Ontario

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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. OG 004-01

L.F.G. Carter)
Deputy Mining and Lands Commissioner)

Wednesday, the 12th day of December, 2001.

THE OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

An application under clause 8(1)(b) of the **Oil, Gas and Salt Resources Act,** R.S.O. 1990, c. P. 12, as amended by S.O. 1994, C. 27, S. 131 and 1996, C. 30, S. 56-70, 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, Lowrie Holdings Inc. and Clearbeach Resources 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 6-11-1 Pool";

BETWEEN:

LOWRIE HOLDINGS INC. AND CLEARBEACH RESOURCES INC.
Applicant

-and-

ALL LEASED LANDOWNERS IN THE ROMNEY 6-11-1 POOL, more particularly described in Schedule "A" attached hereto and forming a part of this Order

Respondents
(amended December 12th, 2001)

AND IN THE MATTER OF

All and singular those certain parcels, lots or tracts of land and premises, situated lying and being in the Township of Romney, in the County of Kent, and Province of Ontario, more particularly described in Schedule "B" attached hereto and forming part of this Order.

ORDER FOR COMPULSORY UNITIZATION

WHEREAS a Hearing was held in this matter commencing at 10:00 am on the 25th day of September, 2001 in the Wedgewood Room of the Wheels Inn, at 615 Richmond Street, Chatham, Ontario, with Mr. Christopher A. Lewis, Counsel for the Applicant, having introduced evidence and submissions. No one from the Respondents appeared to oppose the application. Opposition by the Respondents relying upon written submissions prior to the hearing and introduced as various exhibits. The tribunal allowed the presentation of an objection by Mr. Randy J. Robinson, representing Farmer's Oil & Gas Inc., an adjacent land user;

AND WHEREAS the Ministry of Natural Resources has issued drilling permits for two wells, conditional upon the unitization of the Romney 6-11-1 Pool and production ceasing on the first vertical well prior to production from the horizontal drilled well;

AND WHEREAS executed leases for 100 percent of the said lands have been identified and submitted;

AND WHEREAS the tribunal has been advised by Counsel for the Applicant, Mr. Christopher A. Lewis and through verbal notice through Mr. Daniel Pascoe, Registrar, that the Respondents, the Corporation of the Municipality of Chatham-Kent and Her Majesty the Queen in the Right of Ontario as Represented by the Minister of Natural Resources, would not be in attendance nor would they be filing further submissions in opposition of this application for unitization;

AND WHEREAS to promote the conservation of oil, gas and unitized substances, to prevent waste, to ensure the greatest ultimate recovery of unitized substances and to ensure to each of the parties to this Order obtaining his, her or their equitable share of unitized substances produced under and by virtue of the terms of the Unitization Order, it is deemed necessary and desirable to unitize the lands, oil and gas leases, formations and substances hereinafter described;

UPON reading the documentation filed in support of the application and upon hearing the evidence;

1. **THIS TRIBUNAL ORDERS** that the Title of Proceedings be amended to include Clearbeach Resources Inc. within the meaning of "Applicant". **AND FURTHER ORDERS** that the Title of Proceedings be accordingly amended by deleting all words specifically the parties found after "Applicant" and replacing them with the words, "-and- ALL LEASED LANDOWNERS AND LEASE INTEREST HOLDERS IN THE ROMNEY 6-11-1 POOL", more particularly described in Schedule "A" attached hereto and forming part of this Order Respondents.

2. **THIS TRIBUNAL FURTHER ORDERS** that this Order for Unitization will effective on the 1st day of March, 2001.

3. **THIS TRIBUNAL FURTHER ORDERS** that the unit to be known as the Romney 6-11-1 Pool shall be described as all and singular those certain parcels, lots or tracts of land and premises, situated, lying and being in the Township of Romney, in the County of Kent, and

Province of Ontario, more particularly described in Schedule "B" attached hereto and forming part of this Order, being of the Ordivician Age of the Cobourg and Sherman Fall formations of the Mid to Upper section of the Trenton Group, consisting predominantly of grey to brown limestone with interbedded shaly and carbonaceous partings.

4. **THIS TRIBUNAL FURTHER ORDERS** that the unit boundaries, tracts and participating section of the Romney 6-11-1 Pool shall be in accordance with the Plan marked as Schedule "C" attached hereto and forming part of this Order, and **FURTHER ORDERS** that the allocation of each of the Leased Landowners oil and gas interests shall be as set out in the Summary of Tract Allocation, in accordance with Schedule "D" attached hereto and forming part of this Order.

5. **THIS TRIBUNAL FURTHER ORDERS** that the interests of the Applicant, Lowrie Holdings Inc. and Clearbeach Resources Inc., and the interests of the Respondents, described in Schedule "A" attached hereto and forming part of this Order, being all Leased Landowners in the unit known as the Romney 6-11-1 Pool, more particularly described in Schedule "B", attached hereto and forming part of this Order, be and are hereby joined and unitized, for purposes of drilling or operating wells, being for the purposes of oil and gas production.

6. **THIS TRIBUNAL FURTHER ORDERS** that the relationship between the Applicant, Lowrie Holdings Inc. and Clearbeach Resources Inc., and the Respondents, being all Landowners in the Romney 6-11-1 Pool, be regulated in respect of such lands as if each of them had reached agreement on the terms and conditions, as set forth in the Unit Operation Agreement, being Schedule "E", attached hereto and forming part of this Order and attaching to any pre-existing agreement in respect of oil and gas rights in the Romney 6-11-1 Pool accordingly.

7. **THIS TRIBUNAL FURTHER ORDERS** that where conflict occurs between the Unit Operation Agreement and this Order, the terms of the Order shall prevail.

8. **THIS TRIBUNAL FURTHER ORDERS** that the Unit Operating Agreement may be amended by the Applicant, Lowrie Holdings Inc. and Clearbeach Resources Inc., with the agreement of no fewer than that number of Leased Landowners corresponding with 60 (sixty) per cent of the unit area of the Romney 6-11-1 Pool, or , if amended as may be amended from time to time, for the purposes of expanding the size of the unit area through inclusion of additional lands in the vicinity of and abutting the current unit area:

(a) by executing an agreement with the Leased Landowner(s) which conforms with the Unit Operation Agreement attached to this Order as Schedule "E", with the necessary modifications;

(b) by serving on each Leased Landowner a copy of this Order of Compulsory Unitization, with Schedules attached; and

(c) by registering on title on the lands of each of the aforementioned Leased Landowners, or additional, a Unit Amending Agreement along with schedules attached setting out the following information:

(i) a plan of the defined unit area;
(ii) the metes and bounds of the enlarged or reduced unit area; and
(iii) a summary showing the names of the individual Landowners and tract allocation of each party's oil and gas interest within the tract and unit area

9. **THIS TRIBUNAL FURTHER ORDERS** that, in accordance with subsection 15(4)(g) of O. Reg. 245/97, amended by O. Reg. 22/00, the Applicant, Lowrie Holdings Inc. and Clearbeach Resources Inc., is appointed as the Initial Unit Area Operator.

10. **THIS TRIBUNAL FURTHER ORDERS** that the royalty payments to Leased Landowners shall be as set out in Clause (3) of the Unit Operation Agreement, Romney 6-11-1 Pool, and shall be determined on an areal basis, in accordance with Schedule "D" attached to and forming part of this Order.[1]

11. **THIS TRIBUNAL FURTHER ORDERS** that service of the Order will be affected by the tribunal through regular mail delivery to the residences of the Landowners as indicated on Schedule "A" attached to and forming part of this Order.

12. **THIS TRIBUNAL FURTHER ORDERS** that this Order shall be effective until such time as all of the recoverable oil and gas reserves in paying quantities have been produced from the Romney 6-11-1 Pool, and without limiting the generality of the foregoing, continuing as long as the leased substances are produced from the Romney 6-11-1 Pool, as may be enlarged or reduced from time to time, or until such time as all wells located on the aforementioned pool have been abandoned or plugged.

13. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by any party to this application.

14. **THIS TRIBUNAL FURTHER ORDERS** that upon payment of the required fees, Notarized Copies of the Order be filed in the Chatham Land Registry Office, Kent #24, 40 William Street North, Chatham, Ontario N7M 4L2, on lands corresponding to each of the Tracts listed in Schedule "D", attached hereto and forming part of the Order.

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[1] The royalty payments are to be in accordance with Clause 3 of the Unit Operation Agreement, attached as Schedule "E".

15. **THIS TRIBUNAL FURTHER ORDERS** that this Order is binding on the Applicant and the Leased Landowners and their executors, heirs, successors or assigns.

Reasons for this Order are attached

DATED this 12th day of December, 2001.

Original signed by
L.F.G. Carter

Lorne F.G. Carter
Deputy Mining and Lands Commissioner

Ontario

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BETWEEN:

LOWRIE HOLDINGS INC. AND CLEARBEACH RESOURCES INC.
Applicant

-and-

ALL LEASED LANDOWNERS IN THE ROMNEY 6-11-1 POOL, more particularly described in Schedule "A" attached hereto and forming a part of this Order

Respondents
(amended December 12th, 2001)

AND IN THE MATTER OF

All and singular those certain parcels, lots or tracts of land and premises, situated lying and being in the Township of Romney, in the County of Kent, and Province of Ontario, more particularly described in Schedule "B" attached hereto and forming part of this Order.

REASONS

This Matter was heard on Tuesday, September 25th, 2001, in the Wedgewood Room of the Wheels Inn at 615 Richmond Street, Chatham, Ontario.

APPEARANCES:

Christopher A. Lewis	Counsel on behalf of the Applicant, Lowrie Holdings Inc. and Clearbeach Resources Inc.

No one attended on behalf of the Respondent(s)

Randy J. Robinson	presented on behalf of an adjacent land user, Farmers Gas & Oil Inc.

PRELIMINARY/PROCEDURAL MATTERS:

Mr. Lewis pointed out that in conversation with the two Respondent parties, the Ministry Of Natural Resources and the Corporation of the Municipality of Chatham-Kent, prior to the hearing date indicated they would not be appearing before this hearing. This confirmed pre-hearing conversations relayed to the tribunal, by Mr. Daniel Pascoe, Registrar, from the two Respondent parties.

Mr. Robinson, agent for an adjacent property owner, Farmers Gas & Oil Inc., had submitted a request to the Mining and Lands Commissioner by letter on September 20th, 2001 and September 24th, 2001 for the opportunity to make a verbal presentation on September 25th, 2001 at the hearing concerning their adjacent lands.

Mr. Lewis, also filed as Exhibit 12 executed confirmations of consent to a Unit Operation Agreement from the Working Interest parties; U.S. Energy Development Corporation, NRG Corporation, Clearbeach Resources Inc., Crich Buildings & Holdings Inc., Van Boekel Holdings Inc., Roger and Gloria Quenneville, Yellow Creek Farms Ltd. and Brookwood Resources Inc., all with Lowrie Holdings Inc., Mr. Lewis also filed signed confirmations of consent to a Unit Operation Agreement from the Gross Overriding Royalty Agreement parties; Brookwood Resources Inc. and Brett holdings Inc., all with Lowrie Holdings Inc. which have all been completed prior to the hearing date. The letter consent forms were dated May 28th, 2001 and the dates of signed consent ranged from May 28th, 2001 through to September 24th, 2001.

Subsequent to providing submissions and evidence for the application, Mr. Lewis filed accounting dockets and a motion claiming Counsel's costs and those of the expert witness panel for $24,660 from the Respondents.

SERVICE (Hearing):

Mr. C. Lewis provided an affidavit of service (Ex. 8) declaring that a copy of the Application for Unitization was served on the Respondents as follows:

1. On the Respondent, Her Majesty the Queen In Right of Ontario as Represented by the Minister of Natural Resources via courier on June 8th, 2001,
2. On the Respondent, the Corporation of the Municipality of Chatham-Kent via courier on June 26th, 2001,
3. On the Respondent, U.S. Energy Development Corporation via prepaid first class mail on June 8th, 2001.
4. General notice of the Hearing published in the Chatham Daily News on September 1st, 2001 for those with an interest in said lands.

The latter item (4.) served as a reminder to all of the Leased Landowners previously served with the Unitization Agreement leading up to June 2001, thirteen, of which, have signed in agreement with the proposed unitization.

To assist the Leased Landowners in this matter; the tribunal arranged to have a copy of the application to be available for viewing locally, prior to the hearing, with the Clerk/Director of Land Services of the Corporation of the Municipality of Chatham-Kent at the Civic Centre, located at 315 King St. West, Chatham, Ontario and with the Petroleum Resources Centre, Ministry of Natural Resources located at 659 Exeter Road, in London, Ontario. This was set out in the newspaper notice, noted above, conveying the additional option to contact the Office of the Mining and Lands Commissioner or Counsel for the applicant.

BACKGROUND:

Lowrie Holdings Inc. and ClearBeach Resources Inc. are Ontario companies having oil and gas interests in the Province. They have been in operation for twenty years with thirteen wells currently operating under the regulations of the Ministry of Natural Resources in Ontario. A Licence (No. 8393) to drill the well, "Forbes et al Romney 6-11-1", from the N.W. corner at the coordinates 898.2 metres S. and 110 metres E. within Lot 11, Concession I, of Romney Township, Kent County, Ontario was granted on January 26th, 1996 by the Ministry of Natural Resources. The vertical well was to have a bottom hole not to exceed 940 metres. A Licence (No. 9468) to drill the well, "Forbes (Horiz.#1) Romney 6-11-1", from the N.W. corner at the coordinates 748.60 metres S. and 202.00 metres E. within Lot 11, Concession I, of Romney Township, Kent County, Ontario was granted March 28th, 2000 by the Ministry of Natural Resources. The horizontal well was to have a bottom hole not exceeding 1244 metres, at a latitude of 42 degrees, 06', 15.336" N. and longitude of 82 degrees, 24', 59.270"W. out under Lake Erie.

The vertical well [Forbes et al Romney 6-11-1] was reported to be in a producing state in April 1996 and currently it is capable of producing approximately 25 barrels per day [60,166

barrels to date]. The horizontal well, under Lake Erie [Forbes (Horiz #1) Romney 6-11-1] was reported to be in a producing state from October 2000 with production capacity (initially 600 barrels per day) currently at 120 barrel per day.

The horizontal well #9468 has a restrictive condition affecting production from the vertical well #8393. The condition, placed by the Ministry of Natural Resources, calls for "No production of oil and gas from this well until production from the Forbes et al Romney 6-11-1 well (Licence 8393) has been discontinued". Upon spudding the horizontal well, the company sought remedy from the restrictive condition, placed by the Minister, requiring the closing of the vertical well before production from the horizontal well could commence. In a May 4th, 2000 letter the Applicant applied for permission to produce from both the vertical and horizontal wells on an alternating basis. The Ministry of Natural Resources responded to the request through their Inspection Order 2000-RR-02 on May 9th, 2000 denying the request to produce from both wells within the same spacing unit to be unacceptable as it violated clause 8(3)(c) of the O. Reg. 245/97, amended to O. Reg. 22/00.

The Order of denial further ordered the Applicant to submit a report in accordance with the Provincial Standards section 6.11 by May 31st, 2000, for the vertical well, to plug one of the wells by no later than 120 days from the TD date[1] [October 11th, 2000] of the horizontal well and cease production from the vertical well during the production test period of the horizontal well. The Applicant subsequently appealed the inspection order issued under section 7.0.2 of the **Act**. The Minister's Designate, Mr. E. Habib, heard the appeal on June 9th, 2000 and he stated in his decision[2]:

> Decision
>
> In the absence of a Ministry approved unitization, the Ministry has no option but to seek compliance with subsection 8. 3(c) of O. Reg. 245/97 under the **Act**. Therefore, it is my decision to uphold the Inspector's Order.
>
> Section 8.3 of O. Reg. 245/97 as amended under the **Act** allows drilling of more than one well in a single spacing unit, but limits the production to only one well. The Ministry has allowed operators the option of having more than one well within a single pooled spacing unit with the opportunity to conduct relevant tests to decide which well is better suited for production. In these situations operators are required to select one well for on-going production and to plug the other well.
>
> In most cases, operators opt to unitize more than one pooled spacing unit. The unitization agreement is presented to the Ministry together with supporting documents. If the Ministry is satisfied with the unitization agreement, including the delineation of the pool and protection of correlative rights, the relevant spacing order is either amended or revoked and section 8.3 of the **Act** no longer applies to the unitized area...
>
> The Operator continues to have the option of unitizing the area in question either voluntarily or by application to the Mining and Lands Commissioner.

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[1] **Ontario Regulation 245/97, amended to O. Reg. 22/00**; Defintions 1. , "TD date" means the date when the drilling of a well reaches the total depth of the well;

[2] Notice of Decision (Ref. Inspection Order # 2000-RR-02), unreported, June 28th, 2000, pages 1&2, by E. Habib A/Manager, Oil, Gas and Salt Resources Centre, Ministry of Natural Resources, London, Ontario.

In summary, the appeal upheld the inspection order to plug the vertical well before proceeding further.

The applicant, by letter (December 29th, 2000) requested a deadline extension of the well plugging order and asked for a spacing unit change. The Ministry responded in the negative. In his January 9th, 2000 letter, Mr. R. Rybansky, Chief Engineer, Petroleum Resources Centre stated (Para. 2);

> Given the circumstances of the U.S. Energy lawsuit any change to the existing spacing order may prejudice, the Ministry's position in this case and potentially affect other interests in this field. Therefore, at the present time, the Ministry will not entertain changes to the existing spacing order. However, Clearwood Resources Inc. may apply for an order to unitize the pool or field to the Mining and Lands Commissioner. Unitization orders of the Commissioner prevail over the Minister's spacing orders. Should you file an application to the Commissioner for unitization or require some additional time to plug one of the subject wells the Ministry will consider extending the time required to comply with the plugging requirements of Inspection Order 2000-RR-02.

On February 16th, 2001 Lowrie Holdings Inc. filed an application for voluntary unitization of the 100 acre area, for agreement by the Ministry of Natural Resources as per O. Reg. 245/97, subsection 8(4) of the amending O. Reg. 22/00. Support material for the voluntary unitization included thirteen executed unitization agreements and noted two outstanding parties. The Ministry did not agree to the proposed voluntary unitization, which was outlined in a letter (March 21st, 2001) from Ms. Helen Wright, Crown Lands Administrator [Exh. 1, TAB 10].

The Applicant then proceeded to file an application for the compulsory unitization of the subject lands with the Office of the Mining and Lands Commissioner.

This application is brought pursuant to clause 8(1)(b) of the **Act** for an order joining the various interests within a field or pool for the purposes of drilling or operating wells, the designation of management, and the apportioning of the costs and benefits of such drilling or operations. O. Reg. 245/97, amended to O. Reg. 22/00 at subsection 15 spells out the course the application should take.

The Appointment for Hearing identifies the Respondents of the Second Part as the Corporation of the Municipality of Chatham-Kent and the Ministry of Natural Resources as opposing the application. The application names the unit area proposed as the "Romney 6-11-1 Pool".

ISSUES:

1. Can the purpose of the **Oil, Gas and Salt Resources Act** be ascertained?

2. What criterion is used in advancing notice of the hearing? Who is required to be notified?

3. Is an Order justified if a hearing is attended by only a portion of the parties to the application?

4. Is an order for unitization justified under the circumstances of this application? Namely, that the Ministry of Natural Resources has a condition on one well license to close another prior to producing from that well. Also, this application may jeopardize their position to regulate the number of wells in a spacing unit under subsection 8(3) of O. Reg. 245/97, amended by O. Reg. 22/00.

5. Should the application be granted, what is the effect of the Unit Operation Agreement proposed in relation to the terms set out in the various leases of the Leased Landowners?

6. If granted, what should the effective date and term of the ordered compulsory unitization be?

7. Is there a significant difference in the terms "producing from" and "in paying quantities"?

8. Is the tribunal in a position to award and assess costs related to the hearing process?

EVIDENCE (by sworn expert witnesses for the Applicant)

Mr. C. Lewis, counsel for the Applicant, introduced the expert witness panel; Ms. Kathy McConnell, Mr. Philip Walsh and Mr. Joseph E. Gorman for the record and submitted their **curriculum vitae** to the tribunal. They were sworn and their **curriculum vitae** presented as Exhibits 11(a), (b) and (c) respectively before the Tribunal.

Ms. Kathy McConnell was accepted as an expert in well site geology operations, based on her education (Hons. B.A. in Geology) and sixteen years work experience in the petroleum industry. She notably has served as Petroleum Inspector for the M.N.R. (7 years) and currently operates as a consultant for well-site geology operations. She is a recognized examiner (Classes 1,2,3 &4) under the **Oil, Gas and Salt Resources Act**.

Ms. McConnell was prompted to give evidence on land matters relating to the application [Exh.1]. She pointed out that the purpose was to unitize the west half of Lot 11, Concession 1 within the Municipality of Chatham-Kent, for the purpose of joining the oil and gas interests of the Trent formation (Romney 6-11-1 Pool). Further she noted, the applicant has two wells operating within the formation known as; Forbes et al Romney 6-11-1 (vertical well) and Forbes (Horiz.#1) Romney 6-11-1 (horizontal well). Data shows that the vertical well, completed in April 1996, has produced 60,000 barrels of oil to date and is currently capable of producing at an average rate of 25 barrels per day. Further, the horizontal well, completed in October 2000, has

produced as high as 600 barrels per day and currently averages 120 barrels per day.

Prompted further, Ms. McConnell noted that the spacing units for both wells consisted of 50 acres each being (spacing order 670/94), in the southern half of the proposed unit area. She pointed out that each well was drilled on target within the respective spacing unit. Responding further, she noted the horizontal well has a condition on this licence [Exh. 1, TAB 3] which reads:

> 2. No production of oil or gas from this well until production from the Forbes et al Romney 6-11-1 well (Licence No. 8393) has been discontinued.

Ms. McConnell pointed out that the Applicant made specific efforts to over come the condition to allow drilling/production to proceed. Initially a letter (May 9th, 2000) was sent to the Ministry [Exh. 1, TAB 5] outlining an alternating production schedule from both the vertical well and the horizontal well which, in their judgement, was an optimal method of draining the wells and in compliance with subsection 8(3) of **O. Reg. 245/97**;

> 8(3) No person shall,
>
> ...
>
> (c) produce oil or gas from more than one well in a spacing unit.

Ms. McConnell prompted by Counsel added, the alternating production method from both wells, applied for in the May 4, 2000 letter, was partly to gain more information about the nature of the reservoir to optimally drain the reservoir. The Ministry's response to the request was to refuse the proposal and issue an Inspection Order (2000-RR02). The Inspection Order dated May 9th, 2000 [Exh. 1, TAB6], at paragraph (b), stated; "plug one of the wells no later than 120 days from the TD date[3] of the Forbes (Horiz. #1), Romney 6-11-1 well".

Ms. McConnell stated, an appeal of the inspection order was made to the Manager, Mr. Ernie Habib and his decision [Exh. 1, TAB 7] was to uphold the order. She noted on page two of Mr. Habib's decision his direction: "The Operator continues to have the option of unitizing the area in question either voluntarily or by application to the Mining and Lands Commissioner", and in reference to the paragraph text previous, it was understood he was telling the Applicant that if unitization was applied for the spacing order would be amended or revoked and the subsection 8(3) [O. Reg. 22/00], which allows for production from only one well per spacing unit would no longer apply to the proposed unit area. Faced with the facts of the inspection order a request was filed with the Ministry of Natural Resources for an extension of the well plugging date but, the extension was refused [letter - Exh. 1, TAB 8]. She noted that in the letter Mr. R. Rybansky at paragraph two stated: "However, Clearwood Resources Inc. may apply for an order to unitize the pool or field to the Mining and Lands Commissioner. Unitization orders of the Commissioner prevail over Minister's spacing orders. Should you file an application to the Commissioner for unitization or

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[3] Ibidem

require some additional time to plug one of the subject wells the Ministry will consider extending the time required to comply with the plugging requirement of Inspection Order 2000-RR-02".

Ms. McConnell, prompted by Counsel, outlined that the Applicant proceeded to voluntarily unitize the west half of Lot 11 Concession 1 through notice and documentation. For the record, she noted that they were successful in signing all the landowners into a unitization agreement [Exh. 1, TAB 9] except the Corporation of the Municipality of Chatham-Kent and the Ministry of Natural Resources. Ms. McConnell referred to the Ministry's refusal letter [Exh. 1, TAB 10] for voluntary unitization, from Helen Wright Crown Lands Administrator to Clearbeach Resources Inc., and read;

> Re: Proposed Unit Operation Agreement Romney 6-11-1 Pool
>
> Regarding your letter of February 16,2001, the Ministry does not approve of the proposed unit. Approval to unitize Crown lands in the proposed unit is not granted.

Ms. McConnell noted the next step taken was a meeting between the Applicant and the Ministry to present geological and geophysical evidence. She concluded that the Applicant was informed at that time that the Ministry did not approve of the unitization because, in their opinion, the proposed unit was inadequate and did not protect the correlative rights of the surrounding landowners. She noted that it was the Applicant's opinion that the Ministry did not provide technical reasoning for the refusal.

Ms. McConnell directed attention to the proposed unit area plan [Exh. 1, TAB 11] and briefly described the participating, non-participating and well locations. She continued that, the division of royalties paid out is based on the amount of acreage a landowner has in the participating section. She indicated that fifteen landowners [Exh. 1, TAB 12] were identified, with thirteen providing their consent to unitize [Exh. 12]. She noted that the landowners will receive a calculated percentage of the 12.50 percent royalty allowable (original leases) with respect to their participating acreage.

Referring to the listings [Exh. 1, TAB 12], Ms. McConnell outlined the names and percentages of gross production owned by current lessors, gross overriding royalty owners, and the working interest owners. She added that the two mortgagees named do not have a direct ownership and only upon default by the lessors of their respective obligations would they assume a position in the agreements. She stated that all fifteen landowner lease agreements have been executed [Exh. 13] in favour of the Applicant.

Ms. McConnell introduced to the tribunal a revised version of the unit operation agreement [Exhibit 6(a)] pointing out that the parties to the Second Part will be Lowrie Holdings Inc. and Clearbeach Resources Inc. is to be added. She outlined a multitude of housekeeping changes throughout the document which had been prompted by a review of the Gaiswinkler decision[4] and

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[4] December 3rd, 1999, Mining and Lands Commissioner file OG 003-98, (unreported)

their due diligence to perfect the document. She noted two basic differences from the previous decision; a payment of $10.00 per acre used in the calculation of minimum royalty payments and the non-participating acreage payments and a payment of $500.00 per well, per year to the landowner whose property has the well or wells on it.

Ms. McConnell stated that Lowrie Holding Inc. (Jane Lowrie, Manager) and its predecessor companies have been in the industry in excess of twenty years and operate 15 wells in Ontario, 13 of which are bonded with the Ministry of Natural Resources. Concluding, she noted that Lowrie Holdings Inc. has the right to act on behalf of all the other working interest owners through signed Capital Agreements.

Ms. McConnell responding to the Robinson's letter of September 24th, 2001 [Exh. 9] noted Mr. Robinson's contention that, "...there is no technical data presented by the applicant that the vertical well 6-11-1, is on target within the proposed unit boundary" and "the map in Exhibit 1, Tab 11 shows the location of the...vertical well to be outside the legal target area", she directed the tribunal to Exhibit 1, TAB 2 and the survey map (Brisco and O'Rourke Ltd. - Construction and Technical Surveyors) showing the well location 110 meters within the east line of the boundaries proposed. Ms. McConnell concluded that the vertical well is on target under the spacing regulation requirements and the survey information at Tab 2.

Ms. McConnell, working through Mr. Robinson's letter (September 24th, 2001), responded to items 4 & 7 concerning the accuracy of the downhole location of the vertical well. She pointed out that the drilling was completed with a cable tool rig, a percussion method, which relies on gravity for direction thus producing a relatively straight hole downward and not requiring a deviation survey for the Ministry similar to a rotary drill process. Ms. McConnell's contentions were supported by Mr. P. Walsh, a panel member, who responded that through experience with this type of drilling, in a dozen or so cases, it is only a matter of one or two feet deviation if that and the target hole is at least 50 feet in from the edge of the tract and professionally speaking there was no way this well was off target.

Ms. McConnell directed attention to an October 31, 1996 memorandum from the Ministry of Natural Resources (R.M. Rybansky) to Farmers Oil & Gas Inc. [within Exh. 9] and read: "When disputes or doubts arise as to the actual down hole location of a particular pay zone relative to target area, the Minister may exercise its authority under s. 28, Regulation 915 to direct an operator to conduct additional down hole deviation surveys or other such tests to determine the matter". She responded that Lowrie Holdings Inc. has not been questioned by the Ministry of Natural Resources for its practices until October 2000 when this spacing issue was raised and no down hole tests have been ordered by the Ministry.

Ms. McConnell, prompted by Counsel, pointed in response to the Ministry's objection to this unitization [Exh. 2] and she noted the similarity of this application through Exhibit 3 where three other operators with unitization orders in place at present produced from both horizontal and vertical wells in a pre-existing spacing unit. The area size in these cases, she pointed

out, ranged from 150 acres to 200 acres each in area, as approved by the Ministry of Natural Resources.

Ms. McConnell, in conclusion pointed out that the two well concept proposed will provide the optimal benefit for all parties in the unit operation agreement and will not be wasteful or oppose conservation principles. She pointed out that the method of Landowner sharing will be on a royalty schedule basis and those working interests will receive their portion of the gross production as outlined [Exh. 1, TAB 12]. Reflecting further she pointed out that all landowners except Yellow Creek Farms Ltd. will effectively receive increases in their remuneration.

Mr. Philip Walsh was accepted as an expert witness in well site locations (geological and geographical interpretation), based on his education (B.Sc. in Geological Sciences, M.B.A. in strategic marketing and current Ph.D. studies in strategic marketing in a deregulated natural gas marketplace) and over twenty years experience in the petroleum industry. He has served in various capacities from Explorationist, Staff Geologist and other oil and gas management positions. Currently he maintains a consulting practice in the oil and gas industry and has served as an expert witness in regulatory and legal matters for corporate and government clientele. Mr. Walsh is recognized as a Registered Professional Geologist (Alberta) and a member of the Association of Geoscientists of Ontario

Mr. Walsh, prompted by Counsel for the Applicant, outlined that his firm was retained to evaluate and recommend an appropriate unit area for the Forbes et al Romney 6-11-1 well (vertical) and the Forbes (Horiz.#1)Romney 6-11-1 well. He pointed out that the written report was filed as Exhibit 1, TAB 17.

Mr. Walsh referenced the report stating that the research was done on specific well information from the Applicant, the Ministry of Natural Resources - Petroleum Resources Section and the public access data available relating to wells in the adjacent area. He referred to figure 1 of the report [Exh. 1, TAB 17] noting that it was an interpretation of various fault lineaments and that a fault is a structural deformation of the rock. He stated that figure 4 was a cross-section view of the fault including the wells associated with this application. He continued that it was their determination that the two wells in question are geologically distinct from each other. He noted that it was his experience (in Ontario) that the pools of this nature have highly complex geology. He stated further that it was characteristic of regional fault trends and within the fault itself complex faulting occurs further which attributes to a series of different reservoirs developing adjacent to the faults. He concluded that in comparison with the adjacent property wells, such as, Farmers oil and gas wells #3, #5 and #10 that there is a different structure in each of these wells which indicates they are separate and distinct geologically from the wells in this application.

Mr. Walsh outlined the participating and non-participating areas within the unit area defined in the diagrams [Exh. 1, TAB 17] and pointed out that between the two wells there is a structural difference which interprets a fault running between them. He noted, that it certainly appears geologically that the wells are separate and distinct, but still contained within the area

determined geographically as the Romney 6-11-1 pool, yet are two separate reservoirs.

Mr. Walsh referred to Figure 4 [Exh. 1, TAB 17] and noted based on the scale bar illustrated there that the Farmer's well is about 0.50 kilometers from the Romney 6-11-1 vertical well and from the filed report at page 5, para. 2, read:

> The lack of current pressure data for the Consumers et al 34340 7-10-1 and Farmers #3 Romney 2-10-1 wells does not allow for a determination of pressure communication but given the structural inconsistencies and the distances involved, it is highly unlikely that there is any effective communication between these wells and the 6-11-1 pools.

Mr. Walsh added that in the report the model is described at length concerning the reservoirs, recognizing the permeability and the porosity associated with the reservoirs which are directly related to the fault patterns and the faulting that takes place there. He stated, the interpretation of the reservoir is biased as to what is known and in this case there is faulting at the north and south end, with a linear fault running between them and the reservoir associated with the vertical well is deemed to be more related to the extent of the fault running in a north/south direction. He noted, it is not inconsistent for reservoirs such as this to be narrow and the horizontal well could be approximately 40 to 50 metres from the vertical well bore and yet not in communication. He drew the conclusion that, in light of this, it is unlikely that there would be communication from 107 metres or possibly 0.5 kilometres away. In support of the statements above he stated, when determining unitization matters reliance is based on the evidence at hand and if additional information from adjacent drilling operations proves pressure communications the option exists to expand the unit at that time.

Mr. Walsh summarized his evidence stating that the vertical and horizontal wells are distinct and are separated by a fault. In his opinion, the two wells are also separate and distinct from any surrounding area wells. He continued that to produce only from one well leaves resources untouched in the ground. He concluded that unitization constitutes the efficient and effective exploration of reserves. Producing from both wells, each with its own reservoir, is a prudent conservation method. Further, on the subject of the royalty payment scheme proposed, Mr. Walsh agreed that it was consistent with the industry in that it relates to the interests of both the working partners and the royalty interest owners.

Mr. Joseph E. Gorman was accepted as an expert witness in reservoir engineering (geological and geographical interpretation), based on education credentials (B. Eng. Civil) and professional qualifications (P. Eng. in Ontario and Newfoundland, Class I, II, IV & V Inspector), as well as, over twenty years of experience in the petroleum industry. He has served in capacities such as,; Production Engineer, Senior Reservoir Operations Engineer, Petroleum Engineering Consultant and Manager, Gas Supply Operations. Currently he operates a consulting practice in oil and gas well designs, storage projects and reserve evaluation matters. Mr. Gorman is recognized by the Professional Engineers in Ontario and Newfoundland, the Society of Professional Engineers and the Ontario Petroleum Institute.

Mr. Gorman, prompted by Counsel for the Applicant, outlined his role in producing the report [Exh. 1, TAB 17] which included pressure and well communications testing. He reflected that the reservoir pressures of the two wells tested quite different based on surface pressure measurements and determining the weight of the fluids and gases in the well bore. The results showed the vertical well pressure was significantly lower. Further an extreme approach of pressure estimates was adopted to eliminate some of the unknowns and errors in calculating. The results still showed a definite difference between the wells, which indicates that each produces from separate reservoirs.

Mr. Gorman added, the data available on the wells outside the proposed unit area was limited and of no use in the performed study.

Mr. Gorman concluded that his view mirrored Mr. Walsh in that if there are two separate reservoirs or two pockets that are not in communication it makes sense to fully exploit the resources in the area with production from the two wells.

Presentation by adjacent land owner/user

Mr. Randy J. Robinson, the owner of adjacent lands, was accepted by the tribunal, with the concurrence of Counsel for the Applicant, to provide relevant input and speak specifically to this application for unitization. The tribunal reminded Mr. Robinson that he did not have a direct party interest in the application.

Mr. Robinson introduced himself as a neighbouring oil and gas producer (Farmer's Oil & Gas Inc.) with concerns for this unitization application. First, on the subject of notice he pointed out that he had been made aware of the hearing only through conversation with an acquaintance and he felt a wider geographic area should have received the notice. He suggested that the Wheatley, Ontario newspaper would have been a good choice for giving notice in this matter.

On the subject of notice, Mr. Robinson, in reference to a decision by the Commissioner entitled Gaiswinkler[5] read from page 18, para.1;

> It is noted that the process requires a hearing whereby the evidence of the applicant, those leased and unleased landowners, working interest operators and potentially affected landowners outside the proposed unit will be heard

Further he stated, it seems the process should include people who have an interest and live outside the proposed unit area. He did agree that notification of proceedings by newspaper advertising is an acceptable means however, the newspapers used should be one of circulation in the geographic area. In his opinion the use of the Chatham Daily News was not sufficient in this case.

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[5] Ibidem

Mr. Robinson noted conversations and correspondence with Mr. Lewis, Counsel for the Applicant and Mr. Pascoe of the Office of the Mining and Lands Commissioner, concerning the issues of correlative rights and the lack of technical data. Those concerns prompted the letter of September 20th, 2001 [Exh. 9]. On the matter of correlative rights he stated that there have to be reasonable expectations that these rights will be protected by the planners and developers of specific units. He noted the same concerns were raised in the Ministry's letters [Exh. 2 and 5] as to correlative rights.

Mr. Robinson introduced Exhibits #7, #9 and #10, which were accepted by the tribunal and Counsel for the Applicant. He stated that, in his opinion, there is no technical evidence that the vertical well in the 6-11-1 pool is within the targeted area or that it meets the legal set back requirement under the regulation. Mr. Robinson stated, in his opinion, that in the absence of technical evidence it is uncertain as to whether the well (vertical well) qualifies to be part of the unified unit. He offered that there are tests that can alleviate these concerns and the materials submitted do not show that type of test has been performed on the vertical well.

Mr. Robinson in reference to the maps [Exh. 10] pointed out the location of Farmers wells numbered 3 (top left), 5 and 10 in relation to the subject unitization area proposed. He noted that well number 3 was producing but numbers 5 and 10 are restricted from production at present. He reflected that unitization will allow for more than one well to produce in the area which opposes spacing requirements as set out in the regulations. It was his contention that Farmers #5 and #10 wells in the Romney field may be the same pool and that both the horizontal and the vertical wells could be draining off the Farmers pool area. He questioned the applicant's confidence that the wells will not drain other areas, indicating that the materials show pool draining 1,000 feet to the north and south but not areas 300/400 feet to the left (east). Mr. Robinson concluded, voicing his concern with the vagueness of words used by the industry such as: spacing units and unitization. In his estimation, the words and phrases are "plastic language" and in reality they can be called anything. In his interpretation a "unitized unit" gives the operator nothing more than the right to produce from wells within the unit area. He suggested that in the future the Ministry of Natural Resources and the Mining and Lands Commissioner could explain differences that affect operators and provide an understanding of the words used.

Mr. Robinson was invited to ask questions of the expert witnesses panel, through the tribunal, for clarification of evidence in the application. Mr. Robinson, by way of clarification stated that he was not challenging the boundaries of the pool or an interpretation of the information given in evidence and the words the expert witnesses used such as; interpreted the information to be, it appears separate or distinct and its highly unlikely, are probably the best given the uncertainty of this type of information. He stated that the reservoirs are tricky to define and they appear to be broken formations like shattered pieces of glass with communication from great distances and no communication from short distances. He reflected that it is probably a great unknown and may be like that for some time to come. He concluded that there is no evidence to extend the pool beyond the proposed boundaries and that is acceptable.

Mr. Robinson, reflecting on the evidence given by Mr. Gorman, noted that both wells are required to maximize the production of the reservoirs and added that perhaps more wells in the area could produce more resources from the isolated pockets found there. He further stated that producers and maybe operators should be given the leeway or the choice, based on the economic and technical information, to have as many wells within the spacing unit deemed practical, providing for the ultimate production of the resource.

Mr. Robinson queried Mr. Gorman as to what was meant by the term "conservation of resources". In response, Mr. Gorman noted that it was two-pronged; to maximize the amount that is taken from underground and the proper manner the resources are to be dealt with once in the possession of the well operator. He stated that for example, if a well is drilled into a reservoir to produce oil and there is a significant gas cap topping the oil and if production of the oil is started as soon as it is found without drilling deeper, this could be considered to have complete disregard for the long term performance from the reservoir. Secondly the mix of gas/oil ratio, in this example, would be high with depletion of the resource or energy in a premature fashion. In the alternative, he continued, a good conservation practice would be to drill deeper into the oil pool so that recovery is more efficient.

Mr. Robinson questioned whether the evidence about the bottom holes of the wells was accurate. Ms. McConnell fielded the question and pointed out that both wells from the tests and drill samples obtained indicated the bottom holes to be accurate as submitted in the application.

Mr. Robinson, in summation pointed out that from Farmers Oil & Gas Ltd.'s point of view, their adjoining lands near the vertical well are being drained by the well and the operator is being allowed to do so under the rules of capture which allow an operator to pull resources from under neighbouring lands. He stated in agreement that it was difficult to determine where the reservoirs were located. He offered the solution that the tribunal approve the unitization only based on specific and absolute evidence that the vertical well down hole location is accurate, and only then allow the well to come into production. Mr. Robinson offered to meet this condition with the cooperation of Farmers Oil & Gas Inc. and their sharing the costs to check the down hole locations.

Submissions by Mr. Chris Lewis

Mr. Lewis submitted that this application for unitization under clause 8(1)(b) of the **Oil, Gas and Salt Resources Act** should be granted. The proposed unitization will enable production from two existing vertical and horizontal wells, located in the west half of Lot 11. This process of Unitization was encouraged by the Ministry of Natural Resources in their correspondence to the Applicant on June 28th, 2000 [Exh. 1, Tab 7] and again January 9, 2001 [Exh. 1, Tab 8].

He added, the purpose of unitization is three-fold in that it promotes; the conservation of oil, gas and unitized substances so as to prevent waste, ensures the ultimate recovery of the unitized substances and ensures that each party interest to the order obtains their equitable share of the unitized substances produced. An order for unitization will make this possible. The general

intent of unitization here can be found in the Commissioner's Gaiswinkler decision[6] at para.1, page 17 where it reads:

> It is noted, with respect to both pooling and unitization, that the underlying reasons for creating this legislation scheme is to enhance the resource recovery, protect the correlative rights of the various landowners involved and ensure conservation of the resource through prevention of wasteful extraction processes.

This application is consistent with the unitization decision noted.

Mr. Lewis, on the subject of conservation, stated; Messrs. Walsh and Gorman in their professional opinions gave evidence that production from both wells will comply and there is no suggestion of waste. Further they indicated that the wells drain two distinctly separate pools and production from both wells is the optimal draining method achievable for the reservoir.

He further submitted that the resource potential indications are encouraging with one well producing at 25 barrels per day (currently shut-in) and the horizontal well currently producing at approximately 125 barrels per day. He stated further, both of these wells should be producing but, licence conditions at present will not allow production from both wells. He submitted, the unitization order sought here will override the conditions and allow both wells to produce the resource to its fullest.

Mr. Lewis stated that the agreement is equitable providing the working interests fair share in production simply through more production with two wells. Further the gross over-riding royalty interests will continue to share in the same manner as before the order. The landowners will share equitably in royalties received for their acreage with only a slight change. Yellowcreek Farm Ltd. will be slightly reduced and its share will be redistributed fairly to the other landowners. However, there will be increased production from both wells which will mean more royalties to distribute.

Mr. Lewis submitted that unitization is to be supported by public conservation bodies and in support of this he quoted Ballem's book[7] , at page 185;

> It is impossible to say anything against the principle of unitization. It undoubtedly receives better operating procedures, enhances recovery, and implements good conservation practices, all at a reduced cost. It is not surprising, therefore, to find that unitization is encouraged by public conservation bodies.

Mr. Lewis submitted, the application for unitization of the Romney 6-11-1 Pool is based appropriately on the geological, geophysical and engineering evidence filed in a report by

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[6] Ibidem

[7] Ballem, John Bishop, The Oil And Gas Lease in Canada, 2nd Ed., (Toronto: University of Toronto Press, 1985).

Messrs. Walsh and Gorman [Exh.1, TAB 17] which endorses unitization of the subject lands.

Mr. Lewis noted that Mr. Robinson was not challenging the proposed unit area. In response to Mr. Robinson's questions he stated, the report by Walsh and Gorman [Exh. 1, TAB 17] describes the wells as not communicating with any other well in the vicinity and each well is producing from distinctly separate reservoirs from within the pool. He referred to Mr. Walsh's evidence [Exh. 1, TAB 17, page 5], recorded at page 11 herein, and noted that from Mr. Walsh's statements that faulting separates this pool north/south from other formations in the area and that the survey lines are in keeping with the area boundaries purposed.

Mr. Lewis referred to the revised unit operation agreement [Exh. 6] and the changes noted earlier by Ms. McConnell from that of the pre-hearing draft. He noted that all of the lessors have signed on for the unit area agreement with the embodied payment provision except the Corporation of the Municipality of Chatham/Kent and the Ministry of Natural Resources. Further he submitted, all working interests and gross over-riding royalty participants have consented [Exh. 12] to the unitization and the relationship is based on CAPL[8] operating agreements between, Lowrie Holdings Inc. and Clearbeach Resources Inc. He further submitted and proposed that Lowrie Holdings Inc. and Clearbeach Resources Inc. be named the initial unit operator effective March 1st, 2001.

Mr. Lewis submitted that the order should be for a duration as long as payments under Clause 3 of the proposed unit operation agreement are made or tendered. He noted the suggested duration wording was a deviation from the Gaiswinkler[9] decision in that; duration was for as long as substances are produced in paying quantities from the unit with no stoppages in production of more than 90 days. He noted that the reasoning was to remain consistent with the unit operation agreement. He felt that the duration wording of the Gaiswinkler decision was inconsistent with the lease agreement and shut-in well provisions of the leases and could allow a delay type rental payment to be made if wells are shut-in. Further, there could be some undue hardships placed on the operators with stoppages in excess of 90 days, halting the unit production, and there may be technical problems beyond the control of the operator which could also bring the unitization order to an end.

Mr. Lewis submitted that the changes by way of the revised agreement [Exh. 6] is an attempt to parallel the order and the unit operation agreement regarding duration and he read from section 3), paragraph 2, page 3:

> And as long as the payments in this clause provided are made or tendered, the Leased Substances shall be deemed to be produced from and operations for the recovery of same shall be deemed to be conducted by the Lessee on the said Lands under the said Lease, and

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[8] CANADIAN ASSOCIATION OF PETROLEUM LANDMEN. Operating Procedure 1990

[9] Ibidem

> the said Lease as hereby amended shall remain in full force and effect as to all of the said Lands retained by the Lessee under the said Lease and/or this Agreement

In conclusion, Mr. Lewis pointed out that Mr. Robinson's concerns for the accuracy of the downhole locations and target zones were satisfied through the evidence given by the expert witnesses. He further submitted that the suggestion by Mr. Robinson that the Commissioner's order require a down hole survey of the well is inappropriate and is in any event outside the jurisdiction of the tribunal to order.

FINDINGS FOR THE PROPOSED UNITIZATION

Purpose of the Act

In Ontario, the **Oil, Gas and Salt Resources Act** was enacted in 1990 and amended in subsequent years. Within the **Act** there are roles for the Mining and Lands Commissioner appointed under the **Ministry of Natural Resources Act** , and the Ministry of Natural Resources - Petroleum Resources Institute. The **Act** does not contain a purpose statement and is silent in this regard. However after examination of several Statute and regulation sources, a clear indication of the purpose can be ascertained. Within subsection 2. of the **Mining Act**, the legislation notably encourages exploration for mineral resources and it states;

> 2. The purpose of the Act is to encourage prospecting, staking and exploration of the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario.

and within that **Act** is the definition which clearly supports a purpose for oil and gas exploration;

> "minerals" means all naturally occurring metallic and non-metallic minerals, including natural gas, petroleum, coal, salt,...

Generally, the purpose of the **Oil, Gas and Salt Resources Act** may be derived from the **Mining Act** and specifically through the above notables. In addition, it may be possible to infer the purpose of the **Act** from a number of provisions. Within Ontario Regulation 245/97, amended to O. Reg. 22/00, is a definition of pooling;

> "Pooling" means the joining or combining of all the various oil and gas interests within a spacing unit for the purpose of drilling and subsequently producing from a well;

The latter half of the statement implies the purpose is for "drilling" and "producing" from a well and in the tribunal's opinion, is consistent with the term "exploration of development of mineral resources" found in the **Mining Act** and noted above.

O. Reg. 22/00 advances "pooling" through subsection 8(3) as a requirement for drilling and production of oil or gas;

8(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;

The provisions of clauses 8(1)(a) and (b) of the **Act** and the O. Reg. 22/00 subsections 14 and 15 clearly define methods of procedure to develop oil and gas pooled resources.

While the foregoing discussion is by no means conclusive, it is noted by the tribunal that effectively Lowrie Holdings Inc. and Clearbeach Resources Inc. cannot continue to produce from existing wells underlying the circumscribed area without having this application to unitize granted. 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 ascertained through a consideration of the consequences of discontinuing exploration. Specifically, if the exploration and production from under these lands was to cease altogether, the economic benefits to operators, employees, royalty interests and the economy overall would be erased. The purpose of the **Act** is evident through various definitions and their references to the applications.

Whether the Order Justified under the Circumstances

Clearly Lowrie Holdings Inc. and Clearbeach Resources Inc. and their representatives attempted to bring all landowners into a voluntary unitization agreement pursuant to subsection 8(4) of O. Reg 22/00. However the Minister's agreement was not attained as required in the regulations and the Applicant proceeded with this application for a compulsory Order from the Mining and Lands Commissioner. Subsection 8(4) spells out the terms under which a unitization can be achieved voluntarily or through compulsory Order and it states;

8. (4) If an area is unitized by a voluntary agreement among the oil and gas interest owners within 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 requirements 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 O. Reg. 22/00, s. 4.

The compulsory order option, by the Commissioner, calls for a hearing into the matters of any application whereby the opportunity to hear evidence from the Applicant, leased landowners, unleased landowners, working interests, royalty interests and potentially affected adjacent landowners outside the proposed unit area is afforded the tribunal. The merits of the application were enhanced by the hearing process.

The working interests in this application are solely; Lowrie Holdings Inc. and Clearbeach Resources Inc. held jointly.

The tribunal did receive opposition from the Ministry of Natural Resources seemingly in two capacities. The first being as the regulator and the second as a lessor under a registered oil and gas lease agreement. The Ministry chose to not attend the hearing to advance their opposing views and the tribunal is left to interpret the correspondence and submissions of the Ministry, which were received prior to the hearing. It is difficult to ascertain the direction of any opposition without first hand evidence under examination or through cross-examination, however the tribunal will attempt to outline their objection(s).

The tribunal, solely for the purpose of weighing circumstances that could provide a barrier to entertaining this application for a compulsory unitization order, noted several points raised in pre-hearing correspondence by the Ministry of Natural Resources.

The relevant points noted include the conditions *(1)* contained in the Licence 9468 [Exh. 1, TAB 3];

> 2. No production of oil or gas from this well until production from the Forbes et at Romney 6-11-1 well (Licence 8393) has been discontinued;

and *(2)* the restrictions in subsection 8(3)(c) of O. Reg. 245/97, amended by O. Reg. 22/00;

> 8(3) No person shall,
> (c) produce oil or gas from more than one well in a spacing unit.

In addition, the Ministry raised concerns surrounding the circumstances of proposed spacing unit changes and the U.S. Energy lawsuit *(3)* which in their mind may prejudice the Ministry's position in the case and potentially affect other interests in the field.

The tribunal finds on the first two issues [*(1) & (2)*] that a compulsory unitization order if granted under clause 8(1)(b) of the **Act** serves to expunge licence conditions and spacing unit orders that have gone before. Specific reference to this is found in subsection 8(2), of the **Act,** which notes an order by the Commissioner under clause 8(1)(b) **prevails** over an order made under section 7.1, of the **Act**, and a regulation made under clause 17 (1)(e.1) and (e.2).

> 7.1 (1) The Minister may, by order,
> (a) establish a spacing unit by designating a surface area and the subsurface beneath the surface area as a spacing unit;
> (b) amend or revoke a designation of a spacing unit; and
> (c) specify where wells may be located within a spacing unit.
>
> ~
>
> 17. (1) The Lieutenant Governor in Council may make regulations,
> ...
> (e.1) limiting the number of wells in a spacing unit from which a person may produce;
> (e.2) requiring the joining of interests in oil or gas in a spacing unit as a condition of drilling a well in the spacing unit or producing from a well in the spacing unit;

The tribunal finds that the latter issue [*(3)*] does not pose to a barrier to the consideration of this application. Based on clarifying documents and submissions before this tribunal by Counsel for the Applicant the "US Energy lawsuit" is noted as dismissed by Order of The Honourable Justice Brown of the Superior Court of Justice (Ontario) [Exh. 4][10].

As previously stated; all landowners within the subject lands have valid lease agreements with pooling and unitization clauses empowering the lessee to proceed to production from either well. Notably the Corporation of the Municipality of Chatham-Kent and the Ministry of Natural Resources have provided a lease for their portions of the land in question. All the requirements are in place to effectively unitize voluntarily or collectively excepting, the Minister's agreement to the unitization. Subsection 8(4) of O. Reg. 245/97, amended by O. Reg. 22/00, provides for this alternative compulsory order, by the Commissioner, to unitize the area.

The tribunal finds justification in hearing this application for a compulsory unitization order to be in compliance with legislation.

The tribunal further points out that, in its opinion, this decision does not interfere with the Ministry's ongoing authority to regulate the drilling and exploration within the industry.

Adequacy of Notice

The tribunal was satisfied that all party interests were given adequate notice of the proceedings for this application. Notices (Appointment for Hearing) were addressed to all current landowners and royalty interest owners corresponding to the various tracts in the proposed Romney 6-11-1 Pool. Moreover, through publication of details of the Appointment in the Chatham newspaper and appointing several central viewing locations to access the application documentation, as well as the usual access to the Registrar of the Office of the Mining and Lands Commissioner and/or Counsel for the applicant, those landowners with an interest in the said lands were deemed notified and reminded in a reasonable fashion.

Indeed the publication and viewing process served to locate an adjacent landowner/user and bring forth concerns for this application to unitize through Mr. R. Robinson, who subsequent to learning of the Appointment for Hearing, filed various letters and support materials which served to seemingly pose questions of the unitization. Mr. R. Robinson, acting as an agent, was given access to the hearing based on the possibility of presenting new evidence that production under unitization could infringe on the oil rights of others and specifically those of Farmers Oil & Gas Inc. an adjacent landowner.

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[10] U.S. Energy Development Corporation vs. Lowrie Holdings Inc. and M.N.R., "The Court Orders that the within action is dismissed without costs", Court File No. 35481, August 30th, 2001 (entered 77-72), Honourable Justice Brown, London, Ontario.

Specific to notice, it was noted that other publications for notice could have been used which in Mr. Robinson's opinion would have better served the adjacent landowners. The tribunal finds, its has to consider the geography and the "doing-of-business" catchment basin always in determining when and where to give notice publicly and solicit those with an interest. The habits of the general public to favour one form of media over another is extremely broad and it is reasonable to assume that not all decisions on where to advertise will satisfy all individual preferences. Questions arising for ongoing consideration will be: "Is the radius for those with interests 1 kilometer or 100 kilometers from the said lands?" and "Where do they take notice from in such matters?"

The tribunal does not take the task of notice lightly. It is a discretion that is constantly reviewed by those entrusted with the application/task. The parties to the Application have been justly notified of the Appointment for Hearing and it is their choice to attend. No new evidence has been presented to the contrary and the methods and notice for this hearing continue to be adequate. The tribunal accepts the concerns raised and will endeavour to be diligent in the manner when it chooses the breadth of the net and medium for future notice in such matters.

Merits of the Application:

Jurisdiction

The tribunal notes that its powers to order "the joining of the various interests within a field or pool..." pursuant to clause 8(1)(b) of the **Act** are of sufficient significance as to override the rules concerning spacing units and other spacing restrictions set down by the licencing process. It is notable in clause 8(2)[11] of the **Act** where such an order prevails over pre-existing Minister's spacing orders [cl. 7.1], regulations which limit the number of wells in a spacing unit [cl. 17(1)(e.1)] and the joining of interests in a spacing unit as a condition of drilling or producing from a well in that unit [cl. 17(1)(e.2)].

The O. Reg. 22/00 under subsection 8.(4) lays out the conditions for unitization. Salient to this reference is the fact that an area unitization is achievable voluntarily with the satisfaction of the Minister of Natural Resources "or" through a compulsory order issued by the Mining and Lands Commissioner. The section concludes with directions to the Minister as to how to proceed once a unitization is in effect, which parallels the **Act** [cl. 7.1 and cl. 17(1)(e., e.1,2,3)].

The **Act** and the O. Reg. 245/97, amended to O. Reg. 22/00 is clear in these matters. No opposition was expressed by the Respondents on this tribunals authority to act.

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[11] Ibidem, (see page 19 herein)

Lease (core contract)

The tribunal finds that all landowners within the unit boundaries proposed are bound by the terms in their individual lease agreements including the references to pooling and combining.

The opposing submissions by the Ministry prior to the hearing and those stated by Mr. R. Robinson at the hearing questioned core elements found within the industry. Relevant to the lease documents is the term *rule of capture*. In their July 25th, 2001 letter [Exh. 2] response to the application the Ministry noted: "Should the outcome of this application lead to production of both wells then this precedence ... will extend the 'rule of capture' beyond the constraints intended in the legislation under the **Oil, Gas and Salt Resources Act**". Mr. R. Robinson in evidence and correspondence noted: "We are owners of lands which are affected by this application because under the laws of Ontario and the 'rule of capture' principle, the Applicant is allowed to maybe draining our lot ... resources and property...". Both parties appeared both bound and puzzled with the wording and the tribunal provides the following referenced explanations.

The *rule of capture* while referenced by the objections to this application is not found in The Dictionary of Canadian Law, (Dukelow & Nuse), a usually reliable source in such matters, but certainly appears to be an expression used within those circles engaged in exploration and the oil & gas industry. The tribunal relies on several sources for discussion and in Ballem[12] were he states as to *rule of capture*:

> The"rule of capture", succinctly phrased by Hardwicke[13] is, "the owner of a tract of land acquired title to the oil and gas which he produces from wells thereon, though it may be proved that part of such oil and gas migrated from adjoined lands," is firmly entrenched in Canadian Law in Borys v. Canadian Pacific Railway and Imperial Oil Limited[14], the Privy Council said:
>
> The substances are fugacious and are not stable within the container although they cannot escape from it. If any of the three substances is withdrawn from his property which does not belong to the appellant, but lies within the same container and oil and gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So also, if any substances is withdrawn from his property, thereby causing any fugacious matter to enter his lands, the surrounding owners have a remedy against him. The only safeguard is to be the first to get to work, in which case those who make the recovery become owners of the materials which they withdraw from any well which is situated on their property or from which they have authority to draw.

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[12] Ballem, John Bishop. The Oil And Gas Lease In Canada, 2nd Ed., page 92, (Toronto: University of Toronto Press, 1985)

[13] Hardwicke E., The Rule Of Capture And Its Implications As Applied to Oil And Gas, 13 Texas Law Review, 391, 393 (1935)

[14] [1953] 2 D.L.R. 65, (1952-53) 7 W.W.R. (N.S.) 546, 550 (J.C.P.C.)

Further found in the case Kelley v. Ohio Oil Co[15] is another explanation of the *rule of capture* for purposes herein;

> The right to acquire, enjoy and own property, carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others.
>
> To drill an oil well near the line of one's land, cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well, no matter where it comes from. In such cases the well and contents belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas or water which enters the well came.

The tribunal finds the *rule of capture* to be a summarization of the Lessee's right, under licence, to drill and produce hydrocarbon substances found in pools or fields. Further, due to its uncertain and shifting characteristics, the wondering of the substance is not the responsibility of the Lessee, who could win or lose based on the nature of the substances, regardless of their efforts to capture it. The **Oil, Gas and Salt Resources Act** is silent on the term specifically.

Outside the right to capture there remains regulations with regard to size, area, hole depth, boundaries and the protection of the environment. No new evidence was presented on this matter that would alter the applicant's current proposal, expand or contract the area, alter the boundaries proposed, shift the location of the downhole depth, define the reservoir size further or identify different substance migration patterns. The tribunal is satisfied with the Applicant's contention that adjacent landowners are not being purposely drained of their resources, if at all.

The tribunal is satisfied the Lessee has the right to pool and unitize the majority of leases within the unit given the terms of the Lease contracts. The lease documentation provided within Exhibit 1, TAB 13 indicates, the Leases in 14 of 15 cases have a Pooling/Combining clause;

> 13. Pooling:
>
> The Lessee is hereby given the right and power at any time and from time to time to pool or combine the said lands, or any portion thereof, or any zone or formation underlying the said lands or any portion thereof, with any other lands or any zone or formation underlying the same, but so that the lands so pooled and combined (hereinafter referred to as a "unit") shall not exceed One (1) spacing unit as herein defined. In the event of such pooling or combining the Lessor shall receive on production of the leased substances from the unit in lieu of the royalties herein specified, only such portion of such royalties as the surface area of that portion of the said lands placed in the unit bears to the total surface area of all land in the unit. Further in the event of such pooling or combining any payment made in accordance with paragraph 3 hereof shall be apportioned in the same way as Royalties. Drilling operations on, or production of the leased substances from, or the presence of a shut-in or suspended well on, any land included in the unit shall have the same effect in continuing this Lease in force and effect as to the whole of the said lands, as if such drilling operations or production of the leased substances were upon or from the said lands or some portion thereof, or as if such shut-in or suspended well were located on the said lands, or some portion thereof.

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[15] Kelley V. Ohio Oil Co.; 57 O.S. 317, 327, 328 (1897).

Within the closing text of the quoted lease clause, it is notable that, the Lease is to continue in force despite the lands being in a unitization agreement.

Continuing, within the one last Lease with the Ministry of Natural Resources is a Pooling and Unitization clause at page 4;

> POOLING AND UNITIZATION
>
> The Lessee, subject to the approval of the Lessor, may include the Premises, or any portion thereof, or any zone or formation underlying the Premises or any portion thereof, with any other lands or any zone or formation underlying the same, but all of the lands so pooled shall not exceed one spacing unit as established by a spacing order under the Oil, Gas and Salt Resources Act. In the event of such pooling, the Lessor shall, in lieu of the royalties elsewhere herein specified, receive on production of oil or gas from the said spacing unit only such portion of the royalties stipulated herein as the surface area of the Premises placed in the spacing unit bears to the total surface area of all lands in such spacing unit.
>
> The Lessee, subject to the approval of the Lessor, may include the Premises, or any part or parts thereof, with other lands in a unitization agreement. The plan of unit operations, the manner of allocating production to each tract in the unit area, and the contents of any such unitization agreement shall also be subject to the approval of the Lessor and when so approved shall be binding upon the Lessor. Upon any such unitization agreement, the royalties elsewhere herein specified shall be paid on the basis of the production allocated to the Premises under the unitization agreement and not upon the basis of actual production from any well(s) situated onshore.
>
> All operations on or production of oil or gas from a spacing unit under a pooling agreement, or a unit area under a unitization agreement, shall be deemed to be operations on or production from that portion of the Premises within the spacing unit or unit area, as the case may be, in respect of the Lessee's obligations, expressed or implied under this lease.

It is evident from a review of the lease clause above that the lessor's approval to pool or unitize is required prior to the lease being included in a unit area. However in the absence of further argument by the Lessor (Ministry of Natural Resources) against a unitization agreement and correlative rights for this matter, the tribunal finds the Lessee's (Applicant) attempt to unitize the leases and subject lands to be in order.

The leases of the Respondents are bound by the correlative rights of others. The tribunal further recognizes the core value and continuation of the leases and their terms despite an ordered unitization. In the event of a retreat or surrender from the Unit Operation Agreement the Lease terms still prevail.

Technical Data

The unit will allow two producing wells from distinctly separate reservoirs, as presented in evidence. Both wells have shown producing quantities which satisfy the expectations of the unit operator elect. Recorded in evidence is the current daily volumes for the Forbes et al

Romney 6-11-1 well at 25 barrels and the Forbes (horiz.) Romney 6-11-1 well at 125 barrels. No new evidence was presented that discounts the claims of the expert witnesses for the Applicant regarding substance volumes captured.

However the accuracy of the technical information surrounding the actual down hole location of the vertical well was raised by the adjacent landowner, Mr. Robinson. In light of the query as to the accuracy of the downhole location a convincing argument by Ms. McConnell and Mr. Walsh concerning the cable-tool process of drilling was received into evidence. Based on the explanations received concerning the percussion nature of cable-tool drilling, the tribunal finds that downhole location accuracy will not deviate more than a few feet which certainly does not pose a barrier to this application.

Unitization

This application for compulsory unitization drew challenges from Respondents through pre-hearing filed materials and a hearing presentation by an adjacent landowner.

The Ministry of Natural Resources initially issued licences for the drilling of both wells located in the unit and had the forethought to place a restrictive condition on production from the second (horizontal), pending the closure of the earlier vertical well. This issue is explained away within the ibidem item "Whether an Order is Justified in the Circumstances". Through the pre-hearing correspondence, the Ministry introduced reasoning for denial of unitization based on, what could be called, the core values of the Ontario petroleum industry. Mr. Robinson, adjacent landowner, echoed his concerns for similar reasons in support of the Ministry's position. However he may have contradicted an earlier position on these matters by indicating that he was not opposed to the Applicant's proposed unitization upon hearing the expert witness testimony.

In the Ministry's Appeal Decision of June 28th, 2000 [Exh. 1 TAB 7] and again in the July 25th, 2001 response letter [Exh. 2] it was implied that the "correlative rights" are being circumvented and misinterpreted. The tribunal heard no new evidence or received no new supporting material at the hearing on these subject matters, only the repeated comments from Mr. Robinson.

The tribunal finds that the issue of correlative rights of landowners is a challenge to a core element of the petroleum industry and the protection of those rights have been argued extensively in law[16]. While the Respondents to this application may well be aware of most industry terms, there were those at the hearing not completely familiar with certain terminology and its sources and referred to those certain terms as "plastic words". The Office of the Mining and Lands Commissioner has noted a need for explanations concerning terms used in this industry in the past and has provided several printed pamphlets on the terminology of this industry. The following explanation is offered on the subject matter raised:

[16] Ibidem. Bory's v. Canadian Pacific Railway and Imperial oil Limited (see page 22 herein)

> The Correlative Rights[17] of landowners; means the inherent right of an owner of oil or gas in a pool to his share of the production and reservoir energy and his right to obtain his just and equitable share of production and to be protected from wasteful practices by others in the pool.
>
> The Protection of Correlative Rights of landowners is provided for by the Province under the **Act** in that it places requirements on the operators to drill and produce a well within the target area of a pooled spacing unit.

The statutes and regulations surround the respect for correlative rights of landowners through spacing unit designations, reasonable set-back requirements and compensation methods. The proposed unitization agreement has met the pre-conditions with regard to the rights of interested parties represented by fifteen executed lease agreements with protective royalty clauses contained therein. The tribunal finds the fifteen interested parties correlative rights have been addressed and accounted for in this application for unitization.

The tribunal turned next to the possibility that not all affected landowners may have been accounted for and perhaps the boundaries should be different than that proposed. Mr. Robinson in his presentation, contended that the vertical well was draining the pool under his adjacent lands without due compensation afforded him through correlative rights. No new evidence of a technical nature was presented that would expand or contract the boundaries proposed by the applicant.

The tribunal continues to be satisfied that the correlative rights of those landowners directly involved have been accounted for in executed lease documents and the unitization agreement proposed. The position of the Ministry on the correlative rights issue remains a bald statement and their opportunity to expand on the point, now lost, would have been received and given the same weighing as other evidence at the hearing.

The tribunal is convinced by the evidence and submissions that the proposed unitization area and the planned production is in keeping with good conservation practices. The correlative rights of others within the field have been accounted for and included within the boundaries. No new evidence has been submitted that discounts or questions the claims of the applicant as to reservoir sizes and substance migration patterns. It is the Applicant's contention that adjacent/adjoining landowners are not being purposely drained of their substance resources, if at all.

In determining a Compulsory Order to Unitize the majority of landowners and their correlative rights certainly influences consideration of the order by the tribunal. With this in mind the tribunal has undertaken an analysis by arithmetic mean. One hundred percent of the land within the unit is under executed leases with access to the oil and gas resource granted to the lessee. Thirteen of the fifteen or 86.667 percent of the lessors (landowners) are in agreement with the unitization. Based on land mass, 54.8828 percent of the lessors (landowners) have granted and

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[17] Oil, Gas and Salt Resources Act, document of explanation, page 4, authored by the Office of the Mining and Lands Commissioner, Queen's Printer for Ontario, printed in Ontario, Canada, 2000.

agreed the lessee has the right to unitize the lands, which includes the lands of the Corporation of the City of Chatham/Kent (Respondent) . The tribunal finds a clear majority favours unitization. In the absence of new evidence or providing depth to their claim the Ministry of Natural Resources objection based on the arithmetic goes against the correlative rights of others in the majority.

It is difficult for the tribunal to ascertain whether the objections of the Ministry of Natural Resources are in its capacity as regulator or respondent to the application. Both roles have recognized distinct and separate powers within the regulations and the lease contract respectively. However in the absence of clarifying evidence the tribunal accepts that the July 25th, 2001 response [Exh. 2] to this application echos the context of earlier correspondence and decisions by the Ministry as regulator. As a lessor the Ministry has correlative rights like any of the other lessors and are a party to the same rights as others in the field with the proviso that one or a few may not withhold the rights of others to receive their economic rewards through royalties and rents.

In conclusion, the tribunal finds that the Compulsory Order to Unitize prevails (subsection 8(2) of the **Act**) over conditions and decisions reached by the Ministry, as regulator, under subsection 7.1 and a regulation under clause 17(1) (e.1) or (e.2) of the **Act.** The tribunal does not consider this ruling to be a stretch of its interpretation in view of the Ministry's suggestion and reminder [Exh. 1, TAB 7, TAB 8, Exh. 2] to the applicant that resolution of the situation could be sought through an order by the Mining and Lands Commissioner. The Ministry of Natural Resources opposition to this application could very well question their past decisions to offer licences and lease the lake acreage. However their position on this is not for the tribunal to ponder further.

The tribunal has taken its resolve in discussions favouring unitization from Ballem's book[18] at page 179:

> 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 distinction, created by the ownership subdivisions.

and at page 185:

> ...Once a lease is included in a unit by the lessor executing the unit agreement, and all operations anywhere within the unit have the effect of continuing the lease in force.[19] Moreover, the entire lease and not just the unitized zone will continue. This is the only result that is consistent with the wording of the lease and it has also received judicial sanction in *Voyager Petroleum Ltd.* v *Vanguard Petroleum Ltd*.[20] It is not surprising that

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[18] Ibidem

[19] Esso Resources Canada Limited v. Pacific Cassiar Ltd. (1984) 22 Alta. L.R. (2d) 175 (Alta. Q.B.).

[20] [1982]

> unitization has grown increasingly popular with each passing year. It has become almost the rule with respect to gas fields and is normally completed before production commences. The trend to unitize oil fields is steadily growing.
>
> It is impossible to say anything against the principle of unitization. It undoubtedly receives better operating procedures, enhances recovery, and implements good conservation practices, all at a reduced cost. It is not surprising, therefore, to find that unitization is encouraged by public conservation bodies. In the purely private area of contract between the lessor and lessee, different factors may come into play. Under current industry practice the lessor is expected to execute a unit agreement without any additional consideration, the benefits described above evidently being regarded as sufficient incentive.

The tribunal finds substance in Ballem's comments, support for unitization and the Order which will prevail over conditions. The evidence by the expert witnesses certainly outweighed any opposition in the matter. The tribunal found the evidence to be of assistance in reaching the findings in that the lands circumscribed by the unit boundaries offers the best opportunity for further efficient exploration and production from the pool, as well as protecting rights. The alternative is not considered a favourable solution in that it raises the likelihood that the resources would be abandoned entirely.

Regulations

The direction of an application is driven by O. Reg. 245/97, amended to O. Reg. 22/00, at subsection 15 (3) wherein the format is prescribed for an application for unitization. The regulations in the tribunal's opinion have been followed by the Applicant within this submission providing information consistent with the requirements of an application for unitization.

Unit Agreement:

Unit Boundaries

Pursuant to clause 15(4)(b) of Ontario Regulation 22/00, the tribunal is compelled to establish the unitization area boundaries within the Order. This is seen as a major component of the typical unitization application, and the tribunal is to address which lands are to be included in the inscribed area and which lands are to be excluded from the area. This decision is made in reference to the known geographical formations, correlative rights, hydrocarbon discovery data, etc.

The Ministry of Natural Resources objected to this aspect of the application through pre-hearing submissions noting the possibility of correlative rights being excluded. Notwithstanding the Ministry's expressed objections it would have been most beneficial to hear a stronger presentation by the Respondent as to their reluctance to agree to the unitization in this boundary formation. It does not appear to be sufficient nor complete to raise an objection and not seize the

opportunity to present a point view. The tribunal is somewhat puzzled with this position, but will endeavour to provide an order which explains the situation.

The tribunal finds no new evidence was presented that opposes or alters the boundaries proposed by the Applicant.

Appointment of Initial Unit Area Operator

Lowrie Holdings Inc. and Clearbeach Resources Inc., are the sole working interests and owners within the proposed unit. The two corporations are applying for the appointment as the initial unit operator, in accordance with clause 15(4)(g) of O. Reg. 245/97, amended to O. Reg. 22/00. Lowrie Holdings Inc. and Clearbeach Resources Inc. are effectively managed by the same parties and the documented Lessees of 100 percent of the subject lands in the proposed unit. Evidence was received which profiled the operator with over 20 years of experience in the petroleum industry, a current operator of fifteen wells and well known to regulators in Ontario through thirteen licenced operations. No evidence has been submitted that opposes the appointment. The tribunal finds that the appointment of Lowrie Holdings Inc. and Clearbeach Resources Inc. as the initial unit area operator is in order.

Ordering of Unitization Provisions

Based on the information provided at the hearing and in material submissions the tribunal finds it will follow a previous format adopted by the Office of the Mining and Lands Commissioner and its predecessor, in these matters, the Ontario Energy Board. The proposed Unit Operation Agreement - Romney 6-11-1 Pool will be affixed as a Schedule to the Compulsory Unitization Order. The Unit Operation Agreement will be a joint and several agreement between a collective of Lessors (fifteen) and the single lessee (Lowrie Holdings Inc. and Clearbeach Resources Inc.).

The tribunal has received and reviewed a pre-hearing draft of the Unit Operation Agreement submitted with the application and has reviewed the second replacement draft [Exh. 6a and 6b] received during the hearing from Mr. Lewis. The tribunal finds that it will order the relationship between the lessor(s) and lessee to be governed by the agreement and comments in this regard, in response to submissions surrounding the second replacement draft of the Agreement, accordingly.

In the recitals of the agreement, there is a reference to "the Mortgagee OF THE THIRD PART". The tribunal has determined that this provision will not be changed as drafted however, the mortgagees were not named to be provided with notice of these proceedings and insofar as may be named in the Unit Operation Agreement, they cannot be bound by its provisions.

In conclusion, it is the intention of this tribunal to empower the operator, Lowrie holdings Inc. and Clearbeach Resources Inc., with the flexibility to manage the Romney 6-11-1 Pool without having to reapply to the tribunal each time it wishes to redraw its boundaries, based on new knowledge of the oil and gas formations.

Deemed Effective Date

The applicant has requested this Order take effect on the 1st day of March, 2001 which best corresponds with the activities of the operator. The lease agreements all were signed prior to this date, however the satisfaction of the Ministry with voluntary unitization has not been given for arguments filed with this application. Respectfully, the issue here is not whether the MNR was satisfied but if the date appears reasonable from an operational or accounting point of view. The tribunal takes its lead from the applicant and their suggested date, as they are ultimately responsible for the proper accounting and paying of royalties from a certain date. The tribunal finds that March 1st, 2001 will be the effective date of this Order.

The tribunal also deems that the Compulsory Unitization Order will take effect on March 1st, 2001 and will include those land leases with the Corporation of the Municipality of Chatham-Kent and the Ministry of Natural Resources.

Duration of the Order

The tribunal is required under clause 15(4)(l) of the O. Reg. 245/97, amended by O. Reg. 22/00 to provide, "a statement as to the duration of the Order".

The Applicant provided Clause #3 on the subject of duration which Counsel suggested was consistent with the Lease agreements. Counsel's suggested the wording of the clause is dissimilar from a previous Commissioner's decision, but not offensive to the Lease agreements.

He noted the revised submissions used the expression, "deemed to be produced from" rather than the term "produced in paying quantities". The tribunal points out that the terms are the same and in Ballem[21] he states:

> ...American Courts in most of the important oil producing states interpret the "produced" as "producing in paying quantities"[22]...
> ...The Ontario courts dealt with a variation of this wording in Stevenson vs. Westgate[23] .

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[21] Ibibem, page 111.

[22] Summers, Oil and Gas, vol. 2, 198. Many American courts have also interpreted found, discovered, obtained, and produced as meaning the same thing, namely, produced in paying quantities.

[23] [1941] 2 D.L.R. 471 (Ont. S.C.O.); [1942] 1 D.L.R. 369 (C.A.)

Nonetheless, occasionally lease forms refer to "production in paying quantities" which the tribunal accepts, for the moment, as one in the same as the term "producing from". Both forms effectively continue the lease as the habendum clause intended and are acceptable for the purposes of this application.

Counsel in submissions also suggested the revised format eliminated inconsistencies surrounding the shut-in well provisions and the excessive hardships that the term: "no stoppages in production of more than 90 days" could have on operations. The tribunal finds the habendum clause of the Oil and Gas Leases submitted [Exh. 1, TAB 13], save one, is specific in that it is to continue:

> ...so long thereafter as the leased substances or any of them are produced from the said lands, subject to the other provisions herein contained:
>
> ...AND FURTHER ALWAYS PROVIDED that if at the end of the said term the leased substances are not being produced from the said lands...then this Lease shall remain in force so long as any drilling or working operations are prosecuted with no cessation of more than Ninety (90) consecutive days...

and further;

> ...if drilling or working operations are interrupted or suspended as the result of any cause whatsoever beyond the Lessee's reasonable control, or if any well...any portion thereof form a part, is shut-in, suspended or otherwise not produced as the result of a lack of or an intermittent market, or any cause whatsoever beyond the Lessee's reasonable control...

The tribunal finds the clause #3 does not deviate from the intentions of the Lease and the habendum clause as referenced. The clause #3 is considered acceptable. Much like the duration of the lease involving lands which are under production, and so as not to contradict the habendum clauses of the leases still in effect, it is reasonable that the Order for Compulsory Unitization continue so long as the leased substances are being produced from the Romney 6-11-1 Pool. Further, in keeping with previous decisions rendered, the drafting used elsewhere in the industry, preserving the context of the Leases and attempting, in effect, to lessen the vagueness of the term, the tribunal finds that it will order the duration of this Order for Compulsory Unitization so long as there are substances produced from the well(s) and the proviso that there is to be no stopping of production for unforseen circumstances of longer than 90 days.

Disputes

The Initial Unit Operator, Lowrie Holdings Inc. and Clearbeach Resources Inc., is deemed appointed which means that with respect to management decisions involving production and marketing, Lowrie is allowed to manage the operations of this Unit.

Clause 8(1)(b) of the **Act**, under which this Order for Compulsory Unitization is made, provides that the tribunal is charged with determining whether a unit will be created and setting out various conditions which governs the unit creation, all of which are to be set out in the Order. In keeping with the direction of Government today through its regulations, and at the request of the applicant, the tribunal agrees that it would not be prudent to micro-manage each aspect of the changes to the unit area, and so has provided for the Operator to manage those matters in accordance with paragraph 9. of its Order for Compulsory Unitization.

However, the tribunal is also charged with regulating the joining of the interests in the field or pool. Which this tribunal takes to mean that it has ongoing legislative responsibility with respect to what has been Ordered. The tribunal finds that it is not necessary to include a dispute resolution provision within the Unit Operation Agreement, nor in its Order. In an operation sense under clause 8(1)(b) of the **Act,** the tribunal retains responsibility for the Romney 6-11-1 Pool, and in this regard, parties are free to apply to the tribunal for further direction in those instances when such a need should arise. The tribunal is equipped with alternative dispute resolution processes which could be accessed by the parties on a formal or an informal basis, not to mention that where absolutely necessary, the matter can be set down for a hearing to determine issues in the future as they are identified. However, the parties are encouraged to attempt, at first instance, to resolve disputes as they are identified; either on their own or with the assistance of tribunal staff.

Motion for Costs (Mr. C. Lewis)

Mr. Lewis submitted that in light of the Ministry's conduct as a party to the application and having filed material that disputes the application before this tribunal, it is convenient and makes good sense to have submissions for costs at this point in time rather than coming back or making them in writing at a later date. The tribunal, in its discretion, accepted the argument in the interest of time and encouraged Mr. Lewis' submissions in the matter of costs.

Mr. Lewis, submitted that under Part VI, subsections 126 and 127 of the **Mining Act**, costs can be awarded at the discretion of this tribunal and either assessed directly by the tribunal or referred to an assessment officer.

Mr. Lewis submitted that just as the as the Superior Court of Justice has the discretion to order costs either on a solicitor and client basis or on a party and party basis, this tribunal has the same discretion. The principle to be followed in determining whether costs are awarded can be found in the case Shier v. Fiume[24] from the Ontario Court (General Division). He referred to pages 3 & 4 of the case and read;

> The Defendant offered no evidence that in any way challenged the Plaintiff's case. The one independent witness called for the Defendant offered no relevant evidence at all.

[24] Sheir v. Fiume, 6 O.R. (3rd) 759 [1991] O. J. No. 2367. Ontario Court (General Division)

> ...A person is entitled to have his day in Court but is he entitled with immunity to force others into court with him, with all the intended costs and expenses which litigation today involves? Certainly when he has an arguable case no one would dispute that. But is he so entitled when he does not have an arguable case? I accept the proposition that a Defendant is not required to admit to a Plaintiff's case, nor is there an obligation on the Defendant to settle a Plaintiff's claim. The Defendant is entitled to require the Plaintiff to prove his claim.

and on the page next (4);

> If the new rules are to be given their full intended force and effect, a party who has been given disclosure to the extent present in this case, should be obligated to assess whether he has any evidence on which to make a reasonably arguable case. If as here there was no evidence to support a reasonably arguable case, then that person may still have his day in Court if he so wishes. But he should reasonably be expected to fully indemnify another whom he compels by his intransigent nature to meet him in Court.

He continued, and in a similar decision for awarding costs can be found in the case Worobel Estate vs. Worobel[25] where it states;

> Costs are available on a solicitor and client basis at the discretion of the trial judge; that the exercise of discretion must be in relation to relevant factors. What is relevant is the conduct of the litigation and not otherwise on related conduct. Accordingly here solicitor and client costs cannot be awarded on the simple basis that the husband engaged in past criminal conduct. This is not of itself relevant to the conduct of the litigation. However, the solicitor and client award of costs might be made on the grounds that the husband refused to dispose of the matter otherwise. He put in a statement of defence, he did not settle or abandon his defence and therefore forced the matter to go to trial, yet did not appear at the trial. In light of his conduct the Plaintiffs shall have their costs on a solicitor and client basis, including any costs arising out of Action No. 274886 and prejudgment interest.

Mr. Lewis submitted that the principles applied by the Superior Court in these cases can be applied here under subsections 126 and 127 of the **Mining Act.** He paraphrased that basically if a hearing or proceeding goes forth unnecessarily where a defendant has defended but really not put in any evidence or appeared, then those are circumstances that warrant a solicitor/client award.

Mr. Lewis continued, upon examining the Ministry's conduct in this case, on two occasions [Exh. 1, TABS 7&8] they suggested the applicant file for unitization. When the applicant attempted to unitize voluntarily the Ministry of Natural Resources rejected it out of hand with no basis given for their reasoning nor technical evidence other than the bald assertion that it did not protect the correlative rights of others. Why were they not prepared to voluntarily agree to the proposed unitization? In Exhibit 1, at TAB 9 & 10 there are documents of the tendering for

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[25] Worobel Estate v. Worobel (1988), 67 O.R. (2nd) 151, 31 E.T.R. 290 (H.C.J.)

voluntary unitization, by the Applicant, and again the Ministry's flat refusal. Mr. Lewis submitted that Exhibits 2 & 5 contained the Ministry responses/objections to this application which are not substantiated by any hard evidence whatsoever.

Mr. Lewis submitted that the Ministry did not appear at this hearing or tender any evidence in support of their objections. The Ministry's conduct, based on the principles of the Shier case (*Supra)*, indicates an order for solicitor and client costs. Mr. Lewis continued, the Ministry could have agreed to unitization or simply taken no position at all, being no objection, no agreement, just simply putting the application in the hands of this tribunal to weigh the evidence appropriately and render a decision.

Mr. Lewis further submitted, that under clause 8 of the **Oil, Gas and Salt Resources Act**, the Commissioner has the authority to make the order. Further, that there is no reference contained in the **Act** that a hearing has to be held. Several clauses (No.'s; 10, 11 and 14) in the **Act** make reference to calling a hearing and others do not, which simply illustrates for this argument that if the Ministry had taken no position then this hearing would not have been necessary. He submitted that if a hearing had not been called there would have been significant cost savings for the Applicant. He further stated that, if it is the view of the tribunal, that to serve natural justice requires a hearing, then the ambivalent position of the Ministry could have permitted, for example, a written hearing at much less expense.

Mr. Lewis submitted his firm's dockets [Exh. 13] to September 24th outlining fees and costs related to the application since April 8th in the amount of $14,760 and added the costs of the expert witness panel; Mr. Gorman $2,000, Mr. Walsh $2,000 and Ms. McConnell $5,500. Further Mr. Lewis submitted that to a large extent the hearing was unnecessary and costs of $24,260 are claimed under motion. In the alternative, he further submitted that on a party and party basis payment of two-thirds of a solicitor's bill is appropriate.

FINDINGS FOR COSTS

Jurisdiction

The authority of a tribunal is limited to the jurisdiction conferred by the statute. Exercising of any other authority will be *ultra vires*. The Commissioner is defined under the **Oil, Gas and Salt Resources Act** as being appointed by the **Ministry of Natural Resources Act.**

Within the **Oil, Gas and Salt Resources Act** at subsection 1(3) it is set out that Part VI of the **Mining Act** applies "to the exercise of the Commissioner's powers and the performance of his or her duties under the **Act**". The duties of the Commissioner specific to this application are found in clause 8.(1) and subsections 14 and 15 of O. Reg. 245/97, amended by O. Reg. 22/00 concerning applications for pooling or joining of interests within a specific area.

In cases before the Commissioner there are several sections in Part VI of the **Mining Act** which apply to the powers and the performance of his or her duties pursuant to directing proceedings;

> 116. (1) Section 114 and 115 apply despite the *Statutory Powers Procedure Act* and, subject to that Act, the Commissioner may,
>
> (a) give directions for having any matter or proceeding heard and decided without unnecessary formality;
>
> ...
>
> (c) give such directions respecting the procedure and hearing as he or she considers proper
>
> 117. Despite the *Statutory Powers Procedure Act*, the Commissioner may hear and dispose of any application not involving the final determination of the matter or proceeding, either on or without notice, at any place he or she considers convenient, and his or her decision upon any such application is final and is not subject to appeal, but where the Commissioner makes his or her decision without notice, he or she may later reconsider and amend such decision. R.S.O. 1990, c. M.14, s. 117.
>
> 119. (1) The Commissioner, in addition to hearing the evidence adduced by the parties, may require and receive such other evidence as he or she considers proper,...

The tribunal finds the provisions within the **Mining Act** provide the clear authority to call a hearing. The procedure is to provide an opportunity for the named parties and public to be heard and to ensure, as nearly as possible in an imperfect world, that government policy is fairly and properly applied.

Counsel for the Applicant, through his submissions, drew into the application process the matters of conflict between the Applicant and the Ministry in pre-hearing issues dealing with; process, inspection orders and appeal decisions. The tribunal does not accept these issues as inclusive to the application process. The Ministry of Natural Resources' inspection order and subsequent appeal decision are issued by the Ministry within their authority under the **Act.** The tribunal points out that an order under clause 8(1)(b) for compulsory unitization is not to be considered an appeal of the Ministry's decisions. Any hearing under clause 8. is *de novo*. According to clause 8(2): "An order under (1) (b) prevails over an order made under section 7.1 and a regulation made under clause 17 (1) (e.1) or (e.2)". This means the Order prevails over specific sections of the **Act.**

Counsel for the Applicant submitted that a hearing was not necessary given the approach and non-appearance of the Ministry. A tribunal of administrative law is compelled to consider fairness in its proceedings whether required to by statute or if the exercise fits discretionary limits. The **Oil, Gas and Salt Resources Act** provides discretion in such matters and directs the powers and duties of the Commissioner to Part VI of the **Mining Act.** The tribunal finds, where there is a general interest in matters dealing with capturing resources and related economic issues, that expanding the notice of a hearing to include the public shows regard for public awareness. Also, important is allowing a forum familiar to the public in which to discuss matters. Perhaps the best

explanation is found in the phrase, *audi alteram partem*, to hear both sides and no better example than this hearing is necessary. The hearing offered a forum for an adjacent landowner to be heard together with the parties to the proceedings. The point here is that there may be one other citizen that opposes or supports the application and they should reasonably be allowed to address the tribunal with relevant information. Considering the alternative it can be said that the tribunal's discretion in deciding proceedings was considered to be fair. The tribunal proceeded on the side of caution in these matters.

Submissions, by Counsel outlined how the Commissioner has the authority to award costs. The tribunal, for discussion, finds that within the O. Reg. 245/97, amended to O. Reg. 22/00 at clause 15(4)(k) the Commissioner is given the direction to provide: "a statement of how the costs of the hearing are to be shared" and within this statement is the caveat that a hearing is to be held upon which an assessment for costs can be applicable. Coupled with the above, the tribunal provided notice to the interested parties of the hearing and that the tribunal may proceed in their absence and costs may be awarded against them.

Counsel for the Applicant pointed out the provisions in Part VI of the **Mining Act** which applied to the awarding of costs. The applicable provisions include;

> 126. The Commissioner may in his or her discretion award costs to any party, and may direct that such costs be assessed by an assessment officer or may order that a lump sum be paid in lieu of assessed costs. R.S.O. 1990, c. M.14, s. 126.
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> 127 (1) The costs and disbursements payable upon proceedings before the Commissioner shall be according to the tariff of the Ontario Court (General Division).
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> (2) The Commissioner has the same powers as an assessment officer of the Ontario Court (General Division) with respect to counsel fees. R.S.O. 1990, c. M.14, s. 127.
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> 128. The fee and attendance money to be paid to a witness before the Commissioner or recorder shall be according to the Ontario Court (General Division) scale. R.S.O. 1990, c. M.14, s. 128.

The tribunal finds, based on the Statutes, that it has the authority to award costs and assess the sharing of costs in relation to matters set down within a hearing.

Discussion

The tribunal does not accept the overall view of Counsel for the Applicant, that this hearing could have been avoided. This tribunal is not convened to determine fault with the regulator, the Ministry of Natural Resources, in their decision regarding agreement to voluntary unitization or to issue an inspection order. The purpose is to hear evidence on the application for a compulsory order.

The directions given in the Order were strictly honoured by Counsel for the Applicant and reasonably adhered to by the Ministry of Natural Resources (Respondent). In the latter case submission response materials due on July 20th, 2001 did not reach the Office of the Mining and Lands Commissioner until July 25th, 2001 [Exh. 2]. However, a late filing by a matter of days is not sufficiently serious to warrant the making of a cost award. The tribunal finds no basis to award costs to the Applicant regarding the process set in place by the Order For Service and Order To File issued by the Office of the Mining and Lands Commissioner on June 29th, 2001. In assessing the matters it is determined that this situation is not characteristic of a genuine dispute with differing adversarial positions.

Subsection 8(4) of the O. Reg. 22/00, offers two outcomes flowing from to an application for unitization. The parties are found, by the tribunal, to have acted reasonably and in the Ministry's case they provided an alternative solution for the Applicant by indicating, on several occasions, the opportunity to seek solution through an application to the Office of the Mining and Lands Commissioner. While Counsel for the Applicant may see this hearing process as an appeal of the Ministry's decision to not agree with a voluntary unitization it is, in fact, a hearing *de novo*. The application is for a compulsory order and nothing more. Any interpretation that previous decisions are being overturned is unfounded. The order has a prevailing feature as indicated by clause 8(2) of the **Act**.

The tribunal finds that, given the objectives of the public hearing process, it will not exercise its discretion in this case to make an award of costs. The public interest has been served through this hearing.

The tribunal upon review of the dockets [Exh. 13], provided by Counsel, notes the work related to this application/hearing process and has determined it to be typical of work performed leading up to the presentation of an application.

The tribunal reviewed the timing of pre-hearing correspondence between the Ministry and the Applicant and found it to be reasonable. It does not appear that there was any attempt to delay or prolong pre-hearing procedures. In fact the Ministry willingly provided added information on several occasions with regard to other remedies for the Applicant's unitization issue. However, issues arising in the exchange of correspondence, not within this tribunal's mandate, may well have served to drive a wedge in their relationship.

Upon reviewing the case submitted by Mr. Lewis, Shier vs. Fiume (*Supra*), the tribunal finds the case, for reference here, has several misrepresentations and while it is quite applicable to those in an adversarial situation (fraught with the emotions of husband and wife), within the context of this application for unitization it is not. Perhaps the simplest difference between the case and this application is found in the recitals and the definition of the terms. The case notes a "Plaintiff" and a "Defendant" in a land purchase with complications as to ownership with aside issues. This application records an "Applicant" and "Respondents" to a compliance application.

A *defendant*, according to the Dictionary of Canadian Law (Dukelow & Nuse), *Includes every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings. A person against whom an action is commenced.* On the other hand, a *respondent*, is accordingly *a person against whom one presents a petition, issues a summons or brings an appeal.* Clearly there is action being sought to remedy the situation despite the claims of the Respondents to this application. The issues are clearly, in respect to the application and its processes, not so much against another's claim, but adherence to legislated statutes. This is not to say this application could not have turned adversarial such as, in relation to orders given, service provided, abuse of process, unreasonable acts to prolong or grounds that the proceedings are vexatious. The tribunal does not find the actions by either class of party to be characterized by an impasse.

CONCLUSIONS

For the foregoing reasons a compulsory unitization order will be granted in the matter of an application by Lowrie Holdings Inc. and Clearbeach Resources Inc.

For the foregoing reasons, in the matter of the costs of the Mining and Lands Commissioner, it is deemed by the tribunal that costs are not payable by any party to this application.

In the matter of the motion for cost award for the Applicant, the request for pre-hearing and hearing costs is to be dismissed and each party is therefore responsible for their respective costs.

Appendices:

Schedule "A" landowners-lessors
Schedule "B" unit boundaries - legal description
Schedule "C" Map
Schedule "D" Allocation schedule
Schedule "E" Unit Operation Agreement