EASEMENTS, ERRORS, AND ENERGY PROJECTS: *SHELF HOLDINGS* REVISITED

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A. Introduction

Easements are most commonly known as rights of way over property owned by another.[1] Referred to by some as a backwater area of Canadian property law,[2] they are most often the subject of court cases between angry cottage owners. They are much less frequently viewed as critical legal tools of environmental activism. However, in 1987, the humble easement momentarily became a thorn in the side of an oil company and its ability to run pipelines through private farmland in Alberta. In the decision of *Shelf Holdings v Husky Oil Operations Ltd*,[3] the Alberta Court of Queen's Bench found that a privately granted right of way to an oil pipeline was invalid as it was not capable of meeting a basic common law requirement of easements. While the case itself had nothing to do with environmental activism, without a valid property interest registered on title, Husky Oil's installation of its pipeline became derailed.

This derailment, however, turned out to be brief. The Alberta Court of Appeal (ABCA) swiftly overturned the trial judge's decision, holding that a pipeline could and, in the case before it, did meet all common law easement rules.

To this day, *Shelf Holdings* continues to be referenced and reproduced in property law textbooks[4] to explain the fourth rule of easements: an easement must be capable of forming the subject matter of a grant. Specifically, an easement cannot

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[1] Jonathan Gaunt & Paul Morgan, eds, *Gale on Easements*, 20th ed (London: Thomson Reuters (Professional) UK, 2017) at 378.

[2] Bruce Ziff & Moe M Litman, "The Acceptance and Limits of Possessory Easements" (1989) 3 RPR (2d) 129 [Ziff & Litman, "Limits"]; Bruce Ziff & Moe M Litman, "The Road not Taken: Some Important Questions about the Nature of Easements" (1989) 50 RPR 261 at 271 [Ziff & Litman, "Road"].

[3] *Shelf Holdings Ltd v Husky Oil Operations Ltd* (1987), 78 AR 337, 1987 CanLII 3375 (QB) [*Shelf Holdings* ABQB cited to CanLII].

[4] See e.g. Bruce Ziff, *Principles of Property Law*, 4th ed (Toronto: Thomson Canada Limited, 2006); Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009); Marjorie L Benson, Marie-Ann Bowden & Dwight Newman, *Understanding Property: A Guide to Canada's Property Law*, 2nd ed (Toronto: Thomson Carswell, 2008); Mary Jane Mossman, *Property Law: Cases and Commentary*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2019); Anne Warner La Forest, ed, *Anger & Honsberger: Law of Real Property* (Toronto, Thomson Reuters, 2006) (loose-leaf updated 2018, release 21).

constitute a possessory interest. This article provides a close read of that decision, its history, and the development of the Canadian case law in relation to the fourth rule of easements since the ABCA's decision was released. In doing so, it discusses three major problems with the ABCA's decision that arguably create more confusion than clarity on the issue of oil pipelines and the nature of easements in Canada.

First and foremost, this article explains how and why the ABCA's findings concerning pipelines and common law easements were unnecessary and completely irrelevant to the real legal question at issue in that case. Second, it details how that Court's ruling effectively allows for a complete evasion of the fourth rule of easements through careful drafting. It also reviews how subsequent approaches to this question have differed from the ABCA's and explains why these latter decisions concerning the fourth rule of easements are more legally coherent than the decision in *Shelf Holdings*. Finally, this article discusses how the ABCA's judgment neglects the remaining easement rules and, in particular, ignores a problem concerning the second rule of easements and industrial oil pipelines.

While the main goal of this article is to demonstrate and clarify the problems with a case used to teach the fourth rule of easements to Canadian law students, its purpose is not purely academic. Industrial oil pipelines are incapable of complying with at least two common law easement rules. While this fact is largely irrelevant in those jurisdictions where statutory rights of way exempt industrial pipelines from the common law rules of easements, it remains significant in those jurisdictions where the law concerning easements and pipelines is less clear. In such places a re-visitation of this now 30-year-old decision and its previously unaddressed dimensions may resonate in the context of present legal battles or infrastructure projects concerning pipelines both in Canada and other common law jurisdictions.

This re-visitation, however, also uncovers what may be the inarticulate premise of the *Shelf Holdings* decision and should serve as a caution for would-be environmental activists turned litigators: principled legal reasoning can be glossed over by even high-level courts for the sake of industry and resource development.

B. The Facts

The facts that lead to the dispute in *Shelf Holdings* are fairly straightforward. In 1967, a company called Peregrym Farms Ltd. entered into a purchase and sale agreement for Crown land with the Alberta government. In 1974, Peregrym granted Husky Oil a right of way for the purpose of constructing an oil pipeline under and through its land. The grant issuing this interest was subsequently entered into the day book of the North Alberta Land Registration District Land Titles Office.[5] However, when the land was purchased and eventually conveyed to Shelf Holdings,[6] the certificate of title issued

[5] A survey plan indicating the pipeline route through Peregrym's land and instruments in relation to the easement agreement were also subsequently registered.

[6] Peregrym sold the land to a person named Carl Rusnell who then assigned the land to his company, Shelf Holdings, the holding company named as a party in the case.

by the Land Titles Office showed no registration on title of any instruments related to the construction of Husky's pipeline.[7]

A year after the purchase from Peregrym, the Land Titles Office sought to correct the error through a memorandum. This was opposed by Shelf Holdings because it would prejudice the title taken, which was free of any registered right of way.[8] The main issue at trial became whether the interest granted to Husky qualified as an exception to the indefeasibility of title taken by Shelf Holdings. For reasons expanded on below, of his own motion, the trial judge found that in order for the interest granted to Husky to qualify as an exception to indefeasibility of title, it had to comply with the four common law rules of easements.

The word "easement" is not a term of art and in order for a property interest to qualify as one, it must conform to four distinct requirements:[9]

1. There must be a dominant and servient tenement;

2. The easement must accommodate the dominant tenement;

3. The dominant and servient tenements cannot be owned and occupied by the same person; and

4. The easement must be capable of forming the subject matter of a grant.

The first rule requires that in order to enjoy an easement over the land of another (the servient tenement), one must hold a real property interest in an appurtenant piece of land, known as the dominant tenement. The second rule demands that the easement convey a benefit to the dominant land rather than to any particular owner of that land. The third rule prohibits land owners from granting an easement to themselves over land owned exclusively by them. Finally, the fourth rule is comprised of three sub-principles pertaining to what form an easement may take; specifically, its description cannot be too vague, it cannot constitute a possessory interest, and it cannot be for the purpose of mere recreation.[10]

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[7] *Shelf Holdings* ABQB, *supra* note 3 at paras 2–6. Information obtained from an interview with a Land Titles Office employee revealed an interesting historical fact left out of both judgements. In the late 1970s, the Land Titles Offices in Alberta began the conversion of their records to digital form and mistakes like the one in this case happened often. Due to human error, easements and other instruments registered on title in the office's physical books failed to make the transfer onto digital versions of title. Personal Interview with Dewayne McNeil, supervisor of Land Survey division of Alberta Land Titles office (25 May 2018).

[8] *Shelf Holdings* ABQB, *supra* note 3 at para 10.

[9] *Re Ellenborough Park,* [1956] Ch 131, [1955] EWCA Civ 4 [*Ellenborough*].

[10] Gaunt & Morgan, *supra* note 1.

In *Shelf Holdings*, the trial judge found that the interest granted to Husky by Peregrym amounted to a possessory interest and consequentially violated one of the sub-principles of the fourth rule.[11] The Alberta Court of Appeal reversed the trial judge's decision, finding that the fourth rule was met as the language of the grant did not convey an interest of exclusive possession.[12] However, as revealed by the eventual registration of Husky's interest on title and a subsequent decision by the Alberta Court of Appeal, the ABCA's finding in *Shelf Holdings* was completely unnecessary.

C. The Irrelevancy of the Decision

Apart from being problematic in nature, the Court of Appeal's finding that a pipeline could qualify as a common law easement was also unwarranted. This was because, in focusing on the issue as framed by the trial judge, the ABCA overlooked the real legal question in the case which needed to be answered.

In his reasons, the trial judge identified that the most likely way[13] for Husky's interest to be recognized on Shelf Holding's certificate of title was if it qualified as an exception to indefeasibility of title under the *Alberta Land Titles Act*.[14] In Justice Andrekson's view, the relevant provision was section 65(g) [15] that read:

> 65(1) The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention therein, subject to...
>
> (g) any right of way or other easement granted or acquired under any Act or law in force in Alberta.

However, in his interpretation of section 65(g), Justice Andrekson focused only on the first half of the provision, "any right of way or other easement". Indeed, neither the trial nor the appellate decision engaged substantively with the latter half of the provision or explained what "granted or acquired under any Act or law in force in Alberta" meant.[16] At least one commentator expressed concern that the Court of Appeal's decision opened up a chasm of exceptions to indefeasibility of title, clearly not envisioned by the statute nor in keeping with the provision's primary objective.[17] Perhaps in response, less than a year after the ABCA's decision in *Shelf Holdings*, a different bench of the Court held that instrument-granted easements, with no reference

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[11] *Shelf Holdings* ABQB, *supra* note 3 at para 44.

[12] *Shelf Holdings Ltd v Husky Oil Operations Ltd* (1989), 94 AR 241, 1989 ABCA 30 (CanLII) at paras 35–39, 44 [*Shelf Holdings* ABCA cited to CanLII].

[13] The other possibilities were the existence of fraud on the part of the purchaser and whether the land titles registrar had the jurisdiction to correct the error by way of memorandum. Neither of these arguments were accepted by the trial judge. *Shelf Holdings* ABQB, *supra* note 3 at paras 45, 52.

[14] RSA 1980, c L-5, s 65(1), It read: The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention therein, subject to…"

[15] *Ibid*; *Shelf Holdings* ABQB, *supra* note 3 at paras 14–15.

[16] E Mirth QC, Annotation of *Shelf Holdings* ABCA, *supra* note 12 (WL).

[17] *Ibid*.

to any statutory power to impose an easement, failed to qualify under section 65(g) of the *Land Titles Act*.[18]

Therefore, the question that should have been canvassed in *Shelf Holdings* was not what kind of interest was granted to Husky but under what authority it was granted. Regardless, even if one accepted that privately granted rights of way could qualify under section 65(g) of the *Act*, the finding that these interests had to be common law easements was based on Justice Andrekson's unnecessarily restrictive interpretation of the term "right of way".

Since at least 1950, Alberta's legislation has recognized statutory interests called Utility Rights of Way (URWs).[19] URWs need not conform with any of the common law easement rules.[20] Further, their legislative description expressly provides for the "laying, constructing, maintaining and operating [of] pipelines for the transmission, transportation or conduct of any substance".[21]

The trial judgement in *Shelf Holdings* appears to at least consider the notion that what had been granted was a URW. Indeed, this was Husky Oil's initial argument.[22] Furthermore, the original easement agreement still on record with the Northern Alberta Land Titles Office identified no dominant lands within the terms of the grant, indicating that the interest granted was always meant to be a URW.[23]

Regardless, Justice Andrekson did not believe that URWs qualified as an exception to the indefeasibility of title under section 65(g) of the *Act*. As neither easements nor rights of way were specifically defined in the *Act*, Justice Andrekson attributed a common law definition to both. Easements at common law required adherence to the four rules whereas a right of way, he held, was simply another way of describing a positive easement.[24] URWs, he observed, were statutory rights of way, expressly exempted from some of the common law rules for easements.[25] This being

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[18] In *Petro-Canada Inc v Shaganappi Village Shopping Centre Ltd* (1990), 109 AR 237, 1990 CarswellAlta 153 at para 13, the Court's opinion about what had occurred in *Shelf Holdings* was "the easement was for a pipeline, which by s. 7 of the Pipeline Act, R.S.A. 1980, c. P-8, could not be built without approval from the Energy Resources Conservation Board. That board also has power under that *Act* to grant an easement over the objection of the servient tenement. Any private agreement for easement in that circumstance no doubt was made in contemplation of that statutory power and might in that special way be classified as "under an Act" within the meaning of s. 65(1)(g)."

[19] *Land Titles Act*, RSA 2000, c L-4 s 69 [Alberta *LTA*].

[20] *Remington Development Corp v Enmax Power Corp,* 2011 ABQB 694.

[21] Alberta *LTA*, *supra* note 19, s 69(b).

[22] *Shelf Holdings* ABQB, *supra* note 3 at para 16.

[23] Grant of Easement, Calgary, Alberta Government Services Land Titles Office (Document 2642VA).

[24] *Shelf Holdings* ABQB, *supra* note 3 at paras 16–18.

[25] Such as the need for a dominant tenement; see *Land Titles Act*, RSA 1980, c L-4, s 72(3) and Alberta *LTA*, *supra* note 19, s 69(3).

the case, they could not be easements and did not qualify under section 65(g) of the *Act*.[26]

The notion that a right of way at common law always equates to a positive easement cannot be correct. While rights of way are often another way of referring to easements they can also, for example, be contracted into with a particular individual, taking the form of a license rather than an easement. However, while the ABCA correctly noted that the common law definition of "right of way" might not always amount to that of an easement,[27] it too failed to explore the option of URWs. Instead, it engaged with the chief finding of the trial decision and produced, as argued below, a problematic and completely unnecessary decision.

Tellingly, despite the ABCA's finding that the grant at issue properly conveyed an easement, when Husky's interest was ultimately registered on title, it was registered as a URW, not an easement. It remains so to this day.[28]

D. The Problems with the Decision

Although it was unnecessary to begin with, the ABCA's finding that Husky's pipeline was capable of conforming with the rules of common law easements was also flawed in at least two major ways. First, there are problems with its finding that pipelines are capable of complying with the fourth rule of easements. However, it is also difficult to square the concept of oil pipelines with the second rule of easements, that an easement must accommodate the dominant tenement. Curiously, this latter issue was a question with which neither level of decision substantively engaged, if at all.

1. The Subject Matter of the Grant

The fourth rule of easements, that the interest must be capable of forming the subject matter of the grant, is comprised of three distinct sub-principles:

> 1) the interest granted must not be overly vague or uncertain;
> 2) the interest cannot constitute a right to mere recreation; and
> 3) the interest granted must not amount to a possessory one.[29]

The last principle pertains to the legal classification of an easement as a non-possessory interest over land owned by another. [30] A conveyance of anything less is likely a license while anything more would equate to a grant of outright ownership.

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[26] *Shelf Holdings* ABQB, *supra* note 3 at para 41.

[27] *Shelf Holdings* ABCA, *supra* note 12 at para 16.

[28] Interview of Dwain McNeill, Supervisor at Calgary Surveys Department, Land Titles Office (31 January 2019) commenting on title 882 217 649. The pipeline's registration on title has subsequently been updated in accordance with the revised Act to reflect that it remains registered as a utility right of way.

[29] Gaunt & Morgan, *supra* note 1 at 26 citing *Ellenborough*, *supra* note 19 at paras 164, 175.

[30] Gaunt & Morgan, *supra* note 1 at 6: "[a] possessory right cannot be an easement".

At trial, Justice Andrekson's finding that the interest granted to Husky was possessory in nature was based primarily on *Re Interprov Pipe Line Co*,[31] a much earlier decision of the Saskatchewan Court of Appeal (SKCA). In that case, the SKCA held that an easement could not be granted to a pipeline as it amounted to a grant of exclusive possession of a portion of the servient tenement's sub-soil.[32] Justice Andrekson adopted and applied the SKCA's reasoning, finding the language used in the grant to Husky Oil from Peregrym similar to that of the grant in *Re Interprov Pipe Line Co*.[33] Further, while pipelines had been found to constitute easements in other cases, Justice Andrekson concluded that in none of those had the fourth rule of easements been properly canvassed.[34]

In reversing the trial decision, the ABCA declined to follow *Re Interprov Pipe Line Co*, as the case law relied upon by that decision concerned "absolute rights to land authorized by statute"[35] and was thus distinguishable from the case at bar. In the Court of Appeal's view, a right of way conveyed by private grant could only be classified as possessory if it detracted "so substantially from the rights of the servient owner that it must be something other than an easement."[36] This, in turn, could only be ascertained by looking at the language of the grant itself.[37] With respect to the interest conveyed to Husky Oil by Peregrym, Haddad J.A. found that it did not amount to a possessory interest because words such as "exclusive use" or "appropriate" or any other terms that signified exclusive possession, were absent from the conveyance.[38] As Litman and Ziff note,[39] it is not clear whether Haddad J.A. meant that the servient land owner was not deprived completely of access to the sub-soil area or to the surface area above it. Regardless, in relying on the language of the grant, he expressly found that Husky's pipeline was guilty of neither transgression.[40]

i. The Exclusive Nature of Pipeline

The chief problem with the ABCA's decision in *Shelf Holdings* with respect to the fourth rule of easements is how it provides for the complete circumvention of that rule through careful drafting of the granting instrument. Any grant that describes a right of

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[31] *Re Interprovincial Pipe Co*, [1951] 2 DLR 187, 1951 CanLII 212 (SKCA) [*Interprovincial Pipe Co* cited to CanLII].

[32] *Ibid* at paras 29–33.

[33] *Ibid*, cited by the Trial Judge in *Shelf Holdings* ABQB, *supra* note 3 at paras 23–24.

[34] *Shelf Holdings* ABQB, *supra* note 3 at paras 37–38.

[35] *Shelf Holdings* ABCA, *supra* note 12 at para 23.

[36] *Ibid* at para 34, adopting and citing Albert J McClean, "The Nature of an Easement" (1966) 5 West LR 32 at 51.

[37] *Shelf Holdings* ABCA, *supra* note 12 at para 35.

[38] *Ibid* at para 44.

[39] Ziff & Litman, "Limits", *supra* note 2 at 131–32.

[40] *Shelf Holdings* ABQB, *supra* note 3 at para 40.

way for a crude oil pipeline as anything but one of exclusive possession is an exercise in fiction. Litman and Ziff acknowledged this basic fact in their 1989 commentary, despite agreeing with the outcome of the ABCA decision.[41] There is no plausible way a servient owner could use any of the space physically occupied by such a pipeline.[42] Moreover, a study of pipeline safety regulations in Alberta alone demonstrates that pipelines not only exclusively occupy the sub-soil of a servient tenement, they can exclude the servient owner from use of the surface area above as well. First, pipelines are often subject to surface infrastructure such as "pipeline risers, headers … valve stations, pigging equipment, separators, metering shacks, line heaters, tanks, secondary containment, or processing plants".[43] Additionally, no permanent or even temporary structures can be erected on lands under which oil pipelines run, with that area typically ranging from 15 to 25 meters in width. Trees and other vegetation are removed from the surface area to prepare for the pipeline's construction and while the goal is to restore the condition of the topsoil on the surface area, this comes with no guarantee.[44] Testimonials of permanent damage to crops and tile drainage systems by pipelines are a common read in any farming journal or online community.[45] Finally, after installation, the land remains subject to a variety of on-going inspections and digs as the granting instrument for a pipeline easement will always reserve the right for pipeline maintenance and repair.[46]

Interestingly, in their commentary on both decisions, Litman and Ziff urged a policy level re-examination of the fourth easement rule.[47] In the authors' opinion, the interest that ought not to be substantially impaired was the use of the entire servient land by its owner. In other words, they believed that an easement could constitute an exclusive possession interest as this would amount to "[a] mere thread passing through a large parcel".[48] While this argument has not been adopted by Canadian courts,[49] it is worth noting that pipelines carry a unique risk that might disqualify them as easements

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[41] Ziff & Litman, "Limits", *supra* note 2 at 134.

[42] Indeed, much older decisions found that, even in relation to tunnels dug underground, the "owner of an exclusive right to use a tunnel is, in fact, almost certainly, the owner of the tunnel itself. See Gaunt & Morgan, *supra* note 1 at 6, citing *Bevan v London Portland Cement Co* (1892), 67 LT 615; *Re Pearson's Will* (1900), 83 LT 626.

[43] Alberta, "Pipelines in Alberta: What Landowners Need to Know*"* (25 May 2018), online: *Farmers Advocate Office* (pdf) <www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex1125/$file/878-4.pdf?OpenElement> at 5–6 ["Alberta Regulations"].

[44] *Ibid* at 6–7.

[45] Chris Bennett, "Pipelines and Farmers Battle Over Lifetime Loss" (14 November 2017), online: *Farm Journal* <agweb.com/mobile/article/pipelines-and-farmers-battle-over-lifetime-loss-naa-chris-bennett/>.

[46] *Ibid* at 7.

[47] Ziff & Litman, "Limits", *supra* note 2 at 134–35; Ziff & Litman, "Road", *supra* note 2 at 263–65.

[48] Ziff & Litman, "Limits", *supra* note 2 at 134; Ziff & Litman, "Road", *supra* note 2 at 268.

[49] "[T]o count as an easement, the grant cannot confer a right to possession or control of the servient lands to an extent that is inconsistent with the possessory rights of the servient owner: '[t]here is no easement known to the law which gives exclusive or unrestricted use of a piece of land. A grant of the exclusive or unrestricted use of land beyond all question passes the ownership of that land.'" *Robinson v Pipito*, 2013 BCSC 1670 at para 52 [*Robinson*].

even under this much looser interpretation of the fourth rule. Pipelines are susceptible to a variety of problems, all of which can have catastrophic consequences for the lands through which they run. These problems are not just limited to oil leaks,[50] which substantially devalue the properties over which they occur and destroy livelihoods of the land owners and workers.[51] They are also compounded in the ways that pipeline companies respond to them.[52] Indeed, even in routine maintenance operations, the spread of weeds and biocontamination from pipeline vehicles and equipment remains a perennial risk to farmers.[53]

ii. Approaches to the Fourth Rule of Easements Post-Shelf Holdings

More recent decisions, however, have taken a different approach to the interpretation of grants which may serve to temper the ability of careful drafters to evade the fourth rule of easements.[54] Instead of looking for any particular magic words to denote exclusive possession, this approach examines the nature of the easement, its purpose as described in the grant, and the intentions of the parties at the time.[55] Notably, this method of interpretation was established long before the ABCA's decision in *Shelf Holdings*, by the Supreme Court of Canada in *Laurie v Bowen.*[56] There the Court held that "the circumstances existing at the time of the grant may be looked at for … the purpose of construing the conveyance as to the nature and extent of the rights conveyed."[57]

This approach has resulted in the avoiding of some easements found to constitute a possessory interest in the servient land, despite the absence of express exclusive possession language from the granting instrument.[58] Notably it has also resulted in the preservation of other rights of way that appeared on paper to constitute more than an easement, but in reality did not.[59] Thus far this approach has not been applied to an oil pipeline easement, likely due at least in small part to the existence of URWs in places like Alberta and British Columbia. However, as discussed below, there remains the possibility that it might and that the realities of pipelines in relation to the rules of easements could finally be acknowledged by our courts of law.

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[50] Alicia Bridges, "'Worse than Oil': Sask. Farmers Say Husky Downplaying Damage from Salt Water Leak", *CBC News* (22 July 2018), <cbc.ca/news>.

[51] "How Shell's Oil Spill Destroys our Livelihood – Nigerian Farmers", *Premium Times* (3 May 2015), online: <premiumtimesng.com>.

[52] Bridges, *supra* note 50.

[53] "Alberta Regulations", *supra* note 43 at 8.

[54] *Robinson*, *supra* note 49; *Square-Boy Limited v The City of Toronto*, 2017 ONSC 7178 [*Square-Boy*].

[55] Robinson, supra note 49 at para 45.

[56] *Laurie v Bowen*, [1953] 1 SCR 49, 1952 CanLII 10 at para 26.

[57] *Ibid* at para 26.

[58] *Robinson*, *supra* note 49 at paras 45–48.

[59] *Square-Boy*, *supra* note 54 at para 35.

Regardless as to whether or not *Shelf Holdings* will ever be overturned or confined through this more sensible and logical approach to the interpretation of granting instruments, another argument remains as to why industrial oil pipelines are not easements: they violate the second rule of easements as explained in *Ellenborough Park*.

2. An Easement Must Accommodate the Dominant Tenement

To accommodate the dominant tenement, an easement must be "connected with the normal enjoyment of the dominant tenement" and be "reasonably necessary for the better enjoyment of that tenement". [60] An easement should not serve to enhance the value of a particular individual's "ownership of the land".[61] Other authors explain this rule as "whether the right makes the dominant tenement a better and more convenient property."[62]

Regardless of the phrasing, the heart of this rule is that an easement must accommodate the dominant land and not the dominant land owner. An easement cannot confer a benefit that is uniquely suited to a particular owner of a land, otherwise it is a license and not an easement.[63]

The concept of a large pipeline designed for the specific purpose of transporting crude oil to an oil refinery is difficult to reconcile with the above principles. While there are indeed a multitude of cases concerning easements of pipes and drains,[64] these pertain to the right to move sewage through a neighbor's property or to draw water for plumbing purposes. Such pipelines are very different from the one at issue in *Shelf Holdings*.

A more apt comparison is perhaps the finding by the Supreme Court of Canada that a railway line is capable of conforming with the common law rules of easements.[65] Like an industrial oil pipeline, a railway track is simply a means for a company to move its product over and through lands owned by others. In *Canadian Pacific Ltd v Paul*[66] the Supreme Court of Canada found that the CPR had been granted a "statutory right of way" over the Tobique First Nation's reserve lands near Woodstock, New Brunswick. It went on to find that this right of way complied with all four common law easement rules:

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[60] *Ellenborough*, *supra* note 9.

[61] *Ibid*.

[62] Bruce Ziff, *A Property Law Reader: Cases, Questions and Commentary* (Toronto: Thomson Carswell, 2004) at 753.

[63] Dianna Ginn, "Incorporeal Hereditaments" in La Forest, *supra* note 4 at Ch 17.

[64] *Pyer v Carter* (1857), 1 H & N 916; *Nicholas v Chamberlain* (1606), Crow Jac 121; *Watts v Kelson* (1870) LR 6 Ch App 166.

[65] A comparison noted by at least one other author in Mirth QC, *supra* note 16.

[66] [1988] 2 SCR 654, 53 DLR (4th) 487 [*Paul*].

> in the present case the dominant tenement — the lands held outright by the railway — are benefited by the right of way across the servient tenement of the Crown. The right of way accommodates the dominant tenement. It is evident that the dominant and servient owners are different persons. The interest of the railway is certainly capable of forming the subject matter of a grant.[67]

Notably, the application of the easement rules to the railway in *Paul* is brief and without citations to any specific supporting case law. However, even if we accept the Court's finding, the facts of *Paul* demonstrate how a railway company's right of way could conform with this rule while an industrial pipeline cannot.

In *Paul*, the CPR held an interest in strips of land that bordered each side of Reserve No. 23. This land had been granted to the railway company by the Crown for the specific purpose of constructing a path across Crown lands over which to lay its rail.[68] Here the dominant lands granted to the CPR by the government constituted a path, not a singular plot of land. In this case, a right of way over the servient tenement for the purpose of re-connecting the dominant tenement whenever it was split by way of private land, clearly benefited the dominant land by ensuring a continuous path. Furthermore, even if the railway conveyed its interest in the dominant lands to a new purchaser that did not intend to use it as a railway, the easement over the reservation would still clearly benefit the dominant land as it served to connect the pathway that comprised the dominant tenement.[69]

Notably, although it directly informs three of the common law easement rules, neither decision in *Shelf Holdings* identified a specific dominant tenement. For the sake of argument however, let us assume that both courts believed the dominant tenement to be the lands that contained Husky's refinery.[70] While there is no question that an industrial oil pipeline was beneficial to Husky Oil, if the land housing its refinery was conveyed to someone other than an oil company, the beneficial nature of the pipeline is immediately called into question. It is difficult to see how an orphanage or an orange juice factory would make much use of an industrial oil pipeline. If anything, the pipeline would more likely prove a liability.[71] By virtue of its unique

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[67] *Ibid* at para 22.

[68] *Ibid* at para 6.

[69] See e.g. *Canadian Pacific Railway v Vancouver (City),* 2006 SCC 5, where the City of Vancouver passed a by-law that designated a corridor of land granted to the CPR in the 19th century "as a public thoroughfare for transportation and 'greenways', like heritage walks, nature trails and cyclist paths" (at para 4).

[70] An incorporeal hereditament can be a dominant tenement and likely each separate right of way assigned to Husky Oil for the pipeline could be interpreted to act as a chain leading to its refinery; see Gaunt & organ, *supra* note 1 at 15.

[71] While federal and provincial regulations require oil companies engage in specific abandonment protocols, the timeline between abandonment and reclamation (the process of returning the land to a condition as similar to its pre-construction condition as possible) can be indefinite; see "Frequently Asked Questions (FAQs) Concerning Federally-Regulated Petroleum Pipelines in Canada", online: *Natural Resources Canada* <nrcan.gc.ca/energy/infrastructure/5893> ["Natural Resources"]; "Alberta Regulations", *supra* note 43 at 17.

nature, an industrial pipeline is something that accommodates a specific and limited kind of land owner. It does not make a dominant tenement a better or more convenient property in general.

Despite these arguments, the trial decision in *Shelf Holdings* failed to canvass the rule, instead merely listed it in a perfunctory manner along with the three others when outlining the law on easements.[72] For its part, the ABCA judgment noted that the first three easement rules "presented no problem in this case".[73] It also expressly found, with respect to accommodating an unnamed dominant tenement, that the interest granted to Husky "easily accomplished that aim".[74] No reasons were provided for this statement.

E. The Lessons of *Shelf Holdings*

First and foremost, it is important to acknowledge that the foregoing observations with respect to *Shelf Holdings* and the common law rules of easements are of little consequence to pipeline projects west of Ontario. The land registry acts of all those provinces contain statutory rights of way that allow oil pipelines to be registered as easements.[75] However in those jurisdictions that lack such statutory rights of way, the arguments raised in this article may be more than simply academic. Ontario is one of those jurisdictions.

Ontario's *Land Titles Act* allows for the registration of easements or any "incorporeal hereditament of freehold tenure enjoyed in gross"[76]. Therefore, while the statute expressly creates a statutory right of way that is exempted from the second common law rule of easements, it says nothing that even implies an exemption from the fourth rule.[77]

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[72] *Shelf Holdings* ABQB, *supra* note 3 at paras 18–20; Natural Resources, *supra* note 71; *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.

[73] *Shelf Holdings* ABCA, *supra* note 12 at para 18.

[74] *Ibid* at para 37. Indeed this portion of the ABCA judgement cites *Gale on Easements* to support its conclusion, however the reference is a discussion in that text which concerns utility easements that provide services such as power, gas, oil, etc. to a structure on the dominant land or conversely provide services such as drainage: Gaunt & Morgan, *supra* note 1 at 341. As argued above, an industrial oil pipeline is not the same. It is a means of transport specific to crude oil or natural gas from its source to a refinery.

[75] A statutory easement may be granted in Manitoba in respect of a pipeline, as defined in the *Oil and Gas Act*, CCSM, c O34; see *Real Property Act*, CCSM, c R30, s 111(3)(a)(vii). Saskatchewan's easements for public works and public utilities extends to gas and oil pipeline companies, including the right to construct and maintain the pipeline; see *Public Utilities Easements Act*, RSS 1978, c P-45, s 2(1)(b). Alberta's *Land Titles Act* allows for the creation of a utility right of way. A corporation operating a pipeline for the transportation of "any substance" can register their interest under the act; see RSA 2000, c L-4, s 69). Finally, British Columbia provides a retroactive exemption for pipelines to be registered as statutory rights of way without a dominant tenement; see *Land Title Act*, RSBC 1996, c 250, s 218(1)(c)).

[76] RSO 1990, c L.5, s 39(1)(a); s 39 in general

[77] Contrast this with New Brunswick's *Property Act*, which clearly provides exemptions for oil pipelines from the common law easement rules, expressly allowing them to be registered as private easements and

At the end of their 1987 commentary, Litman and Ziff caution that "in Alberta, lawyers should register utility and pipeline rights of way [as Utility Rights of Way]. Practitioners outside of Alberta should examine the legislative scheme extant in their jurisdiction to determine the appropriate courses of action."[78] However, given the wording of Ontario's statute, this advice could prove difficult to follow. It could be that any right of way granted to a pipeline in that province is vulnerable to a challenge based on at least one of the common law rules of easements.

For example, in the wake of the *Shelf Holdings* decision, it may be that many pipeline rights of way in Ontario were registered as private easements and not as statutory rights of way. Theoretically at least this would render a recognized property right of a pipeline company in Ontario vulnerable to legal challenge based on both the second and fourth rules of easements. Further, given the wording of Ontario's statute, even if a pipeline right of way is registered as an "incorporeal hereditament of freehold tenure enjoyed in gross", absent a court finding implicit exemption, the interest would still have to comply with the fourth rule of easements. Notably, recent publications by the Government of Ontario clearly state that easements granted by the Minister to corporations over crown land cannot amount to an exclusive possession interest vested in the grantee.[79]

Of course, standing would be an issue with respect to these kinds of legal challenges.[80] However, there are scenarios where a third party could be in a position to challenge the validity of such agreements. The recent Ontario case of *Enbridge Pipelines Inc v Williams*[81] is illustrative of this point. In *Williams*, members of the Haudenosaunee First Nation sought to block the maintenance dig on a pipeline by Enbridge for interference with their aboriginal right to harvest rabbits on the land. While the case largely revolved around whether or not Enbridge could seek an injunction against the activities of the Haudenosaunee protestors, arguably at the heart of it lay the law that governs easements. Enbridge's arguments rested on the fact that within the grants of easements made to Enbridge's predecessor by "various private land owners"[82] existed provisions for maintenance digs.[83] However, nowhere in the judgement is the nature of the interest granted to Enbridge identified as anything but

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retroactively exempting pipelines registered as private easements prior to the enactment of the exempting provision; see RSNB 1973, c P-19 s 26.

[78] Ziff & Litman, "Road", *supra* note 2 at 271.

[79] See Ontario, "Easements (Grants of)", online: <ontario.ca/page/easements-grants>.

[80] As the registration of such interests are the result of negotiated agreements, the likelihood of them being challenged is remote. As discussed above, the litigation in *Shelf Holdings* was possible only due to a mistake on the part of the Land Titles Office. In *Interprovincial Pipe Co*, the litigation stemmed from a refusal by Registrar to issue a certificate of title to the pipeline company on the basis that the interest was not one recognized under the laws of Saskatchewan; see note 7; *Interprovincial Pipe Co*., supra note 31 at para 2.

[81] *Enbridge Pipelines Inc v Williams*, 2017 ONSC 1642.

[82] *Ibid* at para 5.

[83] *Ibid* at para 59.

an easement. If the agreements at issue were registered as easements, one wonders whether the Haudenosaunee could have challenged not only Enbridge's right to perform maintenance digs on their traditional hunting territory, but the validity of Enbridge's interest in the land itself.

Placing these arguments in the context of transnational pipelines, one can also see how similar challenges could jeopardize much larger projects. The 2013 Energy East Pipeline Project involved a plan to transport diluted bitumen from Western Canada though Ontario to Quebec and the Atlantic Provinces via pipelines. It was cancelled in 2017 for reasons that many attribute to provincial and federal politics.[84] Transnational pipeline projects in Canada are highly susceptible to timing, requiring the alignment of allied governments both provincially and federally. Therefore, such projects could be undone by simply causing enough delay in one of the jurisdictions key to the plan. Those looking to cause such a delay through litigation might find a legal foothold in the common law rules of easements.

Of course, the expediency of attacking the validity of a particular easement is effective only in those jurisdictions where municipal planning laws prohibit the subdivision of real estate into minute grants of exclusive possession. For example, if a farmer can sell a strip of fee simple to a pipeline then the easement argument becomes moot. [85] Additionally, even if successful, such a legal strategy would likely be a stalling tactic at best, given the power of expropriation vesting in all provincial and federal governments with respect to the facilitation of pipelines in Canada.[86] Impermissible easements can ultimately be replaced by orders of expropriation. However, it should be noted that stalling tactics in other forms have succeeded in derailing some of the largest pipeline projects.[87] Conversely, for those provincial governments advocating for pipelines,[88] a close examination of their own rights of way legislation and those of neighbouring provinces implicated in these projects[89] may be in order.

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[84] Donald Savoie, "Politics Killed the Energy East Pipeline", *The Globe and Mail* (16 October 2017), online: <theglobeandmail.com>; Michelle Lalonde, "Energy East Pipeline: What it Was and Why Some Are Cheering its Demise", *Montreal Gazette* (10 October 2017), online: <montrealgazette.com>; Jonathan Montpetit, "Don't Count on Quebec Backing Energy East Pipeline Revival, Province's Premier Warns", *CBC News* (6 December 2018), online: <cbc.ca/news>.

[85] See Ziff & Litman, "Road", *supra* note 2 at 270–71. However, even if such fragmentation is permitted, it is also questionable, given potential land tax implications, whether someone seeking to purchase a right of way will agree to a grant of exclusive possession instead; see *Shelf Holdings* ABQB, *supra* note 3 at paras 26–32 where the Trial Judge cites: *Metropolitan Railway Co v Fowler*, [1892] 1 QB 165, at 171 aff'g [1893] AC 416; *Jarvis v Toronto* (1894), 21 OAR 395, [1894] OJ No 33 at 400 (QL) (CA); *Consumers Gas Co v Toronto* (1897), 27 SCR 453 at 457.

[86] See e.g. *National Energy Board Act*, RSC 1985, c N-7, s 104 (1); *Ontario Energy Board Act*, SO 1998, c 15, Sched B, s 99; *Surface Rights Act*, RSA 2000, c S-24, s 15.

[87] The Associated Press, "Barack Obama Rejects Keystone XL Pipeline Citing 'National Interest'", *CBC News* (6 November 2015), online: <cbc.ca/news>.

[88] Kevin Bissett, "New Brunswick Premier Hopes to Resurrect Cancelled Energy East Pipeline Project" *The Globe and Mail* (2 December 2018), online: <theglobeandmail.com>.

[89] In addition to Ontario, the provinces of Prince Edward Island, Newfoundland and Labrador, Nova Scotia, and Quebec also do not provide express rights of ways for industrial oil pipelines. PEI's legislation is silent

All of this being said, a final observation about the case of *Shelf Holdings* needs to be made and should serve as a lesson to those interested in using the common law as a tool for environmental activism. It is not based on any legal principles but instead on the inarticulate premises of decisions that pose disruption to development or industry. As discussed above, the Alberta Court of Appeal's finding with respect to oil pipelines and the fourth rule of easements was completely unnecessary. Indeed, its effect is reminiscent of shoving a square peg into a round hole and begs the question of why the Court forged ahead with such problematic and unnecessary reasoning. The answer may be simply the spectre of economic and infrastructure concerns. To be clear, nowhere in the Court's judgement is an acknowledgement that the trial decision threatened Alberta's oil sector. However, it is difficult to imagine that this was not an inarticulate premise of the decision. Arguably this was also the case in a decision released after the trial judgement in *Shelf Holdings* but prior to its appeal, where the Alberta Court of Queen's Bench found that powerlines constituted a common law easement, again without providing any substantive reasons for the ruling.[90] In both these cases it is not the presence of affirmative statements in support of industry that lends credence to the inarticulate premise theory, but the absence of cogent reasons for exempting energy corporations from private law rules. Therefore, while a re-visitation of *Shelf Holdings* highlights some implications for current legal challenges to pipelines in Canada, overcoming the non-legal obstacles that such litigation might face is likely the subject of an entirely different article.

on the matter except for reference to public utilities and their interference with highways (*Roads Act*, RSPEI 1988, c R-15, s 4.1); Newfoundland and Labrador appears to have exemptions for pipeline easements acquired by the Oil and Gas Corporation established by the provincial government in 2019 but not for other oil companies (*Oil and Gas Corporation Act*, SN 2019, c O-6.1, ss 3, 9); Nova Scotia has exemptions for easements acquired by public utility providers but is silent on purely private companies using pipelines as conduits to transport oil (*Land Registration Act*, SNS 2001, c 6, s 61A; *Public Utilities Act*, RSNS 1989, c 380, s 2(e)(vi)); similarly Quebec also contains no express exemption for oil pipelines, although in 2005, the provincial government passed specific legislation that allowed Ultramar Ltd. to expropriate and acquire easements for its pipelines (*Loi concernant Pipeline Saint-Laurent*, LQ 2005, c 56). Curiously this law was successfully challenged at the Superior Court level under section 7 of the *Charter*; see: *Ferme Denis Scott et Fils c Ultramar Ltee*, 2010 QCCS 5809 at para 66.

[90] *Card v TransAlta Utilities Corp* (1987), 57 Alta LR (2d) 155 at para 9, [1987] AJ No 1421 (QL) (QB).