

Court File No.:

IN THE SUPREME COURT OF CANADA

(On appeal from the Supreme Court of Newfoundland and Labrador, Court of Appeal)

BETWEEN:

ARCHEAN RESOURCES LTD.

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND
LABRADOR, AS REPRESENTED BY THE HONOURABLE THE MINISTER
OF FINANCE FOR THE PROVINCE OF NEWFOUNDLAND AND
LABRADOR AND HER MAJESTY'S ATTORNEY GENERAL
FOR NEWFOUNDLAND AND LABRADOR

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL

(Archean Resources Ltd., Applicant)

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended)

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PART I – STATEMENT OF FACTS

1. This test case is about the future of Canada's mining and resource industries ó it is about whether Canada, in the years to come, will be in a position to meet the mineral and other natural resource demands of its population. This case addresses the question of how to ensure that the next Voisey's Bay (the site of the world-class discovery of nickel-copper-cobalt orebodies in Labrador) does not go undiscovered. This test case has implications for all Canadians ó if the appropriate exploration funds are not spent because of an inappropriate interpretative tax context, Canada will become a minerals and resource commodities have-not country instead of one of the world's largest exporters of minerals, mineral products and other natural resources.

Reference: Affidavit of Prospectors and Developers Association of Canada,
paras. 13, 14, 15 [Tab 2A]

2. This case is about the appropriate approach to the interpretation of taxation statutes, and raises the fundamental issue of accessibility of legislative meaning to taxpayers. It also raises the related question as to the respective constitutional roles of the legislature and the judiciary in conferring meaning upon taxation enactments.

A. Archean: A Newfoundland Company Investing in Newfoundland and Labrador's Future

3. Archean Resources Inc. is a Newfoundland prospecting firm engaged in the business of mineral exploration in Newfoundland and Labrador. Archean's principals, Albert Chislett and Chris Verbiski, are the co-discoverers of the world-class Voisey's Bay nickel-copper-cobalt orebodies. Archean plays an important role in the economy of Newfoundland and Labrador - in the period 1993 to date, it invested over 2.85 million dollars in exploration expenditures for its own account and over 79.7 million dollars in exploration expenditures for others (including for Diamond Fields Resources Inc. and Voisey's Bay Nickel Company Ltd. while Archean was exploration manager of the Voisey's Bay properties).

Reference: Judgment of Court of Appeal below, para. 3 [Tab 4D]
Voisey's Bay Location Map, Exhibit "A" to Affidavit of Jeffrey W.
Beedell [Tab 2B]

(i) Archean Acquires Exploration Licences

4. In the early 1990s, Archean acquired exploration licences for the Labrador region. Pursuant to Section 23 of the *Mineral Act*, those licences conferred on Archean the exclusive right to explore for minerals for a period of five years, but not the right to extract minerals. Upon receipt of its exploration licences, Archean began exploring in the Voisey Bay area.

Reference: Judgment of Judge at first instance, para. 2 [Tab 4B]
Mineral Act, R.S.N.L. 1990 c.M-24, as amended, s. 23

(ii) Option to Purchase: Agreement Between Diamond Fields Resources And Archean Before Discovery at Voisey's Bay

5. In 1993, Archean entered into an agreement the Labrador Option Agreement with Diamond Fields Resources Inc. This agreement granted to Diamond Fields an option to purchase an undivided 100 per cent right, title and interest in the mineral exploration licences. In consideration for the option, Archean acquired the right to a 3% net smelter royalty on any subsequent mineral production from the licenced lands. At that time, no mineral discovery had been made at Voisey Bay.

Reference: Labrador Option Agreement annexed to Affidavit of Albert Chislett dated November 19, 1998, Exhibits A and B [Tab 6A]
Judgment of Court of Appeal below, para. 5 [Tab 4D]
Affidavit of Prospectors and Developers Association of Canada, paras. 11 and 12 [Tab 2]

(iii) Acquisition by Diamond Fields Resources of Exploration Licences Covering Voisey's Bay

6. In 1995, Diamond Fields exercised its option and acquired the mineral exploration licences covering the Voisey Bay Properties. Archean retained no interest in the lands. At the time of the transfer, neither Diamond Fields nor Archean had the right to engage in mining operations. The transfer was registered and approved by the Minister of Natural Resources on June 28, 1995, as required by section 24 of the *Mineral Act*.

Reference: *Mineral Act*, *supra*, s. 24
Judgment of Court of Appeal below, para. 5 [TAB 4D]
Judgment of Judge at first instance, para. 9 [TAB 4B]

(iv) Transfer of Exploration Licences to Voisey's Bay Nickel Company and Application for Mining Lease

7. On April 28, 1995, Diamond Fields transferred to Voisey's Bay Nickel Company Limited its mineral exploration licences covering the Voisey's Bay properties. Voisey's Bay Nickel Company Limited is currently seeking a mining lease from the provincial government in order to develop, extract, remove, deal with, sell, mortgage, or otherwise dispose of all unalienated minerals in, on or under the land covered by the lease under the *Mineral Act*, only the holder of an exploration licence can apply for a mining lease.

Reference: Judgment of Court of Appeal below, para. 6 [TAB 4D]

(v) No Automatic Right to Mining Lease

8. A person who applies for a mining lease has no guarantee of being granted one. No mining lease may be issued under the *Mineral Act* unless the applicant proves compliance with

- survey requirements;
- assessment work and expenditure requirements; and
- reporting requirements.

Additionally, a mining lease may *not* be issued within the first 3 years of a licence (as was the case with the Archean licences at the time of Diamond Fields' exercise of the option) unless a full 3 years of assessment work has been completed and reports filed (which was not the case with the Archean licences at the time of option exercise).

Reference: *Mineral Act, supra*, sections 12(1) and 31
Affidavit of Chris Verbiski dated December 13, 1998, para. 7 [TAB 6B]

B. Archean Seeks Declaration that Net Smelter Royalty is Not Taxable

9. Archean sought a declaration from the Supreme Court of Newfoundland (Trial Division) that its net smelter royalty was not taxable under section 9(1)(a) of the *Mining and Mineral Rights Tax Act* (the "Act"). Section 9(1)(a) and the related definition of "mining operations" in section 2(g) provides that:

9.(1) A person who receives from

(a) an operator, contractor or other person during a financial year money by way of rental, royalty or similar payment for the grant to the operator, contractor or other person of the right to engage in mining operations .

is liable for and shall pay to the minister in the manner and at the time set out in this Act an annual tax of 20% of the net revenue received in consideration of the grant of the right during that financial year.

2(g) mining operations means the extraction or production within the Province of minerals up to and including primary crushing and includes the transportation, handling, storing, distribution and sale of those minerals, but does not include processing. [emphasis added]

Reference: *Mining and Mineral Rights Tax Act*, R.S.N.L. 1990 c. M-16, as amended, sections 9(1)(a) and 2(g).

10. Despite the structure of the *Mineral Act*, which creates two distinct mineral titles and two distinct rights ó a licence/right of exploration and a lease/right of extraction, Justice Wells of the Supreme Court of Newfoundland, Trial Division concluded that the transfer of an exploration licence was the same as, or the *equivalent* of, the transfer of a right to engage in mining operations. Based on a *remedial and liberal construction* of the *Act*, Justice Wells decided that the language employed in section 9 of the *Act* could encompass a situation where the rights of an exploration licence holder were granted or transferred in return for a royalty entitlement.

Reference: Judgment of Judge at first instance, paras. 42-45 [TAB 4B]

11. The trial judge acknowledged that the interpretation contended for by Archean was plausible, albeit *at first blush* and on a narrow construction of the wording. Yet, as a result of the decision of the Trial Division, the future net smelter royalty payments to Archean will be subject to tax under section 9(1)(a) of the *Mining and Mineral Rights Tax Act*.

Reference: Judgment of Judge at first instance, paras. 39, 46 [TAB 4B]

C. Seeking Proper Interpretation from Court of Appeal

12. Before the Court of Appeal, Archean argued that its net smelter royalty should not be subject to this exceptional taxation - section 9(1)(a) of the *Act* imposes a tax only on consideration given for *the right to engage in mining operations* and a licence for exploration does not encompass a right to engage in mining operations. Notwithstanding Archean's position that, upon application of the *plain meaning* principle of construction, it was clear that the words of section 9(1)(a) of the *Act* did not encompass the rights held by an exploration licensee

(which merely involve the right to apply for a lease if certain conditions are met), the Court of Appeal upheld the decision of the trial judge.

Reference: Judgment of Court of Appeal below, paras. 48-49 [TAB 4D]

13. Applying the so-called "pragmatic" interpretative approach, described as "often resisted" because it gave "too much discretion to unelected judges, contrary to both democratic principles and the rule of law", Green J.A. concluded that the trial judge's decision was "justifiable". After recognizing that, in many cases, it was "unfair to give a taxation statute an interpretation at variance from that which might reasonably be relied upon by the taxpayer", Green J.A. opined that this was not one of those cases because it was unlikely that Archean would not have engaged in its search for minerals if it knew in advance that the tax imposed under section 9 might apply to it.

Reference: Judgment of Court of Appeal below, paras. 31, 46 [TAB 4D]

D. No Royalties or Taxes Paid Yet

14. Mining operations at Voisey's Bay have not yet commenced and therefore no net smelter royalty payments or taxes thereon have been paid.

PART II – STATEMENT OF ISSUES

15. This case raises the following issues of public importance that warrant the consideration and guidance of this Honourable Court:

Issue One: What are the appropriate principles governing the interpretation of taxation statutes?

Given the interest in assuring that taxation statutes are accessible to taxpayers so that taxpayers may fairly order their business and affairs, should taxation statutes be interpreted strictly and according to their plain and ordinary meaning or purposively and pragmatically according to their remedial objects?

Issue Two: What are the respective roles of the Courts and legislatures in conferring meaning upon legislative enactments?

To what extent does the separation of powers between legislatures and the Courts properly limit judicial construction of the intent of the legislature?

Issue Three: What are the implications of exceptional exploration royalty taxation upon the mineral exploration and development industry?

Should an exceptional government tax with no corresponding governmental service, purporting to tax royalties and consideration in relation to mining leases at 20%, be constructed to capture exploration royalties respecting non-mining lease interests, thereby negatively impacting the mineral exploration industry?

PART III – STATEMENT OF ARGUMENT

Issue one: What are the appropriate principles governing the interpretation of taxation statutes?

Given the interest in assuring that taxation statutes are accessible to taxpayers so that taxpayers may fairly order their business and affairs, should taxation statutes be interpreted strictly and according to their plain and ordinary meaning or purposively or pragmatically according to their remedial objects?

16. This case raises the issue of which principles of statutory interpretation should apply in taxation cases in order to ensure justice to both taxpayers and government. This case provides this Honourable Court the opportunity to offer guidance on questions such as these:

- what approach to statutory interpretation should be favoured - plain meaning or the purposive or pragmatic approach?
- when is recourse to extrinsic interpretative aids appropriate?
- have the sub-rules of statutory construction or presumptions of legislative intent been displaced by the pragmatic approach, and if not, when is recourse to them appropriate?
- when is it appropriate to apply the presumption that, where a taxing statute is not explicit, reasonable uncertainty resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer?

17. The answers to these questions will provide guidance to taxpayers as to how taxation enactments should to be construed and thus how to properly conduct their businesses.

A. Confusion as to Appropriate Statutory Interpretation Methodology

(i) Divergent Appellate Court Approaches: Purposive or Plain Meaning Approach

18. Confusion as how statutes should be interpreted is evident in recent Court of Appeal cases that emanate from different provinces - no consensus exists as to whether the purposive or pragmatic methodology of statutory interpretation should be favoured or whether the plain meaning approach should be applied.

Purposive or Pragmatic Approach	Plain Meaning Approach
<p>Approach:</p> <ul style="list-style-type: none"> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament <p>Court of Appeal below:</p> <ul style="list-style-type: none"> the Court favoured the purposive or pragmatic methodology of statutory interpretation 	<p>Approach:</p> <ul style="list-style-type: none"> statutory language is given its plain ordinary grammatical meaning -in the absence of ambiguity resort to other interpretive devices or principles, or to extrinsic aids, is unnecessary and inappropriate <p>Court of Appeal of Newfoundland and New Brunswick:</p> <ul style="list-style-type: none"> the Court of Appeal of Newfoundland in <i>R. v. Wonderland Gifts Ltd.</i> and the New Brunswick Court of Appeal in <i>Parlee v. New Brunswick (Workers' Compensation Board)</i> applied the plain meaning approach. <p>Ref: <i>R. v. Wonderland Gifts Ltd.</i> (1996), 140 Nfld. & P.E.I.R. 220 (Nfld. C.A.), para. 28 [TAB 7S] <i>Parlee v. New Brunswick (Workers' Compensation Board)</i> (1991), 82 D.L.R (4th) 764 (N.B.C.A.), para. 10 [TAB 7P]</p>

19. The inconsistency in interpretative approach has extended to appellate tax cases. The approach of the Court of Appeal below may be contrasted with the plain meaning approach to the interpretation of a logging tax statute adopted and applied by the British Columbia Court of Appeal in *Slocan Forest Products Ltd. v. British Columbia*.

Reference: *Slocan Forest Products Ltd. v. British Columbia* (2002), 142 B.C.C.A. 315 (C.A.) [TAB 7Y]

(ii) **Divergent Interpretation Approaches in this Honourable Court**

20. Divergences of views as to the appropriate interpretative approach to statutory interpretation may be found in the decisions of this Honourable Court. In her concurring judgment in 2747-3174 *Québec Inc. v. Québec (Regie des permis d'alcool)*, L'Heureux-Dubé J. suggested that this Honourable Court was ÷waverings at randomö between the purposive or pragmatic approach and the plain meaning approach.

Reference: 2747-3147 *Québec Inc. v. Québec (Regie des permis d'alcool)*, [1996] S.C.R. 919 at para. 170 [TAB 7A]
Will-Kare Paving & Contracting Ltd. v. R., [2001] 1 S.C.R. 915, per Binnie J. (dissenting) [TAB 7DD]

Purposive or Pragmatic Approach	Plain Meaning Approach
<ul style="list-style-type: none"> • in <i>Stubart Investments Ltd. v. The Queen and Bell Expressvu Limited Partnership v. Rex et al</i> this Honourable Court cited from <i>Driedger on Construction of Statutes</i> : <p style="margin-left: 40px;">Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.</p> <p>Ref: <i>Stubart Investments Ltd. v. The Queen</i>, [1984] 1 S.C.R. 536 at 578 [TAB 7Z] <i>Bell Expressvu Limited Partnership v. Rex et al</i> 26 [TAB 7C]</p> • the Driedger formulation of principle has also been identified with the plain meaning interpretation approach. <p>Ref: <i>Canada v. Antosko</i>, [1994] 2 S.C.R. 312, pp. 326-327 [TAB 7D] <i>Friesen v. Canada</i>, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] <i>Alberta (Treasury Branches) v. Canada</i>, [1996] 1 S.C.R. 963, paras. 14 and 15 [TAB 7B]</p> 	<ul style="list-style-type: none"> • in <i>R. v. Multiform Manufacturing Co.</i>, (which O'Neil J.A. in the Court of Appeal below said might appear to support the Archan argument) this Honourable Court applied the plain meaning rule, as follows: <p style="margin-left: 40px;">í .When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament has clearly expressed its intention in the words it has used in the statute.</p> <p>Ref: <i>R. v. Multiform Manufacturing Co.</i>, [1990] 2 S.C.R. 624 at p. 630 [TAB 7R]</p> • the plain meaning rule has also been applied in a number of recent tax cases ó in <i>Shell Canada Ltd. v. Canada</i>, this Honourable Court stated: <p style="margin-left: 40px;">í It is well established in this Court's tax jurisprudence that a searching enquiry for either the ÷economic realitiesö of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction.</p>

	<p>Where the provision at issue is clear and unambiguous, its terms must simply be applied. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.</p> <p>Ref: <i>Shell Canada Ltd. v. Canada</i>, [1999] 3 S.C.R. 622 at paras. 40 and 43 [TAB 7W] <i>Singleton v. Canada</i>, [2001] 2 S.C.R. 1046 paras. 24-31 [TAB 7X] <i>Ludco Enterprises Ltd. v. Canada</i>, [2001] 2 S.C.R. 1082 paras. 38 and 39 [TAB 7J] <i>Friesen v. Canada</i>, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] <i>Canada v. Antosko</i>, [1994] 2 S.C.R. 312 (S.C.C.), pp. 326-327 [TAB 7D]</p>
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B. Confusion as to recourse to extrinsic interpretative aids

21. Inconsistency also exists in appellate courts regarding the extent to which there may or may not be recourse to extrinsic interpretative aids in statutory interpretation cases ó can interpretive aids be used in all cases or only in cases of ambiguity?

Extrinsic Interpretive Aids All the Time	Extrinsic Interpretative Aids Only When Necessary
<p>Court of Appeal below:</p> <ul style="list-style-type: none"> the Court of Appeal below applied the purposive or pragmatic interpretative approach: it considered all indicators of legislative meaning, including a 1974 Report of the Royal Commission on Mineral Revenue regarded to be the impetus for the <i>Mining and Mineral Rights Tax Act</i>. <p>Ref: Judgment of Court of Appeal below, paras. 27, 45 [TAB 4D]</p>	<p>Court of Appeal of Saskatchewan and New Brunswick:</p> <ul style="list-style-type: none"> appellate courts from different provinces have held that recourse to extrinsic interpretative aids is appropriate only in cases of ambiguous language the Saskatchewan Court of Appeal in <i>Parlee v. New Brunswick (Workers' Compensation Board)</i>, and in <i>Sunnyside Nursing Home v. Builders' Contract Management Ltd.</i>, the Saskatchewan Court of Appeal stated that: <p>í Courts must be guided by the language of the statute to determine the intent of the legislators, and only in the event of ambiguity is there justification for seeking the</p>

	<p>assistance of other guidelines for interpretation.</p> <p>Ref: <i>Sunnyside Nursing Home v. Builders' Contract Management Ltd.</i>, [1990] 5W.W.R. 289 (Sask. C.A.), para. 22 [TAB 7AA]</p> <p><i>Parlee v. New Brunswick (Workers' Compensation Board)</i>, (1991), 82 D.L.R (4th) 764 (N.B.C.A.), para. 10 [TAB 7P]</p> <p>Supreme Court of Canada:</p> <ul style="list-style-type: none"> • in <i>CanadianOxy Chemicals Ltd. v. Canada (Attorney General)</i>, this Honourable Court signaled that recourse to external interpretative aids was only appropriate in cases of "genuine ambiguity" between two or more plausible readings of an enactment <p>Ref: <i>CanadianOxy Chemicals Ltd. v. Canada (Attorney General)</i>, [1999] 1 S.C.R. 743 para. 14 [TAB 7F]</p>
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22. Guidance is needed from this Honourable Court on the question of whether, and if so, when, recourse may be had to extrinsic aids to interpret tax statutes. Resolution of this issue will reduce litigation in all provinces.

C. Confusion as to presumptions of legislative intent

23. No consensus exists on the issue of whether presumptions of legislative intent should be part of statutory interpretation. The judgment of the Court of Appeal below raises the important question of whether or not the presumptions of legislative intent continue to be part of the law of statutory interpretation.

C.A. Below Discards Legislative Intent Presumptions	SCC Sanctions Legislative Intent Presumptions
<p>Court of Appeal below:</p> <ul style="list-style-type: none"> • the Court of Appeal below relied upon s. 16 of the <i>Interpretation Act</i> to discount the "sub-rules, said to have "fictional qualities about them," of statutory construction or presumptions of legislative intent" - the sub-rules were viewed as "ways in which the courts attempt to achieve fairness in application of a legislative provision in a particular case" <p>Ref: Judgment of Court of Appeal below, para.</p>	<p>Supreme Court:</p> <ul style="list-style-type: none"> • the presumptions of legislative intent have been sanctioned and continue to be applied at the level of this Honourable Court and in the decisions of other appellate courts. <p>Ref: <i>Royal Bank v. Sparrow Electric Corp.</i>, [1997] 1 S.C.R. 411 paras. 39, 110 [TAB 7V]</p> <p><i>Canadian Marconi Co. v. R.</i>, [1986] 2 S.C.R. 522 at p. 535 [TAB 7E]</p>

30 [TAB 4D]	<i>Moonshot Developments Ltd. v. Ontario (Ministry of Municipal Affairs)</i> (1993), 13 D.L.R. (3d) 69 (C.A.) [TAB 7M] <i>Corbett v. The Queen</i> , [1999] 4 C.T.C. 231 (Fed. C.A.) paras. 37-38 and 79 [TAB 7G] <i>McRae v. Canada (Attorney General)</i> (1997), 46 B.C.L.R. (3d) 137 (B.C.C.A.) paras. 20, 23 [TAB 7K]
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(i) Role of Presumptions of Legislative Intent

24. The presumptions of legislative intent are informed by political and economic liberalism which sought to ensure the protection of individual liberty and private property rights from state interference.

Reference: *Re: Estabrooks Pontiac Buick Ltd.*, (1982), 44 N.B.R. (2d) 201 (N.B.C.A.), paras. 14-18 [TAB 7T]
Ruth Sullivan, *Driedger On the Construction of Statutes* (3rd ed., Butterworth, Toronto, 1994) pp. 318-320 [TAB 7GG]

(ii) No Taking of Property Without Compensation

25. Among the most venerable presumptions of legislative intent, discussed by LaForest, J.A. (as he then was) in *Estabrooks*, is the presumption that legislation should not, absent clear language, be interpreted as taking the property of an individual without compensation. This principle, characterized by LaForest, J.A. to be "fundamental" and "a constitutional principle in the British sense" was not in his view circumscribed by the New Brunswick equivalent of s. 16 of the *Interpretation Act*:

I might add in passing that s. 17 of the *Interpretation Act*, which deems all statutes remedial and requires "a fair, large and liberal" interpretation of all statutes, has nothing to do with this principle. That provision was enacted to correct an earlier but vanishing distinction between the "strict" approach of the courts to penal and taxation statutes and the "liberal" construction given other statutes; see Driedger, *supra*, pp. 148 et seq. The courts, be it noted, still require that a penal or taxation statute clearly bring within their ambits those made subject to a penalty or tax.

Reference: *Re: Estabrooks Pontiac Buick Ltd.*, (1982), *supra*, para. 29 [TAB 7T]
Ruth Sullivan, *Driedger On the Construction of Statutes* (3rd ed., Butterworth, Toronto, 1994), p. 408. [TAB 7HH]

(iii) Taxation Statutes Must be Clear

26. In *Morguard Properties Ltd. v. City of Winnipeg*, this Honourable Court made it clear that the presumption of legislative intent extends to the principle that a taxation measure must be enacted in clear language:

In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule.

Reference: *Morguard Properties Ltd. v. City of Winnipeg*, (1983), 2 S.C.R. 493 at p. 509 [TAB 7N]

(iv) Special Considerations Apply to Taxation Measures

27. The jurisprudence associated with s. 53 of the *Constitution Act, 1867* is helpful in understanding the special considerations attending taxation measures imposed upon the citizens of Canada. Section 53 states as follows:

Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Reference: *Constitution Act*, 1987 (U.K.), 30 & 31 vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5

28. The basic purpose of s. 53 is to ensure that taxation powers do not arise incidentally in delegated legislation (in the form of statutory regulations) but rather originate directly from the elected representatives of the taxpayers. In this manner, parliamentary control and accountability remains strictly within the control of the elected representatives of the taxpayer.

Reference: *Re Eurig Estate*, [1998] 2 S.C.R. 565 paras. 30 and 32 [TAB 7U]
O.E.C.T.A v. Ontario (Attorney General), [2001] 1 S.C.R. 470 paras. 71 and 72 [TAB 7O]
Westbank First Nation v. British Columbia Hydro & Power Authority, [1999] 3 S.C.R. 134 para. 19 [TAB 7CC]

29. The imposition of a tax is nonetheless considered constitutional if, and only if, express, clear and unambiguous language is used to delegate the authority to impose a tax. Taxes imposed by non-legislative bodies without specific and unequivocal direction from the legislature are considered unconstitutional.

Reference: *Re Eurig Estate*, [1998] 2 S.C.R. 565, para. 36 [TAB 7U]
O.E.C.T.A. v. Ontario (Attorney General), [2001] 1 S.C.R. 470
 para. 74 [Tab 7O]

30. If taxes imposed by non-legislative bodies without clear and unambiguous direction from the legislature to do so are unconstitutional, then important questions arise from the judgment of the Court of Appeal below, namely:

- it is permissible to impose taxes by way of pragmatic interpretation of non-explicit taxing provisions?
- does the “pragmatic” interpretative approach disregard the fundamental constitutional principle relating to taxation statutes contained in s. 53 of the *Constitution Act, 1867*?
- Because the test for the constitutional delegation of taxation power is the use of “clear and unambiguous language” – does this indicate that a high degree of judicial deference to the language of the legislature is warranted whenever taxation statutes are being interpreted by the courts?

(v) Resolving Ambiguities in Favour of Taxpayers

31. A corollary of the presumption against state interference with the citizen’s property is the principle that, where a taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from the lack of explicitness must be resolved in favour of the taxpayer.

Reference: *Johns-Manville Inc. v. Her Majesty the Queen*, [1985] 2 S.C.R. 46 at p. 67 [TAB 7I]
Symes v. The Queen, [1993] 4 S.C.R. 695, per L’Heureux-Dubé J. (dissenting) at p. 811 [Tab 7BB]

D. Guidance Needed from this Honourable Court

32. By granting leave to appeal in this case, this Honourable Court will be able to provide clarification on the following issues:

- should courts be applying the plain meaning or the pragmatic approach in the interpretation of taxation measures?
- in what circumstances is recourse by the court to extrinsic interpretative aids appropriate in tax cases?
- do the presumptions of legislative intent in statutory interpretation cases remain current, or have they been displaced by the pragmatic approach?

33. With leave, this Court will also be in a position to offer guidance on whether, and how, the decisions of the Courts below can be reconciled with the judgment of this Honourable Court in *Re: Mining and Mineral Rights Tax; Newfoundland and Labrador Corporation Ltd. and Javelin International Ltd. Attorney General of Newfoundland and Attorney General for Alberta et al (Intervenants)*. In that case, in discussing the tax imposed by the then equivalent of section 9(1)(a), this Court affirmed that no royalty tax applied unless there was a passing of the right to mine by the royalty recipient. Speaking for a majority of the Court, Martland J. characterized the tax imposed in the following manner:

This is a tax imposed upon a person who **has obtained** the right to engage in mining operations for the production of a mineral resource in Newfoundland and who **has granted** the right to engage in such operations to someone else in return for payments made by the recipient of the grant [emphasis added].

Reference: *Re: Mining and Mineral Rights Tax; Newfoundland and Labrador Corporation Ltd. and Javelin International Ltd. Attorney General for Newfoundland and Attorney General for Alberta et al.*, [1982] 2 S.C.R. 260 at p.282 [TAB 7L]

Issue Two: What are the respective roles of the Courts and legislatures in conferring meaning upon legislative enactments?

To what extent does the separation of powers between legislatures and the Courts properly limit judicial construction of the intent of the legislature?

A. Parliamentary Sovereignty: Distinct Roles and Duties of Courts and Legislatures

34. What role should courts play in law making ó should they õmake lawsö or should they only õapply lawsö? Should courts rectify or rewrite laws with which they do not agree and, if so, what is the basis of their authority to do so? These are questions which directly arise from the

judgment of the Court of Appeal below. Because the Court below recognized and affirmed a role for courts in law-making, the judgment puts to the forefront the issue of whether, and how, one can reconcile a judicial law-making role with the doctrine of parliamentary sovereignty.

Reference: Judgment of Court of Appeal below, para. 28 [TAB 4D]

35. The doctrine of parliamentary sovereignty holds that the will of the legislature, as expressed in validly enacted legislation, is the supreme and paramount source of our law. The doctrine rests on the idea of the separation of powers – that legislatures make laws and the Courts apply those laws. As was stated by LaForest, J.A. in the case of *Re Estabrooks Pontiac Buick Ltd* (1982):

There is no doubt that the duty of the courts is to give effect to the intention of the legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the legislature.

Reference: *Re Estabrooks Pontiac Buick Ltd*. (1982), 44 N.B.R. (2d) 201, (N.B.C.A.), para. 13 [TAB 7T]
 Judgment of Court of Appeal below, para. 28. [Tab 4D]
 Ruth Sullivan, *Driedger On the Construction of Statutes* (3rd ed., Butterworth, Toronto, 1994), p. 25 [TAB 7FF]

36. Professor Hogg has described the concept of parliamentary sovereignty as follows:

The idea underlying parliamentary sovereignty is that in a democratic society important public policy choices should be made in the elected legislative assemblies, and not by non-elected judges.

Reference: Peter Hogg, *Constitutional Law of Canada* (Scarborough, Carswell Thompson Professional Publishing, 4th ed., 2002), p. 12-6 [TAB 7EE]

B. Separation of Powers: Courts Are to Interpret Statutes Not Create Them

37. In *R. v. McIntosh*, Lamer, C.J.C. affirmed the principle underlying the separation of powers doctrine, namely, that it is the task of the courts to interpret and not to create the law. He adopted the principle, as expressed in Côté, *Interpretation of Legislation in Canada*, to the effect that:

Since the judges' task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say.

Reference: *R. v. McIntosh*, [1995] 1 S.C.R. 686, para. 28 [Tab 7Q]

38. The idea that courts should be hesitant to employ purposive interpretation to find unexpressed legislative intention has recently been reaffirmed in tax cases. In *Shell Canada Limited*, this Honourable Court stated:

This Court has consistently held that Courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

Reference: *Shell Canada Limited v. Canada* [1999] 3 S.C.R. 622, para. 43 [TAB 7W]

39. This case provides this Honourable Court the opportunity to further delve into the respective role of courts and legislatures and to provide guidance on the following questions:

- to what extent, if any, does s. 16 of the *Interpretation Act* and/or the "pragmatic" statutory interpretation methodology confer a law-making role upon the judiciary?
- to what extent, if any, does s. 16 of the *Interpretation Act* and/or the "pragmatic" statutory interpretation methodology delimit the principles of parliamentary sovereignty and the separation of powers between the legislature and the judiciary?

C. Taxation Without Representation – Does a Role for Judicial Law-Making Offend s. 53 of the *Constitution Act, 1867*?

40. The issue of the respective roles of courts and legislatures respecting taxation enactments engages the protection respecting tax measures which is found in section 53 of the *Constitution Act, 1867*. Section 53, which codifies the fundamental democratic principle that there should be "no taxation without representation", states that:

Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Reference: *Re Eurig Estate*, [1998] 2 S.C.R. 565 (S.C.C.), para. 30 [Tab 7U]
Constitution Act, 1867, (U.K.) 30 & 31 vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5

41. Section 53, which has been characterized as òa constitutional imperative that is enforceable by courtsö, is not limited in its application to the federal legislature - it also applies to the provinces. In *Re Eurig Estate*, Major, J., speaking for a majority of this Honourable Court, stated:

[Section 53] prohibits not only the senate, *but also any other body other than the directly elected legislature*, from imposing a tax on its own accord. [emphasis added]

Reference: *Re Eurig Estate, supra*, paras. 28, 30, and 33 [TAB 7U]

42. This Honourable Court has not, as of yet, had the opportunity to provide clarification on the effect of section 53 of the *Constitution Act, 1867*, on the role of the judiciary in the interpretation of taxation statutes. This case provides this Honourable Court the opportunity to address the following questions of national importance:

- to what extent, if any, is the judicial law-making role said to arise under s. 16 of the *Interpretation Act*, and/or the òpragmaticö statutory interpretation methodology permissible in the interpretation of taxation statutes in light of s. 53 of the *Constitution Act, 1867*?
- if a judicial law-making function can be derived from section 16 of the *Interpretation Act*, to what extent can section 16 be effective to do so in light of section 53 of the *Constitution Act, 1982*, which provides that òthe Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effectö?

Reference: *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

43. Because s. 16 of the *Interpretation Act* is in substance mirrored in comparable provisions in the federal *Interpretation Act* and the various provincial *Interpretation Acts*, the guidance provided by this Honourable Court on whether or not such provisions are effective to invest the judiciary with law-making powers will reduce litigation throughout the country.

Reference: *Interpretation Acts of Canada*, [Pull-out Chart, appended in Part VII]

Issue Three: What are the implications of exploration royalty taxation upon the mineral exploration and development industry?

Should an exceptional government tax with no corresponding governmental service, purporting to tax royalties and consideration in relation to mining leases at 20%, be construed to capture net smelter royalties and other non-mining lease interests, thereby negatively impacting the mineral exploration industry?

A. Hidden Treasures: Prospecting and Mineral Exploration in Canada

44. The mining and mineral industries have played, and continue to play, an essential role in the economic growth of this country. Canada is one of the leading producers of potash, uranium, nickel, asbestos, zinc, calcium, titanium concentrate, aluminum, platinum group metals, salt, gold, molybdenum, copper, gypsum, cobalt, and lead. It is also one of the largest exporters of minerals and mineral products ó in the year 2001, export of minerals and mineral products helped ensure a trading surplus for Canada.

Reference: Natural Resources Canada, Canadian Mining Facts, pp. 1,3
<http://mmsd1.mms.nrcan.gc.ca/mmsd/facts/canFact-e.asp?regionId=12>
 Affidavit of the Prospectors and Developers Association, para. 6 [TAB 2A]

45. In the last year alone, mining and mineral industries injected over 35 billion dollars into the Canadian economy. They also provided much needed, well-paid employment to some 376,000 Canadians in 2001 and to approximately 395,000 Canadians in the previous year. To ensure continued growth and continued employment opportunities for as many Canadians as possible, some 497 million dollars were expended in mineral explorations and deposit appraisals in 2000.

Reference: Natural Resources Canada, Canadian Mining Facts, *supra*, pp. 1,3
 Natural Resources Canada, Mineral Exploration and Deposit Appraisal Expenditures in Canada, March 2002,
<http://mmsd1.mms.nrcan.gc.ca/mmsd/exploration/facts-e.pdf>
 Affidavit of Prospectors and Developers Association, sworn -, paras. 5,6

46. These statistics are important for a number of reasons. Not only do they establish a clear link between mineral development and overall economic prosperity - which brings about job opportunities - but they also point to the fact that if Canada is to continue to be a leading member of the international mining community it must actively encourage prospecting and mineral exploration.

B. The Dangers of Exceptional Taxation: Leaving Undiscovered the Next Voisey's Bay

47. The province of Newfoundland and Labrador will have the fastest-growing economy this year ó it is moving from the status of a have-not province to a have province. This growth is fuelled, in large part, by the discovery of Voiseyø Bay and the impetus of the associated prospecting and mineral exploration activities. In Newfoundland and Labrador alone, mining and minerals contributed 2.8 billion dollars to the economy and provided well-paying jobs to some 2900 people ó the average weekly wage in the Newfoundland mining industry was \$1192 in 1999 (this represents one of the highest earning levels in the province).

Reference: Affidavit of Prospectors and Developers Association, paras. 7, 8, 9 [TAB 2A]
 Natural Resources Canada, Newfoundland and Labrador Mining Facts,
<http://mmsd.1mms.nrcan.gc.ca/mmsd/facts/canFact-e.asp?regionId=0>

48. This test case provides this Honourable Court the opportunity to offer guidance on the issue of how to interpret statutes that impose exceptional taxes. In other words, should such statutes be interpreted according to the same rules and principles as all other taxation statutes or should they be interpreted according to different rules? And, if they are to be interpreted according to different rules, what policy reasons mandate a different approach and what are the rules or criteria to be used? Answers to these questions are crucial, for one decision regarding the scope of one interpretation may have a tremendous impact not just on one province but on the country as a whole.

49. The importance of how to interpret statutes which impose exceptional taxes is nowhere more evident than in this case. The consequences of the decision of the trial judge and of the Court of Appeal are colossal:

- reduction in mineral exploration and deposit appraisal expenditures (they totaled 27.3 million dollars in 2000);
- the next Voiseyø Bay may well remain undiscovered;
- fewer good paying jobs for the people of Newfoundland and Labrador;
- investment will flow away from the shores of Newfoundland and Labrador to more inviting ports.

Reference: Affidavit of Prospectors and Developers Association, paras. 13, 15, 16, 17 [TAB 2A]
 Natural Resources Canada, Newfoundland and Labrador Mineral

Exploration and Deposit Appraisal Expenditures,
<http://mmsd1.mms.nrcan.gc.ca/mmsd/exploration/facts-e.pdf>

50. The guidance provided by this Honourable Court will have a profound impact on the continued economic viability and growth of Newfoundland and Labrador and all of Canada. Mining, energy and other natural resource exploration and development are crucial to the Canadian economy. While there exists off the coast of Vancouver Island sufficient frozen natural gas hydrates to satisfy Canada's future energy needs for many years to come, these hydrates will remain forever dormant unless exploration, research and development dollars are spent in Canada. The availability of the research and development expenditures necessary to ensure that the next Voisey's Bay does not remain undiscovered depends on the existence of an appropriate interpretive tax context.

PART IV – SUBMISSION ON COSTS

51. This application for leave to appeal raises issues of public importance within the meaning of subsection 40(1) of the *Supreme Court Act*. For this reason, if leave to appeal is granted the Applicant requests that costs be awarded to the Applicant, in any event of the cause.

PART V – ORDER REQUESTED

52. That leave to appeal be granted with costs, in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 26th, 2002.

Colm St. R. Seviour
Counsel for the Applicants

PART VI – TABLE OF AUTHORITIES

Cases	Para.
A. <i>2747-3147 Québec Inc. v. Québec (Regie des permis d'alcool)</i> , [1996] S.C.R. 919	20
B. <i>Alberta (Treasury Branches) v. Canada</i> , [1996] 1 S.C.R. 963	20
C. <i>Bell Expressvu Limited Partnership v. Rex et al.</i> 2002 S.C.C. 42	20
D. <i>Canada v. Antosko</i> , [1994] 2 S.C.R. 312	20
E. <i>Canadian Marconi v. R.</i> , [1986] 2 S.C.R. 522	23
F. <i>CanadianOxy Chemicals Ltd. v. Canada (Attorney General)</i> , [1999] 1 S.C.R. 743	21
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H. <i>Friesen v. Canada</i> , [1995] 3 S.C.R. 103	20
I. <i>Johns-Manville Inc. v. Her Majesty the Queen</i> , [1985] 2 S.C.R. 46	31
J. <i>Ludco Enterprises Ltd. v. Canada</i> , [2001] 2 S.C.R.1082	20
K. <i>McRae v. Canada (Attorney General)</i> (1997), 46 B.C.L.R. (3d) 137 (B.C.C.A.)	23
L. <i>Mining and Mineral Rights Tax; Newfoundland and Labrador Corporation Ltd. and Javelin International Ltd. Attorney General for Newfoundland and Attorney General for Alberta et al.</i> , [1982] 2 S.C.R. 260	33
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Books

EE.	Hogg, Peter, <i>Constitutional Law of Canada</i> (Scarborough, Carswell Thompson Professional Publishing, 4 th ed., 2002)	36
FF.	Sullivan, Ruth, <i>Driedger on the Construction of Statutes</i> (3 rd ed., Butterworths, Toronto, 1994) p.25	35
GG.	Sullivan, Ruth, <i>Driedger on the Construction of Statutes</i> (3 rd ed., Butterworths, Toronto, 1994) pp. 318-320	24
HH.	Sullivan, Ruth, <i>Driedger on the Construction of Statutes</i> (3 rd ed., Butterworths, Toronto, 1994) p. 408	25

PART VII – STATUTORY PROVISIONS

Mineral Act, R.S.N.L. 1990 c. M-12, as amended, s. 12(1), s. 23, s. 24, and s. 31

Mining and Mineral Tights Tax Act, R.S.N.L. 1990 c. M-16, as amended, ss. 9(1)(a) and 2(g)

Constitution Act, 1867, (U.K.) 30 & 31 vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 53

Constitution Act, 1982 U.K. 1982 c. 11, s. 52(1)

Interpretation Act, R.S.N.L. 1990 c. I-19, as amended, s. 16

Interpretation Act, R.S.C. 1985, c. I-11.2, s. 12

Interpretation Act, 1995, S.S. 1995, c. I-11.2, s. 10

Interpretation Act, R.S.P.E.I. 1990, c. I-8, s. 9

Interpretation Act, R.S.O. 1990, c. I-11, s. 10

Interpretation Act, R.S.A. 2002, c. I-8, s. 10

Interpretation Act, R.S.B.C. 1996, c. 238, s. 8

Interpretation Act, R.S.M. 2000, c. 26 ó Cap I80, s. 6

Interpretation Act, R.S.N.B. 1989, c. I-13, s. 17

Interpretation Act, R.S.N.W.T. 1988, c. I-8, s. 1

