DECLARATORY RELIEF UNDER ALBERTA OIL AND GAS LEGISLATION

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This paper discusses the applicable legislative and regulatory provisions in Alberta respecting applications for declarations of common purchaser, carrier and processor and orders for rateable take of natural gas, including the implementation of the objectives of such remedies through decisions of the Energy Resources Conservation Board. Reference is also made to the historical development of these remedies and comparable U.S. legislation (Texas, Oklahoma and Louisiana) in reaching conclusions and recommendations.

I. INTRODUCTION

The purpose of this paper is to examine remedies available under The Oil and Gas Conservation Act of Alberta[1] (the "Act") and consequential provisions of The Gas Utilities Act,[2] and The Public Utilities Board Act[3], respecting applications for declarations of or orders for:

1. common purchaser
2. rateable take
3. common carrier, and
4. common processor.

together with requirements for and purposes of such applications and the procedures currently employed in making them are documented.

Although the statutory provisions referred to throughout this paper are directed to an assessment of their impact on the production, transportation and processing of natural gas and associated by-products, it must be noted that parallel remedies exist respecting oil and apply to two common declarations. The limitation of this paper to remedies arising in the context of natural gas is not only to prevent needless duplication, but also because it is the writer's perception that historically most applications have been made under the "gas provisions"; and future applications will more likely result from the current and anticipated "gas bubble" and concomitant drainage problems.

The references hereinafter made are to decisions of the Energy Resources Conservation Board (the "Board"), however, it must be observed that in each case validity is given to declarations of the Board by orders-in-council of the Lieutenant Governor in Council. The reasons for each ruling are contained in the Board decisions recommending the issuance of the Order in Council and are referred to on the perceived and an-

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The paper deals with decisions up to May 14th, 1979.

1. RSA 1970, c. 267 as am.
2. RSA 1970, c. 158 as am.
3. RSA 1970, c. 302 as am.

ticipated consistency of the Board's approach. In some instances the hearing is held before, and reasons for decision given by, a panel of examiners appointed by the Board pursuant to s. 16 of The Energy Resources Conservation Board Act[4]. For ease of reference, decisions quoted have been ascribed to the Board.

Administration of the provisions of the Act respecting the subject matter of this paper is made in implementation of the objects and applications of the Act, including:[5]

> (c) To afford each owner the opportunity of obtaining his share of the production of oil or gas from any pool or of crude bitumen from any oil sands deposit.

Accordingly, in most instances, decisions of the Board reflect its attempt to achieve equity between the parties.

II. STATUTE LAW AND BOARD DECISIONS

A. *Common Purchaser Declaration*

The most common declaratory order is one issued pursuant to an application made under s. 52 of the Act:

> (1) Upon application and after a hearing, the Board, with the approval of the Lieutenant Governor in Council, may declare any person who purchases, produces or otherwise acquires gas produced from a pool from which gas is being taken to be a common purchaser of gas from the pool.
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> (2) Each common purchaser of gas shall purchase gas offered for sale to him without discrimination in favour of one producer or owner as against another in the pool.
>
> (3) No common purchaser of gas shall discriminate in favour of his own production or production in which he is directly or indirectly interested either in whole or in part.

Similar provisions respecting common purchasers of oil are found in s. 51 of the Act.

In implementing s. 52, the Board has advanced three separate tests to be met. These tests, contained in Board letter of 7th May, 1962, are incorporated in many of the Board decisions, including 77-25, and are simply stated as follows:[6]

> (a) whether or not, and if so, to what extent, drainage has occurred subsequently to the completion of a well on the applicant's property,
>
> (b) whether or not opportunities have existed for the marketing of gas from the applicant's property, and, if so, where and the nature of them, and
>
> (c) the prospects for marketing gas in the near future.

These "rules" reflect the regulations bearing on common purchaser applications[7] and will be discussed separately hereafter.

1) *Drainage*

In making an application under s. 52 of the Act, it is first incumbent on the applicant to demonstrate[8] "the extent that drainage has occurred from the applicant's property subsequently to the completion of a well thereon". In the *Eagle* application,[9] the applicant argued that drainage was proven by a dichotomy between the virgin reservoir pressure

4. SA 1971, c. 30.
5. RSA 1970, c. 267, s. 5(c).
6. Decision 77-25, 318 (Applicaton 770308, Eagle Explorations Ltd.).
7. Oil and Gas Conservation Regulations, Alta. Reg. 151/71, s. 15.020.
8. *Id.*, s. 15.020 (c)(i).
9. Decision 77-25, *supra* n. 6.

(estimated by material balance) and drill stem tests conducted in the alleged drained wells on completion: " . . . Eagle maintained that if there had been drainage in the past, then in all probability there would be drainage in the future"[10]. After an analysis of the reservoir characteristics and the methods employed to calculate the pressure in the pool, the Board denied the application, stating[11] " . . . the applicant has (not) provided conclusive evidence that pressure depletion has occurred in its wells".

The drainage alleged must occur after completion of the applicant's well or wells.[12] The Board acknowledges the "rule of capture" and does not attempt to give retroactive effect to its orders[13] to compensate an applicant for lease-line drainage occurring prior to the date of issuance of the order. To this end, therefore, any declaration issued pursuant to s. 51 or s. 52 is prospective only in its effect. In practice, it would be unlikely to recompense, for remedial drainage would commence only on the date of issuance of the order (or to be exact, the date of its ratification by the Lieutenant Governor in Council). As pointed out in the *CDC* decision[14] " . . . under a common purchaser order, the effective date for applying the equitable distribution of production from a pool would be the date at which marketable gas was available and offered for sale, and the maximum period of retroactivity would be to the date of the common purchaser declaration".

2) *Attempts to Contract*

The applicant for a common purchaser declaration must also demonstrate it has been unable to contract a sale of its gas (oil) with a purchaser. A common purchaser order may issue even where the applicant has been offered a gas purchase contract. In the *Blake* decision, the Board stated:[15]

> In deciding whether or not a common purchaser declaration would be appropriate, the Board considers whether Blake had been offered a contract rate more or less consistent with the rates at which other wells in the pool are being produced. It appears to the Board that neither of the contracts offered to Blake is equitable, having regard to the rate at which current wells are depleting the pool.

Problems similar to that encountered in the *Blake* decision may also arise where the "drained" party is offered a different type of contract (i.e. reserves based contract) than that under which current production from the pool is being marketed (i.e. a deliverability type contract) resulting in actual or anticipated drainage consequent on different rates of withdrawal from the pool. In this event, it is submitted that a rateable take order (*infra*) would provide a more appropriate resolution to the problem than the issuance of a common purchaser declaration.

Tender of correspondence showing attempts to contract, in conjunction with viva voce evidence at the hearing, would appear to satisfy the re-

10. *Id.* at 319.
11. *Id.* at 321.
12. Decision 77-19 (Application 770170, Blake Mineral Resources Ltd.).
13. Decision 78-9 (Application 770793, Spur Engineering Limited).
14. Decision 78-19, 6 (Application 780383, CDC Oil and Gas Limited).
15. Decision 77-19, *supra* n. 12.

quisites of this portion of the test, as well as that contained in the Regulations.[16]

3) *Future Markets*

The Regulations provide that the Application should contain[17] " . . . a discussion of (ii) the future prospects of marketing the oil or gas". Although marketing conditions appear to be of general knowledge, there have been situations where future market facts have been relevant to declarations granted by the Board. In the *Zebra* decision[18] the Applicant made application for, in effect, an interim common purchaser declaration. The Board found drainage was occurring through production sold by two units (Sylvan Lake Unit Nos. 1 &2) to TransCanada Pipelines Limited ("TCPL"). The applicant had negotiated a contract with TCPL, but the commencement date of the contract was approximately one year after the date of the hearing. In its decision, the Board granted a common purchaser order which included an expiry date to coincide with the first date on which the Applicant was entitled to make deliveries under its contract.[19]

In the *Eagle* decision,[20] " . . . believing the risk of lease-line drainage occurring prior to Eagle obtaining a gas contract is minimal and that ultimate recovery from Eagle's lands will not be adversely affected should it not obtain a gas purchase contract before 1980", the Board denied the application. In this instance the possibility of gas contracting in the near future, on the facts, precluded the issuance of a common purchaser order.

Once a common purchaser declaration has been issued, it is incumbent on the parties to negotiate an equitable allocation of the common purchaser's purchases which are to be met by each producer in the pool.[21]

> Where, however, the producers are unable or unprepared to agree amongst themselves, or with the purchaser, as to the terms under which gas will be purchased from the pool, then the common purchaser, to fulfill his obligation, must make the determination . . . because only the common purchaser has the obligation imposed on him not to discriminate. If he is unable to make the determination . . . the parties may seek the assistance and direction of the Board. . . .

The assistance and direction of the Board is obtained by a separate application pursuant to s. 52(4) of the Act:

> Upon the application of a common purchaser of gas or of a person who offers gas for sale to a common purchaser of gas and who claims the common purchaser has discriminated against him contrary to this section in purchasing gas, 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, or
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> (b) 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.

It must be noted that an application for direction pursuant to s. 52(4) is not one which will be heard in conjunction with an application for a common purchaser order. The wording of this subsection makes it clear that

16. Alta. Reg. 151/71, 15.020 (b)—" . . . documents showing (ii) the opportunities that have existed for the marketing of oil or gas produced from the applicant's property".
17. Alta. Reg. 151/71, 15.020 (c)(ii).
18. Decision 77-22 (Application 770412, Zebra Resources Ltd.).
19. *Id.* at 285.
20. *Id.* at 322.
21. Decision 78-21, 3 (Application 780354, Northwestern Utilities Limited).

jurisdiction is only granted after the declaration of a common purchaser has been made. Accordingly, in instances where a request under s. 52(4) is contained within an application under s. 52(1), the former has been denied. This is true even in instances where no objection has been taken to the issuance of a common purchaser order by the proposed common purchaser and all parties are in agreement that the only issue remaining to be resolved is that of directing "the proportion of the common purchaser's acquisitions of gas from the pool which he shall purchase from each producer . . .".[22]

The Act implies that where the applicant is a person offering gas for sale, the onus is on it to establish "discrimination". However, "the Board does not believe that section gives the Board the broad authority to determine what facts or circumstances constitute discrimination"[23] preferring, instead, that such determination be made by the Court.

With respect, it is submitted this position is untenable under the legislation currently in place. Although unnecessary where the applicant is the common purchaser, it appears that where the applicant is a seller offering gas for sale ,demonstration of discrimination is a condition precedent to the Board's exercise of its powers under s. 52(4) of the Act. In this instance, the Board must determine whether the offer to purchase made by the common purchaser is one which the seller ought to accept, and which would discharge the obligation imposed on the common purchaser by the declaration. It is submitted that such a determination is within the general powers granted to the Board under s. 108(1) of the Act:

> Except where otherwise provided, the Board has exclusive jurisdiction to examine, enquire into, hear and determine all matters and questions arising under this Act

In the *Northwestern Utilities Limited* application, two parties (Brascan Resources Limited and Bridger Petroleum Corporation Limited) had deliverability contracts with Northwestern Utilities Limited ("NUL"). These contracts dedicated large quantities of lands and provided for a contract maximum of 15 MMcf/day under each. The contracts also stipulated a one month production test in each contract year to determine the purchase obligation of NUL, together with rights to retest, vested in both the vendor and purchaser. These could be exercised at any time or times during the year. Hudson's Bay Oil and Gas Company Limited, acting for itself, Sulpetro of Canada Ltd., and Canada-Cities Service Ltd. made application for and obtained a declaration declaring NUL a common purchaser of gas from the Colony L and K pools which were subject to the gas purchase contracts in question. Negotiations between the producers from these pools resulted in an agreement pursuant to which allocation of production from the pools was determined under two formulae. The first provided for equal sharing amongst the wells on a combination of well bore net pay and initial sandface A.O.F.; the second provided a penalty factor of 10 per cent (2/5 of the initial sandface A.O.F.) if the drained wells were unable to participate in deliverability tests conducted under the contracts. The producers and the gas purchaser were unable to agree on whether the drained wells were entitled to produce at all times, including test periods, under the contracts in a similar manner to the draining wells.

22. *Id.* at 3.
23. *Id.* at 4.

The matter was referred to the Board in the Application of Northwestern Utilities Limited under s. 52(4). At the hearing, NUL pleaded the provisions of s. 52(5) of the Act:

> A direction by the Board under subsection (4) does not operate to require a common purchaser:
>
> (a) to purchase a greater total amount of gas from the pool than he was obligated to purchase from the pool under the gas purchase contracts existing immediately before the making of the declaration under subsection (1) or
>
> (b) to purchase gas from the pool at a greater rate than the rate at which he was obligated to purchase gas from the pool under the gas purchase contracts existing immediately before the making of such declaration.

The producers argued that the rate which existed immediately prior to the making of the Declaration of Common Purchaer was the contract max./day, essentially 30 MMcf/day and that inclusion of the drained wells during deliverability tests could not increase this rate. There was no disagreement between the parties that essentially all reserves in the subject pools would be produced during the term of the contract. NUL argued that s. 52(5) should take cognizance of a decline in the rate of take which would occur had the drained wells not been included in deliverability tests conducted over the life of the pools.

The Board declined to rule on this issue, stating:[24]

> ... the Board appreciates that the parties are seeking assistance in the question of whether the Hudson's Bay group wells should or should not be in deliverability tests for the purposes of determining the obligations of N.U.L. to purchase gas from the pool. In the opinion of the Board, however, the determination of that question requires a legal interpretation of the effect:
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> (a) of a common purchaser declaration on an existing contract having regard to the specific contractual conditions, and
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> (b) the related effect of section 52(5) of the Act.
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> The Board does not believe its authority extends to the interpretation of questions of law and, consequently, any determination of the issue by the Board would be of little consequence and of no legal effect. The Board, as a result, is not prepared to address itself to the related question of deliverability tests.

A final determination of this question will only be made when and if "discrimination" is established to be a fact and hence within the purview of s. 108(1), or a question of law to which the procedures of s. 42 of the Energy Resources Conservation Act will apply.

Little direction can be obtained from existing judicial pronouncements as to the meaning of "discrimination". Most arguments on the subject appear to arise in the context of appeals from administrative decisions. In *re H.G. Winton Ltd.* v. *Borough of North York*[25], Robins, J. determined that the Council of the Borough of North York discriminated in rezoning a specific area, resulting in an inability to build a church on a parcel of land optioned for that purpose. He held that it[26] " ... acted unreasonably and arbitrarily and without a degree of fairness, openness, and impartiality required of the Municipal Government". It is submitted that little if any assistance can be drawn from this type of decision for the purpose of construing discrimination as the term is used in, *inter alia*, s. 52 of the Act. A common purchaser should not be viewed as discharging a statutory authority. Nor are the usual reference sources of much assistance, i.e.

24. *Id.*
25. (1979) 88 DLR (3d) 733. (Ont. H. Ct.).
26. *Id.* at 741.

"the action of discriminating or distinguishing; a distinction (made with the mind or in action); the condition of being discriminated or disguished"[27] and "in general, a failure to treat all equally; favouritism".[28]

The concept of discrimination has also been dealt with in the context of Public Utilities rate cases. This practice similarly appears inappropriate in light of the highly singular nature of the obligations imposed under s. 52(2) and (3).

Although a final determination of this question would be appreciated, the wording of s. 52 and the circumstances to which the issue might arise dictate an assessment of the separate facts in each situation, and preclude a precedent of universal application.

B. *Rateable Take Order*

Implementation of the objectives stipulated in s. 5 of the Act is also achieved through use of s. 35—"Rateable Take of Gas". This Section has been construed as providing for an equitable sharing among owners of gas produced from a pool. Section 35 provides:[29]

> The Board, after a public hearing, may, by order, restrict the amount of gas and oil produced in association with gas that may be produced during a period defined in the order from a pool within Alberta
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> (a) by limiting, if such limitation appears necessary, the total amount of gas that may be produced from the pool, having regard to the efficient use of gas for the production of oil, and to the demand for gas from the pool, and
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> (b) by distributing the amount of gas that may be produced from the pool in an equitable manner among the wells in the pool, for the purpose of giving each well owner the opportunity of producing or receiving his share of the gas in the pool.

This section addressed itself to two situations:

(a) production of gas used in conjunction with the primary production of oil, i.e. gas cap or solution gas, and

(b) production rates of gas among owners in a single pool.

An order under s. 5 has many similarities to a declaration under s. 52. Though not a "common" order addressed against a single party, many applications under other sections (i.e. s. 52)[30] have incorporated a request for a rateable take order. In some instances it has been sought as a conjunctive relief by all parties to an application for common purchaser, the sellers arguing its issuance will forestall ongoing drainage, the potential common purchaser that it would alleviate its obligations as arbiter or negotiator under s. 52. In the *Spur Engineering* decision[31], the Board endorsed the position that s. 52(4) prevailed to determine the sharing required by the common purchaser and an order under s. 35 would be inappropriate where a common purchaser declaration has, or will be issued.

In considering an application under s. 35:[32]

> . . . the Board believes it must be convinced that a well owner has been or is being deprived of the opportunity to obtain his just and equitable share of the production of any pool. The Board considers that a proper basis of assessment is to determine whether or not each owner has and will

27. Shorter Oxford Dictionary (3 ed., 1955) 523.
28. Black's Law Dictionary (4 ed. 1951) 553.
29. SA 1972, c. 74, s. 8.
30. Decision 77-19, *supra* n. 12.
31. Decision 78-9, *supra* n. 13 at 5.
32. Decision 77-23, 293 (Application 770423, Ridgewood Resources Ltd.).

> continue to have a reasonable opportunity to produce gas at rates more or less in proportion to his recoverable reserves.

To achieve this objective, the Board must take cognizance of reservoir characteristics in addition to lease-line withdrawals. Essentially, the Board requires evidence similar to that necessary to make a decision of common purchaser to enable it to issue a rateable take order.

In *Ridgewood*, the applicant had drilled and completed a well in the Big Bend McMurray B Pool and subsequently obtained a "reserves based" contract with TCPL providing a 1/7300 rate of take. The pool had been discovered some years earlier and delineated by Pennzoil Petroleum Ltd. Pennzoil's interest in these lands was committed under a cross-dedication type contract also with TCPL which, in essence, enabled Pennzoil to produce from the pool volumes of gas determined on its reserves in the area rather than merely in the single pool. Ridgewood alleged that the result was to entitle Pennzoil to produce its reserves in excess of a rate of 1/7300, thus creating lease-line drainage. The Board determined the existence of past drainage and the possibility of future drainage occurring in the absence of a s. 35 order.[33] The Board subsequently elaborated on the purpose and impact of s. 35:[34]

> The Board agrees with both Ridgewood and Pennzoil that where gas allowables are set to preserve equity, the basis should be reserves. In the actual application of this philosophy there are two principal questions which must be dealt with. They are as follows:
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> (1) should the allowables reflect the total pool reserves, or only those reserves associated with drilled spacing units?
>
> (2) should the reserves reflect a detailed interpretation of geology and differing reservoir characteristics for each well as opposed to the total acreage in each drilling space unit, general geological interpretation and average reservoir characteristics?

In reaching its conclusions, the Board stipulated allowables relative solely to reserves underlying drilled spacing units, recognizing that a procedure was available whereunder larger production spacing units could be created to discourage additional and unnecessary drilling. Availability of s. 35 is restricted to parties having existing producible wells in the same pool, and attempts to reconcile production rates, *inter se*. Consequently, no consideration should be given to the possibility of producible spacing units which may be created in the future.

In its determination of the second issue, the Board indicated reservoir characteristics would, *prima facie*, be those generalized for the pool, and that wellbore pay thickness throughout a drilling spacing unit would prevail in the absence of detailed geological evidence.

It is easy to be critical of this overly simplistic approach to the implementation of s. 35, but difficult to provide an alternate approach which would recognize and credit all of the perceptible vagaries of geological interpretation. As an initial observation, difficulties are attendant on a strict "reserves approach". The Act and Board decisions are unclear as to, *inter alia*, the onus required to discharge the presumption of 640 acre spacing for gas well drainage. Perhaps different rules should apply where the allegedly drained well is located on the periphery of an existing mapped pool, or is in an undesignated pool. Likewise, the presumption of 640

33. *Id.* at 295.
34. *Id.* at 297.

acre spacing is somewhat contingent on the nature of the pool involved, and may be inappropriate in the instance of channel sands, where geological characteristics depart from those of traditional gas and oil pools. *Ridgewood* leaves some question as to the onus of an affected party required to supplant such presumption.

An example of the former situation occurred in *Zebra*. In this case the applicant had drilled a well near the mapped boundary of the Glauconitic A pool. On an adjacent legal subdivision an abandoned well was located. Evidence of this was not tendered at the hearing. A possible conclusion is that the dry hole negated the presumption that reserves in the Glauconitic underlaid the entire section. The position of the Board in denying the rateable take application pending negotiations between the parties obviated determination of this question.

As a corollary to "distributing the amount of gas . . . in an equitable manner among the wells in the pool"[35] the Board may also " . . . limit . . . the total amount of gas that may be produced . . . ".[36] The subsections call on the Board to review the demand for such gas. In so doing, the Board has ruled:[37]

> The rates should allow a reasonable life and also be sufficient to maintain economic production of the pool reserves.

Again, the Board has established a presumption that where a gas purchase contract rate exists for one well in the pool, it is reasonable to adopt that rate for other wells in the same pool. For the purposes of *Ridgewood*, the allowables were expressed in daily and annual production limits, stated in Mcfs.

The subject matter of s. 35 assumes that, in each application, the well or wells for which relief is sought are capable of production of natural gas in sufficient quantities to warrant the issuance of the order requested. Although the issue has been argued at least on one previous instance[38], there are no definitive parameters under which future determinations are to be made. In *Zebra* a complicating factor was encountered: allegedly draining wells from which comparisons could be drawn were subject to Order No. M.U. 87 enabling commingled production of the Glauconitic and Shunda A pools. It may be opined that satisfaction of common tests, i.e. "production in paying quantities" or "commercial production" would be sufficient.[39] However, difficulties may ensue where well economics are contingent upon obtaining other relief such as common carrier or common processor declarations, without which completion of the subject well, together with requisite gathering and processing expenses, would not be justified. The Board has yet to establish the criteria to be employed in this matter.

C. *Common Carrier Declaration*

The increasing costs of installing gathering or other pipeline facilities

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35. RSA 1970, c. 267, as am., s. 35(b).
36. *Id.*, s. 35(a).
37. Decision 77-23, *supra* n. 32 at 298.
38. Decision 77-22, *supra* n. 18 at 284.
39. The Board employed the term "sustained production" in the Examiner's Report on Application 780748 (Marathon Petroleum Canada Ltd.).

has enhanced the viability of applications made pursuant to s. 49 of the Act:[40]

> (1) Upon application and after a hearing the Board, with the approval of the Lieutenant Governor in Council, may from time to time declare each proprietor of a pipeline in any designated part of Alberta or the proprietor of any designated pipeline to be a common carrier as and from a date fixed by the order for such purpose, and thereupon any such proprietor is a common carrier of oil, gas or synthetic crude oil or any two or all of them in accordance with the declaration.
>
> (2) No proprietor of a pipeline who is a common carrier shall directly or indirectly make or cause to be made or suffer or allow to be made any discrimination of any kind as between any of the persons for whom any oil, gas or synthetic crude oil is gathered, transported, handled or delivered by means of the pipeline.
>
> (4) No common carrier shall discriminate in favour of his own oil, gas or synthetic crude oil or oil, gas or synthetic crude oil in which he is directly or indirectly interested in whole or in part.

A pipeline is defined as including:[41]

> all property of any kind used for the purpose of, or in connection with, or incidental to, the operation of a pipeline in the gathering, transporting, handling and delivery of oil, gas, synthetic crude or water.

Hence it would include incidental facilities, such as dehydration, compression, and, in the case of oil, tankage facilities. This interpretation is buttressed by the definition of "processing plant" (*infra*) for the implementation of the common processor provisions.

It is not uncommon for an application for a common carrier declaration to be made in conjunction with a request for common purchaser, since, in the absence of a gas purchase contract, the applicant has, in all likelihood, few wells in the vicinity of the pool, imposing economic limitations on the construction of a separate gathering system.

The regulations[42] require an applicant to file, in support of his request for a common carrier declaration:

(a) a map showing locations of pipelines, and the applicant's facilities, and

(b) a submission respecting:

  (i) proposed volumes to be transported;

  (ii) existing capacity of the line, and practicality of any proposals contained in the submission;

  (iii) economics of alternatives to the common carrier declaration; and

  (iv) possibilities of marketing transported products.

The Board has expanded the above criteria, and, consistent with its approach to common processor applications, requires the applicant to demonstrate it has been unable to "make reasonable arrangements to use . . . "[43] the proposed common carrier's pipeline.

Although the common carrier is obligated not to discriminate between its production and that of any third party, no provision similar to s. 52(4) provides a mechanism for review in the event discrimination is alleged, or the parties are unable to reach an agreement as to usage. Rather, an appli-

40. SA 1976, (2nd Sess.) c. 41, s. 3.

41. *Id.*, s. 3 (The Act, s. 2(1)(33).

42. Alta. Reg. 69/72, Reg. 15.010.

43. Decision 78-9, *supra* n. 13 at 5.

cant unable to conclude an acceptable arrangement would be required to proceed to the Public Utilities Board ("PUB").

Although primarily designed to enable use by a "non-owner" of facilities where construction of an alternate gathering and/or transportation system cannot economically be justified, the Board recognizes common carrier declarations may be awarded in other circumstances. In *Spur*, the Board examiners noted:[44]

> ... since Spur indicated it would build its own pipeline to the plant, a common carrier order may not be strictly necessary. However, the examiners believe that in view of the spare capacity of the existing system, the market available, and the capacity of the wells, the construction of a separate gathering line should be discouraged, as it would result in needless expense, a waste of material, avoidable environmental impact and a needless delay in the production from the applicant's well.

The provisions of s. 49 were considered in an application by Prairie Utility Management Ltd.[45] for the use of a line owned by Cretaceous Pipelines Ltd. The Cretaceous line was employed to satisfy a single customer, and Prairie wished to use it to transport gas to three communities for local sale. Like *Spur*, a determination was made[46]:

> ... that a practical alternative to the common carrier declaration does exist—a new pipe line system. On the other hand, the Board is convinced that such a saving in transportation cost would result through the proposed common carrier operation that, having in mind the probable impact on the communities, it must be considered significantly more attractive.

The *Prairie Utility* decision has two interesting features. First, there was an admission by Cretaceous that excess throughput capacity existed, sufficient to transport all volumes requested by the applicant. Second, no determination of drainage of the applicant's reserves was made by the then Oil and Gas Conservation Board. Justification for issuance of the declaration was based, in part, on the fact that "in this instance a common carrier order would tend to promote one of the general objects of The Oil and Gas Resources Conservation Act."[47]

Since many currently operating systems appear over-built, spare capacity should be available in most instances of future applications. However, substantial difficulties could ensue if, in a similar case, the Board were required to adjudicate between rival and competing claims for limited throughput capacity where the applicant failed to demonstrate drainage loss. Presumably, if the Board did conclude there " ... would be any serious long term adverse effect on the operations of the proprietor"[48] the general objectives of maximized utilization would not prevail. In addition, no statutory mechanism in the Act would be available to determine the quantum of throughput to be foregone by the existing users of the pipeline and/or gathering system.

In contrast to the Act, the wording of The Gas Utilities Act[49] might provide relief to a party refused a common carrier declaration. Under this legislation, The Public Utilities Board is granted jurisdiction over:[50]

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44. *Id.* at 6.
45. Unnumbered decision dated 5th December, 1962. The section in question was then s. 42 of The Oil and Gas Resources Conservation Act, 1957, SA 1957, c. 63.
46. *Id.* at 16.
47. *Id.*
48. *Id.*
49. RSA 1970, c. 158.
50. SA 1976, c. 21, s. 2(1); (The Gas Utilities Act, s. 5.1).

(i) Any pipe or any system . . . of pipes, wholly within the Province, whereby gas is conveyed from any well-head or other place at which it is produced to any other place, (and)

(ii) includes all property of any kind used for the purpose of, or in connection with or incidental to the operation of a gas pipe line in the gathering, transporting, handling and delivery of gas.

This subsection specifically names tanks, compressors, valves, meters and similar adjuncts to normal gas gathering or transmission systems.

In making an application, the applicant must:

(a) ascertain whether the gas pipeline is subject to an exemption order issued under s. 3(1)(a), if so, apply for an order to rescind the exemption under s. 3(2),

(b) obtain consent of the Lieutenant Governor in Council to the bringing of the application.

Thereafter, it must have the " . . . just and reasonable individual rates, joint rates, tolls or charges . . . which shall be imposed, observed and followed thereafter by the owner of the gas utility . . . "fixed by the PUB under s. 27. Such an application would entail a detailed examination of all considerations inherent in rate regulatory applications. This procedure can be cumbersome and lengthy, particularly because shipments of gas cannot be commenced until rates are set by the PUB, the Board lacking jurisdiction to make retroactive orders.[51]

A similar problem may arise with applications under The Gas Utilities Act—determination of the volumetric requirements of the applicant. Although The Gas Utilities Act dictates that the owner of a gas utility shall not:[52]

make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality, or subject any particular person or corporation or locality to any prejudice or disadvantage in any respect whatever.

there does not appear to be a specific power vested in the Public Utilities Board to allocate volumes of throughput (see s. 27).

Another difficulty is attendant on a true construction of s. 49 of the Act. The legislation has employed a term, "common carrier", which has had copious judicial interpretation. The definition of the term at common law is at variance with the realities of situations encountered with applications under s. 49. A common carrier[53] " . . . must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation pro hac vice". Such a representation bears with it certain obligations imposed by common law. To what extent these duties and obligations are to be borne by a person declared a common carrier under the Act is unclear. The common law stipulated:[54]

51. *Western Decalta Petroleum Ltd., et al* v. *Public Utilities Board of Alberta* (unreported, 30 March 1978, J.D. of Edmonton, App. 10741).

52. RSA 1970, c. 158, s. 24(1)(d).

53. 5 Can. Abr. (2d) 208.

54. *Rolland Paper Company Limited* v. *C.N.R.* (1957) 22 WWR 673 at 678 per Maybankm J. (Man. Q.B.).

> . . . the common carrier is in the nature of an insurer. It . . . is responsible for the safety of goods entrusted to it, so long . . . as they remain in its hands in its capacity of carrier. About its only exemption from the consequences of having received property into its care is when loss or damage is the result of act of God, or of the enemies of the Sovereign, or flows from an inherent vice or natural deterioration of the thing being carried.

The reference in s. 50 of the Act:

> The Board, by order, may relieve any common carrier, after due notice and hearing, from the duty of carrying any . . . gas . . . of inferior or different quality or composition, or from such other duties as in its opinion are unreasonable.

would appear to deprive the common carrier of one of the few defenses available to it under common law—the right to refuse to carry goods which may contaminate, or perish in transit. Questions may arise respecting the liability of the carrier to the party requesting carriage, third party liability, under *Rylands* v. *Fletcher*[55] (i.e. pipe line break and explosion) or negligence (i.e. delivery of gas to a plant not constructed to process the stream components).

Final determination of the consequences of a common carrier declaration, together with its concomitant rights and obligations, must await judicial opinion or legislative clarification. A similar observation must be made respecting the carrier's remuneration since an application to the PUB under s. 56(3) has yet to be made.

D. *Common Processor Declaration*

Similar problems to those encountered in common purchaser and carrier applications arise in relation to common processor declarations pursuant to s. 54:

> (1) Upon application and after a hearing the Board, with the approval of the Lieutenant Governor in Council, may declare any person who is the owner or operator of a processing plant processing gas produced from a pool or pools in Alberta to be a common processor of gas from the pool or pools.
>
> (2) Subsection (1) does not apply to a person declared to be a common purchaser under section 52 or where an operator has entered into a contract approved under section 11 of The Gas Utilities Act.
>
> (3) Each common processor shall process gas which may be made available for processing in his plant without discrimination in favour of one producer or owner of gas as against another in the pool or pools.

A processing plant is defined as:[56]

> a plant for the extraction from gas of hydrogen sulphide, helium, ethane, natural gas liquids or other substances, but does not include a wellhead separator, treater or dehydrator;

This definition should be contrasted with that of a "pipeline" (*supra*). In many instances, an application for common carrier will be made in conjunction with one for a common processor declaration.[57]

The exclusion provided under s. 11 of The Gas Utilities Act is similar in effect to a declaration of the owner or operator as common purchaser. Section 11(1) of that Act provides for designation by the PUB of an area and permission to:

> a) the operator of an absorption plant (q.v.) or

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55. (1866) L.R. 1 Ex. 265.
56. RSA 1970, c. 267, s. 2(1)35.
57. *See* Decision 77-22, *supra* n. 18, Decision 77-23, *supra* n. 32 and Decision 75.3, discussed in text accompanying n. 61, *infra*.

> b) a person . . . that has been given an order under section 37,[58] or . . . approval under section 38,[59] or has filed . . . under section 42[60] of the Oil and Gas Conservation Act

to enter into contracts for the purchase of gas to be used from the designated area. Section 11(3) requires:

> The Operator . . . shall enter into similar contracts with each owner or producer of gas within the designated area, if (a) the owner or producer is willing to enter into a contract with the Operator. . . .

The Board has outlined the matters required to be demonstrated in an application under s. 54 as:[61]

> (1.) Producible gas reserves do exist and that gas processing facilities are needed.
>
> (2.) Reasonable arrangements for the use of processing capacity in the subject gas processing plant could not be agreed upon by the parties.
>
> (3.) The proposed common purchaser operation is either the only economically feasible way to process the gas in question or is clearly the most practical and desirable way.

It is less than clear in what situations the provisions of s. 54 of the Act should be available as a remedy. In the *Great Plains* decision, the following situation was related. The Minnehik-Buck Lake Pekisko A pool was discovered in 1952, and a portion of it unitized (Unit 1) in 1963 and enlarged in 1969. A gas purchase contract for Unit 1 was negotiated (DCQ - 78.8 MMcf) and a plant (the CanDel Plant) constructed, eventually having a design capacity of 100 MMcf/d in 1971. In 1969, Great Plains drilled a well (7-30) outside the Unit 1 boundary, obtained a gas purchase contract and negotiated an interruptible processing agreement for the 7-30 well with the CanDel Plant to the extent of its excess capacity. Great Plains and Amoco subsequently drilled two additional wells (10-8 & 7-25) and proposed unitization (Unit 2). As of the date of the application, the 10-8 and 7-25 wells had not been produced. Great Plains et al. were denied approval to construct a separate processing facility for Unit 2 in the face of local objection and " . . . because the existing CanDel Plant provided an alternative processing facility".[62] The parties were unable to conclude satisfactory arrangements for joint use of the CanDel Plant by Units 1 and 2 precipitating application 7976. The Board confirmed the ongoing drainage of Unit 2 reserves through Unit 1 wells.

Great Plains alleged that preferential treatment given to Unit 1 production through the CanDel Plant meant[63] "since May 1971 Unit No. 1 had produced 80 per cent of its nomination in comparison to 68 per cent of the nomination of the 7-30 well".

The major difficulty encountered in this application arose because, although the plant capacity was adequate to process the combined DCQ's for both units, the combined contract max-days exceeded the capacity by approximately 5 MMcf/d without plant modification.

After reviewing the facts, the Board outlined four possible alternatives:

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58. Relates to recovery and processing after enhanced recovery.
59. Relates to inter alia, gas storage, water production or storage, concurrent oil and gas production, etc. and Board approval.
60. Respects use of energy resources in industrial or manufacturing operations.
61. Decision 75.3, 25 (Application 7976, Great Plains Development Company of Canada Ltd.).
62. *Id.* at 29.
63. *Id.*

1. pro-rate use of the CanDel Plant through a common processor order,
2. continue existing practice of utilizing spare excess capacity for interruptible use by Great Plains,
3. availability of alternate processing through a different plant,
4. construction of a new plant for Unit 2.

Alternative 2 was dismissed as unreasonable and unreliable, 3 as uneconomic and environmentally inferior and 4 as economically unattractive in comparison with utilization of a modified CanDel Plant. The Board acknowledged that, in order for alternative 1 to be employed, some plant expansion and modification would be necessary, but determined:[64]

> ... that the gas in question could be accommodated in the CanDel Plant with a relatively low capital investment and a correspondingly low incremental operating cost and that operation would be attractive to Unit 2 from an economic viewpoint. Assuming the appropriate sharing of capital and operating costs, there should be no significant adverse impact on CanDel or Unit 1 once plant expansion has been completed.

Until plant modification was effected, Unit 1 would be required to reduce production to accommodate the Unit 2 deliveries. After issuance of the common processor order, production through the plant was prorated and the Great Plans *et. al.* portion was processed on a fee basis. Final resolution was effected by enlargement of Unit 1 to include the Unit 2 wells, and transfer of part ownership of the CanDel Plant as a segment of unitization equalization costs.

It is important to note that in *Great Plains* the Board made a determination of drainage of the Unit 2 wells. A similar situation arose in *Spur*,[65] where an application for, *inter alia*, common processor was made in conjunction with a request for a rateable take order. The Board denied the latter, but did determine drainage of Spur *et al.* reserves was occurring. In ruling on the common processor segment of the application, the Board stated:[66]

> ... a common processor order should be issued and they note that the issuance of the order will provide the applicant with the opportunity of having its gas processed, thus reducing or eliminating further drainage from its land.

Recently, Spur has applied to the Board under s. 52(4) to set rates under the common purchaser order granted to Spur. The result of this will also establish the minimum processing capacity allocated to Spur at the 7-28-40-26 plant.

In both *Great Plains* and *Spur*, the Board made a primary determination that lease-line drainage was occurring, and implied that the common processor order was adjunct to forestalling future drainage. It does not appear, from the wording of s. 54, that drainage is a condition precedent to the exercise by the Board of the powers granted thereunder; hence, an application is not expressly precluded in instances where, without drainage, political, environmental and economic circumstances dictate a preference to multi-party use of a single facility. However, no provisions of the Act appear to specifically charge or enable the Board to set a rate of throughput for the applicant in such a case.

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64. *Id.* at 34.
65. Decisions 78-9, *supra* n. 13.
66. *Id.* at 7.

Regardless of whether the applicant has obtained an order under s. 3[illegible] or a declaration under s. 52(4), difficulties are certain to arise in the implementation of s. 54(3). It is not unreasonable to assume that in the majority of cases, the existing throughput is controlled by the owners of the plant, more or less in proportion to their equity ownership of the gathering and processing facilities. In these instances, no fee or rate structure exists for the processing of outside gas.

In the absence of the purchase of an equity interest in the plant by the applicant (the result in *Great Plains*) or agreement as to the rates to be paid for processing, the applicant would be required to proceed to the Public Utilities Board under s. 56(2) of the Act:

> 2) When the Board has declared a purchaser or processor of gas to be a common purchaser or a common processor, and agreement cannot be reached between the common purchaser or common processor and a person desiring to sell his gas or have it processed, as the case may be, as to the price to be paid for the gas or the costs, charges or deductions for the processing of the gas, either party may, pursuant to the Gas Utilities Act, apply to the Public Utilities Board.

The Gas Utilities Act grants the PUB jurisdiction to determine the rates and charges to be levied with respect to absorption plants[67] and scrubbing plants[68] pursuant to s. 27. The observations made earlier with respect to applications to the PUB apply equally to any application under s. 56(2), and similar criticisms can be made.

The paucity of applications for and declarations of, common processor demonstrates not only the reasonable approach taken by owners with respect to "outside gas"; but also technological advances of the industry, which, to a large extent, have displaced requirements for such requests. New advanced equipment has justified construction of low volume, practically portable, facilities enabling producers to economically process reserves which may previously have resorted to the provisions of s. 54.

III. LEGISLATIVE ASSESSMENT

A. *Historical Review*

In determining the philosophy and policy underlying the provisions of the Act under consideration, some reference should be made to the historical development of these remedies. A partial reason for the inability to clearly ascertain the legislative intention arises from the paucity of background material and the apparently haphazard incorporation of these remedies into Alberta law.

Section 54 (common processor) first appears in The Oil and Gas Conservation Act, 1969[69] and is of recent manufacture.

The sections of the Act respecting rateable take originate from The Oil and Gas Resources Conservation Act,[70] where:

> ... the Board is empowered ... to control and regulate the production of petroleum either by restriction or prohibition, or both ...

These also arise through the Board's enforcement of The Oil and Gas

67. The term is defined in RSA 1970, c. 158, s. 2(a).
68. *Id.*, s. 2(j).
69. SA 1969, c. 83, s. 54.
70. SA 1938, c. 1, s. 16; RSA 1942, c. 66, s. 16.

Wells Act[71] including s. 3(1), where authority is conferred on the Lieutenant Governor in Council to regulate, *inter alia:*

> (t) restricting the production of any wells producing any gas or oil, or both, to any prescribed percentage of the open flow capacity, and prescribing the percentage of permissible extraction as to any specified gas well or gas wells in any specified area or areas or all gas wells,
>
> (u) prescribing the proportion or maximum amount of natural gas . . . which may be produced from any area or areas. . . .

The generalized principle of equitable production does not appear as the rationale for the creation and enforcement of these regulations, where the stated purpose[72] " . . . is the conservation of oil resources and gas resources . . . whether generally or with respect to any specified area or any specified well or wells . . . ". Incorporation of objectives of equitable production first occur in The Oil and Gas Resources Conservation Act, 1950:[73]

> The intent, purpose and object of this Act is—
>
> (c) to give each owner the opportunity of obtaining his just and equitable share of the production of any pool.

The rateable take provisions of Act show developing sophistication. In s. 34:

> (1) . . . the Board, with the approval of the Lieutenant Governor in Council, may—
>
> (h) restrict the amount of oil or gas, or both, which may be produced in the Province—
>
> (v) by prorating the production of gas allocated to a pool among the producers from the pool . . .

pursuant to which a declaratory remedy is conferred, similar to s. 35 of the Act. Reference to "prorating" was deleted in 1957,[74] and the requirement of ratification eliminated in 1972.[75]

"Common carrier" provisions, first employed in 1962, made their debut in The Oil and Gas Resources Conservation Act, 1950. Section 39 stipulated:

> (1) The Board, with the approval of the Lieutenant Governor in Council . . . (may) declare the proprietors of all pipelines in any designated part of the Province or the proprietor of any designated pipeline to be a common carrier.

The restatement of this section in the 1957 statute deleted the Board's authority to make orders of "universal application", limiting the ambit of the declaration to[76] " . . . each proprietor of a pipeline in any designated area or the proprietor of any designated pipeline . . . ", and accentuating the singular, rather than collective effect of declarations granted thereunder. Section 49 of the Act perpetuates the curious addition of the words " . . . of any kind . . . " in the context of common carrier, which do not, and have not, appeared in the sections respecting common purchaser and common processor.

Finally, the present s. 52 advents in s. 40 of The Oil and Gas Resources Conservation Act, 1950, basically in its present form.

Two observations should be made about the legislative development of these sections. First, the primary objective of the early statutes was con-

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71. SA 1942, c. 7; RSA 1942, c. 67.
72. SA 1938, c. 1, s. 3.
73. SA 1950, c. 46, s. 3.
74. SA 1957, c. 63, s. 36(c).
75. SA 1972, c. 74, s. 8.
76. SA 1957, c. 63, s. 42.

servation and regulation of production, not equitable sharing of reserves produced. Second, some provisions, especially common carrier and common purchaser, do not appear to have been enacted under the pressure of necessity.

This point is illustrated by the fact that the common carrier provisions were first considered twelve years after their enactment, in *Prairie Utility Management*, discussed *supra*.

B. *Comparable U.S. Legislation*

The legislative provisions discussed in this paper are not unique. Other jurisdictions, such as Texas, Louisiana and Oklahoma, have comparable legislation respecting both common purchasers and common carriers, and utilities legislation governing aspects of common processor. Examination of such legislation, and the procedures whereby it is implemented, may be of some assistance in attempting to ascertain the origin and objectives of the provincial remedies. However, caution must be exercised in both the review and the conclusions which ensue, for two reasons:

1. the Constitution of the United States, with its emphasis on property rights and due process[77], dictates mechanisms which are or may be inappropriate in the Canadian context.
2. the history of oil and gas development in the states under consideration discloses a philosophical approach to the problems dealt with under ss. 35, 49 and 52 of the Act which may not be analogous to the Canadian experience.

Much of the oil and gas legislation of the selected states is drafted in terms of "physical waste" and conservation, rather than in direct consideration of potentially conflicting property rights. There is some debate as to the[78] " . . . propriety or extent of granting to an administrative body, as distinguished from a court, authority to regulate, adjust or protest correlative rights of private owners separate and apart from regulatory action for the purpose of conservation".

Property to most oil and gas in the United States is private, and can only be expropriated by state or federal government under the power of "eminent domain", requiring a public purpose and the payment of adequate compensation.

> However the reasonable regulation, restriction, or even the prohibition of certain uses and the incidental adjustment of private property rights necessary in the public interest are authorized by the police power of the States.[79]

The conservation statutes of the several states are enacted pursuant to the "police powers" — those powers that allow a government to legislate for the safety, health, morals, or welfare of the public. Thus, the regulation must be reasonable and private property rights must be protected[80] "to the extent reasonably possible and consistent with the over-riding public interest".

Another problem under the American Constitution is that common purchaser and common carrier legislation might interfere with pre-

77. 1A Summers, *The Law of Oil and Gas* s. 106 (2d ed. 1938).

78. Interstate Oil Compact Commission, *A Study of Conservation of Oil and Gas in the United States, 1964*, 186.

79. *Id.* at 186.

80. *Id.* at 187.

existing contractual relationships. Article 1 s. 10 of the United States Constitution provides that "no state shall pass any law impairing the obligations of contract". Many state constitutions have a similar provision. The prohibition is directed against a state and therefore does not explicitly prevent the U.S. Federal Government from enacting laws which may operate to impair contractual obligations. But a similar restriction has been implied from the other provisions of the Constitution. The due process clause enjoins Federal legislation which impairs vested rights including those acquired under contract. Any law of Congress which necessarily and directly impairs the obligations of contract and which is not made in pursuance of some express power (such as the Commerce Power) has been held to be inconsistent with the spirit of the Constitution. Thus the oil and gas legislation of the selected states is predicated on different legal principles than the corresponding Alberta legislation. These differences must be kept in mind when the state law is considered.

1. *Texas*

The Natural Resources Code of Texas declares all carriers who meet certain specifications to be common carriers. Basically, it includes those pipelines which are in some way available for use by the public.[81] Pipelines limited to the wells and refineries of the owner are excluded.[82] The Texas exemption of pipelines where the owners have not held themselves out as performing a public service is an explicit refusal to impose a duty where the common law would not impose one. However, pipelines which are not common carriers may still be public utilities and subject to the duties of that status. This demonstrates a basic contrast between Texas and Alberta.

In Alberta, until declared to be so by an order of the Lieutenant Governor in Council, the provisions of s. 52 of The Oil and Gas Conservation Act do not apply. In Texas, there is no need for an application to an administrative body to declare a pipeline to be a common carrier. All pipelines either have the duties of common carrier imposed upon them or are exempt.

Texas imposes the status of common purchaser upon entities which are also common carriers or affiliated with common carriers, or those which, although not common carriers, operate gathering systems.[83]

The connection between the statutorily defined common purchaser and the common law duties of a common carrier is seen in the exemptions Texas makes in its common purchaser definitions. At common law, duties were imposed after a carrier held himself out as transporting the public's goods. After providing four means of becoming a common purchaser, Texas exempts those companies transporting only crude oil from property in which they own an operating interest. The underlying principle seems to be that a private company should not have public duties imposed upon it unless it has taken the first step in that direction by undertaking to provide a public service.

The purpose of regulating certain entities as common purchasers is

81. V.T.C.A. Natural Resources Code, s. 111.002.

82. *Id.*, s. 111.003(a) & (b).

83. *Id.*, Subchapter D s. 111.081.

stated to be conservation;[84] apparently the objectives of protection of correlative rights or stabilization of prices are not included. Therefore, if challenged judicially, these provisions must prove themselves to be directly related to conservation with only an incidental but necessary effect on rights and prices.

A section of the Code declares that:[85]

> operation of gathering systems for crude petroleum by pipeline or truck in connection with the purchase or purchase and sale of crude petroleum is a business in the mode of the conduct of which the public is interested, and as such is subject to regulation by law.

It also provides that such a business shall not be carried on unless the operator of the system is a common purchaser. Thus if any such operator objected to being a common purchaser, and won on that point, it would lose the right to carry on its business. It is a very powerful device to compel gathering systems to submit to common purchaser regulation.

Another section defines the duty of non-discrimination of the common purchaser of oil:[86]

> (It) shall purchase oil offered to it for purchase without discrimination in favor of one producer or person against another producer or person in the same field and without unjust or unreasonable discrimination between fields in this State.

The definition of "field" was an issue in the 1966 case of *Railroad Commissioners* v. *Rio Grande Valley Gas Company.*[87] The field in question was composed of seven vertically separated gas reservoirs. The court noted that for purposes of prorationing, "field' had been statutorily defined to include only a single reservoir. However, the objectives of the prorationing legislation were to prevent waste and to protect correlative rights between producers in one reservoir. The Common Purchaser Act had those two purposes;[88] additionally, it was enacted to prevent discriminatory purchasing within a field which would result in some purchasers being denied access to markets. To implement this legislative purpose the Court concluded that "field" should be broadly defined as a "certain geographical area"[89] and the vertically separated reservoirs were held to be one field.

On the issue of price and quantity, the Court noted that ordinarily they would be settled by agreement of the parties. It continued:[90]

> However, in the absence of agreement as to these items, it then becomes the primary duty of the common purchaser to devise in good faith a formula, which will be non-discriminatory as to price and rateable take among the various producers in the field. While rateable take is generally based upon the well's allowable, this is not necessarily true in all cases. Where no allowable has been set, another reasonable basis may be selected . . . Once the common purchaser has in the absence of agreement set a price, the question of the good faith of the purchaser and the reasonableness of the basis chosen by it in setting the price may present a question for the Railroad Commission.

Thus, in Texas, once the Commission orders a Common Purchaser to extend its lines and take gas, the purchaser has a duty to set the price and quantity in good faith and without discrimination.

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84. *Id.*, s. 111.082.
85. *Id.*, s. 111.084.
86. *Id.*, s. 111.86(a).
87. 405 S.W. (2d) 304 (Tx. Sup. Ct.).
88. *Railroad Commission* v. *Permian Basin Pipeline Co.* (1957) 302 S.W. 2d. 238 (Tx. Civ. Op. Ct.).
89. 405 S.W. (2d) at 309.
90. *Id.* at 312.

The common purchaser is allowed reasonable and just discrimination between fields. The legislation states in s. 11.086(b) that "A question of justice or reasonableness under this section shall be determined by the Commission taking into consideration the production and age of wells in respective fields and all other proper factors". A 1963 decision held that a Court did not have jurisdiction to hear complaints of discrimination where the complaints had not first been presented to the Commission.[91] A 1968 decision refined that conclusion. The Commission's authority to determine discrimination was held to be incidental to its power to take official action. Therefore in a case where the alleged discrimination had ended, and no official action by the Commission was required, the Court had jurisdiction to determine the existence of discrimination.

The Railroad Commission is given the authority to make rules and orders necessary to prevent discrimination.[92] Furthermore, it has a positive duty to search out discrimination.[93]

> (It) shall make inquiry in each field concerning the connection of various producers, and if discrimination is found to be practised by a common purchaser, the Commission shall issue an order to the common purchaser to make any reasonable extensions, reasonable connections, and rateable purchases that will prevent the discrimination.

The Commission may issue a show cause order to any common purchaser, requesting it to show why it should not purchase the allowable production of any producer discriminated against under the above subsection.[94] Thus it seems that the first labelling of a practice can be tentative, and the Commission is open to hear of any mitigating circumstances that would make a practice non-discriminatory. The next section is mandatory:[95]

> On information that discrimination is practiced in its purchases by a common purchaser, the Commission shall request the Attorney General to bring a mandatory injunction suit against the common purchaser to compel the reasonable extensions that are necessary to prevent discrimination.

Although it is only a request, presumably the Attorney General would act upon it and institute the requested suit. Severe court sanctions are provided for violators. The Attorney General may institute a suit against a domestic corporation resulting in the forfeiture of its charter, and an injunction forever prohibiting the company from doing business in Texas.[96] A foreign corporation can have its permit cancelled and face a similar injunction.[97] The injunction, forfeiture or cancellation are in addition to all other penalties.[98] The statute provides that an action for damages against the common purchaser may be brought by any person who has been discriminated against in favor of the production of a common purchaser.[99]

The powers and duties of the Railroad Commission are set out. It shall prescribe and enforce rules for the gathering, loading, delivering and storing of crude petroleum by common carriers.[100] It shall establish rules

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91. *Texas* v. *Crown Central Petroleum Corp.* (1963) 369 S.W. (2d) 458 (Civ. Ap.).
92. V.T.C.A. Natural Resources Code, s. 111.090.
93. *Id.*, s. 111.091(a).
94. *Id.*, s. 111.091(b).
95. *Id.*, s. 111.092.
96. *Id.*, s. 111.093.
97. *Id.*, s. 111.094.
98. *Id.*, s. 111.094(b).
99. *Id.*, s. 111.095.
100. *Id.*, s. 111.131.

for Public Utilities as to rates and charges. The Commission may require the enlargement or extension of facilities of a common carrier if "found to be reasonable and required in the public interest and the expense involved will not impair the ability of the common carrier or public utility to perform its duty to the public".[101] Where crude petroleum is in excess, it is to be apportioned equitably, and the Commission is to make rules to that end.[102]

The Commission is to establish rates for the gathering, transporting, loading, and delivery of crude by common carriers.[103] It must base the rates on the amount that will provide a "fair return on the aggregate value of the property of a common carrier used and useful in the services performed".[104] The Commission is permitted a reasonable discretion in setting rates.[105]

The enforcement mechanisms are delineated. Any person, or the Attorney General on behalf of the state, may institute proceedings.[106] If a company violates a Commission Rule found by a court to be valid, the Commission shall apply to the court to appoint a receiver. The court may appoint a receiver of the property involved in violating the rule.[107] The receivership may be dissolved only upon a showing that the rule was not wilfully violated.[108]

In addition to these wide powers of enforcement, subchapter H enunciates the financial penalties which can be recovered against an offender at the suit of the State or of an aggrieved party. The penalty is a minimum of $100 and a maximum of $1,000 a day for each offense.

As may be seen from the foregoing discussion, Texas has a comprehensive Code specifically defining the rights, duties and obligations of common carriers and common purchasers. Crucial concepts such as discrimination are defined in relation to Commission's role in preventing such discrimination and the sanctions which it may exercise once a determination of discrimination has been made.

A review of the Commission's enforcement powers suggests that they are likely to act as an effective deterrrent.

2. *Louisiana*

Louisiana's definition of "common carrier" is similar to that of Texas in that it encompasses pipelines transporting petroleum for hire. It differs in that gas pipelines are not common carriers but are regulated as public utilities. Both common carriers and public utilities are regulated by the Louisiana Public Services Commission.

To carry out the provisions of the common carrier chapter the Commission is authorized to employ experts. Any agents so selected[109] "shall be

101. *Id.*, s. 111.137.
102. *Id.*, s. 111.142.
103. *Id.*, s. 111.181.
104. *Id.*, s. 111.183.
105. *Id.*, s. 111.184.
106. *Id.*, s. 111.221.
107. *Id.*, s. 111.223.
108. *Id.*, s. 111.225.
109. L.S.A., R.S. 45:259.

made from among those recommended by the oil producing interests of the state". By such a provision, Louisiana assures that the producing interests have input into any rules made with respect to the definition of discrimination and other duties of a common carrier pipeline.

Louisiana has compulsory pooling provisions which define a producer's equitable share of oil or gas in a pool as that[110] "which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract or tracts in the pool bears to the recoverable oil and gas in the total developed area of the pool".

The Commissioner is to make rules to prevent or lessen "avoidable net drainage", defined as drainage not equalized by counter drainage. The regulations are also to ensure that each producer has the opportunity to use his just and equitable share of the reservoir energy.[111] This provision is a legislative acknowledgement that draining reservoir energy can be just as harmful as draining oil or gas.

Louisiana has a Common Purchaser Law. It provides that whenever there is an excess of gas to market demand from a common source of supply, each producer from the source may not produce all its gas. A producer's share is to be the proportion that the natural flow of its wells bears to the total natural flow of the source having due regard to the acreage drained by each well.[112] A 1955 decision considered the purpose of this section:[113]

> The "Common Purchaser Law" was drawn to prohibit discrimination solely in the matter of quantity, to prevent unfair, discriminatory and inequitable abuses in the distribution of natural gas, not as to prices to be paid, but solely to give security to producers in that they would all stand on equal footing in so far as access to market through pipe line facilities would be made available, and the statute sought to alleviate and prevent the abuses whereby some producers were favored as against others, some afforded markets, others ignored, and, by the process of prorating among producers, assured them that no one would sell more than the other in a given zone.

Every person engaged in the business of purchasing and selling natural gas is declared to be a common purchaser, who must purchase without discrimination.

3. *Oklahoma*

Oklahoma is similar to Texas and Louisiana in that it declares all operators of public natural gas pipelines to be common purchasers and imposes a duty to purchase. The focus of the provision is on the public benefit to be derived from conservation regulation, not on the substantive gain that private producers and royalty owners would derive from such regulation.

Oklahoma's law also provides that certain pipeline companies transporting oil or natural gas shall be common carriers "as at common law". This declaraton applies to companies presently transporting oil and gas for hire under Federal or Oklahoma law incapable of revocation. This type of common carrier is not to allow or be guilty of unjust discrimination. Thus a different standard is imposed on them than on common purchasers, who are not to discriminate at all.[114]

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110. *Id.*
111. L.S.A., R.S. 30:9.
112. L.S.A., R.S. 30:41.
113. *State* v. *Arkansas Louisiana Gas Co.* (1957) 227 La. 179.
114. 52 Okla., St. Ann. s. 24.

Parties in the business of transporting gas who do not become common purchasers under the statute are not to own or operate any gas wells, leases, holdings or interests.[115] Both the oil and gas pipelines declared to be common purchasers were only those "claiming or exercising the right to carry or transport . . . products . . . for hire or otherwise". A 1961 case tested the boundaries of this provision. The decision, as reported in the headnote, was as follows:[116]

> Oil company was not common purchaser required to purchase oil without discrimination and was not common carrier required to transport oil without discrimination, merely because company's wholly owned subsidiary owned and operated pipelines through which the company's crude oil purchases were transported, where company and subsidiary did not have same directors, officers or operating personnel, separate corporate existence of company and subsidiary was not designed to perpetrate fraud and subsidiary was not merely instrumentality or adjunct of company and was not merely dummy or sham of company.

As the above decision illustrates, it is possible, although difficult, to avoid the obligations of Oklahoma's common purchaser law.

In addition to declaring pipeline operators common purchasers, Oklahoma law declares every party engaged in the business of purchasing or selling natural gas to be a common purchaser. This status brings with it the obligation to purchase all of the gas which may reasonably be reached by its gathering lines. But the Commission is not given authority to order the extension of such lines. Purchases must be made without discrimination between producers or sources of supply. The common purchaser cannot favour its own production. It must take only the rateable proportion that its production bears to the total production available for marketing.[117]

IV. CONCLUSIONS

The foregoing analysis evidences the philosophical dichotomy currently existing between the Alberta and State legislation. This distinction may arise from the legislative power granted to or enforced by the authority exercising the regulatory function. The Alberta provisions, as presently administered, appear primarily to resolve production rates, carriage, processing and sales among individual owners within a pool, to achieve equity. Accordingly, the authority granted under the Act should be employed in a minimal fashion, with the least disturbance on existing contractual relationships. A corollary of this would be to impose a substantial onus on the applicant to justify issuance of the order requested.

In contrast, U.S. provisions arise from a public utility approach to production and transportation — processing — purchasing. A corporation carries the obligation of disproving its designation as common purchaser or carrier. Contractual relationships are by implication suborned to the public good.

This comparison and analysis discloses obvious deficiencies in the Alberta system, some of which could be resolved by reference to the U.S. legislation.

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115. *Id.*, s. 25.
116. *Gulf Oil Corp.* v. *State*, (1961) 360 P. (2d) 933 (Okla.).
117. 52 Okla., St. Ann. 240.

First, the Act employs terminology which is either ambiguous in its context, or inappropriate. "Discrimination" is a most inexact word. Its meaning is not only dependant on the subject matter and particular facts under consideration, but also on the state of mind of the interpreter. Similarly, "common carrier" is a term of considerable judicial lineage which may, or may not, suit the purposes of the Act and the distinctive position of a pipeliner so declared pursuant to s. 49.

Substantial difficulties may arise if implementation of ss. 49 and 54 were challenged, since the Act is basically void of definition respecting the rights, liabilities and obligations of a party so declared.

Although the creation of a complete regulatory scheme is not advocated, a request for a more adequate framework in which these provisions are to be utilized would not be without merit. On this point, assistance can be taken from the U.S. legislation since there is some justification for recognition of the parentage of the Alberta legislation[118].

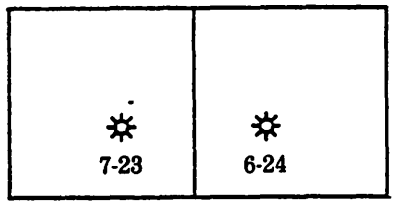
Second, specific criticism has been advanced respecting the operation of the common purchaser provisions of the Act. If the principal objective of ss. 35 and 52 of the Act is equitable production forestalling drainage, some consideration should be given to granting the Board powers to issue retroactive or interim directives, pending final appeal or negotiated resolution of production rates and contract sharing. However, this policy must take cognizance of the rule of capture and the objectives of conservation and prevention of waste.

Appendix A consists of five sample "cases" which may highlight some difficulties in the implementation of ss. 35 and 52.

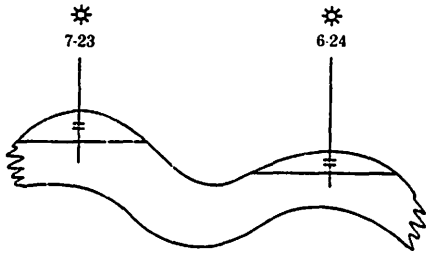
118. G. Govier, "The Administration of the Oil and Gas Conservation Act in Alberta" (1968-69) 7 *Alta. L. Rev.* 341.

APPENDIX A: CASES

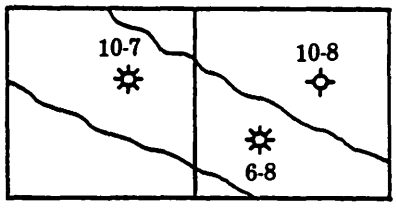
CASE 1



Well 7-23 has been on stream for two years selling to a utility on a deliverability basis; 6-24 recently encountered the same producing horizon, however, this section is not contracted. The DST pressure and a subsequent sandface pressure measured during the AOF test both clearly indicate that drainage is occurring. The pressures at 7-23, the only other well producing from this formation in the immediate area, are similar to those measured at 6-24. The geology is very complex however, and the gas zone in 6-24 is at a lower elevation than the water at the 7-23 well. Geologists believe the situation is as shown opposite. Gas is probably not being drained but the pressure is declining due to a manometer effect through the connecting aquifer.



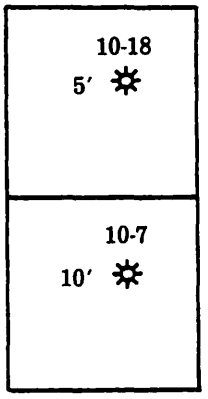
CASE 2



A competitor is draining reserves from a contracted producer at 10-7. After initially drilling a duster at 10-8, a well at 6-8 has been successfully completed. The formation is a tortuous channel deposit which is mapped as shown with marginal geological and geophysical support. Both 10-7 and 6-8 have equal net gas pays in very similar reservoir rock.

In a common processor/rateable take application it is argued that each well should equally share the contract rate available for 10-7. However, the competitor claims that the dry hole on section 8 invalidates reserves on ½ of section 8 and therefore 6-8 should only share production ½ as much as 10-7.

CASE 3

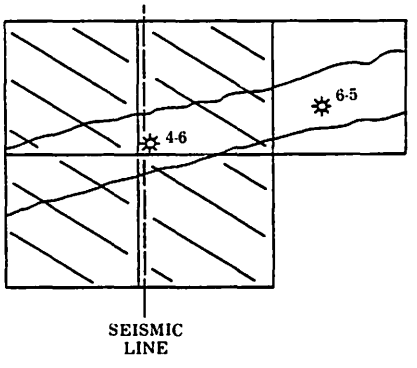


A competitor is selling gas on a deliverability basis at 2 MMscfd from 10-18. The well has excellent deliverability but only 0.5 Bcf of recoverable reserves based on 640 acres.

Company A completes a well in the same formation at 10-7. The well has twice as much pay as 10-18 but after considerable stimulation work will only produce at 1 MMscfd. Calculated reserves for 640 acres are 1.0 Bcf recoverable.

There is no contest that reserves are being drained, however, in an application for rateable take issue Company A claims 10-7 should produce twice as much as 10-18 because of reserves. The competitor claims the opposite due to deliverability. The maximum available contract is 2 MMscfd.

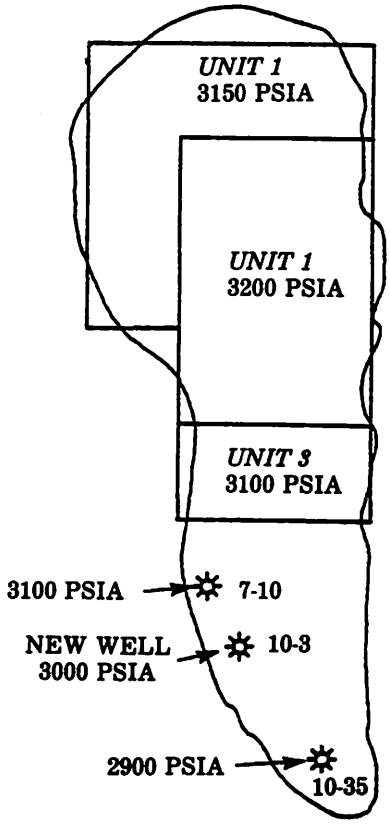
CASE 4



A competitor is producing 6-5. To satisfy an offset obligation Company A is forced to drill a well on very short notice on an offsetting four-section block. The seismic was shot along the road allowance and it elected to drill on a precise shot point at 4-6 rather than stepping in to an ontarget location and risk missing the winding channel deposit; 6-5 and 1-6 have equal metrages of gas pay.

Company A has proven that its well is being drained. What is its rateable share of production?

CASE 5



Company A has produced since 1968 from three units in a single Devonian reservoir. The original pressure was 4000 psia and the zone has a fairly powerful aquifer which partially maintains the pressure and masks the effects of withdrawals on pressure. Its contract is reserves' based for all three units and gas is sold to purchaser X. Company B placed wells 7-10 and 10-35 onstream in 1974 on a deliverability based contract with gas purchaser Y. The previous year Company C acquired the rights to section 3 and drilled a successful well (10-3). Section 3 is not contracted.

Geological evidence strongly suggests that all wells are in the same reservoir. Who should relinquish part of its contract to Company C on a common purchaser application; and who should be named as common purchaser?