to calculate that, but I think the gas would have a good chance of being economically as important as oil.

Q It would be fair to say it would be fair to say it would be very close? A. Yes.

Q Now, sir, my friends referred you to the Science of Petroleum. I wonder if I might have the book for a minute? I now show you the book, and the writer points out to you that included under the heading of "Nomenclature of Petroleum Products" we find this at page 7,

"Included in this are the definitions for Petroleum products tentatively adopted by the American Society for Testing Materials."

The actual article commences on "Nomenclature of Crude Oil and its Products" at page 4. Do you observe the words, "to characterize" - at page 4 -

"to characterize the present immense confusion, it will be sufficient to indicate only a few typical examples of this industry both with regard to production as well as to distillation and trade."

Do you observe those words? A. Yes.

Q The article goes on,

"The raw material, namely, the crude oil, is known in the United States as 'Crude Oil' or 'Petroleum'."

Do you observe those words? A. Yes.

Q Yes. Now, do you observe at Page 8 a definition of "crude oil"? A. Yes.

Q What is the definition you observe? A. "Synonym

"for Crude Petroleum: A description of any oil in an unrefined state."

Q Yes. That is the synonym for "crude petroleum". That book was written in 1938.

MR. STEER: That is right, Doctor, is it?

A Yes.

Q MR. RILEY: Now, going back to page 5, do you observe this on page 5,

10 "The German term 'Petroleum' for illuminating oil does not correspond with the English definition, where the term 'petrol' is used for motor fuels, nor with the American definition, where the term 'petroleum' is used for crude oil."

Do you observe that language? A. Yes.

Q I think you said earlier that in that book, aside from the Nomenclature, all through the book the word "petroleum" was used as synonymous for "crude oil"?

A Yes, it is.

20 Q Now, sir, is there a society called the American Petroleum Institute? A. Yes, sir.

Q And is there, likewise, a society known as the American Gas Association? A. Yes, there is.

Q Have you the definitions used by the American Gas Association present in court? A. Yes, I have.

Q Is the American Gas Association regarded as an authoritative body? A. Yes, it is. It has on its Board a number of previous presidents of the Natural Gas companies.

30 Q Do you find a definition of "casinghead gas" or "wet natural gas"? A. Yes.

Q What does the American Gas Association define that substance as?

A "Casinghead Gas (Wet Natural Gas): Unprocessed natural gas which is produced from a strata containing crude petroleum and/or condensate."

Q Do you find the term "condensate" defined? A. Yes.

40 Q What is condensate?

A "Condensate - Natural Gas: The liquid producible as a result of retrograde condensation by a reduction of pressure which may be accompanied by a reduction of temperature, from a high pressure wet natural gas which existed in formation in a single gaseous phase."

Q Do you find the term "dissolved natural gas" defined?

A Yes.

Q And the definition?

A "Dissolved Natural Gas: Natural Gas in solution with crude oil in the reservoir."

Q Do you find the term "dry natural gas" defined?

10 A "Dry Natural Gas: Natural gas that is produced from a stratum that does not contain crude petroleum and/or condensate, or gas that has had those components removed."

Q Yes. Do you find the term "hydrocarbon" defined? A. Yes.

"Hydrocarbon: A compound that contains only hydrogen and carbon. The simplest forms of hydrocarbon are gaseous but with increasing molecular weights they become liquid and finally solid."

20

Q Do you find the term "natural gas" defined? A. Yes.

"Natural Gas: Any gas of natural origin as produced from oil or gas wells and consisting primarily of hydrocarbons."

Q Do you find the term "natural gas liquids" defined?

A Yes.

30

"Natural Gas Liquids: Those liquid hydrocarbon mixtures which are gaseous in the reservoir but are recoverable by condensation or absorption. Natural gasoline, condensate and liquefied petroleum gases fall in this category."

40

Q Now, that liquid petroleum gas or the liquefied petroleum gases, is that what Mr. Nolan was questioning you about yesterday, when you were on the stand, or when you were on the stand Friday, the L.P.G. gas? A. Yes, the liquefied petroleum gases, L.P.G. gases.

Q Now, do you find the term "natural gas reserves" defined?

A "Natural Gas Reserves: Gas in natural formation in wells, fields or pools."

Q Do you find the word "petroleum" defined?

A "Petroleum: A complex mixture of various hydrocarbons existing as a liquid in the upper strata of the earth."

Q Now, sir, are the definitions of the American Gas Association accepted as authoritative? A. Yes, they are authoritative.

Q Now, my friend was dealing with petroleum in what he called "the wide generic sense", and he said you are using it in the narrow sense. Leaving that phase of the matter alone, you used the expressions "petroleum substances", "petroleum compounds" and "petroleum fluids". When did they become a part of the nomenclature of the technologists? A. It was not until the science of petroleum began to expand, I would say, about 20 years ago.

Q Now, I will show you a publication called "Natural Gas Investigation, Federal Power Commission", bearing date of 1948. Are you familiar with this work? A. Yes. MR. NOLAN: Now, my lord, I hope in future my friends will put their case in chief in their examination-in-chief and not leave it for rebuttal, because all these matters were entered upon and dwelt upon at some length when this witness was being examined in chief. It is not open to my friends to wait until after the cross-examination, when we have finished our part of the questioning, to put books and matters of this kind to a witness when they themselves have opened this matter in their own direct examination, and I object to it, sir.

30 THE COURT: In this particular case, Mr. Nolan, I am going to allow you and Mr. Helman re-cross-examination if you wish to do so on those things that Mr. Riley has raised for the first time. I agree with you that your objection is a valid one.

MR. RILEY: Well, my lord, may I say this, sort of in self-defence. In examination-in-chief we did not introduce the meaning of words amongst the technologists, and I did not refer the witness to books of reference. I did not do that, our position being this plain, that the chemical or the mineralogical or the technical or the scientific meaning of these words has nothing to do with this lawsuit. My friends raised raised the question of nomenclature and my friends are the ones that raised it, and I am merely showing now . . .

40 THE COURT: That part of your re-examination is all right, but what you are trying, or doing right

now, is the part that Mr. Nolan is objecting to. You are introducing a brand new book that they did not touch on at all, and he says if you are going to introduce that kind of book you should introduce it in your direct examination, and I agree with him.

MR. RILEY: Very well, sir. Of course, I am only trying to show that this nomenclature . . .

THE COURT: You can go ahead and I have told Mr. Nolan I will allow the other counsel to re-

10

cross-examine on that book.

Q

MR. RILEY: All right.
At page 71, sir, you observe the language,

"The production of oil requires the expenditure of energy. It must be moved through the pores of the reservoir sand to the well bore and then raised to the surface. Oil, in itself, possesses virtually no mechanical energy which can be utilized in its production and, hence, the required energy must be supplied from other sources.

20

One of the primary sources is natural gas. This fact was little realized 15 or 20 years ago. E. L. DeGolyer has stated, 'It was not until 1917 that even the most advanced technologists of the time understood the function of gas in the production of oil. It was not until 1924 that Beecher and Parkhurst gave us the first quantitative basis for our understanding of the importance of the solubility of gas in oil and viscosity effects of such gas.'

30

MR. HELMAN: Now, what are you reading, Mr. Riley? My friend takes a book, it is a composite book, I take it, and we do not know the author, we do not know anything about what it is, or anything like that, who wrote that particular part that you are reading?

MR. RILEY: I am reading from page 71 under the heading, "Special Problems Incident to the Production of Gas Associated with Oil", being the Natural Gas Investigation report by Commissioner Nelson Lee Smith and Commissioner Harrington Wimberly.

40

MR. HELMAN: What date is that?

MR. RILEY: 1948.

Q

"In the earlier history of the industry, natural

"gas produced with oil was considered a nuisance and was largely blown to air. In many instances, the gas was produced as rapidly as possible in order to get rid of it in the hope of obtaining greater oil production. The fallacy of this concept of reservoir conditions is now fully realized. It is an accepted fact today that gas plays one of the principal roles in oil production."

10

Now, sir, do you agree with the statement that has been read to you from that book? A. Yes.

Q

Now, sir, my friends have mentioned the Gas Investigation before the Board considering export, and I believe we raised it too. Were there numerous experts present at the Commission hearing? A. Yes, there were.

Q

Under "Gas Reserves", in calculating gas reserves, did any experts fail to include gas in solution as natural gas reserves? A. No, it was always included.

20

Q

Getting back to nomenclature, was this concept of petroleum substances, petroleum fluids, petroleum compounds . . .

MR. HELMAN: Which concept?

MR. RILEY: And this so-called wide usage of petroleum, when that was in existence in 1906 and generally used . . .

MR. HELMAN: My friend has asked several questions bundled together, my lord. He said, "Was this concept" and he gives a half a dozen concepts as an illustration and he tacks on to it something else. I submit, my lord, that that question must be broken up into its constituent parts.

30

THE COURT: The latter part of it merely divides the first original sentence, and if you want to take them one at a time, all right. I see no objection to your question. You simply illustrate to the witness what you are talking about. Taking the first part of your question, I had not the faintest notion of what you were talking about. However, that does not prevent the witness from not knowing, but after you had finished then I did know. I knew where you were driving, at least, having heard the plaintiff's examination.

40

Q

MR. RILEY: Are you able to answer it, sir? A. Yes, I think you mean that was the usage of the word "petroleum" as an adjective as part of a broad phrase meaning "petroleum substances in existence in 1906".

- Q Yes, generally used? A. I was not here in 1906 but I do not believe that it was.
- Q Well, from your reading, do you know? A. I have seen no instances in my reading where it was used.
- Q All right.
- MR. RILEY: There is this, that I asked him to bring something that I could have asked him about in chief, namely, a core from Leduc.
- MR. NOLAN: As long as it is based on your forgetfulness, I won't object.
- 10 MR. RILEY: All right.
- THE WITNESS: However, in my forgetfulness, I did not bring it.
- Q MR. RILEY: Well, both oil and gas do come from the rock, and you will produce the core?
- A Yes.
- Q All right, thank you.
- MR. NOLAN: I have no questions to ask.
- THE COURT: Mr. Helman?
- MR. HELMAN: My lord, I wanted to take a look at this book my friend was using and showing the witness part of it, and I was going to ask your lordship for permission to read it during the lunch hour and recall the witness, if I desire to have him, after I have had an opportunity of taking a look at this book.
- 20 THE COURT: Yes. Any other questions from Dr. Nauss?
- MR. HELMAN: Not at the moment, not unless something arises out of the book itself after I have read it.
- 30 THE COURT: It is twenty minutes after eleven. At this moment I am going to adjourn until half past eleven and I am going to ask the Clerk of the Court to see that this room is thoroughly aired during that ten minutes. Court will stand adjourned until 11.30.
- (Hearing resumed after short adjournment.)
- 40 MR. HELMAN: My lord, as far as the last witness is concerned I am not going to ask him any further questions, so that he may go, if your lordship wishes to let him go.
- THE COURT: There are no questions to be asked of you, Dr. Nauss. We welcome your presence here but if you do not want to stay, you are at liberty to go.
- DR. NAUSS: Thank you, my lord.
-

HENRY VINCENT O'CONNOR,
having been first duly sworn, examined by Mr. Riley,
testified as follows:

- Q Mr. O'Connor, sir, what is your occupation? A. I am
a practicing barrister and solicitor in the City of
Calgary.
- Q A member of the Alberta Bar? A. Yes.
- Q When were you born, sir? A. In the Province
of Ontario in 1901.
- 10 Q When were you admitted to the Bar? A. March 17th,
1927.
- Q You say you were born in Ontario; when did you first
come to the Province of Alberta? A. In the year
1918 and I have been here ever since.
- Q When did you first become associated with the petroleum
and natural gas industries? A. Well, in 1922 I
was in the law office of J. J. O'Connor, K.C., and in
1925 or '26 he incorporated the Great West Oils Limited
that drilled a well in Turner Valley.
- 20 Q What was your interest in Great West Oils? A. We
were the solicitors for the company and helped to
finance it.
- Q Now, from that date on have you been connected with
the petroleum and natural gas industries? A. Yes,
we were. I was the solicitor for, an officer of,
about 14 small independent companies that had various
holdings of petroleum and natural gas in Turner Valley,
Pouce Coupe and the Leduc-Calmar fields, and at Ellerslie,
South of Edmonton.
- 30 Q Yes? A. And I also was solicitor for a number
of petroleum and natural gas syndicates.
- Q Yes? A. Probably half a dozen of them. And as
a solicitor I acted for a large number of private
companies who were dealing in petroleum and natural gas
and private leases, assignments and transfers, royalty
trust agreements, dealing with various interests in
them and farm-out agreements; and I also perused and
advised regarding similar documents prepared by other
solicitors and conveyancers who were dealing with
petroleum and natural gas reservations with clients
that I was acting for.
- 40 Q During the experience you have mentioned have you
encountered the term "petroleum"? A. Yes, I have
encountered the term "petroleum" and "natural gas".
- Q Petroleum and natural gas? A. Yes. But I have
never prepared any documents relating to petroleum as
apart from natural gas.

- Q Yes. Have you ever seen a document restricted to petroleum alone? A. Yes, once or twice. In checking some of the old titles away back to 1912, sometimes they reserved petroleum alone, or coal and petroleum, but I did not draft any document dealing with petroleum that did not have reference to natural gas too.
- Q Have you ever come across any lease or similar document, either drawn by you or by another solicitor, whereby there was a lease of petroleum alone? A. No, I never saw a lease dealing with petroleum alone, but I remember seeing an advertisement in a Calgary newspaper early this year, I think it was, where an owner of petroleum in the Stettler area . . .
- 10 MR. HELMAN: Just a minute. I am objecting to this. If there is an advertisement in a newspaper, let us get the advertisement and see what it says. Surely this witness cannot say that he remembers seeing an advertisement in a newspaper. He is not an historian.
- 20 MR. RILEY: All right, we will skip that.
- Q Have you ever encountered the term "natural gas"?
A Yes, many times.
- Q You have never seen an actual conveyance, you say, of petroleum without the words "and natural gas" accompanying it? A. No, I never have.
- Q All right, sir. Have you ever seen a lease for natural gas alone, do you know anything about those? A. No, I have never seen one or dealt with one, but I know there are leases dealing with natural gas. I have negotiated for natural gas alone for a carbon black company, but I never prepared a lease with natural gas alone. Every one I have prepared had petroleum and natural gas.
- 30 Q From your experience, what does the term "petroleum" mean in the language of those engaged in the conveyancing of land?
MR. NOLAN: Now, my lord, this raises a very important question and perhaps I might be permitted to say something to your lordship on the point before Mr. O'Connor is asked to answer.
- 40 THE COURT: Let us have the question asked read, Mr. Howard.
BY THE REPORTER: "From your experience, what does the term 'petroleum' mean in the language of those engaged in the conveyancing of land?"
THE COURT: Thank you, Mr. Howard.
MR. NOLAN: My lord, as I apprehend

10 Mr. Steer's opening, and as I apprehend the conception of this case entertained by counsel for the plaintiff, they take the position that the meaning of the term "all petroleum" in this case is a question of fact, namely, what the words mean in the vernacular of, I think it is mine owners, land owners and commercial men at the time that they were used. Of course, we do not admit that that is the test, and say that the question of the vernacular of these three types of people is not the matter which is in issue in this case. But assuming that it is, then, of course, we say that the vernacular of the mine owner, and of the land owner and of the commercial men, is in itself a question of fact and I do not think Mr. Steer would disagree with that.

20 Now, my lord, also in his opening, my friend Mr. Steer made reference to two cases, the North British Railway vs. Budhill Coal and Sandstone Company, 1910 Appeal Cases, at 116, and a case called Lord Provost and Magistrates of Glasgow against Farie, to be found in 13 Appeal Cases at 657. Now, my lord, . . .

MR. STEER: Just for the sake of clarity, my lord, my reference was to the Farie case and then to the Barnard-Argue case, 1912 Appeal Cases, and the Glasgow case was an incidental reference.

30 MR. NOLAN: I want to refer your lordship to our own case in our own courts, the case of Stuart and Calgary and Edmonton Railway Company et al, which is reported in 1927, 1 W.W.R., 639, being the judgment of the Honourable Mr. Justice Boyle, and particularly at pages 649 and 650. And I may add that this judgment was affirmed by the Court of Appeal in 1927, 3 W.W.R. at page 678. Now, in the course of his judgment there - your lordship will remember the case. It was the question of the reservation of mines and minerals in an Agreement of Sale, but it so happens that the transfer which was registered did not contain the reservation, and the question was: "Had there
40 been a conveyance of mines and minerals?" and the Court held that there had not because those words "mines and minerals" were not contained in the transfer. That is not the point I want to make. It is the procedure used at the trial and the judgment of the learned trial judge as to evidence of the kind which is now proposed to be adduced that I wish to draw your attention to.

At page 649 his lordship
said:

10 " A number of witnesses for the defendants
gave opinion evidence as to what construction
should be placed on some of the documents in
the case. I had serious doubts at the time
as to the admissibility of this evidence but
as it was strongly pressed by counsel, seem-
ingly relying on North British Railway v.
Budhill Coal and Sandstone Company (1910)
Appeal Cases 110, at pages 127-8, 79 L.J.P.C.
31, 101 L.T. 609, 26 T.L.R. 79, and Glasgow
(Lord Provost) v. Farie, supra, I admitted
it, but I now can see no authority in these
cases after reading them for admitting such
evidence. In fact the very thing these
witnesses were trying to do is what in my
view the Court is required to do in this case,
viz., place the proper construction on the
20 language used in the documents. I should
therefore dismiss entirely from my mind this
evidence; that is not necessary, however, as
it never had any impression on my mind, I do
not think it is of the slightest importance
what construction witnesses now think I should
place on the documents. It is something I
must decide by reading the documents in the
light of the surrounding circumstances of the
time. I do not think that any of the oral
30 evidence in this case is of much value except-
ing that giving the history of oil and gas
exploration in this province up to 1905. The
plaintiff's case, it occurs to me, must stand
or fall according to what is the correct con-
struction to be placed on the documents."

40 Well, my lord, there is
another case which I would like to refer to because
there has been a question put to this witness which,
I submit, is merely a matter of his opinion as to
what should be included in the word "petroleum".
Unfortunately, it is not available to us. The case,
my lord, is Fawson v. Noonan, (1879) R.E.D. 377,
and that is Russell's Equity Digest. However, there
is a note on that case to be found in The Canadian
Abridgement, Volume 11, at page 1297. The Canadian
Abridgement, Volume 11, 1297. The heading of this

note, my lord, I, perhaps, may be permitted to read.

"Custom or Local Usage. Parol Evidence Rule.
Explanation of Particular Words in Contract
by Local Custom or Usage - What must be proved
of Custom."

And then there is a quotation from Mr. Justice Ritchie:

10 "A contract may be affected by proof of the
existence of a custom or usage, as where words
used by the parties have, by known usage, by
local custom, or among particular classes,
acquired a meaning different from the general
one, such evidence may be resorted to in order
to ascertain their intention. Or if there
has been a recognized practice with reference
to the transaction out of which the contract
arose in such cases the parties may be supposed
20 to have assumed the existence of the practice
and to have used the words as understood in
the locality. But the usage and practice must
be general and certain, not depending on the
judgment and opinion of witnesses, but the fact
of their existence must be clearly established,
so that both parties must be presumed to have
been cognizant of them, and to have made their
contract with reference to them."

30 And so, my lord, with
respect to the question which has been put to the
witness Mr. O'Connor, I submit that it is not a
matter of fact that he is asked to testify to but
the endeavour is being made to extract from him
his judgment and opinion which will not be of assist-
ance to the Court in deciding the issue in this case,
and I object to the question.

40 THE COURT: I am going to be like the
late Mr. Justice Boyle, I am going to hear the answer,
but whether it affects me a particle or not, is another
matter.

MR. RILEY: Mr. Howard, would you please
read my question to the witness?

BY THE REPORTER: "From your experience, what
does the term 'petroleum' mean in the language of
those engaged in the conveyancing of land?"

A "Petroleum" means liquid oil or crude oil produced
from the earth.

- Q And in conveyances, in conveyancing, what about the term "natural gas"? A. "Natural gas" is the natural gas produced from the earth, either with crude oil or by itself.
- Q And in the language of conveyancers, is natural gas embraced within the substance petroleum? A. Well, from my experience of what is meant by the term "petroleum", that petroleum was one substance and natural gas was a distinct and different substance, and that distinction was maintained in all conveyancing and agreements that I had anything to do with, or that I have observed or seen.
- 10 Q Does your experience extend to areas in which there is oil and gas? A. Yes. I would say in the Leduc field is oil and gas and the Viking-Kinsella, where we had some reservations, that is a straight gas field.
- Q So that you have had both types or sources? A. Yes.
- Q Thank you, sir. Just answer my friends.

20

CROSS-EXAMINATION BY MR. NOLAN:

- Q Mr. O'Connor, when did you begin to draw leases and documents pertaining to the petroleum industry? What year was it? A. Well, I would say in the early thirties I drafted them myself.
- Q Yes? A. Before that, I had seen them and read them.
- 30 Q But you became a draftsman in your own right sometime after 1930? A. Yes.
- Q Or about that time? A. Yes, I had.
- Q I suggest to you, Mr. O'Connor, that the reason that you used the words "petroleum and natural gas" was for the sake of abundant caution? You know, we lawyers are cautious people, Mr. O'Connor, and I am suggesting that you were cautious when you did that?
- A Yes. In addition to that, I was dealing separately and with special clauses with the natural gas.
- 40 Q And when you deal separately, when a special clause is brought in, you have to make some reference to it?
- A Quite.
- Q And perhaps that is the reason that you use "petroleum and natural gas"? A. Well, when they wanted to use both terms, and would not be content with one.
- Q They were as cautious as you were, or perhaps your caution infected them? A. Everybody seemed to

be the same.

Q Thank you. That is all I will ask you.

CROSS-EXAMINATION BY MR. HELMAN.

- Q Do you know if either you or your brother have a financial interest in this lawsuit? A. No, we have not.
- 10 Q Have you got any interest under a syndicate agreement of any kind? A. No.
- Q You are positive of that, are you, witness? A. Yes, I do not know of any. I would know if we had.
- Q I see. Had you at any time to deal with an actual conveyance of petroleum such as is contained in a C.P.R. agreement? A. Not when it just mentioned the one term, no.
- Q And do you attach any importance to the word "all" if it was said "all petroleum"? A. Yes.
- 20 Q That would be a more comprehensive term than the simple word "petroleum"? A. Well, it means the same as "petroleum" so far as I know.
- Q But if you say "all petroleum", it would include every classification of petroleum? A. It would include all the liquid and crude oil.
- Q And you know that in the United States they always use the expression "oil and gas", don't they, in conveyances there? A. I do not know very much about the United States.
- 30 Q Have you had occasion to look at the forms of leases that are used in various United States textbooks?
A Not particularly.
- Q Have you got Thornton on Oil and Gas in your office?
A I do not think so. I do not think that we have.
- Q Have you any form book in your office on oil and gas?
A Not on oil and gas.
- Q I am going to suggest to you that every form book that you can find that has been published in the United States uses the expression "oil and gas"? A. I do not know that.
- 40 Q And the leases all use the expression "oil and gas"?
A I do not know that.
- MR. RILEY: That is not true at all.
MR. NOLAN: Are you willing to be cross-examined on that?
MR. RILEY: No, but I just say that one should be careful of the question that one puts to a witness.

MR. NOLAN: You can take care of that
in your own way without giving evidence.

Q MR. HELMAN: Do you use the term "oil
and gas" in your leases? A. No, "petroleum
and natural gas".

Q I see. You have never used the expression "oil and
gas"? A. I do not think I ever have.

Q I see.

10 THE COURT: Any other questions?
MR. STEER: No, my lord, I will call
Mr. Thom.

JOHN MCGREGOR THOM, having
been first duly sworn, examined by Mr. Steer, testified
as follows:

Q Mr. Thom, you are the registrar of land titles for
20 North Alberta? A. That is correct.

Q And your office is situated at Edmonton? A. That
is correct.

Q Have you title 115-C-39 of the Canadian Pacific Rail-
way Company covering the whole of Section 1, Township
48, Range 12, West of the 4th Meridian, in the Prov-
ince of Alberta?

MR. HELMAN: What land is that? I never
heard of it before?

30 MR. STEER: It is land in the North
Alberta Land Registration District.

MR. NOLAN: As I understand it, a
question is being addressed to the witness with respect
to the whole of Section 1, Township 48, Range 12, West
of the 4th Meridian. I do not know what the question
is going to be, and I do not care. This land is not
the land at issue in this action, and no evidence
respecting it can be relevant here.

40 MR. STEER: Perhaps if I indicate to your
lordship my purpose, your lordship will be able to rule,
and in order to indicate my purpose I have got to state
what the evidence will be, and your lordship will
accept it or reject it.

MR. NOLAN: I understand perfectly well
that my friend must tell your lordship what it is
going to be before your lordship can rule, and I am
quite content that your lordship will disregard it
in the event you rule against it.

10 MR. STEER: The Canadian Pacific Rail-
way has a title to the whole of Section 1-48-12-4,
and out of that title is cancelled into the name of
James M. Cox the north half of 1, and that title,
by intervening transfers, got into the name of
Phillip James Cox and Phillip James Cox conveyed to
Northwestern Utilities Limited all the natural gas
which may be found to exist within, upon or under
the north half of section , and I am tendering
evidence, my lord, for the purpose of establishing
that as of the date of the conveyance by Canadian
Pacific Railway to James M. Cox on the 15th of Dec-
ember, 1923, the Canadian Pacific Railway regarded
natural gas and petroleum as two separate things.

20 MR. HELMAN: How do you get that?
They did not sign any subsequent ones. Well, now,
just let me understand this matter because it
relates to the C.P.R. The C.P.R., as I understand
it, did not transfer the natural gas. It was a
subsequent purchaser who purported to give the North-
western Utilities sole title to the natural gas. Am
I right in that, Mr. Steer?

MR. STEER: Correct.

30 MR. HELMAN: How can that conceivably be
evidence against the C.P.R. as to what somebody who
had purchased property from the C.P.R., with the
reservation for petroleum, may have seen fit to do
with the Northwestern Utilities? We cannot get
that far away. I mean, that cannot be evidence,
something that was done in 1923 by a purchaser from
us with another company altogether and in which we
had no part. That certainly cannot be evidence in
this case, my lord, and I submit that to your lord-
ship.

40 MR. STEER: My lord, we must go back to
the tests on this question of fact that are laid down
in the cases which I have cited to your lordship.
The meaning of the word "petroleum" is a question of
fact and evidence on that question of fact, in my
submission, can be led as to what meaning was attached
to that word by all classes of people who were called
upon to deal with the word. The Land Titles Office
at Edmonton in 1923, knowing that petroleum underlying
this land was reserved to the Canadian Pacific Railway,
as I will demonstrate if I am permitted to examine the
witness, the Land Titles Office at Edmonton, knowing
petroleum to be reserved to the Canadian Pacific Rail-

way, accepted a transfer from a registered owner of land, who owned everything in the land except what was reserved to the Canadian Pacific Railway, accepted and registered a transfer of the natural gas. Nobody, in my respectful submission, could be more vitally interested in determining what is the meaning of the word "petroleum" in 1923 than those officers who were in charge of the titles in this province, and the evidence which is to be submitted is evidence of the fact that to the officials of the Land Titles Office in Edmonton petroleum was a liquid and natural gas was a gas, and it is submitted as evidence of that fact, my lord.

10

MR. NOLAN: Well, my lord, they do not prove that, but if they are taken at their face value, these documents, I have only two things to say: Firstly, they do not pertain to the lands in question in this action; and, secondly, the conveyance to which my friend makes reference of "all natural gas" is between persons not parties to this action.

20

THE COURT: I am going to permit you to put in the title and to examine on it, subject to the objections which I have heard and, subject to those objections, I am going to consider the evidence. If it has nothing to do with this action, if I come to the conclusion that it has nothing to do with this action, then I will pay no attention to it.

MR. STEER: Very good, my lord. I would like to make this observation - well, I won't bother.

30

THE COURT: You were offering title 115-C-39?

MR. STEER: I am offering now a certified copy, my lord, of title 115-C-39 in the name of the Canadian Pacific Railway Company covering the whole of Section 1-48-12 West of the 4th Meridian. .

THE COURT: Subject to the objections it will be marked Exhibit 32.

40

CERTIFIED COPY CERTIFICATE
OF TITLE TO CANADIAN PACIFIC
RAILWAY COMPANY MARKED
EXHIBIT 32.

Q MR. STEER: And this title is a cancellation, Mr. Thom, is of the 15th of December, 1923, cancelled and a new Certificate of Title issued to James M. Cox et al, the 15th of December, 1923?

A That is the north half of 1.

Q The north half of 1? A. The north half of 1-48-12

West of the 4th, except coal, petroleum and valuable stone.

MR. NOLAN: I take it my objection, if I may be permitted to say so, my lord, will be with regard to all three documents?

THE COURT: Yes.

Q MR. STEER: And then am I right in thinking that the north half of 1 eventually got into the name of Phillip James Cox? A. That is right.

10 Q And the date of Phillip James Cox's title is . . .
A . . . the 11th day of October, 1946.

Q The 11th day of October, 1946? A. Yes.

MR. STEER: I tender that, my lord.

THE COURT: Exhibit 33.

CERTIFIED COPY CERTIFICATE
OF TITLE TO PHILLIP JAMES COX
MARKED EXHIBIT 33.

20 MR. MITCHELL: Can we get the title number, Mr. Steer?

MR. STEER: Yes. The title number is 210-K-114, and it is a title in the name of Phillip James Cox for the north half of section 1-48-12-4, reserving unto the Canadian Pacific Railway Company all coal, petroleum and valuable stone.

Q And then this title Exhibit 33 bears a notation as to a cancellation in favour of Northwestern Utilities Limited of what? A. All gas within, upon or under . . .

30 Q "all gas"? A. All natural gas within, upon or under the north half of one.

Q The north half of one? A. Yes.

Q And what I now show you is a certified copy of title 87-C-116, Mr. Thom? A. In the name of Northwestern Utilities Limited, which covers all natural gas which may be found to exist within, upon or under the north half of section one.

40 MR. STEER: May I tender that, my lord?

THE COURT: Exhibit 34.

CERTIFIED COPY CERTIFICATE
OF TITLE TO NORTHWESTERN
UTILITIES LIMITED MARKED
EXHIBIT 34.

MR. STEER: As has been pointed out, my

lord, this is a title in favour of Northwestern Utilities Limited of all natural gas upon or under the north half of 1-48-12-4.

Q I am showing you a collection of documents here, Mr. Thom. Those documents are what, Mr. Thom?

A Abstracts issued from my office.

Q Covering various parcels of land? A. That is correct.

Q Registered in the name of, originally? A. C.P.R.

10 Q Canadian Pacific Railway? A. Yes.

MR. NOLAN: And these, my lord, will be subject to the same objection, if you please, sir?

THE COURT: Yes.

Q MR. STEER: And what we have here, Mr. Thom, is a collection of fifteen abstracts covering various parcels of land originally in the name of the Canadian Pacific Railway Company, am I right?

A Correct.

20 MR. STEER: Could I tender those fifteen abstracts, my lord, as one exhibit?

THE COURT: Any objection?

MR. STEER: There is the general objection with regard to the admissibility.

MR. HELMAN: And we are still objecting to these as being irrelevant, my lord.

THE COURT: Exhibit 35.

FIFTEEN ABSTRACTS IN QUESTION
MARKED EXHIBIT 35.

30

MR. STEER: I think perhaps I ought to tell your lordship what these abstracts disclose. The first is that of the 31st day of January, 1915, the title to a quarter section, which I need not describe, stood in the name of the Canadian Pacific Railway Company, or, rather, I should say that it shows that as of the 6th day of August, 1902, the title stood in the name of the Canadian Pacific Railway, and by a transfer of that date, which was not registered until the 1st of February, 1915, the land went to Peter Tilberg without reservation. That with regard to another parcel, by transfer dated the 6th of August, 1902, registered the 21st of July, 1914, the title went to Joseph W. Woods without reservation. That by instrument dated the 20th of July, 1903, registered the 10th of January, 1912, another parcel went to Walter H. Brunisdon,

40

without reservation.

That by instrument dated the 14th of July, 1904 and registered the 27th of October, 1904, a parcel went to George H. Field, excepting coal.

10 That by transfer dated the 8th of February, 1904, registered the 4th of March, 1915, a parcel went to James William Blain, excepting to the C.P.R. all mines and minerals.

Again by instrument dated the 16th December, 1905, registered the 25th of June, 1906, a parcel went to J. A. Gibson, excepting coal and petroleum.

20 The 9th of July, 1906, and registered the 7th of September, 1906, a parcel went to Western Canada Land Company Limited, no reservation.

The 5th of November, 1912, and registered the 16th of December, 1913, a parcel went to Peter Hjalmssohn, reserving to the C.P.R. all gas, petroleum, mines and minerals, with the right to work the same.

30 By instrument dated the 20th of November, 1913 and registered the 3rd of January, 1914, a parcel went to Lucien Dubuc, reserving to the C.P.R., the Canadian Pacific Railway, coal, petroleum and valuable stone and the right to work the same.

40 MR. HELMAN: I just rise to say, while my friend is reading them, the abstracts, that one is obviously wrong because the word "all" is left off, and I am sure the word "all" must be in the original reservation, and I would much prefer to have the titles put in rather than the abstracts, because I do not think they are very accurate.

Q MR. STEER: Have you got the titles, Mr. Thom? A. No, I do not have them.

MR. STEER: The titles are prima facie evidence, or the abstracts are, but if my learned friend can show an inaccuracy in the abstract, he is at liberty to do so.

MR. HELMAN: I do not think that is a

fair way to do it. We know that the reservation is "all coal, petroleum and valuable stone" and this abstract must be wrong. Why put in a document that does not carry the true picture?

THE COURT: Well, is there any objection to you putting it in?

MR. HELMAN: I beg your pardon?

THE COURT: If Mr. Steer is wrong, he is wrong, and that is all there is to it, and you should correct him.

10

MR. HELMAN: What should be put in are certified copies either of the transfers or a certified copy of the actual title itself, but to put in this kind of an abstract which has a sort of shortening of the reservation, I submit, is not a correct thing to do and not the best evidence for your lordship to go on.

MR. STEER: My lord, the Evidence Act says that these abstracts are prima facie evidence of their contents, and it is only as a matter of convenience and to save a great big bulky record, and to save Mr. Thom's convenience that we are doing it in this way. If my learned friend should establish that this abstract is wrong by the omission of the word "all", or if Mr. Thom can get us the information, I will be perfectly happy to have the abstract corrected.

20

THE COURT: All right, go ahead.

MR. STEER: By instrument dated the 14th of January, 1915 and registered September 17th, 1919, a portion to Newton Egge, excepting coal.

30

By instrument dated 22nd February, 1916, registered May 4th, 1916, a parcel "to Edmonton, Dunvegan and B.C. Railway, excepting mines and minerals which, without restricting the generality thereof, shall be deemed to include all gas and petroleum."

By instrument dated the 18th of January, 1917, registered February 9th, 1917, a parcel to Henry Nelson, excepting Coal and petroleum.

40

By instrument dated December 10th, 1919, registered February 17th, 1920, a parcel to His Majesty, King George the Fifth, in right of Canada, represented by the Soldier Settlement Board, reserving all gas, petroleum, mines and minerals.

By instrument dated 18th of February, 1922, registered March 25, 1924, a parcel to Minnie B. Johnson, reserving all coal, petroleum and valuable stone.

MR. HELMAN: You got it right that time.

THE COURT: Pardon?

MR. STEER: I got it right that time, according to Mr. Helman.

10 By instrument dated July 25th, 1942, and registered the 8th of May, 1943, a parcel to Edward Christian Larsen, excepting mines and minerals, "which, without restricting the generality thereof shall be deemed to include all gas and petroleum."

MR. NOLAN: My lord, Mr. Steer did not take the trouble to read the descriptions, because it would have taken too long, and I am only going to ask him to agree with me that none of these abstracts affect the northeast quarter of section 19, Township 50, Range 26, West of the 4th Meridian.

20 MR. STEER: Correct. When my learned friend uses the word "affect", I suppose he means that they do not have any specific relation to that land.

THE COURT: You mean geographically?

MR. STEER: Geographically.

MR. NOLAN: I will put it another way.

30 The lands mentioned in the abstracts are not the northeast quarter of Section 19, Township 50, Range 26, West of the 4th Meridian?

MR. STEER: I took it that is what my friend meant in the first place.

Q Now, Mr. Thom, perhaps you will produce for me instruments registered in your office, known as 1123-J and 435-P?

A. Yes, sir.

MR. NOLAN: My lord, may we just have a moment to look at these, please?

THE COURT: Yes.

40 MR. NOLAN: I object to them, my lord. I take it my friend is endeavouring to prove what he is pleased to call the vernacular through these documents. But on a cursory examination of them, I cannot find any reservation in them at all.

MR. STEER: Perhaps that might be the reason why they are being tendered.

MR. NOLAN: Well, then, it is the absence

of proof that my learned friend puts forward, which I think is equally objectionable.

10 MR. HELMAN: My lord, I want to take objection, because it shows your lordship the breadth that this case is going to take. Are we going to call witnesses from the C.P.R. to say that the Western Canada Land Company had a special deal in which the question of petroleum was discussed and they decided to leave it out and that that covered the whole thing with regard to this party? I mean, how far afield are we going? It is an illustration to me, a striking illustration, my lord, as to the danger of permitting anything to go in except that which relates to this particular piece of property. Who knows what the transaction was between the C.P.R. and the Western Canada Land Company, or why they gave them the whole of the property, or did not make reservation in there, or what special terms there were there back in 1903 that operated between them? I mean, are we going to go through every transaction that the C.P.R. has had over the breadth of the whole of Canada and take out the ones that we like to put in? I submit it is clearly not admissible, and it is going to make a case which is of a length that is going to get out of all hand.

20 THE COURT: I am going to allow them, subject to objection.

30 Q MR. STEER: I show you here, Mr. Thom, a document which is a transfer, number 1123-J, Canadian Pacific Railway Company to Frank Waugh. . .

A Yes.

Q . . . covering a portion of land? A. The southwest quarter of section 1, 59, 24, West of the 4th.

Q Any reservations or exceptions? A. There is no reservation or exception.

Q Yes. What about this other document? A. 435P is a transfer from the C.P.R. . . .

40 Q Dated? A. . . . dated the 9th of July, 1906, covering the northwest quarter of Section 1, the whole of Sections 5 and 15, and the northeast quarter and the south half of Section 17, etc.

Q I do not think we need to go through all the land.

A To the Western Land Company, with no reservation.

Q With no reservation as to mines and minerals? A. Yes, that is correct.

THE COURT: Do you want to put them in as one exhibit?

MR. STEER: Yes, my lord.
THE COURT: Exhibit 36.

TWO TRANSFERS FROM CANADIAN
PACIFIC RAILWAY COMPANY
MARKED EXHIBIT 36.

THE COURT: I think that is as far as
we will go now, Mr. Steer.

10 MR. STEER: There is one question that
I would like to ask, if I may, and it is with regard
to this exhibit and I will be through, my lord.

Q What is the form number found on this exhibit,
Mr. Thom? A. With regard to the transfer to
the Western Canada Land Company Limited, at the foot
of the page, "Form 106-500-Feb. '06", and with respect
to the transfer to Waugh, "Form 287, 500, July 03."

20 THE COURT: We are not progressing very
fast. Do you gentlemen think that an hour will be
sufficient to get that sandwich and cup of coffee?

MR. STEER: Sufficient for my purposes,
my lord.

MR. NOLAN: More than sufficient for
mine.

MR. HELMAN: And for mine.

THE COURT: All right. Court will
stand adjourned until 1.30.

30 (Hearing resumed at 1.30 P.M.)