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Section 19 of the Perpetuities Act and the oil and gas lease as a fee simple determinable state of a *profit* à *prendre*

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Statute Commented on:

Perpetuities Act, RSA 2000, c P-5.

In a couple of years we will "celebrate" the fortieth anniversary of the *Perpetuities Act* of 1972, SA 1972, c.121. They may not know it yet, but the wildest celebrations will be heard from those who hold oil and gas leases granted after July 1, 1973 which are still in force. Here's why. After that date, as each and every oil and gas lease reaches its fortieth birthday, the lessor's possibility of reverter for terminating the lease for want of production comes to an end; thenceforward the lease can only be terminated for cause (as described in the default clause of the leases) such as the non-payment of royalties, which causes can typically be cured without losing the lease. Lessees will become the effective owners of the oil and gas estate.

This will likely come as a great surprise to lessors who, after all, imagined that they were granting a lease and not a perpetual right to any oil and gas that might be found on their lands. It may also come as a surprise to the drafters of the *Perpetuities Act* – the report of the Alberta Law Reform Institute that led to the adoption of the Act and this particular section (pp 55 - 59) does not discuss the peculiar status of oil and gas leases. It may be that the legislature will want to change this result before it is too late.

Or it may simply be that I am wrong!

In any event, here, in a little more detail, is the basic argument. The argument assumes that the oil and gas lease is in the form of a short fixed primary term (anything from ten years to two years) which is continued thereafter for so long as there is production (or operations or some such defined term) on the leased lands.

1. An oil and gas lease is not a true lease but a *profit à prendre*: *Berkheiser v Berkheiser*, [1957] SCR 387.
2. A *profit* must be granted for an estate known to the law: *Berkheiser* per Justice Kellock quoting Halsbury. Estates govern duration. In this case the most convincing estate characterization of the oil and gas lease is that of a fee simple determinable of an incorporeal entitlement: *Berkheiser*.
3. At common law the possibility of reverter on a determinable fee was treated as vested (and not contingent) and therefore not subject to the rule against perpetuities.
4. Section 19 of the *Perpetuities Act* changes the common law rule in two ways. First, it makes the possibility of reverter subject to the rule in the same manner as the right of re-entry for breach\satisfaction of a condition subsequent. And second, section 19

> establishes that the perpetuity period for these two interests is not the general commercial period of 80 years (s 18) but the shorter period of 40 years (s 19(3)). Thus, "if the event that determines the determinable interest does not occur [want of production\operations in our case] within the perpetuity period [40 years], the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest."

And why am I writing this now? Well, it's that time of year when I am teaching perpetuities to first year property law students and this issue seems a lot more practical and pressing than class closing and class splitting rules! And, if we're going to do anything about this anomalous result it's time we got the discussion going.