DECLARATORY RELIEF UNDER OIL AND GAS LEGISLATION — UPDATE

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Decisions of the Alberta Energy Resources Conservation Board arising over the past year are reviewed, along with new legislation in British Columbia and related decisions of the B.C. Energy Commission.

Since May 14, 1979, the Energy Resources Conservation Board of Alberta ("the Board") has issued a number of decisions, both on applications prior to and after that date, which reflect its current thinking on problems related to s. 52 of The Oil and Gas Conservation Act[1] ("the Act"). Although some of the fact patterns on which these decisions are based are reflected (albeit obliquely) in the previous article by the writer,[2] interest in the subject of gas purchase contract sharing appears to justify examination of these decisions and some of the issues which they present.

In addition to this updating, it is also the writer's intention to canvas in cursory form some recent legislative enactments in British Columbia and decisions of the British Columbia Energy Commission, which parallel the Alberta experience.

I. RECENT DECISIONS OF THE BOARD

To the writer's knowledge, the only Board decisions (including those of the Board's Examiners, whether or not subsequently endorsed by the Board) arising since the earlier paper on this subject are under s. 52 of the Act, namely applications to have gas purchasers declared to be common purchasers of gas and ancillary matters.

The facts outlined in the application by *Zephyr Resources Ltd.*[3] are, in the main, those described in Case 5 of the previous paper. They give rise to a consideration not evidenced in earlier Board decisions, namely, which parties should properly be subject to the jurisdiction of the Board? In this instance, Zephyr had made application for the declaration of TransCanada Pipe Lines Ltd. ("TCPL") as a common purchaser of gas from the Lone Pine Creek-Wabamum A pool. In fact, although TCPL was, by far, the major purchaser of gas from this pool, Pan-Alberta Gas Ltd. ("Pan-Alberta") was concurrently taking slightly less than one percent of the pool production.

Pan Alberta was not named as a party against which relief was sought, nor did it make an appearance at the hearing. In response to argument concerning the absence of Pan Alberta, the examiners noted that:[4]

> . . . while Pan-Alberta purchases some gas in the pool, the volume of gas involved is only about 0.7 percent of total pool production. The examiners believe that any potential inequity that might materialize if Pan-Alberta were not named as a common purchaser of gas in the pool, would similarly be relatively insignificant. . . .

The Board acknowledged, however, that further recourse to s. 52 was available should an interested party feel the Board's decision was inequitable.

A similar issue, on a greater scale, arose in an application by *Texaco Canada Resources Ltd.*[5] ("Texaco") with respect to the Brazeau River Elkton-Shunda B Pool. This

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1. R.S.A. 1970, c. 257, as am., referred to hereinafter as "The Act".
2. R.M. Perrin, "Declaratory Relief Under Alberta Oil and Gas Legislation" (1980) 18 *Alta. L. Rev.* 26.
3. Examiners' Report, Application 790071 (Zephyr Resources Ltd.).
4. *Id.* at 5.
5. Examiners' Report, Application 790782 (Texaco Canada Resources Ltd.). *Note*, no Order in Council relating to this report has been issued.

pool covers a substantial area (some three to four townships), of which approximately one-third was contained in the Brazeau River Gas Unit No. 1. TCPL, named in the application for which common purchaser status was sought, purchased all of the non-unit pool production at the north end of the pool, and in close proximity to Texaco's well from which drainage was alleged. Approximately 70 percent of the unit pool production was under contract to, and purchased by, Alberta and Southern Gas Co. Ltd. ("A & S"), and constituted approximately 40 to 50 percent of the total pool production.

The examiners noted:[6]

> . . . the drainage from the drilling spacing unit of the 6-17 well is caused in part by wells on lands under contract to A & S. The declaration of TransCanada, but not A & S, as a common purchaser could cause the development of an inequity within the pool in that TransCanada's current suppliers would continue at the existing contract rates. While the impact would likely be quite small initially, it would become significant with time and with the addition of wells not under contract.

During argument on the matter, Texaco invited the Board "to consider whether or not it can of its own motion make Alberta and Southern a common purchaser in the area".[7] The Board's decision not to name Alberta and Southern appears to be in conformance with the provisions of The Administrative Procedures Act,[8] and specifically s. 5:

> Before an authority . . . makes a decision or order adversely affecting the rights of a party, the authority
> (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party . . .

The declaration of one of a number of gas purchasers from a pool as common purchaser creates substantial difficulties in achieving the objectives of s. 5(c) of the Act. If, as has been suggested, the common purchaser's prime consideration is the relief of ongoing drainage by the Applicant, how are the common purchaser provisions[9] to operate in light of s. 5(c), where any reduction in the sale of gas volumes of contracted producers will automatically create discrimination in rates-of-take *vis-a-vis* other producers in the same pool but contracted with a different purchaser?

If relief from drainage is, as submitted, the principle criterion, what portion of that drainage can be laid at the feet of the producers meeting contracts with the common purchaser, since allocation of responsibility for drainage, *per se*, is incapable of geological or engineering exactitude where more than two wells are producing from the pool?

By preference, an applicant should name all purchasers of gas from the pool to be declared common purchasers, regardless of the significance of each in the total pool sales. If this procedure is followed, it should then become the responsibility of the common purchasers to negotiate the allocation of responsibility for the alleged drainage among their respective contracted producers.

The *Zephyr* application is illustrative of another difficulty encountered in applications under s. 52 — the problem of future markets.[10] The applicant in this instance had, in compliance with Alberta Regulation 151/71, sought gas purchase contracts from purchasers in the area. Although none of these purchasers indicated any immediate interest in acquiring additional volumes at the time of solicitation, one, Pan-Alberta, did evidence an interest in the future contracting of the drained lands. Zephyr did not pursue the matter and chose to approach the Board to request an "open-ended" declaration of common purchaser. Notwithstanding that the application was subsequently granted, the examiners advised: ". . . that the Board should indicate clearly to Zephyr that Zephyr should continue to diligently pursue an independent contract".[11]

6. *Id.* at 4.
7. *Id.* at 3.
8. R.S.A. 1970, c. 2, as am.
9. The Act, s. 52.
10. Perrin, *supra* n. 2 at 29.
11. *Supra* n. 3 at 5.

A similar case arose in an application respecting the Canard Colony C pool,[12] where the applicant, Brascan Resources Limited, also requested an "open-ended" declaration. The lands from which drainage was alleged however, were contracted with Pan-Alberta. Pan-Alberta acknowledged that due to the indeterminate future point when the purchaser would be in a position to commence to take production, and the drainage being sustained by Brascan until that time: ". . . Pan-Alberta was prepared to release Brascan from contractual obligations . . . if Brascan could obtain a contract from any other purchaser".[13] In response to objection by intervenors, Brascan amended its application to seek a declaration of limited duration, and the examiners recommended:[14]

> . . . the Board . . . issue an order declaring TransCanada to be the common purchaser of gas . . . and that the order be effective to the date at which Brascan commences delivery of gas under its Pan-Alberta contract, or 1st of November 1985, whichever is earlier.

It is submitted that the regulatory requirement that each application contain "a discussion of (ii) the future prospects of marketing the oil or gas",[15] together with the stated Board position that:[16]

> . . . where the prospects for marketing without the common purchaser declaration are not favourable, the Board would be sympathetic to an application made even at a time when a relatively small percentage of the reserves has been drained . . . [however] . . . where there are reasonable prospects for the marketing of gas in the near future . . . the drainage is more serious[.],

demand that an applicant employ its best efforts in seeking both a present and a future market for his gas prior to making application to the Board. Correspondence filed evidencing the present gas marketing limitations does not satisfy the requirements to be met for each application, and where this material alone is filed as evidence, it is submitted the Board should deny application as incomplete.

The question of retroactivity of Board orders has been raised (and rejected) in previous deliberations and decisions of the Board.[17] On November 16, 1979, The Oil and Gas Conservation Amendment Act, 1979[18] was proclaimed. Section 3 inserts the following section into the Act:

> 56.1 The Board may, in a declaration or order under this Part, order that all or any part of the declaration or order be effective as of a date specified in the declaration or order, and a date so specified may be previous to the date the declaration or order is made but may not be previous to the date on which the application for the declaration or order was made to the Board.

This section was considered by the Board in the Examiners' Report on the application by *Hewitt Oil (Alberta) Ltd.* ("Hewitt") respecting the Ferry Belly River C Pool.[19] On 28th of September, 1979, Hewitt submitted its application to the Board; on the 15th November of that year, the Company completed the tie-in of its wells to a nearby processing plant and reached a user agreement with its owners.

Although Hewitt requested an order by the Board retroactive to the date of its filing, the applicant subsequently ". . . revised its request for the effective date to be retroactive to the date its facilities were tied into the processing plant . . .".[20]

The examiners held they were restricted by the day of assent to the Act (16th November 1979) and that this date constituted the maximum period of retroactivity. In so doing, the examiners reaffirmed the earlier position of the Board that: ". . . the sharing

12. Examiners' Report, Application 790508 (Brascan Resources Limited).
13. *Id.* at 3.
14. *Id.* at 5.
15. Oil and Gas Conservation Regulations, Alta. Reg. 151/71, s. 15.020(c)(ii).
16. Letter of May 7, 1962 from the Oil and Gas Conservation Board to all Operators, p. 1.
17. *See* Decisions 77-19 (Blake Mineral Resources), 78-9 (Spur Engineering Limited), 78-19 (CDC Oil and Gas Limited).
18. The Oil and Gas Conservation Amendment Act, 1979, S.A. 1979, c. 56.
19. Examiners' Report, Application 790675 (Hewitt Oil (Alberta) Ltd.).
20. *Id.* at 3.

agreement could be retroactive only to the date that the purchaser offered acceptable quality gas to the common purchaser".[21] This ruling can be interpreted as stating the Board will limit the effect of s. 56.1 to the later of the date application is made under s. 52 or the date on which the applicant is in a position to physically deliver gas for sale to the prospective common purchaser.

Since the purpose of s. 52 is remedial, this amendment is both timely and beneficial; however, it can only be hoped that its implementation will not encourage the construction of facilities which would be idled when the applicant is subsequently denied its request for a common purchaser declaration.[22]

In *Atapco,*[23] the Board was requested to make a ruling pursuant to s. 52(4)(a) of the Act:

> ... the Board to assist in giving effect to a declaration under subsection (1) may direct:
> (a) the point at which the common purchaser shall take delivery of any gas offered for sale to him....

In making its determination, the Board identified those considerations which it felt were germane to making a ruling under this section, as:[24]

> — the economics of the alternatives,
> — the present situation and probable future development in the area, and
> — the effect of delay on drainage of the applicant's reserves.

The competing proposals were primarily concerned with the costs of hook-up of Atapco's plant. One alternative required greater capital and operating costs to be payable by the common purchaser, Northwestern Utilities Ltd. ("NUL"), as opposed to reduced cost to NUL at a second location. The latter proposal necessitated the construction of a 1.75 mile pipeline by Atapco and the idling of an existing pipeline. In reaching its determination, the examiners noted:[25]

> ... if additional reserves are developed in the area which would utilize the north delivery point, the monthly operating charge paid by NUL would be shared ... The examiners believe there is a possibility of future development in the area and on this basis the north delivery point appears even more economically desirable....

However, the examiners stipulated that Atapco would be required to pay the capital costs of connection at the designated delivery point. The Board adopted the examiners' recommendation as to delivery point, but did not endorse their ruling that Atapco be required to pay connection costs, stating: "... the Board, although it does not disagree with the reasoning ... is not certain that it has the jurisdiction to make such a direction".[26]

Although the reluctance of the Board to voluntarily extend its jurisdiction is admirable,[27] it is submitted that s. 20 of the Act gives the Board jurisdiction to determine liability for costs incurred in the implementation of a Board decision:

> The Board ... may make such just and reasonable orders and directions as the Board considers necessary to effect the purposes of this Act and as are not otherwise specifically authorized....

The protection extended to a common purchaser under s. 52(5) of the Act buttresses the argument that additional costs imposed on a purchaser by virtue of its obligations as a common purchaser under s. 52 should be borne by the applicant to whom the benefit of that section accrues.

The final Board decision to be canvassed in this paper relates to the application by *Spur Engineering Ltd.*[28] pursuant to s. 52(4)(b) of the Act directing:

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21. *Id.* at 4.
22. A partial example of this occurrence is found in the Application 790783 (Ocelot Industries Ltd.).
23. Examiners' Report, Application 790548 (American Trading and Production Corporation).
24. *Id.* at 3.
25. *Id.* at 5.
26. Decision 79-18.
27. *See* Decision 78-21 (Application 780354, NUL) at 4.
28. Decision 79-7 (Application 780464, Spur Engineering Ltd.).

> . . . the proportion of the common purchaser's acquisitions of gas from the pool which he shall purchase from each producer or owner offering gas for sale to him.

NUL had been declared a common purchaser from the Lacombe Viking A pool by Decision 78-9, and, although it was taking gas from Spur at the date of the application, Spur alleged the rate of take from its well by NUL constituted discrimination. The examiners adopted the position that:[29]

> . . . the reserves attributed to each well capable of production was a suitable basis . . . [for] . . . the prorationing of common purchaser acquisitions under section 52 of the Act, [and] . . . should reflect only reserves underlying the drilled spacing units of the . . . wells from which gas is being offered for sale, irrespective of whether or not the reserves are under contract.

Recognizing the vagaries of geological interpretation, the examiners ruled that a net pay of five feet be adopted for each well, and accordingly, contract sharing be allocated on the ratio that each well's deemed net pay bore to the total deemed net pay of all wells. This approach (albeit somewhat simplistic) precluded determination of the applicant's rights to drain reserves underlying lands other than its own spacing unit, in a fashion similar to that occurring through contracted and connected producing spacing units.

Since applicants are entitled to the protection of s. 52 in implementation of the objective of s. 5(c) of the Act, i.e.: "to give each owner the opportunity of obtaining his just and equitable share of the production of any pool", and if credence is to be given to the "rule of capture",[30] it follows that applicants should be entitled to produce solely the reserves underlying their spacing units at a rate consistent with good production practice, adequate to forestall ongoing drainage, and thus to ". . . become owners of the material which they withdrew from the well which is situated on their property or from which they have authority to draw".[31] Given this analysis, the employment of similar formulae for the implementation of both s. 35 (rateable take) and s. 52 appears questionable. In the former, the section is addressed specifically to the rights of competing producers; in the latter, the declaration acts as a denial of existing rights of a contracting party (producer) by restricting the volumes he is entitled to deliver to his gas purchaser, and results in a direct (as opposed to indirect) interference in his purchase agreement.

It is clear law that, where legislation acts so as to interfere with pre-existing rights (such as those secured by a gas purchase contract) ". . . you must not construe the words so as to take away rights . . . unless you have plain words which indicate that such was the intention of the legislature".[32]

It can therefore be argued that an applicant under s. 52 should not benefit through the ability of its well to drain lands other than the applicant's spacing unit in a manner similar to contracted wells, and that the obligation imposed under s. 52 on a common purchaser of gas should be interpreted accordingly. This view of the limited effect to be given to a common purchaser declaration is consistent with s. 21(1) of the Act:

> (c) a declaration . . . a provision of the Board pursuant to this Act . . . overrides the terms and conditions of any contract . . . conflicting with the provisions of the . . . declaration.

As has been previously mentioned,[33] judicial interpretation of the Act, and specifically s. 52, might be of great assistance in resolving this question.

II. B.C. LEGISLATION

In 1979, Bill 23, the Energy Amendment Act, 1979, was presented to the Legislative Assembly of British Columbia, and subsequently incorporated in the Energy Act,[34] receiving assent on July 31, 1979.

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29. *Id.* at 4.
30. *See Borys* v. *C.P.R.* (1953) 7 W.W.R. 546 (J.C.P.C.).
31. *Id.* at 550, *per* Lord Porter.
32. *Re Cuno* (1889) 43 Ch. D. 12 at 17.
33. Perrin, *supra* n. 2 at 32.
34. S.B.C. 1973, c. 29.

The acknowledged purpose of Bill 23 was to insert the remedies of:
(a) common carrier
(b) common purchaser, and
(c) common processor
into the B.C. Legislative scheme, similar in effect (if not in form) to those provisions currently in The Alberta Oil and Gas Conservation Act.

A copy of the Energy Amendment Act is found in Appendix B.

The major distinction between the Alberta common purchaser provisions and those in the B.C. statute (s. 86.1) appears to be that in B.C., the responsible authority may rule on allocation of purchases at the same hearing held to determine whether the purchaser should be declared a common purchaser.

This procedure is reflected in decisions rendered by the British Columbia Energy Commission on this section. The order of the Commission on the application of Westgrowth Petroleums Ltd., respecting the Buick Creek North Dunlevy A Pool, is illustrative:[35]

> The contract quantity applicable to the production of natural gas from the said well shall be the lesser of the volume determined on the basis of the ratio of the daily gas allowable of the said well to the sum of all the daily gas allowables determined for the Buick Creek North Dunlevy A Pool, or the actual production.

Other provisions of the British Columbia legislation appear to be subject to many of the same questions and comments which have been addressed to the comparable Alberta legislation.

APPENDIX A

SELECT BIBLIOGRAPHY

Examiners' and Board Decisions

Application No.	*Applicant*	*Relief Sought*
770867	Signalta Resources Limited	— common purchaser (common processor and carrier portions adjourned) — Pembina Lobstick Glauconitic A Pool.
780263	Mon-Oil Limited	— common purchaser Whitecourt Pekisko E Pool
780373	Camel Resources Ltd.	— common purchaser —Bruce Upper Mannville O Pool
790783	Ocelot Industries	— common purchaser — Craigend Grand Rapids P & R Pools
790675	Hewitt Oil (Alberta) Ltd.	— common purchaser Ferrybank Belly River C Pool
790071	Zephyr Resources Ltd.	— common purchaser, common carrier, common processor — Lone Pine Creek — Wabamum A Pool
790782	Texaco Canada Resources Ltd.	— common purchaser — Brazeau River Elkton — Shunda B Pool

35. British Columbia Energy Commission Order Number COM-7-80. *See also* Order Numbers COM-5-80, COM-6-80 and COM-8-80.

790508	Brascan Resources Limited	— common purchaser — Canard Colony C Pool
790548	American Trading and Production Company	— common purchaser (s. 52(4)(a))
79-18	American Trading and Production Company	— common purchaser (s. 52(4)(b))
(79-7) 780464	Spur Engineering Limited	— common purchaser (s. 52(4)(a))

APPENDIX B

ENERGY (AMENDMENT)

CHAPTER 9

Energy Amendment Act, 1979

[Assented to July 31, 1979.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. Section 1 of the *Energy Act*, S.B.C. 1973, c. 29, is amended
   (a) in the definition of "energy utility" by adding the following at the end
      (iv) a surplus energy producer; and
   (b) by adding the following definition:
      "surplus energy producer"
         means a person designated under this Act to be a surplus energy producer.
2. Section 21(2) is repealed and the following substituted:

   (2) The Lieutenant Governor in Council may, on application, designate a person to be a surplus energy producer and establish the conditions under which the surplus energy producer may sell surplus energy to other persons.

   (3) This Act, other than this section, does not apply to a surplus energy producer.
3. The following is added after section 85:

   Common carrier

   86. (1) The commission may, on application by an interested party and after a hearing, notice of which has been given to all persons who the commission believes may be affected, issue an order declaring a person to be a common carrier, effective on a date determined by the commission, with respect to the operation of a pipeline for the transportation of one or more of
      (a) crude oil,
      (b) natural gas,
      (c) natural gas liquid, or
      (d) another type of energy resource prescribed by the Lieutenant Governor in Council,

   and may, in the order, establish the conditions under which the common carrier shall accept and carry the crude oil, natural gas, natural gas liquid or other energy resource, as the case may be.

   (2) A common carrier shall comply with the conditions in an order made under this section.

(3) The commission may, by order and after a hearing, notice of which has been given to all persons who the commission believes may be affected, vary an order made under this section.

(4) Where an agreement between a person declared to be a common carrier and another person

(a) was made before an order was made under this section, and

(b) is inconsistent with the conditions established by the commission,

the commission may, in the order or a subsequent order, vary the agreement between the parties to eliminate the inconsistency, and the common carrier and the commission are not liable for damages suffered by the other person resulting from the variation.

(5) The commission may declare a person to be a common carrier, whether the person has acted or held himself out as a common carrier or not.

Common purchaser

86.1 (1) The Commission may, on application by an interested party and after a hearing, notice of which has been given to all persons who the commission believes may be affected, issue an order declaring a person who purchases or otherwise acquires

(a) crude oil,

(b) natural gas,

(c) natural gas liquids, or

(d) another type of energy resource prescribed by the Lieutenant Governor in Council,

from a pool designated by the commission, to be a common purchaser of the crude oil, natural gas, natural gas liquids or other type of energy resource, as the case may be, and may, in the order but subject to subsection (3), establish the conditions under which the common purchaser shall purchase the crude oil, natural gas, natural gas liquids or other type of energy resource, as the case may be.

(2) A common purchaser shall comply with the conditions in an order made under this section.

(3) The commission shall not require a common purchaser to purchase natural gas from a pool

(a) in a greater total amount, or

(b) at a greater rate

than he was obligated to purchase from that pool under the gas purchase contracts existing immediately before an order was made under this section.

(4) The commission may, by order and after a hearing, notice of which has been given to all persons who the commission believes may be affected, vary an order made under this section.

(5) Where an agreement made between a person declared to be a common purchaser and another person

(a) was made before an order was made under this section, and

(b) is inconsistent with the conditions established by the commission,

the commission may, in the order or a subsequent order, vary the agreement between the parties to eliminate the inconsistency, and the common purchaser and the commission are not liable for damages suffered by the other person resulting from the variation.

Common processor

86.2 (1) The commission may, on application by an interested party and after a hearing, notice of which has been given to all persons who the commission believes may be affected, issue an order declaring a person who owns or operates a plant for processing natural gas to be a common processor and may, in the order, establish the conditions under which the common processor shall accept and process natural gas.

(2) A common processor shall comply with the conditions in an order made under this section.

(3) The commission may, by order and after a hearing, notice of which has been given to all persons who the commission believes may be affected, vary an order made under this section.

(4) Where an agreement made between a person declared to be a common processor and another person

(a) was made before an order was made under this section, and

(b) is inconsistent with the conditions established by the commission,

the commission may, in the order or a subsequent order, vary the agreement between the parties to eliminate the inconsistency and the common processor and the commission are not liable for damages suffered by the other person resulting from the variation.

Amendments to Other Acts

4. Section 16 of the *British Columbia Hydro and Power Authority Act, 1964*, S.B.C. 1964, c. 7, is repealed.
5. Section 41 of the *Pipe-lines Act*, R.S.B.C. 1960, c. 284, is repealed.
6. This Act comes into force on a day to be fixed by proclamation.