File No. OG 003-03

L. Kamerman	)	Friday, the 11th day
Mining and Lands Commissioner	)	of March, 2005.

THE OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

An application under subsection 8(2) of the **Oil, Gas and Salt Resources Act**, R.S.O. l990, c. P. 12, as amended by S.O. 1994, c.27, section 131 and as amended by S.O. 1996, c.30, sections 56 to 70 and as amended by S.O. 1998, c. 15, exhibit "E", section 24 and as amended by S.O. 1999, c.12, exhibit "N", section 5 and Section 15 of Ontario Regulation 245/97, as amended, for an Order requiring the joining of the various interests further described herein, for the purpose of drilling or operating wells, the designation of the Applicant, Farmers Oil and Gas Inc., as the initial unit area operator and the apportioning of the costs and benefits of such drilling or operation, hereinafter referred to as "the Application for Unitization of the Romney 10-1" Pool";

AND IN THE MATTER OF*:*

All and singular those certain parcels, lots or tracts of land and premises situate, lying and being comprised of the South half of the North Half and the North half of the South half of Lot 10, Concession 1, comprised of approximately 100 acres more or less, in the Geographic Township of Romney, formerly the County of Kent, now in the Municipality of Chatham-Kent, Province of Ontario;

B E T W E E N:

FARMERS OIL AND GAS INC.

Applicant

- and -

JAMES ALBERT LYLE ROBINSON and BEVERLY ROBINSON, being leased landowners who have executed the proposed unitization agreement

Respondents of the First Part

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- and -

BARRY JOHN WINFREE, KRISTEN LEE WINFREE and ERIE LANDS LIMITED, being unleased landowners who have not executed the proposed Petroleum and Natural Gas Lease and Grant and the proposed Unit Operation Agreement

Respondents of the Second Part

- and -

ROXANNE HILLMAN, HENRY FAST, ANNE FAST, NICHOLAS KISCH, PETER GUENTHER, HELENA GUENTHER, ROY LEE ROULHAC, NORMA HAMILTON, SYLVIA TELYNE MENIFEE, ANDRE CARLOS HAMILTON, 1147186 ONTARIO LIMITED and CAMPERS COVE LIMITED, being the leased landowners who have not executed the proposed Unit Operation Agreement

Respondents of the Third Part

- and -

TALISMAN ENERGY INC., being an overriding royalty holder and a working interest owner who has not executed the proposed Unit Operating Agreement or the proposed Unit Operation Agreement as lessor

Respondent of the Fourth Part

- and -

ROYAL BANK OF CANADA, CIBC MORTGAGES INC., BANK ONE, NA, being mortgage interest owners

Respondents of the Fifth Part

- and -

MINISTER OF NATURAL RESOURCES

Respondent of the Sixth Part

O R D E R

UPON hearing from counsel for the parties and reading the materials filed;

1. THIS TRIBUNAL ORDERS that the application of Farmers Oil and Gas Inc. for compulsory unitization pursuant to subsection 8(2) of the **Oil, Gas and Salt Resources Act** be and is hereby dismissed.

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2. THIS TRIBUNAL FURTHER ORDERS that submissions may be made by any one of Farmers Oil and Gas Inc., the Applicant, Talisman Energy Inc., Party of the Fourth Part, and the Minister of Natural Resources, Party of the Sixth Part, hereto as to costs in this matter to the tribunal and to each two of the other aforementioned three parties, being to the Applicant, the Party of the Fourth Part and Party of the Sixth Part, by no later than the 4th day of April, 2005 and that each of the aforementioned parties is to respond to the submissions of the other by no later than the 18th day of April, 2005, by filing a copy of their response with the tribunal and with each two of the other aforementioned three parties.

Reasons for this Order are attached.

Dated at Toronto this 11th day of March, 2005.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. OG 003-03

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Respondents of the Fifth Part

- and -

MINISTER OF NATURAL RESOURCES

Respondent of the Sixth Part

REASONS

Appearances

Farmers Oil & Gas Inc.	Mr. Christopher Lewis, Counsel
Talisman Energy Inc.	Mr. Stephen Shantz, Counsel
Ministry of Natural Resources	Mr. Stephen H. Gibson, Counsel

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This matter was heard in the Coach Room, Wheels Inn, 615 Richmond Street, Chatham, Ontario, commencing on January 12 through to and including January 16, 2004.

Background

This matter involves the application of Farmers Oil & Gas Inc. ("Farmers") for compulsory unitization order, pursuant to subsection 8(2) of the **Oil, Gas and Salt Resources Act**, c. P. 12, as amended, involving the unitization of 100 acres located within Lot 10, Concession I, in the Geographic Township of Romney, formerly the County of Kent, now in the Municipality of Chatham-Kent, Province of Ontario.

The subject lands form part of the larger pool which is the subject matter of spacing order S.O 2002 - 11 Romney 3-8-11, whose spacing units are 50 acres in size and correspond to the underlying survey fabric. Throughout most of the pool, the spacing units run in a northwesterly to southeasterly direction ("stand up units"), with a few exceptions in the adjacent Lots 8 and 9, Con I, of which four are lay- down units.

The lands underlying the proposed 100 acre unit, tracts 3, 4, 5 and 6, currently form half of four separate spacing units. Should the application be allowed, the remaining four tracts, numbers 1, 2, 7 and 8, would effectively be orphaned. The latter two are almost completely within Lake Erie, having a narrow strip of shoreline which would not be sufficiently large to allow the required 107 metre set back for drilling for spacing units of this size. Farmers and one of the predecessors to Talisman, Pembina, had both sought changes from MNR to the original spacing order within Lot 10, Con I. The proposals involved varying configurations of stand up and lay down spacing all of which were refused. MNR stated that the refusal was based on its review of available technical data, some of which was proprietary and confidential and not all of which was available to Farmers. The proposals apparently did not meet with policy and objectives. Applications to MNR for changes to an existing spacing order are not relevant to the application for unitization before the tribunal and are outside of its jurisdiction.

The internal policy document relied upon by MNR, being the Petroleum Resources Centre Manual of Administrative Policies, Procedures and Bulletins Spacing, Pooling and Unitization Policy PR 2.02.01 was referred to, as was the first unitization application granted by the tribunal after acquiring this jurisdiction in 1997, namely **Gaiswinkler** (tribunal file OG 003-98, unreported), whose principles were enunciated and discussed.

Two other compulsory unitization applications were also referred to, namely that of the adjacent **Lowrie** (tribunal file OG 003-98, unreported) and the **Wigle** Pool, Unit 12, [tribunal file OG-007-01, unreported] located in adjacent Mersea Township, both of which were approved. The **Lowrie** unitization involved a small operator and allowed unitization of 100 acres. The **Wigle** unitization application by Talisman similarly involved a relatively small portion of the pool or field. MNR, which had been a party as Crown lands formed part of the unit, opposed the **Lowrie** application. It did not appear at the hearing, but made written submissions. The Talisman unitization application of **Wigle** apparently was accomplished without MNR's awareness or did not form part of its witnesses' recollections.

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Facts

Farmers currently has one well in production in tract 2 of Lot 10, Con. I. Farmers #3, Romney 2-10-I is outside the proposed unitization area. The pooled spacing unit for Farmers #3 is tracts 2 and 3. Farmers made application for, and was issued drilling licences for three additional wells within the proposed unit area [tracts 3 through 6, Lot 10, Con I], of which two have been drilled to target depths and the third whose horizontal leg has not been drilled.

Permit 8473 for Farmers #4 (Dev. #1) Romney, 03-10-I was issued 1997/01/06 and expired one year later. Although its surface is located within tract 3, its bottom hole location is to have been within tract 5. As a condition for production, pooling of tracts 5 and 8 was required.

Permit 8479 for Farmers #5 Romney 04-10-I was issued on 1997/02/12 and expired one year later. It is located within tract 4, but is off-target. As a condition for production, pooling of tracts 1, 2, 3 and 4 was required.

Well Licence 8669 for Farmers #10 Romney 6-10-I was issued on 1998/04/06 and expired one year later. It is located within tract 6, but is off-target. As a condition for production, pooling of all eight tracts in Lot 10, Con I was required.

Talisman is opposed to the Farmers' application, stating that there is no technical evidence to allow any deviation from the current spacing order or pooling requirements associated with the permits or licence. It maintains that allowing the unitization application would prejudice both those interests within and outside of the proposed unit.

MNR opposed the application on similar grounds with respect to the lack of technical evidence to justify changes to the current regulatory scheme. Moreover, on a policy basis, MNR contended that the proposed unit is an affront to the existing rules for pooling and unitization, whereby the proposed unitization is a means of avoiding the pooling requirements on the existing well licences. The terms of those pooling requirements had been known to Farmers at the time it commenced drilling, so that it should not be allowed to effectively circumvent those requirements at this later juncture. Although there is an Interlocutory Order dealing with this issue, it is reiterated at this point that the Crown does not own any land in the proposed unit. It has been added as a party in its capacity of steward of the province's resources.

The tribunal heard from landowners within the proposed unit, such as Mr. Garish for Campers Cove Limited, who felt very strongly that despite ongoing production surrounding his land throughout the area, that he and others have not received royalties for resources under their lands. Mr. Garish questioned the public policy and protective role played by MNR. It was his feeling that the resources under his lands may well have been drained through production from the many adjacent wells. Mr. Van Deven, on behalf of the owners, stated that the matter has been untenable, with MNR and Talisman not being held to account.

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Talisman has a gross overriding royalty interest in an 80 acre parcel, which includes lands within the proposed unit area as well as those involving Farmers #3 to the north and tract 2. Talisman also has a crown lease for the mostly off-shore tracts 7 and 8.

Based upon what had taken place in the **Lowrie** unitization, Farmers sought to make expert submissions through a panel of witnesses, which was objected to by Talisman and by the MNR. The tribunal heard from the three primary parties concerning this procedural issue and determined that it would be governed by its own preference to have experts heard from sequentially, given the contentious nature of the application and range of technical expertise provided.

Issues

1. Does the evidence support a finding that the resource located under the proposed unit is not in effective communication with adjacent lands or as between the three wells located in the proposed unit?

2. Can the words "part of" in subsection 8(2) of the **Oil, Gas and Salt Resources Act**, support unitization of a unit as small as 100 acres?

3. What is the meaning of subsections 8(3) and 8(4) of the **Oil, Gas and Salt Resources Act** in relation to a proposed unitization?

4. Can this unitization application be distinguished from earlier applications (**Gaiswinkler, Lowrie, Wigle**) which were allowed?

5. How should section 121 of the **Mining Act** that the tribunal's decision be on the real merits and substantial justice of the case, be applied to the facts of this case?

Executive Summary

The application is dismissed on the basis that there is inadequate technical evidence of compartmentalization.

The tribunal finds that the heterogeneous Goldfields/Lakeshore field is one of great geological complexity, but that complexity does not conclusively mean that the resource is found in compartments. The tribunal has given Farmers the benefit of the doubt in its determination to drill off-target wells at certain locations in preference to wells within the target zones of the spacing order. This flows from the fact that MNR must have been persuaded at that time to issue the licence and permits for the off-target locations. What has defeated the application is the fact that there is no production or other concrete data to persuade the tribunal to make its decision and it has found that it is unwilling to rely on either interpolation or assumptions to deviate from the resource management scheme which has been devised to protect the resource and guard against wasteful practices.

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The existence of compartments in this reservoir is not discounted by the tribunal. The Coulter and Waugh report provides tacit recognition of this, although MNR has refused to acknowledge this fact from the documentary evidence which it filed. However, in the absence of concrete evidence the tribunal finds that the prevailing regulatory scheme must prevail.

The tribunal finds that the meaning of the words "part of" in clause 8(2)(a) cannot be applied to an area of land as small as has been advocated on behalf of Farmers. The part of the reservoir located under the four tracts of Lot 10, Con I is found to be so small in relation to the principles and objectives of unitization as to render it nonsensical. In the absence of evidence of compartmentalization of pools which are considerably smaller than the 50 acre tracts, compulsory unitization is not warranted.

The facts of this case more properly support an application for compulsory pooling, to permit production from any appropriate combination of wells 3, 4, 5 and 10. While it has no jurisdiction over proposed amendments to spacing orders, the tribunal has found itself to be disconcerted by the rationale provided MNR for its decisions or recommendations insofar as blanket statements referring to policy and program objectives are not inherently informative, but constitute more in the way of conclusions.

The tribunal is troubled by the fact that more than one licence was issued by MNR to Farmers, despite ongoing failure to bring an earlier well to production and by the fact that the lands which were required to be pooled were overlapping. The last licence issued involved all of the tracts listed as conditions for the previous two well licences, not to mention shutting in of a third well, currently in production.

The meaning of subsections 8(3) and (4) of the **OGSRA** must be considered in the context of three phases of relevant legislative provisions. At each phase, the words of the **Act** must be read together with the relevant words of the regulation. The current phase has come about after the amendments to the **OGSRA**, which came into effect on December 11, 2002. A Compulsory Unitization Order will prevail over conditions on well licences, whether on-target or off-target as well as over the requirement that there be pooling prior to drilling and production. The Order does not prevail over the regulated provision that there can only be one well per spacing unit. That regulated provision can only be removed by the Minister and the obligation to do so is discretionary, as set out in O. Reg. 245/97, ss. 8(4).

The manner in which the Minister will exercise the discretion provided for in subsection 8(4) of O. Reg. 245/97 is set out in Policy in a manner which is not helpful as it merely restates the regulation. It may be, as a result and hypothetically, where the tribunal has issued a compulsory unitization, that the Minister in the circumstances of concern for the resource management scheme, exercises his discretion not to amend or revoke the pre-existing spacing order for that area covered by the ordered unitization. It appears that, as such, the discretion of the Minister may have the effect of overriding that part of any ordered unitization which contemplates that the number of wells can be unlimited, because the power to revoke this provision rests with the discretion of the Minister.

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Past decisions allowing unitization by the tribunal have been examined and distinguished, albeit not in a manner that is entirely satisfactory to the tribunal. Nonetheless, the tribunal's findings in this case are based upon the best expert evidence which has been made available at this time, which includes the overall resource management scheme of the legislation, something which was not addressed in any depth in the past.

The tribunal's powers to make findings on the real merits and substantial justice of a case do not empower the tribunal to re-write the law of unitization to permit the unitization of such a small area which is unjustified by the technical evidence. There are limits to the equitable relief which can be granted. However, the tribunal would be pre-disposed, without prejudging the facts of the case, to allowing any such compulsory pooling application which may be brought involving any one or two of the licences for pooled tracts in Lot 10, Con I. As such, it may by its own motion, open the terms to govern such pooling, to examination. Also, a prospective applicant should be forewarned that other interest owners are not precluded from requesting that they be appointed as the initial unit operator.

Counsel for the parties will be able to make such submissions as to costs as they may advise. However, if such application is made by either MNR or Talisman, the tribunal seeks certain information and submissions.

Evidence

Witnesses for Farmers included Kathy Lynn McConnell, former MNR inspector of 18 years and the well site geologist retained and present for the drilling of wells by Lowrie and Farmers; consultants from Energy Objective Ltd., being Dr. Philip Walsh, a professional geologist with expertise in geophysics with several graduate degrees in business, including a PhD. and Mr. Joseph E. Gorman, a professional engineer with expertise in reservoir engineering; and Mr. Randy Robinson, one of the principles of Farmers. MNR called two witnesses, both of whom were involved in the applications process itself: Mr. Rudolf (Rudy) Michael Rybansky is a professional engineer, offering expertise concerning regulatory standards for oil and gas in Ontario; and Mr. Terry Robert Carter, a professional geologist who provides professional advice to government concerning geological evaluations. Talisman determined during the course of the hearing that it would not call any witnesses.

All of the technical evidence was focussed on the issue of whether the resource in this field is found in compartmentalized formations which may lie in close proximity but between which there is no "effective" communication or flow. Witnesses on behalf of Farmers asserted a compartmentalization or pod theory. **Ms. Kathy Lynn McConnell**, a former MNR inspector with a background in geoscience, acted as the well site geologist on the drilling of the Farmers' wells and the wells drilled on the adjacent Lowrie Lot 11, Con I. The evidence from Lowrie was repeated, namely that the Forbes #1 Horizontal Romney 6-11-I passed within 60 feet of the Forbes et al. Romney 6-11-I vertical well with no corresponding indication of communication within the vertical well. Had the two wells been in communication, it was the contention of Ms. McConnell [and Walsh/Gorman] that drilling fluid would have been lost. This was due to the fact that it was highly pressured and would have flowed into the lower pressured vertical well. This did not take place. 8

Ms. McConnell stated that the absence of communication could develop over time. If there were communication, it would not be inconsistent with evidence of compartmentalization, but rather could be indicative of pods within the reservoir, the migration of whose contents could be slower.

Oil and gas was encountered during the drilling of the Farmer's No. 5 well estimated potential production was 50 barrels per day. Farmer's No. 10 (Romney 6-10-I) flowed oil and gas to surface during drilling and was thought by Ms. McConnell to be a potentially better producer estimated at 75 barrels per day. The Farmers #4 was going to be drilled off the vertical formation through proposed horizontal drilling.

The down hole completion point from the #5 and bottom hole of the #4 is 1400 feet. The proposed completion point of the #10 is 1000 feet from the #4. During drilling, there was no evidence that the formations in which the wells were located were connected in any way. Under cross-examination, it was suggested that the Farmer's #4 (the horizontal well) surface location is within tract 3. The intention, however, is to drill its bottom hole location within tract 5. The Farmer's #5 well in tract 4 would be 1200 feet from the Farmer'#3 well. It was suggested that the Forbes et al. #6-11-I well is 1500 feet from the surface of the #5 well and 2400 feet to its bottom hole location.

In other words, the distance between bottom holes of the wells is as follows. Between the #5 and #4 if is 1400 feet; between the #10 and the #4 it is 1000 feet; between the #5 and #3 would be 1200 feet; and between the Forbes et. al. #6 and the surface of the #5 is 1000 feet and the bottom holes is 2400 feet.

Ms. McConnell suggested that, should the unitization go ahead, the remaining lands to the north containing the Farmer's #3 well could be reconfigured by MNR to create a lay down spacing unit, which MNR has refused to do.

Mr. Randy Robinson, Vice President of Farmers, stated that his company's interest in oil and gas exploration and production dates back to the 1980s, when he and his father felt it would be a good fit with their land-based interests. Farmers a small company without in-house technical expertise which is able to engage professionals in geophysics, geology and seismic testing. Accordingly, it has acquired a reputation for competence, knowledge and experience.

Farmers #3 was drilled in 1995, pursuant to a farm-out agreement with Pembina, predecessor to Talisman and is operated by Farmers with Talisman having an overriding royalty interest. (The original lease on these lands was granted by predecessor to Mr. Robinson's parents to The Consumers Gas Company Limited; the farm-out agreement was granted by Pembina to Farmers) Its initial production was 50 to 60 barrels a day, which has since dropped to 12. According to the terms of the farm-out agreement, having completed this well within set parameters allowed Farmers to assume the interests of Pembina, subject to gross overriding royalties on any subsequent wells.

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Farmers #3 was the only well in which it had access to outside data, its target was determined through five seismic testing lines, three provided by Farmers and two from Pembina. Based upon its interpretation of the seismic data, Farmers would have liked to have drilled 100 to 200 feet further east, but was convinced to do otherwise. (This was a condition of the earning well in the farm out agreement thereby ensuring that the drilling took place on target). As a result, no change to spacing was required, according to Mr. Robinson whereas, had the well been off-target, pooling of tracts 1 through 4 would have been required.

Should the current Farmers unitization application be allowed, the 25 acre tract 2 where the Farmer's #3 is located would effectively be stranded and shut in. An alternative to this situation, which Mr. Robinson had pursued with no success would have been to pool tract 2 with tract 1 for a lay down spacing unit through an amendment to the spacing order. Before the tribunal and as a result of this potential stranding of its #3 well, Mr. Robinson asked that the existing spacing unit be allowed to remain in place concurrently with the proposed unit, so that tract 2 could be both part of the compulsory unit and part of the original spacing order.

Farmers drilled its off-target #5 in 1997 to further ascertain the resource location within Lot 10, being based upon its own existing seismic used to drill the Farmers #3 as well as data from the (adjacent, Lot 11) Forbes vertical well. MNR did grant a drilling licence to Farmers for this well, but owing to its off-target location, the drilling licence required that tracts 1 through 4 be pooled prior to production.

The Farmers #10 was drilled in 1998 based upon the running of one additional seismic line from the northeast to southwest. According to Mr. Robinson, that new seismic line not only confirmed the location for the #5 (after it was drilled), but disclosed a structural high followed by a structural low, delineating a separate producible feature in the lower west tract. It was suggested, however, by Talisman, that the surface location of the #10 was very close to the border of the Campers Cove lands, being most likely on those lands rather than on Robinson lands and flowing from its location was the very real possibility of being subject to Talisman's gross overriding royalty. If this were the case, then all four of the Farmers wells would be subject to a 16% gross overriding royalty.

The rationale for having actually drilled the fourth, off-target Farmers #4 well, whose drilling was confined to its vertical portion because of the failure to pool as required on the licence was due to an agreement with the adjacent Campers Cove to not drill on lands which were occupied as campgrounds.

Almost one million dollars has been invested in these three wells. None are in production, however, due to the pooling requirements on the well licences. Farmers made its unitization application because of what Mr. Robinson characterized as arbitrary spacing and pooling requirements which have unjustly thwarted it from realizing its inherent right to produce the resource it has discovered. It wants to produce from the three wells drilled as soon as possible and to also protect its correlative rights from drainage from wells which surround these lands.

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Farmers' initial efforts had been in relation to seeking changes in spacing, which would have had the effect, if granted, to allow production from those wells within required set backs. All of its efforts were in an attempt to have a spacing pattern which logically followed its technical development plan and allowed it to produce wells and generate royalties. Farmers' efforts to have the Spacing Order amended were explained as underlying the reasons it felt it was unable to produce in the current regulatory scheme.

Farmers filed documentation which illustrated its efforts with regards to obtaining the near shore oil leases from MNR, its efforts to obtain the cooperation of Talisman in regards to producing from its property via amendments to existing spacing order and its rationale for seeking amended spacing from MNR. In this correspondence, Mr. Robinson stated that he understood that MNR would not allow one company to tie up the spacing of another, something which he felt was the result of the near shore oil leases. In November, 1996, Mr. Robinson sought to obtain the water portion from Pembina and sought its cooperation. The December response indicates that Pembina was still in the process of determining its drilling program for 1997. In December, 1998, Farmers sought the consent of Talisman to pooling lands so that Farmers #5 could be produced, but the letter goes on to state that the proposal is for two lay down spacing units. Mr. Robinson's letter of April, 1999 to Talisman indicates that his understanding of the original farm-out agreement would allow Farmers to obtain assignment of certain interests of Talisman in Lot 10 in exchange for costs incurred. Talisman did not agree that this was a term of the written farm-out agreement and declined the proposal. Talisman did set out the terms under which it would agree to pool and farm-out its interest in Lot 10. Finally, it stated that its consent to a change in spacing for the Farmers #5 is not necessary. "At this time Talisman will agree to pooling the north half 10 as provided for in MNR Permit #8479 Farmers #5 Romney 4-10-1. Talisman's royalty interest in production from the north half of lot 10 would be calculated as 80/100th x 16%. Under this approach a change to the spacing order will not be required." Therefore, Talisman has agreed to the pooling in accordance with the licence for Farmers #5, thereby willing to forego the separate royalties from Farmers #3, but it is not indicating its agreement for an amended spacing order for several lay down spacing units. On November 24, 1999, Talisman withdrew any offers for pooling and farm-out in Lot 10

Going back to June 11, 1998, the Farmers letter summarizes a meeting of May 28, 1998 with representatives of Talisman concerning the Farmers #10 requirement to pool the near shore portion of Lot 10. Documentation from Talisman was not filed, but Mr. Robinson summarized his understanding of its position in his letter. Talisman indicated hat it would prefer to be the driller and operator of any production; it would be prepared to participate as a working interest. Its third choice would be an overriding royalty interest.

A February 11, 2000, letter, marked "without prejudice" was filed. Without going into detail, it involved a settlement of issues in Lot 10 between Farmers and Talisman. Farmers' letter of April 23, 2001 refers to an earlier conversation and seems to resurrect the possibility of a buy out of one by the other. On October 29, 2001, Farmers indicated receipt of a letter from Talisman, dated October 17, 2001 that it is not interested in selling. Mr. Robinson suggested that Talisman could have said so and even come up with its own offer. Talisman did apparently conduct an evaluation and quoted a price to buy out Farmers. Mr. Robinson stated,

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> With your minority interests in Lot 10, given to you unfairly through MNR, you can block the majority from oil development and production, and do your best at draining its reserves up your adjacent producing wells claiming any oils from Lot 10 to be 100% yours.

The correspondence also disclosed issues involving MNR's treatment of Farmers, whereby it apparently accepted and entertained an objection to its 1996 application to amend spacing from Pembina, even though time for doing so had passed, according to the MNR policy dealing with such applications. The actual refusal to amend spacing, however, does not deal with this objection, but merely stated, "We studied the available technical data including the seismic information submitted with your application. The Ministry's conclusion from this review is that "the current spacing units are appropriate and therefore your application …. is denied."

Mr. Robinson has never been given the technical reasons for MNR's refusal to amend its spacing order. Even though it had asked for the data relied upon and for an explanation with supporting reasons, MNR's reply was to refer to its policy 2.02.01. The response to the application by Farmers to change spacing were appropriate according to MNR policies and that no new technical information had been forthcoming to change its position. [see spacing and pooling policy fm 2.02.01]. Based upon statements made by Dr. Palonen of MNR, wherein he stated that [tab 20, ex. 5] the pool had been significantly developed by successful drilling and the original spacing order had accomplished its purpose. He suggested that anyone wishing to realize the advantages of producing the pool as a single unit should be attempting to unitize the pool through voluntary unitization.

Having failed to obtain the change in spacing that it sought and also pursuant to certain MNR correspondence, Farmers then determined that it would be necessary to seek unitization. Mr. Robinson stated that what he felt was arbitrary spacing (i.e. a uniform grid overlaying the survey fabric) will not meet the needs of the producer and ends up on the facts in this case thwarting Farmers from realizing its inherent right to produce the resource that it has discovered. Production from the proposed unit would protect its correlative rights, preventing the resource from being drained through wells on adjacent properties.

Had his efforts been successful, Mr. Robinson stated that the additional pooling would not have been required for Farmers #5. Instead, tracts 3 and 4 would have sufficed to allow the required 107 metre set back, with tracts 1 and 2 meeting similar requirements for the pre-existing Farmers #3, which could remain in production. This is no different than what had taken place in Lot 9 by MNR in 1994 to lay down units in what Mr. Robinson described as meeting the needs of the developer. Ironically, Farmers had been approached in 1992 for its support of an application to amend spacing, which it was unwilling to give until it had adequate technical knowledge. Once Farmers had undertaken necessary seismic to understand and support such a change, Pembina's successor, Talisman, was no longer of a mind to do so. Mr. Robinson characterized Talisman as uncooperative with Farmers' efforts and stated that the

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person with whom he was to deal with kept changing. Mr. Robinson was not willing to agree with the suggestion that Talisman's lack of cooperation stemmed from Farmers insistence on proceeding with amendment to the spacing order as opposed to dealing with the voluntary pooling conditions of its licences.

Mr. Robinson clarified that it had been his understanding that Farmers could apply for the off-shore leases only when it had a proven land-based well. The effect of having lost out the leases to Talisman was that it unduly restricted Farmers' ability to produce on Lot 10. Mr. Robinson did concede that the grant to Talisman did not change the pooling requirements which went with the various well licences. The lawsuit suggests that there may be improper drainage occurring under Lot 10. When asked which wells might be involved, Mr. Robinson stated potentially the Lowrie and Lot 9 wells, although this could not be verified. It was suggested that the proposed unitization could similarly drain reserves and have a prejudicial effect on tracts 1, 2, 7 and 8.

Mr. Robinson stated that he thought that the pooling conditions on the licences could be adjusted once the resource was located, believing that this was a common practice of MNR. When Farmers undertook its drilling, it assumed that it would get cooperation from MNR and Talisman to change the spacing because MNR had imposed what he characterized as the technically ridiculous condition of meeting the current spacing requirements. Wells #4, #5 and #10 would not be off-target within the proposed unit, because production can take place in a unit without regard to set-back requirements in the same manner as spacing units are.

Mr. Robinson was unwilling to concede the strong likelihood for drainage from without, stating that its potential cannot be proved or disproved, and while it is not a likely probability, it is an unknown probability. Mr. Robinson maintained that the technical basis for Farmers' application was the prospect of heterogeneous pools with as little as between 20 and 100 feet between them. Mr. Robinson vehemently denied that the application was for purposes of avoiding pooling conditions on the licences. The purpose behind the efforts had been to attempt to allow a unique area to produce by meeting the regulatory mechanism. He suggested that the 1988 spacing order did not reflect the needs of the resource. Farmers was aware of the pooling requirements and drilled accordingly, but now it is simply trying to remove the conditions, as its ultimate objective is to gain access to the resource. Despite Farmers' goals in this matter, Mr. Robinson continued to deny that the unitization application was a means of trying to get out of the pooling requirements on the licenses.

Mr. Robinson was of the opinion that the seismic lines, particularly that of 1997 which confirmed existing evidence and uncovered a new feature, should have been persuasive of determining the overall structure, size and delineation of the resources, despite assertions that well data was necessary to confirm the information. The seismic data was characterized as subjective. Despite reference in Walsh's Report that seismic is very subjective and should not be used alone in determining the characteristics of the resource, Mr. Robinson continued to disagree, calling it a useful and provable tool. Mr. Robinson disagreed with the implications of Dr. Palonen's remarks that it had no significant new technical data, stating that Farmers' seismic was persuasive, notwithstanding the position maintained by MNR that only production data would be determinative.

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Mr. Robinson indicated that the unitization application was made instead of pooling because the latter would not be adequate to Farmers' needs and had not been considered in relation to the resource structure. MNR had apparently cautioned Mr. Robinson about drilling off-target and had never promised to alter the spacing. Mr. Robinson was resolute in his position, despite repeated experiences to the contrary, both of Farmers and of the Talisman predecessor.

Discussions ensued about the legal proceedings involving tracts 7 and 8, which were initially were for judicially reviewed and then converted into an action for damages. Mr. Robinson indicated that his primary concern was not that Talisman could drain Farmers' lands, but rather that Farmers had sustained a loss of access to those reserves. He believed that the proposed bottom hole of the #4 would not drain tract 8. He maintained his staunch disagreement that the spacing requirement does not determine where the resource will be drained from. When the well was drilled in 1998, Mr. Robinson stated that he agreed to drill the well, but not to produce it. Now that he wants to produce it, he would account for the interests in tract 5. This evidence was contrasted with his application in 1998, which retained two stand-up units at the south, effectively maintaining the coupling of tracts 5 and 8.

Dr. Philip Richard Walsh, having a bachelor of science in geology and geophysics, has expertise in Ordovician reservoirs dating back to 1987. Dr. Walsh, one of the principals of Energy Objective Ltd., was approached by Farmers in 2003 to conduct an evaluation of Lot 10, Con I, with a view to reviewing the geology, geophysics and engineering, to negotiating a pooling agreement with Talisman and present various scenarios to the MNR. His technical analysis was conducted as a contingency in case the pooling issue could not be resolved. Dr. Walsh's analysis utilized all data available from Farmers and the MNR library, as well as information from the adjacent Lot 11 Lowrie unitization which his company had been involved in. He has concluded, based upon geology and geophysics, that one can loosely define where the trend runs, but that it is difficult to ascertain the dimensions of the reservoir relative to Farmers' wells numbers 10, 3 and 5. No data was available in connection with Farmer's #4.

Essentially, what Dr. Walsh established was the best sized unit for Farmers, doing so without data from production or a depletion stand point. His approach incorporated known technical information and complied with MNR's required 107 metre setbacks used for spacing units of Ordovician depth. A 100 acre unit was proposed. Dr. Walsh indicated that in his opinion the 100 acre pooling requirements for the #5 well and the 200 acre pooling requirement for the #10 well were not reasonable, given that Ordovician wells involve 50 acre spacing units. As the licence had expired for well #4, and its trajectory was uncertain, notwithstanding its bottom target in tract 5, Dr. Walsh determined that tract 5 should be part of the participating interests in the proposed unit.

Ideally, Dr. Walsh would have required such technical data such as bore analysis (geophysical logs and core data), geological mapping, geophysical mapping (seismic), reservoir studies (core analysis of the formation and properties of permeability and porosity, down hole pressure and pressure depletion data being correlation of flow data), along with production statistics and economic studies. Data from down hole vertical lots are not as readily available as are found with other operators such as Talisman. 14

By allowing the proposed unitization, the wells could be brought into production, which would permit the testing and gathering of data associated with production, such as bottom hole pressure recorders and surveys, recording of pressure loss and depletion relative to the production which has taken place. This would allow a reservoir study and pressure statistics to be obtained. Dr. Walsh stated that he hesitated to quantify production without this information. However, he is comfortable that a 100 acre unit is large enough to encompass such depletion as may take place and could be expanded or shrunk as became justified because, it was explained, interpretation of field data is not an exact science. Once wells are produced, one obtains data to correlate productivity from which one can determine whether the area for the unit is appropriate. The Farmers #4 well was included in the proposed unit but there is not yet any data to indicate it will be productive. Explaining his statement that the proposed unit could be expanded, Dr. Walsh stated that interpretation of data in this field is not an exact science.

Figure 2 of the Energy Objective Ltd. study of Romney 10-I, was prepared in May 2003 for this unitization application, with Dr. Walsh's interpretation of the data set out in Figure 4. The cross-section depicted is designed to determine the depth relationship between the various wells and of the hydrocarbon bearing formations to one another. This analysis formed the basis of his recommendations. The report uses geological data in combination with seismic data enabling the coordination of a geological evaluation with a geophysical evaluation. When one attempted to put the seismic on top of the fault line, the information became too complex (mirrored in evidence of Terry Carter for MNR) but did assist in providing the orientation of the faults. The result is an elongated field running in a northwest to south easterly direction, which coincides with the MNR evaluation. On the adjacent Lowrie Lot 11 unit, the seismic data coupled with the pressure and production data for the horizontal and vertical wells of the 6-11-I led Dr. Walsh to interpret a fault at that location. In a heterogeneous reservoir, such as was the case here, there are permeability barriers which do not allow for pressure communication. Effective isolation was explained as precluding movement over short periods of time, but not eliminating the possibility of movement over decades or millions of years.

Referring to the addendum to the Report, dated December 13, 2003, Dr. Walsh read into the record:

> The fact is that the heterogeneous nature of this reservoir results in a series of pools within the larger structure, each pool effectively isolated by permeability barriers within the structure. The size and extent of these pools can range from small to large.
>
> What Talisman and the MNR fail to submit is the fact that seismic is a very subjective tool and its use alone in determining the size of a reservoir or pool is inappropriate. Ideally a combination of geological information derived from drilling wells and engineering data derived from testing and producing wells when aggregated with the seismic data provides the best opportunity to identify the size and extent of a reservoir. Even in those circumstances there still remains an interpretive element to this identification that can never be 100% accurate.

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> While the report submitted by the MNR in its reply submission deals with the historical development and production of certain wells within the Goldsmith/Lakeshore field, it fails to indicate what the lateral extent of the reservoir is for each of those wells. Again, the heterogeneous nature of this reservoir makes that determination difficult even with the amount of information at Talisman's disposal.

Dr. Walsh discussed the three principles of unitization set out in the **Gaiswinkler** unitization decision. He stated that, while MNR set out the spacing, Farmers has the right to interpret it the way they see it. Having gone through the various processes and being unable to secure a change in the spacing order, unitization was the only other option available. Unitization is a third step in the resource recovery process whose objective is that of conservation of the resource, where waste has been defined by regulation. It was Dr. Walsh's opinion that the continued exclusion of the four [Farmers] tracts of the proposed unit from production would be wasteful and may even lead to dissipation of its resource, while those surrounding continue to produce, particularly time where communication might more readily come into play over time. As for causing a reduction in the oil or gas recoverable, Dr. Walsh indicated that he was comfortable that three wells in this area could produce the resource through the most appropriate means in a manner which is economically recoverable, so long as there was monitoring of production and pressure.

Dr. Walsh echoed the belief that MNR could lay down spacing for tracts 1 and 2 and not to be orphaned, which would not be inconsistent with what occurred in Lot 9. MNR might not agree, but to do so would be sound, geologically speaking. His reasons for having excluded the Farmers #3, which had been in production for some time, from the proposed unit was based upon what he considered a fair and equitable distribution of the resource; there was no technical reason to justify their exclusion. As for tracts 7 and 8, Dr. Walsh referred to Talisman's lack of cooperation with Farmers' attempts to find a solution. Although his inquiry did not extend beyond Lot 10, Dr. Walsh did not agree that the resource demanded unitization of the entire field, given the heterogeneous nature of the reservoir.

Dr. Walsh denied the suggestion that mandatory pooling and other options were viable. In his and Farmers' dealings, Talisman had not been cooperative in any respect and failed to provide any kind of a formal response to their inquiries. He did agree that generally, the policy is reasonable, but stated that it is being unreasonably applied when there is technical information which leads to the belief that the existing spacing should be altered.

Dr. Walsh did not agree that his report was based upon a theory of compartmentalization. He stated that it was difficult to determine where the reservoirs exist and the extent of the reservoir. He took this approach because there was insufficient evidence to establish communication; not that there was no communication.

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Dr. Walsh was asked by Mr. Shantz on behalf of Talisman about the report Energy Objective prepared in September, 2002 (Ex. 22) whose purpose was to provide information to Farmers for negotiations with Talisman to attempt to bring those wells into production. That report did concede that the long-term effects of continued production of adjacent wells could deplete the reservoir identified with the Farmers #4. Asked about the underlying principles of the report, it was suggested that the basis of the report was that there would be value if there was communication. Dr. Walsh disagreed, stating that the underlying assumptions were different. The confidentiality of this report was raised.

Mr. Gibson suggested that Figure 2 depicts six passes over the same three faults, so that Farmers #3 and #5 appear within the same fault structure, similar to what occurred with the two wells in Lot 11. Dr. Walsh indicated that the Forbes fault was not seismically identified, but was interpreted from the data. Similar information does not exist between the two Farmers' wells. Dr. Walsh did not agree that the beginning of the oil shows for Farmers occurs at the same structural depth, with no data to support the existence of the fracture shown in red, are suggestive of a heterogeneous reservoir. He stated that one aspect will not be indicative of a heterogeneous reservoir. Mr. Gibson focused on the Energy Objective report's having mentioned on four separate occasions of the lack of evidence, suggesting that the required evidence could be obtained through production which Dr. Walsh countered and justified through Farmers' inability to successfully pool. Dr. Walsh maintained that unitization is dynamic and could be monitored for future changes, so long as those involved worked together. He denied that his compartmentalization theory should have resulted in more dry wells, stating that each operator will have conducted a thorough analysis of significant characteristics such as rate of productivity, porosity, permeability to avoid such an occurrence.

Joseph Emmett Gorman, referred to page 4 of the Energy Objective report where it stated, "The lack of historical and current pressure data for all of these wells makes it difficult to ascertain whether any of them are in communication with each other." Engineering data required to ascertain communication is pressure correlation over time as a function of production, so that it is the impact of production on an adjacent well to see whether there is a pressure variation in that other well corresponding to the production of the first well. The pressure test and engineering data for the Forbes horizontal and vertical wells was extensively reviewed by Mr. Gorman, which led him to determine that there was no communication. Although he also had access to production data, it was the pressure data from one well in production with one well shut in which led to the assumption that there was no communication from an operational standpoint. This was done through measurement of the fluid levels in both to monitor the range of reservoir levels in both and there was no overlap. Mr. Gorman was very comfortable with his conclusion, subject only to the accuracy of his data.

Regarding the other eight wells used in the cross-section, Mr. Gorman indicated that he did not have similar pressure data and could not perform any geological modeling to enhance his report. The report states at page 5, "Technical data, including well bore analysis (geophysical logs & core data), geological mapping, geophysical mapping (seismic), reservoir studies (pressure data), production statistics (past and forecasted) and economic studies are used

to determine the appropriate boundaries of the unit area, the participating (productive) area and the non-participating (non-productive) area." Without this data for all of the wells, it becomes difficult to enhance his understanding of the pool. If Farmers' #5 and #10 were producing, it might be possible to determine whether there was effective or operational communication.

At the same page, the report states, "Without the pressure data specific to the wells contained within the Romney 10-I Pool, a material balance determination of remaining reserves cannot be conducted. Complicating matters further is the heterogeneous nature of the Ordovician carbonate reservoir and the difficulty in interpreting reservoir extent." Mr. Gorman explained that one could make a determination of the changes in pressure as the resource was developed, when wells are producing. If one is not producing, one cannot measure the pressure drop via production. This calculation is done in conjunction with the geologist and an estimate of porosity. On page 6, the report continues, "The lack of engineering evidence to support pressure communication with adjacent producing wells combined with the complex nature of the geology of this reservoir supports the delineation of the balance of the unit area using current pooling boundaries." Mr. Gorman stated that it is a reasonable approach to fall back to the current spacing unit boundaries as the pooling area.

Mr. Gorman stated that the geological model of Dr. Walsh and his geological-based interpretation, taken from the adjacent **Lowrie** unit/Forbes wells, was used to confirm the engineering model. This led to the conclusion that there was a permeability boundary or fault preventing pressure communication between the wells. From an engineering reservoir standpoint, communication is measured by degrees and is not absolute. When one examines the impact of production in an area, one looks at operating and at the impact on adjacent properties over time. Pressure correlations over time are a function of distance, homogeneity, permeability, pressure draw downs and speed of production. One must look at the effective communication on outside properties over the life of the pool, the magnitudes of which may vary.

Mr. Gorman based the boundaries of the proposed unit from inferences drawn for adjacent producing properties. The proposed unit boundaries contain set backs which offer more protection by being larger than those offered by spacing.

Mr. Gorman offered opinions as to the three governing concerns raised in the **Gaiswinkler** case, namely enhanced resource recovery, protection of rights of correlative landowners and prevention of waste. Mr. Gorman stated that, unitization allows the operator more freedom in the placement of wells than is allowed in spacing which would actually be removed, which would permit drilling to be matched with knowledge of reservoirs for optimal resource recovery. Spacing was characterized as imposing arbitrary restrictions, and with the current restrictions, production cannot occur. There are three types of interests involved in this case, those of Farmers, the landowners and the overriding interest owners. The proposed unit would protect the correlative rights by permitting the lands to be produced before the reservoir is depleted, should time prove that there was in fact communication, where Mr. Gorman felt that over time impact from production outside could be felt. Key to his position was that significant money has been spent on the Farmers' wells. Waste is defined by regulation. If the part of the

pool were unitized, then Farmers would have the flexibility to produce that portion of the resource to which it is entitled whereas if it is denied, the reservoir energy will not be available in the future. Farmers has done necessary seismic work and has identified resource which two wells have proved. He stated that it would have better extraction of resource if it is allowed to produce based upon its geophysical data rather than an arbitrarily established set back. The proposed unit, having three wells, would be produced under good management practices, the point being that effective production is a function of the methods used. If the resource is not recovered at this location, then the ultimate recovery will be lower. It is assumed that Farmers would be a good operator using approved practices. The status quo is inefficient because it cannot be removed.

Mr. Gorman agreed that there was the possibility of communication and pressure changes could occur over longer periods of time whether six months or twenty years. There was no engineering data to support the extent of the reservoir shown on Figure 4 to correspond with Farmers #5; there is no way to know where the boundary is. It was suggested that, if the depiction were actually correctly based on actual data, the well could have been drilled on target and this is still the case. Another option would be to run a directional leg to the target area. The same reining in of the Farmers #10 could be done to overcome pooling problems and return to on-target.

Although it was suggested that there are multiple means to obtain pertinent data, such as the down hole pressure test after the initial drilling, the drill stream test, which is conducted near the well bore to give an idea of properties near the well bore, which can assist if there is a change in pressure from other wells in the area, Mr. Gorman did not agree that it could in and of itself indicate communication. As to the possibility of a down hole pressure test on the well, with lower readings at the other wells, giving evidence of some communication, this could be so if one assumed that the pressure obtained was accurate and all other pressures are obtained in a standardized manner. If they are different, it would indicate that the wells are not in communication. The usefulness is one of degree, including at what stage it is done and how it was obtained. The examination was closed with the suggestion by Mr. Shantz that there were other ways, besides having the well(s) in production to obtain data.

Mr. Gibson questioned whether Mr. Gorman was proceeding with an assumption of no communication, which he denied. He relied upon Dr. Walsh's model, which he sought to confirm or deny, but for which there was no data to do so. The semantics of whether his conclusions were based upon a lack of engineering data or whether they were based upon geological interpretation were batted back and forth. With respect to his opinion on the adjacent Lot 11, Mr. Gorman stated that his degree of certainty was high, where his engineering opinion was based upon the accuracy of the data provided. The cross-section represents more in the nature of geology and there is no engineering data upon which to confirm or deny it.

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Mr. Gorman stated that flexibility in being free to drill where it is determined the resource is located does not imply a lack of protection, which is afforded through the MNR approval for drilling. The question was raised as to why this wasn't a compulsory pooling application. The contradiction of the compartmentalization theory with concern regarding waste from without was pointed out. When asked about the inconsistencies, Mr. Gorman replied that this was not a homogeneous reservoir.

Mr. Gorman clarified that there was no useful pressure data. While the form 7 wellhead pressure or results of pressure or flow tests might exist it was, based upon his review, insufficient to work with. On the assumption that he did have sufficient and accurate data for Farmers #3 and #5, a single down hole measurement of the reservoir pressure if similar would not be definitive and if dissimilar would indicate lack of communication. Mr. Gorman stated that there are two ways to test pressure. One is to shut in one well and produce the other at a steady rate or through a pulse test. The second, which is not feasible at this time, can occur where they want to quantify secondary recovery, and determination is made by water injection. The concept of monitoring is to develop a correlation of the impact of one well on another. It involves the proximity of waves, which may be subdued and may also be too small to measure.

Mr. Rudolph Michael Rybansky, a professional engineer since 1981 with technical training in reservoir and petroleum engineering, gave expert opinion on the regulatory standards and legislation of oil and gas in Ontario. His responsibilities for MNR involve technical reviews and approvals, licensing, voluntary spacing from a technical engineering perspective. According to Mr. Rybansky, the goals and purpose of Ontario's oil and gas legislation is to promote conservation, providing a framework for the orderly development of the resource through the application of standards, and whose primary mechanisms are well licensing and spacing.

Mr. Rybansky summarized certain concepts found in the legislation, regulation and operating standards. Spacing is an area of land, including the subsurface geological formations whose oil and gas interests must be joined for the purposes of drilling. Within each spacing unit there is a target area. The objective of regulating spacing is to provide a pattern for the orderly development for the industry once a discovery has been made, to promote development and prevent waste, maximizing recovery through the conservation ethic and to protect correlative rights in adjacent lands.

When an operator discovers a new pool, application for spacing must be made, as required by regulation. There are technical requirements which must be satisfied and documentation to be filed in support, such as geological and reservoir engineering data. The type of spacing and the length and breadth of the area involved must be included. MNR's role is to review the technical data, which can include seismic, pressure, production, well test and geological data as well as interpretations supplied by the applicant. Relevant data from similar pools which are on file with MNR or information sought by MNR from other operators in the vicinity producing from the same horizon may also be reviewed, the latter of which is regarded

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as proprietary and returned after spacing is established. The configuration used for the establishment of spacing units is based solely on whatever technical information is available at the time. This is done before production can commence. Mr. Rybansky stated that the process had been completed and is established prior to commencement of production.

The conditions imposed on a well licence are prerequisites to production. Ideally there is a progression from discovery to development to unitization for the entire pool as delineated by development drilling and analysis. Unitization is regarded as an extension of the objectives of pooling and spacing but applied to the context of the pool or field. MNR advocates that pools be unitized where appropriate to further objectives, as set out in its Spacing Pooling and Unitization Policy PR 2.02.01, which was approved in November, 2003, which replaced FM 2.02.01.

Mr. Rybansky briefly referred to the three applications which had been made to amend the spacing order for Lot 10, Con I, those of Farmers in 1996 and 1998 and that of Telesis. In all cases, MNR reviewed the technical data and felt that the existing spacing met the objectives for the resources in the area. There was no formal review of the 1996 decision. He described the four Farmers wells, one of which was in production and the others of which were either not completed or were off-target. Mr. Rybansky explained that the significance of being off-target is that such drilling is closer to the adjacent spacing unit than is specified by regulation which requires that a larger area be pooled. In applying those conditions, the intent of MNR is to provide the same level of protection as those operators are afforded when they drill on target, that MNR is trying to create a well-specific spacing.

Farmers #5 is off-target in the east-west direction, requiring pooling of tracts one through four. Farmers #10 is off target both north-south and east-west, so that it requires pooling of all eight tracts, or the entire Lot. Farmers #4 has never been completed to the target zone in the Ordovician age rock and having been suspended, has no status with respect to the zone of oil accumulation. Its surface is off-target. The original drilling program called for a portion of the well to intersection the pay zone comprised of tracts 5 and 8.

When assessing an application for an off-target well licence, MNR will look at what spacing units will be impinged upon and the spacing unit must be expanded for well-specific spacing as a condition of the well licence. As for the assessment of the location, the applicant must provide technical information, being seismic or other geological information to justify the location which is assessed for its appropriateness as a legitimate target in the subsurface.

Prior to the issuance of the licences and conditions for these three wells, MNR expressed its concerns to Farmers that the proposal to drill in those locations would be problematic for the applicant because at the time of application, he didn't have all of the mineral interests needed, namely those in tracts 2, 7 and 8. Drilling in such locations prohibits production without the pooling, so that they cannot get a return on the capital invested in the drilling. It is easier to pool before the extent of the reserve is known and with that knowledge,

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those having an interest in the unpooled areas may make negotiations more difficult. With respect to the licence for Farmers #10, there was no response or reaction and drilling was undertaken despite warnings. Pooling conditions had not been altered or waived by MNR, nor was there a commitment to change spacing, which MNR felt throughout, was not warranted.

Farmers unitization application is inconsistent with principles of spacing and unitization from the perspective of MNR's objectives for a number of reasons to be discussed below. It attempts to circumvent an existing spacing regulation; the proposed unit is not supported by geological information; it is inadequate to the combination of principles of spacing and unitization; and would result in negative consequences for stakeholders.

1) Inconsistent with principles of spacing and unitization. Specifically this refers to conservation, the orderly and efficient development of the resource and protection of correlative rights in a just and equitable manner. These principles ensure the conservation of the substances, ensuring the greatest possible recovery and ensure that parties have their equitable share of the resource. In the case of this application, Mr. Rybansky thinks that the benefits would only accrue to those within the proposed unit. The unit is small when compared with the entire pool, but also in comparison to the areas covered by the affected spacing unit, comprised of only the central portion of the area required to be pooled. Two tracts at either end will be stranded, if compulsory unitization is ordered. It is set within competing interests, with more than one company having interests in the area, both inside and outside the proposed unit. It will disrupt and undermine the resource management scheme and conditions imposed. The likely outcome will be to cause competitive drilling, which occurs when one operator faces off against another, even with the set back. When there is no requirement to joint interests, operators would face off, putting wells within their spacing units designed to drain the same area as a well in an opposing unit. In a cooperative situation, two wells would not be drilled in an appropriate geological location. The risk of competitive drilling is that additional and perhaps unnecessary wells would be drilled, lowering the economic viability of the resource. It would also lead to competitive production practices, attempting to get at the resource as fast as possible. It is detrimental to the resource and described as waste in the regulation.

The conditions imposed by MNR on Farmers' wells provide identification of those lands likely to be affected by production, which Mr. Rybansky pointed out are excluded by the proposed unit. In those cases, the correlative rights of those outside of the proposed unit may be adversely affected. This was characterized as a risk, not a certainty, but it is one which MNR seeks to cover when it establishes spacing or puts conditions on a licence. With respect to voluntary unitization, MNR will determine whether its objectives are met. If MNR accepts the proposed unitization, then mandatory spacing will be waived [see paragraph 7.2.2 of the policy along with paragraphs 6.2 and 7.4]. The proposed unit does not comply with the policy in that the boundaries of existing spacing units are not followed, whose inclusion would ensure that those corollary rights identified by MNR are protected.

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2. Circumvents pooling and licencing provisions. Granting the proposed unit would remove or render pooling conditions ineffectual and remove protections intended by those conditions in a manner not intended by the legislation. As such, the legislation was never intended to provide this use of unitization. Such an approach would undermine MNR's ability to manage the resource in an orderly fashion according to its mandate. The words in subsection 8(2) were never intended to encompass such a small portion of a field or pool. The attempt is viewed as a means of getting around MNR's management scheme including conditions on well licences.

3. Inadequate in relation to the entire pool in keeping with principles of pooling and unitization. The proposed unit does not achieve the stated goals and objectives which the management scheme set out by MNR serves to establish. In this particular case, the management scheme was derived from the discovery well, Romney 3-8-II, which required the establishment of spacing units to cover the probable area of the pool, including the west 1/2 of lot 11. The discovery well established a much larger area for the pool than that of the proposed unit. The resource must be and is managed on behalf of the public of Ontario and in the best interests of the resource itself and its efficient and effective recovery. The proposed unit will not account for the totality of interests in the area which includes the broader public interest.

Conceptually, unitization should apply to a larger area, as is set out in the reference to John Bishop Ballem, **The Oil and Gas Lease in Canada**, 2nd ed. (Toronto: University of Toronto Press, 1985):

> …each accumulation will have a finite geographical area, which may be just a few sections of land, or many square miles, in extent. Each field is a homogeneous whole, with the substances free to move within it. From an operational point of view it makes good engineering and economic sense to operate a field as an entity without regard to any artificial distinctions created by different ownerships.

In its review of voluntary unitization proposals, MNR will require that spacing unit boundaries should be followed wherever possible. Any proposed deviations must be supported by, for example, compelling technical data or current data which shows earlier data to be lacking or inaccurate, so that MNR could ensure the change affords the same level of protection.

4. Negative consequences for the stakeholders. MNR has concerns for those lands excluded from the proposed unit, if approved, which are currently protected by the spacing order and conditions for production on the licences. They would be left without a management scheme which in turn may cause them to react by becoming competitive rather than cooperative. Also, it becomes difficult to provide a solution once there is a breach in the MNR management scheme. Mr. Rybansky stated that it was his belief that the current spacing provides greater protection than would be the case if the proposed unit were approved. With the data currently available, MNR has considered creating lay down spacing for the northern and southern tracts, but has found it not to be technically justified.

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If the applicant succeeds with this application, then MNR is faced with the prospect that a mechanism of circumventing its management scheme and controls of the industry will become common place. The fallout from this, based upon historical experience, can be that operators will chose to deal with their own interest and not account for the interests of others through competitive drilling. Once this occurs, the resulting drop in pressure in the reservoir will in turn affect the ability of others to obtain their fair share, which is in turn detrimental to the development of the resource. With too many unnecessary wells, there will be inefficient production practices generating waste, rendering the recovery of the resource uneconomical and becoming a burden on the land through all aspects of having wells in production on the surface entails. Mr. Rybansky stated that these are possible outcomes, but are the reasons that MNR became involved with the regulation of the resource in the first place.

Mr. Rybansky characterized the objective of Farmers as being to circumvent pooling requirements on its licences. [See page 4 of Ex. 1: "The Applicant is now unable to produce any of the Wells described above in the Pool and this Unitization Application has been brought to enable the Applicant to produce these Wells through the removal of the pooling conditions contained on each of the above-noted Well Licenses pursuant to Section 8(3) of the Act."] This intention leads to the concern that if MNR has established prudent controls through licensing and conditions and if such controls are consistently removed through this type of application, there will be little or no control over production. This is the broader base of MNR's concern.

Concerning the evidence that the unit area is being superimposed over the spacing unit for Farmers #3, Mr. Rybansky stated that he believes that this is because Farmers wants to leave the spacing unit as it is. The legislation provides that the pooling order of spacing units will not apply where unitization is ordered by the Mining and Lands Commissioner, so the request is questionable.

This type of proposed unit does not address the whole pool and is regarded by MNR to be self-serving; having not met the objectives of unitization. It had received and objected to the adjacent **Lowrie** unitization on the basis that the two Forbes wells both had conditions imposed on the licences. MNR had similar concerns to the interests of those outside the proposed unit, except that in that case there were no orphaned tracts created. In **Lowrie**, MNR had provided the tribunal with written submissions in that case and given the outcome there, has determined that it must take a more pro-active stance in these matters.

Four different spacing orders have applied to the Romney 3-8-II pool since 1988. One of the orders did change the configuration of five spacing units from stand up to lay down. Mr. Rybansky had no answer as to what MNR would do with orphaned tracts, should the application be allowed, indicating that it has never been faced with this situation. He did concede that it was in MNR's power to reconfigure the affected spacing to lay down, but could not agree that such a move was technically warranted. He was unwavering in this opinion, shared by his colleagues and supported by proprietary data from other operators (which data was not made available to the tribunal).

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The proposed unit is too small, where unitization of the entire pool or field will be what will further its objectives. As to what the size of the pool or field should be, Mr. Rybansky indicated that he has not done a reservoir study and cannot comment on its extent. Even without a detailed study, the pool is much larger than what is proposed. He indicated that it would be better for all interest holders to be part of such a unitization, resulting in benefits to all stakeholders, which cannot be done if someone is excluded. MNR does have access to the necessary technical data and is empowered under subsection 15(2) of Ontario Regulation 245/97 to make its own application, but is not prepared to take that step. It relies on the industry to take such steps as are necessary. However, the trend that MNR is observing is that this is not leading to good resource management. While MNR has the power to seek compulsory unitization, it does not have the power to do voluntary unitization, where it is merely charged with reviewing and responding to proposals.

In response to questions regarding protection of correlative rights and the relative fairness between newcomers and those having had the benefit of production over time, Mr. Rybansky stated that there is no provision to allow for catching up from what might have been earned from a well producing earlier in time to those which are subsequently unitized. The advantages and benefits are seen to accrue to all interest holders. In an ideal world, production would happen all at once, but inherent inequity is part of drilling and the development of oil and gas. Mr. Rybansky was not aware that Alberta has the means to equalize. The potential inequity discussed by Mr. Walsh is not a legitimate reason for excluding certain tracts. MNR seeks to protect the risk to correlative rights through conditions imposed on licences.

Mr. Rybansky stated that protection is more important than production, where it would be preferable for the resource not to produce than to produce unwisely. This flows from the balance of weighing protection from waste through unwise production with giving each owner a fair share of the resource. As soon as the resource goes into production, it will affect others. How much and how far is subject to variables. In the absence of any data, particularly in the early years, the protection of having spacing in place allows one to get past the catch-22 of how to protect while the resource is being produced.

In this particular case, it is the correlative rights of those owners in the tracts listed in the licencing conditions which are being protected. Pooled tracts are in essence a spacing unit which has been created through the off-target location of the well. This is much clearer in the legislative provisions after 2000.

MNR agrees with the definition in **Gaiswinkler** concerning purpose that the proposed unit would allow recovery but with it would come an attendant loss of protection. The protection of correlative rights extends beyond the interest holders within the proposed unit. It is a matter of scale. As a steward of the land and the administrator, the protection of correlative rights within the proposed unit cannot occur at the expense of those without. MNR applies the same standards to corporate entities and individuals, requiring that they be pooled. While there can be no production if the well is shut in, Mr. Rybansky points out that the resource is still available. It was suggested that MNR is protecting Talisman at the expense of Farmers, some-

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thing Mr. Rybansky denied, stating that once it is in compliance, it will be entitled to enjoy its share of the resource, just like any other operator. The protection which takes place before production does not value one set of interests over another, but rather is an ordering of proceedings.

The purpose of unitization is to further enhance the recovery of the pool. If the application had been to unitize the whole, MNR would support it. If there were another unit proposed which respected spacing unit boundaries, even for a reasonable subset of the entire pool, MNR would support that. Where this standard is not met, MNR will object. The legislative reference for unitization of parts of pools contemplates very large pools.

If the unitization is ordered as requested, it creates a dilemma for MNR. An amendment to an existing spacing unit after a lengthy period of time is not desirable, particularly where it has been under production, where it would be regarded as disruptive. Such a change would not be conducive to orderly spacing. It would, on the other hand, be acceptable where there is new data where previously it has been sparse, but where there is a lot of existing data, this causes a problem.

Mr. Terry Robert Carter, a geologist for MNR, provides professional advice to government and the public, conducts geological evaluations of oil and gas pools and storage, with responsibilities extending to the review of applications for licences, spacing amendments, voluntary pooling and unitization from a geological perspective. He is not a geophysicist and indicated that MNR does not have one.

Mr. Carter stated that he expressed his concerns regarding the drilling of the off-target wells nos. 4, 5, and 10 by Farmers due to the pooling requirements, to Mr. Robinson, Ms. McConnell and Mr. Ron Borsato, the geophysicist. He had reviewed all of the data, interpretations and opinions provided by Energy Objective along with MNR's own files concerning these and adjacent wells, geological literature concerning relevant pool or reservoir studies. He also examined drill cuttings from the OGSR library, catalogued according to depth, which constitute a representative sample, along with their corresponding files for drilling and production. Based upon his review, Mr. Carter could not agree with the conclusion of the applicant's experts that the proposed unit was comprised of small, isolated reservoirs. His own interpretation was that the whole of Lot 10 is one large geological feature, which runs northwest to southeast, comprised of a dolomitized zone. The proposed unit is wholly found within the structure. Within the boundaries of the compilation map there are 24 successful wells and one incomplete. There were no dry holes. From this, he was able to interpret that the proposed unit is part of a single oil or gas field or pool.

Dolomitization is the alteration of rock, usually limestone, by adding magnesium which changes the calcite to dolomite. The circulation of warm water containing magnesium creates porosity in the rocks which in turn is the reservoir for the resource. This is known as a hydrothermal dolomite reservoir in which the reservoirs are aligned in the direction of the faulting. Faulting is the path taken by the warm mineral-bearing waters.

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Mr. Carter referred to the Coulter and Waugh study, with the known extent of the field being between 400 to 1200 metres wide and 14 kilometres long, with Lot 10 being near the southeast part of the field. From a geological perspective, the established boundaries involved the plotting of dolomite in the wells through examination of well cuttings and photoelectric effect logs. The tracking of the boundaries was assisted by a view of the cuttings from the horizontal well in Lot 9. The AB line on the compilation map [ex. 19] is bisected at two locations in purple, showing the established outside boundaries of the field, of which Mr. Carter stated he was very certain. The establishment of the outside boundary is significant, because it shows the limits of where the oil and gas potentially occur. Inside, one would expect to encounter porous, dolomite reservoir rock.

An examination of the successful well patterning in the vicinity of the proposed unit confirms that there are productive wells at both ends of the proposed unit and to the southwest of the unit. The reasonable interpretation is that the proposed unit is expected to be part of the pool, that it is part of a single structure. This runs counter to the pod or compartmentalization approach advocated by the applicant. MNR disputes Walsh's theory that there are separate reservoirs based on the fact that the majority of the wells in this feature are productive.

In Mr. Carter's opinion, the cross-section advocated by Energy Objective is too complicated, on the basis that the trend of the structure could be best represented by a cross-section which runs across the features at right angles. While it does intersect a number of wells, it does not assist in clarifying anything. In his alternative, compilation map, the AB line is the preferable path. It more clearly identifies the geology going from one side of the host structure to the other. The path intersects with 4 wells and 1 dry hole. At the well locations, he was able to identify the occurrence of dolomite, the presence of oil, the mapping of a presence or absence of a depression over the dolomitized structure, by mapping that to attempt to interpret where the pool structure boundaries are located. The presence or absence of a depression, a typical feature, is where the limestone has been dolomitized, and is typically where the drilling takes place.

The geological cross section, found at Tab E of MNR's materials, is Mr. Carter's interpretation of known data concerning those wells named, along with an interpolation between the wells. There are no breaks or discontinuities in the occurrence of dolomite in this area and there is no reason to find breaks in the dolomite. The white spaces indicate an absence of data and where no wells have been drilled. This follows known principles in geology, where there is an interpolation between known information from one well to the next. All wells shown located within dolomite have oil shows. In his opinion, it is reasonable to interpolate that there is reservoir rock between the known wells. By contrast, the pod or compartmentalization approach would require that one interpret barriers between the wells, which is not consistent with interpolating the known data from well to well. Based upon this cross-section, the reservoir structure at the proposed unit location is part of a much larger field or pool, with no data to support the separation of fields or pools. Nothing in the various Energy Objective reports changes this opinion.

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Under cross-examination, Mr. Carter agreed with the Coulter and Waugh report that the area is fractured, faulted and heterogeneous, but maintained that it is non-compartmentalized in a larger sense. There is no data to allow one to interpret the compartmentalization and the Coulter and Waugh report did not review the data from Lot 10. The exact nature of the established geological model, which was exhaustively documented as to general concepts and principals by Dr. Graeme Davies, was discussed. Asked about the heterogeneous description, Mr. Carter stated that most if not all reservoirs are heterogeneous, with the distribution of water, oil and gas occurrence in dolomite, with the term recognizing that fact.

What is really at issue is compartmentalization or non-compartmentalization. If the reservoir was compartmentalized, it would mean that there would be porosity barriers or zones, with the presence of fractures or absence of which also create pathways for communications. A fault or fracture in and of itself does not create a barrier. The movement of dolomitizing fluid creates the reservoir, and it is counterintuitive to say that the fractures can be barriers. The porosity of the dolomitized zone creates pockets along either side of the fracture, which causes the heterogeneity of the dolomite. A fault denotes movement, whereas there is no movement with a fracture. Varying degrees of porosity are caused. If this was a situation where there was compartmentalization, the degree of porosity might be lacking and form a complete barrier. That would be an extreme example of heterogeneity. The features must be thought of three dimensionally, even through the cross section might identify a barrier in two dimensions.

Examining his geological cross-section, Mr. Carter identified the well at A as being the Talisman #1, with the second well being plugged, but not abandoned. Noting that the target depth of the second is close to the first, this was not an indication of the degree of homogeneity. An operator might “abandon” and proceed with another well a mere 100 feet away because the second well is horizontal, a relatively new technology which give better access to the resource and to recover more over a shorter time. It does so because the well bore encounters more of the reservoir, where it might run along the reservoir layer for hundreds of metres, whereas a vertical well would only have access to ten metres of the reservoir. While the well bore of the horizontal well is very close to the edge of the target zone for the lay-down spacing unit, Mr. Carter interpreted this as not being compartmentalization.

The reservoir encountered by Talisman is not separated from the proposed unit area. Based upon interpolation of known data, Mr. Carter stated that there would be communication. Mr. Lewis concluded this questioning by suggesting that the Talisman #1 horizontal is draining the proposed unit area, to which Mr. Carter replied that they do not know the extent of the reservoir volume being drained by one well. It is not quite as simple as stating that they are or are not in communication, being a very complex issue which will vary within the reservoir. In order to accurately interpret the area drained by a well, one would need data, such as engineering studies from the production data.

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As a geologist and not an engineer, Mr. Carter was not able to answer questions concerning production data from the 4-9-I and 5-8-I. He stated that he was not qualified to determine the relationship between two reservoirs. Mr. Carter agreed that there is no direct evidence of communication or lack thereof. Mr. Carter indicated that he had not interpreted the site of fractures or faulting, the former of which is very difficult to do. Faulting can be interpreted from seismic data, noting structural depressions denoting the displacement caused by faults.

Concerning the porosity of dolomite, Mr. Carter was asked whether the variation in pay zone could indicate great variations of porosity. Mr. Carter was unwilling to speculate about the variance in oil legs, stating that it was contrary to his training to do so, and one could not determine how thick they are. Referring to data from the Forbes Romney 6-11-I and the horizontal, including cuttings, and pressure studies, it was pointed out that the conclusion reached was that they were separate and therefore compartmentalized. Mr. Carter agreed that if the data showed that at that location, then there would be compartmentalization. Having compartmentalization immediately adjacent to the proposed unit, it was suggested that a similar situation could occur in the adjacent area. Mr. Carter acknowledged that, taken to the extreme, one could interpret isolated reservoirs wherever there is a well drilled. Mr. Carter stated, however, that there is no geological indication of separation. Mr. Carter took exception to the use of assumptions, rather than interpolation of data.

The MNR submission, at paragraph 4.6 was read into the record, commencing with "Even if it is accepted that the faults and fractures are accurately interpreted, such faults and fractures are the foci of zones of dolomitization and creation of porosity in this type of reservoir and would not be expected to form barriers to fluid movement within the reservoir and as critical to the analysis put forth by Messers. Walsh and Gorman…" It has now been explained in the Addendum prepared by Gorman and Walsh that this isn't seismic data. Asked whether he continued to disagree with Dr. Walsh's interpretation, Mr. Carter stated that he has no doubt that there are faults, but there is no data. The geological interpretation with more data is better. His cross section has more data points. That of Walsh is too complex, having used eight data points and arguably crossing the reservoir twice. It criss-crosses in a complex pattern.

Issues arose concerning a document produced concerning the monthly production of oil gas and water for each well. Mr. Shantz objected because Mr. Lewis had the document from the beginning – it is not this witnesses' document, which denotes improper disclosure. Mr. Gibson pointed out that the document is incomplete, being one of two pages. Although Mr. Carter is familiar with the report, it is Talisman's document and he did not indicate that he had reviewed the production records. It was produced by Mr. Lewis in relation to productivity, with two wells close together and the issue of non-compartmentalization of the reservoir. Mr. Carter has identified these two wells and is aware of the records. Mr. Gibson stated that this puts Talisman in a tough prejudicial position – unless put to talisman in terms of their abandonment.

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Final Submissions

Mr. Lewis for Farmers

Section 8 of the **Oil, Gas and Salt Resources Act** ("the **OGSRA"**) specifically permits unitization of part of a field or pool. All but .01 percent of landowners within the proposed unit are in agreement, representing an articulate and cohesive group. The proposed royalty is to be 12.5 percent divided on an acreage basis, with the form of agreement being that submitted which has been previously approved

Farmers' application is based upon sound data. MNR approved the locations of all of the wells drilled in Lot 10, subject to pooling. Farmers had tried unsuccessfully on several occasions to both change the spacing order and negotiate with Talisman. MNR's refusal to make the requested amendments, characterized by Farmers as being without justification, was essentially "because we say so", without reference to any technical substantiation. Farmers has made substantial investment into this endeavour.

The heterogeneous reservoir is one of discrete pockets of potential producing resource which were created through fracturing and faulting. Tracts 1 and 2 and Farmers #3 are to be excluded due to no proven communication and for reasons of fairness due to past production. Tracts 7 and 8 were excluded because there is no evidence that they contain petroleum substances. The evidence of compartmentalization should be preferred, the best evidence being the existence of a fault with no communication between the horizontal and vertical wells in Lot 11, the relevance of which was the resulting unitization order based upon similar evidence.

Similarly, MNR's evidence concedes that there are variations in the porosity of dolomitized rock so that barriers could exist. Yet, notwithstanding its admission to this effect and its reliance on the Coulter Waugh report which specifically suggests compartmentalization, it continues to maintain that interpolation of data requires conclusions that the reservoir is non-compartmentalized. There is no engineering evidence, either with respect to the proposed unit or elsewhere in the reservoir, to support communication between any two wells.

Whether or not communication exists or any findings are made to that effect, the legislation authorizes unitization of part of a reservoir. The absence of engineering evidence from which to draw a conclusion in respect of Lot 10 is compelling, given the two geological models proposed. The only concrete evidence is that which actually exists, being that for Lot 11, from which the conclusion of compartmentalization can be drawn. The dimensions of the purported reservoir have not been disputed; the issue is one of heterogeneity and porosity, for which variations within one field can exist.

MNR has provided no alternatives, other than the pooled areas required for the drilling licences and notwithstanding its power to do so, it has left unitization to the industry. Should there be concern regarding tracts 1 and 2, prospective changes to the unit can be made with concurrence of 60 percent of the landowners involved.

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As to the purpose of unitization, Mr. Lewis submitted that once the tribunal is satisfied with the area, referring to **Lowrie** and **Gaiswinkler**, allowing the application would enhance development of the resource. It would protect correlative rights, demonstrated by support of all but .01 percent of the landowners. When the definition of correlative rights is read, it encompasses principles of equity and fairness, which are not currently being met, by having this portion of the lands not in production.

As to the fairness and correlative rights issue, Talisman and surrounding lands have had the benefits from this reservoir being in production over twenty years and, on the principle of equity, those within the unit should also be entitled, at this point in time, to receive a share of the benefit of their resource. In the event that the oil and gas is not compartmentalized, the resulting deadlock surrounding bringing these lands into production would perpetuate the existing inequity.

The tribunal has heard and should find that waste can be eliminated through the type of production practices employed. Concerns regarding competitive drilling are unlikely as MNR has control over this regulated process through its approval of conditional or unconditional drilling licences. Also, the proposed unit has taken existing spacing into account insofar as the resulting setbacks, if approved, would be within the parameters set out. The tribunal should not agree to accept the existing spacing order without having had access to the data from which it was established so that it could evaluate its accuracy, particularly when other changes to the spacing have permitted Talisman to drill closer to the western boundary of Farmers proposed unit to access a larger pay zone.

Subsection 8(3) of the **OGSRA** provides that an order of the tribunal would prevail over the requirements in a drilling licence, which is the provision which MNR does not like in connection with this application. Nonetheless, subsection 8(2) contemplates unitization of part of a field or pool, which is warranted on the facts of this case.

Mr. Shantz for Talisman

On behalf of Talisman, Mr. Shantz submitted that there are three points for the tribunal to address, namely its jurisdiction in light of subsection 8(4), the prejudice to Talisman if the application is granted and that there is no scientific or technical justification to allow the application.

Jurisdiction of the Tribunal to Effectively Amend or Revoke a Spacing Order

The spacing units in the S.O. 2002 – 11 Romney 3-8-II spacing order were established by the Minister. The question arises whether the order for unitization sought by the applicant amounts to an amendment or revocation of that spacing order, contrary to the provisions of subsection 8(4) which, along with subsection 8(3). There can be no ambiguity in the meaning of the wording used. The effect of the Order requested by Farmers is to supplant

these provisions, with the effect that they are amended or revoked, thereby resulting in its revocation. The requested Order would shut in Farmers #3 and orphan tracts in the north and south. Any attempt to have this Order for Unitization prevail would be inconsistent with subsection 8(4).

For example, the well licence for Farmers #5 requires pooling of four tracts. Unitization of the north half of Lot 10 (2 stand-up spacing units), would permit the existing boundaries on the well licence, as per the subsection 8(3) requirement, to be removed. Therefore, subsection (3) would permit the conditions to be removed, and would allow one to produce within the existing spacing boundaries.

The same cannot be said if the unitization were to amend or revoke the Spacing Order. Tracts may be added or joined, but the tribunal does not have power to tear apart existing spacing, whose boundaries must be respected. This is the only interpretation in which meaning can be given to subsection 8(4) of O.Reg. 245/97.

Prejudice

Those outside who have received no notice of this application, along with Talisman, would be prejudiced if the application is granted. To given credence to the issues of unitization, they will be affected. If allowed, the result would be that Farmers #3 cannot produce, which would be prejudicial to Talisman. The suggestion by Farmers that the unit boundaries can always be changed as more knowledge is gleaned is no answer.

The discrepancies in the evidence of Mr. Gorman and Dr. Walsh require findings of credibility and reliability, particularly concerning communication in the Energy Objective report which pre-dates the application. The tribunal will be required to determine what is taking place with respect to communication in Lot 10 and over what period of time. If there is found to be drainage, then those in tracts 1, 2, 7 and 8 would be unfairly affected by the order.

Rationale/Justification for this unit.

There is no dispute that there is no technical data in support of this application. The spacing regulation is carried out for good reasons of orderly drilling. The original Spacing Order, which does not change unless there are compelling reasons, was put into place on the basis of the technical information at the time, and all the spacing was based upon that information. There is no evidence to warrant a change.

The tribunal has been asked to consider three reasons to justify the application. Farmers has stated that its hands are tied, that no tests are available to provide better data on the issue of communication and that there will be drainage **and** waste resulting from its inability to produce.

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Farmers maintains that, since its hands are tied in its attempts to develop this resource, it should be entitled to equitable relief from the tribunal, having been thwarted in its ability to benefit from the reservoir. Farmers, in fact, does have other options, particularly in this problem of its own creation. It chose not to drill according to the rules, but to obtain permission to break those rules and to drill off-target, only then to turn around and state that the resulting conditions are not fair. There is no truth to the argument that it has been thwarted by MNR or Talisman and the tribunal should not find its position sympathetic or persuasive.

There are other options available to Farmers: 1) It could have drilled on target, something they chose not to do in the first place; 2) It could go back now and drill on target; 3) It could extend a directional leg on target; or 4) It could comply with the conditions on its well licences through voluntary pooling.

The documentation shows that Talisman was open to the possibility of pooling tracts 1 and 4 but not to amendments in spacing. Farmers wasn't content with that. It is disingenuous to suggest that Talisman thwarted Farmers in its attempts. Contrary to seeking compulsory pooling, Farmers chose an area completely within its own interests. The application amounts to Farmers' attempt to find an easy way out and request that the tribunal relieve it of the problems of its own creation.

Contrary to suggestion that new production data cannot be obtained, it was confirmed that down hole pressure tests were within the realm of possibility. Farmers could have gleaned necessary scientific data by conducting the pressure test on the producing #3 while monitoring pressure on the #5 (without production being necessary) might provide knowledge of communication.

To argue that there will be both drainage and waste is a grievous example of attempting to have it both ways. Farmers has stated that it doesn't believe there is communication, but is relying on communication to show that there is harm being done. This whole line of argument is circuitous and inconsistent. The most cogent and compelling evidence was that of MNR that less protection is provided by the proposed unit than is currently in place. One must look to the whole of Lot 10, in that Farmers chose to drill off-target, and by doing so, they have affected the rights of all those in Lot 10.

The identity of ownership is not a condition of MNR, which is not trying to protect one interest owner over another. Its role is to maintain a level playing field and require everyone to play by the same rules. This fact was not changed when Farmers drilled. Now, Farmers wants the rules to change or exempt them, and there is no justification for doing so.

Mr. Shantz asked for the opportunity to make written submissions on costs.

Mr. Gibson on behalf of MNR

Mr. Gibson commenced by stating that many of MNR's arguments had already been made by Talisman.

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The emphasis on the application is unitization, but the focus within the hearing shifted at times to issues of spacing, which although of some relevance, is not the issue. The tribunal must determine whether it is satisfied on the evidence, the onus being on the applicant, that the proposed unit has sufficient merit to qualify for purposes of the legislation.

The collateral onus is not on MNR to bring forth evidence. It is so entitled in opposition to or to dispute the benefit to accrue to proponents. It has no obligation, in these circumstances, to bring forth an alternative. Any attempt to focus on the absence of technical evidence or alternative unit is a distraction away from the inability of Farmers, to be convincing on its own application. It has failed to meet the onus with persuasive evidence of technical, scientific or a conceptual point of view that ought to be granted, particularly with respect to the current regulatory scheme and the pooling requirements of off-target wells. Rather, Farmers is seeking to be allowed to produce the wells it has drilled through the removal of pooling conditions which had been attached to production.

There is no evidence that the mortgage holders have consented to the leases or new unit. The legal question is raised as to whether the owners of the legal title of mineral rights have leased those rights to Farmers or otherwise agreed to the proposed unit. The mortgagors can get title back after they perform their obligations. This is a legitimate legal concern and the absence of consent is an issue. The identification on the face of the documents does not indicate that the interests have been properly transferred. The contractual right in the new documents filed is different from entitlement to notice of proceedings, but equally important. It was suggested that this did not take place.

Statements made concerning the mistreatment of Farmers over the history of this property do serve to confirm that it chose to drill off-target notwithstanding repeated rejections that spacing be amended. There was no data to suggest that it was entitled to expect, without additional data which was not forthcoming after 1997 that this would change. This history is relevant because it feeds back into the equity arguments. Farmers should be expected to come forward with clean hands. Farmers knew the conditions when it applied for off-target wells and those factors should be found to weigh strongly against arguments of fairness. Landowners within the proposed unit are subject to this same history, whether or not they are aware of what has transpired. They have thrown in their lot with this operator and are represented by Farmers. Having done so, they have given over significant representational powers. They too should find any concerns regarding fairness outweighed by this history.

In its attempts to have it both ways, the tribunal was asked to believe inconsistent evidence concerning communication and risk of depletion from without. In so doing, Farmers essentially defined the rule of capture. Particular concern was raised between the position of the September, 2003 Energy Objective report and the later one filed in support of the application. The evidence of MNR was suggested as being preferable.

Mr. Gorman also provided engineering evidence to complement the Walsh theory, but throughout, he had been forced to concede that there was no evidence to confirm or deny it.

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Then a curious approach was adopted, that of deferring to the Walsh report which supported compartments by default. Mr. Gibson submitted that there is no data to confirm or deny, and moreover, when depletion is brought in, it weighs very heavily against the compartment theory.

The relevance of the evidence of Mr. Rybansky was concerning the broad based risk assessment underlying the policy. Questions regarding specific technical data did not serve to dispel the weight of this evidence concerning the broader regulatory scheme.

The application is inconsistent with the principles of pooling and it should be found to be inappropriate to avoid pooling through the use of unitization. Applications such as this were not contemplated at the time of the enactment of the current subsection 8(2). The proposed unit is too small under the principles. The consequences would be competitive drilling which was the reason the industry has come to be regulated in the first place. The position is that there are larger interests which must be taken into account by MNR in regulating the industry which are protected through the existing scheme and must be protected and accounted for in unitization. These interests were not specifically identified, but it is the interest as a whole.

There is great significance put to the interpolation of known data from known reference points rather than interpretation of data which does not exist. Absence of evidence of compartmentalization is contrary to scientific training. The distinction in method is supported in the interrelationship of the Walsh and Gorman data. That package of the absence of evidence is more consistent with the theory of Mr. Carter than any other. Mr. Carter did make appropriate concessions but was not otherwise swayed in his opinion. The existence of evidence of isolation in Lot 11 does not mean that it is necessarily so in other Lots.

The implication for the regulation of the industry, should the application be granted, was underscored, being beyond what was contemplated for the statutory framework and for which there is no direction on how to proceed.

The applicant has demonstrated inconsistency in arguments, depletion and communication as well as attitude towards the regulatory ministerial scheme to remove conditions found on well licences and consistent with rules for off-target wells. Farmers wishes to have the burden removed. Throughout, the tribunal has heard about the consistency of the regulatory scheme, with wells being more than 107 metres from the proposed boundaries, that operators outside the unit are protected by the spacing unit and well licence conditions. Farmers cannot have it both ways.

MNR sought the right to make submissions on costs.

Reply

The inconsistency of Talisman's position was pointed out, namely that as the major working interest owner in the area, it should have at its disposal concrete data as to communication, which it has declined to present. As for prejudice from the shutting in of

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Farmers #3, this is meaningless, when it would be effectively losing 16 percent of twelve barrels a day in favour of a five percent royalty on 125 to 150 barrels per day. It is in no ones' interest to shut in #3, but for reasons which are incomprehensible, MNR cannot figure out what to do, notwithstanding that there are lay-down spacing units in the adjacent Lot to the west.

There is no question that the tribunal has the jurisdiction to make the Order sought. There is no magic to the size of the unitized area. The Wigle pool of Talisman is one example. There have been small parts of pools unitized both before and since the 2002 amendments to the legislation, but it is still clear that small parts of a pool can be unitized.

There is no question of the tribunal's authority to make the order sought. Notwithstanding the reference in section 24(c) of the **Ontario Energy Board Act**, R.S.O. 1990, c. O. 13, like that of the predecessor clause 8(1)(b) of the **OGSRA,** involved the regulation of various interests within a field or pool, small units such as Wigle were allowed. In those cases, pursuant to 8(2), unitization was to prevail over the subsection 7.1 provision for MNR to establish or amend spacing. Now, the changes effective in 2002 specifically refer to part of a unit or pool. Subsection 8(4) now clarifies that an Order of the tribunal will prevail over a condition in a licence. This in no way detracts from MNR's right to determine spacing. The legislation sets out the hierarchy of regulation, so that spacing can be superseded by unitization. The amendment provide for automatic implementation, with one prevailing over the other. It did not revoke or amend the previous subsection 8(2). The intent has never changed. If one thinks of this as a hierarchy, the unitization is higher than a spacing unit in terms of regulation. The intent in the OEB Act was for spacing to go out the window. The current legislation, as amended in 2002 made it clear, pursuant to (3) that conditions on licences would be overridden by a unitization order. The mechanism is simply more set out than before. Under 7.1(b) the Minister may amend or revoke the designation of a spacing unit and should be doing so where a unitization has an impact on the spacing. This is a broad power. The control to reconfigure spacing is retained by MNR but the intent is in 8(4), further clarified in paragraph 6.2 of the policy, which provides that in the event there is voluntary or compulsory unitization,

> …the following actions shall be undertaken by the Ministry as the circumstances warrant:
>
> i. waive the requirement to establish spacing units under section 11(2) of the regulation, or
> ii. where the unit area is subject to a spacing order, amend the spacing order to remove spacing units from the unit area, and
> iii. revoke or amend any spacing units established on licences for wells located in the unit area.

The order should require the removal of the spacing unit from within the unitized area and it would be logical to say that the orphans should be turned in to lay-down spacing. The requirement that there must be pooling prior to production, pursuant to clause 8(3)(b) of the regulation remains unchanged. To do otherwise is inconsistent with the history of the legislation.

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In conclusion, the tribunal was referred to the particulars of the Wigle decision, upon the application of Talisman. One spacing unit was cut in half, so there is a precedent for doing so. The hearing of the unitization involved no technical data, only land data. There had been no evidence of drilling or production. Despite this, MNR was not aware of the case. At page 20 of the Reasons in **Wigle**, [File OG 007-01], the tribunal has stated:

> Next the provisions of clause 8(1)(a) and (b) of the **Act** and the O. Reg. 22/00 subsections 14 and 15 clearly define methods to develop oil and gas pooled resources. Clearly, the intent of the **Act** is focused on oil and gas exploration and production.
>
> Alternatively, rather than a clear directive stating the purpose of the **Act**, the tribunal is satisfied on the circumstances of this case that the underlying purpose of the legislation can be ascertain through a consideration of the consequences of no exploration. Specifically, if the exploration and production for hydrocarbons from under these lands was to go untouched, the economic benefits to operators, employees, royalty interests and the economy overall would never be seen. While the foregoing discussion is by no means conclusive, it is noted by the tribunal that the purpose of the **Act** is evident through the various definitions and reference.

Findings

This application is based on the assertion that there is sound technical justification for concluding that the resource under the proposed unit is located in relatively small compartments. Should this be found to be the case, does subsection 8(2) of the **OGSRA**, particularly reference to "part of" a unit, support the proposed unitization? Despite the fact that the tribunal has ordered compulsory unitization of several relatively small units, this is the first application strenuously opposed by MNR, on the basis its resource management policy as well as interpretation of the legislation. This has afforded the tribunal with the opportunity to hear the MNR position directly and have its evidence tested. The role of this resource management policy has been considered by the tribunal. The application of the tribunal's jurisdiction to make its findings on the real merits and substantial justice of the case, based upon section 121 of the **Mining Act**, is also considered.

Technical Merits

An evaluation of the technical basis for this application has been difficult for the tribunal, as the meaning of "heterogeneous reservoir" is not entirely clear, notwithstanding the documentary evidence filed as well as the testimony of expert witnesses. Farmers, through the expertise of Dr. Walsh and Mr. Gorman and experience in the field with the adjacent **Lowrie** unit, sought to have the tribunal accept [for a second time, the first having been in the **Lowrie** unitization] that the resource is located in fairly discrete compartments between which there is

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little or no movement either at all or at a rate which would be significant over short periods of time. MNR maintains that it is the distribution of dolomite and porosity within the entire field which is not of uniform structure or composition.

MNR filed a fairly comprehensive case study of the Goldsmith/Lakeshore field by Coulter and Waugh, employees of Talisman, whereas Talisman did not offer any expert witnesses, but merely relied on the opportunity to question Farmers' witnesses. The Coulter and Waugh report is a descriptive history of exploration and development of the Goldsmith/ Lakeshore field, written from the perspective of the major operator in this field, which also happens to be a party in opposition to this application. It is useful to the tribunal in that it describes the challenges associated with development of a heterogeneous field.

The oil and gas field[1] has been described by witnesses, in the MNR summary and the Coulter Waugh document as fourteen kilometres in length and from 400 to 1200 metres in width. The reservoir is known as hydrothermal dolomite (HTD), has occurred in strike-slip faults, where moving hot water, containing minerals (hydrothermal fluid) has moved through and altered the deep subterranean limestone transforming it through chemical reactions with the minerals in the water into dolomite (dolomitization). By the same dolomitization-rendered transformation, the rock has been rendered porous, which has served as a trap to the oil and natural gas found in the field. At paragraph 4.4 of the MNR submission, the pools and reservoirs involved are stated to be several kilometres in length, and can be located through depressions which are recognizable through seismic investigation, with the optimum target for drilling being over such depressions. The mapping of the heterogeneous structure is accomplished to the known edges of the field which is determined by the absence of dry holes.

In their May 2003 Unitization Study, Energy Objective (Walsh and Gorham) describe this formation as having occurred through fairly ancient tectonic activity which created northwest to southeast fractures and faults through which a magnesium-rich fluid caused **selective dolomitization** of the adjacent limestone. This created porous and permeable conditions which allowed for oil and gas to accumulate and migrate. It is through this **selective dolomitization** of areas of otherwise impermeable (non-penetrable) limestone adjacent to the fractures that has created **a number of separate reservoirs**. The creation of the oil and gas bearing formations has been dependant upon those faults and fractures which intersect with the regional fracture system. "The size and shape of the reservoir is defined by the pattern of the fractures."[p. 4 of May, 2003 Report]

In the second paragraph of the Abstract of the Coulter and Waugh report, the authors state: "Strike slip faulting and associated hydrothermal dolomitization of the regional Trenton and Black River limestones have resulted in a heterogeneous reservoir that **has posed challenges** to the successful development of the field." Examples of seismic lines and wells are used to demonstrate the heterogeneous nature of the reservoir. At page 5, it states that:

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[1] Field - An accumulation, pool, or group of pools of hydrocarbons or other mineral resources in the subsurface. A hydrocarbon field consists of a reservoir in a shape that will trap hydrocarbons and that is covered by an impermeable, sealing rock. Typically, the term implies an economic size. Synonyms: accumulation, oil field, oil field, oil pool (Schlumberger Oilfield Glossary Terms - www.glossary.oilfield.slb.com)

> [f]racturing is critical in the development of **reservoirs** within the tight regional Trenton limestone. The Trenton has been subjected to left lateral strike slip faulting along pre-existing zones of weakness in the Pre-Cambrian basement. This faulting allowed relatively hot, dolomitizing fluids to enter the Trenton-Black River from a regional aquifer in the Cambrian. These fluids moved up through the section along the faults, and extended out laterally from the main faults along secondary fractures and porous bioclastic packstone/grainstone facies. In areas where the faults are more closely spaced, dolomitization tends to be more pervasive…
>
> Trenton reservoirs in the Mersea-Romney area **are typically heterogeneous and compartmentalized**, with extreme variations not only in the degree of dolomitization, but also in the porosities, permeabilities, and production rates observed within an individual reservoir.
>
> In general, the best producing wells have a combination of good matrix[2] and fracture porosity[3]. The matrix porosity provides the majority of the reservoir volume, while the fractures contribute to vertical permeability, and often provide a connection to a water drive deeper in the section.

Several of the wells which were produced were described in considerable detail, referring to seismic and production history, including the Romney 5-8-11 and Mersea 6-23-VII wells. There was discussion of re-perforation and acidizing of a lower zone from which an immediate increase in production was realized. The authors state that the multi-stage approach used to evaluate this well is also indicative of "the difficulties encountered in **identifying and successfully completing productive zones** in a heterogeneous reservoir." [p. 10]

The drilling and production of the Romney 3-8-II penetrated a full section of dolomite in the Trenton and Black River, and ultimately, was produced from two zones, the second, upper portion of which was ultimately more productive, notwithstanding that this was contrary to the DST [4]results run in both zones. The authors noted how misleading DST results can be in a Trenton reservoir, particularly where high fluid losses are experienced during drilling. The tribunal notes that this was a vertical well whose life extended over ten years through more than one zone on this vertical trajectory.

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[2] Matrix porosity - the finer grained, interstitial particles that lie between larger particles or in which larger particles are embedded in sedimentary rocks such as sandstones and conglomerates (*Ibid*).

[3] Fracture porosity - type of secondary porosity produced by the tectonic fracturing of rock. Fractures themselves typically do not have much volume, but by joining preexisting pores, they enhance permeability significantly. In exceedingly rare cases, nonreservoir rocks such as granite can become reservoir rocks if sufficient fracturing occurs (*Ibid*).

[4] DST – Drillstem Test - The characteristic plot of pressure versus time obtained from the mechanical recording of pressure gauges in a DST tool. Pressure rises as the tool is lowered into the hole and the hydrostatic head above the tool increases. The pressure stabilizes when the tool reaches bottom and then moves when the packer is set. Pressure drops immediately upon opening of the down hole valve to match the pressure in the drillstring, and then rises as fluid flows into the string. When the down hole valve is closed, the pressure buildup period begins immediately and continues until the valve is closed again (*Ibid*).

During the second temporal period, characterized as the development period of the field, between 1990 and 1993, the drilling of infill locations selected from the existing seismic grid took place. Information from this activity served to increase the known size of the field. Open hole completions are discussed. At the bottom of page 16, the authors state:

> The influence of fracturing in the reservoir also meant that porous oil bearing matrix porosity was intersected by fractures that were in direct communication with deeper water bearing zones.

Examples of the activity on three wells were described for this period. For the first, Mersea 4-21-VII, it states at page 19:

> The production curve indicates a typical decline that is initially steep due to production from the fractures, but levels out over time as the fractures become depleted and production is predominantly from the matrix porosity in the reservoir.

In the description of the horizontal drilling phase between 1998 and 2000 the following observation was made at page 25:

> Talisman's past experience in the play had proven that drilling horizontally in the Sherman Fall across the entire trend resulted in a longer section of fractured dolomite penetrated, **and accessed more compartments within the reservoir.**

In the description of the Romney 6-14-I Horizontal #1 and Lateral #1 wells, the former resulted in penetration of 900 metres of dolomite and the latter in 360 metres of dolomite, with fewer oil shows. At page 27 it states:

> Even though the lateral is relatively close to the same seismic line on which the initial horizontal well was drilled, the changes in the formation as determined by drilling are quite dramatic.
>
> This also illustrates the difficulty in penetrating the best productive areas of a heterogeneous reservoir if it were drilled using only vertical wells.

A summary of the conclusions, on page 31, indicate that Talisman's options for the future will involve field extensions along the trend, **infill drilling** and re-completion work on existing wells to increase production and reserves.

Heterogeneous

The tribunal finds that the heterogeneous Goldfields/Lakeshore field is one of great geological complexity. The exact extent and quality of dolomitization within the area delineated by the field, whose dimensions are fourteen kilometres by 400 to 1200 metres, is

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unknown, as is the number of faults running in parallel to its length or fractures running across its width. The Coulter and Waugh report acknowledges that dolomitization is more pervasive where the faults are more closely spaced. Energy Objective asserts that the dolomitization is selective rather than pervasive. Also, the quality of porosity and permeability varies, particularly involving those zones of fracture porosity, along fractures, and matrix porosity, involving particle size.

Rather than being limited to an indicator of compartmentalization or composition, heterogeneity is also found to mean that such reservoirs as do exist may be filled with any one of water, gas or oil and that all three can be found within a vertical well or plane. The tribunal finds that the evidence of the composition of the entire field points to some degree of compartmentalization but also includes communication through varying degrees of porosity and permeability of the host rock dolomite.

Experience in the Coulter and Waugh report has shown that, despite the best predictions, actual drilling, production and astute reservoir management are the only way in which to determine the actual characteristics of any portion of the field.

Lot 10, Con I

The tribunal finds that the evidence concerning the proposed unit area under Lot 10, Con I is limited to the information that two wells have oil shows. The incomplete well is of no assistance. The fact that two wells have been drilled to show oil lends support to the MNR assertion that there are no dry holes within the entire field, and that dry holes would merely serve to delineate the limits of the field. However, this is not conclusive, given that Farmers drilled those two wells at off target locations in preference to target locations within the ordered spacing units. Farmers is given the benefit of the doubt in this regard, of having performed assessments of where it wished to drill. MNR has also issued drilling licences for those locations, presumably based on the requirements set out in the 1997 version of the regulation[5] or its predecessor[6] for off-target drilling and on the strength of Farmers' data, although the tribunal has not been made privy to the particulars involved.

The fact that there is no available production data from the wells within the proposed unit has left the tribunal to make a decision in an extremely weighty matter based upon either interpolation or assumptions. Interpolations of known data in preference to assumptions derived from known data on adjacent lands and vice versa, may be a valid reason for conducting an exploration program, but the tribunal does not find it to be a useful tool when used as a means of justifying departure from a resource management scheme whose purpose is to guard against unwise extraction practices. The tribunal has been troubled by this interpolation/assumption proposition for the simple reason that neither method provides actual data of what is taking place under the surface. 41

[5] More on the O. Reg. 245/97 as it was in 1997 and after 2000 below.

[6] Pursuant to the **Petroleum Resources Act,** R.S.O. 1990, c. P12 and section 12 of Revised Regulation of Ontario, 915/90, as amended, which has similar provisions for one well/spacing unit, contemplates off-target wells where "topographical, geological or other conditions make boring or drilling a well within the target unfeasible, and no production unless pooled)

The necessary production data could have become available had Farmers successfully produced from these wells, although it is acknowledged that not all three could be produced at one time, nor could two of them in conjunction with the pre-existing Farmers #3 to the north. Data which might disclose the existence or absence of a relationship with the adjacent horizontal and vertical wells in the **Lowrie** unit is similarly not available. The tribunal does recognize that this involves another operator and although the experts may be common to both, data may not be as readily shared.

There are no representative drill core samples (bore analysis), from the horizontal well within the proposed unit which could lend credence to compartmentalization at this location. What does is exist is Farmers' seismic data. However, such data has not been presented to the tribunal[7]and as result, it was unable to assess its technical merit. There was conflicting evidence as to whether such seismic data should have been conclusive of the best location to drill or what might be occurring under the surface within the formation.

The tribunal has come to the conclusion that it does not have before it such necessary data as would provide any real evidence that all of the Farmers' four wells are neither in communication nor in effective communication with one another. Furthermore, Farmers itself does not have such data, having failed to bring any one of the three wells in question into production. Farmers is asking the tribunal to make what amounts to a very pivotal and significant finding without having actual data.

The existence of compartments in this reservoir is not discounted by the tribunal. The Coulter and Waugh report provides tacit recognition of this, although MNR has refused to acknowledge this fact from the documentary evidence which it filed. In the absence of concrete evidence of discrete and small compartments or pods of resources, the tribunal finds that the prevailing regulatory scheme must prevail.

The tribunal finds that the application for unitization for the joining of part of a field or pool is not warranted on the technical evidence, insofar as the pivotal issue of whether there is compartmentalization of the resource at this location has not been proved. The tribunal is not prepared to allow what it sees as a departure from the resource management scheme in allowing unitization of the oil and gas interests in 100 acres based upon an absence of evidence. The fact that earlier compulsory unitizations have been ordered by the tribunal may have involved comparably small units cannot overcome the very serious policy concerns raised by MNR which are found by the tribunal to be persuasive.

The tribunal finds that the meaning of the words "part of" in clause 8(2)(a) cannot be applied on the facts of this case to an area of land as small as has been advocated on behalf of Farmers in the absence of concrete evidence of compartmentalization on a very small scale. Only where it can be proved that multiple non-connecting pods of the resource do in fact exist

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[7] The issue of how to present proprietary data before the tribunal while maintaining its confidentiality was not raised and remains outstanding.

whose distribution does not allow extraction on the pre-existing, spacing unit and target area legislative scheme, will the tribunal consider being swayed from this finding. There is no evidence that the part of the reservoir located under the 100 acres of Lot 10, Con I is compartmentalized.

Orphan Tracts

The unit proposed by Farmers would orphan tracts 1 and 2 and 7 and 8, but also cause Farmers #3 to become shut in. The tribunal has considered Farmers' rationale for exclusion of tracts 1 and 2 and finds that it is not up to the operator to equalize payments to landowners who have had the benefit of past production. Actually, in point of fact, this rationale is further misguided by the fact that, no matter which configuration is used, tract 2 would always come out ahead. Nothing in this proposal serves to equalize between what has gone out to those having an interest in tract 3 with those in tract 1. This power is left to the legislators, who have declined to do so. What Farmers' proposal does do, however, is to isolate those two tracts for reasons which are not sound from a technical standpoint.

The tribunal finds that it does not have the power, as was suggested in the alternative, to order the lands found in tract 3 to remain part of a producing, pooled, spacing unit **and** form a portion of a unitized part of a pool. The unfairness resulting from such a proposal would serve to double the unfair advantage to those in tract 3, who would see production as both part of a spacing unit and a pooled unitization. The tribunal finds that the legislation does not contemplate that this can occur, as it is clearly contrary to subsection 8(3) of the **OGSRA**. The tribunal's powers in ordering compulsory unitization are not unlimited.

Legislative Scheme

Under the legislative scheme set out by the **Oil, Gas and Salt Resources Act** and O. Reg. 245/97, there are three, and not two, ways in which an operator can bring oil and gas wells into production in the province[8]: 1) pooled spacing units whose size is delineated by section 8 of O. Reg. 245/97; 2) those off-target pooled spacing units (expanded spacing units) permitted in accordance with section 13(3), (4) and (5) of O. Reg. 245/97, and whose size is determined in accordance with Policy PR 2.02.01, or any predecessor or prospective policy; and 3) unitization.

The laying of spacing units in an initial spacing order, with its attendant statutory target zones [see section 9, O. Reg. 245/97], in keeping with sound resource management practice, recognizes by size the area which a well is likely to drain within a particular age or depth of formation. The boundaries of units within a spacing order, for the most part, may be oriented according to known data from a discovery well, but otherwise are largely superimposed on existing survey fabric. The tribunal agrees with Mr. Robinson that the result of such spacing

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[8] Leaving aside the distinction between voluntary and compulsory pooling and unitization.

is to render the placement of the target areas within spacing as arbitrary. However, this initial arbitrary laying of spacing is not prohibitive to well managed and methodical development. There are ways to produce within existing spacing or obtain a licence for what amounts to modified spacing.

In those cases, it is the off-target pooled spacing units which provide the means by which an operator may gain the opportunity to drill and produce from a location which it believes is technically preferable. The opportunity cost of drilling an off-target location is to effectively neutralize or make unavailable to that operator any number of spacing units which must be pooled to create the new off-target spacing unit. Based on the fact that Farmers has drilled two wells to completion and partially drilled a third, without recovering any of its costs, the tribunal would suggest that for an operator to proceed with an off-target location for drilling, it should be very certain of the well location.

The tribunal has considered the various concerns raised by Farmers in relation to its inability to produce. It is persuaded, at this time, that the objectives of the sound management of the resource, as well as the operational objectives of Farmers, can be adequately met through production from any one or two of the off-target well locations, as circumstances warrant, and upon successful pooling of the lands involved, namely all eight tracts of Lot 10, Con I.

In considering the meaning of "part of" in relation to the development of a field or pool, based upon the foregoing analysis of the legislative scheme, the tribunal finds that the words must mean something other than in relation to an off-target pooled spacing unit. The principles and objectives of the resource management scheme are in place to avoid competitive drilling practices, draining of the resource through too many wells in close proximity, attendant reduction in pressure in the reservoir which will have an impact on the future recovery of the resource, which in turn will cause waste.

The issuance of licences for off-target wells provides the operator with the ability to drill exactly where it believes would allow optimal recovery. There is no question that the off-target location will disrupt the existing spacing order grid. By its very nature, the off-target well requires that all of those spacing units encompassed by the existing set-back imposed upon the off-target well location be included in the off-target spacing unit. It does not follow from this, however, that the number of wells which would have been allowed pursuant to the original spacing order should be allowed in the off-target pooled spacing unit. This makes sense in that it is the off-target well which is out of alignment with the grid. The surrounding grid as per the spacing order remains unchanged. The operator is held to drilling and producing, either from the off-target spacing unit or from the original spacing units within the spacing order, but not both.

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Licences to Farmers

The tribunal has heard evidence from Mr. Robinson that the seismic data he has in his possession has recommended the particular locations for drilling to Farmers. Clause 8(3)(a) of O. Reg. 245/97, as it currently reads, provides that **no well shall be drilled in a spacing unit that has not been pooled**. At the time the three Farmers wells were drilled, either section 13(b) of 245/97 or section 12 of R.R.O. 915/90 (the former was filed on June 27, 1997 – it is unclear from the dates of Farmers #4 and #5, which were issued on 1997/01/06 and 1997/02/12, respectively, as to which regulation governed their issuance) provided that a well licence could be issued for an off-target well that had not been pooled, but there could be no production without pooling.

The criteria for MNR to issue an off-target well licence have also changed. Previously, section 13(b) required that there be a topographical, geological or other condition to make drilling in the target unfeasible. [note, this is not preferable] Subsection 10(1) of the regulation as it currently reads is similar in that a well within target must be unfeasible. The current policy, at paragraph 4.0 further expands the reasons which are acceptable for locating a well outside the target area, being:

i Topographic features such as lakes, streams or other water bodies, steep hills or valleys within the target area,

ii Surface obstructions such as buildings, roads, power lines, railways and utility right of ways within the target area,

iii Geological or reservoir reasons supported by technical evidence showing the geological target to be inaccessible from the spacing unit target area, and

iv Proposed well is a horizontal well.

The policy which governed the issuance of the well licences was not in issue. As a result, the tribunal was not provided with a copy of the policy which would have applied at the time Farmers applied for its licences, but given the similarity in wording between the previous subsection 13(b) of 245/97 or subsection 12(5) of R.R.O. 915/90 and the current subsection 10(1) leads the tribunal to assume that the reasons for the issuance of the licences must have been justified on some basis by Farmers to MNR. The tribunal did not hear evidence concerning their respective merits. It heard only that MNR attempted to dissuade Farmers from pursuing its off-target well locations, one reason being the difficulty obtaining cooperation for pooling, at an affordable cost, once a field has been in production.

One matter which was addressed was whether a change to the configuration of the spacing order had been warranted in the circumstances. Despite this not being an issue before it for which it has jurisdiction, the tribunal does note that the evidence has been of the northwest to southeast orientation of the field and faults, supposedly through elongated fracture zones

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between which there are degrees of matrix porosity. Despite MNR providing its oblique references to the absence of new data and existing spacing meeting its resource management objectives, it would appear to follow that the orientation of spacing should be the same as that of the field. This northwest to southeast orientation does not support the proposition that creation of lay down spacing in that area would be a solution. However, the tribunal has found itself disconcerted by the quality of technical evidence in this regard, and has not found such blanket statements as were offered by MNR particularly reassuring. It can only imagine how unsatisfying this must have been for an operator which has invested nearly a million dollars in the area.

What is troubling to the tribunal is, after having issued a licence for the Farmers #4 well, why MNR would issue further licences to continue drilling new wells, particularly as each successive well would have the effect of negating any production possibility of producing one of the earlier wells. Farmers #4 required pooling of tracts 5 through 8, which would not conflict with the pre-existing Farmers #3 in tracts 2 and 3. Farmers #5, requiring pooling of tracts 1 though 4, would have put Farmers #3 out of production. Then, Farmers #10, requiring pooling of tracts 1 through 8, would have put Farmers #4 and #5 (along with the already shut in #3) out of production, had they ever gotten that far. The issuance of these licences makes absolutely no sense either from an operational point of view or from the perspective of the current policy. The tribunal has absolutely no idea what "other conditions" have made the drilling of on-target wells unfeasible within the proposed unit. It notes, too, that Farmers is a small operator and less likely than a major operator to readily absorb the cost of several wells which cannot produce.

If MNR was satisfied with the technical merit of each respective licence, the tribunal is left to wonder what information Farmers and MNR had to determine that an on target well would have been unfeasible. Also, the tribunal must now be troubled as to how it is that MNR could have presumed that Farmers would be able to bring each successive well into production.

Meaning of Section 8 of **OGSRA**

"Prevails Over"

The tribunal attempted to derive some direction from the meaning of the words, "prevails over" used in subsection 8(3).

"Prevail" is defined, in those most applicable definitions found in the Webster's Third International Dictionary (unabridged) (Springfield: Meriam-Webster Inc., 1993):

> 1. to grow strong: increase in vigor 2. to gain victory by virtue of strength or superiority: win mastery: triumph… to be or become effective or effectual: be successful…

> prevailing, is stated to mean, can apply to what is in general or wide circulation or use what exists generally, especially in a given place or time. Prevailing applies to what is predominant or widespread beyond others of its kind or class at a time or place indicated, implicit…

Black's Law Dictionary defines "prevail" as:

> To be or become effective or effectual, to be in force, to obtain, to be in general use or practice, to be commonly accepted or adopted; to exist. Atlantic Coast Line R. Co. v. Gamble, 155 Fla. 678, 21 So. 2d 348, 350. To succeed; to win.

Despite the fact that "prevails over" has been used in 62 different Acts and regulations in Ontario, the tribunal was unable to find any case where their meaning was considered. Nor does it find the definitions cited above as being particularly helpful.

Subsections 8(3) and (4), Generally

The interpretation which should be given to subsections 8(3) and (4) of the **Oil, Gas and Salt Resources Act** was put into question by the parties. Subsections 8(3) and (4) of the **OGSRA** deal with the relationship between the tribunal's order [for compulsory unitization under subsection 8(3) and for both compulsory unitization and pooling under subsection 8(4)] and requirements in a regulation, conditions in a licence and a Minister's spacing order. The words used in subsection 8(3) of the **OGSRA** contemplate conditions in O. Reg. 245/97 and conditions in a licence which are imposed pursuant to the authority of O. Reg. 245/97. Similarly, the words used in subsection 8(4) of the **OGSRA** contemplate but do not amend or revoke a spacing unit established by order of the Minister under section 7.1 of the **OGSRA**, or one which has been established by the operation of O. Reg. 245/97 or by conditions on a licence made under the authority of O. Reg. 245/97.

The meaning of subsections 8(3) and (4) of the **OGSRA** is directly tied in to certain provisions of O. Reg. 245/97. The earlier subsection 8(2) of the **OGSRA** was similarly directly tied in to O. Reg. 245/97. The exact meaning of either the earlier subsection 8(2) of the subsequent subsections 8(3) and (4) is found to be dependant upon the relevant provisions of O. Reg. 245/97 which governed at the particular time.

The following table sets out the two versions of relevant provisions section 8 of the **Oil, Gas and Salt Resources Act,** those enacted in 1997 and the amendments which became effective 20 days after receiving Royal Assent on November 26, 2002, thereby being December 11, 2002. Also set out are those provisions of O. Reg. 245/97 which the tribunal considers relevant to the interpretation of section 8 of the **Act,** the regulation having been originally enacted in 1997 and amended effective February 2, 2000 and the amendments to the **Act** became effective 20 days after Royal Assent on November 26, 2002, thereby being December 11, 2002:

OGSRA	**OGSRA** (December 11, 2002)
1. (1) In this Act , "spacing unit" means a surface area and subsurface beneath the surface area, established for the purpose of drilling for or producing oil or gas;	
8. (2) An order made under clause 1(b) [for unitization] prevails over an order made under section 7.1 [Minister's order to establish spacing, to amend or revoke designation of a spacing unit and specify where wells may be located] and a regulation made under clause 17(1)(e) [limiting number of wells in a spacing unit] or (e.2) [requiring the joining of interests in a spacing unit as a condition of drilling or producing].	**8.** (3) An order made by the Commissioner under subsection (2) for the joining of the oil or gas interests within a unit area prevails over any requirement or condition in a regulation or licence that oil or gas interests within a spacing unit that it included in the unit area be joined. (4) The Commissioner has no authority, in an order under subsection (1) or (2) [spacing or unitization] to amend or revoke a spacing unit that has been established by an order of the Minister, by a regulation or by a condition of a licence.
O. Reg. 245/97 – filed June 17, 1997	O. Reg. 245/97, amended 22/00 (February 2, 2000)
1. In this Regulation, "pooled spacing unit" means a spacing unit in which all of the various oil and gas interests have been pooled; "target area" means the area within a spacing unit that is allocated for drilling a well;	
8. [sets out size of spacing units corresponding to age of formation and target area set back within spacing unit]. **9.** Despite Section 8, the Minister may issue a well licence for an exploratory well that is proposed to be drilled off-target or for which interests in the spacing unit have not been pooled; however, it is a condition of such a licence that there be no production from the well before all the oil and gas interests within the spacing unit have been pooled. **13**. No person shall, (a) produce from more than one well in a spacing unit; (b) drill a well within a spacing unit outside the target area, unless topographical, geological or other conditions make drilling a well within the target area unfeasible; or (c) produce oil or gas from a well in a spacing unit unless all the interests in the oil and gas in the spacing unit have been pooled for the purpose of producing from the well.	**8.** This section applies to all oil or gas exploratory and development wells. (2) Unless otherwise specified by the Minister, oil and gas well spacing units shall be comprised of, [number or portion of tracts corresponding with age of formation] (3) No person shall, (a) drill a well in a spacing unit that has not been pooled; (b) produce oil or gas from a spacing unit that has not been pooled; or (c) produce oil or gas from more than one well in a spacing unit. (4) If an area is unitized by a voluntary agreement among the oil and gas interest owners win the area and the Minister agrees with the unitization, or if an area is unitized by an order of the Commissioner, the Minister shall revoke or amend any pooling conditions on licences for wells located in the unitized area, and may, as the circumstances of the unitized area warrant, do one or both of the following: 1. Waive the requirement under section 11 to establish spacing units. 2. If the unitized area is subject to a spacing order, amend the spacing order to remove the spacing units

	from the unitized area. **13.** (1) This section applies only to oil or gas exploratory and development wells that are subject to a spacing order of the Minister. (2) An exploratory or development well that is drilled shall be located in the target area of the spacing unit specified by the spacing order. (3) The Minister may issue a well licence for an exploratory or development well that is proposed to be drilled outside the target area of topographical, geological or other conditions make drilling a well within the target area unfeasible. (4) If the Minister issues a well licence for an exploratory or development well under subsection (3), subsection (2) does not apply to the well and the Minister shall specify the spacing unit and target area for the well as a condition of the well licence. (5) The spacing unit and target area for a well specified on the well licence as provided in subsection (4) apply in respect of that well despite any spacing order, whether the spacing order was issued before or after the well licence was issued under subsection (4)
15. (1) In this section, "participating section" means that portion of a unitized area from which oil or gas is produced; "unit area or unitized area" means the geographical area and the geological formations to which the unitization applies' "unitize" means the joining of the various oil and gas interests within a field or pool, or a part of either, for the purpose of drilling and operating one or more wells and the apportioning of the costs and benefits of the drilling and operating, and "unitization" has a corresponding meaning.	

Subsection 8(2), 1997 to 2002

The drafting of subsection 8(2) provided that a unitization order was to prevail over an order made under section 7.1 [Minister's order to establish spacing], any regulation made under clause 17(1)(e) of the **OGSRA** [limiting the number of wells in a spacing unit] or (e.2) [requiring the joining of interests in a spacing unit as a condition of drilling or producing]. Despite the reference to 17(1)(e.2), between 1997 and February 2, 2000, there was no provision in O. Reg. 245/97 that the interests in a spacing unit be joined for purposes of drilling a well. Therefore, notwithstanding the wording of subsection 8(2) of the **Act**, the tribunal's compulsory unitization order would prevail over a Minister's spacing order, over the requirement that there be one well per spacing unit, and over the requirement that there be pooling before production could take place in an off-target or regulated spacing unit.

When the regulation was amended in 2000, pooling was included as a necessary pre-condition to drilling. Based upon the drafting of subsection 8(2) of the **OGSRA,** the tribunal's unitization order would have prevailed over this requirement as well.

Subsections 8(3) and (4), since 2002

The words used in subsection 8(3) are different from those in the old subsection 8(2), in that a Minister's order under subsection 7.1 of the **Act** is no longer included. Therefore, an order for unitization will not prevail over a Minister's order to establish spacing. However, it will prevail over specific, regulated provisions dealing with the spacing units themselves, or over conditions in licences which establish new, off-target spacing orders.

The establishment of spacing may occur through a Minister's order pursuant to section 7.1 of the **Act**, through subsections 9(2) through (4) of O. Reg. 245/97, section 12 of O. Reg. 245/97 for water covered areas, and section 13 for off-target spacing units. The exact meaning of subsection 8(2) of O. Reg. 245/97 is not clear, as the Minister either establishes spacing by Order, in which case the composition of spacing units is set out, or by operation of provisions in section 9, whereby the required area to be pooled for each type of formation, which will constitute a spacing unit, is specified. Supposedly, according to the drafting of subsection 8(2) and section 9, the former size delineations would govern where the Minister has established spacing but not otherwise specified size.

Through the use of the words in subsection 8(3) of the **Act**, "requirement…regulation" and "condition… licence" it is clear that the tribunal's order for unitization will prevail over certain regulated requirements and licence conditions. However, further reading of subsection 8(3) reveals that the "requirement" or "condition" over which the tribunal's order will prevail is "that oil or gas interests within a spacing unit that it [the tribunal] included in the area **be joined**". The scope of the application of subsection 8(3) is limited to those requirements in the regulation or conditions in licences for which joining or pooling is required, namely **drilling and production**. The application of subsection 8(3) does not extend to the requirement in the regulation that permits only one well per spacing unit. This is because there is no mention in clause 8(3)(c) of O. Reg. 245/97 that there be pooling or joining. The apparent meaning of this is, therefore, that nothing in the tribunal's order for unitization will prevail over the requirement that there can be only one well per spacing unit.

Subsection 8(3) of the **Act** stipulates that a compulsory unitization order also does not make use of the words, "part of a spacing unit", but rather contemplates that the tribunal's order will prevail over any regulation/requirement or condition/licence that oil or gas interests "within a spacing unit" included in the ordered unit area be joined. Although this reference is rather oblique, the drafting does make the assumption that a unitization order will be comprised of the oil or gas interests found within whole spacing units and not parts of spacing units. The only way in which, grammatically, parts of spacing units would have been contemplated as part of the regulatory scheme would have been had this reference specifically included "part of a spacing unit". The grammatical reading outlines the fundamental principle underlying compulsory and voluntary unitization, where the legislation does not contemplate that orphaned tracts could result through unitization of parts of spacing units. The tribunal finds that it will adopt this interpretation.

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Subsection 8(4) states nothing more than that a tribunal's order for unitization does not serve to amend or revoke a spacing order of the Minister. It merely clarifies the manner in which subsection 8(3) is to operate in relation to spacing orders of the Minister.

It is subsection 8(4) of O. Reg. 245/97 which specifically deals with the issue of amendment and revocation, both of pooling conditions on licences and of the continued existence of ordered spacing units. The wording of subsection 8(4) sets out that the conditions on licences **must be** amended or revoked by the Minister, once there is a compulsory unitization order, in the same manner as if there is a voluntary unitization order with which the Minister agrees. Then, there is further discretion in the Minister to waive spacing, amend the spacing order to remove the spacing units from the unitized area or both. This discretion is described as being exercised as the circumstances of the unitized area warrant.

The definition of "unitize" in section 15 of O. Reg. 245/97 contemplates that once the interests have been joined, drilling and operating of one or more wells within a unitized area may take place. In fact, section 7.1(1)(c) of the **Act,** involving Minister's spacing orders, uses the words, "specify where **wells** may be located within a spacing unit", implying that there may be more than one well in a spacing unit, should the Minister so order. The power to **limit** the number of wells in a spacing unit is to be found in regulation, with the power to do so set out in clause 17(1)(e.1) of the **Act** and further delineated by subsection 8(3)(c), which limits the number of wells to one.

The definition of "unitize" does not deal with whether there may be more than one well in a spacing unit included in a unit area; it does not deal with the status of a spacing unit established by order. Subsection 8(4) of O. Reg. 245/97 requires that the original spacing order may only be amended or revoked at the discretion of the Minister. The manner in which this discretion is exercised by MNR should be set out in the Policy.

Paragraph 6.2 of the Policy, at the last line of the paragraph, states,

> Where voluntary unitization is satisfactory to the Minister or where the Commissioner orders unitization, the following actions shall be undertaken by the Minister *as the circumstances warrant*:
>
> i waive the requirement to establish spacing units under section 11(2) of the Regulation, or
>
> ii where the units area is subject to a spacing order, amend the spacing order to remove spacing units from the area, and
>
> iii revoke or amend any spacing units established on licences for wells located in the unit area.

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The tribunal does not regard this re-stating of the regulation particularly helpful in determining how MNR will exercise this discretion.

There are two possibilities as to how the discretion may be interpreted. One is that the Minister will go ahead and make such amendments to the spacing order as may be required in the circumstance that certain spacing units are caught by the unitization. The other possibility is that the Minister will exercise his discretion and make a determination whether to amend the spacing order based upon compelling, resource management principles, such as have been outlined in the course of the hearing.

The following table sets out in a summary manner the three phases of **OGSRA** with the corresponding regulation applicable over time and a corresponding interpretation relevant for the period set out, based upon the findings set out above:

1997 – Feb/2000 s. 8(2) **OGSRA** and s. 9 and 13 O. Reg. 245/97
Unitization order shall prevail over: 1) Minister's spacing order ✓ 2) Regulation - #wells/spacing unit 13(a)✓ 3) Regulation – pooling as condition of drilling 13(b) – not enacted **x** 4) Regulation – pooling as condition of production 13(c) - enacted ✓ 5) Regulation - licence off-target, condition that no production unless pooled s. 9 ✓
February 2000 – December 10, 2003s. 8(2) **OGSRA** and s. 8 & 13 O. Reg 245/97 as amended by 22/00
Unitization order shall prevail over: 1) Minister's spacing order ✓ 2) Regulation - pooling as condition of drilling - s. 8(a) ✓ 3) Regulation - pooling as condition of production –s. 8(b) ✓ 4) #wells/spacing unit - s. 8(3)(c) ✓ 5) Regulation – off-target condition of pooling on licence 13(3) & (4) →imports pooling as condition of drilling and production from 8(3)(a) and (b) ✓ s. 8(4) of O. Reg. 245/97, as amended provides that if voluntary unitization with Minister's agreement or compulsory order 1) Minister **shall** revoke or amend pooling conditions on licences - as per 13(3) and (4) and 2) **may** as the circumstances of the unitized area warrant: i. waive requirement to establish spacing ii amend spacing order to remove the spacing units from the unitized area Based upon the scope of section 8(2) of the **Act**, there is nothing in the regulation to prevent the tribunal's order from being in full force and effect, without the need for any action on the part of the Minister.
December 11, 2002 s. 8(3) & (4) **OGSRA** s. 8 & 13 O. Reg. 245/97, as amended by 22/00
8(3) Unitization order prevails over requirement in regulation that interests in spacing unit be joined: 1) Regulation – pooling as condition of drilling – s. 8(3)(a) - ✓ 2) Regulation - pooling as condition of production – s. 8(3)(b) - ✓ 3) Regulation –production from more than one well/spacing unit–no requirement for joining -s. 8(3)(c)-**x** 8(3) Unitization order prevails over condition in a licence that interests in a spacing unit be joined: 1) Condition of licence for off-target well, Minister specifies spacing unit - 13(3) & (4) ✓ 8(4) Spacing and Unitization Orders do not amend or revoke spacing unit established by Minister's order, regulation or condition of licence, same as set out in s. 8(3) above, **but** s. 8(4) of O. Reg. 245/97, as amended, if voluntary unitization with Minister's agreement or compulsory order 1) Minister **shall** revoke or amend pooling conditions on licences - as per 13(3) and (4) and

2) **may** as the circumstances of the unitized area warrant:
i. waive requirement to establish spacing
ii amend spacing order to remove the spacing units from the unitized area

Based upon the scope of subsection 8(3) of the **Act**, the provision of the regulation which requires that there be one well per spacing unit will remain in full force and effect unless the Minister exercises his discretion to remove those spacing units within a unitized area from the spacing order.

The tribunal finds that the meaning of subsection 8(3) of the **Act** is, as was suggested on behalf of Talisman, to prevent the tearing apart of a spacing unit in a compulsory unitization order. Subsection 8(4) of the legislation clarifies that neither type of tribunal order, for compulsory pooling or unitization, serves to amend or revoke the legislative scheme or what has been put in place by the Minister pursuant to that legislative scheme. Such authority remains with the Minister.

Other Compulsory Unitizations Ordered

The tribunal has found it difficult to reconcile results in this application with several which have gone before, namely that of **Gaiswinkler** in the Colchester South, of Talisman in the **Wigle** pool, involving the unitization of an area of land as small as that encompassed by four spacing units and the adjacent **Lowrie** pool involving an area of land as small as two spacing units. Talisman's role in opposition to the proposed unit, as an overriding interest owner both within and without, is understandable. However, its continued opposition in light of the **Wigle** unitization is less clear.

Gaiswinkler

The **Gaiswinkler** unitization, referred to above [O.G. -003-98, December 3, 1999 for Colchester South 81-1 Pool] involved several horizontal legs drilled under the waters of Lake Erie from an onshore location. MNR issued well licences and one permit to deepen a well, all of which were conditional upon pooling, two of which required the pooling of areas which ultimately comprised all of the unitized area and a third which required the pooling of a substantial portion of what became the unitized area. Access was obtained through the one on-shore location, rather than through multiple wells on the surface.

Included were lands under the bed of Lake Erie which were subject to a new Crown lease. The size of the unit was 150 acres, where the spacing units had been 23 acres. Mr. Rybansky gave evidence in support of this application. He recommended unitization to the operator as a means of complying with conditions on the permits. Otherwise, only one well would have been permitted within the area pooled pursuant to the conditions on the permit and licences. The date of the application pre-dates the current section 8 of the **OGSRA** provisions, where under clause 8(1)(b), the tribunal could "require and regulate the joining of the various interests within a field or pool". No mention is made of part of and no evidence was presented to the effect that this was the whole pool. Rather, it reflected the sum total of all the lands required to be pooled under the various licenses and permit.

Due to the deepening of a well which dated back to the 1950's, the compulsory unitization order recognized the fact that there had been some form of pre-existing production so that the provisions of its "unitization" order were effectively back-dated to March 1, 1998. This anomalous provision was notwithstanding the date of the order of December 3, 1999, despite the clear prohibition regarding production without pooling.

The tribunal is having difficulty reconciling the support of MNR for resulting unit of 150 acres in **Gaiswinkler** with its opposition to the current application. This fact should not be construed as a re-hearing of the case by the tribunal. It finds itself in a similar position to Farmers in attempting to understand why MNR sought different treatment for **Gaiswinkler**. Several possible reasons to distinguish the facts include the relative isolation of the Colchester South pool and the fact that the unitization involved three horizontal legs under Lake Erie.

Lowrie

As reflected by the file number, this application was filed in 2001, and as such is viewed by the tribunal as having been governed by the second phase of interpretation of the **Act** and regulation set out above.

The **Lowrie** unitization (tribunal file OG 004-01) of the west one half of the adjacent Lot 11, Con I, involved 100 acres. The Crown was a party to that proceeding as a landowner, but did not appear at the hearing. It filed written objections to the proposed unit under the signature of the Manager of the Petroleum Resources Centre, citing two reasons. It asserted that the correlative rights of owners on adjacent properties who had not been made parties would likely be affected. It also believed that the primary purpose behind the unitization application was to allow production from two wells within one spacing unit. Both issues are before the tribunal in the current application.

Two of the same technical witnesses on behalf of **Lowrie** also appeared in the current applicant maintaining that the two wells in close proximity, concerning which the tribunal has heard considerable evidence, did not show pressure changes when one was under production. It was asserted that the one well was not being drained by the other. The applicant raised issues concerning voluntary unitizations to which MNR was permitted to respond in post-hearing submissions:

> "Please see the MNR spacing and pooling policy excerpts[*]. MNR's acceptance of these voluntary units was based on its judgment that it had met the objectives of spacing as specified in its policy. 54

[*] Spacing units are the prerequisite building blocks that are employed under the Oil, Gas and Salt Resources Act (Act) to provide a framework for the orderly development and conservation of oil and gas resources. The primary objectives of spacing units for oil and gas wells are as follows:
(1) Promoting the conservation and preventing the waste of oil and gas resources and the maximizing their ultimate recovery.
(2) Providing for the orderly and efficient development of oil and gas resources.
(3) Providing the correlative rights of owners so that each owner of an interest in oil and gas is afforded an opportunity to obtain his just and equitable share of production of such resources.

The tribunal has examined the documentation in the **Lowrie** file and obtained the following information, raised on behalf of **Lowrie** but for which no response from MNR was received, concerning the purported three voluntary unitizations:

1. Olinda Unit 2, Township of Gosfield North, County of Essex, by Talisman [4 spacing units]
2. Renwick South Pool Unit #2, Township of Romney by Talisman [3 whole spacing units plus two halves]
3. Mersea 2-15-B unit in Township of Mersea by Talisman [3 spacing units]

Counsel for **Lowrie** stated in its letter of August 20, 2001:

> In each of the foregoing cases, the Ministry of Natural Resources has approved a unitization which permits the operator to produce two wells from a pre-existing spacing unit. In addition, in each of these voluntary unitizations, a vertical well was being produced together with a horizontal well both drilled within the same spacing unit.

The details of these other files found in **Lowrie** were not raised at the Farmers hearing. The tribunal can make no determinations as to whether the actual facts surrounding these aforementioned three purported unitizations are correct. On the assumption that they are, the size of the units are of concern, as is the fact that the Renwick voluntary unitization orphans two spacing units with what appears to be the blessing of MNR. It is also unknown whether MNR did something to those orphaned spacing units to alleviate such a situation. A review of the maps filed with the **Lowrie** documentation indicates that none of these purported units involved lands along the lakeshore or under the bed of Lake Erie. There is no indication from the maps filed as to the extent of the spacing orders involved. Finally, as unitizations, these are not in keeping with what MNR has suggested is an appropriate meaning to be given to "part of a field or pool". MNR has maintained throughout that unitization of interests within part of a field or pool should involve a substantial portion of the entire field and not an area comprised of several spacing units in size.

Moving to the **Lowrie** decision, the tribunal has been unable to test any of this evidence, having been part of a previous adjudication before a Deputy Mining and Lands Commissioner. The technical findings are purportedly found in two very short paragraphs, but do not appear to deal with technical matters. The Deputy Commissioner has stated at page 26 in the second paragraph from the bottom, "No new evidence has been submitted that discounts or questions the claims of the applicant as to reservoir sizes and substance migration patterns." It becomes clear from the Reasons in that Unitization Order that there was no testing of the evidence concerning the compartmentalization theory advanced by **Lowrie** and as a result the Deputy Commissioner found that he accepted the evidence presented.

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When reviewing voluntary agreements Ministry staff shall review all aspects of the agreement to determine if the agreement satisfies the objectives of spacing and pooling. Regard to the interpretation of the pool and protection of correlative rights, and future drilling plans shall be given when reviewing the voluntary agreements.

The tribunal must, therefore, distinguish **Lowrie** from the current application, as having been made on the best technical evidence available at that time. The objections of MNR, while similar to those voiced in the Farmers' application, did not dislodge the expert evidence upon which the applicant sought to rely and which the tribunal accepted. This can be distinguished from the current Farmers application, where much of the expert evidence on behalf of Farmers has been extensively tested and disputed. A further distinguishing factor was MNR's attendance at the hearing to actively assist the tribunal by putting forward as strong and compelling case in favour of the greater public interest.

Also, as reflected by the file number, this application was filed in 2001 and so is viewed as having been governed by the second phase of interpretation of the **Act** and regulation [subsection 8(2) of **OGSRA** prevailing over regulation made pursuant to clause 17(1)(e.1) **OGSRA,** whereby through 8(2)(c), one cannot produce from more than one well in a spacing unit]. It is unknown whether MNR revoked those portions of the underlying spacing order encompassed by the **Lowrie** unitization. However, even if it did not, the tribunal's compulsory unitization order will prevail over the requirement that there can be no more than one well in a spacing unit.

Wigle Pool, Unit 12 – Talisman

The **Wigle** Pool unitization was originally ordered on March 8, 2002 and subsequently amended, again, a decision of the Deputy Mining and Lands Commissioner. Like **Lowrie**, its timing will be governed by the second phase of interpretation of the **Act** and regulation.

Information on the file, but not forming part of the Order, notes that the tribunal (Registrar) was advised by telephone by a representative of Elexco Ltd. which is the agent for Talisman, that advertising the application was unnecessary, as there were so few landowners involved. That the tribunal acted in accordance with this recommendation undoubtedly caused it to fail to provide notice to those landowners and other interested owners outside the proposed unit. Also, flowing from this same request, rather than making a copy of the application available for viewing by the public or parties at the Petroleum Resources Centre facilities (of MNR) in London, Elexco indicated that the application could be viewed in its offices. Although speculative, this perhaps answers why MNR was unable to recall the particulars of the **Wigle** unitization when asked questions by Mr. Lewis.

The **Wigle** unitization was for tracts 1, 4, 5 and 8 of Lot 6, Con III. The Spacing Order 2000-125 is not extensive. It involves 16 spacing units in one area and an additional seven in another. The unitization area is comprised of one and a half spacing units and two tracts which do not form any part of the Spacing Order. As a result, there is no doubt that one half of a spacing unit has been orphaned as a result of this order.

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Nothing has been filed with that application to indicate whether a drilling licence had been issued by MNR and flowing from this, whether the proposed unitization area corresponds to the pooling requirements on that application. In fact, subsection 15(3) does not require that this information be filed with a unitization application, which is yet another interesting shortcoming which is revealed as a result of this more extensive analysis.

Concluding Comments

This has been a particularly difficult application for several reasons. In this application for unitization MNR has, for the first time, sought and secured a role for itself in opposition to a unitization application in its capacity as regulator and watchdog of the public interest and not as the administrator of Crown lands. It did oppose the **Lowrie** unitization application, but in that case, despite being a party, was content to make written submissions. Perhaps it is because those submissions were not given a great deal of weight by the Deputy Mining and Lands Commissioner that MNR took a more active role in this application, one in which it vehemently opposed the proposed unitization. This represents a point of departure from earlier unitization applications before this tribunal and speaks loudly and clearly concerning the importance placed on the proper development of the resource. To date, all unitization applications, however small the unit, have been allowed[9].

The tribunal has found this to be a most difficult and troubling application to consider. It has been concerned about the impact on Farmers of a change in direction for the tribunal from allowing unitizations to disallowing them, when a very small unit area is involved. This concern has weighed heavily on the tribunal. It is cognizant of the fact that Farmers is not a large operator, but one which has invested heavily in the three wells which are located within the proposed unit from which it has to date been unable to recover its investment let alone see a return on it. The tribunal is also very aware that the landowners within the proposed unit are supportive of the proposed application. In making the findings that it did, no weight has been given to the suggestion that those landowners who signed on with Farmers did so at their own risk and must bear the consequences. The tribunal has listened to their concerns, particularly their feeling that they are being treated differently by MNR than Talisman has been, with the result that they are not obtaining their fair share of income from the resource located under their properties. The tribunal has examined the extent of its powers when dealing with issues of fairness below.

Mr. Gibson has also raised a very important issue, that of whether mortgagors having received notice of further instruments or agreements which were executed following the issuance of the Appointment for Hearing. It becomes clear that, notwithstanding the attempts by the tribunal to settle all matters through alternative dispute resolution, this has no place in a unitization application which requires that the public interest, **all** of the interests within the proposed unit and interests immediately without of the proposed unit must be heard and considered.

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[9] One application which was withdrawn is not included.

The tribunal has been persuaded on the evidence of MNR that to permit unlimited drilling and simultaneous production within such a small area relative to the size of the entire field would not support the resource management scheme advocated on behalf of the public interest without having been persuaded on the evidence that unitization is warranted. To allow unitization of part of a pool of 100 acres under such circumstances would have consequences for management of the resource by the regulator, MNR and for the resource itself. The tribunal has considered this to be a very important policy concern.

The proposed unitization would permit production from at least four wells without adequate evidence that these wells are not in effective communication with each other and other wells in the vicinity. In the absence of direct evidence that there is no pressure relationship between each of the Farmers #4, 5 and 10 wells, and between any one of those wells and that of Farmers #3 or the two Lowrie wells, the tribunal cannot allow the proposed unitization. The privilege of unitization bears with it greater responsibility to properly manage a greater portion of the lands under which the resource lies. This cannot be done theoretically, but must be done based on actual knowledge.

The fact that Farmers insisted on drilling at certain locations suggests that it had something persuasive that those were the best places to drill, in preference to very large, very available, almost immediately adjacent target zones. This is despite the suggestion by MNR and Talisman that one would hit oil no matter where one drilled in this field. In examining the requirement of section of O. Reg. 245/97 as it was in 1997, or its predecessor section 12 of R.R.O. 915/90, the tribunal feels that MNR apparently agreed that there were, at the very least, topographical, geological or other conditions which made drilling on target unfeasible. The tribunal was not provided with this evidence but it is hard put to understand just how the three Farmers' wells could have received licences to drill had MNR not been persuaded from a technical point of view. This, in its opinion, has led to the very real expectation from Farmers that it should have been able to produce from these wells in some manner. If this is incorrect, and the tribunal has heard no submissions on this point, then it raises the question of why MNR would licence multiple off-target wells for Farmers. The tribunal has not lost sight of this fact in its deliberations of this application.

The fact is, and the tribunal finds, that the establishment of spacing by order or licence order makes the assumption that individual spacing units are the preferred manner of development prior to unitization. The purpose of the legislative scheme is to establish the orderly development of the resource in preference to unbridled and unlimited drilling and production. The rationale behind this policy is the effective application of a precautionary principle, namely that it is better to proceed cautiously with controlled development of the resource in preference to the greater ease of access permitted by unitization. From its interpretation of subsections 8(3) and (4) of the **Act**, along with subsection 8(4) of O. Reg. 245/97, it can be seen that MNR has taken back to itself the right to determine the extent of development within a voluntary or compulsory unit through the exercise of its discretion whether or not to revoke or amend spacing. Whether this renders the tribunal's order for compulsory unitization meaningless is open to debate.

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The tribunal is required to give meaning to the legislative provisions, so long as they are not in conflict. It has come to the conclusion that this seemingly meaningless implication of a compulsory unitization order for a small 100 acre unit speaks to the fact that the legislation did not intend to have such small compulsory unitizations without the cooperation of MNR, which could only be obtained through persuasive evidence of what is below the surface.

The right to produce from such small areas is found to be governed by the provisions of the off-target spacing unit pooling conditions [ss. 13(3) – (5) of O. Reg 245/97]. While Farmers may not want to provide those in tract 3 with more than their fair share of production, that decision, which is not for Farmers to make, has resulted in no one within tracts 1, 3 and 4 though 8 being given the opportunity for a share in what is likely to be certain production, based upon all the evidence for Lot 10, Con I and the field in general.

If Farmers has found interest holders within tracts 1, 7 and 8 to be uncooperative when attempting to negotiate for rights to oil and gas in order to pool for purposes of any one of its Farmers #4, 5 or 10 wells, the avenue is open to it to apply for a compulsory pooling order. There is nothing in the legislation which suggests that an operator is precluded from having more than one well on an off target spacing unit, but is merely precluded from producing from more than one well at one time within a spacing unit. Therefore, once properly pooled, it would be open to Farmers to produce from its #3 and 4 together, from its #4 and #5 together or it may produce from its #10 alone. Nothing that the tribunal is able to discern prevents Farmers from shutting in one well in order to properly pool according to the licence conditions for another well.

Farmers has everything that it needs to make applications for compulsory pooling for the pooled tracts of its Farmers #4 and Farmers #5. As to whether the step from two pooled off-target spacing unit (Farmers #4 and #5) to one pooled off-target spacing unit for the same lands (Farmers #10) should be complicated, again, the tribunal suggests that the fact that Farmers #10 was even granted licences should have some bearing on the matter.

Real Merits and Substantial Justice

The proposed unit has been laid out, in part, to exclude lands over which Farmers has no rights, particularly those in tracts 7 and 8, which were granted by MNR to Talisman. The tribunal does not find that it has the power to re-write the law of unitization to permit the unitization of such a small area which is unjustified by the technical evidence, namely the absence of any evidence of compartmentalization of very small areas of resource.

The tribunal has considered the meaning of its powers found in section 121 of the **Mining Act** to make its decisions on the real merits and substantial justice of the case. It is quite clear from the **O.G.S.R.A.** that ownership and interest in lands should play no role in the requirement to pool or the desire to unitize all or part of a pool or field. The fact remains, however, that inequality of bargaining power, the nature of the interests in the lands in question and the relative degree of cooperation will make a difference, if not to MNR or the larger

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operator, at the very least to the smaller operator or the owners who have signed on with that smaller operator. Where lands are governed by a pre-existing overriding royalty interest, and that overriding royalty interest owner opposes a unitization despite having, from all appearances[10], obtained for itself almost the exact same thing, should this be a factor in the tribunal's consideration.

The power to make a determination on the real merits and substantial justice of the case is largely found in workers compensation legislation, in Ontario's past and present rent regulation legislation and in the **Mining Act**. While the cases which have gone to the courts essentially say the same thing about this power, perhaps those found in the rent review area say it most eloquently. In **Reference Re Residential Tenancies Act** (1980), 26 O. R. (2d) 609 at 636, the court states:

> The fact that the Commission is instructed to make its decisions on "the real merits and justice of the case" (s. 93) does not, in our opinion, import by implication that the Commission may disregard the law or legal precedent. Nor does it suggest to us that the Commission, in complying with this instruction, is to act in a manner "unlike" a Court. A Court, no less than the Commission, must function within the framework of the applicable law, yet so that "justice according to law" (which here includes the principles developed by the Courts of equity) will be achieved in the particular matters coming before it for decision.
>
> A similar kind of observation can be made, we think, about the argument of counsel for the Attorney General that because the Commission is authorized to make orders in certain situations based on what is "reasonable" or "justified and fair" or what might otherwise be "unfair", it therefore enjoys a very broad mandate to do what it thinks necessary to "set matters right" as between the parties. We are content to remark that none of these terms are unknown or unfamiliar to those who must exercise their responsibilities as Judges of a Court; indeed, almost identical terms are employed to define the powers of Courts and Judges under Part IV of the Landlord and Tenant Act which is still the law in force in Ontario. Neither is a statutory mandate to make such orders as a Court sees fit or proper to make in the circumstances of a particular case, something which is unknown in the laws in force in this Province. The Judicature Act, R.S.O. 1970, c. 228, itself contains many illustrations, including s. 19(1), which authorizes the issue of an injunction in any case where it appears to the Court to be "just and convenient" that such an order be made.
>
> In any event we are satisfied that the Commission's discretion in the matter of the orders which it may make falls well short, in fact and in law, of a discretion to "set matters right". The powers which it may invoke in any described situation

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[10] The tribunal has only had the opportunity to review the file and the Order. Talisman has not been given the opportunity to respond to the questions raised by the tribunal subsequent to the hearing.

> are defined and limited by the legislation, and may be invoked only where the facts of the case fit the described situation. In exercising its powers the Commission must follow procedures established by the Act. If it exceeds its powers, or if it errs in law in the matter of the procedures it follows, an appeal will lie by which its actions will be subject to be reviewed and set aside, if necessary. In this regards its position is not materially different from that of a Court whose actions may be reviewed by a higher Court.

This view is echoed in the case of **581355 Ontario Ltd. v. Tenants of 80 St. Clair Avenue East** (1991), 49 O.A.C. 74 (Div. Ct.) Steele J. states at page 77:

> I do not believe that s. 13(1) of the Act, which gives exclusive jurisdiction to the Board to determine all matters and questions arising under the Act, creates or expands the substantive powers given to it by the Act. Nor do I believe that s. 49(1) of the Act, that provides that every decision of the Board shall be upon the real merits and justice of the case, allows the Board to give itself substantive powers not otherwise set out in the Act…

The tribunal has indicated that the facts of this case more properly support an application for compulsory pooling, to permit production from any appropriate combination of wells 3, 4, 5 and 10. There is no other way that the tribunal can exercise its powers. Again, in recognizing the equities of the case, the tribunal's substantive powers do not extend to rewrite the law "to set matters right" on the facts of this case to allow a unitization to proceed which is not supported by the evidence available. The limits of the tribunal's powers, in this regard, are that, without pre-judging matters, indicate that it would be favourably predisposed to any future application for compulsory pooling involving all of Lot 10, Con I. In this regard, should difficulties continue to be experienced in obtaining such rights as it requires for pooling of its off-target wells, all of the parties are reminded that the issue of whether the tribunal will adopt the pre-existing terms of any agreements between the applicant/operator and interest owners, such as overriding royalty interest owners, is one which has not yet been determined. The tribunal finds that it may be inclined to open this issue on its own motion, should parties be unable to arrive at acceptable terms on their own. Similarly, parties are cautioned that, in an application for compulsory pooling, an interest owner other than the applicant is not precluded from making a case to be appointed the initial unit operator.

Costs

Counsel for all of the parties indicated that they wished to make submissions on costs in this matter. While costs normally follow the cause, they are awarded at the discretion of the tribunal.

The tribunal is faced with the situation where MNR did not show up to voice its objections to the previous **Lowrie** application, but rather chose to put those concerns in writing. The written position was apparently given the weight it deserved by the Deputy Mining and

Lands Commissioner. Ministries of the Crown which do not attend a hearing to make the Crown's case are not helping the decision maker. The impact of MNR's previous actions are felt in the Farmers' application, where it is now faced with strenuous opposition of MNR's heavily mounted campaign in opposition to the proposed unitization of the oil and gas interests in a 100 acre unit.

Nowhere in O. Reg. 245/97 or in the Policy is the acceptable size of a unitization set out. Nowhere in the Policy is any meaning given to the words, "part of" in relation to the field or pool. Nowhere in MNR's evidence has the tribunal been afforded an explanation as to why a 150 acre unitization is acceptable to the MNR, such as occurred in **Gaiswinkler**, to allow the tribunal to adequately distinguish it from a 100 acre unitization. In another unexplained similarity with **Gaiswinkler,** the tribunal has heard nothing to distinguish the fact that Farmers has been issued three licences which it could not produce at the same time unless the area was unitized

As far as the tribunal is able to ascertain, Farmers merely followed what it thought it was entitled to, having given consideration to what had taken place before in other unitization applications. Given that there is no clarification found in the Policy as to why this particular unit would not be acceptable, the tribunal is left to wonder why the MNR is now seeking its costs in Farmers' application. This case has served as a turning point in unitization applications in that the resource management objectives require that unitization of "part of" a field or pool has been found, in the absence of evidence of compartmentalization on a very small scale which suggests multiple pods within a small area, to mean a substantial portion of the field.

In this application, the MNR has successfully persuaded the tribunal that there are overriding, resource management objectives which should govern a unitization application involving such a small area of land. This evidence was not previously presented to the tribunal in person to displace the weight of technical evidence on behalf of an applicant. Given that there have been, to the direct knowledge of the tribunal, several compulsory unitization applications comparable in area which have been allowed, one with the endorsement of the MNR, the Farmers' application represents a change in direction from what has previously been allowed.

Talisman's position in this hearing was from the perspective of protecting its interests an overriding interest holder as well as an interest holder from outside the proposed unit. The latter is an interesting perspective, given that the rights of outside interest holders did not arise in **Wigle** and that MNR was not advised that the proceeding was taking place.

The parties will be asked to advise the tribunal as to whether they wish to make written submissions on costs. The Order if necessary, will set out a time frame for the parties to make initial written submissions and a further time for responses.

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Conclusions

The tribunal finds that unitization is not warranted on the facts of this case. The lack of technical evidence is one factor. The size of the proposed unit is another determinative factor. The fact that earlier unitizations of comparable size have been allowed is unfortunate. Gaiswinkler can be distinguished by the fact that it involved several horizontal wells under the bed of Lake Erie in a relatively isolated portion of the Colchester south pool. **Lowrie** was allowed on the basis that the technical evidence was not refuted and little weight had been given to the policy concerns raised in correspondence from MNR. Talisman's **Wigle** is the most problematic in that it was apparently issued without the knowledge of MNR and apparently without having provided notice to those outside the proposed unit. The most problematic part is not that **Wigle** was issued, but that Talisman opposes the Farmers' application, despite the fact that the tribunal can find no technical reasons to distinguish them.