Docket: 2014-4359(IT)G

BETWEEN:

ALTA ENERGY LUXEMBOURG S.A.R.L.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 11, 12, 13, 14 and 19, 2018, at Toronto, Ontario

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Warren J.A. Mitchell, Q.C. Matthew G. Williams E. Rebecca Potter
Counsel for the Respondent:	Patricia Lee Christopher M. Bartlett

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JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2013 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment. Costs are awarded to the Appellant.

The parties will have until September 11, 2018 to arrive at an agreement on costs, failing which they must file their written submissions on costs no later than September 12, 2018. Such submissions are not to exceed ten pages.

Signed at Magog (Québec), this 22nd day of August 2018.

"Robert J. Hogan"

Hogan J.

Citation: 2018 TCC 152
Date: 20180822
Docket: 2014-4359(IT)G

ALTA ENERGY LUXEMBOURG S.A.RL.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

Overview

[1] The Appellant, a resident of Luxembourg, claimed an exemption from Canadian income tax under Article 13(5) of the Canada-Luxembourg Income Tax Convention 1999 (the "Treaty") in respect of a large capital gain arising from the sale of shares (the "Shares") of Alta Energy Partners Ltd. ("Alta Canada"), its wholly-owned Canadian subsidiary. At that time, Alta Canada carried on an unconventional shale oil business in the Duvernay shale oil formation (the "Duvernay Formation") situated in Northern Alberta. Alta Canada was granted the right to explore, drill and extract hydrocarbons from an area of that formation (Alta Canada's "Working Interest") designated under licenses (the "Licenses") granted by the government of Alberta.

[2] The Minister of National Revenue (the "Minister") denied that the exemption applied and assessed the Appellant accordingly.

[3] Article 13(5) of the Treaty is a distributive rule of last application. It applies only in the case where the capital gain is not otherwise taxable under paragraphs (1) to (4) of Article 13 of the Treaty.

[4] Article 13(4) is relevant to the outcome of this appeal. Under that provision, Canada has preserved its right to tax capital gains arising from the disposition of shares where the shares derive their value principally from

immovable property ("Immovable Property") situated in Canada. However, the application of Article 13(4) is subject to an important exception. Property that would otherwise qualify as Immovable Property is deemed not to be such property in the circumstances where the business of the corporation is carried on in the property (the "Excluded Property" exception).

[5] The Appellant concedes that the Shares derived their value principally from Alta Canada's Working Interest in the Duvernay Formation. The Appellant also concedes that the capital gain it realized will be taxable under Article 13(4) unless this Court agrees with the Appellant's submission that its full Working Interest is Excluded Property.

[6] Unsurprisingly the Respondent defends the contrary view. According to the Respondent, substantially all of Alta Canada's Working Interest remained Immovable Property because Alta Canada drilled in and extracted hydrocarbons from only a small area of the Duvernay Formation that it controlled.

[7] Alternatively, should this Court disagree with the Respondent on this point, the Respondent contends that the general anti-avoidance rule (the "GAAR") provided for in section 245 of the *Income Tax Act* (the "*ITA*") applies to deny the benefit of the exemption claimed by the Appellant. The parties agree that there is a "tax benefit" and an "avoidance transaction" for the purpose of the GAAR. They disagree, however, as to whether the "avoidance transaction" gave rise to an "abuse" or "misuse" which is required to trigger the application of the GAAR.

I. The Facts

[8] The parties filed a Statement of Agreed Facts which is appended to these reasons as "Appendix A".

[9] Four witnesses testified for the Appellant and I found each to be credible and reliable. Joseph Greenberg, the CEO of Alta Resources USA, has a background in geology and in the interpretation of geological maps. He founded Alta Resources to carry out business in exploring and developing oil and gas reserves in North America by drilling wells and described in his testimony his methods for doing so. Chaim Miller, managing director in the finance group at Blackstone Capital Partners. has a background as a tax lawyer and described Blackstone's investment structure and methods for raising capital, particularly in

ways that benefitted its U.S. investors. Anthony Acconcia, partner and senior managing director at Blackstone Capital Partners, described the business of Blackstone in structuring investment funds and its involvement with Alta. Jenny McCarthy, the president and chief operating officer of Alta Resources USA, described the process of drilling horizontal and vertical wells.

[10] In the spring of 2011, Blackstone Group LP (“Blackstone Capital Partners”) and Alta Resources LLC (“Alta Resource USA”) (Alta Resource USA together with Blackstone Capital Partners is defined as the “Co-Investors”), shale oil and gas exploration and development firms, formed Alta Energy Partners LLC (“Alta US LCC”), a Delaware limited liability corporation, to acquire and develop unconventional oil and natural gas properties in North America (the “Initial Structure”).

[11] At that time, Blackstone Capital Partners was an affiliate of the Blackstone Group. Part of the partnership’s mission was to invest in unconventional oil and gas reserves alongside a co-investor who had a successful track record in the development of those types of reserves. As is typical of private equity funds, Blackstone Capital Partners raised equity by securing capital commitments from endowments, pension funds and insurance companies, funds of funds, high net worth individuals and a host of other institutional investors (the “Blackstone Capital Investors”).

[12] By the spring of 2011, Alta Resources USA, the chosen Co-Investor, was recognized as a leader in the development of shale oil and gas assets in the United States.

[13] Blackstone Capital Partners, Alta Resources LLC and Alta US LLC examined development properties, ultimately deciding to develop the Duvernay shale property in northwestern Alberta. On June 13th, 2011, they incorporated Alta Energy Partners Canada (“Alta Canada”), a wholly owned Canadian subsidiary of Alta US LLC to, as the Appellant submitted, carry on the Canadian business. From June 2011 to April 2012, Alta Canada assembled around 62,000 acres in the Duvernay shale.

[14] A certain number of Blackstone Capital Investors benefited from tax exempt status by virtue of their status as pension funds, endowments or charitable organizations. The evidence also shows that approximately 50% of Blackstone

Capital Investors were US citizens or residents (the "US Investors") and the other half were not (the "Foreign Investors").[1]

[15] Blackstone Capital was formed as a limited partnership to allow its investors to benefit from limited liability from a commercial standpoint. Equally important, Mr. Miller testified that this structure was used to allow the Blackstone Capital Investors to benefit from the conduit tax status of the partnership.[2]

[16] Generally speaking, tax exempt investors prefer to invest in pooled investment structures that enjoy conduit status to avoid tax at the level of an entity that is not transparent.

[17] The limited partnership structure also affords tax advantages for taxable investors. The transparent nature of partnerships allows the possibility of matching gains with deductible losses. Mr. Miller testified that Blackstone typically uses limited partnerships to raise capital for new ventures to accommodate their investor's preference in this regard.

[18] Blackstone Capital Partners typically sets up a fund vehicle in the form of a Delaware partnership which obtains capital commitments from limited partners across the world. Blackstone Capital Partners then investigates investment opportunities, sometimes setting up joint ventures with outside operators such as that with the Alta group. In doing so, it forms secondary partnerships or limited liability companies such as that with Alta US LLC. Such partnerships are advantageous to U.S. investors because of their pass-through status.

[19] The evidence shows that the decision to insert Alta LLC USA, as a holding company, to pool the investments of the Co-Investors, was a mistake. From a US tax perspective, Mr. Miller testified that the initial structure needed to be revised to mitigate US anti-deferral provisions (Subpart F). Absent the restructuring, partners of Alta Canada could have been subject to tax on their *prorata* share of certain categories of passive income. The error was attributable to the fact that the Co-investors in Alta LLC USA ultimately decided to acquire and develop resource properties situated in Canada and not the United States. Mr. Miller, who was responsible for establishing the investment structure, testifies that he would have established a foreign based holding corporation for the Co-Investors

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[1] See Transcripts, volume 3 at page 164, evidence of the Appellant's witness, Chaim Miller.
[2] See Transcripts, volume 3 at page 164-166, evidence of the Appellant's witness.

had he known that Co-Investors would be investing in assets outside the US. According to Mr. Miller, Blackstone typically used foreign holding corporations when investing in foreign jurisdictions.

[20] Blackstone Capital Partners, Alta Resources USA and Alta US LLC were advised that the total investment in Alta's Canadian assets was expected to grow between $300 and $400 million in two years.

[21] In December 2011, a representative of Blackstone Capital Partners sent a letter to Luxembourg tax authorities seeking confirmation of the tax regime which would be applicable to the Appellant after the restructuring. The representative subsequently received a reply stating that the proposed restructuring was in compliance with tax legislation and administrative policies in Luxembourg.

[22] On April 19, 2012, the Appellant was incorporated under the laws of Luxembourg to hold participations in Luxembourg and foreign companies. It had as its sole shareholder, Alta Energy Canada Partnership, a partnership established under the laws of Alberta.

[23] On the same day, Alta US LLC transferred 56,345,864 common shares of Alta Canada to the Appellant.

[24] Additionally, on that day, the Appellant's board of managers resolved to approve the Appellant's purchase of Alta Canada's shares from Alta US LLC.

[25] It is worth noting that Blackstone Capital Partners Investors incurred costs that could have been avoided if the Co-Investors had first firmed up their plans where to invest prior to establishing the initial holding corporation structure. First, the sale of the Shares from Alta USA to Alta Luxembourg gave rise to a taxable capital gain. Fortunately, for the Co-Investors, the CRA accepted that the fair market and the adjusted cost base of the Shares were equal at that time. If this had not been the case, US and Foreign Investors in Blackstone Capital Partners would have incurred Canadian tax in connection with that sale. The Co-Investors have also incurred, undoubtedly, significant legal costs in connection with the establishment of the revised structure.

[26] Alta Canada carried out the development of its Working Interest in the Duvernay Formation in Northern Alberta (the Kaybob area of Alberta). The oil

and natural gas beneath the relevant land is owned by the Government of Alberta, which grants leases and licences giving exclusive rights to drill for and recover oil and natural gas. The parties provided, as an example of such a licence, a petroleum and natural gas licence (a “PNG licence”), but noted that such licences do not grant legal title to the surface of the land.

[27] In the Kaybob area, the initial term of the PNG licence was four years but could be extended by five years if validated by drilling a well or “grouping” the licence with another licence in the intermediate area on which a well had been drilled within the last month. Without validation, the licence expired at the end of the four year term, unless the holder proved that it was producing or capable of producing petroleum or natural gas.

[28] On June 1, 2011, Alta Canada acquired PNG licences covering 14,400 net acres (or 22.5 sections) in the Duvernay shale from Sphere Energy Corp. (“Sphere”) for $25 million plus a royalty of 5.25%. Under the agreement of sale, Alta Canada committed to drilling one vertical well within 12 months and one horizontal well within 18 months of closing.

[29] On January 9, 2012, Alta Canada acquired additional PNG licences and leases covering 36,160 net acres (or 56.5 net sections) in the Duvernay shale from TAQA North Ltd. (“TAQA”) for $141 million plus a royalty of 2%.

[30] On January 25, 2012, Alta Canada acquired all of the rights, title and interests in 4,411 net acres (or 59.5 sections) from Cequence Energy Ltd. (“Cequence”) for $13,231,620.

[31] Alta Canada acquired additional licences and leases from Husky Oil Operations Ltd., Crew Energy Inc., Yoho Resources Partnership, Shell Canada Energy, and directly from the Government of Alberta, bringing Alta Canada’s net acreage in the Duvernay shale to 67,891.

[32] Between 2012 and 2013, Alta Canada drilled six horizontal and vertical wells and was a non-operator in two additional wells.

II. Discussion

A. Is the capital gain realized by the Appellant as a result of the sale of the shares taxable in Canada in view of Article 13(4) of the Treaty?

[33] Under the *ITA*, Canadian income tax is payable on the gains realized from the disposition of "taxable Canadian property" that is not "treaty protected property" as defined in the *ITA*.

[34] Generally speaking, a share of the capital stock of a corporation is "taxable Canadian property" if, at the time of its disposition, or the 60 months that ended prior to that time, more than 50% of the fair market value of the share was derived, *inter alia*, directly or indirectly from or any combination of: (i) "real or immovable property situated in Canada", (ii) "Canadian resource properties", (iii) "timber resource properties", and (iv) options in respect of interests in any of the aforementioned properties.

[35] The Appellant concedes that the Shares are "taxable Canadian property" under the ITA because the Shares derived more than their 50% of their value from Alta Canada's Working Interest which is a Canadian resource property. However, the Appellant contends that the Shares are "treaty protected property" under Article 13(5) of the Treaty.

[36] "Treaty protected property" is defined as follows:

> [. . .] property on income or gain from the disposition of which by the taxpayer at that time would, because of a tax treaty with another country, be exempt from tax under Part I.

[37] As noted earlier, the Respondent asserts the opposite on the ground that Article 13(4) of the Treaty applies to tax the gain.

[38] These two provisions read as follows:

> (4) Gains derived by a resident of a Contracting State from the alienation of:
>
> > (a) shares (other than shares listed on an approved stock exchange in the other Contracting State) forming part of a substantial interest in the capital stock of a company the value of which shares is derived principally from immovable property situated in that other State; or

> . . .
>
> may be taxed in that other State. For the purposes of this paragraph, the term "immovable property: does not include property (other than rental property) in which the business of the company, partnership, trust or estate was carried on; and a substantial interest exists when the resident and persons related thereto own 10 per cent or more of the shares of any class or the capital stock of a company.
>
> (5) Gains from the alienation of any property, other than that referred to in paragraphs 1 to 4 shall be taxable only in the Contracting State of which the alienator is a resident.
>
> [Emphasis added.]

[39] Article 13(1) and (5) sheds light on the purpose of Article 13(4). All of these provisions are distributive rules that define the circumstances in which each of the Contracting States can tax gains.

[40] Article 13(1) is a provision commonly found in most tax treaties. It provides that gains derived from the disposition of immovable property are subject to tax in the source state. Generally speaking, it is also accepted that the country of residence of a taxpayer should tax the gain arising from the sale of shares of a corporation, even when the shares derive their value from economic activities conducted in the other Contracting State. The latter state gives up its right to tax the capital gain as an incentive to promote capital inflows to fund business operations in that jurisdiction. Article 13(5) embodies this principle.

[41] Article 13(4) specifies that the sale of shares of a company or of an interest in a partnership, trust or estate the value of which is derived principally from immovable property will be liable to tax in the state where the immovable property is situated. The purpose of this rule is to prevent the non-taxation by the source state of capital gains which is derived principally from immovable property. Absent this rule, it would be possible for a company to conduct a share sale instead of an asset sale to avoid taxation in the source state. The carve-out excludes from the definition of immovable property properties in which the business is carried on. The carve-out is thus an exception to the principle that the source state has jurisdiction to tax gains arising directly or indirectly from the increase in value of immovable property. In this context, Article 13(4) reflects a compromise between the two Contracting States. A gain from a share sale is subject to tax by the jurisdiction real property only in the case where the shares

derive their value principally from Immovable Property situated in that jurisdiction and such property is not Excluded Property.

[42] In a document dated January 31, 1991 (the "Position Paper"), a government official traces the dividing line between "Immovable Property" and "Excluded Property" as follows:

> 6. Immovable property (e.g. real estate) that is not used or held for use in the company's business but is held as an investment for capital gain is not Excluded Property.[3]
>
> [Emphasis added.]

[43] In this light, the Excluded Property exception appears to have been intended, *inter alia*, to encourage investments by Luxembourg residents in Immovable Property acquired to be used in a company's business.

[44] In the context of the sector resource property, the author of the Position Paper opines as follows:

> We have received a number of requests recently for technical interpretations concerning what is meant by "property, other than rental property, in which the business of the company was carried on" in the context of resource industries.
>
> Positions
>
> [. . .]
>
> 3. Oil and gas reserves, mines and royalty interests are Excluded Property if the owner is actively engaged in the exploitation of natural resources and if such assets are actively exploited or kept for future exploitation by such owner, subject to the exception resulting to hydrocarbons in the Canada-United Kingdom Convention. [4]
>
> [Emphasis added.]

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[3] Positon Paper, Joint Book, Vol IX, Tab 117, at p 3016. The Appellant has placed particular reliance on this document.

[4] The Position Paper was later referenced as support for CRA Document No. 2000-0015753, "Article 13 – Canada Netherlands Treaty" (2000), at p 1, in which the CRA confirmed that resource property comes within the exclusion for property in which the business of the company is carried on if the property is actively exploited or held for future exploitation, Article 13 of the Canada-Netherlands Treaty contains the same language as does Article 13 of the Treaty.

[45] The author of the Position Paper recognizes that two conditions must be satisfied for oil and gas reserves to qualify as Excluded Property. First, the corporation must be actively engaged in the exploration of the reserve. Secondly, the reserve must be <u>actively exploited</u> or <u>kept for</u> future exploitation by the owner.

[46] As demonstrated by the facts of this case, a working interest cannot be developed and fully exploited all at once. Initially, the reserve must be accurately delineated. The resource owner must then prove that the resource can be extracted at a reasonable cost, having regard to the projected future commodity price. The resource owner is unable to commence significant drilling and extraction operations until the economic value of the reserve has been established.

[47] Before that time, stakeholders are generally unwilling to fund those activities. Moreover, an owner of an oil and gas reserve cannot bring its reserves to the market until such time as a facility has been built to process the hydrocarbons that will be extracted from the formation and pipeline transportation capacity has been secured to bring the processed commodity to the market.

[48] It is common knowledge that the capacity of a processing plant and a pipeline is limited. These assets have a long useful life. Stakeholders will be unwilling to commit capital to build the infrastructure until they are ensured that there will be a steady supply of hydrocarbons to justify the significant capital costs of those assets. Mr. Greenberg testified that the resource owner must guarantee a steady supply of hydrocarbons that matches the capacity of the processing facility that will process the resource and the pipeline that will bring the product to the market.

[49] According to the Respondent, a working interest does not qualify as "Excluded Property" if the working interest has been set aside for future drilling or extraction activities.[5] On this point, the Respondent submits that the phrase "property in which the business was carried on" means property in which the business of the corporation is located and carried on.

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[5] This view is contrary to the view expressed in the Position Paper.

[50] Referring to the ordinary meaning of the word, the Respondent suggests that "in" refers to "a physical place." The use of "in" instead of "by which", "with which", or "through which" further denotes that it is not enough for the property to be used in the business, but that the business must be carried on within the physical limits of the property. The carve-out will then be "limited to immovable property that was not only owned or used by the company, but was occupied by the business for its business operations or activities."

[51] The test proposed by the Respondent does not work well for all of the types of "immovable property" that are included in these words. "Immovable Property", as defined for the purpose of Article 13(4), includes rights granted under licenses issued by government bodies to exploit minerals and other natural resources in Canada ("Incorporeal Property"). Incorporeal Property doesn't have physical substance. Incorporeal Property cannot be occupied. Only physical property is capable of being occupied according to the ordinary sense of that word.

[52] For this reason, the Respondent muses that perhaps it was not intended for Incorporeal Property to qualify as Excluded Property. This begs the question as to why this issue was not clearly addressed in Article 13(4) of the Treaty.

[53] The Respondent concludes on this point by speculating that "it is possible and reasonable to accept, for purposes of the exception described in Article 13(4) of the Treaty that business is carried on in a working interest <u>where the company's activities exercise the rights granted by the lease</u> or license".[6]

[54] The Respondent then goes on to consider how the test that it proposes should be applied to the resource sector. The Respondent contends that the Excluded Property exception must be applied on a strict license by license basis because each license is a separate asset of the holder.[7] From this perspective, the Appellant would have to demonstrate that it drilled on or extracted hydrocarbons from the section of the formation covered by a particular license. If it did, the license would qualify as Excluded Property. If it did not, it would not. This is a heavy burden to discharge because it does not account for the factors that cause resource corporation to approach the development of their reserves as a whole.

[6] Paragraph 41 Respondent's Written Submissions. I believe that the Respondent meant to say "where the company conducts its activities by exercising rights granted by the lease or license".
[7] The government awards licenses in respect of a designated area commonly referred to as a "section".

As demonstrated by the facts of this case, resource corporations do not develop their reserves on a section by section basis.

[55] When questioned by me, the Respondent's counsel insisted that the Respondent's current position is not inconsistent with the opinion expressed in the Position Paper. I fail to see how that is the case. The author of the Position Paper opined that a working interest can be set aside for future development, provided the corporation otherwise carries on a resource business. Clearly this means that drilling and extraction activities do not have to be carried out on the sections of the formation that have been set aside for future development, a practice commonly followed in the resource sector. It is implicit in the Position Paper that a resource corporation can carry on qualifying activities elsewhere on the formation and qualify undeveloped sections as Excluded Property.

[56] It appears to me that the Canada Revenue Agency ("CRA") is repudiating its early position without admitting that it is doing so. Taxpayers should be able to rely on stated positions that take into account how reserves are developed in Canada. In this regard, it is clear from the evidence that Alta Canada carried on the business of exploring for, developing and producing oil in respect of its Working Interest in the Duvernay Formation. I note that the Respondent appears to have conceded this fact by accepting that Alta Canada was a "principal-business corporation" within the meaning of subsection 66(15) of the *ITA*[8].

[57] Respectfully, I believe that the Respondent's position reflects a lack of understanding of how resource assets are developed and exploited in Canada. Consider the example of a corporation that holds a timberland. In many cases, a forestry corporation holds "timber rights" under licenses or concessions granted by government bodies that allow the corporation to harvest the trees in the area designated by the license or concession. The timberland can be held through multiple licenses or concessions.

[58] A forestry company will not harvest the trees on a timberland all at once. Section of the timberland will be set aside to allow the trees to reach their full maturity. By leaving a part of the timberland untouched, the timberland owner prevents soil erosion and allows growth to take place in the area of the woodlot where trees have already been harvested. It is common knowledge that clear cutting is environmentally unsound. The uncut part of the timberland remains a

[8] The definition at paragraph (a.1) specifically refers to "exploring or drilling for petroleum for natural gas."

valuable asset that can be used by the forestry company to finance its operations as a whole.

[59] If I apply the test propounded by the Appellant in the circumstances described above, the section of the timberland that has been set aside for future harvesting will not qualify as Excluded Property. In contrast, a timberland exploited on a clear cut basis will be Excluded Property. Under the Respondent's approach sustainable development will be discouraged. That result is counterintuitive. I do not believe that the Excluded Property exception was intended to operate in that way.

[60] In the case of a conventional oil field, the resource owner extracts hydrocarbons by drilling a vertical well on a section of the formation where the owner expects oil to be found. If oil is found, it will quickly flow to the surface because of the intense pressure under which the hydrocarbons are found. Since the oil is often in a large pool a vertical well on a particular section often allows the operator to extract oil from many of the sections where no drilling takes place. Under the Respondent's narrow test, only the section of the formation in which drilling takes place qualifies as Excluded Property.

[61] Mr. Greenburg confirmed in his testimony that shale oil deposits present greater development challenges than traditional oil fields. Hydrocarbons are found in pockets over a large area of the shale formation. Because of the geology of the formation, a sufficient number of licenses must be acquired to secure access to a large part of the formation to maximize the chances of economic success. The geology of the reserve must be properly delineated before drilling can commence. To be of economic interest to its stakeholders, the operator must also prove that it can extract the hydrocarbons from its working interest.

[62] Ms. McCarthy testified that she was authorized to spend $12 million on the first well that Alta Canada drilled. The cost of the first well exceeded her budget by approximately $8 million. This is not unusual. The operator must establish the best way to drill the well and stimulate the formation. Ms. McCarthy explained that in these circumstances the initial drilling is done on a trial and error basis. Once the best drilling methods are identified and documented, the same methods are used to drill wells elsewhere. In the case of the Duvernay Formation, this was possible because the geology of the formation was fairly consistent throughout. Hence, it was expected that future wells could be drilled at a lower cost. According to Ms. McCarthy, information gathered from operations carried

out on the Formation was used to locate where the next well should be drilled. Likewise, drilling and stimulation techniques established to be effective elsewhere on the formation were redeployed on the next well.

[63] Mr. Greenburg referred to all of the above operations, as de-risking activities ("De-risking"). Activities carried out on one section of the formation enhance the value of the other sections of the formation. De-risking activities are carried out to determine the economic value of the formation as a whole, a necessary step before capital will be committed to the full development of the reserve. It is clear from Mr. Greenburg's evidence that once Alta Canada determined that it could extract hydrocarbons on an economically viable basis, it was able to attract additional capital from the Co-Investors. In that sense, de-risking its Working Interest allowed Alta Canada to secure financing for its operations.

[64] The law is well settled: a "tax treaty or convention must be given a liberal interpretation with a view to implementing the true intention of the parties".[9] With this principle in mind, I am of the view that the Treaty negotiators intended for a resource property to qualify as Excluded Property when such property is developed in accordance with the industry's best practises.[10]

[65] The evidence shows that Alta Canada approached the development of its working interest on a systematic and commercially prudent basis. Alta Canada took the steps required to properly delineate the part of the formation that it controlled in order to plan how and when it would drill wells, extract hydrocarbons, and bring the hydrocarbons to the market. At each stage of development, Alta Canada used the best practices of the industry to develop its reserves. Alta Canada should not be penalized for having done so.

[66] The Respondent submits that the evidence shows that the Co-investors planned, from the outset, to dispose of their investment in Alta Canada after a short holding period of five years or less. It is unclear from the evidence that this was the case. In any event, I agree with the Appellant that the evidence shows that if a sale was to take place, it would occur through a sale of the shares of Alta Canada rather than a sale of assets by Alta Canada. The Revised structure was set up to achieve this outcome. The evidence also shows that Alta Canada was sold by the Appellant as a going concern. In this regard, Ms. Miller testified that she

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[9] *Crown Forest Industries Ltd. v. Canada*, 1995 25 S.C.R. at para 43.

[10] In this regard, I share the opinion expressed in the Position Paper.

was required to provide services to Alta Canada after the sale to ensure a successful transition of the business to the new owner, Chevron.

[67] According to the evidence in this case, the initial stages of resource development present the greatest risk for investors. At that time, it is unknown whether the resource can be exploited on an economically viable basis. Ironically, under the Respondent's approach a shareholder of a resource corporation would be denied the benefit of the Excluded Property exception at a time when the shareholder bears the greatest investment risk. In contrast, a shareholder would benefit from the exception when the shareholder's investment risk has been significantly reduced as a result of the full exploitation of the resource property. Generally speaking, tax incentives, like the Excluded Property exception, are intended to promote risk taking rather than the opposite.

[68] Since the purpose of the carve-out is to attract foreign direct investments, it is reasonable to assume that the treaty negotiators wanted the exception to be granted in accordance with industry practices. They would not have intended that the exception only applies where the reserve is fully exploited on a strict license by license basis, because such a literal and formal interpretation would not have favoured foreign investment.

[69] For all of these reasons, I conclude that all of Alta Canada's Working Interest in the Duvernay Formation is "Excluded Property". Consequently the capital gain realized by the Appellant as a result of the disposition of the Shares is not taxable in view of Article 13(4) of the Treaty.

B. Does the GAAR Apply to Override the Application of the Luxembourg Treaty?

[70] The Appellant concedes that it derived a tax benefit from the restructuration of its activities (the "Restructuration") from the US to Luxembourg. The Appellant also concedes that the restructuration was not arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; the Restructuration thus qualified as an avoidance transaction. The only issue before the Court is, therefore, whether the avoidance transaction was abusive. To determine whether there was abuse, Courts have adopted a two-step approach.

[71] The first step involves identifying the object, spirit and purpose of the relevant rule. Statutory interpretation under GAAR differs from traditional word-

based interpretation.[11] Whereas, under the modern rule of statutory interpretation, the analysis seeks to determine what the meaning of a provision is, under the GAAR, statutory interpretation is used to determine the object, spirit or purpose of the provision.[12] The object, spirit or purpose is the rationale underlying the provision. Transactions may be found abusive of a provision's underlying rationale, even though they comply with the literal, contextual and purposive meaning of the words of the statute.[13]

[72] The second step requires determining whether the avoidance transaction falls within, or frustrates, that rationale. In this regard, it is necessary to understand how the taxpayer relied on the statute and to identify the overall result of the avoidance transaction. Where the overall result defeats, circumvents or frustrates the rationale underlying one provision or more, the GAAR will apply.

[73] In support of its submission, the Minister enumerated a number of provisions of the *ITA* and of the Treaty. The Minister contends that the avoidance transaction resulted in an abuse of sections 38 and 39, subsections 2(3) and 248(1), and paragraph 115(1)(b) of the *ITA*; of Articles 1, 4, and 13 of the Treaty; and of the *ITA* and the Treaty read as a whole.

[74] I fail to see how the Restructuration constitutes an abuse of sections 38, 39 subsection 2(3) and paragraph 115(1)(*b*). All of those provisions address, *inter alia*, the taxation of a capital gain. It is clear that those provisions are not intended to operate in the case where a non-resident realizes a gain from the disposition of the "treaty protected property" as defined in subsection 248(1) of the *ITA*. I have concluded that the Shares are "treaty protected property". Therefore, as asserted by the Appellant, the provisions of the *ITA* operated in the manner intended by Parliament. The remaining question is whether the Restructuration constitute an "abuse" or a "misuse" of the Treaty.

[75] According to the Respondent, the misuse or abuse results from the fact that the Appellant, although a resident of Luxembourg for the purposes of Article 4 of the Treaty, was created and became the owner of the Shares for no purpose other than avoiding Canadian income tax on the gain that it realized on the disposition

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[11] Oxford at para 40-46.
[12] *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 at para 70.
[13] *Ibid*, at para 109.

of the Shares. The Respondent also states that the Appellant paid no tax in Luxembourg.[14]

[76] The Respondent asserts that the rationale and purpose of the Treaty is to prevent or reduce double taxation on activities or transactions that potentially may be subject to tax in both Contracting States at the same time.

[77] A tax treaty is a multi-purpose legal instrument. The preamble of the Treaty states that the two governments desired "to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital." While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. Under the GAAR analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty as a whole.

[78] As noted earlier, Article 13(4) allows the source State to tax a gain (1) when the shares formed a substantial interest in the capital stock of a company and (2) where the value of the shares is derived principally from immovable property situated in the source state that is not Excluded Property.

[79] The carve-out included at paragraph 13(4) must be understood in the context of the Treaty. Within the Treaty, Article 13(5) provides that gains from the alienation of any property will generally be taxed by the residence state, except where any of Articles 13(1)-(4) applies. Article 13(1) provides that gains derived from the alienation of immovable property will be taxed in the source state. Article 13(4) specifies that the sale of shares of a company, or of an interest in a partnership, trust or estate the value of which is derived principally from immovable property will be liable to tax in the state where the immovable property is situated. As noted earlier, absent this rule, tax could be avoided in the source state through a share sale rather than an asset sale. The carve-out excludes from the definition of immovable property properties in which the business is carried on. The carve-out is thus an exception to the principle that the source state will have jurisdiction to tax gains arising directly or indirectly from the increase in value of immovable property.

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[14] In my opinion, the avoidance of "foreign tax" is irrelevant. The term "tax benefit" does not include a tax benefit under foreign law.

[80] For Article 13(4) and (5) to apply, the taxpayer must be a resident of the contracting state – in the present case, Luxembourg. To qualify as a resident of Luxembourg, the Appellant had to meet the requirements set out in Article 4 of the Treaty. Article 4 does not include a limitation rule that denies access to treaty benefits as is the case for many of the treaties that Canada has entered into.

[81] Article 13(4) needs also to be interpreted in the context of the *ITA*. As explained earlier, paragraph 115(1)(*b*) provides that a non-resident will not be liable to tax on the alienation of treaty-protected property. The Excluded Property exception is thus a limit to Canada's power to tax capital gains pursuant to the *ITA* in the event there is a sufficient level of economic activity exercised in owning the Canadian immovable property.

[82] This contextual interpretation of the carve-out is coherent with the purposive analysis of Article 13(4). To this effect, it is important to consider the OECD Model Treaty and its commentaries, because the OECD model treaty often serves as a baseline in Canadian treaty negotiations.[15] Other extrinsic materials may also be relevant.

[83] The OECD Model Treaty does not include a carve-out for immovable property in which the business of the company is carried on. Departure from the model tax treaty may be significant as it demonstrates the intent of one, or both, parties to diverge from the general approach. When there is no common agreement on a specific point at the start of the negotiations, a divergence may be the result of a bargain struck by the parties. In the instant case, it is apparent that the parties intended to depart from the model treaty. This departure involved carving out from the definition of immovable property properties where economic activities were carried on.

[84] Parties to a tax treaty are presumed to know the other country's tax system when they negotiate a tax treaty; they are presumed to know the tax consequences of a tax treaty when they negotiate amendments to that treaty. The OECD commentaries highlight that some states – like Luxembourg – generally do not tax capital gains: OECD commentary on Article 13, 28.12. It is then the responsibility of the state that does tax capital gains to prevent a double exemption if it wishes to do so.

[15] OECD Model Tax Convention on Income and on Capital, December 18, 2017, Introduction at para 2-3.

[85] When the Treaty was negotiated, the Canadian treaty negotiators were aware of the fact that Luxembourg allowed its resident to avoid Luxembourg income tax on gains arising from the sale of shares of foreign corporations in broad circumstances. In this light, if Canada wished to curtail the benefits of the Treaty to potential situations of double taxation, Canada could have insisted that the exemption provided for under Article 13(5) be made available only in the circumstance where the capital gain was otherwise taxable in Luxembourg. Canada and Luxembourg did not choose this option. It is certainly not the role of the Court to disturb their bargain in this regard.

[86] The Respondent then asserts that the Appellant should be denied the benefit of Article 13(5) because it was a conduit created solely for the purpose of passing on the tax benefit (e.g. exemption from Canadian capital tax) to its shareholders who were not entitled to claim the benefits of the Treaty in their own right.

[87] I am uncertain what the Respondent means when it uses the term “conduit” to describe the circumstances of the Appellant’s holding and disposition of the Shares and the distribution of the sales proceeds to the Appellant’s shareholders. A corporation is often referred to as a “conduit” when it holds property for a principal. In that case, the principal is the “beneficial owner” of the property’s legal title is in the name of the corporation which holds title as an agent or nominee for the principal.

[88] The Minister’s assessment was premised on the fact that a capital gain was realized by the Appellant. Therefore, it is clear that the Minister has accepted that the Appellant was the “beneficial owner” of the shares sold to Chevron. If not, and the Appellant was holding the shares as nominee or agent for someone else, then that person should have been assessed by the Minister.

[89] In this light, the Respondent’s argument that the Appellant was acting as a “conduit” appears to be inconsistent with the Minister’s acceptance of the Appellant as the “beneficial owner” of the Shares and the lawful recipient of the sale proceeds.

[90] The Respondent takes issue with the fact that the Appellant held the Shares for a short period of time, sold them when the Co-Investors wished to do so, and distributed the proceeds to its shareholders. I find nothing unusual with these transactions. Holding corporations are often established for a single purpose which includes the holding of shares of a single corporation. When that task

comes to an end following the sale of the investment, the corporation is often wound up and the proceeds of sale are distributed to the shareholder. While a board of directors is independent from the corporation's shareholders, directors are required to act in the best interests of the corporation's shareholders. They do so by taking into account the purpose for which a holding corporation was created and the intent of the shareholders.

[91] There is nothing in the Treaty that suggests that a single purpose holding corporation, resident in Luxembourg, cannot avail itself of the benefits of the Treaty. There is also nothing in the Treaty that suggests that a holding corporation, resident in Luxembourg, should be denied the benefit of the Treaty because its shareholders are not themselves residents of Luxembourg.

[92] The Respondent argues that the overall result of the Restructuration amounted to "treaty shopping", which constitutes an abuse of the Treaty. The phrase treaty shopping is not defined in any Canadian tax treaties or in the *ITA*. The OECD Glossary of Tax Terms defines "treaty shopping" as follows: "An analysis of tax treaty provisions to structure an international transaction or operation so as to take advantage of a particular tax treaty."

[93] When the Treaty was negotiated, adopted and ratified by Canada and Luxembourg, the Model Convention included in Articles 10, 11 and 12 a very narrow anti-abuse or treaty shopping rule.[16] That provision was based on the concept of beneficial ownership and applied only to certain types of income (dividends, rents and royalties) received by residents of the other Contracting State. The rule was ultimately incorporated in the Treaty. It has been found to be of very limited application.[17]

[94] In the case of the Canada-United States Tax Convention, Canada was persuaded by the United States to adopt a comprehensive anti-treaty shopping[18] rule, which is commonly found in many of the United States tax treaties. Generally speaking, that provision operated on a look through basis. In the case of private corporations, treaty benefits are denied if an insufficient number of shares are owned directly or indirectly by residents of the United States who are "qualifying persons" within the meaning of that treaty in their own right. This is

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[16] OECD Model Tax Convention on Income and on Capital, June 1998.
[17] See for example *Canada v Prévost Car Inc.*, 2009 FCA 57 and *Velcro Canada v The Queen*, 2012 TCC 57.
[18] Article XXIX-B.

a good example of how Canada and other countries impose, under some treaties, conditions other than mere residence to curtail treaty shopping.

[95] In the federal budget of 2013, the Department of Finance ("Finance") announced that it was reconsidering Canada's bilateral approach to treaty shopping. Later that year, the Department of Finance released a consultation paper designed to provoke feedback from taxpayers.[19] In summary, the paper outlined two approaches: namely the continuation of the bilateral approach previously followed by Canada, and a new approach that would lead to the enactment of a domestic anti-treaty shopping rule that, potentially, would override all of Canada's tax treaties (the "Domestic Approach"). Finance appeared to favour the latter approach, because Canada's new policy to curb treaty shopping could be enacted more quickly.

[96] In the budget introduced in the spring 2014, following the consultation process, Finance announced that it would proceed unilaterally under the Domestic Approach.[20]

[97] To this effect, Finance presented a broader measure to curb treaty shopping. The proposed rule would use a general approach focused on avoidance transactions, and to, "provide more certainty and predictability for the taxpayer" would contain "specific provisions setting out the ambit of its application" as follows:

> *Main purpose provision*: subject to the relieving provision, a benefit would not be provided under a tax treaty to a person in respect of an amount of income, profit or gain (relevant treaty income) if it is reasonable to conclude that one of the main purposes for undertaking a transaction, or a transaction that is part of a series of transactions or events, that results in the benefit was for the person to obtain the benefit.
>
> *Conduit presumption*: it would be presumed, in the absence of proof to the contrary, that one of the main purposes for undertaking a transaction that results in a benefit under a tax treaty (or that is part of a series of transactions or events that results in the benefit) was for a person to obtain the benefit if the relevant treaty income is primarily used to pay, distribute or otherwise transfer, directly or indirectly, at any time or in any form, an amount to another person or persons that would not have

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[19] Consultation Paper on Treaty Shopping – The Problem and Possible Solutions, released on August 12th, 2013.
[20] Budget 2014, Annex 2 – Tax Measures: Supplementary Information, Consultation on Tax Planning by Multinational Enterprises.

> been entitled to an equivalent or more favourable benefit had the other person or persons received the relevant treaty income directly.
>
> *Safe harbour presumption*: subject to the conduit presumption, it would be presumed, in the absence of proof to the contrary, that none of the main purposes for undertaking a transaction was for a person to obtain a benefit under a tax treaty in respect of relevant treaty income if:
>
> > the person (or a related person) carries on an active business (other than managing investments) in the state with which Canada has concluded the tax treaty and, where the relevant treaty income is derived from a related person in Canada, the active business is substantial compared to the activity carried on in Canada giving rise to the relevant treaty income;
> >
> > the person is not controlled, directly or indirectly in any manner whatever, by another person or persons that would not have been entitled to an equivalent or more favourable benefit had the other person or persons received the relevant treaty income directly; or
> >
> > the person is a corporation or a trust the shares or units of which are regularly traded on a recognized stock exchange.
>
> *Relieving provision*: If the main purpose provision applies in respect of a benefit under a tax treaty, the benefit is to be provided, in whole or in part, to the extent that it is reasonable having regard to all the circumstances.

Even if a transaction results in a tax treaty benefit for a taxpayer, it does not necessarily follow that one of the main purposes for undertaking the transaction was to obtain the benefit. One of the objectives of tax treaties is to encourage trade and investment and, therefore, it is expected that tax treaty benefits will generally be a relevant consideration in the decision of a resident of a state with which Canada has a tax treaty to invest in Canada. The proposed rule would not apply in respect of an ordinary commercial transaction solely because obtaining a tax treaty benefit was one of the considerations for making an investment.

The rule, if adopted, could be included in the *Income Tax Conventions Interpretation Act* so that it would apply in respect of all of Canada's tax treaties. <u>The rule would apply to taxation years that commence after the enactment of the rule into Canadian law</u>. The Government also requests comments as to whether transitional relief would be appropriate.

[Emphasis added.]

[98] It is apparent to me, that the Respondent seeks to achieve the same result in the instant case under the GAAR as that intended under the above captioned proposed rule. In my opinion, the Respondent is seeking to apply the GAAR in order to deal with what Finance now believes is unintended gap in the Treaty. In *Garron Family Trust v The Queen*, Justice Woods concluded that the GAAR could not be applied in this fashion, as follows:

> The problem that I have with this argument is that, if accepted, it would result in a selective application of the *Treaty* to residents of Barbados, <u>depending on criteria other than residence</u>. It seems to me that this is contrary to the object and spirit of the *Treaty*, which is apparent in Article I and Article IV(1). Residents of Barbados, as defined for purposes of the *Treaty*, are entitled to the benefits of Article XIV(4) as long as they are not also residents of Canada.[21]

[Emphasis added.]

[99] The Federal Court of Appeal, in the same case, added:

> If the residence of the Trusts is to be determined on the basis of the residence of St. Michael Trust Corp. (which is the premise for the Crown's argument based on the general anti-avoidance rule), then the Trusts have not avoided section 94. On the contrary, they have fallen squarely into it. The fact that the Trusts would also be entitled to a treaty exemption flows from the fact that in the Barbados Tax Treaty, Canada has agreed not to tax certain capital gains realized by a person who is a resident of Barbados. If the residence of the Trusts is Barbados for treaty purposes, the Trusts cannot misuse or abuse the Barbados Tax Treaty by claiming the exemption.[22]

[100] The Minister argues that the Restructuration constitutes an abuse of Articles 1, 4 and 13, because, absent the Restructuration, the gain would have been taxable in Canada. I do not find this result contrary to the rationale underlying Articles 1, 4 and 13. The rationale underlying the carve-out is to exempt residents of Luxembourg from Canadian taxation where there is an investment in immovable property used in a business. The significant investments of the Appellant to de-risk the Duvernay shale constitute an investment in immovable property used in a business. Therefore, I conclude that the GAAR does not apply to preclude the Appellant from claiming the exemption provided for under Article 13(5) of the Treaty.

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[21] 2009 TCC 450.
[22] *St. Michael Trust Corp. v. Canada*, 2010 FCA 309, at para 90.

[101] For all of these reasons the appeal is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with these reasons. Costs are awarded to the Appellant.

Signed at Magog (Québec), this 22nd day of August 2018.

"Robert J. Hogan

Hogan J.

Appendix A

2014-4359(IT)G

TAX COURT OF CANADA

B E T W E E N:

ALTA ENERGY LUXEMBOURG S.A.R.L.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties to this proceeding admit, only for the purposes of this proceeding and any further appeals respecting it, the truth of the following facts and the authenticity of the documents referred to in this Statement of Agreed Facts as that term is defined in the *Tax Court of Canada Rules (General Procedure)*. The parties to this proceeding agree to the admission into evidence of the documents referred to in this Statement of Agreed Facts.

The parties agree that this Statement of Agreed Facts does not preclude either party from calling evidence to supplement the facts agreed to herein or to establish other facts not set out herein, it being accepted that such evidence may not contradict the facts agreed to herein.

PRELIMINARY

1. Alta Energy Luxembourg S.a.r.l. (the "Appellant") is a corporation incorporated as a société à responsabilité limitée under the laws of the Grand Duchy of Luxembourg ("Luxembourg").

2. This appeal is with respect to the notice of assessment dated April 28, 2014 in respect of the Appellant's 2013 taxation year.

Alta Resources LLC

3. Alta Resources LLC ("Alta Resources") is a private company founded in Texas in 1999. Its Chief Executive Officer is Joseph Greenberg.

4. Between 2004 and 2007, Alta Resources and its then partners identified and leased 24,076 net acres in the Fayetteville shale in Arkansas. In 2007 they sold their assets in the Fayetteville shale for approximately US$580 million on a total investment of approximately US$70 million. A copy of the sales presentation in respect of Alta Resources' Fayetteville assets is located at tab 1 of the Joint Book of Documents.

5. Between 2008 and 2010, Alta Resources and its then partners identified and leased 48,701 net acres in the Marcellus shale in Pennsylvania. In 2010 they sold their assets in the Marcellus shale for approximately US$670 million on a total investment of approximately US$170 million. A copy of the sales presentation in respect of Alta Resources' Marcellus assets is located at tab 2 of the Joint Book of Documents.

6. Alta Resources Investments, LLC ("Alta Investments") was formed on April 12, 2011 by Alta Resources and various "friends and family" of Alta Resources.

Blackstone Group LP

7. Blackstone Group LP ("Blackstone") is a publicly-traded private equity, investment banking, alternative asset management and financial services partnership based in New York City.

8. Blackstone Capital Partners VI LP ("BCP VI") was formed as a private equity general corporate investment fund. The private placement memorandum offering of limited partnership interests in BCP VI dated June 2009 is located at tab 3 of the Joint Book of Documents.

9. Blackstone Energy Partners LP ("BEP") was formed as a private equity investment fund to invest in energy and natural resources investments. The private placement memorandum offering of limited partnership interests in BEP dated April 2011 is located at tab 4 of the Joint Book of Documents.

Alta Energy Partners, LLC

10. In or around January 2011, Alta Resources and Blackstone had initial discussions concerning a potential relationship between the two companies.

11. In a memorandum dated January 27, 2011, Blackstone's deal team reported to Blackstone's Review Committee on the proposed deal with Alta Resources. A copy of the memorandum

dated January 27, 2011 from Blackstone's deal team to the Review Committee is located at tab 5 of the Joint Book of Documents.

12. On February 9, 2011, Blackstone's Review Committee concluded that the deal team should continue working on the Alta Resources opportunity.

13. By limited liability company agreement dated April 12, 2011(the "LLC Agreement"), Alta Investments and BEP, BCP VI and affiliated entities, formed Alta Energy Partners, LLC ("AEP"), a Delaware limited liability company. The LLC Agreement is located at tab 6 of the Joint Book of Documents.

14. Under the LLC Agreement, Alta Investments agreed to make capital contributions up to US$84.5 million to AEP, and the Blackstone entities agreed to make capital contributions up to US$915.5 million.

15. AEP's board of managers consisted of five managers. The capital partners affiliated with Blackstone had the right to designate three managers. Alta Investments had the right to designate two managers.

16. The initial managers of AEP designated by Alta Investments were Mr. Greenberg and Todd Mitchell. The initial managers of AEP designated by the Blackstone entities were David Foley, Angelo Acconcia and a third person to be named at a later date. Copies of the resumes of Mr. Mitchell, Mr. Foley, and Mr. Acconcia are located at tabs 7, 8 and 9, respectively, of the Joint Book of Documents.

17. Randy King joined AEP's board as its fifth manager in or about February 2012. Mr. King received director's fees in the amount of $200,000 per annum. He did not hold any equity in AEP. A copy of Mr. King's resume is located at tab 10 of the Joint Book of Documents.

18. Minutes of AEP's board of managers refer to meetings on November 11, 2011 and February 3, 2012. Copies of the minutes from AEP's November 1, 2011 and February 3, 2012 board of managers meetings are located at tabs 11, and 12 of the Joint Book of Documents.

Alta Energy Partners Canada Ltd.

19. On June 13, 2011, Alta Energy Partners Canada Ltd. ("Alta Canada"), an Alberta corporation, was incorporated as a wholly owned subsidiary of AEP to conduct its Canadian operations.

PROPERTY ACQUISITION

20. Following the formation of AEP, Blackstone and Alta Resources evaluated a number of potential opportunities, including the Duvernay shale in the Kaybob area of Alberta.

21. Each parcel of land in Alberta can be identified by its meridian, township, range, and section. The "meridian" refers to the 4^{th}, 5^{th} and 6^{th} meridians (i.e., 110°, 114°, and 118° west longitude, respectively) that intersect Alberta. All sections in which Alta Canada held an interest during the relevant time was in the West 5^{th} meridian. The "range" is a six-mile-wide column numbered from east to west, starting at range 1 west of each meridian. The "township" is a six-mile-wide row numbered from township 1 at the Montana border to township 126 at the Northwest Territories border. The term "township" also describes the

six-by-six mile square formed by the intersection of ranges and townships. A "section" measures one square mile (640 acres). Each six-by-six mile township is divided into 36 sections, numbered 1 to 36.

22. The Government of Alberta is the owner of the oil and natural gas beneath the relevant surface in Alberta.

23. Leases and licenses are granted by the Government of Alberta and grant the holder the exclusive right to drill for and recover oil and/or natural gas in the subject lands, together with the right to remove from the location any oil and/or natural gas recovered. A representative petroleum and natural gas licence (a "PNG licence") is located at tab 13 of the Joint Book of Documents.

24. A PNG licence does not grant the licensee any legal title to the surface of the subject land.

25. For locations in the Kaybob area, the initial term of a PNG licence issued by the Government of Alberta was four years.

26. The term of a PNG licence can be extended by an intermediate term of 5 years if validated. Validation is achieved by drilling a well or by "grouping" the licence with another licence in the immediate area on which a well has been drilled within the last month. If a validating well is not drilled during the PNG licence's initial four-year term, and the licence is not otherwise extended, the licence will expire.

27. The primary term of a petroleum and natural gas lease (a "PNG lease") is five years.

28. When a PNG lease reaches the end of its primary term, or a PNG licence reaches the end of its intermediate term, it expires and is cancelled unless the holder can prove that it is producing or capable of producing petroleum and/or natural gas.

Sphere Energy Corp.

29. On May 26, 2011, Blackstone's deal team sought the approval of Blackstone's Review Committee to pursue two opportunities to acquire PNG leases/licences covering acreage in the Duvernay shale in Canada: 14,400 net acres from Sphere Energy Corp. ("Sphere"); and 12,000 acres pursuant to a joint bid on a Crown lease. A copy of the memorandum dated May 26, 2011 from Blackstone's deal team to the Review Committee is located at tab 14 of the Joint Book of Documents.

30. The Investment Committee approved proceeding with the Sphere investment as described in the May 26, 2011 memorandum. A copy of the email dated May 31, 2011 in respect of the Investment Committee's approval is located at tab 15 of the Joint Book of Documents.

31. On June 1, 2011, AEP agreed to acquire Sphere's interest in its PNG leases and licences covering 22.5 sections, equal to 14,400 net acres, in the Kaybob area in exchange for $25 million and an overriding royalty of 5.25%. Pursuant to the agreement, the purchaser committed to drill one vertical well within 12 months of closing and one horizontal well within 18 months of closing. A copy of the letter agreement dated June 1, 2011 between Sphere and AEP is located at tab 16 of the Joint Book of Documents.

32. In an email dated June 1, 2011, Edmund Gill, counsel from the law firm of McCarthy Tetrault LLP ("McCarthy Tetrault"), described advice provided to Mr. Greenberg

regarding business issues and the Canadian tax implications of the investment in Canada. Mr. Gill has advised that the paragraph numbered "1" of his email is referring generally to taxes incurred in the business itself – income on profits, and the paragraph numbered "2" of his email is referring to the capital gain resulting from a sale of the Canadian operating company – being Alta Canada. A copy of the email chain dated May 31, 2011 and June 1, 2011 between McCarthy Tetrault, Mr. Acconcia, Mr. Greenberg and others is located at tab 17 of the Joint Book of Documents.

33. AEP's acquisition of the Sphere acreage was effected by Alta Canada's acquisition of all of the issued and outstanding shares of 1612402 Alberta Ltd., a wholly owned subsidiary of Sphere to which Sphere had conveyed its entire interest in its PNG leases and licences, with an overriding royalty in favour of Sphere. A copy of the Share Purchase and Sale Agreement dated June 15, 2011 is located at tab 18 of the Joint Book of Documents.

34. Later, on July 25, 2011, Blackstone briefed its Investment Committee on an opportunity to acquire acreage in the Duvernay shale from "B&G", a private company. This acreage was not acquired. A copy of Blackstone's July 25, 2011 memorandum regarding Alta Energy – B&G Duvernay Shale Acquisition is located at tab 19 of the Joint Book of Documents.

TAQA North Ltd.

35. On November 25, 2011, Blackstone's deal team reported to Blackstone's Investment Committee on the potential acquisition of acreage from TAQA North Ltd. ("TAQA"). A copy of the memorandum dated November 25, 2011 to the Investment Committee is located at tab 20 of the Joint Book of Documents.

36. The Investment Committee approved the deal team moving forward on the TAQA acquisition at the purchase price outlined in the memorandum to the Investment Committee with a 10% variance on price. A copy of the email dated December 27, 2011 in respect of the Investment Committee's approval is located at tab 21 of the Joint Book of Documents.

37. On January 9, 2012, Alta Canada acquired the Duvernay rights of TAQA in PNG licences and leases covering 56.5 net sections, equal to 36,160 net acres, in the Kaybob area in exchange for $141 million and an overriding royalty interest of 2%. A copy of the letter agreement dated December 2, 2011 between TAQA and Alta Canada is located at tab 22 of the Joint Book of Documents.

Cequence Acquisition

38. On January 25, 2012, Alta Canada agreed to acquire all of the rights, title and interests of Cequence Energy Ltd. ("Cequence") in certain zones in respect of 59.5 sections, equal to 4,411 net acres, for $13,231,620, subject to adjustments. A copy of the letter agreement dated January 25, 2012 between Cequence and Alta Canada is located at tab 23 of the Joint Book of Documents.

Husky Swap

39. On March 22, 2012, Alta Canada and Husky Oil Operations Limited ("Husky") entered into an Undeveloped Mineral Rights Exchange Agreement whereby Alta Canada acquired Husky's interest in PNG leases in the Duvernay covering 11.75 sections, equal to 3,806 net acres, in exchange for Alta Canada's interest in PNG leases covering 8 sections, equal to 3,840 net acres.

Farmin Agreement with Crew Energy

40. On July 20, 2012, Alta Canada entered into a "farmin" agreement with Crew Energy Inc. ("Crew"). Crew had PNG leases with an approaching expiry date but did not want to drill a well because it had limited capital but it wanted to save the lands for shallower production. Under the agreement, Alta Canada committed to drill a well by August 20, 2012 and, thereby, validate the licence. Alta Canada would earn a 100% working interest in two sections, equal to 1,280 net acres, subject to an overriding royalty interest retained by Crew. Crew would also retain the shallow rights over the lands. The letter agreement dated July 20, 2012 between Alta Canada and Crew is located at tab 24 of the Joint Book of Documents.

Yoho Validation Agreement

41. By July 2012, Alta Canada had drilled a well on lands covered by the PNG licence #5408120191 held by Alta Canada. In or around July 2012, Alta Canada agreed with Yoho Resources Partnership ("Yoho") that Alta Canada would include the PNG licence #5408120190 held by Yoho in a grouping application to the Crown to have both Alta's licence and Yoho's licence validated into intermediate terms. In consideration for the inclusion of the Yoho licence in the grouping application, Yoho agreed to assign 35% of its working interest in Yoho's licence to Alta Canada and Alta Canada thereby acquired 211 net acres.

Shell Swap

42. On January 23, 2013, Alta Canada exchanged its working interest in one section, equal to 640 net acres, to Shell Canada Energy ("Shell") in exchange for Shell's working interest in another section, also equal to 640 net acres. The Asset Exchange Agreement dated January 23, 2013 between Alta Canada and Shell is located at tab 25 of the Joint Book of Documents.

Yoho Acquisition

43. On March 14, 2013, Alta Canada and Yoho entered into an Undeveloped Acreage Conveyance whereby Alta Canada acquired a 75% working interest in 4 sections, equal to 1,920 net acres, for $6,977,921. The Undeveloped Acreage Conveyance between Alta Canada and Yoho dated March 14, 2013 is located at tab 26 of the Joint Book of Documents.

Crown Lease Bids

44. Between August 10, 2011 and March 20, 2013, Alta Canada acquired PNG licences in respect of acreage in the Kaybob area directly from the Government of Alberta as follows:

Acquisition Date	Acquired Property	Purchase Price
2011/08/10	Crown Lease #1	$5,020,017.00
2011/08/24	Crown Lease #2	$9,988,386.00
2011/09/06	Crown Lease #3	$1,819,746.00
2011/10/05	Crown Lease #4	$481,073.00
2011/10/19	Crown Lease #5	$11,788,501.00

2011/11/16	Crown Lease #6	$296,497.00
2011/11/30	Crown Lease #7	$882,146.00
2012/01/11	Crown Lease #8	$2,340,377.00
2012/05/30	Crown Lease #9	$171,217.00
2012/07/25	Crown Lease #10	$3,445,233.00
2013/03/20	Crown Lease #11	$1,375,882.00

Net Acreage Position

45. As at March 28, 2013, Alta Canada's net acreage position in the Kaybob Duvernay was 67,891 acres. Alta Canada's interest in its acreage was pursuant to PNG leases and licences called working interests.

46. Alta Canada also held gross overriding royalties in respect of 5,120 net acres, covering 12 sections.

THE RESTRUCTURING

47. By letter dated October 25, 2011, AEP engaged Deloitte Tax LLP ("Deloitte"), of Houston, Texas, to provide tax advisory services during the period October 12, 2011 through December 31, 2013. A copy of the October 25, 2011 letter is located at tab 27 of the Joint Book of Documents.

48. In connection with the Restructuring, AEP, Alta Resources and Blackstone also received advice from:

a. Andrews Kurth LLP, as counsel to Blackstone Capital Partners;

b. Morgan Lewis & Bockius LLP, as counsel to Alta Resources;

c. McCarthy Tetrault, as Canadian transactional counsel; and

d. Arendt & Medernach LLC, as Luxembourg transactional counsel.

A copy of a document entitled "Alta Energy Partners Restructuring Working Group List" is located at tab 28 of the Joint Book of Documents.

49. By email dated December 1, 2011, Seth Abrams of Deloitte summarized a discussion with the Alta management team of proposed structural changes, and distributed a draft presentation by Deloitte entitled "Proposed Alta Energy Restructuring Preliminary Steps & Tax Considerations", dated December 1, 2011. A copy of the email dated December 1, 2011 is located at tab 29 of the Joint Book of Documents, and a copy of the draft presentation by Deloitte is located at tab 30 of the Joint Book of Documents.

50. On December 7, 2011, Gary Levin of Blackstone advised Christophe Diricks of Deloitte and King Chong of Blackstone that the total investment in Alta's Canadian assets was expected to grow to between $300 to $400 million within the next two years, and that Blackstone made the investment with a target multiples of invested capital expectation of between two and three times. A copy of the email chain that includes the email from Mr. Levin sent on December 7, 2011 is located at tab 31 of the Joint Book of Documents.

51. The .draft presentation by Deloitte dated December 1, 2011 contemplated a tax ruling process with the Luxembourg tax authorities. On December 8, 2011, Eric Fort of Arendt & Medernach sent a letter dated December 8, 2011 on behalf of Blackstone Capital Partners to the Luxembourg tax authorities, Administration des Contributions Directe, to apply for confirmation of the tax regime applicable to Alta Energy Luxembourg S.a.r.l. within the frame of the investment structure described in the letter. By letter dated January 30, 2012,

Mr. Fort reported to Andrews Kurth LLP that he had received confirmation from the Luxembourg tax authorities that the content of his letter of December 8, 2011 was in compliance with current tax legislation and administrative practice in Luxembourg. A copy of the January 30, 2012 letter with attached copy of the December 8, 2011 letter is located at tab 32 of the Joint Book of Documents.

52. On December 9, 2011, Arendt Services S.A. ("Arendt Services") provided Blackstone with an estimate of €41,900 as the annual charge to provide certain services. Copies of an email exchange dated October 20, 2011 to January 5, 2012 between Mr. Chong and various recipients, the email sent January 5, 2012 from Grant Broadway of Arendt Services to Mr. Chong attached to Mr. Chong's email, and a Service Proposal dated January 5, 2012 attached to Mr. Broadway's email are located at tabs 33, 34 and 35, respectively, of the Joint Book of Documents.

53. On December 15, 2011, Mr. Greenberg emailed Mr. Mitchell and others to set up a conference call to discuss changes in the sharing ratio between Blackstone and Alta Investments as it related to the Canadian shale play, and the proposed corporate restructure "to optimize tax efficiencies due to the large presence in Canada." On December 19, 2011, Mr. Greenberg distributed a PowerPoint presentation entitled "Alta Energy Partners, LLC Canada Update December, 2011" for purposes of the conference call. A copy of the email from Mr. Greenberg sent on December 15, 2011 is located at tab 36 of the Joint Book of Documents and a copy of the Alta Energy Partners, LLC Canada Update December 2011 PowerPoint presentation is located at tab 37 of the Joint Book of Documents.

54. McCarthy Tetrault prepared a PowerPoint presentation dated March 16, 2012, to show the Canadian tax effects of the proposed restructuring. A copy of the March 16, 2012 presentation is located at tab 38 of the Joint Book of Documents.

55. On April 19, 2012, Alta Energy Canada Partnership ("AECP"), a partnership established under the laws of Alberta, having its office in Houston, Texas, was formed by Alta Investments and certain entities affiliated with BEP and BCP VI. A copy of the Partnership Agreement of AECP dated April 19, 2012 is located at tab 39 of the Joint Book of Documents.

56. AECP's board of managers consisted of five managers. The capital partners affiliated with Blackstone had the right to designate three managers. Alta Investments had the right to designate two managers. The managers of AECP designated by Alta Investments were Mr. Greenberg and Mr. Mitchell. The managers designated by the Blackstone entities were Mr. Foley, Mr. Acconcia and Mr. King.

57. On April 19, 2012, the Appellant was incorporated under the laws of Luxembourg with AECP as its sole shareholder. A copy of the deed of incorporation dated April 19, 2012 is located at tab 40 of the Joint Book of Documents.

58. The Appellant had a board of managers consisting of:

a. two class A managers, being:

  i) Mr. Greenberg; and

  ii) Christopher Placca of Blackstone; and

b. three class B managers, initially being:

  i) Antonella Graziano of Arendt Services;

ii) Anne Catherine Grave of Arendt Services; and

iii) Catherine Koch of Arendt Services.

Copies of the resumes of Mr. Placca, Ms. Graziano, Ms. Grave, and Ms. Koch are located at tabs 41, 42, 43 and 44, respectively, of the Joint Book of Documents.

59. The class B managers were provided by Arendt Services. Blackstone and Alta Resources did not meet with the class B Managers nor did they receive the resumes of the class B Managers prior to their appointment.

60. On April 19, 2012, AEP transferred its 56,345,864 common shares of Alta Canada to the Appellant in exchange for a demand promissory note.

61. The Appellant subsequently subscribed for additional shares in Alta Canada.

62. On April 19, 2012, a management services agreement was entered into by Alta Canada and Alta Resources pursuant to which Alta Resources agreed to provide certain services to Alta Canada. A copy of the Management Services Agreement is located at tab 45 of the Joint Book of Documents.

63. The Restructuring Steps also included a 30-year profit participating facility agreement made on April 19, 2012 ("PPL"), between AECP, as lender, and the Appellant, as borrower, for a loan facility of $184,683,166, later increased to $300 million, bearing fixed and variable interest. A copy of the PPL is located at tab 46 of the Joint Book of Documents.

64. Fixed interest under the PPL was 0.5% p.a., while variable interest corresponded to 100% of the Appellant's adjusted net profit for the period, reduced by: fixed interest of the period, fixed interest of the previous period during which no variable interest was due, a margin

of 1% of adjusted net profits during the period, and such amount as the board of managers of the Appellant determined should be retained by the Appellant to be invested, reinvested or otherwise used by the Appellant in its business.

65. The Appellant was funded by AECP with 1% equity, 14% through an interest-free loan (the "IFL"), and 85% through the PPL.

66. By written resolution, the Appellant's board of managers resolved on April 19, 2012, among other things:

a. to approve the Appellant's purchase of the Alta Canada shares from AEP; and

b. to approve the entering into of the PPL and the IFL.

A copy of the written resolutions of the board of managers of the Appellant is located at tab 47 of the Joint Book of Documents.

67. In or around May 15, 2012, the Appellant and Arendt Services entered into a corporate services agreement pursuant to which Arendt Services agreed to provide certain services to the Appellant. A copy of the Corporate Services Agreement is located at tab 48 of the Joint Book of Documents.

68. Minutes of the Appellant's board of managers refer to meetings on July 16, 2012, November 19, 2012, January 24, 2013, April 12, 2013, April 30, 2013, July 11, 2013, July 30, 2013, September 5, 2013, and February 12, 2014. Copies of the Board Discussion Materials in respect of the meetings of the Appellant's board of managers meetings held on November 19, 2012 and January 24, 2013 are located at tabs 49 and 50 of the Joint Book of Documents. Copies of the minutes from the Appellant's board of managers meetings are located at tabs 51, 52, 53, 54, 55, 56, 57 and 58 of the Joint Book of Documents. The

Appellant's board of managers had also signed written resolutions dated July 16, 2012. A copy of the written resolutions of the board of managers of the Appellant is located at tab 59 of the Joint Book of Documents.

69. AECP's board of managers held meetings on May 2, 2012, August 7, 2012, November 7, 2012, and February 7, 2013. Copies of the discussion materials in respect of the meetings of the AECP's board of managers meetings are located at tabs 60, 61, 62, and 63 of the Joint Book of Documents. Copies of the minutes from AECP's board of managers meetings are located at tabs 64, 65, 66, and 67 of the Joint Book of Documents. AECP also prepared Monthly Financial Report presentations for April 2012, May 2012, June 2012, July 2012, August 2012, September 2012, October 2012, November 2012, December 2012, January 2013, February 2013, and March 2013. Copies of these presentations are located at tabs 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, and 79 of the Joint Book of Documents.

OPERATIONS

Wells

70. During 2012 and 2013, Alta Canada drilled six wells, specifically:

a. Altaenergyca 102 Kaybobs 6-18-62-19W5 (the "6-18 vertical well");

b. Alta Energy Kaybob South 13-28-059-18 (the "13-28 vertical well");

c. Alta Energy Kaybob South 6-25-60-19 (the "6-25 vertical well");

d. Alta Energy HZ Kaybobs 1-32-61-20 (the "1-32 horizontal well");

e. Altaenergyca Kaybobs 1-31-62-20 (the "1-31 vertical well") which, after the drilling of the horizontal leg, became the Altaenergyca HZ Kaybob 8-5-63-0 (the "8-5 horizontal well"); and

f. Alta Energy HZ Kaybobs 14-25-60-19 (the "14-25 horizontal well").

A copy of a map showing "Alta Operational Activity" is located at tab 80 of the Joint Book of Documents.

<u>6-18 Vertical Well and 1-32 Horizontal Well</u>

71. At the time of Alta Canada's acquisition of the Sphere rights, 14.5 of Sphere's sections had licences expiring between January 2014 and September 2015 but which could be grouped and validated with a single vertical test well.

72. On January 20, 2012, Alta drilled the 6-18 vertical well. The 6-18 vertical well was drilled in section 18 of township 62/range 19. The 6-18 vertical well satisfied Alta Canada's commitment to Sphere to drill a vertical well.

73. On August 23, 2012, drilling operations began for the 1-32 horizontal well. The 1-32 horizontal well was drilled in section 5 of township 62/range 20 and section 32 of township 61/range 20. The 1-32 horizontal well satisfied Alta Canada's commitment to Sphere to drill a horizontal well.

<u>13-28 Vertical Well</u>

74. On July 12, 2012, Alta drilled the 13-28 vertical well in section 33 of township 59/range 18. Kaybob 13-28 was drilled on lands covered by a licence that was scheduled to expire on December 4, 2012.

<u>6-25 Vertical Well and 14-25 Horizontal Well</u>

75. In August 2012, Alta drilled the 6-25 vertical well in section 25 of township 60/range19.

76. In 2012, Alta also drilled the 14-25 horizontal well drilled in section 25 of township 60/range 19.

<u>1-31 Vertical Well and 8-5 Horizontal Well</u>

77. Alta drilled the 1-31 well pursuant to the farmin agreement between Alta Canada and Crew entered into on or around July 20, 2012. This vertical well was drilled in section 31 of township 62/range 20.

78. The well was temporarily abandoned to plan for a horizontal leg to be drilled at a later date. The horizontal leg, the 8-5 horizontal well, was drilled in section 31 of township 62/range 20 and section 25 of township 63/range 20.

<u>Non-Operator Wells</u>

79. During 2012 Alta Canada also participated as a non-operator in the drilling of two additional wells, specifically:

   a. Yoho HZ Kaybobs 1-16-62-21W5M ("Yoho 1-16 horizontal well"); and

   b. Yoho HZ Kaybobs 14-21-62-21W5M ("Yoho 14-21 horizontal well").

80. Celtic Exploration Ltd. ("Celtic") had a working interest in certain acreage in which Yoho was the operator.

81. Yoho had served notice on Celtic in respect to the drilling of two wells, the Yoho 1-16 horizontal well and the Yoho 14-21 horizontal well. Celtic elected not to participate in the drilling of the wells and was subject to a penalty for non-participation of 300% cost recovery out of production from the wells.

82. On October 16, 2012, Alta Canada entered into a participation and production sharing agreement with Yoho, pursuant to which Alta Canada participated in the drilling of, and share in the production from the Yoho 1-16 horizontal well and the Yoho 14-21 horizontal well. The Participation and Production Sharing Agreement dated October 16, 2012 between Yoho and Alta Canada is located at tab 81 of the Joint Book of Documents.

83. By paying 25% of the costs to drill, case and complete the Yoho 1-16 horizontal well and the Yoho 14-21 horizontal well, Alta Canada was entitled to a 25% interest in production from the wells until Celtic's 300% penalty is recovered. At that point, Alta Canada's 25% interest would revert back to Yoho and then to Celtic. As of June 30, 2013, Yoho 1-16 horizontal well had achieved approximately 8% payout Yoho 14-21 horizontal well had achieved approximately 13% payout.

84. Alta Canada did not otherwise have an interest in the acreage in which Yoho 1-16 horizontal well and Yoho 14-21 horizontal well were drilled.

<u>Tony Creek Pipeline</u>

85. By Letter of Agreement dated June 6, 2013, Alta Canada, Yoho, and ExxonMobil Celtic agreed to proceed together to fund the capital and operating expenditures attributable to the Tony Creek North Pipeline. A copy of the letter agreement dated June 6, 2013 is located at tab 82 of the Joint Book of Documents. A copy of a map showing the Tony Creek Pipeline is located at tab 83 of the Joint Book of Documents.

Midstream

86. During 2012, Alta Canada initiated discussions with Gas Processing Management Inc. ("GPMi"), a midstream consultant, regarding midstream strategic alternatives. Midstream initiatives relate to the transportation, storage and wholesale marketing of oil and natural gas.

87. GPMi estimated the cost of developing gathering and processing infrastructure to be $290,845,932, including over $206 million for the gas processing plant.

88. On May 21, 2013, Alta Canada retained Equinox Engineering Ltd. ("Equinox"). A copy of the Engineering and Procedure Services Agreement between Alta Canada and Equinox is located at tab 84 of the Joint Book of Documents.

89. In July, 2013, Equinox provided a series of reports to Alta Canada in respect of a Kaybob pipelines gathering system. A copy of the Project Execution Plan, Design Basis Memorandum, Hydraulic Report, Process Design Basis, Material Selection Report, Basis of Estimate (Class III), and Hydraulic Report: Supplementary Design Case – High Pressure 600 ANSI is located at tabs 85, 86, 87, 88, 89, 90, and 91 of the Joint Book of Documents.

Production

90. On March 22, 2013, production from the Yoho 14-21 horizontal well was delivered to the SemCAMS KA processing plant.

91. On March 28, 2013, production from the Yoho 1-16 horizontal well was delivered to the SemCAMS KA processing plant.

92. On April 18, 2013, production from the 1-32 horizontal well was delivered to the SemCAMS KA processing plant.

<u>Alta Canada's Income</u>

93. In 2011, Alta Canada had no income other than interest income and a net loss of $2,298,640.74. A copy of Alta Canada's Unaudited Income Statement for the period ended December 31, 2011 is located at tab 92 of the Joint Book of Documents.

94. In 2012, Alta Canada had no income and a net loss of $4,300,313.56. A copy of Alta Canada's Unaudited Income Statement for the period ended December 31, 2012 is located at tab 93 of the Joint Book of Documents.

95. Between January 1, 2013 and March 31, 2013, Alta Canada had income of $233,813.49 and a net loss of $543,639.25. A copy of Alta Canada's Unaudited Income Statement for the period ended March 31, 2013 is located at tab 94 of the Joint Book of Documents.

SALE TO CHEVRON CANADA LTD.

96. In mid-February 2013, Mr. Acconcia and Mr. Greenberg had discussions with Mr. King regarding Anderson King working on the potential sale of Alta Canada's interest in the Duvernay. A copy of an email exchange dated February 15 and 16, 2013 between Mr. Acconcia, Mr. Greenberg and Mr. King is located at tab 95 of the Joint Book of Documents.

97. On March 28, 2013, AECP engaged Anderson King to render divestiture advisory services in connection with the proposed sale of AECP's interest in the Kaybob area. A copy of the

engagement letter dated March 28, 2013 from Anderson King to AECP is located at tab 96 of the Joint Book of Documents.

98. AECP provided a management presentation to potential purchasers of the Alta Canada's interest in the Duvernay. A copy of the Executive Summary of the management presentation is located at tab 97 of the Joint Book of Documents. A copy of the complete Management Presentation is located at tab 98 of the Joint Book of Documents.

99. On June 3, 2013, Chevron Canada Ltd. ("Chevron") submitted a bid to Anderson King to acquire Alta Canada's shares for US$629 million. A copy of an email chain dated June 3, 2013 between Mark Menke of Chevron, Mr. King, and others, and the letter dated June 3, 2013 from Chevron to Mr. King enclosed thereto are located at tabs 99 and 100, respectively of the Joint Book of Documents.

100. On June 25, 2013, AECP prepared a presentation entitled Preliminary Hold Case Development Plan. A copy of the June 25, 2013 presentation is located at tab 101 of the Joint Book of Documents.

101. By letter dated June 27, 2013, Chevron submitted a bid of US$640 million for all the shares of Alta Canada. A copy of the June 27, 2013 letter is located at tab 102 of the Joint Book of Documents.

102. Blackstone provided a memorandum to its Investment Committee on July 8, 2013 regarding the potential sale to Chevron. A copy of the July 8, 2013 memorandum is located at tab 103 of the Joint Book of Documents.

103. By emails dated July 9 and 10, 2013, Blackstone's Investment Committee agreed with the deal team's recommendation to sell to Chevron. A copy of an email chain between members of the Investment Committee, Mr. Acconcia, and others is located at tab 104 of the Joint Book of Documents.

104. The Appellant and Chevron executed a purchase and sale agreement ("PSA"), made as of August 1, 2013, in which the Appellant agreed to sell and Chevron agreed to buy the shares in Alta Canada for US$641,365,188, subject to adjustment. A copy of the PSA together with all exhibits and disclosure schedules thereto is located at tab 105 of the Joint Book of Documents.

105. The PSA had an effective date of April 1, 2013, and purchase price adjustments included revenues and expenses between the effective date and closing date.

106. The Appellant and AECP wanted an effective date as early as possible because expenditures incurred by Alta Canada between the effective date and the closing date would be the responsibility of the purchaser.

107. The adjustments to the purchase price of the PSA were set out in a Preliminary Closing Statement dated September 3, 2013. Adjustments included interim expense amounts plus cash for total increases to the purchase price of US$7,906,560.43, less interim revenue amount of US$1,913,800.15, for a final sale price of US$647,357,948. The Preliminary Closing Statement also included a conversion to Canadian dollars for reference purposes. The final sale price in Canadian dollars was $679,712,251.45. A copy of the Preliminary Closing Statement is located at tab 106 of the Joint Book of Documents.

108. Included among the interim expenses added to the purchase price paid by Chevron were the expenses in respect of the processing plant and gathering system incurred after the effective date of April 1, 2013, including all amounts paid to Equinox.

109. Deloitte provided advice on the preliminary steps and tax considerations in respect of the proposed sale of Alta Canada. A copy of a presentation entitled "Alta Energy – Proposed Exit Planning Preliminary Steps & Tax Considerations" dated September 4, 2013 is located at tab 107 of the Joint Book of Documents.

110. The closing of the PSA occurred on September 10, 2013. The proceeds from the sale of the Alta Canada shares were paid directly from Chevron to AECP via a Direction to Pay from the Appellant, with $169.9 million held in escrow pending review of the purchase by CRA authorities and the Appellant's request for a clearance certificate. A copy of the Direction to Pay from the Appellant to Chevron is located at tab 108 of the Joint Book of Documents.

111. The Appellant's proceeds from the sale to Chevron were directed to AECP in exchange for a note ("Sale Note") in the amount of $509,784,188.59 from AECP to Appellant dated September 10, 2013. The Sale Note was then offset by the existing PPL and IFL from AEP to AECP. The Appellant and AECP entered into a repayment agreement dated September 10, 2013 documenting repayment of the IFL, in the amount of $41,070,704.59, and repayment under the PPL in the amount of $463,694,859, comprised of $249,357,849.22 principal and $214,247,009.50 accrued interest. A copy of the September 10, 2013 Repayment Agreement is located at tab 109 of the Joint Book of Documents.

112. The PPL and IFL only accounted for 99% of the value of AEL. As a result, upon repayment of the PPL and IFL there was an outstanding balance of $5,018,625.18 on the Sale Note.

In order to mitigate the Luxembourg tax consequences on the resulting payment of interest, AEL created a U.S. branch and allocated the Sale Note to the branch with the intention that the interest income on the outstanding balance on the Sale Note would be tax exempt in Luxembourg.

113. In January 2014, the Appellant paid $48,318,680.14 to the Minister and obtained a clearance certificate, on the understanding that the issuance of the clearance certificate would not impact the ongoing review by the Canada Revenue Agency. A copy of a letter dated January 21, 2014 from Joanne Perrin of the Canada Revenue Agency to the Appellant is located at tab 110 of the Joint Book of Documents.

114. Chevron released escrow funds of $130,910,616.23 to AECP and AECP signed a promissory note to the Appellant dated February 7, 2014. A copy of the promissory note dated February 7, 2014 is located at tab 111 of the Joint Book of Documents.

115. The Appellant and AECP entered into a Repayment Agreement dated February 12, 2014 documenting repayment of accrued interest of $129,000,000 under the PPL. A copy of the February 12, 2014 Repayment Agreement is located at tab 112 of the Joint Book of Documents.

116. The remaining amount of the Sale Note ($1,910,616.23) after repayment of the PPL interest was allocated to the Appellant's U.S. branch.

117. Following the disposition of the Alta Canada shares, the Appellant did not conduct any other business or investments.

Tax Reporting

118. For its taxation year ended December 31, 2012, the Appellant's corporate income tax in Luxembourg was €1,477.39 (CAD 1,940.87) and the Appellant's municipal business tax was nil. A copy of the Appellant's 2012 Corporate Tax Return is located at tab 113 of the Joint Book of Documents.

119. For its taxation year ended December 31, 2013, the Appellant paid a total of €3,210.00 in tax to Luxembourg. A copy of the Appellant's 2013 Corporate Tax Return is located at tab 114 of the Joint Book of Documents.

120. The Appellant filed a Canadian tax return for its 2013 taxation year claiming an exemption from Canadian tax on the capital gain on the sale of the shares of Alta Canada to Chevron under Article 13 of the Treaty. It is this gain that is the subject of this appeal.

MISCELLANEOUS

121. The Respondent accepts that Alta Canada was a "principal business corporation" pursuant to subsection 66(15) of the *Income Tax Act* (Canada) (the "Act").

122. The Respondent accepts that the Appellant was a resident of Luxembourg for the purposes of Article 4(1) of the Treaty on the basis of paragraph 7.2 of the report dated July 28, 2016 of Jean-Pierre Winandy and Marc Meyers (the "Winandy Report"). A copy of the Winandy Report is located at tab 115 of the Joint Book of Documents.

123. The Appellant admits that the shares of Alta Canada were taxable Canadian property within the meaning of subsection 248(1) of the Act.

124. The Appellant admits that the series of transactions set forth in paragraphs 10(j) to (m) of the Amended Reply and the sale of the shares of Alta Canada to Chevron were transactions that resulted directly or indirectly, or were part of a series of transactions which series, resulted, directly or indirectly, in a tax benefit to the Appellant. The tax benefit was the relief afforded by the Treaty on the sale of Alta Canada to Chevron.

125. The Appellant admits that the series of transactions set forth in paragraphs 10(j) to (m) of the Amended Reply and the sale of the shares of Alta Canada to Chevron were a series of transactions that was an "avoidance transaction" as that term is defined in subsection 245(3) of the Act.

126. Also included in the Joint Book of Documents are the following documents:

a. Advance Income Tax Ruling 2000-0015753 (E), regarding Article 13 – Canada-Netherlands Treaty, dated January 1, 2000, which is located at tab 116 of the Joint Book of Documents;

b. a memorandum by G. Arsenault's dated January 23, 1991 (9011711), which is located at tab 117 of the Joint Book of Documents; and

c. a memorandum dated December 16, 2014 from S.E. Thomson, Income Tax Rulings Directorate, to Lizzy Jacobs, Aggressive Tax Planning Division, which is located at tab 118 of the Joint Book of Documents.

Marked for Identification

127. A summary spreadsheet of Alta Canada's third-party vendor expenditures, which was prepared during the discovery process with reference to Alta Canada's records, is located at tab 119 of the Joint Book of Documents. The parties have agreed to the inclusion of this document in the Joint Book of Documents for the purposes of being marked for identification.

DATED at Toronto, Ontario, this 7th day of June, 2018.

Warren J.A. Mitchell, Q.C.
Matthew G. Williams
E. Rebecca Potter
Counsel for the Appellant

Patricia Lee
Christopher M. Bartlett
Counsel for the Respondent

2014-4359(IT)G

TAX COURT OF CANADA

B E T W E E N:

ALTA ENERGY LUXEMBOURG S.A.R.L.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS
CORRIGENDUM

Paragraph 78 the Statement of Agreed Facts dated June 7, 2018 should have read as follows:

78. The well was temporarily abandoned to plan for a horizontal leg to be drilled at a later date. The horizontal leg, the 8-5 horizontal well, was drilled in section 31 of township 62/range 20 and section 5 of township 63/range 20.

DATED at Toronto, Ontario, this 11th day of June, 2018.

Warren J.A. Mitchell, Q.C.
Matthew G. Williams
E. Rebecca Potter
Counsel for the Appellant

Patricia Lee
Christopher M. Bartlett
Counsel for the Respondent

CITATION:	2018 TCC 152
COURT FILE NO.:	2014-4359(IT)G
STYLE OF CAUSE:	Alta Energy Luxembourg S.A.R.L. v. Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 11, 12, 13, 14 and 19, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	August 22, 2018

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