THE NEGOTIATOR

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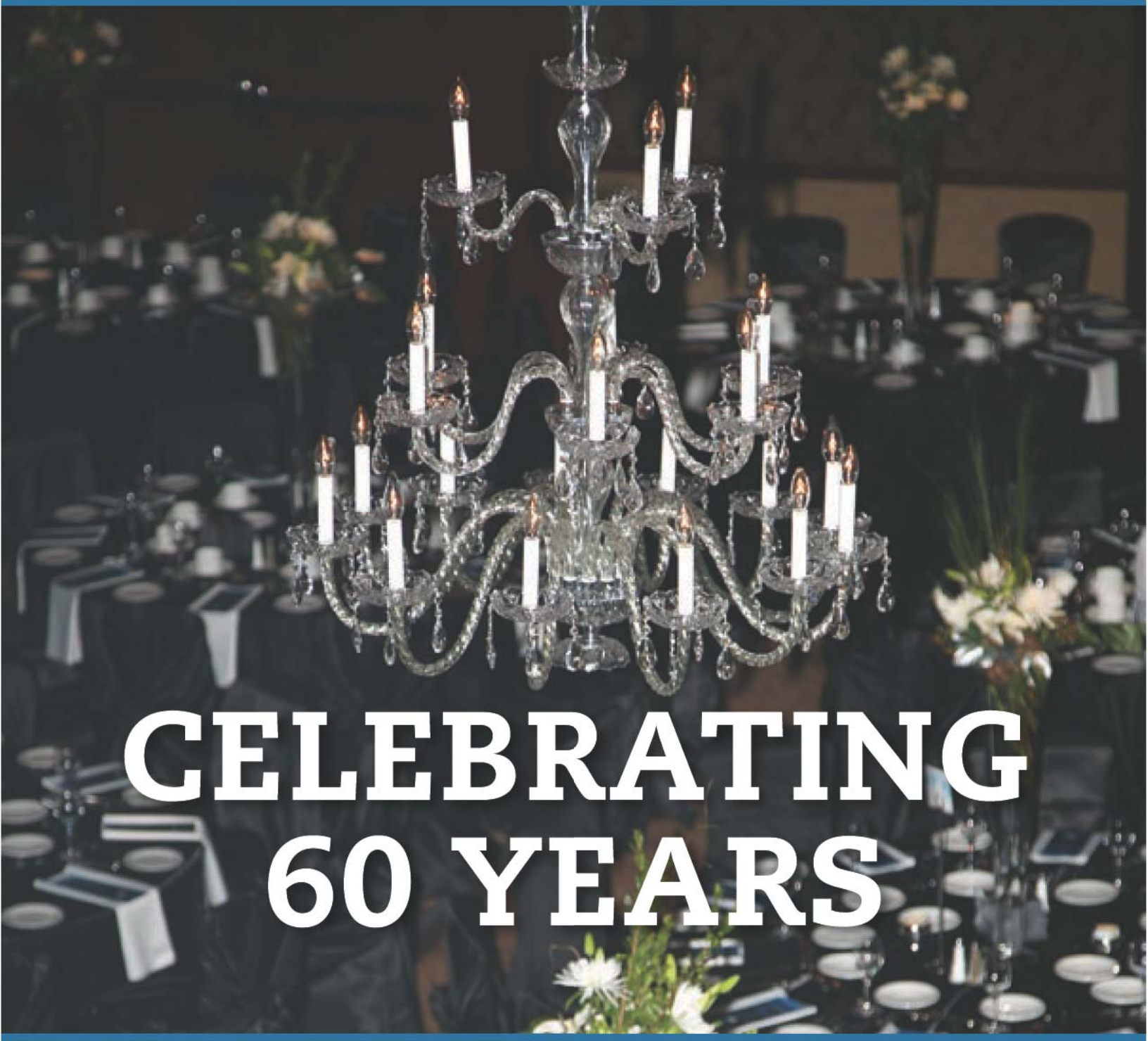

CELEBRATING 60 YEARS

Remise, Release, Forever Discharge ... Not
Surface Owner Releases and the Courts

Look What's Surfaced!
Alberta's Surface Rights Board – Dispute Resolution Process

Alberta's New Land-Use Framework
What is Land-Use Framework all about?

Remise, Release and Forever Discharge … Not

Surface Owner Releases and the Courts

I try not to "do" case law reviews in my *Negotiator* articles as there are already several law firms and services that provide summaries of notable cases. I also find such summaries hopelessly boring and usually not all that useful since court cases are very fact specific and limited in wide application. This is probably why I am a solicitor (boring paper pushing lawyer) and not a fancy pants litigator (think Matlock).

That being said, the Alberta case discussed below regarding the limited value of paying for a full release is a potentially useful cautionary tale with respect to thinking that a release is actually a release of all potential future liability. A tragically common tale of thinking a written contract (the release) will bind the signatory (land owner) when something goes wrong in the future. Unfortunately in our modern world, ideas of equity and fairness often over rule the certainty provided in written agreements.

It also does not hurt that my partner, Bill Laurin, wrote the commentary below (in a righteous rage) and so I don't have to madly finish my article on the ERCB shutting in wells on freehold leases if it thinks the lease might be dead. Way cooler article, but you will have to wait till next time. Until then, I present – Remise, Release and Forever Discharge … Not.

Ball v. Imperial Oil (2008 ABQB 765)

The recent judgment of the Alberta Court of Queen's Bench in *Ball v. Imperial Oil Resources Limited* serves a timely reminder of the risks inherent in relying on a standard form landowner release in respect of environmental damage. The *Ball* judgment serves to demonstrate a pronounced judicial tendency to narrowly construe releases, and should serve as a warning when assessing residual operational liability for environmental damages, or potential contingent pre-effective date environmental liability contractually assumed in the context of purchase and sale agreements.

The Facts

The facts giving rise to the *Ball* judgment are uncomplicated, and not uncommon. The Ball Ranch has been in operation since 1934 and at trial consisted of approximately 2,500 acres in Southern Alberta including Sec. 29, which has been leased from the Alberta Crown since 1948. At the relevant time, 49 head of cattle were pastured on Sec. 29 along with three bulls. Imperial was the licensee of a two inch fuel gas pipeline and a three inch sour gas line that traversed Sec. 29 in parallel approximately six feet below the surface. In the fall of 2001, a brown spot on Sec. 29 was noticed as a result of an aerial survey, and the following spring a soil sample was taken that indicated hydrocarbon contamination. Pipeline repair work was commenced on July 8, 2002, apparently without notice to the landowner, and consisted of the following: (i) the pipeline was located using a "hydrovac", and the soil slurry was removed from the location; (ii) topsoil and subsoil were placed in piles alongside the excavation; and (iii) hydrocarbon contaminated soil was separated and placed on a tarp close to the excavation site. The tarp containing the contaminated soil was not fenced, and water that had inadvertently entered the excavation and became contaminated was simply pumped onto the ground and no steps were taken to fence off the affected area. The Court found against Imperial in both negligence and nuisance and awarded $65,000 in special, pecuniary and general damages. In short, Imperial owed a duty to the landowner to give adequate prior notice of its intended repair work and to adequately protect the livestock from exposure to hydrocarbons and hydrocarbon contaminated soil and water. The Court held that the causal connection between the cattle being exposed to the hydrocarbons and the subsequent compromised health of those cattle (and that of its progeny) had been established.

Release – Not

What is remarkable about this story, and which should cause concern for operators, and from a due diligence perspective for industry in general, is that the Court awarded these damages notwithstanding that the landowner had signed two "standard form releases" and was paid in excess of $12,000.00 as consideration for such releases. The release in question stated:

> "KNOW ALL MEN by these presents that [landowner] in consideration of the sum of [$] now paid to me by [the operator], (the receipt of which sum is hereby acknowledged), do hereby REMISE, RELEASE and FOREVER DISCHARGE [the operator], its servants, agents, employees, contractors, successors and assigns, of and from all manner of actions, causes of action, suits, debts, claims and demands whatsoever, and without limiting the generality of the foregoing, in particular all manner of actions, causes of action, suits, debts, claims and demands arising out of or connected with Sec 29 … Payment in full for access and damages pursuant to repairing the 3" gas line from Gulf Millarville 6-32 … Payment in full for nuisance, inconvenience time spent … which against [the operator], its servants, agents, employees,

contractors, successors and assigns, or any of them, I ever had, now have, or which I, my heirs, executors, administrators or assigns, or any person claiming by, through or under me, hereafter can, shall or may have for or by reason thereof or by any act, matter of thing whatsoever existing up to the present time."

In discussing whether the landowner's claim was barred by virtue of the two releases, the Court acknowledges that while the Statement of Defence responded to the landowner's claim on a number of grounds, including the defence of release (i.e. the written release bars any future claim against us), in argument Imperial's counsel "quite properly in my view resiled from that defence and did not attempt to argue the Defendant's non-liability on that basis. Accordingly, it need not be considered."

The lesson is that an operator's liability to a landowner in respect of environmental damage may not be limited by a release, and the benefit of paying cash consideration in respect of such release may be minimal.

Paul Negenman

Call For Nomination

2009-10 Board Of Directors

WANT TO MAKE A DIFFERENCE? Give back? Make more contacts? Share ideas? Be involved? Then you have come to the right place ... Why not consider putting your name forward for election to the CAPL Board of Directors?

Ask any current or past CAPL Director and you will hear how rewarding and gratifying this important role can be. As an Active, Senior, or Life Member of the CAPL, you have all the credentials required to put your name on the ballot. This year a new Executive and Board of Directors will be voted in at the April 22, 2009 General Meeting. **The deadline for acceptance of nominations is March 23, 2009.** If you are interested, or know someone that might be interested, and have a desire to contribute to the CAPL in a major way, please do not hesitate to contact any one of the Nominating Committee members:

Cindy Rutherford (Chairman)	403-539-1777	crutherford@progressenergy.com
Jim Moore	403-237-0900 (Ext. 232)	jmoore@skanaexploration.com
Brad Goodfellow	403-228-0509	brad@rangerland.ca
Suzanne Stahl	403-237-0681 (Ext. 24)	suzanne.stahl@onefourenergy.com

Nominations will be carried out in accordance with Article 10 of the CAPL By-Laws.