

NEWSLETTER

The Freehold Owners Association ("FHOA")

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HAS BIG OIL CO-OPTED THE JUSTICE SYSTEM?

ANNUAL MEETING

The Annual Meeting of the Freehold Owners Association, will be held at 1:00 p.m. on Saturday, June 14, 2003, in the main gym of the Louis Riel Elementary and Junior High School, 9632 Oakfield Drive S.W., Calgary, Alberta. The annual meeting will be followed by a mineral rights information seminar. For further information, refer to the Notice of Meeting or visit our web site at www.fhoa.ca.

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JUSTICE

Like beauty, justice lies in the eye of the beholder.

Last year, the majority of a 9-member panel of Olympic figure skating judges awarded gold to a Russian couple in

the pairs figure skating competition. In the eyes of skating experts, media pundits, the 16,000 people who watched in person and hundreds of millions of worldwide television viewers, the performance of Canadians Jamie Salé and David Pelletier had clearly been superior to that of the Russians.

When the French skating judge confirmed suspicions of bias by admitting that her decision in favour of the Russians had been improperly influenced, a media feeding frenzy ensued. The International Skating Union and International Olympic Committee went into major damage control mode. The French judge was suspended indefinitely; a second gold medal was awarded to the Canadians; and a review of the entire judging system was ordered.

What does the Olympic figure skating judging fiasco have to do with freehold mineral ownership?

In any judging system, the men or woman who sit in judgment make difficult choices based on established rules. Public acceptance of the system depends on the perception that the rules are fair and that the judges are unbiased.

In the case of Salé and Pelletier, the fairness of the rules was not in question and there was no suggestion that the French judge had benefited personally from her decision. The

media spotlight was instead directed at the effect of powerful lobbyists on the judging process.

In the case of freehold ownership, recent 'rule changes', bureaucratic policy pronouncements and judicial decisions call into question the impact of the oil and gas industry lobby on both the fairness of the rules and the administration of justice.

FHOA'S OBJECTIVES

The Freehold Owners Association was organized almost four years ago to:

- provide information and education to help freeholders protect their valuable resources;
- research issues of concern to freeholders; and
- act as a common voice for freeholders by bringing their legitimate concerns to the attention of the oil and gas industry, industry regulators, governments and the general public, and by advocating reasonable resolutions to these concerns.

In an effort to provide information and education to freeholders, FHOA has sponsored information seminars; published semi-annual newsletters; created and maintained a comprehensive web site; answered thousands of telephone calls and e-mails from freeholders; and provided technical information to members at a modest cost. Our efforts have

succeeded - at least to the extent of making information and education available. Unfortunately, many tens of thousands of freeholders remain unaware of the existence of our association and the information we provide.

With an annual budget of less than \$50,000 (most of which is dedicated to providing education and information), the Freehold Owners Association cannot afford to conduct the type of research into issues of concern to freeholders which is needed. However, we have made a small start. Last summer, *FHOA* hired two university students under a salary-matching program sponsored by Human Resources Development Canada. The students conducted legal research and assisted with computer applications. This year, *FHOA* has again received HRDC approval to hire a computer science student and an oil and gas law student for the summer. We intend to use these students to assist us in: making our web site more 'user-friendly'; creating videos of information seminars for distribution to members unable to attend our seminars in person; and in beginning the process of drafting a freehold lease agreement which more fairly balances the interests of freehold owners and the oil and gas industry.

The Freehold Owners Association commends Human Resources Development Canada for sponsoring a program which provides an opportunity for post-secondary students to gain experience in their chosen fields, and for not-for-profit associations such as *FHOA* to hire otherwise un-affordable staff. We also express our thanks to the Honourable Joe Clark, MP for Calgary Centre. Federal MP's must approve all HRDC grants in their ridings. Prior to Mr. Clark's election in Calgary Centre, all HRDC grants in this riding were rejected by the sitting MP.

FHOA's progress towards achieving our goals of providing education and information and researching issues of concern to freeholders is in stark contrast to our lack of progress towards our third goal.

By acting as a common voice for the legitimate concerns of freeholders and advocating reasonable resolutions to these concerns, the Freehold Owners Association hoped to level the uneven playing field which has historically existed between freehold owners and the oil companies that lease our mineral interests. To say we have not succeeded in this goal is a gross understatement. Recent 'rule changes', bureaucratic policy pronouncements and judicial decisions have tilted a previously uneven playing field to the near vertical.

The balance of this newsletter is an attempt to explain the impact of these changes, pronouncements and decisions on freehold owners, and to set forth your association's plan to deal with them.

THE 'RULES'

In theory, our elected representatives are responsible for the rules which govern Canadian society. These rules are set forth in thousands of municipal, provincial and federal acts and associated regulations. In Alberta alone, there are 490 provincial acts and 1073 associated regulations governing everything from the operation of cemetery companies to dangerous dogs. The full text of these acts and regulations may be reviewed at the Queen's Printer website by anyone having several lifetimes (<http://www.ap.gov.ab.ca>).

In practice, government bureaucrats draft the rules which govern our society, and even the wisest and most well-intentioned politician cannot

read and understand every act or statute for which he or she is responsible. In practice, government bureaucrats and the politicians that rely upon them are constantly subjected to direct and indirect lobbying by special interest groups seeking rule changes.

Although any individual, group or corporation can lobby for rule changes, in practice only special interest groups with 'deep pockets' can afford to retain lobbyists who have direct access to senior government officials. Similarly, only the rich and powerful can afford media 'spin doctors' capable of manipulating public opinion and indirectly influencing our elected officials.

In practice, the rules which govern our lives are increasingly determined by corporate agendas. Nowhere is this more true than with respect to the rules which govern oil and gas exploration and development.

OIL AND GAS RULES

Canadian non-renewable resources fall within the jurisdiction of the provinces, and provincial legislatures are largely responsible for the rules which govern the finding and development of these resources.

In Alberta, there are approximately 20 acts and regulations that relate directly to the exploration for and development of oil and gas. The most encompassing are the Mines and Minerals Act and the Oil and Gas Conservation Act.

The Mines and Minerals Act applies to all wells in Alberta and all mines and minerals owned by the Crown. This act provides the Energy Minister with the authority to regulate all aspects of the relationship between the Crown

and the oil companies that explore for and develop the oil and gas resources beneath Crown lands. The terms in Crown lease agreements; the records which must be kept by oil companies; the amount and timing of royalty payments to the Crown; and the penalties for breach of an agreement with the Crown; are all regulated under the Mines and Minerals Act.

There is no Alberta statute which establishes rules governing the relationship between oil companies and freehold mineral owners.

The Oil and Gas Conservation Act applies to both Crown and freehold mineral rights. Under this act, all aspects of oil and gas industry operations in Alberta are regulated by the Alberta Energy and Utilities Board (the Board). The Board is a quasi-judicial body appointed by the Alberta Government

The purpose of the Oil and Gas Conservation Act is, in part, "to afford each owner the opportunity of obtaining his share of the production of oil or gas from any pool". The Board has broad general powers to "make any just and reasonable orders and directions the Board considers necessary to effect the purposes" of the act. However, the Board takes the position that it has no jurisdiction to become involved in situations where an oil company-lessee has deprived a freehold owner-lessor of the opportunity of obtaining his or her share of the production from a pool. According to the Board's legal department, such situations belong in the courts.

Modern Canadian society is replete with situations where the interests of different parties conflict. In most of these situations, the courts represent the last resort for conflict resolution. The Board itself recognizes that it "has a role in resolving issues and disputes

between affected parties, such as energy companies and landowners". In 1999, the Board involved "major stakeholders" in designing a system which would allow for mediation and other collaborative options in resolving disputes. An Appropriate Dispute Resolution (ADR) initiative was subsequently introduced. The ADR process has apparently been very successful in both resolving disputes between surface owners and oil and gas companies and improving overall land owner-industry relations.

Regrettably, the Board's legal department refused *FHOA's* request for assistance in implementing a similar process for resolving disputes between freehold mineral owners and the industry.

As matters currently stand, in cases of conflicts between freehold owners and the oil companies that have leased our mineral rights, the courts are our only recourse. It is in this context that recent rule changes and judicial decisions are so troubling.

OUR LEGAL SYSTEM

When the media reports stories of 'ambulance chasing' American lawyers attempting to negotiate contingency fee agreements with relatives of plane crash victims before the relatives have otherwise learned of the deaths of their loved ones, Canadians thumb their collective noses at our litigious southern neighbours. Similarly, when 'fast food' restaurants are sued in American courts for serving coffee that is too hot, we pat our collective backs and thank the powers that be for Canada's 'superior' legal system.

In our collective arrogance, how many Canadians stop to think about the price we pay to look down our noses at the excesses of the American legal

system?

Can the Canadian courts or regulators be thanked when unsafe tires are recalled by tire manufacturers? No, the thanks belong to American juries. And what about Adelphia, Enron, ImClone, Global Crossing, Tyco, Worldcom, etc. Canada has had no comparable corporate scandals. Does this mean that the business practices of Canadian companies are radically different from those in America? Or could it be that the difference lies in our regulatory and legal systems?

What are the differences?

In June of 2002, a 12-member Texas jury found Arthur Andersen (Enron's auditors) guilty of obstructing justice for destroying documents. No Canadian jury would have reached a similar verdict simply because no Canadian jury would have been allowed to hear a similar case. In the Canadian judicial system, ordinary Canadians are not considered competent to hear complicated commercial cases. Such cases are almost invariably tried by judges.

There are obvious advantages to a system in which important decisions are made by an individual with relevant training and an intellect superior to that of the great unwashed masses, but Canada's more elitist system clearly places far greater power in a single individual than does the American system.

The power of Canadian trial judges manifests itself in one of the most significant practical differences between the Canadian and American judicial systems - the treatment of court costs. The rule in the United States is that an unsuccessful plaintiff is only responsible for a successful defendant's court costs if the law suit is found to be frivolous or vexatious. In contrast, in Canada the party that

loses a law suit is generally responsible for paying the winning party's court costs. There are complicated rules governing the magnitude of cost awards in Canada, but trial judges have broad discretionary power to interpret these rules; provincial appeal courts seldom interfere; and the Supreme Court of Canada will not hear an appeal of a cost order.

Senior litigators typically bill themselves out at \$300 - \$400 per hour, and trials of complex issues can take months and involve multiple corporate defendants who retain multiple lawyers to defend themselves. What rational Canadian citizen of ordinary financial means would sue a powerful corporation under these circumstances?

In the United States, class action litigation has played an important role in the legal system for more than 40 years. In a class action, individuals with a common legal interest band together to pursue a common goal. The litigation is conducted in the name of a representative plaintiff who files the lawsuit on behalf of many other individuals in the class who have similar claims.

American social changes ranging from school desegregation to prison reform have been brought about by class actions. Large groups of individual Americans injured by product defects, toxic waste, or fraudulent business practices have also used class action litigation to recover damages in compensation for their injuries. Massive punitive judgment awards in American class actions act as a powerful deterrent to corporate malfeasance.

Class actions involving product liability or fraudulent business practices are typically conducted under contingency fee arrangements whereby

a law firm pays all costs of carrying the class action forward in return for a percentage of any court-awarded judgment or out of court settlement.

In Canada, legislation governing class actions exists in six Canadian provinces. In each of these provinces, the legislation provides a mechanism under which the representative plaintiff is protected from adverse cost awards in the event the class action is unsuccessful.

In a December, 2000 report, the Alberta Law Reform Institute recommended that the Alberta Legislature introduce class action legislation and that neither the representative plaintiff nor the other members of the class be liable for a successful defendant's court costs unless the class action was deemed to be frivolous or vexatious by the court. Your association supported the recommendations in this report with a brief.

RECENT RULE CHANGES

The Class Proceedings Act

On March 6, 2003, the Alberta Legislature gave first reading to the Class Proceedings Act. The Alberta legislation differs from the legislation in every other Canadian province and the United States in that the representative plaintiff has no protection from adverse cost awards.

Following introduction of the bill, counsel for the Alberta Law Reform Institute was quoted in the Calgary Herald as follows: "They've chosen to discourage class-action lawsuits". In the same article, Justice Minister Hancock responded: "If there's an appropriate case that ought to be tried, you should be able to get together a group of people who are prepared to

stand behind you". "We're not trying to engender a society where we encourage more lawsuits".

The Freehold Owners Association also has no desire to encourage needless lawsuits. We have approached the Board (and industry associations) in an attempt to establish an Alternate Dispute Resolution process which could resolve freehold owner-oil company disputes outside the court room. Our approaches have been rebuffed.

Most of the problems faced by freehold owners are common problems - chronically late royalty payments; excessive deductions from royalties; 'market price' manipulation; shut-in wells holding freehold mineral rights for decades; etc. Similarly, a number of currently unresolved legal issues impact large numbers of freeholders - the nature of the legal relationship established under a lease or a unit agreement; the ownership of hydrocarbons produced from freehold mineral rights where title to petroleum and natural gas is split; the ownership of coal bed methane produced from freehold mineral rights where title to coal and natural gas is split (see below); etc.

The Class Proceeding Act will not encourage the resolution of any of these problems or legal issues.

The cost award in the split title ownership trial clearly illustrates the problem. In 1997, the Chief Justice of the Court of Queen's Bench of Alberta stayed (halted) 20 legal actions initiated by freehold owners against their oil company-lessees pending the determination of a preliminary issue of law - the ownership of hydrocarbons produced from a well on lands where title to all coal and petroleum is held by the successor company to the CPR and title to all other mines and minerals is held by individual freehold

owners. The Chief Justice's order effectively placed the plaintiffs in the 20 lawsuits in the position of conducting a class action against the 60 oil companies named in the underlying actions without the benefit of support from the thousands of individual freeholders who would benefit from a successful outcome.

In June of 2002, the Alberta Court of Appeal upheld the trial judge's ruling on the ownership issue (see below). The Appeal Court also dismissed the freeholders' appeal of the trial judge's cost award. According to the Court of Appeal, it was appropriate for the trial judge to have ordered the freeholders to pay more than \$600,000 to the defendant oil companies for a 6 ½ day trial because of the technical nature and complexity of the litigation and because of the seriousness and significance of the issue to the oil companies.

Six hundred thousand dollars may be relatively insignificant to Encana Corporation - the successor to the CPR and principal defendant in the split title ownership trial had revenues of more than \$10 billion in 2002 - but \$600,000 is clearly significant to the citizens of ordinary financial means who were the plaintiffs in the 20 lawsuits.

Almost 2000 freeholders have joined the Freehold Owners Association at this point. *FHOA's* members presumably represent the kind of group that the Alberta Justice Minister envisions as potentially standing behind a representative plaintiff. But even in the unlikely event that every one of our members could afford to contribute \$3,000 to a fund to protect a representative plaintiff from a potential adverse cost award in a class action, it wouldn't be enough - a class action to decide any of the common problems which face Alberta freeholders can be expected to take far

longer than 6 ½ days.

The Class Proceedings Act received third and final reading on April 29, 2003. According to Minister Hancock, "If the bill is not sufficient to give people access to the courts, then we will review it".

In the opinion of the Freehold Owners Association, a Court of Queen's Bench trial judge decision to order citizens of ordinary financial means to pay the oil companies they are suing \$600,000 for the costs of a 6 ½ day trial of a preliminary issue of law before the merit of the citizens lawsuits has even been heard should offend most Canadian's sense of what is fair and just. But justice is in the eye of the beholder and, when it comes to court costs, the relevant and ultimate beholder is the Court of Appeal of Alberta.

Six hundred thousand for a 6 ½ day trial involving 17 oil company lawyers - how much for a 6 week trial involving 30 oil company lawyers?

In *FHOA's* view, the Class Proceedings Act does not take proper account of the magnitude of potential cost awards which Alberta's highest court may deem to be appropriate in a class action which raises issues of significance to the oil and gas industry. Your association intends to seek a meeting with the Justice Minister to discuss our concerns with the Class Proceedings Act.

The Energy Statutes Amendment Act

Both British Columbia and Alberta have recently introduced legislation dealing with the ownership of coal bed methane. The purpose of this legislation is to provide clarity for investors in situations where one party has the right to coal and another to natural gas.

Coal bed methane currently comprises more than 7% of all gas production in the United States. Alberta and British Columbia have vast potential reserves of coal bed methane. Although there are many unanswered questions concerning the economic exploitation of coal bed methane, it is clearly an important future resource.

In both British Columbia and Alberta, the legislation specifies that the owner of natural gas owns any gas produced out of coal. The British Columbia legislation applies to both Crown and freehold mineral interests. The Alberta legislation applies only to Crown mineral rights.

As a result, in Alberta the ownership of coal bed methane remains an open issue in situations where individual freeholders hold title to all mines and minerals except coal (or coal and petroleum), and Encana Corporation or Fording Coal, as successors to the CPR, holds title to coal.

RECENT LEGAL DECISIONS

Split Title Ownership

Most of Alberta was settled after 1889 when the Dominion Government stopped including subsurface minerals in grants and sales of western Canadian homestead lands to settlers. As a consequence, most of the individually-owned freehold mineral rights in Alberta were originally acquired from either the Canadian Pacific Railway Company or the Hudson Bay Company.

In the case of the CPR, the railway company was granted 25 million acres of land in western Canada in 1881 in return for its commitment to complete and operate a transcontinental rail line. To raise funds for railway construction

and to encourage traffic on its rail line, the CPR sold farm-sized portions of its railway grant lands to homesteaders. Initially, the CPR had no interest in subsurface minerals and sold land to homesteaders without reserving anything for its own account. In approximately 1904, the CPR recognized the potential value of coal to its operations, and began to reserve this substance for its own account in land sales to homesteaders. Several years later, the CPR recognized the potential value of subsurface petroleum, and changed its policies to reserve both coal and petroleum for its own account. At the time, the CPR had no interest in natural gas which was considered to be a dangerous nuisance. It was not until approximately 1912 that the CPR began to reserve all mines and minerals for its own account in land sales to settlers.

As a result of the CPR's land settlement policies, title to petroleum and natural gas became split on at least 1 million acres of land in Alberta and a further 1/2 million acres in Saskatchewan. As a further result, title to coal became split from natural gas on an unknown, but significantly greater, amount of land in western Canada.

Within Alberta, there are an estimated 10,000 owners of split title natural gas rights. *FHOA* does not know how many owners of split title natural gas there are in Saskatchewan. Encana Corporation, as successor to the CPR, owns the rights to petroleum beneath all split title lands in western Canada. The rights to coal beneath split title lands are held by either Encana or Fording Inc., another CPR successor corporation.

Fifty years ago, the Judicial Committee of the Privy Council, then the highest court of appeal in the Commonwealth, decided the issue of

ownership of hydrocarbons produced from wells drilled on lands where the CPR had the rights to coal and petroleum and individual freeholders had the rights to all other minerals, including natural gas. In Borys v. CPR and Imperial Oil Limited, the Privy Council clearly stated that hydrocarbons which emerge from a subsurface reservoir and are recovered in gaseous phase at the bottom of a well bore on split title lands belong to the individual freehold owners of natural gas, not the CPR or its successor companies.

On June 26, 2002, the Alberta Court of Appeal dismissed an appeal of a 1998 Court of Queen's Bench decision on the ownership of hydrocarbons produced from wells drilled on split title lands. The trial judge had ruled that although Borys was applicable and binding authority and although the Privy Council's statement was a summary of a lower court decision it upheld, the summary was both "wrong" and "obiter" (not binding upon her).

The Alberta Court of Appeal acknowledged that Borys was applicable and binding authority but did not directly comment on the trial judge's remarkable assertion.

Our entire legal system is based on the concept of precedent - a lower court can express its disagreement with a superior court, but the lower court is bound by the superior court's words to the extent that these words are not just casual observations unrelated to the issue before the court. How can a summary by the highest court of appeal in the Commonwealth of a lower court decision it upheld be a casual observation unrelated to the issue?

In *FHOA's* view, both the Alberta Court of Appeal and the trial judge have disparaged the reasoning of the

Privy Council and have exceeded their authority by substituting their own reasoning for that of a superior court.

According to the trial judge and the Alberta Court of Appeal, the Borys decision stands for the proposition that ownership of hydrocarbons produced from wells on split title lands is fixed at the date of the CPR's reservation and that subsequent phase changes (ie. a change from liquid to gas or vice versa) are irrelevant to ownership.

It bothered the Alberta Courts not one wit that the Privy Council said no such thing and instead stated exactly the opposite. It was also of no concern to the Alberta Courts that in every other oil and gas producing jurisdiction in the world, what you own is what you recover in a well legally drilled on your property, not what might have existed beneath the lands a century ago. Similarly, the words used by the CPR in its reservation - "all petroleum which may be found to exist" - were of no concern to the Alberta Courts. Petroleum is a liquid and is only "found to exist" when a well is drilled and hydrocarbons are recovered. The CPR could have reserved 'all petroleum which then existed', or even 'all petroleum'. It didn't. It reserved "all petroleum which may be found to exist". These words are clearly prospective, not retrospective.

The Alberta Court decisions are primarily about the ownership of evolved gas produced from wells on split title lands. Evolved gas is gas which is dissolved in petroleum in a subsurface reservoir under initial reservoir conditions but evolves from petroleum as reservoir pressure declines and ultimately emerges from the reservoir and is recovered in gaseous phase at the bottom of a well bore. If the Court of Appeal decision stands, hundreds of millions of dollars worth of past and future evolved gas production - gas which was a

dangerous nuisance of no interest to the CPR at the turn of the last century-will become the property of Encana, the CPR's successor.

The Court of Appeal decision also has serious ramifications for coal bed methane ownership. As set forth above, the Appeal Court ruled that ownership in split title situations "must be determined at initial reservoir conditions" and that "phase changes that occur subsequently are irrelevant to ownership". During the ownership trial, the trial judge heard uncontested evidence that subsurface coal undergoes the same kind of 'irrelevant phase changes' as petroleum does when coal bed methane is produced - ie. the pressure on the coal is reduced and gas evolves from coal in the subsurface. If the Appeal Court ruling stands, Encana/Fording's public claims to coal bed methane in situations where the CPR's successors hold title to coal and individual freeholders hold title to natural gas would appear to be unassailable.

The freehold owners involved in the split title ownership trial have sought leave to appeal the Alberta Court of Appeal decision from the Supreme Court of Canada. As of this writing, the Supreme Court has not decided whether to grant leave to appeal. In the event that leave to appeal is granted, *FHOA* intends to apply for leave to intervene.

Shut-in Wells - Lady Ivry Freyberg

A respected Calgary law firm had this to say about a recent Court of Queen's Bench of Alberta decision: "This July 23, 2003 decision of Romaine J. is, ahem, novel and should strike fear into all lessors of freehold oil and gas leases and abject glee into all lessees".

Reduced to its ugly essentials, the Lady Ivry decision stands for the

proposition that a freehold lease which contains a typical pre-CAPL shut-in royalty clause does not automatically terminate after the primary term if an economic market for gas exists and the oil company-lessee does not produce a shut-in well. Further, the freehold owner-lessor, not the oil company-lessee, has the burden of proof in establishing that an economical or profitable market for gas exists at any time. Further still, the default clause in many pre-CAPL leases applies to both the lessee's obligations and its options.

The Lady Ivry decision has been appealed.

An Appeal Court ruling upholding the Court of Queen's Bench decision will go a long way to providing the oil and gas industry with the judicial bullet-proofing of pre-CAPL leases that the industry has managed to accomplish contractually through CAPL leases forms.

RECENT POLICY PRONOUNCEMENTS

Access to Freehold Information

Members who have made technical service requests in the past year are aware that *FHOA* can no longer provide its members with information respecting the ownership of freehold minerals. Similarly, we are unable to provide information on whether freehold mineral rights are leased, to whom the rights are leased, or when the lease was executed. This kind of information, which is readily available to the oil companies and land agents that lease our mineral rights, is exceedingly valuable to freehold owners.

Knowledge is power. During lease negotiations the freehold owners of a

particular tract of land, a section of land, or a larger area may wish to share information on lease offers or form a common front to leasing agents. After a freeholder's mineral rights have been leased, communicating with offsetting freehold owners may become even more critical. For example, the offset clause in CAPL 88 and 91 lease forms is structured so as to eliminate a freeholder's protection from offsetting gas well drainage if there is an old dry hole on the section comprising the freeholder's mineral rights. The clause is not written in simple language and, in the 15 years since CAPL leases were introduced, many freeholders have entered into CAPL 88 or CAPL 91 leases without first checking for oil dry holes on their sections and insisting on wording changes to provide offset protection if a dry hole exists. In most cases, there are multiple freehold mineral rights owners within a single section. Typically, many of the freehold owners within a section no longer live on the land and are not aware of drilling or production activities offsetting their mineral rights. In situations where a freeholder recognizes that he or she is being drained but can do nothing about it due to the combination of an old dry hole and a CAPL 88 or 91 lease, it becomes critical to know who the other freeholders in the section are and when they entered into their leases. These other freehold owners may have leased their mineral rights before oppressive CAPL leases became commonplace and may be able to force a well to be drilled on the section under the offset well clause in their lease.

The reason that *FHOA* cannot provide freehold mineral rights information to members is that our Association has been denied access to this information by IHS Energy, the sole provider of volume freehold mineral rights

information to the oil and gas industry and other interested parties. IHS has advised *FHOA* that providing freehold information to our Association “could compromise IHS Energy’s ongoing relationship with the Government of Alberta”. IHS has also advised that if “Government officials confirm in writing that they have no problem with your association having access to our comprehensive mineral rights database, then IHS Energy would reconsider our decision”.

FHOA has asked senior Land Titles officials to confirm in writing that they have no objection to our Association accessing the same information that is available to the oil and gas industry. By letter dated March 5, 2003, Land Titles refused our request. According to a senior Land Titles official: “It is not the role of Land Titles to support or promote the goals of special interest parties over the rights of others, such as the 40,000 plus freehold mineral title holders that are not members of your Association (1800 members) or the commercial interests of a private company such as IHS Accumap.”

The Freehold Owners Association has built and maintains a web site designed to provide information and education to freehold owners. We do not restrict access to this web site to our members, but make it available to all freeholders. Our information seminars are open to all freeholders, irrespective of whether they belong to the Association. Similarly, we answer telephone calls and e-mails and provide copies of our newsletters to any concerned or interested freehold owner, irrespective of whether they are members of *FHOA*. For senior Government bureaucrats to construe the Freehold Owners Association as a special interest party somehow seeking to subvert the rights of other individual freeholders can, at best, be described as ludicrous.

According to senior bureaucrats, the position adopted by Land Titles with respect to the Freehold Owners Association is based on a policy decision to prevent ‘name searching’ of volume Land Titles information.

Anyone can find out who owns the mineral rights beneath a particular parcel of land by providing a legal description of the parcel to a Land Titles office or registry shop and paying \$5 or \$10 dollars per title search. What you can’t do is provide an individual’s name to a Land Titles office or a registry shop and pay for a search of all minerals owned by that person. *FHOA* has been advised that preventing searches of the Land Titles register on a name basis is of considerable ideological importance to senior policy makers.

Nothing has historically prevented any individual or corporation from searching every mineral title in the Province and creating a private database containing all of the information in the Land Titles registry. Nothing that is except the huge cost of initially building and then maintaining such a database. Over the past 30 years, and with the full knowledge and cooperation of Land Titles, IHS Energy and its predecessor companies have built and maintained such a private database. Freehold mineral information in the IHS database has been, and continue to be, made available to other oil and gas industry service providers, oil companies, and other interested parties for a fee.

Senior Land Titles bureaucrats are apparently concerned that the IHS’ private database can be name searched.

From a practical standpoint, preventing name searching provides protection to a freehold owner who has financial problems and does not want his creditors, his creditor’s

lawyers or collection agencies to become aware of his mineral ownership. There may be other practical ‘benefits’, but as anyone can search the Land Titles registry by location, it is not obvious what these benefits might be.

The Freehold Owners Association is clearly not in the business of debt collection, and *FHOA* has no interest in name searching. We want access to freehold mineral rights information in the IHS database so as to provide this information to our members in the same cost-effective manner as the information is made available to the oil and gas companies that lease our mineral rights.

Why should the Freehold Owners Association be singled out by senior bureaucrats in the Land Titles Department for special treatment? Is it fair or just for Government bureaucrats to apply one set of rules to an organization representing individuals who own freehold mineral rights and another to the oil companies that lease our minerals?

Your Association intends to approach the appropriate policy committee of the Legislature and request an explanation.

GOING FORWARD

The recurring question asked by freehold owners in telephone calls, e-mails, technical service requests and membership applications is: “What is fair?”.

Finding and developing subsurface oil or gas is a complex business, and the freehold lease agreements which are necessary to allow oil companies to find and develop any oil or gas beneath freehold lands are equally complex. Most freeholders don’t understand the oil and gas business;

the freehold leases they are asked to sign; or the royalty statements they may receive if oil or gas is produced from their property.

When someone doesn't fully understand something that effects their livelihood or their heritage, they naturally become suspicious and fearful.

In an Ipsos-Reid survey released on January 22, 2003, Canadians were asked to rank the trustworthiness of various professions and industries (www.ipsos-reid.com). Amongst industries, the oil and gas industry scored 17% and ranked 27th out of 28, just slightly ahead of the last-placed tobacco industry. Had this poll been conducted amongst freehold owners rather than the general Canadian public, it is probable that the oil and gas industry would have scored much lower.

In *FHOA's* view, most oil and gas companies are good corporate citizens; are not fixated on maximizing profit at the expense of the vulnerable; and seek only a fair return on their investments. There are however a number of serious problems in the relationship between freehold owners and the oil and gas industry. To name but a few: freehold lease agreements do not fairly balance the interests of freehold owner-lessors and oil company-lessees; the royalty statements provided to most freeholders are indecipherable; and the business practices of some oil companies with respect to freeholders are offensive.

Your Association has approached the Canadian Association of Petroleum Producers (CAPP) and other leading industry associations with a view to jointly addressing the legitimate concerns of freeholders. Industry associations have ignored *FHOA's* overtures.

In a number of American states, oil and gas industry associations work with freehold owner associations such as *FHOA* on issues which are mutually beneficial. For example, it is not in the interest of oil companies or the Government of Alberta to see freehold mineral rights split into ever smaller chunks as they pass from generation to generation. The cost of leasing a parcel of freehold land increases in direct proportion to the number of mineral title owners. Ultimately, the number of title owners increases to the point that it is uneconomic for an oil company to lease the parcel. This limits the number of drilling opportunities available to the industry and deprives the Government of potential freehold mineral tax. It is also clearly not in the interest of the freehold owners.

Similarly, it is not in the best interest of the oil and gas industry for applications to the Board by oil companies to be opposed by freehold owners simply because the freeholder doesn't fully understand the issue involved. *FHOA* can assist both the industry and the Board by helping freeholders understand the impact of complex technical applications in their particular circumstances.

On April 14, 2003, CAPP's President announced that Canada's energy industry intended to invest \$20 million on a news and information web site aimed at bolstering its public support (www.centreforenergy.com). This web site contains a lot of information which freehold owners may find useful, but is predictably designed to paint the energy industry in a favourable light. In *FHOA's* view, the oil and gas industry does not need more PR to address its credibility problems. The industry needs to take action to address legitimate concerns.

If the oil and gas industry does not see fit to taking action to address the

concerns of freeholders, *FHOA* will need help from our elected representatives.

The only Alberta statute specifically relating to freehold minerals is the Freehold Mineral Rights Tax Act. This act provides the Energy Minister with authority to levy an annual tax on production from freehold mineral rights in the preceding year. Although the formula for calculating freehold mineral tax is complex, the overall levy equates to an approximately 6% royalty payable to the Province on all production from freehold lands.

Most freehold lease agreements provide for the oil company-lessee to pay its working interest share of freehold mineral tax. The freehold owner's share is also usually paid by the oil company-lessee and subsequently deducted from royalty payments. As a consequence of the foregoing, many freehold owners do not fully understand the impact of freehold mineral tax.

One of the reasons that Crown royalties are significantly higher than freehold royalties is that oil companies leasing freehold land must take into account freehold mineral tax. The tax has the effect of reducing the royalty rate that an oil company can afford to pay a freeholder by at least 5%.

In the April 8, 2003 provincial budget, the Energy Department estimated that freehold mineral tax will generate \$214 million for the Crown in 2003 - 04. This amount exceeds the Energy Department's entire operating budget for 2003 - 04, including that portion of Board funding not paid for by the oil and gas industry.

Although our forefathers broke the land in this Province under harsh circumstances at the turn of the last century and earned the right to the

minerals which they have passed down to us, in *FHOA's* view, it is fair and reasonable for freeholders to pay a tax on production from our mineral rights to the Province of Alberta. Sharing is a tradition in Alberta and it seems appropriate to share the benefits of our heritage with those whose forefathers, through quirks of fate or timing, did not acquire mineral title.

However it is also fair and reasonable for freehold owners to expect fair treatment from the government we support with our taxes and, in most instances, our votes.

Perhaps the Freehold Owners Association has been remiss in not fully explaining the issues which concern freehold owners to our elected representatives, and in not more aggressively seeking Government assistance in resolving these issues. *FHOA's* goal going forward is to enlist the assistance of our elected representatives in creating a fair and just relationship with the oil and gas industry.

MEMBERSHIP

When a Land Titles bureaucrat categorizes the Freehold Owners Association as a special interest group not representing the interests of all Alberta freehold mineral rights owners because we only have 1,800 members and there are more than 40,000 freehold owners in Alberta, the importance of growing *FHOA's* membership becomes obvious.

As of this writing, 1,935 freehold owners have joined *FHOA* - an increase of more than 25% in the past year. Most volunteer organizations would be pleased with this type of membership growth. Unfortunately, it will take many years of growth at this pace to achieve the kind of membership numbers that appear to be

required for certain bureaucrats to accept our organization as a legitimate representative of all freeholders.

One of the difficulties that *FHOA* faces is that, in many cases, a single family member has joined our Association on behalf of a number of family members who hold title to the mineral rights. *FHOA* would prefer that all individual mineral title owners in a family join our Association, but we also know that many freeholders are pensioners living on fixed incomes to whom \$25 is significant. What is of paramount importance is that we know how many freehold owners we represent.

If you have joined the Freehold Owners Association on behalf of a number of family members who share in your title, and if you wish *FHOA* to represent your family's interests in dealings with relevant organizations and authorities, please advise us of this when you renew your membership.

On behalf of the board of directors.

Else Pedersen,
President

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