File No. OG 002-02

L. Kamerman	)	Tuesday, the 4th day
Mining and Lands Commissioner	)	of May, 2004.

THE OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

Subsection 8(1) of the Oil, Gas and Salt Resources Act, R.S.O. 1990, c.P.12, as amended by 1994, c.27, s.131, 1996, c.30, s.56-70 and 74, 1998, c. 15, Sched. E, s. 24, 1999, c. 12, Sched. N., s.5, 2000, c.26, Sched. L, s. 8 and 2001, c. 9, Sched. K., s. 4 and Section 14 of Ontario Regulation 245/97, amended to O. Reg. 22/00;

AND IN THE MATTER OF

An application by Metalore Resources Limited (the "Applicant") for an Order joining the interests of the Corporation of Norfolk County ("Norfolk County") and the interests of the Ministry of Natural Resources (the "Ministry") (hereinafter collectively referred to as the "Respondents") pursuant to the above-noted provisions, together with the interests of Steven Bauer ("Bauer"), the interests of Donald Schott and Sandra Schott (Schott") and the interests of J.S. DeLeebeeck ("DeLeebeeck");

AND IN THE MATTER OF

Ontario Regulation 440/93 made pursuant to the Petroleum Resources Act, R.S.O. 1990, c. P-12 and that part of the Ministry of Natural Resources Spacing Order 00-53 dated December 7, 1999 involving Charlotteville Township, County of Norfolk, being comprised of Part of Lot 10, Concession I, Charlotteville Township, County of Norfolk, (the "Spacing Unit");

AND IN THE MATTER OF

Part VI of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended and Ontario Regulation 263/02;

(Amended May 4, 2004)

. . . . 2

AND IN THE MATTER OF

Those lands of Norfolk County described as: the easterly 20 acres of even width throughout the northerly 75 acres of Lot 10, in the first concession, in the Township of Charlotteville, in Norfolk County as more particularly described in Instrument No. 287546. Those lands of the Ministry described as: that part of Lot 10, in the first Concession, in the Township of Charlotteville in Norfolk County (hereinafter collectively described as the "Respondent's Lands");

B E T W E E N:

METALORE RESOURCES LIMITED

Applicant

- and -

CORPORATION OF NORFOLK COUNTY

Respondent of the First Part

- and -

THE MINISTER OF NATURAL RESOURCES

Respondent of the Second Part

AND IN THE MATTER OF

An application for an Order that fixes the amount of past royalties payable to Norfolk County and the Ministry on the basis of their respective acreage contributed to the Spacing Unit; and an Order joining all the interests in the Spacing Unit including those of Norfolk County and the Ministry in accordance with the above statutory authority, providing that the relationship between the Applicant and the Respondents be governed by a Petroleum and Natural Gas Lease and Grant, the form of which has been filed with this application and an Order declaring that, to the extent that all tracts within the Spacing Unit are operated as a pooled Spacing Unit pursuant to the above-noted statutory authority, the interests of the Respondents and all royalties, past and present, shall be determined based upon their respective acreage contributed to the Spacing Unit in accordance with the above-noted Lease and Grant.

INTERLOCUTORY ORDER

WHERES this matter was heard on the 24th day of July, 2003, in London, Ontario;

AND WHEREAS counsel for the parties settled all but two issues and the tribunal found that it would accept the terms outlined and make a ruling on those matters for which there was no agreement;

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1. **THIS TRIBUNAL ORDERS** that the Title of Proceedings shall be amended to add after the third clause the words, "**AND IN THE MATTER OF** Part IV of the **Mining Act**, R.S.O. 1990, c. M.14, as amended and Ontario Regulation 263/02.

2. **THIS TRIBUNAL FURTHER ORDERS** that the royalty clause pertaining to the Corporation of Norfolk County, Respondent of the First Part, shall state as follows:

The lessee agrees to pay the following to the Lessor:

…

(c) a royalty of twelve and one-half percent (12.5%) of the net revenue from the gas that is produced from the Premises.
It is understood and agreed that the fair market value of the gas that the Lessee receives at the point at which the lessee transfers custody of the gas, without any deduction whatsoever being made for any of the Lessee's or purchaser's costs including but not limited to the cost for handling, processing or transporting the gas.

3. **THIS TRIBUNAL DIRECTS** that the parties execute consents to the issuance of a Compulsory Pooling Order setting out in detail the agreed terms and conditions within 30 days of the date of this Interlocutory Order.

DATED this 4th day of May, 2004.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. OG 002-02

L. Kamerman) Tuesday, the 4th day
Mining and Lands Commissioner) of May, 2004.

THE OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

Subsection 8(1) of the Oil, Gas and Salt Resources Act, R.S.O. 1990, c.P.12, as amended by 1994, c.27, s.131, 1996, c.30, s.56-70 and 74, 1998, c. 15, Sched. E, s. 24, 1999, c. 12, Sched. N., s.5, 2000, c.26, Sched. L, s. 8 and 2001, c. 9, Sched. K., s. 4 and Section 14 of Ontario Regulation 245/97, amended to O. Reg. 22/00;

AND IN THE MATTER OF

An application by Metalore Resources Limited (the "Applicant") for an Order joining the interests of the Corporation of Norfolk County ("Norfolk County") and the interests of the Ministry of Natural Resources (the "Ministry") (hereinafter collectively referred to as the "Respondents") pursuant to the above-noted provisions, together with the interests of Steven Bauer ("Bauer"), the interests of Donald Schott and Sandra Schott (Schott") and the interests of J.S. DeLeebeeck ("DeLeebeeck");

AND IN THE MATTER OF

Ontario Regulation 440/93 made pursuant to the Petroleum Resources Act, R.S.O. 1990, c. P-12 and that part of the Ministry of Natural Resources Spacing Order 00-53 dated December 7, 1999 involving Charlotteville Township, County of Norfolk, being comprised of Part of Lot 10, Concession I, Charlotteville Township, County of Norfolk, (the "Spacing Unit");

AND IN THE MATTER OF

Part VI of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended and Ontario Regulation 263/02;

(Amended May 4, 2004)

AND IN THE MATTER OF

Those lands of Norfolk County described as: the easterly 20 acres of even width throughout the northerly 75 acres of Lot 10, in the first concession, in the Township of Charlotteville, in Norfolk County as more particularly described in Instrument No. 287546. Those lands of the Ministry described as: that part of Lot 10, in the first Concession, in the Township of Charlotteville in Norfolk County (hereinafter collectively described as the "Respondent's Lands");

B E T W E E N:

METALORE RESOURCES LIMITED

Applicant

- and -

CORPORATION OF NORFOLK COUNTY

Respondent of the First Part

- and -

THE MINISTER OF NATURAL RESOURCES

Respondent of the Second Part

AND IN THE MATTER OF

An application for an Order that fixes the amount of past royalties payable to Norfolk County and the Ministry on the basis of their respective acreage contributed to the Spacing Unit; and an Order joining all the interests in the Spacing Unit including those of Norfolk County and the Ministry in accordance with the above statutory authority, providing that the relationship between the Applicant and the Respondents be governed by a Petroleum and Natural Gas Lease and Grant, the form of which has been filed with this application and an Order declaring that, to the extent that all tracts within the Spacing Unit are operated as a pooled Spacing Unit pursuant to the above-noted statutory authority, the interests of the Respondents and all royalties, past and present, shall be determined based upon their respective acreage contributed to the Spacing Unit in accordance with the above-noted Lease and Grant.

REASONS

The hearing of this matter took place in London, Ontario on the 24th day of July, 2003.

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Appearances:

Metalore Resources Limited	Mr. Mark Abradjian, counsel
Corporation of Norfolk County	Mr. Keith M. Jones, counsel
Ministry of Natural Resources	Mr. Stephen H. Gibson, counsel

Background

The parties were able to settle most of the outstanding matters, with the exception of two issues, for which they requested a ruling by the tribunal.

On the 25th day of July, 2003, the tribunal issued a draft Order which set out its decision on the proposed royalty clause, as follows:

> **3.** **THIS TRIBUNAL ORDERS** that the royalty clause pertaining to the Corporation of Norfolk County, Respondent of the First Part, shall state as follows:
>
> The lessee agrees to pay the following to the Lessor:
> …
>
> a royalty of twelve and one-half percent (12.5%) of the net revenue from the gas that is produced from the Premises.
> It is understood and agreed that the fair market value of the gas that the Lessee receives at the point at which the lessee transfers custody of the gas, without any deduction whatsoever being made for any of the Lessee's or purchaser's costs including but not limited to the cost for handling, processing or transporting the gas.

The tribunal also proposed as a precondition to the issuance of the requested Order on Consent Allowing the Application for Pooling, that the Applicant, Metalore Resources Limited, and the Respondent of the Second Part, the Ministry of Natural Resources, negotiate and enter into an Inspection Protocol, with or without the assistance of the tribunal Registrar, Daniel E. Pascoe, which shall include the following provisions:

> (a) Any inspection of the well contained on the subject lands shall only take place upon adequate notice, either by telephone or facsimile, the terms of which shall be negotiated for purposes of the Inspection Protocol to include an agreed upon date and time convenient to permit a representative of Metalore Resources Limited and an inspector from Ministry of Natural Resources, within the meaning of the **Oil, Gas and Salt Resources Act**, to attend, but shall not exceed 48 hours in advance of the intended inspection, failing which agreement, shall take place on a date and time set by the Ministry of Natural Resources;

. . . . 4

(b) At the time of the inspection, should an issue of compliance arise for which Metalore Resources does not agree, and for which the inspector intends to give an order in writing directing compliance, according to the provisions of section 7 of the **Oil, Gas and Salt Resources Act**, that Metalore Resources Limited be given at the time of the inspection the option of either

(i) effecting compliance in the manner and within the timeframes specified by the inspector, without prejudice to its position that there was satisfactory compliance and no need for the issuance of the order by the inspector, so that Metalore Resources Limited may chose to take such course of legal action as it may see fit, including but not limited to, judicial review or application under Rule 14 of the **Rules of Civil Procedure** for interpretation of an instrument; or

(ii) not comply with the order, which it understands may result in the affixing of a tag to the work.

This draft Order resulted in submissions to the tribunal's jurisdiction to make an order with respect to an inspection protocol.

Mr. Gibson, on behalf of the Ministry (MNR) filed his written submission on the 18th of September, 2003, which is reproduced:

1.0 General

1.1 The within submissions are made at the invitation of the mining and Lands Commissioner (the "Commissioner" in respect of her proposal, reflected in draft wording received on July 25, 2003, which would create a unique inspection and enforcement protocol as between the Ministry of Natural Resources and Metalore Resources Limited, presumably in respect of all works operated by the latter corporation.

1.2 For reference, the proposed draft wording is as follows:

"…"

1.3 The Ministry of Natural Resources opposes the creation of a special or unique inspection and enforcement protocol pertaining to Metalore Resources Limited, particularly within the parameters of an order of the Commissioner in respect of an application under Section 8(1) of the **Oil, Gas and Salt Resources Act** (the "Act"), the grounds for which opposition include as follows:

1.3.1 the creation of an inspection enforcement unique and specific to a single operator, in this case Metalore Resources Limited, exceeds the jurisdiction of the Commissioner as defined by Section 8(1) of the Act.

1.3.2 the creation of an inspection enforcement protocol unique and specific to Metalore Resources Limited was not an issue identified or considered by the parties to the application and, as such, was not an issue in respect of which there was an opportunity to adduce evidence in relation thereto.

1.3.3 specific elements reflected in the draft inspection enforcement protocol are contrary to the powers of an inspector as established by the Act, including but not necessarily limited to the power to enter in or upon any premises at any time without warrant.

1.3.4 specific elements reflected in the draft inspection enforcement protocol are or are potentially inconsistent with inspection mechanisms as established by the Act, including but not necessarily limited to the mechanism for issuance of orders and affixing of tags pursuant to Section 7 thereof.

1.3.5 specific elements reflected in the draft inspection protocol for Metalore Resources Limited are contrary to existing ministerial compliance protocols and enforcement plans, including but not limited to frequency and timing details based upon, amount other things, the history/experience of the operator.

1.3.6 the creation of an inspection and enforcement protocol unique and specific to Metalore Resources Limited runs contrary to the principal of consistent inspection and enforcement of the oil and gas industry as a whole.

1.3.7 the establishment of an inspection and enforcement protocol unique and specific to a single operator creates a risk of challenge to inspection and enforcement mechanisms by operators not subject to the said unique inspection and enforcement protocol.

2.0 Analysis

2.1 *Proposed Protocol Exceeds Jurisdiction of Mining and Lands Commissioner*

The within application was instituted and heard as a pooling application pursuant to Section 8(1) of the Act. Under that provision, the Commissioner is limited as to the orders which she is authorized and can make, specifically to the following:

a) the oil or gas interests within a spacing unit be joined for the purpose of drilling or operating an oil or gas well;

b) management of the drilling or operation be carried out by the person, persons, or class of persons named or described in the order; and

c) the costs and benefits of the drilling or operation within the spacing unit be apportioned in the manner specified in the order.

It is submitted that the proposed inspection and enforcement protocol does not relate to and is not contemplated by any of the aforesaid orders.

In making of the above submission, counsel for the Ministry of Natural Resources is aware of the existence of a discretion in the Commissioner to make effectual and ensure compliance with her decision as contained in Section 105 of the **Mining Act**. Indeed, counsel referred to such discretion within the course of his submissions during the hearing of this application, particularly in respect of the question of compensation for loss of bid opportunity. In this regard, however, it is now submitted and conceded that such discretion must be exercised in relation to an authorized decision, in this case as defined by Section 8(1) of the **Act**. Discretion cannot be exercised to expand jurisdiction, particularly where such jurisdiction is limited by statute.

2.2 *Proposed Protocol not an Issue at Hearing*

While conceding that issues requiring consideration and decision may arise during the course of any hearing, it is to be noted that the creation of a unique inspection and enforcement protocol specifically Metalore Resources Limited was not an issue identified by the parties within their written submissions to the Commissioner and, furthermore, was not a matter put before the Commissioner by any party during the course of the abbreviated hearing. As such, the parties, and in particular the Ministry of Natural Resources, have not had an opportunity to adduce any evidence relevant to inspection and enforcement protocols and/or the inspection and enforcement history of Metalore Resources Limited for consideration by the Commissioner before any decision was or could be made. In this regard and without prejudice to the overriding jurisdictional submissions reflected in paragraph 2.1 above, it is submitted that, before any decision can or should be properly made on the issue of enforcement inspection protocol, the Commissioner must hear and consider relevant evidence, including the details and rationale of existing protocols and the detailed inspection, enforcement and compliance history of Metalore Resources Limited. With respect, without the benefit of such evidence, the Commissioner is not in a position to make any valid, informed, or justified decision on such issue.

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2.3 *Proposed Protocol Inconsistent with Statutory Powers of Inspector*

The Act (Section 3) establishes the powers of inspectors appointed thereunder, expressly including the power to enter in or upon any premises at any time without a warrant. The proposed protocol contemplates verbal or written notification to Metalore Resources Limited of an intended inspection by an inspector, such notification being of up to 48 hours in duration. It is contended that the requirement of such notice is inconsistent with and constitutes a restriction upon the aforenoted right of re-entry enjoyed by an inspector. It is also submitted that the Commissioner ought not to make any order which is inconsistent with the powers of an inspector as established by statute.

In the above regard and relating back to the jurisdictional submission of paragraph 2.1 above, it is further submitted that the Commissioner has no authority to restrict a power established by statute. Only the legislature, by statutory amendment, is empowered to restrict express powers of an inspector as created by statute.

2.4 *Proposed Protocol Inconsistent with Statutory Enforcement Mechanisms*

The Act (Section 7) establishes the mechanism for issuance of a written order requiring compliance with the Act and/or regulations where an inspector finds a contravention, in combination with which order the inspector may also tag the work pending compliance. The proposed protocol contemplates both a notification of Metalore Resources Limited by the inspector on an "intention" to issue a written order and a consequential option for Metalore Resources to comply or not, apparently within the notification period. It is submitted that the aforenoted procedures are inconsistent with the statutory mechanism established in Section 7 of the Act, both in respect of the notification of an intention to issue an order and the granting of the compliance option to Metalore Resources Limited as operator. It is again submitted that the Commissioner ought not to make any order which is inconsistent with an enforcement or compliance mechanism established by statute.

In the above regard and again relating to the jurisdictional submission in paragraph 2.1 above, it is further submitted that the Commissioner has no authority to create an alternative enforcement/compliance mechanism, particularly in contradiction with established statutory procedures. Again, only the legislature, by statutory amendment, can and should alter mechanisms created by statute.

2.5 *Proposed Protocol Contrary to Compliance Protocols and Enforcement Plans*

Pursuant to its statutory powers and duties, the Ministry of Natural Resources, through the Petroleum Resources Centre, establishes annual and five year enforcement protocols and plans. Critical to such protocols and plans are compliance monitoring of field operations, surveillance, and inspections without notice, the frequency and degree of which procedures relate directly to the size of operations and compliance history of the operator in question. The inspection requirements contemplated by the proposed protocol for Metalore Resources Limited and in particular the written notification requirement in light of the size of relevant operations and negative compliance history, are in direct contravention of these plans and protocols.

2.6 *Proposed Protocol Contrary to Consistent Inspection and Enforcement of Industry*

One of the fundamental principles of current enforcement plans and protocols, directed at the goal of compliance, is consistent inspection of and enforcement against the operators of the oil and gas industry in Ontario as a whole, albeit accounting for, among other things, size of operations and compliance history of specific operators. Quite simply, the creation of an inspection and enforcement protocol specific to Metalore Resources Limited, establishing mechanisms inconsistent with statutory procedures and established protocols otherwise applicable to all other operators, runs contrary to such principle of consistency. The unacceptability of such inconsistency is only augmented by the appearance that the proposed protocol creates mechanisms which are more favourable or more lenient towards a significant operator with a negative compliance history.

2.7 *Proposed Protocol Creates a Risk of Challenge to Existing Mechanisms and Protocols by Other Operators*

Further to the submission in paragraph 2.6 above, it is submitted that the creation of a distinct protocol applicable only to a single operator establishes the framework for a challenge to existing mechanism and protocols by operators not subject to that distinct protocol but subject to different mechanisms and protocols. The existence of such a unique protocol raises the specter of discrimination as against other operators and the potential threat of a constitutional challenge to the established mechanisms and protocols.

3.0 Conclusion

For the reasons set forth above, the Ministry of Natural Resources submits that, within the parameters of the pending application, the Commissioner ought not to consider, order, or otherwise implement an inspection enforcement protocol pertaining only to Metalore Resources Limited.

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On the 10th of October, 2003, Mr. Mark Abradjian for Metalore made the following written submissions:

1) Introduction

This submission is made in response to the Mining and Lands Commissioner's invitation to respond to her draft wording for inclusion in a contemplated Pooling Order. The Applicant understands that that the submissions made, and the final order will relate exclusively to Well No. 27 which is the subject of this Application.

2) Background and Outline of Submission

i) The draft inspection and enforcement protocol [the protocol] arose out of the Ministry of Natural Resources' [the "Respondent's"] request that the pooling order requested be conditional upon the Applicant's compliance with all statutory requirements. The Applicant submitted at the Hearing and again submits that the Pooling Order should not be conditional upon compliance. However, the Applicant views the proposed protocol not as a condition but as a means by which to effect the Commissioner's Order.

ii) The Commissioner is given discretion to give directions and orders that will make the pooling order effectual and ensure that it will be complied with. While this does not expand the range of possible decisions in a pooling order beyond those contemplated by the legislation, it does allow the Commissioner to implement procedures that she feels are necessary to make the pooling order work effectively.

iii) The draft order is problematic if it is conditional on the inspection and enforcement protocol. However, if the order is final, regardless of whether the protocol is entered into, and the protocol is simply the means chosen by the Commissioner to make the pooling order effectual, then the protocol is a proper use of the Commissioner's jurisdiction.

iv) If the protocol is within the Commissioner's jurisdiction, it does not matter that the protocol will alter the mechanisms for inspection and enforcement set out in the statute.

v) While the Applicant favours a consistent approach to enforcement and inspection throughout the industry, the policy of the Respondent has not been to inspect and enforce on a consistent basis despite their submissions relating to the importance of consistency. This has made the protocol necessary.

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Analysis

i) Jurisdiction of the Commissioner

In a pooling application, the Commissioner is limited to making an order that is listed in section 8(1) of the **Oil, Gas and Salt Resources Act**:

8. The Commissioner may order that,

(1) (a) the oil or gas interests within a spacing unit be joined for the purpose of drilling or operating an oil or gas well;

(b) management of the drilling or operation be carried out by the person, persons or class of persons named or described in the order; and

(c) the costs and benefits of the drilling or operation within the spacing unit be apportioned in the manner specified in the order. 2002, c. 18, Sched. L., s. 6(2).

This means that a pooling order could not be made conditional on, amongst other things, the Applicant complying with all statutory regulations. When it is made, a pooling order must be final.

ii) The Commissioner's Discretion

Section 105 of the **Mining Act** (R.S.O. 1990, c. M.14) gives the Commissioner broad discretion to make orders and directions that the Commissioner feels are necessary to make her decision effectual and to ensure that they will be complied with:

Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but, except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.

This discretion is incorporated into decisions made on Pooling Applications by section 1(3) of the **Oil, Gas and Salt Resources Act**:

Part VI of the Mining Act applies, with necessary modifications, to the exercise of the Commissioner's powers and the performance of his or her duties under this Act.

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The Commissioner's discretion is limited to giving directions that are necessary to ensure the parties comply with her decision to pool. It does not allow her to make a decision that is not listed in section 8(1) of the **Oil, Gas and Salt Resources Act**. A conditional order is outside of the Commissioner's jurisdiction.

iii) Characterization of the Protocol

The Respondent argues in paragraph 2.1 of its submission that the protocol exceeds the Commissioner's discretion because it does not relate to the pooling order. The applicant submits that there is a clear connection between the protocol and the order. Given the history of problems with inspection and enforcement between the Applicant and this Respondent, it is reasonable that a pooling order could only be made effective if certain procedural safeguards relating to inspection and enforcement were put in place.

In the *Gaiswinkler Enterprises Ltd.* decision (File OG 003-98), the Commissioner held that it is charged with "regulating the joining of the interest in the filed or pool. What this means is that the tribunal has the ongoing legislative responsibility with respect to what has been ordered." (Pg. 31) In this case, the protocol is the method chosen by the Commissioner to regulate the pooling order.

As noted above, the pooling order cannot be made conditional on the negotiation and entering into the protocol. The protocol is simply a means to make the pooling order work given the circumstances. If the parties do not successfully negotiate the protocol, the order must still stand. It is submitted that parties should be given a time frame such as 30 days to negotiate the protocol.

iv) Alleged inconsistency with Statutory Powers of Inspector, and Statutory Enforcement Mechanisms

It is agreed that the Inspection Protocol would limit the power given to an inspector under section 3 of the **Oil Gas and Salt Resources Act** to enter upon premises without notice or warrant. It would also limit the power of an inspector to issue an order without first giving the operator the opportunity to comply with the alleged deficiency.

The **Oil Gas and Salt Resources Act** indicates that, in general, it would be appropriate for inspectors to enter the lands of the operator without warrant or notice. (See section 3(1)(a) of the **Oil Gas and Salt Resources Act**) However, the discretion is allowed under that statute that would indicate that a general protocol would not be effective for every operation and in every situation.

The Act sets out general enforcement mechanisms to ensure that operators comply with the Act. However, these are general empowering sections that give inspectors the authority to issue orders and tag operations. They do not set out a mandatory

and consistent procedure to be followed by inspectors upon discovery of non-compliance with the Act. For example, under section 7, when an inspector discovers a violation, that inspector may issue an order. Presumably, he/she could also insist on compliance by a certain date without issuing an order.

To hold that the statutory powers of the inspectors to enter upon a premises without notice or warrant is absolute and inalterable would also fetter the Commissioner's ability to make effective orders given the circumstances of the parties.

iv) Consistency in Inspection and Enforcement

The Respondent's submissions state that the protocol could be challenged by operators subject to different and less favourable inspection and enforcement protocols. However, the Respondent has argued in the past that it does not need to apply consistent inspection and enforcement procedures throughout the industry. In paragraph 2.6 of the Respondent's submissions, it states that while consistent inspection and enforcement is a goal, consistent and enforcement is tempered by factors such as size of operations and compliance history.

The Applicant favours a consistent approach to enforcement and inspection throughout the industry. However, its experience has shown that consistent inspection and enforcement is not occurring. The Respondent has historically not been consistent in its enforcement initiatives and cannot now be permitted to use consistency as a shield to prevent the proposed protocol. As a result, this protocol would help to limit the inconsistent inspection and enforcement that is occurring, and would not be the basis for a challenge based on discrimination among operators. The Respondent's submission states that Metalore has a "negative compliance history". In reality, Metalore has been in operation for more than 59 years and has not been convicted of any compliance-related offence.

v) Conclusions

For the reasons set forth above, the Application submits that while the Commissioner does not have the authority to make a conditional pooling order, she does have the discretion to give directions to the parties that will render the pooling order effectual. Accordingly, the protocol should not be viewed as a condition to the pooling order, but as a set of directives issued by the Commissioner to render her order effectual.

Findings

The tribunal drafted an Interlocutory Order which essentially asked the parties to come to an accommodation concerning inspections and compliance before it would be willing to

issue a Compulsory Pooling Order ostensibly on Consent, with the tribunal having been asked to make a ruling on several issues which the parties could not resolve. This proposal of the tribunal's was immediately challenged as being outside of its jurisdiction to pursue. The tribunal finds that it agrees in this regard.

Although not discussed with the parties at the convened hearing, the tribunal finds that it is necessary to look into the operation of the **Oil, Gas and Salt Resources Act** ("**OGSR Act**" and its regulation, O. Reg. 245/97 when dealing with the issue leases involving Crown lands, which are governed by Part IV of the **Mining Act** ("**MA**") and O. Reg. 263/02.

Part IV of the **MA** is entitled "Oil, Gas and Underground Storage". Section 99 provides that the Part applies to certain Crown lands. For the purposes of the lands in question, it would appear that the lands are included in those contemplated by the words, "lying south and east of the Mattawa River, Lake Nippissing and the French River." The lands circumscribed by this reference appear to correspond to the lands circumscribing the Southern Ontario Mining Division, as described in Schedule 1 of R.R.O. 767/90, which is fully set out in O. Reg. 83/87, with the exception that the latter references provide detailed information commencing with the intersection of the Interprovincial Boundary between Ontario and Quebec and describing each portion of the boundaries of the Mining Division.

The role of the Crown as both regulator and landowner is dealt with in O. Reg. 263/02, but also includes provisions of the **OGSR Act**. Section 24 of O. Reg. 263/02 states:

> **24.** A licensee or lessee shall carry out all exploration, drilling, production and storage operations (details of which are found in other sections) in accordance with,
>
> (a) the Act and this Regulation;
>
> (b) the terms and conditions of the licence or lease;
>
> (c) the *Oil, Gas and Salt Resources Act*, the *Ontario Energy Board Act*, 1998 or the regulations made under them; and
>
> (d) any order of the Ontario Energy Board or of the Mining and Lands Commissioner.

Section 26 provides that the Minister (of Natural Resources) may cancel a licence or terminate a lease for failure to, among other things, comply with provisions of the legislation or terms of the document involved. Its provisions are also relevant to the issue of oil and gas development on Crown lands:

> 26. (1) Subject to subsections (2) and (3), the Minister may forthwith cancel a licence or terminate a lease without liability and without compensation to the licensee or lessee, as the case may be, if the licensee or lessee fails to,

(a) comply with the terms and conditions of the licence or lease;

(b) comply with the Act and this Regulation, the *Oil, Gas and Salt Resources Act*, the *Ontario Energy Board Act*, *1998* or the regulations made under them;

(c) comply with an order of the Ontario Energy Board or the Mining and Lands Commissioner;

(d) …

(e) produce oil or gas under a lease on or before the fifth anniversary of the lease or during any five-year period during the term or terms of the production lease;

(f) …

(g) …

(2) The Minister may not cancel a licence or terminate a lease under subsection (1) unless he or she delivers or sends by registered mail to the licensee or lessee at the licensee's or lessee's last address on record with the Ministry a notice setting out the default and requiring that it be remedied.

(3) If the licensee or lessee remedies the default within the time specified in the notice, the Minister shall not cancel the licence or terminate the lease.

(4) For purposes of subsection (2), a notice of failure to comply sent by registered mail …

(5) If a licence or lease has been cancelled, the Minister may cancel, in whole or in part, any or all other licences or leases held by the licensee or lessee if, in the Minister's opinion, the licensee or lessee is unable to satisfactorily develop the area or areas covered by those licences or leases because the licensee or lessee is financially insolvent or because the licensee or lessee is unable to meet the requirements of the Act, this Regulation, the *Oil, Gas and Salt Resources Act* or the *Ontario Energy Board Act, 1998* or the regulations made under them.

This is different from the wording found in section 14 of the **OGSR Act** in that, before the Minister may act, there must be a failure to act which is an offence under section 19, and a hearing and report before the Commissioner may also be involved. The **MA** provisions do not appear to provide for a hearing. This makes sense, in that it would be a duplication of provisions for hearing under the **OGSR Act**. O.Reg. 263/02 under the **MA** does not appear to address the situation, in any great detail, which would involve the bulk of the lands in south-

western Ontario, where a portion but not all of the lands in an application for compulsory pooling are Crown lands. However, there is nothing in the regulation to suggest that its provisions do not apply to those Crown lands, operating in concert with the relevant sections of the **OGSR Act** and any licence issued pursuant to it or O. Reg. 263/02.

In other words, there appears to be a scheme found in the **MA** and O. Reg. 263/02 which governs the manner in which the Minister must approach the issue of whether or not to grant a lease for hydrocarbons on Crown lands. As to the conduct of the operator, compliance is captured generally by the **OGSR Act**. When allegations of non-compliance are leveled at licensees or lessees on Crown lands, the Minister's recourse for purposes of those Crown lands appears to be captured by O. Reg. 263/02 under the **MA**. It remains unclear as to what must occur when the alleged non-compliance occurs in a pooled spacing unit involving private lands and Crown lands, but this is obviously not a question for the tribunal to contend with.

The reference to application for licence or production lease on Crown land is found in sections 6 and 10 of O.Reg.263/02:

6. (1) A licence shall describe the area covered by the licence by tract and block or, if no registered grid system

(3) If an area to be covered by a licence is an area not shown on Plan 1495, the Minister shall specify the minimum and maximum size of the area to be covered on the application or tendering.

10. (1) A licensee who applies to the Minister for a lease shall be granted a lease for an area that formed all or part of the area described in the licence if the licensee demonstrates to the Minister's satisfaction that the area to be covered by the lease contains economically producible oil or gas.

(2) If the Minister is not satisfied that the licensee has demonstrated that the area to be covered in the lease contains economically producible oil or gas, the Minister may,

(a) amend the application with respect to the area applied for and grant the lease; or

(b) refuse to grant the lease.

(3) …

(4) The area to be covered by a lease shall conform to the size requirements of subsection 6(2) or (3).

(5) An application for a lease shall be accompanied by,

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(a) a description of the area,

(i) by tract and block described by Plan 1495,

(ii) if any registered grid system is subsequently established on the area, in accordance with that grid system, or

(iii) if the area is not described by a registered grid system, by a Crown land reference plan prepared in accordance with the instructions of the Minister or any other description approved by the Minister;

(b) a summary of the technical data supporting and quantifying the discovery of the economically producible oil or gas;

…

Test for Lease of Crown Lands

The test for obtaining a lease of hydrocarbons on Crown lands appears to be rooted in findings of economically producible substances. This is something which was not raised during the course of the proceedings, and for which counsel has not had opportunity to make submissions. However, the use of the word "shall" appears to suggest that the Minister has no discretion in this matter. As has been noted before, there are no rights to a hearing which arise under this portion of the legislative scheme, as far as the tribunal can see. Again, this analysis has taken place without the benefit of hearing from counsel.

Compliance with Legislation

Contrary to what was suggested by counsel, section 12 of the **Oil, Gas and Salt Resources Act** states:

> **12.** Every operator shall take every precaution reasonable in the circumstances to ensure that the operator's employees and agents comply with this Act and the regulation.

Ontario Regulation 245/97 states:

> **2.** (1) Subject to subsection (2), operators of a work governed by the Act shall comply with the Provincial Standards.

> (2) An operator may depart from the Provincial Standards if it is reasonable to do so in the circumstances, the operator takes measures to prevent or limit damage that provide a standard of protection that is equal to the standard established in the Provincial Standards and, before departing from the standards, notifies the Ministry in writing of the intention to depart and the details and circumstances of the departure.
>
> (3) An operator who departs from the Provincial Standards in accordance with the conditions set out in subsection (2) is not in contravention of subsection (1).

The issue of compliance is handled by the legislation through the auspices of the inspectors and the Minister's delegate. Whether or not Metalore has and continues to act in compliance of standards is dealt with by inspectors and the Minister's delegate, depending on the section involved. The legislation makes it clear that inspectors are charged with those powers found in section 3 of the **Oil, Gas and Salt Resources Act**, which includes provision that no notice is required for inspection. Procedures for notification of non-compliance and direction for compliance are set out in section 7. The inspector is also empowered to issue orders for the plugging of a well.

The legislative scheme anticipates compliance by an operator. It provides mechanisms for enforcement. Given the provisions of section 2 of O. Reg 245/97, Metalore is required to comply with Provincial Standards. If it believes that it is reasonable in the circumstances to depart from the Standards, notice to the Minister is required prior to undertaking any such departure. While there is an appeal from an inspector's order, there does not appear to be such a process in existence concerning the prior notification of departure from Provincial Standards.

While section 2 of the Regulation does not elaborate on what may take place if the Minister disagrees with the rationale for the departure. It would appear from the wording that notification is sufficient. It is also not clear how this provisions operates in concert with those involving the powers of the inspectors, including the powers found in section 7 of the Act.

While the tribunal agrees that it has no authority to direct the parties as to an inspection protocol, this whole issue arose from the request of Mr. Gibson that the tribunal include in its Order a statement that Metalore comply with the legislation. Based upon the legislative scheme, the tribunal concludes that the issue of compliance is one which is spoken to directly in the legislation and therefore, it would not be necessary, nor proper, for the Tribunal to issue an Order requiring Metalore to comply with the legislative scheme. Should Metalore chose to act in contravention of the Provincial Standards without resorting to notification of the Minister as provided by subsection 2(2) of O. Reg. 245/97, it would appear to do so at its own risk and be required to bear the consequences.

Amendment to Title of Proceedings

Given that the power to enter into a lease involves the **MA** and O. Reg. 263/02, the Title of Proceedings will be amended accordingly.

Powers of the Tribunal

Counsel for the parties have very ably set out the limits of the tribunal's powers in a compulsory pooling application, which do not extend to imposing an inspection protocol as a condition to issuing its order.

The tribunal does have broad powers under section 105 of the **MA**, but it agrees that those powers cannot be used to expand jurisdiction. Notwithstanding that compliance was raised by the Ministry, the tribunal is of the view that there are sufficient provisions within the governing legislation to prevent Metalore from running up against compliance orders of the inspector, should it chose to act appropriately.

One item which must be distinguished concerns the reference to the earlier *Gaiswinkler* decision. It was the first compulsory unitization decision of this tribunal under what was clause 8(1)(b) of the **OGSR Act**. Unitization considerations are not necessarily relevant to this proceeding. However, it is pointed out that the wording governing unitization, now subsection 8(2), has been amended so that the power to regulate the joining of the interests no longer exists in the tribunal.

Agreed Upon Matters for Consent to the Issuance of Compulsory Pooling Order

Counsel indicated that they would be prepared to accept the tribunal's ruling with respect to the issues set out above and further, would execute consents as to the other terms upon which there is agreement for purposes of the issuance of a Compulsory Pooling Order by the tribunal. Counsel did state for the record a summary of those areas in which there was agreement.

The tribunal did not order the transcript of this proceeding, so the following highlights may or may not adequately reflect the highlights covered by counsel. It trusts that, should there be any differences between what is described below and what was agreed upon, counsel will accurately reflect their position in the consents which they are directed to file.

- Norfolk County has agreed to be bound by a form of lease similar to that attached by MNR in its submissions at Tab 54.
- A shut in rental of $500 is payable in the event that the well is shut in for a period of greater than four months, according to the agreement which was submitted by Mr. Jones.
- There will be no annual rental payment prospectively.

- The payment for past royalties, or one time initial rental payment, will be a figure determined by:

  - Production values submitted by Metalore from 1993 to 2000, as have been submitted to MNR but not filed.

  - The tribunal has determined the applicable rate, set out above.

  - There was reference to a letter of Mr. Jeremy Devereaux (Ex. #2, Tab N) dated June 12, 2002, for production to which the royalty determined by the tribunal would apply.

  - Norfolk's portion of the proposed spacing unit is 17.7%, which would factor into the calculations for past royalties.

- The term is for ten years.

- It is agreed that there will be a meter installed on the well, which accords with MNR's operating standards, to monitor the production of the well for a period of eight months, but for the purposes of calculation, the first two months will be excluded.

- For the initial eight month period, bi-monthly royalty payments and bi-monthly reporting on production will occur.

- At the end of the eight month period, there will be a determination of whether royalties payable to MNR are over or under $500. If over, there will be monthly royalty payments and reporting to Norfolk County; if under, the payment and reporting to Norfolk County will be annual, but the meter will nonetheless stay on the well.

- During the eight month period, reporting will be bi-monthly;

- The tribunal has determined that the royalty is 12.5% as set out in detail in its Order.

- MNR has agreed to the joining of interests in the spacing unit, in the form of the lease found at Tab 54 of its materials, for a term of ten years, which includes an annual rental in accordance with the regulation of $2.50 per hectare or $100 per year, whichever is greater, the royalty being 12.5% as according to regulation, to include a unitization paragraph, past royalties based upon calculations and submissions found in the Devereaux letter and based upon 32.7% of the unit.

- Metalore will provide a description of the MNR lands in a form acceptable for registration by the land registrar.

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- A site specific termination clause is to be added to the terms of the lease found at Tab 54.

- Should MNR wish to terminate its lease, it can do so conditionally upon amending the spacing order to exclude the MNR leased lands

- Metalore is to provide proof of liability insurance to MNR with respect to its operations.

Conclusions

The parties will be directed to execute consents to the issuance of a Compulsory Pooling Order setting out in detail the terms upon which there is agreement within 30 days of the date of issuance of this Interlocutory Order. Should those differ from what is set out by the tribunal above, the consents will govern.