

Petrobank Energy and Resources Ltd. (plaintiff) v. Safety Boss Ltd., Safety Boss Inc. and
Michael Miller (defendants)
(0301 09249; 2012 ABQB 161)

Indexed As: Petrobank Energy and Resources Ltd. v. Safety Boss Ltd. et al.

Alberta Court of Queen's Bench
Judicial District of Calgary
McIntyre, J.
March 6, 2012.

Summary:

A blowout occurred at a long-suspended sour gas well sending a stream of poisonous hydrogen sulphide gas high in the air, causing environmental damage. The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that Petrobank's expenditures were higher than necessary because of breaches of contract and negligence by Safety Boss.

The Alberta Court of Queen's Bench allowed the action and assessed damages accordingly.

Company Law - Topic 312

Nature of corporations - Lifting the corporate veil - Principals - "Directing mind and will" of company - [See **Company Law - Topic 4183**].

Company Law - Topic 4183

Directors - Liability of directors - For torts - A blowout occurred at a sour gas well, causing environmental damage - The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that breaches of contract and negligence by Safety Boss increased Petrobank's expenditures - The Alberta Court of Queen's Bench found that Safety Boss was liable because it fell below the standard of skill of an average well-control speciality company in failing to treat a diverter as a priority, in not taking the initiative in controlling the well and in not being more proactive - However, Safety Boss' director could not be held personally liable because his actions were not independently tortious - Nor was there any basis for a finding of fiduciary duty in this case - See paragraphs 86 to 252.

Contracts - Topic 1104

Formation of contract - General principles - Oral contracts - A blowout occurred at a long-suspended sour gas well - The well operator (Petrobank) met with a company offering well control services (Safety Boss) - A dispute arose as to whether a contract was formed - The Alberta Court of Queen's Bench held that an oral contract was formed between the parties at the meeting - Safety Boss was to provide services to Petrobank to assess and control the blowout - Safety Boss would have and exercise the skill of an average specialist in the field of well control - Petrobank would pay Safety Boss' charges for those services - Safety Boss acted from the start as if its task was to assess and control

the well - Its conduct was consistent with a contract to assess and control the well - See paragraphs 46 to 51.

Contracts - Topic 2056

Terms - Implied terms - Compensation for work, materials or services - A blowout occurred at sour gas well - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether the parties had entered into a contract and, if so, whether a term implying reasonable charges should be implied into the contract to give it business efficacy - The Alberta Court of Queen's Bench held that an oral contract was formed - However, it was not necessary to imply a term of reasonableness of charges to give business efficacy to the contract - This was an emergency situation where Petrobank's goal was to urgently secure the services necessary to resolve the emergency and was aware that the well control operation would be expensive - See paragraphs 52 to 58.

Contracts - Topic 2056

Terms - Implied terms - Compensation for work, materials or services - A blowout occurred at a long-suspended sour gas well - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether a contract was formed at the meeting, and if so, whether the contract imposed on Safety Boss a duty of good faith - The Alberta Court of Queen's Bench held that an oral contract was formed between the parties at the initial meeting - However, there was nothing in this case that would justify imposing a stand-alone duty of good faith - This was not in the "category of special relationship cases" that would give rise to such a duty - See paragraphs 69 to 74.

Contracts - Topic 2056

Terms - Implied terms - Compensation for work, materials or services - A blowout occurred at a sour gas well - The well operator (Petrobank) initially met with a well-control services provider (Safety Boss) - After work commenced, a special services work order was executed providing for payment of invoices in 30 days but did not mention interim payments - Thereafter, Safety Boss demanded progress payments based on a line of credit which had to be cleared when it reached \$500,000 - A dispute arose - The Alberta Court of Queen's Bench held that there was no evidence that the progress payment expectation was conveyed to Petrobank when the contract was formed (i.e., at the initial meeting) - Even if a contract was not formed until the work order was executed, the order was silent regarding progress payments - Therefore, the \$500,000 credit line limit was not a contractual term - See paragraphs 61 to 68.

Contracts - Topic 2065

Terms - Implied terms - To achieve business efficacy - [See first **Contracts - Topic 2056**].

Contracts - Topic 2120

Terms - Express terms - Exclusionary clauses - A well operator (Petrobank) met with a well-control services company (Safety Boss Inc. (SBI)) regarding controlling a well blowout - After work commenced, a special services work order containing an exclusion

clause was executed mistakenly in the name of Safety Boss Ltd. (SBL) - SBI claimed that the work order could be rectified and the exclusion clause absolved it of liability - The Alberta Court of Queen's Bench held that an oral contract had been reached at the initial meeting - The wrong name in the work order was of no moment as the work order and exclusion clause did not form part of the oral contract, nor was it a new contract - Rectification could not be used to add a term to a contract that was not agreed upon by the parties - The exclusion clause was unenforceable - See paragraphs 75 to 85.

Contracts - Topic 3502

Performance or breach - Obligation to perform - Good faith - Exercise of - [See second **Contracts - Topic 2056**].

Contracts - Topic 3852

Performance or breach - Time for performance - Time of the essence - A blowout occurred at a long-suspended sour gas well sending a stream of poisonous hydrogen sulphide gas high in the air, causing environmental damage - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether the parties had entered into a contract and, if so, whether the contract included an implied term that time was of the essence - The Alberta Court of Queen's Bench held that an oral contract was formed at the initial meeting - The emergent circumstances justified implying a term that time was of the essence - See paragraphs 59 and 60.

Deeds and Documents - Topic 5008

Rectification - When unnecessary - Oral contract - [See **Contracts - Topic 2120**].

Equity - Topic 3713

Fiduciary or confidential relationships - Commercial relationships - Arm's length commercial transactions - [See **Company Law - Topic 4183**].

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - [See **Contracts - Topic 1104**, first, second and third **Contracts - Topic 2056**, **Contracts - Topic 2120**, and **Contracts - Topic 3852**].

Mines and Minerals - Topic 8426

Oil and gas - Wells - Control or killing of - Negligence of well-control services company - [See **Company Law - Topic 4183**].

Mines and Minerals - Topic 8428

Oil and gas - Wells - Control or killing of - Damages - A blowout occurred at a sour gas well, causing environmental damage - The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that its expenditures were higher than necessary because of breaches of contract and negligence by Safety Boss - The Alberta Court of Queen's Bench allowed the action, holding that Safety Boss was negligent and in breach of contract for failing to immediately construct and use a diverter to remove H₂S from the well site resulting in two days' delay - Safety

Boss was responsible for the operational and environmental damages incurred during the delay period - See paragraphs 253 to 340.

Cases Noticed:

- Cunningham Racing Inc. v. Airborne Industries (1992) Ltd. et al., [2000] A.R. Uned. 268 (Q.B.), refd to. [para. 22].
- M.J.B. Enterprises Ltd. v. Defence Construction (1951) Co. et al., [1999] 1 S.C.R. 619; 237 N.R. 334; 232 A.R. 360; 195 W.A.C. 360, refd to. [para. 54].
- Sail Labrador Ltd. v. Navimar Corp. et al., [1999] 1 S.C.R. 265; 235 N.R. 201, refd to. [para. 59].
- Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd. (1994), 149 A.R. 187; 63 W.A.C. 187 (C.A.), leave to appeal refused (1994), 179 N.R. 80; 162 A.R. 318; 83 W.A.C. 318; 21 Alta. L.R.(3d) xxxvii (S.C.C.), refd to. [para. 69].
- Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd. (1991), 106 N.S.R.(2d) 180; 288 A.P.R. 180 (T.D.), affd. in part (1992), 112 N.S.R.(2d) 180; 307 A.P.R. 180 (C.A.), refd to. [para. 69].
- National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc. et al. (2005), 390 A.R. 158; 2005 ABQB 856, refd to. [para. 71].
- Transamerica Life Canada Inc. et al. v. ING Canada Inc., [2003] O.A.C. Uned. 565; 68 O.R.(3d) 457 (C.A.), refd to. [para. 72].
- Guaranty Properties Ltd. et al. v. Edmonton (City) (2000), 261 A.R. 376; 225 W.A.C. 376; 2000 ABCA 215, refd to. [para. 77].
- Tercon Contractors Ltd. v. British Columbia (Minister of Transportation and Highways), [2010] 1 S.C.R. 69; 397 N.R. 331; 281 B.C.A.C. 245; 457 W.A.C. 245; 2010 SCC 4, refd to. [para. 81].
- Central Trust Co. v. Rafuse and Cordon, [1986] 2 S.C.R. 147; 69 N.R. 321; 75 N.S.R.(2d) 109; 186 A.P.R. 109, refd to. [para. 86].
- Wilson v. Swanson, [1956] S.C.R. 804, refd to. [para. 89].
- Kehler v. Myles and Foothills Provincial General Hospital (1986), 74 A.R. 259 (Q.B.), refd to. [para. 91].
- Neuzen v. Korn, [1995] 3 S.C.R. 674; 188 N.R. 161; 64 B.C.A.C. 241; 105 W.A.C. 241, refd to. [para. 93].
- Snell v. Farrell, [1990] 2 S.C.R. 311; 110 N.R. 200; 107 N.B.R.(2d) 94; 267 A.P.R. 94, refd to. [para. 94].
- Athey v. Leonati et al., [1996] 3 S.C.R. 458; 203 N.R. 36; 81 B.C.A.C. 243; 132 W.A.C. 243, refd to. [para. 95].
- Hanke v. Resurface Corp. et al., [2007] 1 S.C.R. 333; 357 N.R. 175; 404 A.R. 333; 394 W.A.C. 333; 2007 SCC 7, refd to. [para. 96].
- Heller v. Martens et al. (2002), 303 A.R. 84; 273 W.A.C. 84; 2002 ABCA 122, refd to. [para. 220].
- Robinson v. Williams Estate et al. (2007), 401 A.R. 262; 391 W.A.C. 262; 2007 ABCA 19, refd to. [para. 221].
- Said v. Butt, [1920] 3 K.B. 497 (H.L.), refd to. [para. 231].
- London Drugs Ltd. v. Brassart and Vanwinkel, [1992] 3 S.C.R. 299; 143 N.R. 1; 18 B.C.A.C. 1; 31 W.A.C. 1, refd to. [para. 232].
- London Drugs v. Kuehne & Nagle International Ltd. et al. - see London Drugs Ltd. v.

Brassart and Vanwinkel.
Montreal Trust Co. of Canada et al. v. Scotia McLeod Inc. et al. (1995), 87 O.A.C. 129; 26 O.R.(3d) 481 (C.A.), leave to appeal dismissed (1996), 205 N.R. 314; 95 O.A.C. 399 (S.C.C.), refd to. [para. 237].
ScotiaMcLeod Inc. et al. v. Peoples Jewellers Ltd. et al. - see Montreal Trust Co. of Canada et al. v. Scotia McLeod Inc. et al.
Blacklaws et al. v. 470433 Alberta Ltd. (2000), 261 A.R. 28; 225 W.A.C. 28; 2000 ABCA 175, refd to. [para. 238].
Blacklaws v. Morrow - see Blacklaws et al. v. 470433 Alberta Ltd.
Crestohl et al. v. B'nai B'rith Canada et al., [2009] O.T.C. Uned. I30 (Sup. Ct.), refd to. [para. 239].
Laurier Glass Ltd. v. Simplicity Computer Solutions Inc. et al., [2011] O.T.C. Uned. 1510; 2011 ONSC 1510, refd to. [para. 240].
McNeely v. Herbal Magic Inc. et al., [2011] O.T.C. Uned. 4237; 2011 ONSC 4237, refd to. [para. 241].
Stewart v. Enterprise Universal Inc. et al. (2010), 489 A.R. 153; 2010 ABQB 259, refd to. [para. 242].
ADGA Systems International Ltd. v. Valcom Ltd. et al. (1999), 117 O.A.C. 39; 43 O.R. (3d) 101 (C.A.), leave to appeal refused (2000), 254 N.R. 400; 134 O.A.C. 400 (S.C.C.), refd to. [para. 243].
Frame v. Smith and Smith, [1987] 2 S.C.R. 99; 78 N.R. 40; 23 O.A.C. 84, refd to. [para. 246].
Hodgkinson v. Simms et al., [1994] 3 S.C.R. 377; 171 N.R. 245; 49 B.C.A.C. 1; 80 W.A.C. 1, refd to. [para. 246].
Elder Advocates of Alberta Society et al. v. Alberta et al. (2011), 416 N.R. 198; 499 A.R. 345; 514 W.A.C. 345; 2011 SCC 24, refd to. [para. 250].
Janiak v. Ippolito, [1985] 1 S.C.R. 146; 57 N.R. 241; 9 O.A.C. 1, refd to. [para. 256].
Blackwater et al. v. Plint et al., [2005] 3 S.C.R. 3; 339 N.R. 355; 216 B.C.A.C. 24; 356 W.A.C. 24; 2005 SCC 58, refd to. [para. 259].
R. v. Scheel (1978), 42 C.C.C.(2d) 31 (Ont. C.A.), refd to. [para. 302].
Dix v. Canada (Attorney General) et al. (2001), 302 A.R. 370; 2001 ABQB 901, refd to. [para. 303].
Nathu v. Imbrook Properties Ltd. (1992), 125 A.R. 34; 14 W.A.C. 34 (C.A.), refd to. [para. 312].
Plas-Tex Canada Ltd. et al. v. Dow Chemical of Canada Ltd. et al. (2004), 357 A.R. 139; 334 W.A.C. 139; 2004 ABCA 309, refd to. [para. 312].
Killeen Estate v. Kline (1982), 33 B.C.L.R. 225 (C.A.), refd to. [para. 312].

Authors and Works Noticed:

Fridman, Gerald Henry Louis, *The Law of Torts in Canada* (2nd Ed. 2002), p. 385 [para. 88].
Fridman, Gerald Henry Louis, *The Law of Contract in Canada* (5th Ed. 2006), pp. 15 [para. 46]; 465 to 468 [para. 56].
Pitch, Harvin D., and Snyder, Ronald M., *Damages for Breach of Contract* (2nd Ed.) (2010 Looseleaf Update, Release 4), pp. 4-46 to 4-49 [para. 318].
Waddams, Stephen M., *The Law of Damages* (2010 Looseleaf Ed.), generally [para.

257]; pp. 11.210, 11.250 [para. 320]; 11.257 [para. 319]; 11.260 [para. 320].

Counsel:

Donald J. Chernichen, Q.C., Richard F. Steele, J. Murphy and S.M. Hyatt (Burnet, Duckworth & Palmer LLP), for the plaintiff;
G. Brian Davison and Thomas R. Benson (Davison Worden LLP), for the defendants.

This matter was heard on January 31 to March 31, July 13-15 and August 10, 2011, by McIntyre, J., of the Alberta Court of Queen's Bench, Judicial District of Calgary, who delivered the following reasons for judgment on March 6, 2012.

Judgment for plaintiff.

Editor: Elizabeth M.A. Turgeon

Company Law - Topic 312

Nature of corporations - Lifting the corporate veil - Principals - "Directing mind and will" of company - A blowout occurred at a sour gas well, causing environmental damage - The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that breaches of contract and negligence by Safety Boss increased Petrobank's expenditures - The Alberta Court of Queen's Bench found that Safety Boss was liable because it fell below the standard of skill of an average well-control speciality company in failing to treat a diverter as a priority, in not taking the initiative in controlling the well and in not being more proactive - However, Safety Boss' director could not be held personally liable because his actions were not independently tortious - Nor was there any basis for a finding of fiduciary duty in this case - See paragraphs 86 to 252.

Contracts - Topic 2065

Terms - Implied terms - To achieve business efficacy - A blowout occurred at sour gas well - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether the parties had entered into a contract and, if so, whether a term implying reasonable charges should be implied into the contract to give it business efficacy - The Alberta Court of Queen's Bench held that an oral contract was formed - However, it was not necessary to imply a term of reasonableness of charges to give business efficacy to the contract - This was an emergency situation where Petrobank's goal was to urgently secure the services necessary to resolve the emergency and was aware that the well control operation would be expensive - See paragraphs 52 to 58.

Contracts - Topic 3502

Performance or breach - Obligation to perform - Good faith - Exercise of - A blowout occurred at a long-suspended sour gas well - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether a contract

was formed at the meeting, and if so, whether the contract imposed on Safety Boss a duty of good faith - The Alberta Court of Queen's Bench held that an oral contract was formed between the parties at the initial meeting - However, there was nothing in this case that would justify imposing a stand-alone duty of good faith - This was not in the "category of special relationship cases" that would give rise to such a duty - See paragraphs 69 to 74.

Deeds and Documents - Topic 5008

Rectification - When unnecessary - Oral contract - A well operator (Petrobank) met with a well-control services company (Safety Boss Inc. (SBI)) regarding controlling a well blowout - After work commenced, a special services work order containing an exclusion clause was executed mistakenly in the name of Safety Boss Ltd. (SBL) - SBI claimed that the work order could be rectified and the exclusion clause absolved it of liability - The Alberta Court of Queen's Bench held that an oral contract had been reached at the initial meeting - The wrong name in the work order was of no moment as the work order and exclusion clause did not form part of the oral contract, nor was it a new contract - Rectification could not be used to add a term to a contract that was not agreed upon by the parties - The exclusion clause was unenforceable - See paragraphs 75 to 85.

Equity - Topic 3713

Fiduciary or confidential relationships - Commercial relationships - Arm's length commercial transactions - A blowout occurred at a sour gas well, causing environmental damage - The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that breaches of contract and negligence by Safety Boss increased Petrobank's expenditures - The Alberta Court of Queen's Bench found that Safety Boss was liable because it fell below the standard of skill of an average well-control speciality company in failing to treat a diverter as a priority, in not taking the initiative in controlling the well and in not being more proactive - However, Safety Boss' director could not be held personally liable because his actions were not independently tortious - Nor was there any basis for a finding of fiduciary duty in this case - See paragraphs 86 to 252.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A blowout occurred at a long-suspended sour gas well - The well operator (Petrobank) met with a company offering well control services (Safety Boss) - A dispute arose as to whether a contract was formed - The Alberta Court of Queen's Bench held that an oral contract was formed between the parties at the meeting - Safety Boss was to provide services to Petrobank to assess and control the blowout - Safety Boss would have and exercise the skill of an average specialist in the field of well control - Petrobank would pay Safety Boss' charges for those services - Safety Boss acted from the start as if its task was to assess and control the well - Its conduct was consistent with a contract to assess and control the well - See paragraphs 46 to 51.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A blowout occurred at sour gas well - The well operator (Petrobank) met with a well-

control services provider (Safety Boss) - A dispute arose as to whether the parties had entered into a contract and, if so, whether a term implying reasonable charges should be implied into the contract to give it business efficacy - The Alberta Court of Queen's Bench held that an oral contract was formed - However, it was not necessary to imply a term of reasonableness of charges to give business efficacy to the contract - This was an emergency situation where Petrobank's goal was to urgently secure the services necessary to resolve the emergency and was aware that the well control operation would be expensive - See paragraphs 52 to 58.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A blowout occurred at a long-suspended sour gas well - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether a contract was formed at the meeting, and if so, whether the contract imposed on Safety Boss a duty of good faith - The Alberta Court of Queen's Bench held that an oral contract was formed between the parties at the initial meeting - However, there was nothing in this case that would justify imposing a stand-alone duty of good faith - This was not in the "category of special relationship cases" that would give rise to such a duty - See paragraphs 69 to 74.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A blowout occurred at a sour gas well - The well operator (Petrobank) initially met with a well-control services provider (Safety Boss) - After work commenced, a special services work order was executed providing for payment of invoices in 30 days but did not mention interim payments - Thereafter, Safety Boss demanded progress payments based on a line of credit which had to be cleared when it reached \$500,000 - A dispute arose - The Alberta Court of Queen's Bench held that there was no evidence that the progress payment expectation was conveyed to Petrobank when the contract was formed (i.e., at the initial meeting) - Even if a contract was not formed until the work order was executed, the order was silent regarding progress payments - Therefore, the \$500,000 credit line limit was not a contractual term - See paragraphs 61 to 68.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A well operator (Petrobank) met with a well-control services company (Safety Boss Inc. (SBI)) regarding controlling a well blowout - After work commenced, a special services work order containing an exclusion clause was executed mistakenly in the name of Safety Boss Ltd. (SBL) - SBI claimed that the work order could be rectified and the exclusion clause absolved it of liability - The Alberta Court of Queen's Bench held that an oral contract had been reached at the initial meeting - The wrong name in the work order was of no moment as the work order and exclusion clause did not form part of the oral contract, nor was it a new contract - Rectification could not be used to add a term to a contract that was not agreed upon by the parties - The exclusion clause was unenforceable - See paragraphs 75 to 85.

Mines and Minerals - Topic 8423

Oil and gas - Wells - Control or killing of - Contracts (incl. formation and terms) - A blowout occurred at a long-suspended sour gas well sending a stream of poisonous hydrogen sulphide gas high in the air, causing environmental damage - The well operator (Petrobank) met with a well-control services provider (Safety Boss) - A dispute arose as to whether the parties had entered into a contract and, if so, whether the contract included an implied term that time was of the essence - The Alberta Court of Queen's Bench held that an oral contract was formed at the initial meeting - The emergent circumstances justified implying a term that time was of the essence - See paragraphs 59 and 60.

Mines and Minerals - Topic 8426

Oil and gas - Wells - Control or killing of - Negligence of well-control services company - A blowout occurred at a sour gas well, causing environmental damage - The well operator (Petrobank) sued the well-control company (Safety Boss) it hired to gain control of the well, claiming that breaches of contract and negligence by Safety Boss increased Petrobank's expenditures - The Alberta Court of Queen's Bench found that Safety Boss was liable because it fell below the standard of skill of an average well-control speciality company in failing to treat a diverter as a priority, in not taking the initiative in controlling the well and in not being more proactive - However, Safety Boss' director could not be held personally liable because his actions were not independently tortious - Nor was there any basis for a finding of fiduciary duty in this case - See paragraphs 86 to 252.