THE NATURE OF THE OIL AND GAS LEASE—A STATUTORY DEFINITION—*HAYES* v. *MAYHOOD* [1959] S.C.R. 568, 18 D.L.R. (2d) 497 (S.C.C.)

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The oil industry and practitioners welcomed the 1957 decision of the Supreme Court of Canada in *Berkheiser* v. *Berkheiser*[1] for its clear statement of the nature of the interest conferred by the "unless"[2] type of oil and gas lease as a *profit a prendre*. The decision seemed to arrest the speculations on the subject which had become a trademark of oil and gas cases.[3] It offered a starting point for the formulation of principles which would render more probable the correct forecast of solutions to oil and gas problems. Now, two years later, a decision of the Supreme Court of Canada requires a reappraisal so far as Alberta oil and gass leases are concerned. In *Hayes* v. *Mayhood*[4] the Court construed the Alberta *Land Titles Act Clarification Act*[5] as making an oil and gas lease a "lease" for certain statutory purposes. The implications of this decision are the concern of this comment.

The provision of *The Land Titles Act Clarification Act* in question is s. 2 which reads as follows:

> 2. It is hereby declared that the term "lease" as used in *The Land Titles Act* and any Act for which *The Land Titles Act* was substituted includes, and shall be deemed to have included, an agreement whereby an owner of any estate or interest in any minerals within, upon or under any land for which a certificate of title has been granted under *The Land Titles Act* or any Act for which *The Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any such minerals for a term certain or for a term certain coupled with a right thereafter to remove any such minerals so long as the same are being produced from the land within, upon or under which such minerals are situate.[6]

In *Hayes* v. *Mayhood*[7] the Court held that the word "lease" in s. 14 (1)

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[1] [1957] S.C.R. 387, 7 D.L.R. (2d) 721.

[2] The feature which identifies an "unless" type of lease is a proviso that if the drilling of a well is not commenced within one year the lease shall terminate *unless* on or before the anniversary date the lessee shall have paid to the lessor a sum of money for the privilege of deferring drilling for a period of one year, and so on from year to year during the primary term (which is usually 10 years). For a typical "unless" type of lease see *Canadian Oil and Gas*, Form A.I. (d).

[3] *For* a summary of judicial opinions on the nature of the interest, See *Canadian Oil and and Gas*, §§ 36, 41.

[4] [1959] S.C.R. 568, 18 D.L.R. (2d) 497 (S.C.C.).

[5] 1956 (Alta.), c. 26.

[6] It is generally believed that the section was passed with the intent of being purely procedural so that oil and gas leases could be registered under *The Land Titles Act*. Financial institutions lending money on the security of leases wanted some method whereby their interests could appear on the register, and the Saskatchewan case of *Landowners Mutual Minerals Ltd.* v. *Registrar of Titles* (1952), 6 W.W.R. (N.S.) 230, [1952] 3 D.L.R. 482 (C.A.) had left some doubt whether oil and gas leases were registerable. Apparently, most are satisfied to procure registration by way of caveat. Mr. Thom, the Registrar of the Northern Alberta Land Registration District, informs that very few oil and gas leases have been registered as "leases".

[7] [1959] S.C.R. 568, 18 D.L.R. (2d) 497 (S.C.C.).

(b) of the *Devolution of Real Property Act*[8] included an oil and gas lease because the word "lease" was defined to include an oil and gas lease in the *Land Titles Act Clarification Act*. The statutory definition was transplanted from the *Land Titles Act Clarification Act* to the *Devolution of Real Property Act* because the latter Act contained no definition of "lease" and s. 14 "must have been intended to include in its application leases of real property under the *Land Tiles Act*".[9] Further, if the meaning of "lease" in s. 14 was ambiguous, the two statutes were *in pari materia*, "both having provisions relating to real property in the Province of Alberta," and the transplant of definition was justified by the rule of construction applying in the case of statutes *in pari materia*.

This decision of the Court invites two questions. First, to what other Alberta statutes using the word "lease" will the statutory definition to include oil and gas leases be transplanted? Second, what is the effect of the statutory definition upon the nature of the oil and gas lease?

1. *Other Alberta statutes using the word "lease".*

In *Hayes* v. *Mayhood*[10] the Court applies the *in pari materia* rule of construction because the word "lease" in the statute has an ambiguous meaning and because the statute relates to real property law in Alberta. A fair inference from the decision is that the term "lease" is ambiguous because its meaning is not defined in the statute. In result, any provincial statute dealing with leases which does not define the term "lease" will affect the oil and gas lease, for obviously such a statute relates to real property law in Alberta. It would not be appropriate to catalogue such provincial statutes. Mention may be made of *The Landlord's Rights on Bankruptcy Act*[11] and the landlord and tenant provisions of *The Limitation of Actions Act*[12] and of *The Seizures Act*[13]. Section 18 of *The Judicature Act*[14] provides for relief against forfeiture for breach of a covenant in a lease to insure against loss or damage by fire, and section 21 gives the Alberta Supreme Court the jurisdiction of Chancery at July 15, 1870 with regard to leases of settled lands. While Alberta has not enacted general legislation concerning leases such as is in force in other Canadian provinces,[15] many of the provisions of this code-type legislation are derived from English statutes.[16] One may speculate that such

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[8]R.S.A. 1955, c. 83. Section 14(1)(b) authorizes personal representatives to "lease the real property or a part thereof, with the approval of the Court for a longer term [than one year]." The result of the case is that personal representatives can make oil and gas leases with the approval of the Court nothwithstanding that there is no power to make such leases in the will and that adult beneficiaries are non-concurring.

[9]Mr. Justice Martland for the Court, 18 D.L.R. (2d) 497, at p. 504.

[10][1959] S.C.R. 568, 18 D.L.R. (2d) 497 (S.C.C.).

[11]R.S.A. 1955, c. 171.

[12]R.S.A. 1955, c. 177.

[13]R.S.A. 1955, c. 307.

[14]R.S.A. 1955, c. 164.

[15]For example, *The Landlord and Tenant Act*, R.S.S. 1953, c. 312; *The Landlord and Tenant Act*, R.S.M. 1954, c. 136.

[16]For example, *Conveyancing and Law of Property Acts*, 1881 (Imp.) c. 41; 1892 (Imp.) c. 13 (codifying the law relating to forfeitures); *Landlord and Tenant Act*, 1730 (Imp.) c. 28; *Lord St. Leonard's Act* 1859 (Imp.) c. 35; *The Common Law Procedure Act*, 1860 (Imp) c. 126.

of these English statutes as are of pre-1870 origin are *in pari materia* with *The Land Titles Act Clarification Act* because they probably apply in Alberta[17] and undoubtedly relate to real property law.

2. *Effect of the statutory definition on the nature of the lease.*

Hayes v. *Mayhood*[18] does *not* say that the oil and gas lease is to be treated in Alberta as an ordinary lease for all purposes. Indeed, it is suggested that Mr. Justice Martland would be surprised if his judgment were to be read as subversive of the authority of the *Berkheiser Cass*[19] except in the statutory instances. The reasoning of the *Berkheiser Case*[20] that the "unless" type of oil and gas lease is substantially unlike an ordinary lease and has for its purpose the right to search for and win the substances named remains unimpaired. But while the oil and gas lease is unlike an ordinary lease and is more realistically classified as a *profit a prendre*, there are very few legal consequences resulting from the different classification. For example, the decision in the *Berkheiser Case*[21] would have been the same had the Court classified the oil and gas lease as an ordinary lease rather than a *profit a prendre*. It is true that a leasehold is a corporeal interest whereas a *profit a prendre* is incorporeal, but differences flowing from this conceptual distinction almost disappear when the incorporeal interest is held in gross, as in the case of the oil and gas lease treated as a *profit a prendre*. The interest in gross is irrevocable and assignable, and possessory remedies are available to the owner.[22] The one requirement of the lease which basically distinguishes it from the *profit a prendre* is the necessity of certain duration of term. Even in this respect the distinction disappears in the case of the "lease" by statutory definition, for the wording of s. 2 of *The Land Titles Act Clarification Act*[23] makes it clear that the oil and gas lease is to be deemed a "lease" notwithstanding that its term is to endure for the uncertain time of production of the leased substances.[24]

In summary, it seems that the nature of the interest conferred by the "unless" type of oil and gas lease is not altered by *Hayes* v. *Mayhood*[25] except with respect to peripheral statutory incidents that many attach to it by virtue of reading *The Land Titles Act Clarification Act*[26] definition of "lease" into other Alberta statutes dealing with leases. In considering oil and gas lease problems, an eye to the statute law will be essential.

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[17]Alberta takes the laws of England as of July 15, 1870, insofar as applicable to the conditions in the Northwest Territories at that time and so far as they are not subsequently repealed or modified.

[18][1959] S.C.R. 568, 18 D.L.R. (2d) 497 (S.C.C.).

[19][1957] S.C.R. 387, 7 D.L.R. (2d) 721.

[20]*Ibid.*

[21]*Ibid.*

[22]12 Halsbury (3rd ed.), No. 1356, No. 1359.

[23]1956 (Alta.) c. 26.

[24]*For* uncertainty of term based on production, see *Detomac Mines Ltd.* v. *Reliance Fluorspar Mining Syndicate Ltd.*, [1952] O.R. 783, [1952] 4 D.L.R. 385 (C.A.).

[25][1959] S.C.R. 568, 18, D.L.R. (2d) 497 (S.C.C.).

[26]1956 (Alta.) c. 26.