See paras. 44-47

Case Name:

Guyer Oil Co. v. Fulton and Gladstone Petroleum Ltd.

Guyer Oil Company Ltd., Golden Eagle Oil & Gas Limited and Husky Oil (Alberta) Ltd. v. Fulton and Gladstone Petroleum Ltd.

[1976] S.J. No. 432

[1976] 5 W.W.R. 356

SASKATCHEWAN COURT OF APPEAL

Woods, Brownridge, Hall JJ.A.

Judgment: July 19, 1976

(48 paras.)

Counsel:

W. M. Elliott, Q.C., and *M. A. Gerwing*, for appellants.

E. J. Moss, Q.C., for respondents. (Regina)

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1 **WOODS J.A.** (dissenting):--This is an appeal from the decision of Johnson J. [[1973] 1 W.W.R. 97] dismissing a claim for a petroleum and natural gas lease. The trial occupied 19 sitting days. While the facts are lengthy and the relations of the parties are somewhat complicated, the learned trial Judge has reviewed them and set them out clearly. There is no need therefore to review them all again here. The issues between the parties here are narrow.

2 The thrust of the claim is that the respondent John M. Fulton used information that he had obtained in the service of the appellants for his own ends and those of Gladstone Petroleum Ltd. to the detriment of the appellants. The learned trial Judge held that Fulton, as supervising engineer at

the drilling of wells, having used no confidential information but only that in the public domain, was in breach of no duty. The appellants contend that information used by Fulton in preparing a bid for a lease belonged to the appellant Guyer Oil Company Ltd. and that Fulton had no right to use it contrary to the interests of Guyer and its associates. They also contended that in any event the information was confidential.

3 That Fulton had obtained considerable information from and during his association with the appellants is clear. A qualified and experienced petroleum engineer, Fulton had been employed by Guyer to supervise the drilling of six wells. He had also supervised the drilling of seven wells for a predecessor of the appellant Husky Oil (Alberta) Ltd. These companies were interested in oil developments in what was known as the Dodsland Field. The petroleum and gas found in the Dodsland Field was produced from the Viking sand, a formation some 20 by 60 miles in area, undulating but relatively uniform in depth and extending from Alberta into Saskatchewan in an easterly direction.

4 Guyer drilled a well on LSD 16-2-31-22 W.3 and Fulton supervised the drilling. The rig was released on 7th March 1961. This well was close to 12-31-22 W.3 in which the Government of Saskatchewan had offered the petroleum rights for sale by bids 4th April. A well was also drilled on 1-31-22 W.3 subsequent to that on LSD 16 and just south of s. 12. This was drilled by predecessors of Golden Eagle and Husky. It was brought in on 3rd April, the day before the sale.

5 Fulton gave evidence that in preparing the bid for use by Crown Trust he had used no information that was confidential to his employers. The learned trial Judge accepted this. It is clear from the evidence that Fulton did use information acquired in the service of his employers. There was a great deal of information as to the field available to the general public. In Saskatchewan the extensive information required to be filed with the government for each well is made public 30 days after the release of the rig. Oil bulletins, published copies of well logs, reports of scouts, contacts with well service companies, records of the Department of Mineral Resources, weekly drilling reports and other means of dissemination of data, all can provide sources of information for those interested in investment, exploration or drilling for oil. Fulton of course had access to all of this. He also had the first-hand knowledge of the data from the wells, the drilling of which he had supervised. The learned trial Judge found that Fulton (in preparing the bid for use by Crown Trust) did use certain production information from a report which he prepared for Guyer. However, he was of the view that as each well was completed, Fulton's duty was discharged except for confidential information.

6 This places the responsibility of the professional adviser upon a narrow base. The code of ethics of the societies of professional engineers in both Saskatchewan and Alberta (where Fulton trained) expresses no such limitation upon professional responsibility. However, the canons of ethics are not decisive in the instant matter. The learned trial Judge referred to *Pre-Cam Exploration and Development Ltd. v. Mc-Tavish*, 56 W.W.R. 697, [1966] S.C.R. 551, 57 D.L.R. (2d) 557, 50 C.P.R. 299, as a good illustration of use by an employee of confidential information obtained for an

employer and used for the former's own personal gain. In that case a prospector used information he had acquired in the service of claim owners, to acquire adjoining claims to the exclusion of his employers. The Supreme Court found in the employment of the prospector an implied term not to use the information so acquired to his advantage. By implication it could not be used to the detriment of the employer. There of course, the information was of a confidential nature. The appellants relied upon the case of *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721, which deals with a solicitor. It makes it clear that where a fiduciary relationship exists as between solicitor and client the solicitor must account for profits which he is enabled to make by virtue of his fiduciary position. The learned trial Judge disposes of this case by distinguishing the facts. Other cases were discussed but none are directly on point. It seems clear, however, that if an employee is in a fiduciary position and if as a result of opportunities afforded by his employment, he is enabled to better his own situation in opposition to or at the expense of his employers, he is accountable. On the present facts, Fulton was in a fiduciary position. The learned trial Judge, however, seemed of the view that the only real duty he owed was that of not disclosing confidential information. Fulton had acted for one or other of the appellants with some regularity over an extended period of time. It would seem to be implicit in his position that he should not without consultation or warning be planning a course of conduct that could make him a competitor of his employers. This is a broader requirement than that stated by the learned trial Judge.

7 The judgment appealed from deals at some length with whether or not the information from LSD 16 was ever really confidential. In the oil industry, a well is described as a "tight hole" when special precautions are taken to ensure secrecy as to its drilling and completion. There is also provision in the regulations of the Department of Mineral Resources for holding all information filed with it until 30 days after the rig is released. It is then taken off the confidential list and made available to the public. The well on LSD 16 came off the confidential list on 7th April 1961, so no information would be available from government sources until that date or three days after the date of sale. The respondents adduced considerable evidence to show that the well on LSD 16 was not a tight hole and that in any event Fulton did not know that it was a tight hole. The learned trial Judge, however, concluded that the information provided by the drilling on LSD 16 provided nothing of added significance in assessing the value of sec. 12 because there was such a plethora of other evidence already in the public domain. In other words, he concluded that Fulton would not need that information to assess the prospects of sec. 12.

8 It is however part of his over-all information and certainly among the latest obtainable. As to whether or not he knew that the well was a "tight hole" or not would not seem to be conclusive. There was, however, sufficient mention of it in publications to alert him of it if one in his position needed to be warned.

9 On this point, the learned trial Judge refused to admit the evidence of Nick Bilida offered by the appellants in rebuttal to show that Fulton knew that the well on LSD 16 was a "tight hole". In my view, the evidence tendered was probably admissible on rebuttal. The statement of law applicable and which I would adopt is set out in *Whittaker v. Welch* (1874), 15 N.B.R. 436 at 445 (C.A.), per

Ritchie C.J.:

> "While we admit, as a general principle, that it is not open to a plaintiff to prove part of his case in the first instance and to reserve the remainder of it till the defendant's evidence is given, the rule must be taken with some qualification. The right of the plaintiff to prove the declaration made by the defendant to Mr. Tuck could not be disputed: the only question was, as to the time when it should have been proved, and this is generally in the discretion of the Judge at the trial: *Williams v. Davies* (1833), 1 C. & M. 464, 149 E.R. 481. The statement which Mr. Tuck's evidence contradicted, appeared for the first time on the cross-examination of the defendant, and we think, on that ground, it was competent for the plaintiff to give the evidence, though the effect of it was to confirm his *prima facie* case. If the evidence given had been merely to add a fact to confirm the plaintiff's *prima facie* case, it would not have been admissible; but it was more than that: it was to *contradict* a statement made by the defendant. This distinction is fully borne out by the cases of; *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534; *Wright v. Willcox* (1850), 9 C.B. 650, 137 E.R. 1047; *Whelpley v. Riley* (1851), 7 N.B.R. 275 (C.A.); and *Heavy v. Odell* (1863), 10 N.B.R. 524 (C.A.). The plaintiff had a right to assume that the defendant would give a true account of what had taken place, and therefore was not bound to prove, by anticipation, that which the defendant might not deny."

10 The general principle applicable is that on an issue the party beginning must exhaust his evidence in the first instance and may not split his case by relying on evidence first presented and then when his case is shaken by his adversary seek to adduce further evidence confirmatory of his position. But Ilsley C.J. stated in *Mersey Paper Co. Ltd. v. Queens* (1959), 42 M.P.R. 397, 18 D.L.R. (2d) 19 at 37 (N.S. C.A.):

> "In most of the cases cited, the fact emerging from the evidence on behalf of the defendant which the plaintiff may contradict in rebuttal is evidence of unforeseen particular facts brought out in direct examination rather than cross-examination. The facts sought to be contradicted here were unknown to the appellant. Though doubtless suspected it cannot be said that they were foreseen. True, they were brought out in cross-examination, not in direct examination; but I think it would be unjustifiably technical to make anything depend on this distinction."

11 It cannot be said here that the appellants knew that Fulton would deny knowledge. True his statement of defence denied it but that could well be only to put the appellants to the proof. In my view Bilida's evidence was admissible and should have been considered by the learned trial Judge.

12 The respondents raised the defence of estoppel and later asked to add that of acquiescence. The learned trial Judge dealt with it as estoppel and held that if necessary it constituted a defence to

the action. With respect, I cannot agree. Whatever suspicion there may have been throughout the years, the extent of John Fulton's interest in Gladstone did not come to light until more than eight years after the incorporation of Gladstone. If Fulton had faith in the propriety of his work and association with Gladstone it was not because of anything that the plaintiffs did or failed to do.

13 It was also argued that Gladstone could not be affected by John Fulton's breach of fiduciary duty because Gladstone being a separate legal entity was a bona fide purchaser for value without notice. It would seem, however, that the claim of the plaintiffs is valid, otherwise no such defence should be open here. Robert Fulton caused Gladstone to be incorporated. He and John Fulton were major shareholders in it throughout. On the facts it is difficult to disassociate the knowledge of one from the others. The corporation was to all intents the agent of Robert Fulton in his plan to handle the enterprise and John Fulton became party to it. Gladstone cannot, in my view, sustain a claim to be a bona fide purchaser for value without notice.

14 The learned trial Judge dismissed Golden Eagle Oil & Gas Limited's claim, holding that it never had employed John Fulton and therefore could not claim against him. With respect, I am in agreement with this finding.

15 In the result, I would allow the appeals of Guyer Oil Company Ltd. and Husky Oil (Alberta) Ltd. with costs in this Court and below and refer the matter back to the trial Court for further disposition in accordance with paras, (a), (b), and (d) of the prayer for relief in the statement of claim.

16 The appellant is entitled to costs on this appeal.

17 HALL J.A. (BROWNRIDGE J.A. concurring):--The appellants brought action principally to obtain a declaration that a net royalty petroleum and natural gas lease of S.1/2 12-31-22 W.3, granted by the Crown on 16th May 1961 to the Crown Trust Company and now registered in the name of the respondent Gladstone Petroleum Ltd., was acquired for and is held in trust for the appellants. Several items of auxiliary relief were also sought by the appellants.

18 The appellants' action was dismissed by Johnson J. after a lengthy trial [[1973] 1 W.W.R. 97]. The trial Judge has made several specific and important findings of fact. In view of these findings a lot of the evidence which was adduced at the trial now becomes, in my opinion, irrelevant and there is no purpose in reviewing the same.

19 In several areas there was a conflict of evidence and the findings of the trial Judge therefore depend upon his assessment of the credibility. In one or two key areas there was a direct conflict between the evidence of the respondent John M. Fulton and the witness Joe Elster Guyer, called by the appellants. The trial Judge has accepted the respondent John M. Fulton and his brother Robert Fulton as credible and reliable witnesses. Apart from the assessment of credibility there is, in any event, sufficient evidence to support the findings of fact made by the trial Judge. Under the circumstances these findings must be accepted by this Court. See *Prudential Trust Co. Ltd. v.*

Forseth, 30 W.W.R. 241, [1960] S.C.R. 210, 21 D.L.R. (2d) 587. The facts hereinafter set out, therefore, are related as they were found by the trial Judge.

20 The respondent John M. Fulton was a mining engineer who had obtained a great deal of experience and expertise in the field of petroleum production. In the years 1960 and 1961, and for a few years prior thereto, he had practised as a consulting petroleum engineer in the area termed the "Dodsland Field". He had accumulated information about the area which he recorded on "ongoing" maps and which he used in practising his profession.

21 In or about June of 1960 the respondent Fulton was engaged by Highwood Developments Ltd. to supervise the drilling of some wells in the Dodsland Field. There was no written contract nor was there any retainer. The respondent was paid $100 per day for each day of service plus expenses. Under the arrangement the respondent was free to work for other parties while not engaged by Highwood. Later in 1960 he was also employed by the appellant Guyer Oil Company Ltd. subject to the same terms. The respondent Fulton's duties to his clients, Guyer Oil Company Ltd. and Highwood Developments Ltd., related exclusively to the supervision of drilling oil wells. His principal task was what apparently in the trade is termed "well-sitting". Each well-sitting job was separately performed.

22 The specific duties of the respondent when engaged by Highwood Developments Ltd. and Guyer Oil Company Ltd. were as follows:

"A. Well-sitting

"1. For a proposed well, to prepare a drilling program prior to actual drilling. Such program would outline procedures, recommend samples to be taken and logs to be run.

"2. To supervise the drilling of the well including:

"a) if possible, setting the surface casing,

"b) supervising control of mud in the producing formation,

"c) directing the driller when to stop drilling if not previously directed,

"d) calling for loggers and seeing that proper logs were run according to the drilling program,

"e) if a production well were found, then to supervise the running and setting

of production casing and its cementing,

"ff) authorize drilling rig release,

"g) supervising the cleaning out of production casing by the service rig,

"h) supervision of perforating,

"i) release of service rig.

"B. The preparation of a well report for the client, if requested, but this was done voluntarily by Fulton and not all clients wanted it.

"C. Evaluation Reports for Banks. Such reports were done only on request of client and for specific well or field areas and were prepared to support borrowing of the client from the bank."

23 The duties of the respondent Fulton to the said clients specifically did not include acting upon or advising upon any of the following matters:

"1. Mineral lease selection or acquisition or doing of the same.

"2. Land or surface lease acquisition or doing of the same.

"3. Well site surveys.

"4. Well location points within target areas.

"5. Selection of drilling or oil well servicing contractors.

"6. Evaluating land posted for Crown sale."

24 When a particular well was drilled and either completed or abandoned the respondent's duty to the clients was discharged until again re-engaged, excepting, of course, the obligations imposed upon him with respect to confidential information.

25 Under this arrangement the respondent Fulton, for the appellant Guyer Oil Company Ltd., sat

on the following wells on the dates indicated:

Date of Com- Date of Com-	*mencement of pletion of*
"*Well Location*	*Supervision Supervision*
"a) LSD 2-11-31-20 W3rd	December 2, 1960 December 13, 1960
"b) LSD 2 11-31-22 W3rd	December 13, 1960 December 27, 1960
"c) LSD 2 27 (Avon Hill)	December 24, 1960 December 31, 1960
"d) LSD 10 2-31-22 W3rd	January 26, 1961 January 29, 1961
"(Supervision interrupted)	January 31, 1961 February 7, 1961
"e) LSD 16 2-31-22 W3rd	March 5, 1961 March 19, 1961
"f) LSD 8 11-31-22 W3rd	April 29, 1961 May 2, 1961".

26 For Highwood Developments Ltd. the respondent sat on wells as follows:

Date of Com- Date of Com-	*mencement of pletion of*
"*Well Location*	*Supervision Supervision*
"LSD 16 4-31-22 W3rd	June 2, 1960 June 8,1960
"LSD 12 4-31-22 W3rd	July 30, 1960 August 7, 1960
"LSD 2 10-31-22 W3rd	August 22, 1960 August 29, 1960
"LSD 4 10-31-22 W3rd	September 24, 1960 September 28, 1960
"LSD 6 10-31-22 W3rd	October 10, 1960 October 20, 1960
"LSD 14 2-31-22 W3rd	December 20, 1960 December 31, 1960
"LSD 12 2-31-22 W3rd	December 16, 1960 January 3, 1961"

27 It can be seen from the above that between the dates of 19th March 1961 and 29th April 1961 the respondent Fulton was not employed or engaged by either Guyer Oil Company Ltd. or Highwood Developments Ltd.

28 On 24th February 1961 the Department of Mineral Resources of the Province of Saskatchewan invited bids for a Crown lease sale to be held 4th April 1961 of lands in the Dodsland Field including S.1/2 12-31-22 W.3 with which we are concerned. The notice of sale included

current information which had been obtained by the Department from wells nearest to each of the parcels offered.

29 The respondent John M. Fulton did not learn of the Crown lease sale until he had completed sitting on the well LSD 16-2-31-22 W.3 for the appellant Guyer on 19th March 1961 and had returned to Calgary. In Calgary he was consulted by his brother Robert, who sought his advice on the sale and in particular in regard to S.1/2 12-31-22 W.3. The respondent Fulton informed his brother that he, the respondent, was free to act and advise him, and as a result recommended and arranged for the Crown Trust Company to submit, on behalf of Robert, a net royalty bid on each half of sec. 12. The bid was successful in so far as it applied to the south half of the said sec. 12.

30 The respondent was unaware that the appellant Guyer Oil Company Ltd. was also submitting a bid.

31 After obtaining the Crown lease Robert Fulton decided to drill on the land. To enable him to arrange the financing of the drilling program he had to rely upon the backing of a family holding company, Harco Investments Ltd. This necessarily involved his father Frank G. Fulton, who had been a director of Highwood Developments Ltd. and of Sarcee Petroleums Ltd. of which Highwood Developments Ltd. was a subsidiary. Subsequently, the respondent Gladstone Petroleum Ltd. was incorporated and the net royalty lease was assigned to it by the Crown Trust Company on 17th May 1961. In August 1961 a voting trust agreement was entered into between the Crown Trust Company and two chartered accountants who were the sole registered shareholders of Gladstone Petroleum Ltd. and were voting trustees under a voting trust agreement. The respondent Fulton, his brother Robert and their sister Frances were, however, the beneficial holders of all of the shares of the respondent Gladstone Petroleums Ltd.

32 Under the supervision of the respondent John M. Fulton wells were drilled on the south half of sec. 12, all of which became producers. Later these wells became subject to a unitization order proclaimed 17th May 1966 and amended 18th September 1967. The appellant Husky Oil (Alberta) Ltd. was named as operator of the unit. Husky Oil (Alberta) Ltd. took over Sarcee Petroleums Ltd. and Highwood Developments Ltd. and claims their status in this action as the successor to High-wood Developments Ltd.

33 In October 1967 Gladstone Petroleum Ltd. commenced proceedings to have the unitization order declared null and void. In the course of these proceedings the respondent Fulton disclosed that he was then the owner of 50 per cent of the equity in Gladstone Petroleum Ltd.

34 The trial Judge gave careful consideration to the fact that the Fultons took elaborate steps apparently to conceal their ownership of Gladstone Petroleum Ltd. He accepted however the explanation given by Robert Fulton that these steps were taken only to protect their father Frank G. Fulton, who was deceased by the time of the trial. He gave the arrangement due weight when assessing the credibility of the witnesses.

35 The acts of the respondent John M. Fulton which are complained of in this action took place during an interval when the said respondent was not employed by either Highwood or Guyer. This was an interruption in the employment which arose in a regular manner under the terms of the hiring arrangement. At that time the respondent had no obligation to return to Guyer or Highwood and Guyer and Highwood had no obligation to have him back. His inactivity at that time was part of the pattern of employment. There was no termination of employment in the sense that existed in *Pre-Cam Exploration and Development Ltd. v. McTavish*, 56 W.W.R. 697, [1966] S.C.R. 551, 57 D.L.R. (2d) 557, 50 C.P.R. 299. In that case the employment was terminated deliberately by the employee in an attempt to regularize improper use of confidential information. At that time the only duty which the respondent Robert M. Fulton owed to Guyer or to Highwood was the obligation not to use, to the disadvantage of either Guyer or Highwood, confidential information which he had received in the course of his employment. This duty arose from what has been termed a general obligation of good faith on the part of the respondent.

36 It is quite obvious from the terms of employment as above set out that during the period of employment it was not the respondent's duty to advise, either directly or indirectly, or to take any steps to assist Guyer or Highwood in formulating a bid for a lease. In fact in the instant case the trial Judge has made a specific finding of fact that the respondent was not aware that the appellant Guyer intended to submit a bid for a lease on the said south half of sec. 12.

37 Generally the duties of the respondent in the employ of both Guyer and Highwood, as hereinbefore set out, establish that the relationship between them was that of master and servant and was not the principal-agent type of relationship which existed in *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721; or in *Can, Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206. The respondent Fulton, therefore, does not become liable to the appellants by the mere acquisition of the lease. It must be shown that in acquiring the lease the respondent Fulton improperly made use of confidential information acquired during the term of his employment to the disadvantage of the appellants.

38 The regulations of the Department of Mineral Resources of the Province of Saskatchewan which applied to the Dodsland Field at all material times required each well owner to file with the Department all pertinent information obtained from a well after 30 days had expired from the date of the rig release. All of this information was made available by the Department to the public. I agree, therefore, with the finding of the trial Judge that any information obtained by the respondent Fulton from the wells upon which he sat with the exception of those which the respondent supervised for Guyer on LSD 16-2-31-22 W.3 and LSD 8-11-31-22 W.3 could not, at the time the respondent Fulton advised his brother Robert, be considered confidential. This information was then in the public domain. The information having become public knowledge was available to the respondent Fulton to use as it was to any other member of the public. See *O. Mustad & Son v. S. Allcock & Co. and Dosen*, [1963] 3 All E.R. 416. [1964] 1 W.L.R. 109, and *Baker v. Gibbons*, [1972] 1 W.L.R. 693, [1972] 2 All E.R. 759.

39 As the well on LSD 8-11-31-22 W.3 had not been commenced at the time the bid was made, the only possible source of confidential information available to the respondent Fulton was from the well on which he sat for the appellant Guyer on LSD 16-2-31-22 W.3.

40 The latter well was drilled by Guyer to carry out his obligations under a farm-out agreement with certain other parties and with the object of obtaining a producing oil well. Guyer did not assign to it much, if any, significance for evaluative purposes. It was not drilled as close as possible to the south half of sec. 12 as it might have been and it was drilled earlier than required for compliance with the farm-out agreement. Had Guyer been relying upon the well on LSD 16-2-31-22 W.3 to formulate a bid for the Crown lease on the south half of sec. 12 he would have drilled it closer to that land and would have delayed the start of drilling until closer to the date of bidding.

41 At the time that the bid was made there was, according to the expert testimony accepted, little or no information from the drilling of LSD 16-2-31-22 W.3 which would assist in formulating a bid for the lease on the south half of sec. 12. The only factor of any significance was that a producing well had been completed. This fact was not confidential information but a matter of general knowledge.

42 The trial Judge specifically accepted the statement of the respondent Fulton that he did not use any confidential information in preparing the bid for the lease in question. In his reasons the trial Judge stated his findings as follows [p. 117]:

> "The defendant Fulton swore positively that he had used no information that was confidential to his employers in preparing the bid for his brother, Robert Fulton. This statement I accept."

43 This finding by the trial Judge that the respondent did not use confidential information, in my opinion, eliminates the basis for the appellants' claim.

44 The respondent John M. Fulton, in preparing the recomendation and submitting the bid for the Crown lease, relied upon the general knowledge and skill which he had acquired over a great period of time in the practice of his profession. This was not a similar situation to that which existed in *Pre-Cam Exploration and Development Ltd. v. McTavish*, supra, where the mere use of information was all that was necessary to make an acquisition possible. In the instant case the public information available to a person making a bid for a Crown lease had to be evaluated and assessed. An estimate had to be made of what terms would be attractive to and acceptable by the Crown. In addition, of course, an important factor would be the evaluation of the production potential of south half of sec. 12. The skill of the respondent John M. Fulton and the general knowledge which he had obtained of the Dodsland Field had enabled him to predict very closely the result on LSD 16 before drilling had even started. The evidence of expert witnesses was that the well on LSD 16 would have to be in production for several months before it could be evaluated. The appellants are not entitled to prevent the respondent John M. Fulton from using his skill and knowledge which he has acquired over the years. This, in effect, is what they are attempting to do in this action.

45 It does not appear to me in any event that the appellants can now be placed in any better position than they would have been if the respondent had submitted no bid at all. In addition to the bid made by the respondent the following bids were received by the Department of Mineral Resources:

"Altair Oil Limited for the S 1/2 of 12 -- $25,000.00

"Guyer Oil Company Ltd. for the S 1/2 of 12 -- $16,000.00

"Canpet Exploration Ltd. (now Golden Eagle) for the S 1/2 of 12 -- $20,000.00."

46 It is clear from the evidence of Henry Bernard Sawatzky, called by the appellants, that the Guyer bid would not have succeeded in any event. Sawatzky was the head of the evaluation division of the Department of Mineral Resources at the material time. He described the method used to evaluate bids and the basis upon which they were accepted. This evidence reads as follows:

> "We would use this information to come up with an estimated primary recovery of oil from the parcel in question. Having received the bids we would then incorporate these bids and run parallel calculations to decide whether it would be better for the Crown to accept the top cash or go to the net royalty risks involved and we felt that the risks on the S.1/2 of 12, because of this additional well information, were considerably reduced and so the net royalty lease route was definitely better for the Crown than to take a cash bid. However, on the N.1/2of 12 we felt that the risks were such that we were better off to take the cash."

47 The bid of the respondents was accepted because it was on the net royalty basis. It was the only bid submitted on such basis. If it had not been submitted the Crown would have accepted the top cash bid which was that of Altair Oil Limited. The respondent, therefore, would not have been successful in any event in obtaining the lease.

48 I would dismiss the appeal with costs.