File No. OG 003-98

L.F.G. Carter	)	
Deputy Mining and Lands Commissioner	)	Friday, the 3rd day
L. Kamerman	)	of December, 1999.
Mining and Lands Commissioner	)	

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 1994, c. 27, s. 131 and 1996, c. 30, s. 56-70, and section 15 of Ontario Regulation 245/97 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, Gaiswinkler Enterprises Limited 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 Colchester South 81-1 Pool";

B E T W E E N:

GAISWINKLER ENTERPRISES LIMITED

Applicant

- and -

ALL LEASED LANDOWNERS IN THE COLCHESTER SOUTH 81-1 Pool, more particularly described in Schedule "A" attached hereto and forming part of this Order

Respondents (Amended December 3, 1999)

AND IN THE MATTER OF

All and singular those certain parcels, lots or tracts of land and premises, situate, lying and being in the Town of Essex, formerly the Township of Colchester South, in the County of Essex, and Province of Ontario, more particularly described in Schedule "B" attached hereto and forming part of this Order.

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ORDER FOR COMPULSORY UNITIZATION

WHEREAS a Hearing was held in this matter commencing at 10:00 a.m. on the 11th day of May, 1999, in the MacDonald and Cartier Rooms of the Radisson Riverfront Hotel, at 333 Riverside Drive West, Windsor, Ontario, with Mr. David Wayne Lewis, Counsel for the Applicant, having introduced evidence and submissions and with no one appearing in opposition to the application which was subsequently reconvened by telephone conference call on the 28th day of September, 1999, with Mr. Lewis appearing on behalf of the Applicant and Mr. Rudy Rybansky on behalf of the Ministry of Natural Resources, with notice not having been given to the leased landowners;

AND WHEREAS the Ministry of Natural Resources has issued drilling permits for three additional wells, conditional upon the Unitization of the Colchester South 81-1 Pool;

AND WHEREAS the tribunal has been advised by Counsel for the Applicant, Mr. D.W. Lewis, that previously unleased landowners, Mr. D. K. Edwards, Mrs. J.E. Edwards and Dr. R. Lacoursiere, identified on earlier documents as Respondents of the First Part, have entered into leases with the Applicant, copies of which have subsequently been provided to the tribunal;

AND WHEREAS the tribunal has further been advised by Counsel for the Applicant, Mr. D.W. Lewis, and confirmed by Mr. R. Rybansky on behalf of the Ministry of Natural Resources ("MNR"), that a lease with MNR has been completed with regard to one of the areas within the proposed unit lying under the bed of Lake Erie, copies of which have subsequently been provided to the tribunal;

AND WHEREAS the Applicant, Gaiswinkler Enterprises Limited has obtained Oil and Gas Leases on one hundred percent (100%) of the said lands in the proposed Unit, moving this application to one of unitization only, pursuant to clause 8(1)(b) of the **Oil, Gas and Salt Resources Act**;

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 this 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 hearing the evidence;

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1. **THIS TRIBUNAL ORDERS** that the Title of Proceedings be amended to include Roy Barnaby Lacoursiere, David Kent Edwards, Janet Edwards and the Ministry of Natural Resources within the meaning of "All Leased Landowners in the Colchester South 81-1 Pool" **AND FURTHER ORDERS** that the Title of Proceedings be accordingly amended by deleting all of the words specifying the parties found after "GAISWINKLER ENTERPRISES LIMITED Applicant" and replacing them with the words, "-and- ALL LEASED LANDOWNERS IN THE COLCHESTER SOUTH 81-1 Pool, more particlularly described in Schedule "A" attached hereto and forming part of this Order Respondents".

2. **THIS TRIBUNAL FURTHER ORDERS** that the Order will be effective on the 1st day of March, 1998 and **FURTHER ORDERS** that, for purposes of the effective date of this Order, all leases, including those of Roy Barnaby Lacoursiere, David Kent Edwards and Janet Edwards and the Ministry of Natural Resources will be deemed to have been executed on or prior to the 1st day of March, 1998.

3. **THIS TRIBUNAL FURTHER ORDERS** that the unit to be known as the Colchester South 81-1 Pool shall be described as all and singular those certain parcels, lots or tracts of land and premises, situate, lying and being in the Town of Essex, formerly the Township of Colchester South, in the County of Essex, and Province of Ontario, more particularly described in Schedule "B" attached hereto and forming part of this Order, being of Ordovician age of the Trenton and Black River Group, consisting regionally of impermeable limestone.

4. **THIS TRIBUNAL FURTHER ORDERS** that the unit boundaries, tracts and participating section of the Colchester South 81-1 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.(a) **THIS TRIBUNAL FURTHER ORDERS** that the interests of the Applicant, Gaiswinkler Enterprises Limited 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 Colchester South 81-1 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.

(b) **THIS TRIBUNAL FURTHER ORDERS** that the relationship between the Applicant, Gaiswinkler Enterprises Limited and the Respondents, being all Landowners in the Colchester South 81-1 Pool, be regulated in respect of such

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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 any existing agreement in respect of oil and gas rights in the Colchester South 81-1 Pool are amended and superseded accordingly.

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

(d) **THIS TRIBUNAL FURTHER ORDERS** that the Unit Operating Agreement may be amended by the Applicant, Gaiswinkler Enterprises Limited with the agreement of no fewer than that number of Leased Landowners corresponding with 60 (sixty) per cent of the unit area of the Colchester South 81-1 Pool, or no fewer than that number of Leased Landowners corresponding with 60 (sixty) per cent of the unit area of the Colchester South 81-1 Pool, 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,

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

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

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

(a) a plan of the newly defined unit area;

(b) the metes and bounds of the enlarged or reduced unit area; and

(c) 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.

6. **THIS TRIBUNAL FURTHER ORDERS** that, in accordance with clause 15(4)(g) of O.Reg. 245/97, the Applicant, Gaiswinkler Enterprises Limited, is appointed as the Initial Unit Area Operator.

7. **THIS TRIBUNAL FURTHER ORDERS** that the royalty payments to Leased Landowners shall be as set out in Clause 4 of the Unit Operation Agreement, and shall be determined on an areal (proportion by area) basis, in accordance with Schedule"D" attached to and forming part of this Order.[1]

8. **THIS TRIBUNAL FURTHER ORDERS** that service of the Order will be affected by the tribunal by registered mail and by the Applicant, Gaiswinkler Enterprises Limited through hand delivery to the residences of the Landowners as indicated by Schedule “A” attached to and forming part of this Order.

9. **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 Colchester South 81-1 Pool, and without limiting the generality of the foregoing, continuing as long as operations are conducted upon the Colchester South 81-1 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.

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

11. **THIS TRIBUNAL FURTHER ORDERS** that upon payment of the required fees, Notarized Copies of this Order be filed in the Registry Division of the Land Registry Office, in Windsor, Ontario, on the lands corresponding to each of the tracts listed in Schedule "D", attached hereto and forming part of this Order.

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[1] The royalty payments are to be in accordance with Clause 4 of the Unit Operating Agreement. However, for information purposes only, the royalties are 12 1/2 % of the current market value at point of sale of all oil and/or gas produced, saved and marketed from the unit, in proportion to each tract's portion of the whole unit. Payments are made on the first day of the month following that month when the oil and/or gas is sold. For those tracts whose annual royalties do not exceed $25.00, the amount of $25.00 per year shall be paid to the landowners no later than the 31st day of January of the following year.

In addition, for those leased lands within the unit which do not form part of the participating section, which the Applicant has kept under Lease or the Unit Operating Agreement for that year or a portion thereof, the amount of $25.00 per annum shall be paid to those landowners no later than the 31st day of January of the following year.

Finally, for those leased lands which do not form part of the unit, which the Applicant has kept under Lease or the Unit Operating Agreement for that year or a portion thereof, the amount of $25.00 per annum shall be paid to those landowners no later than the 31st day of January of the following year.

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

DATED this 3rd day of December, 1999.

Reasons for this Order are attached.

Original signed by L.F.G. Carter

Lorne F.G. Carter
Deputy Mining and Lands Commissioner

Original signed by L. Kamerman

L. Kamerman
Mining and Lands Commissioner

File No. OG 003-98

L.F.G. Carter	)	
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B E T W E E N:

GAISWINKLER ENTERPRISES LIMITED

Applicant

- and -

ALL LEASED LANDOWNERS IN THE COLCHESTER SOUTH 81-1 Pool, more particularly described in Schedule "A" attached hereto and forming part of this Order

Respondents (Amended December 3, 1999)

AND IN THE MATTER OF

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

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REASONS

This matter was heard on Tuesday, May 11th, 1999, in the MacDonald and Cartier Rooms of the Radisson Riverfront Hotel at 333 Riverside Drive West, Windsor, Ontario.

Appearances:

David Wayne Lewis	Counsel on behalf of the Applicant Gaiswinkler Enterprises Limited
Rudy Rybansky	On behalf of the Ministry of Natural Resources

No one attended on behalf of any of the remaining respondents.

Preliminary/Procedural Matters:

At the commencement of the hearing and pursuant to discussions with the tribunal's Registrar, Mr. Daniel Pascoe, leading up to the hearing, Mr. Lewis advised that all of the lands involved in the application were now under lease, with the proviso that two executed leases for Lacoursiere and the Edwards were currently in transit. Therefore, while the Appointment for Hearing set out Dr. Roy Barnaby Lacoursiere and Mr. David Kent Edwards and Mrs. Janet Edwards as Respondents of the First Part, being unleased landowners, this matter could be disposed of with Mr. Lewis' undertaking to file the two leases executed in favour of Gaiswinkler Enterprises Limited as soon as they were received. The Title of Proceedings was amended accordingly and the hearing proceeded on the basis of an application for unitization only.

At the hearing on May 11, 1999, the tribunal received a copy of the Ministry of Natural Resources Lease, dated March 16, 1999, for the lands under the bed of Lake Erie, it having been registered in the Land Titles Office on April 22, 1999 as instrument # 1459178. On May 12th and 13th, 1999, subsequent to the hearing, the Tribunal received copies of the registry Document General for the Lacoursiere lease, (ID number #1309388), signed on the 21st day of April, 1999 and the Edwards lease, (ID number #921073), signed on the 5th day of May, 1999, which were filed as Exhibits 12 and 13, respectively, to the application.

Mr. Lewis, also filed as Exhibit 7, a copy of registered instrument #213009, dated January 15, 1960, between Mr. Wolfgang Grohs and Mrs. Eleanor Grohs, Lessors and S. J. Putman, Lessee, dated October 15, 1959, which had been previously noted in the application as “unregistered”, but in fact was registered on January 15, 1960.

Service (hearing):

Mr. Leo Gaiswinkler provided an affidavit of service (Ex. 3) declaring that the unleased landowners Lacoursiere and Edwards had been provided with a notice of the appointment for hearing complete with the Document of Explanation prepared by the tribunal, a copy of the proposed Lease and the Unit Operation Agreement. In addition, all of the Leased Landowners were served with the Appointment for Hearing and Document of Explanation.

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In the tribunal's Appointment for Hearing, dated March 5, 1999, the tribunal took further steps to provide a broad notice to those that could have interests in the said lands. The applicant was directed to have notice of the Hearing particulars published in the local newspaper. Mr. Gaiswinkler's affidavit further set out, with required proof, that notice of the Appointment for Hearing had been published in the Windsor Star on May 4, 1999.

To assist the Leased Landowners in this matter, the tribunal arranged to have a copy of the application available for viewing locally prior to the hearing with the Clerk of the Town of Essex Office, located at 44 King Street East, in Harrow, Ontario, to the attention of Mr. Jerry Marion, Town Clerk and with the Petroleum Resources Centre, Ministry of Natural Resources located at 659 Exeter Road, in London, Ontario.

Background:

Gaiswinkler Enterprises Limited is an Ontario incorporated company having oil and gas interests in Ontario. It operates nine wells, including those noted in the application of which five are vertical oil wells and one is a horizontal well with three well bores. The latter horizontal wells draw from under Lake Erie.

Oil was discovered in what has become known as the Colchester Field in 1959. Spacing at that time was provided for under the **Ontario Fuel Board Act**, and pursuant to O. Reg. 260/59 spacing of the field was established. 1000 square foot, or 23 acre square spacing units were established. Unlike current spacing practice, which relies on lot and concession lines within a township for the placement of spacing, the previous spacing had been done over the field itself, bearing no relation to the actual survey fabric (ie. Lot and Concession lines).

The spacing established by O. Reg. 260/59 continued in full force and effect until 1989, when the regulation was revoked and a new spacing regulation was passed. O. Reg. 658/89 came into effect under the **Petroleum Resources Act**. The effect of this spacing regulation was to provide for the continued existence of only those spacing units upon which was located a producing well. Effectively, the remaining lands were not to be part of any existing spacing units, commencing in 1989. This was the legislative framework as it related to the lands in the Township of Colchester South in 1997, at which time Gaiswinkler was looking to expand the lands being drained by its well.

In 1997, Gaiswinkler Enterprises Limited sought to deepen the well and was granted a permit by the Ministry of Natural Resources to deepen G.E.L. No. 18 (Horizontal 1) Colchester South 81-1 well, which had been spudded on August 9, 1997 reaching its total depth of 1,104 metres on October 10, 1997. The actual deepening of the well involved re-entry into the existing well, whereupon two additional horizontal, side-tracked well bores, Horizontal Nos. 2 and 3 were drilled. All three legs of this well extend out into the bed of Lake Erie. The permits all provided that they were conditional upon Gaiswinkler pooling all of the lands des-

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cribed in Exhibit 2, Tab C to the application, being the proposed Colchester South 81-1 Pool area which is the subject matter of the application for compulsory unitization. The area set out by the Ministry of Natural Resources was determined to be those lands which would likely be drained by the deeper and branched wells which shall be referred to as the proposed unit. This pooling was to be undertaken by Gaiswinkler before production on the deepened wells could commence.

Mr. Gaiswinkler sought voluntary pooling of interests of the various Leased Landowners in writing on July 25, 1998, but received no response. He also sought to obtain leases for the oil and gas rights with all of the unleased landowners in the Colchester South 81-1 Pool. The tribunal notes that up to the time of the making of the application, he was partially successful, but had failed to obtain the agreement on either the Lacoursiere or Edwards lands. Due to the failure to secure leases from two of the unleased landowners (subsequently securing these leases at the time of hearing) and failure to obtain agreement for pooling from the Leased Landowners, Gaiswinkler Enterprises Limited applied to the tribunal.

The application in this matter was brought pursuant to clause 8(1)(b) of the **Oil, Gas and Salt Resources Act (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 operation. At the time of the writing of these Reasons, the applicant, Gaiswinkler Enterprises Limited has secured all of the interests in the oil and gas rights in the proposed unit. The application proposes that the various Royalty Interest Owners (named above as Leased Landowners) be deemed to have entered into a single collective Unit Operation Agreement in the form attached to and forming part of the application (Ex. 1, Schedule I). Gaiswinkler also is seeking to have the Order appoint Gaiswinkler Enterprises Limited to be the Initial Unit Area Operator, a term referred to in section 15 of O.Reg. 245/97, being the company which is charged with the operation of the unit. The proposed appointment, through this application, was not contested as Gaiswinkler is the sole operator and working interest owner involved in the lands which are the subject matter of the application.

Issues

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

2. Is an order for unitization justified under the circumstances of this application, namely that the Ministry of Natural Resources has made the permit(s) to deepen the existing well(s) to allow for continuing production conditional upon the lands being unitized?

3. 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, some of whom may also currently be Royalty Interest Owners?

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

5. If granted, what provisions should be provided for resolving issues or differences between parties which may arise?

6. The timing of the proposed payment of certain royalties is based upon a set dollar amount, if not exceeded, which should be paid out annually. Is this method of proposed payment appropriate under the circumstances? Alternatively, should the proposal to have the payment of royalties relating to smaller tracts be altered to be paid on an annual basis and accounted for accordingly?

Evidence

Mr. Leo F. Gaiswinkler, Chairman & Chief Executive Officer, gave evidence on behalf of Gaiswinkler Enterprises Limited. He stated that his company was the proponent to the application for unitizing the proposed unitization area, which he described as Part of Lots 80, 81, 82 and 83, Concession I, and also being part of the bed of Lake Erie, in the Township of Colchester South, County of Essex. Mr. Gaiswinkler did agree, when prompted by Mr. Lewis, that the Township of Colchester South, noted subsequent to the filing of the application and the intervention of provincial legislation, that the Township of Colchester South is now located in the Town of Essex.

Mr. Gaiswinkler pointed out (Exhibit 6) on the map the area in question, referring to it as the general oil pool area and further described under Schedule “A” of Exhibit 1, being located south of Essex County Road #50, approximately 33 kilometres south of Windsor.

Mr. Gaiswinkler related the history, also set out above under the heading of "Background", that the pool was discovered in approximately 1951 and that the area was developed through a series of wells under the **Ontario Fuel Board Act**, 1954 in association with Ontario Regulation 260/59. Based on the regulations of the time, 23 acre spacing units were ascribed to the area. The area today has five vertical oil producing wells and one horizontal oil producing well. This includes an older well known as “Grohs #1" which is situated on Lot 22, of Registered Plan 1469 as shown on Exhibit 6. Currently the older Grohs well produces three barrels of oil per day and the other older producing wells produce seventeen barrels of oil per day.

In 1997 the well known as G.E.L.#18, well No.1 was drilled out and under the lake bed (Lake Erie) where hydrocarbons were discovered. In August 1998, Gaiswinkler re-entered G.E.L. #18, well bore No. 1 and horizontally drilled two side bores named as well bore No. 2 and well bore No. 3 from the existing well bore No. 1 wellhead. The additional bores showed more hydrocarbon discoveries within the fractures. The production from the horizontal well with three bores indicated that production capacity would increase. Notably, the G.E.L. #18 well is physically off-shore of the previously existing spacing unit, and between Grohs No.

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1 to the south and another wellhead known as “8-81-F” (See Exhibit 1, Tab B). However, the “pay zone” for G.E.L. #18 is under the bed of Lake Erie and therefore within the proposed area for unitization.

The wellhead for G.E.L. #18 is located on-shore approximately 1100 feet north of the beach shoreline, found along and beyond the north boundary of the proposed unit area, just north of tract 9, being a right of way , north of Lots 16 and 17 on Registered Plan 1469. It was Mr. Gaiswinkler’s opinion that the additional drilled area was an extension of the existing producing pool and not another separate discovery. His decision to explore G.E.L. #18 further was prompted by the record which recalled a firm by the name of “Place” drilling off-shore into the Lake Erie bed. Showings of hydrocarbons were evident in Place’s records from 1951 to 1953, to which Mr. Gaiswinkler had access. He referred to Schedules B and E of Exhibit 1, which depicted the locations of all wells which had been attempted in the area of the proposed unitized pool.

Mr. Gaiswinkler stated that a twelve and one-half percent (12.5%) royalty would be paid to landowners, with participation based on their property's proportion to the whole proposed unit area. Details of this participation are set out in Exhibit 1, Schedule G. The figure is consistent with the 12.5% royalty paid out under the Grohs No. 1 agreement, divided on the basis of percentage of land over the total unit area. Royalties paid out were reported to be current.

Led by Counsel, Mr. Gaiswinkler next reviewed the leases for the tribunal, offering that the terms of the leases filed were standard to the industry. It was pointed out that Document Books A, B and C (Exhibit 2A, 2B and 2C) contained leases, amendments, assignments and agreements representing all the leases held by Gaiswinkler Enterprises Limited. The exceptions were the two unsigned and unregistered leases with Dr. Roy Barnaby Lacoursiere and Mr. David Edwards and Mrs. Janet Edwards, which as noted “signed on”, immediately prior to the hearing. In total, Gaiswinkler Enterprises Limited holds seventy-one leases.

In answer to the observation that many of the leases appeared to be unregistered, Mr. Gaiswinkler and Mr. Lewis explained that Grohs No. 1 wellhead was drilled in 1959 and the pooled unit included cottage lots and undeveloped lots in a subdivision all under the ownership of Mr. Wolfgang Grohs and Mrs. Eleanor Grohs which are subject to a one page lease to S. J. Putman for the whole thirteen and one-half (13.5) acres. At the time of the contract, 40 years ago, pooling was unheard of. However subsequent legislation has been passed providing for spacing unit formations. To comply with legislation, a six or seven page agreement was signed dealing with the Grohs holdings but was found to be of unregisterable form. However, a registered lease similar to the unregistered version was discovered a few days prior to the hearing which had been registered as instrument number 213009 on the 15th day of January, 1960 (Ex. 7). The discovered document makes specific reference to the ability to pool by the lessee S.J. Putman which had been subsequently transferred to Gaiswinkler Enterprises Limited through assignment (Exhibit 2C,Tab 1). Reflecting on the balance of the lease documents

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it was noted by Counsel and Mr. Gaiswinkler that in some cases, the amending or secondary documents contained legal description not in registerable form, but all leases in this area contain pooling clauses. This includes the new leases with Lacoursiere and Edwards.

The lease with the Ministry of Natural Resources (Exhibit 2B, Tab 45) was noted to have a pooling rights clause on page four, subject to the approval of the Lessor (ie. MNR), with further reference to the right to unitize. It was noted that a request to unitize had been made to the Ministry Natural Resources for Crown approval which was confirmed to have been on May 19, 1999.

With respect to the Lacoursiere and Edwards leases, Mr. Gaiswinkler pointed out for the tribunal that they would be similar in form to that found in Schedule H to the application (Exhibit 1). These leases are consistent with lease documents currently used to contract other landowners by Gaiswinkler Enterprises Limited with the exception of the leases of the Ministry of Natural Resources. [This was later borne out when actual leases were filed, Ex. 12 and 13.]

Mr. Gaiswinkler stated that licences for drilling any and all wells contained in the application are found in Permit Nos. 8658, 8538, 8547, and 8666, marked as Exhibits 8 through 11, respectively. Specifically, Permit 8658, issued June 23, 1997, corresponds with G.E.L. No. 18 (Horizontal well bore #1); Licence 8547, issued August 28, 1997, corresponds with G.E.L. No. 18 (Horizontal well bore #2); and Permit 8666, issued March 27, 1998, corresponds with G.E.L. No. 18 (Horizontal well bore #3). As set out above, each Permit carries conditions imposed by the Ministry of Natural Resources requiring pooling of the unit area. Specifically, there is no spacing regulation currently in place which would allow production from G.E.L. #18. As a result the Gaiswinkler application was submitted.

Mr. Gaiswinkler stated that in his opinion, hydrocarbon production would be sufficient, or in paying quantities, based on the seismic information for the unit area presented under Schedule J of the application (Exhibit 1). Schedule J is entitled "Interpretation of Pool Boundary and Technical Information Relating to the Proposed Unit Area". Of interest to the tribunal, and reproduced below, are the comments found at page 3 of Schedule J:

> This project has been in the planning stage for many years and was finally approved in 1994 by Ministry of Natural Resources, Ontario Petroleum Resources Centre by passing legislation to permit the exploration and drilling for hydrocarbon deposits on Crown Lands under the bed of Lake Erie from onshore locations (which had been prohibited since 1965) in the near-shore area between Point Pelee and Amherstburg in the western part of Lake Erie fronting Essex County.

Also contained in Schedule J are the Radioactivity log Across Trenton Group (page J-10) with the oil pay zone marked in; the Lake Erie seismic shot-line, plat offshore, Colchester-South Unit 81-1, a numbered seismic line referring to the Colchester Prospect, indi-

cating different seismic shots that were run of the off-shore area. The red lines indicate those seismic shots undertaken by Gaiswinkler Enterprises Limited and the black lines are those shot by another party and whose information had been made available to Mr. Gaiswinkler.

Mr. Gaiswinkler stated further that the seismic results on-shore were considered good and the off-shore results were of a poorer quality. His decision to drill horizontally at the G.E.L. #18 site was based on several facts: it was already a producing well in the past, existing and newer geological/geophysical information, various written research papers, and in the end his own intuition caused him to select the location for drilling. The size of the area of the proposed unit is approximately 150 acres and the G.E.L. #18 horizontal well bores will drain a large part of the area. However, some will still have to be explored.

Mr. Gaiswinkler submitted that the size (150 acres) is consistent with the Ministry of Natural Resources requirements for unitization. Further, he stated that the larger pool will allow for greater flexibility in the operation, insofar as the operator does not face the same restrictions as when working within a spacing unit. For example, the legislation allows only one well to be drilled on a spacing unit, as opposed to multiple wells.

Rudy Rybansky, P. Eng., currently Engineering Geology Supervisor and Chief Engineer with the Ministry Of Natural Resources, Non Renewable Resources Centre gave evidence in support of the application. Mr. Rybansky's responsibilities include engineering and technology development and more specifically, he is responsible for overseeing oil and gas pooling requirements and unit applications.

Mr. Rybansky stated that prior to the application process by Gaiswinkler Enterprises Limited, he had met with the proponent, Mr. Leo Gaiswinkler, to discuss the difficulties the latter was experiencing with the pooling and the producing wells. Mr. Rybansky stated that he was familiar with all the wells described in Mr. Gaiswinkler's evidence as well as the Groh # 1.

Mr. Rybansky stated that the Ministry of Natural Resources determines the spacing of wells in different stages. In this case in particular, the arbitrary spacing which had been instituted long ago differs from today's regulations and are specific only to this pool. The area in the application is considered to be ordovidician which, by current regulations calls for 50 acre spacing units. Here, several historical elements had to be taken into account which included: the well drilling history; the geometry of the old spacing units which did not follow the survey fabric, thus bearing no relation to the Lot and Concession lines; the original spacing units of which some remnants exist; as well as the horizontal location of the wells, which affected the surrounding tracts of land.

Mr. Rybansky stated that under the current legislation only one well is permitted per spacing unit, whereas a unitized pool is not restricted in this manner. In addition, provisions of Part IV of the **Mining Act**, R.S.O. 1990, c. M.14 and O.Reg. 116/97 prohibit off-shore vertical wells to be drilled into the bed of any lake. Pursuant to the provisions of subsection 8(4) of O.Reg 245/97, drilling under the beds of waterbodies, including portions of Lake Erie, is permissible via horizontal drilling onshore, with 400 metre set-backs.

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Mr. Rybansky stated that unitization accomplishes the same objectives as establishing spacing units, but alleviates some of the restrictions such as one well per unit and location restrictions. In this particular case, the Gaiswinkler licences were granted for Groh's No.1 and G.E.L. #18 horizontal well bores #1, #2 and #3, calling for the lands to be unitized before production is undertaken, being, in his opinion, necessary to protect the correlative rights of the landowners.

Mr. Rybansky pointed out the proposed unit area for pooling which corresponds with the permit areas, is outlined as Exhibit 6. He stated that Gaiswinkler Enterprises Limited was merely complying with the conditions of the permit in making the application to unitize. Mr. Rybansky recounted meeting personally with Mr. Gaiswinkler and recommending he proceed to unitization. Having had the opportunity to review the application and associated materials, including the proposed Unitization Agreement (Ex 1, Schedule I), Mr. Rybansky stated that MNR was satisfied that the proposed boundaries meet the requirements of the legislation and are appropriate in the circumstances.

Mr. Rybansky concluded by stating that he was in agreement with Mr. Gaiswinkler that the source of the hydrocarbons found in the showings from the three horizontal well bores is an extension of the existing Colchester South pool.

In response to questions from the tribunal, Mr. Rybansky noted that in cases where there was more than one working interest involved, which is not the case here with the applicant being the sole working interest owner, the Ontario Energy Board had reserved the prospective decisions of determining what lands were to be added or subtracted from the participating sections.

Robert O. Cochrane, an engineer in Geological Sciences (B.Sc.) and President of Cairnline Resources Limited, was recognized by the tribunal as an expert witness, qualified to give opinion evidence in petroleum exploration and production.

Mr. Cochrane stated that he had reviewed the application for unitization together with the support materials and based on his assessment a witness statement was prepared, dated March 24, 1999 (forming part of Exhibit 2e).

Mr. Cochrane stated his support for the Gaiswinkler Enterprises Limited application to encompass the proposed area under the Unitization Agreement, as per Exhibit 1, Schedule I. He went on to explain that the geology was ordovician and presented a complex situation for the exploration of oil and gas. By formation the rocks are impermeable but fractured, allowing for fluids and gases to pass through these spaces/cracks changing the lithology. These voids or spaces due to fracturing fill over time with hydrocarbons and further fracturing distributes the hydrocarbons throughout the fractured zone.

Mr. Cochrane stated that it is a difficult process to explore for hydrocarbons throughout a fractured zone. These fractures form long narrow formations and traps in the rock. Through new technical advances and seismic surveys, pinpointing these fractures is more

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accurate than in the past however, some uncertainty still exists in locating and surveying the size of such a complicated reservoir. Mr. Cochrane likened the fracture zone as being comprised of a series of long skinny reservoirs about the width of the 401 highway, suggesting by this visual image that their discovery represents a considerable challenge to the exploration company. He further stated, in addition to being a complex fractured zone, the Colchester South pool is almost circular in nature and thus different from other formations in the Trenton and Black River Groups.

Mr. Cochrane pointed out that while some geological information is available with some wells having been drilled under Lake Erie, the considerable existing development of the pool has been onshore. Past onshore seismic surveys, coupled with recent seismic surveys indicate that the hydrocarbon formations do extend out under the lake. However, the oil pool specific as to size and location is difficult to assess based on the poor to fair quality of the seismic surveys. The surveys do indicate that the prospective area is likely to be bigger than the unit area proposed for the Unit 81-1 Pool.

Mr. Cochrane stated that unitization of the proposed area would be the best process platform from which to proceed with collecting further information and data concerning the characteristics of this pool, thus assisting future exploration and production. Mr. Cochrane explained that choosing the size of a unit area is not spelled out in the regulations and particularly with respect to the area under Lake Erie. Nonetheless, he ventured that 150 acres in this case appeared to be adequate. In paraphrasing his March 24, 1999 memorandum to Gaiswinkler Enterprises Limited, he re-emphasized that, based upon historical information, there is an economic limit to the development of these wells. Furthermore, horizontal wells are expensive to drill and well information from them is scarce. Keeping this in mind, an operator would have to be prudent with his operation, keeping costs down, drilling only when economically feasible.

Mr. Cochrane stated that he had reviewed the Proposed Unitization Agreement (Exhibit 1, Schedule I) and that, in his opinion, it is consistent with oil industry standards. Further it is typical of the ones he has observed developing over his years in the province. It was one which he would use himself, should the need arise.

The Agreement provides flexibility to the operator. Specific reference was drawn to Paragraphs #5, #6 and #7 of the Unit Operation Agreement, which are reproduced:

> 5. The Lessee shall have the right from time to time to include as part of the unit area additional lands in the vicinity thereof and the same thereafter for the purposes of this Agreement shall be treated in all respects as if included in the appropriate schedules hereto; PROVIDED, however, always that such additional lands shall not be included in the unit area except with the consent in writing first had and obtained of those Lessors who together own not less than sixty (60%) of all lands within the unit area (as existing immediately prior to such enlargement) which are then subject to agreements with the Lessee similar to or identical in terms with this agreement."

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> 6. It is understood and agreed that the Lessee shall, at any time or from time to time, have the right to withdraw all of the said lands or any portion or portions thereof from the unit area, whereupon such lands or portion or portions thereof so withdrawn shall no longer be subject to the terms of this Agreement, but shall be governed thereafter instead by terms of the said Lease."

Mr. Cochrane explained that in 1960, the Colchester South field was much larger than it is today. Thus the provisions of Clause 6 would be necessary to manage the field properly, given the size of today's pool. He further reflected that from a private industry standpoint, Paragraph 6 is most beneficial as it allows the Lessee the right to be flexible in relation to the unit size.

> 7. The Lessee shall have the right at any time and from time to time to enlarge or reduce the limits of the participating section of the unit area within such limits as may be determined from geological and scientific information then available to it."

Mr. Cochrane pointed out that Paragraph 7 allows for the reduction and expansion of the unit area by the Lessee. This exemplifies the flexibility needed in any unit agreement. This agreement is the one predominantly used in the industry today for voluntary unitization.

Mr. Cochrane stated further that under unitization, the operator is given the flexibility to make the best use of the technical information gathered to know when to go into production or drill more wells, order more seismic testing of a certain area and through the rights provided for in Clause 6, reduce an area which could be too large and ultimately operate on economies of scale. The technology of today is more accurate, which is necessary when dealing with the changes on a day-to-day basis. Today's technical know-how benefits the landowners, protecting correlative rights through reductions in participating areas, and preserving equity in their royalty rights.

Mr. Cochrane concluded by stating that he is aware of only one unitized area in which there has been a unit size dispute at a later date.

Submissions

In his final submission, Mr. Lewis submitted that the application before the tribunal to unitize Colchester South 81-1 pool of 150 acres was made pursuant to the MNR condition in the permit for production. Mr. Lewis submitted that the evidence of Mr. Rybansky in support of the unitization is appropriate to the circumstances and should be recognized by the tribunal. He further submitted that a Unitization Order would allow Gaiswinkler Enterprises Limited the time and flexibility to define the pool to a greater degree than what currently exists and would allow for the expansion or retraction of the pool, as may be found to be appropriate in the future. The granting of the application would mean that all of the lands could now be pooled. Under the existing spacing unit configuration, Gaiswinkler is only allowed one well,

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while the proposed unit would allow production from both [ie. GROH'S #1 and G.E.L. #18 (Horizontal, Nos. 1 through 3)]. By granting the proposed unitization, full production of the entire 150 acres would proceed. Mr. Lewis urged the tribunal to make the Order accordingly.

On the issue of determining size, Mr. Lewis pointed out that Mr. Cochrane gave his expert opinion that Unit Operators would be best able to manage the resource through the flexibility of being able to expand or decrease the pool. However, Mr. Lewis pointed out that if the application was granted, the tribunal would create the unit, order whatever unitization agreement it deemed proper on the parties to be applicable and he suggested that the right to expand or decrease the unit size would ultimately rest with the tribunal.

In response to questions from the tribunal to the applicant's counsel and the expert witnesses, the following was offered:

On the issue of determining size, Mr. Lewis stated that in terms of Ontario standards (well production) this is a small operation and only attractive to a smaller producing company such as Gaiswinkler Enterprises Limited. This scale of well is attractive to Gaiswinkler in that he can produce from it economically, where others may not. In contrast, some oils wells in Ontario produce 650 barrels per day versus 20 barrels from the subject wells. The production here would be considered at the top of the bell curve.

Mr. Rybansky, on the point of rights to expanding and decreasing the unit size, stated that it is one of the decisions of the Order to choose the operator and the rights should go with the Order. It is his suggestion that it be put with the operator to determine size over time. He further added that it would be onerous to return to the tribunal to deal with each change in participation. There is no reason why the operator should not have the authority to attempt to reach an agreement at first instance. In the event that an issue should arise, any person with an interest could apply to the tribunal for action if they feel they are an aggrieved party.

Mr. Lewis reflected that all leases in the application are consistent and meet the specific clauses required within the industry, such as a 12.5% consistent royalty clause tied into production and marketing, pooling clauses throughout the leases. It was noted that the newer current forms of the lease have expanded to include wording contemplating unitization. The current Crown leases have specific clauses for unitization and the industry standards in subsequent printings are including an appropriate unitization clause.

Mr. Lewis ventured an explanation on the subject of registered and unregistered documents. The current practice is to register the contract document with the registry by caveat to protect the various interests. This was not the case in the past and older documents (of a certain age) are no longer in registerable form. Notably, the registry systems are currently undergoing a conversion process throughout the Province, and the results of this may well address the issue.

By consensus, all present ventured that there was no magic formula to accepting a 60% affirmation of all royalty interest owners as sufficient for an expansion move by the operator. The figure is seen as generous, being more than a bare majority of fifty percent plus one and appropriate for the situation.

Reconvened Hearing

Gaiswinkler is required to file a Unit Operation Agreement with its application in accordance with clause 15(3)(i) of O.Reg. 245/97. The tribunal notes that clause 15(4)(f) requires that the order of the tribunal shall include a copy of the unitization agreement which will govern the relationship between the working interest owners. In this case, all the lessee and working interest parties are one in the same: Gaiswinkler Enterprises Limited and this consolidated issue serves to draw a relationship between the working interests and the royalty interest owners directly. The Leased Landowners are named as parties in the Title of Proceedings.

While in the course of the hearing, the matter of specific provisions in the proposed unit agreement were discussed, there was no discussion of the broader issue of the legal effect of attaching a unit agreement to an order for unitization, which effectively is left blank with respect to particulars involving the individual landowners and tracts, leases, etc. In the course of finding an acceptable format for tribunal purposes, the tribunal found itself struggling with the registrability of a seemingly incomplete document to be attached as a Schedule to its Order.

In two previous cases recently decided by the tribunal, involving pooling, where only one tract of land was involved [see **Talisman Energy Inc. v. Hyatt**, OG-006-98, June 17, 1998 (unreported); and **Talisman Energy Inc. v. St. Pierre**, OG-007-98, June 17, 1998 (unreported)] a lease agreement in blank was attached to the compulsory pooling order. The tribunal, upon considering whether the blank leases would give rise to uncertainty, has concluded that no uncertainty arises in relation to the two named landowners in those cases. However, in the course of this unitization application, the tribunal has experienced certain misgivings with regard to following a similar format for a unitization of what would amount to seventy-one tracts of land, binding upon forty-eight individual leased landowners through use of a blank unitization agreement.

With this in mind, the hearing was reconvened on September 28, 1999 by telephone conference call. With Mr. Lewis' cooperation to setting a reconvened date without 10 days notice, the tribunal proceeded on the basis of Mr. Lewis having waived his client's right to the ten day statutory notice period (ss. 114(2) of the **Mining Act**) The tribunal determined that it would not provide notice to the Leased Landowners who did not attend the original hearing, in keeping with provisions of clause 6.6(3)(d) of the **Statutory Powers Procedure Act**, noting that the issue could be placed under the auspices of legal housekeeping, rather than discussion of the merits of whether or not the application would be granted. The tribunal proceeded on the basis that the Leased Landowners would not be prejudiced by not receiving notice of the reconvened hearing.

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The primary reason for the reconvened hearing [number "1" in the Appointment for Hearing] was to discuss the form of the requested Order for Unitization with regard to: certainty of terms and registrability of the Order having appended to it a Unit Operation Agreement with particulars left in blank; as an alternative, whether or not there was a means by which the required particulars relating to the respective leases, amendments and assignments for each of the Leased Landowners identified in Schedule A could be set out.

Prior to the reconvened hearing, Mr. Lewis provided copies of an Order of the Ontario Energy Board decision, involving the Hillman Pool, EBO 135, dated December 23, 1987, together with a revised copy of the proposed Unit Operation Agreement. This Unit Agreement had been changed from its earlier form (Ex. 1, tab I) through the proposed deletion of paragraphs 5, 6, and 7 along with revisions to Clause 4, as discussed above.

It was noted by the tribunal that clause 3(a) of the Hillman Order provided reasonable direction in the wording for the Gaiswinkler matter. (The Hillman case referred to the document as a "Lease Amendment Agreement" as opposed to the "Unit Operation Agreement"):

> 3(a) The interests of all owners and encumbrancers of lands located within the unit area of the Hillman Pool are hereby joined and regulated in respect of such lands as if each of them had reached agreement on terms and conditions, as set forth in the Lease Amendment attached as Appendix "C" to this Order, and existing agreements in respect of oil and gas rights in the Hillman Pool are amended and superseded accordingly.

The second question put to Mr. Lewis involved the royalty provisions in the proposed Unit Operation Agreement. Specifically, should there be a uniform rate of royalty for all tracts within the unit. As to the matter of those tracts being of small size as to render actual royalties minuscule, should the minimum payment be tied to acreage or tract, and moreover, what dollar amount should be specified as to trigger payment.

Paragraph 4(2) of the original proposed Unit Operation Agreement dealt with non-participating sections of the unit, but it was Mr. Gaiswinkler's position that 100 percent of each tract would participate. Should certain portions of tracts become non-participating, what would be the amount of payment for non-participating portions; should that amount be tied into that portion of the tract, or tied into acreage.

Similarly, paragraph 4(2) of the first draft of the Agreement dealt with those portions of the leased lands which do not form part of the unit, with the proviso that no amounts are payable under this clause if paid under some other spacing unit or pool. The tribunal sought submissions as to what amount should be payable.

As to the percentage royalty, Mr. Lewis indicated that Gaiswinkler Enterprises Limited was seeking to have the royalty rate as set out in the Unit Agreement. There was a discussion with Mr. Rybansky as to whether the wording should be "point of measurement" or "point of sale", but the tribunal was persuaded that adopting the wording proposed would not necessarily lead to a precedent for overriding existing royalty provisions which are not uniform in future cases which might arise. In other words, the issue is not one which should be dealt with at this time, due to the uniformity of the rates, and due to the fact that no landowners appeared to argue this issue.

The third question posed concerned the criteria upon which the proposed unit boundaries could be expanded. The tribunal included in this question whether there was a means by which this right could be exercised by the parties without the need for ongoing tribunal intervention. Mr. Lewis referred to his second draft and stated that his client was no longer seeking this provision in the tribunal's Order. However, Mr. Rybansky made an impassioned plea to retain such provisions as to changing the size of the unit, as it might not be the case that Gaiswinkler Enterprises Limited would always be the Initial Unit Area Operator. Also, Mr. Rybansky put forward the position that the industry requires the flexibility to self-manage compulsory units, owing to the onerous cost of re-appearing before the tribunal for each change. He stated that the Unit Operation Agreement could establish a starting point for the management of the field, and the initial unit area operator should be given the tools to manage the field in the future. The tribunal indicated its willingness to make provision for the industry to self-govern changes to units, with the provision that expansion should require agreement of the owners of 60 percent of the lands involved, which reflects industry standards in voluntary unitization.

The tribunal sought proposed wording for its Order to permit the operation of paragraphs 6 and 7 of the proposed Unit Operation Agreement, which would permit the lessee to withdraw lands from the unit or make changes to the participating sections, without amending the Unitization Order.

The matter of the first effective date of the Order was raised, and Mr. Lewis submitted that it should be March 1, 1998, which would match current royalty accounting records.

In discussing the matter of whether a separate Order would be required for each tract, Mr. Lewis advised that it would be sufficient to append a Notarial Copy of the tribunal's Unitization Order to a Document General, which in turn would contain all of the particulars of the individual leaseholds, such as PIN numbers, legal description, name(s) of Lessor(s), etc.

The tribunal discussed the matter of listing encumbrancers. Mr. Rybansky made the observation that the Ontario Energy Board in the Hillman case had extensively debated what interests needed to receive notice, but in fact some of the mortgagees could not be served. Mr. Rybansky suggested that the intent of the legislation was to provide the working interest owners and royalty interest owners with notice and they should be the ones listed in any Unit Agreement.

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Upon reflection, it was agreed that Messrs. Lewis and Rybansky would meet with Mr. Gaiswinkler to redraft the proposed Unit Agreement, which would be provided to the tribunal as soon as possible. As noted above, a third draft of the proposed Unit Operation Agreement was filed on October 21, 1999.

Findings

Purpose of the **Act**

In Ontario, the Ministry of Natural Resources (MNR) has been given the administrative responsibility for hydrocarbons as found in the **Oil, Gas and Salt Resources Act**, R.S.O. 1990, c. P.12, as amended by 1994, c.27, s. 131 and 1996, c. 30, ss. 56 - 70 and O. Reg. 245/97 (the "**Act**"). The role of MNR is to monitor, regulate and issue licences for drilling and production.

The **Act** does not contain a purpose statement, but rather, is silent in this regard. This is unlike section 2 of the **Mining Act**, being legislation which encourages exploration for the resource, which 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.

However, it may be possible to infer the purpose of the **Act** from a number of provisions. With respect to pooling, an operator cannot either drill an exploratory well, pursuant to section 8 of O.Reg. 245/97, nor move into production, pursuant to clause 14(c) of O.Reg. 245/97, until all of the lands within a spacing unit have been pooled. Therefore, the decision of a single landowner or a number of landowners to lease their oil and gas rights for purposes of exploration or production might be readily defeated by the decision of one or a few landowners in a spacing unit not to pool and enter into leases. There may be found a strong inference in favour of compulsory pooling (ie. by tribunal order) through a weighing of the positions desiring pooling with those opposed. Without such an order, the wishes of those desiring pooling, and indeed, entering into Leases, could readily be circumvented and rendered of no consequence, with the result that, in many cases, exploration and production would not take place.

However, there remains the strong proviso that, despite the inference in favour of compulsory pooling, the decision of whether to pool would be made following a hearing on the merits of the application, including and most particularly, considering the evidence and positions of those landowner(s) opposed to pooling.

It is noted, with respect to both pooling and unitization, that the underlying reasons for creating this legislative 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. It should be noted that this scheme precludes each individual landowner, owning a small part of a spacing unit, from sinking a well over a small tract and going into production. It is designed to prevent a well from being allowed to drain more than the lands to which the licence applies. Thus, in this case, Gaiswinkler Enterprises Limited being required to pool additional lands as a condition of the permit to deepen its existing well. This demonstrates the objective of protecting the rights of those lands surrounding the proposed unit from being drained by the deeper well.

The circumstances surrounding this application are not typical and this was addressed in Mr. Rybansky's evidence. The existing spacing does not follow how such lands would have been spaced under current legislation. This created an unusual basis for an Order for Unitization application, in that the existing permits to drill are conditional upon either pooling or unitizing the lands involved. Based on the significance of the conditions attached to the permits, it can be implied that the real purpose of the **Act** here would be to permit ongoing production to continue through either voluntary or compulsory unitization.

The statutory reality of the **Act**, for purposes of this unitization application, provides that "no person shall drill, operate, deepen, alter, or enter a well or engage in any other activity on or in a well, except in accordance with a licence" [s. 10(1)]. Among other provisions in O.Reg 245/97 not previously mentioned in the body of these Reasons, section 11 of O.Reg. 245/97 allows the Minister to establish spacing units in a water-covered area. Section 9 of O.Reg. 245/97 governs drilling of a development well within an area for which spacing has not yet been established, setting out the applicable size of the area, which corresponds with the geological formations involved, and also the required set-backs.

By the various conditional permits for drilling, dated June 23, 1997, August 28, 1997 and March 27, 1998, respectively, attached to the horizontal well bores of the G.E.L. Well #18, MNR requires that the applicant unitize the interests of the area outlined. The purpose behind the condition would primarily be to ensure that the size of the unit captures the area which will be drained by the well(s). The conditions are intended to provide that no landowner can be drained of their hydrocarbon underground resource without being compensated. The **Act** protects the rights of landowners to receive compensation for hydrocarbons found beneath their land, but also intends that a well on adjacent lands not drain ones' lands without proper compensation. These are some very compelling reasons in favour of unitization. But, the conditions imposed also serve to conserve the resource and enhance its recovery.

While the foregoing discussion is by no means conclusive, it is noted by the tribunal that, effectively, Gaiswinkler Enterprises Limited cannot continue to produce from the existing wells underlying the circumscribed area without having the application to unitize granted by Order. Rather than being pursuant to a clearly stated purpose provision in the **Act**, the tribunal is satisfied, on the circumstances of this case, that the underlying purpose of the legis-

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lation can be ascertained through consideration of the alternative, namely that Gaiswinkler Enterprises Limited must cease production on these lands altogether, and particularly, cease exploring the as yet unknown limits of horizontal wells under a body of water.

Whether Order Justified under the Circumstances

It is clear that Mr. Gaiswinkler attempted voluntary unitization of the proposed unit area required pursuant to the conditions set by MNR, but was unsuccessful. His company therefore, made application pursuant to clause 8(1)(b) of the **Oil, Gas and Salt Resources Act**, to which section 15 of O.Reg. 245/97 also applies. 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 area will be heard. Furthermore, the working interest owner is comprised solely of Gaiswinkler Enterprises Limited. Although the tribunal did receive inquiries pursuant to the Appointment for Hearing, which was served along with a document explaining the relevant portion of the legislation and process generally in layman terms, no landowner attended to oppose the application. In fact, the only opposition to the matter was from Dr. Lacoursiere and the Edwards, who had not entered into leases with Gaiswinkler until well into the application process. Once their leases were assured, they did not appear to present further concerns.

The tribunal has heard submissions, as well as considered the long, complex history of the Colchester South 81 pool and notes that there are significant departures from how matters would have proceeded under today's legislation. In all fairness, the spacing units today would align to the survey fabric. Pursuant to MNR requirements under section 10 of O.Reg. 245/97 and given current methods of drilling and extraction from on-shore, MNR may have ordered spacing to better reflect considerable off-shore deposits, with sufficient on-shore set-backs to allow the drilling of wells to access these reservoirs. Instead, Gaiswinkler has been required to react and apply, some 40 years after the initial discovery of this reservoir, at a time when much of the on-shore reserves may have been tapped and reduced significantly.

Normally, it would be expected in an application pursuant to clause 8(1)(b) that the operator would be seeking to convince the tribunal of the proposed unit boundaries, through a careful analysis of data, study and reports. There is certainly no suggestion that Gaiswinkler Enterprises Limited has not done so, as evidenced by the considerable material filed at Exhibit 1, Schedules B, E and J.

However, all of this material serves to mirror the conditions set in the permit by MNR which, according to Mr. Gaiswinkler and Mr. Rybansky's evidence, were set out after a number of meetings as well as the attendance change in legislation permitting off-shore drilling in Lake Erie from an on-shore location. The tribunal notes that considerable expertise rests with the Non Renewable Resources Section of MNR, with respect to reviewing all manner of technical information for establishment of production spacing units as well as monitoring well activity. Owing to the very unique circumstances of this case in which there is no way to return to 1959 and redo the spacing or the on-shore depletion, the conditions of the permit set by MNR which delineate the proposed unit boundaries, are found to be reasonable in the circumstances and in no way serve to fetter the discretion of the tribunal.

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Adequacy of Notice

The tribunal is satisfied that all interested parties were given notice of the proceedings for the application, through their receipt of the Appointment for Hearing. Notices were addressed to all current landowners corresponding to the various tracts in the proposed Colchester South 81-1 Pool. Moreover, through publication of details of the Appointment in the Windsor newspaper, those landowners on the outside boundaries of the unit would have had this matter brought to their attention in a reasonable fashion. Indeed, such publication has served to flush out parties in a similar application for unitization before the tribunal, having served in that case to create an additional class of respondents, being those landowners who felt that the application and unit boundaries should apply to their lands as well. Such was not the case in this application.

In this instance of a unitization application the decision to cast a broad net of notice (mail) on all seventy-one landowners and notice further was published in a local newspaper offering an opportunity to view the application materials at Harrow and the MNR Petroleum Resources office which was considered appropriate for this process.

Merits of the Application

The tribunal notes that its powers to order "the joining of the various interests within a field or pool..." by order pursuant to clause 8(1)(b) of the **Act** are of sufficient significance as to override the rules concerning spacing units. It is noted that subsection 8(2) of the **Act** provides that such an order overrides pre-existing Minister's spacing orders [s. 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)].

This application for unitization is the first to come to a hearing since jurisdiction was transferred from the Ontario Energy Board to the tribunal (S.O. 1996, c. 30). Referred to in the legislation as joining the interests in a field or pool, an application for unitization involves the determination that the configuration of lands applied for, or some other configuration, will be joined, the ordering of those unleased landowners, if any, to be governed by terms found in the oil and gas lease adopted, the appointment of an initial unit operator, and the setting of terms for the necessary accounting and relationship between the appointed initial unit operator and the remaining working interest owners. In this case, there are no remaining unleased landowners and there is only one working interest owner, that being the applicant Gaiswinkler. In addition, no opposition to the unitization was encountered.

As a result of the newness to the tribunal in adjudicating under clause 8(1)(b), the provisions of subsections 15(3) and (4) of O.Reg. 245/97 have not been fully examined to date, and in particular the content of the proposed unitization agreements or joint venture agreement, as in the case of multiple operators/working interest owners. As will be noted further below, the tribunal has encountered certain challenges in meeting the requirements of the industry as

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well as those of the regulation, some of which were not discussed fully at the hearing. It should be stated that these difficulties were in the nature of form, rather than strictly substance, but are highlighted for future consideration, particularly as prospective applications for unitization are likely to be more complex, involving unleased landowners and multiple working interest owners, two issues not encountered here.

As a result of there being no opposition to the application, the hearing on the merits did not take place in an adversarial manner. Rather, the applicant simply proceeded on the basis of presenting their case through witnesses and Counsel, with witnesses answering those questions put by the tribunal for clarity. Therefore, there was no consideration in these proceedings of issues which could have been raised in opposition to an application of this nature, such as those which unleased landowners or other working interest owners in the unit may have offered to be dealt with.

Unit Boundaries

Pursuant to clause 15(4)(b) of Ontario Regulation 245/97, the tribunal is compelled to establish the unitization area boundaries under 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 excluded from the area. This decision is made in reference to the known geological formations, correlative rights, hydrocarbon discovery data, etc. However, as discussed above, the issue of area boundaries for this application has been set to the satisfaction of the Ministry and does not require the further attention of this tribunal. The tribunal finds, in the circumstances of MNR's conditional permits set out boundaries for the unit, it is reasonable to adopt and affirm the boundaries proposed, being satisfied that the expertise of the Non-Renewable Resources Section of MNR have been ably applied in drafting the boundaries for the conditional permits.

The Lease

The attention of the tribunal in this application is somewhat broad based as to accepting the application submissions and the evidence presented as a reasonable application for unitization. The tribunal will provide a general review of the principles behind the application and focus on the documentation and the issues presented in evidence.

The oil and gas industry is centred around the oil and gas lease/grant and the success of operations within the industry is entrenched in its various sections and clauses. Two important principles dictate the leasing scenario. First is the rule of capture, namely being that which is found and/or produced lawfully is owned by that operator as its discovery or capture. Secondly is the concept of ,“profit a’ prendre”, a reference often given of the oil and gas lease/grant.

The tribunal relies on the discussion in Ballem, John Bishop, **The Oil and Gas Lease in Canada.** 2nd ed. (Toronto: University of Toronto Press, 1985) as to the rule of capture, where he states at page 92:

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> Despite the unrestricted language of the grant, the lessee [operator] only receives those substances that are ultimately reduced into its possession regardless of what quantities originally may have underlain the leased lands. The "rule of capture", succinctly phrased by Harwicke 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,"[8] is firmly entrenched in Canadian Law. In *Borys v. Canadian Pacific Railway and Imperial Oil Limited*[9]*, the Privy Council said:*
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> > 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.

Several sources also set out that the oil and gas lease/grant is a profit a' prendre. In the text J.E. Symth and D.A. Soberman***, The Law and Business Administration in Canada***, 3rd ed. (Scarborough: Prentice-Hall, 1976) at page 522, such an instrument of contract is described as:

> The Oil and Gas Lease is more than a mere lease. Simply it is the right to take oil and/or gas (substances) from under the surface of lands occupied/owned by others. An oil and gas lease bears little if any similarity to a true leasehold interest. It comprises several interests in land combined in one agreement between parties.
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> It is similar to a <u>true lease</u> in that it allows the lessee to occupy a very small portion of the surface in relation to the much larger oil and gas reservoir.
>
> It is an <u>easement</u> in that it allows travel over the property, laying of pipes, works, moving equipment, drilling, etc.
>
> It is known also as a <u>"profit a' prendre"</u> interest in the lands and it permits the removal of oil and gas substances which were previously the real property of the owner and now become the personal property of the Lessee.

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[8] "The rule of capture and its implications as applied to oil and gas' (1935), 13 Tex. L. Rev. 391, 393.

[9] [1953] 2 D.L.R. 65, (1952-53) 7 W.W.R. (N.S.) 546, 550 (J.C.P.C.)

And further issues of rights and privileges under a profit a' prendre are discussed in *Gowan v. Christie* [1873] L.R. 2 Sc. & Div. 273 and upheld by the Supreme Court of Canada in *Berkheiser v. Berkheiser* [1957] S.C.R. 387, 7 D.L.R. (2d) 721. In *Gowan v. Christie* is found the commonly quoted judicial definition of a mineral lease at page 284:

> Not in reality a lease at all in the same sense in which we speak of an agricultural lease... What we call a mineral lease is really when properly considered a sale out and out of a portion of land. It is a liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if he can find them and to take away just as if he had bought so much of the soil.

The conclusion that can be reached here is that an Oil and Gas lease/grant is a virtual ownership of substances captured by the lessee [operator], provided that the conditions and clauses of the lease and legislation are adhered to over the life of the agreement.

During the course of the hearing, witnesses described the lease filed as a standard form. However, there does not appear to be a standard lease in the industry according to Ballem (*supra*). Moreover, he states at page 12, "under common law [it] is not a lease at all." Ballem offers further on page 87 that each lease must however state consistently four principle elements: 1. setting out what rights are granted; 2. providing for the obligation to drill; 3. specifying royalties to be paid; and 4. the length of the primary term. While not making any findings concerning the validity of th 71 leases which cover those lands within the proposed unit, the tribunal has satisfied itself that the 71 lease documents, amendments and assignments each have the aforementioned essential elements.

The profit a' prendre provisions in the oil and gas lease is binding on the successors in title to the property. The Contracts of some thirty plus years ago are just as valid today although the landowners may have changed many times over the passing years. Of the seventy-one leases in this case, only thirty one leases continue with the same ownership as the original lease document while the other forty have changed title at least once. The important point here is that the land(s) in the unit area have been subject to an enuring lease agreement.

The tribunal finds that the applicant, Gaiswinkler, has complied with the regulations for filing of all title documents in accordance with the provisions of clauses 15(3)(e), (f) and (g) of O.Reg. 245/97.

The lease agreements in general drew discussion at the hearing. The issues surrounded; economic viability of the spacing unit, registered versus unregistered lease documents, amendments and assigns, and the tribunal noted the Lessor's conditional consent clauses present within several of the lease agreements.

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It was stated at the hearing that the oil and gas pool underlying the lands defined by the proposed Colchester South 81-1 Pool is of sufficiently small quantity as to not attract the attention or interest of larger operators. Concern was expressed over the long term prospects of the potential of the proposed unit, which gives rise to the operation's economic viability and the conservation move to unitization. Economically, Gaiswinkler, is of the opinion that the wells in this unitization area are sufficient to provide a reasonable return on his investment. Mr. Gaiswinkler is admittedly satisfied with the production potential.

Habendum clauses in leases generally have been drafted in two forms on this issue, although this matter was not argued or discussed at the hearing. According to Ballem (*supra*) at page 111:

> The standard *habendum* clause request that the substances 'are produced' in order to extend the primary term. There is no minimum quantitative limit. American courts in most of the important oil-producing states interpret the word 'produced' as 'produced in paying quantities'.[2]

> The occasional lease form does refer to 'production in paying quantities.' The Ontario courts dealt with a variation of this wording in *Stevenson v. Westgate*,[3], where the fixed term of the lease was for one year 'and for such longer period as oil or gas is found thereon in paying quantities.' The use of the verb 'found' rather than 'produced' deflects the precise applicability of the decision' none the less, the court had to concern itself with the implications of 'paying quantities.' Indeed, the trial judge appears to have treated 'found' a synonymous with 'produced.' ...
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> The Court of Appeal seemed to place more emphasis on the meaning of the word 'found.' Experts had testified at the trial that the wells could be produced profitably. 'The situation that developed was this: oil had been found upon the property in marketable quantities.'[4] It is clear, however, that the court

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[2] 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.'

[3] [1941] 2 D.L.R. 471 (Ont. S.C.0; [1942] 1 D.L.R. 369 (C.A.)

[4] Ibid, 371

> agreed with the trial judge in excluding capital costs. "oil had been found and it was possible to pump it in quantities that were more than sufficient for the then current charges.'5
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> So far as it goes, then *Stevenson v Westgate* stands for the proposition that a Canadian court, faced with the test of 'produced in paying quantities,' would opt for revenues versus operating costs, rather than some other guideline such as whether a 'reasonably prudent operator' would continue to operate the well.

Effectively then, if the Lessee is willing to risk its investment with no onus or financial support requirement of the Lessor(s), then its sole determination to drill and produce oil and/or gas is sufficient.

The information filed is found by the tribunal to be sufficient in demonstrating Gaiswinkler Enterprises Limited's position that hydrocarbons are present underlying the proposed unit. There is, by the applicants own admission, a certain amount of guess work in this type of exploration and what can be gleaned from the evidence is that Gaiswinkler Enterprises Limited is convinced the oil and gas is “in paying quantities”. The proposed unitization will allow the company the opportunity to proceed in a conservation minded manner in further exploring without the restrictions associated with operating a spacing unit.

In its application, Gaiswinkler submitted considerable technical and statistical information gathered from historical data dating from the 1950's. The corporation makes reference to ten technical, geological and engineering reports, listed at page 4 of Schedule J, Exhibit 1 to compile its technical presentation, as found in Schedule J. The materials filed in support of the application identify the geology of the field as belonging to the Black River/Trenton Group of the Ordovician Age in the Ontario Geological Survey ("O.G.S.") Open File #5498 (See Exhibit 1, Schedule E for structural map). Further, the tribunal notes and adopts as its findings that the Colchester South 81-1 Pool (approx. 150 acres) is a smaller portion of the larger Colchester Field (approx. 751 acres).

Considerable time was spent by the tribunal in examining the registered leases and unregistered leases, leading it to conclude that the applicant, Gaiswinkler, has complied with filing requirements provided for in O.Reg. 245/97. The matter of validity of existing leases was not raised as a question for the tribunal to determine, however. Such matters properly rest between the parties who may or may not elect to raise such issues. In any event, the jurisdiction

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5 Ibid, 372

for examining the validity of the leases properly rests with the Courts, should any of the parties be inclined to raise them. This position was supported in **Langlois v. Canadian Superior Oil of California Ltd.** [1957], 23 W.W.R. 401; [1962] 12 D.L.R. (2d) 53 (Man. Q.B.) wherein it was stated: "The parties have entered into a contract which they clearly had the right to make. Anson's Law of Contracts, 20th ed. puts it (pp. 1-2): The parties to a contract, in a sense, make a law for themselves; so long as they do not infringe on some legal prohibition, they can make what rules they like in respect of the subject matter of their agreement, and the law will give effect to their decisions."

This effectively allows the parties to a lease to determine the terms and conditions which will govern their relationship, whether or not such lease is ever registered. The effects of nonregistration may impact on the parties, but is of no importance to the determination of whether to order compulsory unitization.

The issues is also discussed in S.M. Waddams **The Law of Contracts**, 2nd ed (Aurora: Canada Law Book, 1984) commencing at the bottom of page 29:

> ...there is nothing to prevent parties from entering into contracts "on terms written out on half a sheet of notepaper:, but the greater the value and complexity of the transaction the more likely the conclusion that further negotiations were intended.55

With recent precedents for lease drafting, it is becoming commonplace to find the requirement for registration contained within the lease and amending agreement, so that such discussions become moot. However, insofar as several lease documents in the current application have not been registered, nonetheless, it can be implied, as no one appeared to provide evidence to the contrary, that the terms of the agreements have been carried out.

The purpose in examining the tract related title documentation on the part of the tribunal was to ensure that all of the lands within the proposed unit are currently under lease. As was illustrated by the activities leading up to the hearing, if there were unleased landowners remaining, it would have been necessary in this application for unitization to first determine whether unleased landowners should be deemed to be subject to a lease, and if so, what terms should apply. However, notwithstanding the facts of this case, there is a clear benefit to the parties in having leases executed in registerable form which is subsequently registered. This is seen in **Gallagher v. Gallagher** (1962-63) 40 W.W.R. 35 (Sask.) where the Court states at page 770:

> When such a "mineral lease" [profit a prendre] has been granted and then protected by registration of a caveat, it cannot be defeated.

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55 Clifton v. Palumbo, [1944] 2 All E.R. 497 (C.A.) per Lord Greene, M.R.

In concluding this matter of registration, the ordered compulsory unitization of the subject lands can be accomplished without a minute examination of the underlying leases. The terms under which the unit operates are set out in the Unit Operation Agreement which serves to modify or amend the existing lease documents. However, those terms of the leases which are not specifically modified by the Unit Operation Agreement will continue to be in full force and effect as set out in the body of that document at clause 18. Ballem (*supra*) discusses under the heading "Advantages of Unitization to the Lessee" 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.[1] Moreover, the entire lease and not just the unitized zone will be continued. This is the only result that is consistent with the wording of the lease and it has also received judicial sanction in *Voyager Petroleums Ltd. v Vanguard Petroleums Ltd.*[2] It is not surprising that 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.
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> 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 issue of specific lease conditions centred on the Lessor/Lessee relationship and the express permission of the Lessor with respect to entry and use of surface rights was discussed. The nature of such lease clauses puts the onus on the Lessee to notify the Lessor of physical changes in their relationship and seek out their agreement before proceeding. The tribunal, and in light of the applicant's redrafting of the Unit Operation Agreement, has now determined that the issue is safeguarded by that agreement through 18, with is reproduced:

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

[2] [1982] 2 W.W.R. 36 (Alta Q.B.). (This point was not raised on appeal.) this case also bears upon the central point that if the lessor does not execute the unit agreement and there is no unitization clause in the lease, the lease will not be continued.

18. Excepting as herein and hereby expressly modified or amended, the said lease shall continue in all respects in full force and effect for so long as therein and herein provided, and the same as so amended or modified is hereby ratified and confirmed. Subject, however, thereto it is agreed that the entire contract and Agreement between the Lessor and the Lessee with reference to the operation of the unit area is embodied herein and that no verbal warranties, representations or promises have been made or relied upon by the parties supplementing, modifying or inducing the execution of this Agreement.

The Groh's portion of the proposed unit has produced hydrocarbons and the horizontal G.E.L. #18 well has a history of production dating back to 1959. In fact the area has produced fifteen oil and gas wells according to a report by Quillan, Boychuk & Associates Limited - Consultants in Oil and Gas Engineering of Chatham, Ontario (February 10, 1969, being Schedule E of Exhibit 1). Demonstrated past production indicates that the pool produced a high of 185,541 STB in 1960 to a low of 3,480 STB in 1981. Cumulatively, oil production to December 1998 is 554,871 STB for the on-shore locations and 675,000 STB from under the bed of Lake Erie.

Unitization

Upon reviewing the evidence filed, considering the evidence of the witnesses and hearing the submissions of Mr. Lewis, the tribunal finds that the unitization of the Colchester South 81-1 Pool will be ordered on the basis of proportion for area. This means that the pro rata share of each of the tracts will correspond to its proportion in area to the whole of the Colchester South 81-1 Pool. The tribunal finds that doing so is in the best interest of all the parties involved, as well as in keeping with the public interest of maximizing extraction of the resource while at the same time providing for production which is in keeping with conservation principles. Nothing would be gained by requiring production wells from multiple spacing units. Indeed, the demonstrated history supports the finding that continued economically viable production of the pool requires deepening of existing wells under the bed of Lake Erie, using technology which is in its infancy and gaining precious knowledge in a relatively new method of exploration and extraction. The tribunal finds that it accepts the position of the applicant, Gaiswinkler and witnesses Cochrane and Rybansky, that the underground structure of the substances is sufficiently complex and erratic, meaning that it is not found in vast formations, but rather in narrow linear deposits, as to make any calculation of volume corresponding with the individual tracts in the unit extremely difficult, if not impossible to determine.

Relying on the comments found in Ballem (*supra* p. 179) in support of unitization, namely, "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." Ordering the unitization will reduce restrictions associated with pooling, thereby

avoiding the cost of drilling additional wells. Furthermore, as much of the anticipated production will flow from under the bed of Lake Erie, due to legislative constraints, the set-backs and size of spacing units for formations of Ordovician Age, namely 20.24 hectares, or 50 acres, could make production from further out into the bed of Lake Erie impossible without some other special dispensation on the part of MNR.

As this matter was uncontested, there has been no need to weigh the expert evidence of those on opposite sides of the matter. However, the tribunal wishes to state that it found the evidence and opinions of Messrs. Rybansky and Cochrane compelling and of great assistance in reaching its findings that lands circumscribing the proposed unit would offer the best opportunity for further exploration and production of this pool.

The orderly development of the Colchester field proposed by the applicant, in accordance with the conditional permit provided by MNR, is found to be of a size to provide for the efficient draining of the field, protect the flow yield, as well as the environment.

Clause 8(1)(b) of the **Act** permits the tribunal to apportion the costs and benefits of the operation. In this regard, the tribunal has jurisdiction to make each of the Leased Landowners essentially partners in the cost of operation the Pool, each contributing a proportionate share of the required investment capital. However, the tribunal also has the jurisdiction to order that the joining of the interests of the Leased Landowners be such that they obtain a royalty interest only. It is this latter alternative which Gaiswinkler has applied for. The tribunal sees no reason why it should deviate from what has been proposed. Therefore, the tribunal finds that its Order of Compulsory Unitization will join the interests of the applicant and respondents in a manner which sees the respondent Leased Landowners receive royalties only, in accordance with what is proposed in the Unit Operation Agreement.

Appointment of Initial Unit Area Operator

Gaiswinkler Enterprises Limited, being the only working interest owner within the proposed unit, is also applying to be appointed as the initial unit area operator, in accordance with clause 15(4)(g) of O. Reg. 245/97. As Gaiswinkler Enterprises Limited is the Lessee of 100 percent of the lands in the proposed unit, and further as no leased landowner attended to oppose its appointment or propose the appointment of some other operator, the tribunal finds that it will appoint Gaiswinkler Enterprises Limited as the initial unit area operator.

Ordering of Unitization Provisions

With the information provided in connection with the reconvened hearing of September 28, 1999, the tribunal finds that it will adopt the format used by the Energy Board and make the proposed Unit Operation Agreement a Schedule to its Order for Unitization.

The Unit Operation Agreement is noted as a relationship between a collection of lessors and a single lessee. In this case there are seventy-one lessors which relate to Gaiswinkler Enterprises Limited, the single lessee. It is through this Unit Operation Agreement that the various leases are effectively amended, confirmed and draw the parties into a single governing agreement.

The tribunal has received and reviewed the third draft of the Unit Operation Agreement submitted by Mr. Lewis. The tribunal finds that it will order that the relationship between the lessor and lessee will be governed by the agreement, through provisions by which it shall be deemed to apply. Several comments must be made in this regard.

First, in the recitals of the agreement, there is included reference to "the Mortgagee OF THE THIRD PART" and further left in blank a party "OF THE FOURTH PART". The tribunal has determined that it will not change these provisions but states as follows. The interested mortgagees were not given notice of these proceedings, and insofar as they may be named in the Unit Operation Agreement, they cannot be bound by its provisions. Similarly, unnamed parties of the fourth part, of which the tribunal has no knowledge and therefore cannot determine who this might apply to, have not received notice and these provisions do not operate to be binding upon them.

Further, Gaiswinkler Enterprises Limited, or any succeeding unit operator, will be permitted to increase the area of the unit to include lands abutting the existing unit, with the agreement of those Leased Landowners having sixty per cent (60%) of the lands within the Unit at the time the change is made. Such changes would have to be reflected on title of all of the tracts within the unit, as well as those additional lands which may be added to the unit from time to time, by registering a Unit Amending Agreement which would include: a plan of the newly defined unit area; the metes and bounds of the enlarged or reduced unit area; and 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.

Similarly, the tribunal has determined that clauses 6 and 7, discussed in evidence at the hearing, permit Gaiswinkler Enterprises Limited or any successor(s) from withdrawing lands from the unit area or enlarging or reducing the size of any participating area will be retained in the Unit Operation Agreement. For purposes of the Unitization Order, the tribunal finds that it will adopt the approach put forth by Gaiswinkler Enterprises Limited and make all of the lands within the unit participating.

As to the matter of royalties, the tribunal finds that it will adopt the terms set out in the third draft Unit Operation Agreement which was filed on October 21, 1999 and forms part of the Unitization Order. The royalty payments are to be in accordance with Clause 4 of the Unit Operating Agreement and will operate as follows. The royalties are 12 1/2 % of the current market value at point of sale of all oil and/or gas produced, saved and marketed from the unit, in proportion to each tract's proportionate share of the whole unit. Payments are made on the last day of the month following that month when the oil and/or gas is sold. For those tracts whose annual royalties do not exceed $25.00, the amount of $25.00 per year shall be paid to the landowners no later than the 31st day of January of the following year.

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In addition, changes may be made by Gaiswinkler Enterprises Limited for those leased lands within the unit which do not form part of the participating section, which the Gaiswinkler Enterprises Limited continues to keep under Lease or the Unit Operation Agreement for that year or a portion thereof, the amount of $25.00 per annum shall be paid to those landowners no later than the 31st day of January of the following year.

Finally, for those leased lands which do not form part of the unit, which the Applicant has kept under Lease or the Unit Operation Agreement for that year or a portion thereof, the amount of $25.00 per annum shall be paid to those landowners no later than the 31st day of January of the following year.

In conclusion, it is the intention of the tribunal to afford Gaiswinkler Enterprises Limited the flexibility to operate the Colchester South 81-1 unit without having to reapply to the tribunal each time it wishes to redraw its boundaries, pursuant to new knowledge which may be obtained through the operation of this pool.

Deemed Effective Date

The tribunal has been requested to make this Order effective the 1st day of March, 1998, which corresponds with activities of the operator, having been carried out with the sanction of MNR. While the tribunal makes no comment on these activities, it is noted that the application was received on February 25, 1998. The tribunal finds that March 1, 1998 would be a reasonable date from which the accounting and payment of royalties shall take place.

However, with respect to those leases which were not entered into until 1999, namely that of the Edwards, Lacoursiere and MNR, the tribunal finds that it is necessary to deem that their execution took place prior to the effective date of this Unitization Order.

Duration of the Order

Clause 15(4)(l) of O.Reg. 245/97 requires a statement in the Order of the duration of the Order. Much like the duration of a lease involving lands which are in production, the Order for Compulsory Unitization will continue so long as the leased substances are being produced from the Colchester South 81-1 Pool. In keeping with the drafting used elsewhere in the industry, and in an effort to pin down such a vague term, the tribunal finds that it will order the duration of this Order for Compulsory Unitization so long as there are substances produced in paying quantities. To this will be attached the proviso that there be no stopping of production for unforseen circumstances of longer than 90 days.

Disputes

The tribunal heard no evidence on the matter of settling disputes which may arise in connection with the operation of the Colchester South 81-1 Pool. However, Gaiswinkler Enterprises Limited has been appointed as the Initial Unit Area Operator and this means that, with respect to management decisions involving production and marketing, Gaiswinkler is allowed to manage the operations of this Unit.

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Clause 8(10(b) of the **Act**, under which this Order for Compulsory Unitization is made provides that the tribunal charged with determining whether a unit will be created, setting out the various conditions which govern its creation, as set out in the Order. In keeping with the direction of Government today, and at the request of the parties, the tribunal has agreed that it would not be prudent to micro-manage each aspect of making changes to the unit area, and so has provided for the Operator to manage these matters in accordance with Paragraph 5(d) of its Order for Compulsory Unitization.

However, the tribunal is also charged with regulating the joining of the interests in the field or pool. What this means is that the tribunal 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. The operation of clause 8(1)(b) of **Act**, the tribunal retains responsibility for regulation of the Colchester South 81-1 Pool, and in this regard, parties are free to apply to the tribunal for further direct in those instances when need should arise. The tribunal is equipped with successful alternative dispute resolution processes which could be accessed by the parties on a formal or 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. The parties, however, are encouraged to attempt, at first instance, to resolve such disputes themselves, either on their own, or with the assistance of tribunal staff as they are identified.

Costs

The tribunal finds that there will be no costs payable by any party to this application.

Conclusion

For the foregoing reasons, the application by Gaiswinkler Enterprises Limited will be granted.