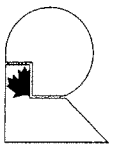

Canadian Institute of Resources Law
Institut canadien du droit des ressources

# Views on Surface Rights in Alberta

Papers and materials from the Workshop
on Surface Rights, Drumheller, Alberta
20-21 April 1988

Edited by
Barry J. Barton

**Discussion Paper**
1988



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## PREFACE

This publication is a result of the Workshop on Surface Rights that the Canadian Institute of Resources Law organized in Drumheller in April 1988. Its purpose is to gather together the background papers and the reports of the small group sessions as a record for participants and non-participants alike. While this publication does not amount to conference proceedings, it should provide a clear view of the issues that were explored at the Workshop.

The Canadian Institute of Resources Law has a mandate to undertake research, education and publication on the law relating to natural resources. In areas of controversy, it does not adopt policy positions; rather, it contributes to a better-informed level of debate on the issues. It has had an interest in surface rights for some time, and conceived the idea of this Workshop out of a realization that there are few occasions on which surface rights can be discussed systematically by parties having different stakes in the process. The Workshop was therefore organized to provide a neutral forum for different interests to meet and exchange views in a non-confrontational atmosphere. Participation was necessarily on the basis of invitation so that the Workshop would be kept to a size that would lend itself to a round-table discussion. Efforts were also made to ensure that the participation included an appropriate balance from the various types of operator companies, the various agricultural and other surface interests, the Surface Rights Board (and the equivalent boards in other prairie provinces), the Energy Resources Conservation Board, the Land Compensation Board, and the legal and appraisal professions.

The Institute was very pleased with the way that the Surface Rights Workshop unfolded. The discussions were well-informed and constructive, even where controversial matters were under consideration. For the success of the Workshop it owes a number of debts of gratitude: to the writers of the background papers; to Ms. Susie Washington for acting as moderator of discussions on the second day of the Workshop; to the organizations (the Canadian Association of Petroleum Landmen, the Independent Petroleum Association of Canada, the Canadian Petroleum Association, the Small Explorers and Producers Association of Canada, the International Right of Way Association and Messrs. Drummond, Crooks, Solicitors) that provided funding assistance on a "no-strings-attached" basis; and above all to the participants who contributed two days of their time and expertise.

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# INTRODUCTION

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The surface rights system is one of the main points of contact between the energy industry and the agricultural community in Alberta. It is the process for the fixing of the compensation that industry operators must pay to landowners for the siting of facilities on private land. This system is subject to continuous change, most of which occurs in an evolutionary way rather than in sharp breaks with the past. Some of these changes are seen in the Surface Rights Act; the revisions in 1983, for example, introduced the prepayment of compensation and the entry fee. Other changes are in practice. Over the years, the evidence presented in hearings before the Surface Rights Board has become more detailed, and more use is made of experts such as lawyers and appraisers. There are more appeals and there are more disputes over costs.

The papers that follow address different aspects of this changing situation. As a reading of them will demonstrate, the papers were prepared for the purpose of stimulating discussion among people already familiar with the general framework of the surface rights system. They outline the issues involved, survey the background as a review and an update, and raise a number of alternatives for solving problems. They all refer to alternatives that are to be found in the other provinces with surface rights legislation or in other quasi-judicial tribunals. The discussion that took place at the Workshop seemed to indicate that the background papers covered most (although inevitably not all) of the important issues.

## THE WORKSHOP DISCUSSIONS

The discussions that took place at the Workshop in Drumheller on 21-22 April 1988 began with a review of the themes raised in the discussion papers and then ranged a good deal more widely. On the first day discussion focussed on each theme in turn, and on the second day, in small groups and in plenary session, assessed both the present state of affairs in surface rights and the various possibilities for change. The exchange of views and the exploration of new ideas was of considerable value to the participants.

Some indication of the views that were expressed and the ideas that were put forward appears in the small group reports reproduced in this publication. However, especially for the benefit of readers who were not participants, it may be desirable to review the discussions in general terms. The observations that follow are necessarily the writer's own perceptions of what took place; there was no consensus document drawn up and agreed upon by the Workshop participants. Nor would that have been possible; having the intention of encouraging a free "off-the-record" dialogue on a round-table basis, the Workshop did not negotiate compromises or put resolutions to a vote. Although there was a good balance from the various sectors, the participation was not perfectly representative of every opinion and every interest in surface rights; and in any event the participants' views on most issues were not unanimous.

## PURPOSE AND PRINCIPLES

It is surprising how much commonality of interest surface owners and operator companies could find. Agreement and disagreement on most issues did not follow the dividing line between owners and operators in any predictable way. Owners and operators found that they both share an interest in clear rules and in procedural fairness. The interest in clear rules took form most prominently in a definite consensus that there should be a clearer statement in the Surface Rights Act of the purpose for which compensation is payable, and a clearer set of rules for the determination of that compensation. The Surface Rights Act, in its present form, was criticized by the majority of participants for creating uncertainty as to what compensation is for; the Act was said to be enigmatic when it comes to stating the basic principles of the surface rights system. There was some discussion of the common law background on access to mineral resources in relation to a better definition of the rights that the Act creates; in particular, are wellsites and mines entitled to preferential treatment in comparison with pipelines and power lines? Given that a better statement of purpose and principles is badly needed, there was some discussion about how a process of reform of section 25 of the Act could be initiated.

In this context there was some debate whether the Board's mandate could be altered to require it to consider a list of factors as to compensation, by changing "may" in section 25(1) to "shall". It was interesting to learn that such a change had been made in British Columbia ten or twelve years ago, but that it had

made no real difference; while in Saskatchewan the imperative "shall" in their Act is thought to be important. There was also some debate about the entry fee (section 19), the purpose of which is particularly obscure. The energy and the agricultural industries appeared to have very different understandings of the purpose of the entry fee. One interesting suggestion was that a distinction can be drawn between the objective elements of compensation and the political; and that the former was suitable for determination by a quasi-judicial board such as the Surface Rights Board, while the latter should be determined by the legislature by fixing the entry fee as high or as low as politics dictated.

Words of caution were also heard. There was a suggestion that the statements of purpose and principle in the Act work well; but more generally there were warnings not to tinker carelessly with the Act even though improvements are needed. In particular, agricultural interests wanted to ensure that features of the Act that protect landowners are not compromised if there are to be any changes to the Act.

## FORMALITY AND BOARD PROCEDURE

There was a distinct consensus that it would be desirable, in the interests of improving the credibility of Board decision-making, for Board procedures to become more formal. There was reference to the lower levels of formality that prevailed in surface rights in previous decades, when the Board would visit a site with the farmer and the landman and decide compensation on the spot. There was also discussion of the relationship between the degree of formality and the type of appeal; and of the cost implications of a more formal hearing procedure. However, it was notable, even unexpected, that in most participants' minds concerns with costs and delays were outweighed by the need for a hearing process that would ensure that all relevant issues are thoroughly explored and documented. It was pointed out that Board decisions and court decisions have a significance that goes far beyond their numbers in comparison with voluntary leases and agreements.

Various specific changes to Board procedures were discussed. There was a strong body of opinion that transcripts should be made of Board hearings, or that proper recordings should be made so that a transcript could be prepared if requested. It was felt that, in contrast to the present process of the Board making a tape recording for its own purposes only, transcripts could improve the

credibility of the process; that they would not only help the Board reach its decision, but also would be useful for appeals, and would serve the public's right to know about Board proceedings. There was also discussion of practices in putting witnesses on oath. It was suggested that there should be an exchange of evidence and exhibits before a hearing so that parties would have some forewarning of the type of case they would have to answer. However, there was no consensus that negotiated surface leases should be filed with the Board.

Other procedural innovations were also discussed. One was to make the Board hearing more of a final arbitration than it is now. Another was the introduction of a mediation step before the Board hearing. There was considerable interest in the British Columbia experience with mediation, but in the upshot mediation as a formal requirement did not seem to be a favoured alternative.

## BOARD REASONS FOR DECISION

A great deal of concern was expressed with the quality of the reasons that the Board gives for its decisions; the Board should do more to make the rationale for its decisions understandable - to explain how it got to its conclusion - and to make its decisions in a more consistent manner. The general concern was that reasons that were difficult to understand cast doubt on the expertise and credibility of the Board. One suggestion was that the Board should have staff resources to enable it to analyze complex data and to assist with the writing of decisions.

## BOARD APPOINTMENTS

There was considerable agreement by the participants on the importance of the procedure for the selection of members of the Surface Rights Board. The previous experience of Board members, it was felt, should be in a field related to surface rights. This was held to be important for the Board to justify its claim to expertise in the field. There were several suggestions that the views of Board users should be solicited before appointments are made, whether through a formal review process or through some less formal advisory procedure.

A related question that was aired was the possible perception of bias that could result from the present duty of the Board to report to the Minister of

Agriculture rather than to some other minister. It was made clear, however, that the Minister does not attempt to influence Board policies or decisions.

## APPEALS TO THE COURTS

Discussion on the right of appeal from the Board to the courts ranged over all the various formulations available; full appeal de novo, modified (or "mutant", as one participant put it) de novo appeal (as at the present), ordinary appeal, appeal on point of law or jurisdiction only, and no appeal, leaving only certiorari and other such administrative law remedies. While there was not a Workshop consensus on exactly what alternative was appropriate, there was a very strong consensus that a right of appeal was essential as a check and balance on the Board.

Participants recognized, however, that judges are not specialists in surface rights and that their decisions are often divergent, and various suggestions came forward on how to balance the need for judicial oversight with the Board's role. One was that the appeal provisions should be reformed to ensure that the Court of Queen's Bench gives guidance to the Board rather than being required to supplant the Board's role. For example, after a successful appeal the case could be referred back to the Board which would make its decision in accordance with the court's directions. This could enhance the consistency of decisions and the credibility of the Board. Another suggestion was that the Board itself could make more use of its power to review its own decisions under section 32.

## COSTS

More than any other subject, costs aroused strong feelings and a vigorous debate. Various perceptions of abuse and unfairness in the costs area were referred to. Some industry participants asked why industry should pay costs; from the agriculture side, it was pointed out that without adequate reimbursement for costs, a right to go to the Board and a right of appeal would be worthless. Yet it could not be doubted that there was general acceptance of the principle that the operator will normally be required to pay the reasonable costs of the landowner, except where costs have been frivolously or unreasonably incurred. This, of course, is the principle that presently governs surface rights costs. Given the general endorsement of the principle, the amount of heat that the subject

generates is something of a puzzle. A lot of the discussion seemed to focus on exceptional cases and on the possibilities of abuse of the system - sometimes, one may suggest, to the point of overlooking the general purpose and rationale of the system.

On a more specific level, suggestions came forward that costs awards should consider the success of the parties as well as the reasonableness of the need for representation; that a new approach be taken to costs in test cases, where one party (especially a power or pipeline company) regards the case as an important precedent for negotiations; and that on appeal court taxing officers should have some understanding of surface rights. Another suggestion was that costs should not be dealt with at the main hearing but should be deferred for more careful consideration at a later point. In spite of the high level of consensus on general principle, the issue of costs seems likely to continue as one of the most difficult areas in surface rights.

# PRINCIPLES FOR THE FIXING OF COMPENSATION: SOME CURRENT SURFACE RIGHTS ISSUES

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## INTRODUCTION

The question "How is compensation to be fixed?" is beguiling in its simplicity. Someone unfamiliar with surface rights might be forgiven for thinking that if it is clear that the operator company is liable to pay compensation to the landowner, then fixing the actual amount to be paid in each case is a reasonably straightforward matter. Familiarity makes one aware that the process is far from so straightforward. There is general consensus that an operator has to pay compensation for a right of entry, whether he obtains it by agreement with the landowner or by virtue of an order of the Surface Rights Board, and that in the absence of agreement compensation is to be fixed in accordance with the Surface Rights Act.[1] However, beyond that point, the consensus on how to fix compensation starts to break down quite quickly. The result is that in any one case radically different compensation figures can be put forward by the operator, the owner, the Surface Rights Board or the courts. This does not lead to stability or predictability.

This paper looks at the rules or principles that lay down how compensation is to be fixed under the Alberta Surface Rights Act. It is concerned with the questions of what compensation is paid for, what is compensable and what methods should be used to calculate the correct values. It is not concerned so much with the procedural matters that will be dealt with in later papers. Since the purpose of this paper is to stimulate discussion, I will raise many more questions than I will answer; but I intend at least to draw the reader's attention to what I believe are the main issues in this area at the present.

## 1. THE BASICS OF THE ACT

Although it will be necessary for us to devote much of our time to the fixing of compensation by the Surface Rights Board, we must keep in mind that surface rights and compensation are usually settled by private negotiation in a wellsite lease or right-of-way agreement. It is said that nine out of ten entries are settled that way. Indeed, the policy of the Surface Rights Act is to encourage

negotiated settlements, with the Board being there only if negotiations do not succeed. The figures arrived at in negotiation are naturally influenced by each party's guess of what the Board would award if the case should be taken there, and conversely Board awards are influenced by the levels arrived at in voluntary negotiations.

The Board's function is entirely focussed on the fixing of compensation. Its function with respect to granting the right of entry is more and more clearly expressed to be a formality in which it has no discretion. The Board's main power, therefore, is that in section 23: to hold a hearing to determine the amount of compensation payable and the persons to whom it is payable. Its exercise of this power is guided by section 25 which in subsection (1) contains the list of factors that the Board may consider in determining the amount of compensation payable. Rather than quoting these well-known factors, I would prefer to draw attention to other aspects of sections 23 and 25. Firstly, the Board may consider the listed factors. It is not obliged to consider all the factors or even (perhaps) any of them. Secondly, the list is open-ended in that the Board may consider any other factors that it considers proper under the circumstances. Thirdly, there is no general statement in sections 23 and 25, or elsewhere in the Act, as to why compensation is actually payable. The answer may be thought to be self-evident, but the amount of debate about the very fundamentals of fixing compensation suggests that the matter is not so simple. General statements as to what compensation is for appear in the legislation of British Columbia, Saskatchewan, and Manitoba.[2]

## 2. SPECIFIC ISSUES

In turning now to consider some of the specific issues that are of interest, I should insert a reminder that it is no criticism to draw attention to areas of controversy and uncertainty. The surface rights system is a dynamic one; new ideas enter it, new problems arise and new ways of thinking emerge. Throughout, there is the tension that arises from permanently diverging interests. It should also be pointed out that the four issues discussed here are by no means the only issues of current interest. There are many other significant issues, such as compensation for setbacks for sour gas, and compensation for damage to the land in expectation of regulatory scrutiny by the Land Conservation and Reclamation Council.

## (a) THE FOUR HEADS APPROACH, THE GLOBAL APPROACH, AND PATTERN OF DEALINGS

The ebb and flow of different ideas is nowhere clearer than in the competition between the "four heads" approach, the "pattern of dealings" approach and the "global" approach.[3] The "four heads" approach deals in turn with the various ways that the owner has experienced losses. Adapting the list of factors in s.25, the Board usually groups these items under four heads and fixes a sum for each: (1) value of the land (or more accurately, value of the interest granted), (2) inconvenience and nuisance, (3) loss of use of the land, and (4) adverse effect. The total of the four sums is the first-year compensation, and the total of items (3) and (4) is the compensation payable in subsequent years. The "pattern of dealings" approach points out instead that owners and operators negotiate many wellsite leases and right of way agreements, and when they agree on compensation they must be taken to be able to judge in their own interests what the proper figures are. The compensation awarded by the Board should approximate the levels of compensation paid for similar rights of entry in the voluntary "market" for surface rights. The proper levels can be ascertained from a pattern of comparable dealings. The related "global" approach emphasizes that it is important to consider the overall effect of the entry without breaking compensation down into different categories. It relies on evidence acquired through the "pattern of dealings" approach. The "pattern of dealings" approach is a view of the type of evidence that is usefully put before the Board; the "global" approach is more a view of how the Board should make its awards.

This diversity of opinion is frequently aired before the Surface Rights Board and in the courts. Each approach has its successes and failures. Oddly, the debate sometimes overlooks the indisputable fact that both the "four heads" approach and the "pattern of dealings" approach are entirely valid in law; that is, they are both consistent with the Act. The former has the sanction of lengthy use, and the latter has the continuing (and authoritative) support of the Court of Appeal. The leading case is Livingston v. Siebens Oil and Gas Ltd.,[4] which held that where there is a pattern of voluntary dealings it should be given great weight by the Board, and indeed should be departed from only with the most cogent reasons. A series of Court of Appeal cases since then has adhered to this rule without the least equivocation.[5]

Opinion on pattern evidence has fluctuated rather more in the Court of Queen's Bench. This fluctuation is noteworthy, because the point of law has been

ruled on by the Court of Appeal on several occasions. For the most part, however, both the "four heads" approach and pattern evidence have been given a role. One of the most exhaustive inquiries into the use of pattern evidence was the group of twelve appeals known as Dome Petroleum Ltd. v. Richards.[6] Miller A.C.J. concluded that area agreements negotiated by surface rights groups should be given great weight as they represented the best evidence available to determine the value of the "taking" to both sides. More recently, attacks have been successfully launched against area agreements for containing elements of protectionism in and coercion on top of compensation: Sandboe v. Coseka Resources Ltd.,[7] Shell Canada Resources Ltd. v. Lozeron.[8] Similarly, it has been said that the surface rights policy of a large land-owning body, such as a grazing association, does not represent true negotiation as it is fixed and presented to the operators on a "take it or leave it" basis: Lomond Grazing Association v. Signalta Resources Ltd.[9] In contrast it has also been held that compensation negotiated with an organized, represented group of landowners is better evidence than figures negotiated with individual unrepresented owners: Transalta Utilities Corp. v. Greenfield.[10]

Pattern evidence is thus subject to scrutiny to check that the agreements re reached voluntarily and freely of external constraints, and also that the agreements are truly comparable with the land in issue. There are many interesting questions to be asked. If the company has let time go by and finds itself having to acquire surface rights in haste, is it acting voluntarily? If a company is willing to pay extra to avoid expensive Board hearings, should it pay the landowners a bonus surreptitiously or should it write the reasons for the bonus right into the lease? Is a pattern of Board awards in a district as good evidence as a pattern of private dealings? To turn to the global award, how is such an award to be made in conformity with the Board's obligation to give reasons for its decisions?[11]

Amid these currents and counter-currents of opinion on "four heads", "pattern evidence" and "global awards", the Surface Rights Board has not found it easy to maintain a steady course. It gave expression to these problems in a recent decision, Bow Valley Industries Ltd. v. Sharp:

> As earlier stated the issue before the Board whether compensation should be awarded in so called "global amounts" or according to a strict interpretation of certain factors under Section 25 of the Act has been dealt with in countless previous decisions with admittedly varying results depending upon the individual evidence brought by the parties. An untold number

> of those decisions have been referred to the Courts by way of appeal, and the decisions emanating from there have been equally if not more varied.[12]

Is there anything that the Legislature can do to reduce these problems? Perhaps the Act could be amended to ban pattern of dealings evidence or the giving of awards in a global fashion. Alternatively, it could be changed to insist that those approaches be used wherever possible, and to state the circumstances where they would be deemed to be possible. These amendments, of course, would be heavy-handed and perhaps unworkable, but there are three other possible changes that are worth more discussion.

Firstly: amendment of s.25(1) so that the Board shall consider the listed factors rather than (as at present) may consider them. This is how the legislation is worded in Manitoba[13] and Saskatchewan.[14] It may have the effect of requiring a separately-stated analysis of each item in a way that would preclude a "global" award.

Secondly: express authority for the Board to consider any pattern of comparable privately-negotiated right-of-entry agreements. This would presumably put to rest any doubts about the power of the Board to take the "pattern of dealings" approach, although much could turn on the exact manner in which this power is related to the existing powers of the Board to consider various factors. This path of reform has been taken in Manitoba, where the new Surface Rights Act contains a provision, inserted at second reading, that along with the other enumerated factors the Board shall consider:

> (h) any other relevant matter that may be peculiar to each case, including
>
> ...
>
> (ii) the terms of a comparable lease agreement that a party may submit to the Board for consideration.[15]

Thirdly: a requirement that all privately-negotiated right-of-entry agreements be lodged with the Board. This provision appears in the British Columbia,[16] Saskatchewan[17] and Manitoba[18] legislation. The benefit that it may bring is a full body of information about voluntary transactions, so that pattern evidence can be discussed with the knowledge that all the relevant transactions are on the table. The "pattern of dealings" approach would be improved as a result. The material would have to be open to owners and operators. The cost of maintaining this accessible data base would have to be considered.

(b) VALUE OF THE LAND OR OF THE INTEREST TAKEN

When the "four heads" approach is in use, one of the main heads of compensation is the value of the land. In 1983 the Surface Rights Act's reference to this matter was expanded in section 25(1) to include two related factors:

> (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
>
> (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land.

As the Board often stresses, the value of the land is not automatically compensable, but is ascertained as a solid base on which compensation may be estimated.[19]

Of all the heads, value of the land provides the most opportunity for dispute, and Board awards for it are far more vulnerable to upset than those made for more intangible factors such as nuisance and inconvenience. One may well ask whether in consequence there is too much emphasis on the value of the land in Board and court deliberations. The two main difficulties at the present seem to be the calculation of residual and reversionary values, and the proper valuation of a small parcel such as a wellsite or a right of way carved out of a larger parcel of land. The small parcel issue may have receded somewhat with the introduction of s.25(1)(b) which seems to allow the Board to proceed without adding any extra sum to the per acre value in recognition of the extra value to the owner of keeping his property intact. The Board has consistently refrained from adding any such extra sum, just as (perhaps in a quid pro quo) it has consistently refrained from subtracting any sum for residual and reversionary value.

The residual interest is the interest in the land that the landowner retains while the right of entry order is in effect. In the case of a buried pipeline , for example, a land owner has a right to farm over the right of way. The reversionary interest is the right to regain full title and possession upon termination of the right of entry order at some future date. These interests stay with the owner, and if they are thought to be significant they are deducted from the amount of compensation that is awarded with respect to the value of the land.

Since 1983 the Surface Rights Act has provided that the Board <u>may</u> ignore the residual and reversionary value,[20] and the Board has done so on every occasion that the issue has been raised. On appeal, the courts have with equal firmness and

consistency maintained that residual and reversionary values can not be ignored, whatever the Act may say, and have deducted them whenever the evidence permits.[21] The resulting reductions of compensation levels can be very significant. Also significant, but in terms of principle, is the way that a reasonably clear change in the rules in the Act for the fixing of compensation can fail to have the effect in the courts that may have been expected of it.

(c) DOUBLE COMPENSATION

Another specific issue that has come to the fore in the last couple of years is the argument that an award of compensation for both the value of the land and the loss of use of the land is tantamount to requiring the payment of a full purchase price and also an annual rental. This analogy leads to the conclusion that there has been a double compensation. The argument has not made progress before the Surface Rights Board, but it has been accepted in several court decisions. Thus in Cabre Exploration Ltd. v. Arndt[22] it was used to disallow compensation for the interest taken, and in Alberta Power Ltd. v. Kneeland[23] to disallow annual compensation for the loss of use of the land.

One may ask whether every case of an award under both heads is duplicitous even if some of them may be so. There may be cases where such an award is the only way to ensure full recompense. In fact, in Lamb v. Canadian Reserve Oil and Gas Ltd.[24] the Supreme Court of Canada came to precisely this conclusion. While considering the Saskatchewan Act, and after a review of the purpose of the Legislature the Supreme Court held that the Board was properly entitled to award compensation in respect of the value of the land and the loss of its use.

(d) DRY HOLES

When a right of entry is being negotiated for a wellsite, and often when wellsite compensation is before the Board, it is not known whether the drilling will result in a producing well or a dry hole. This uncertainty is catered to by fixing one figure for first-year compensation and another for annual compensation. Operators have argued that in dry hole cases the first year figure should be reduced in any event, referring in particular to the reversionary value in the owner that reduces the value of the land award. The Board generally refrains

from making a reduction.[25] It can be argued that abandonment and reclamation of the site are often delayed; and that compensation should be assessed not for the extent of the activities that the operator actually carries out, but for the rights of the landowner that are affected, as at the time that those rights were taken.

If the case goes on appeal, whether because the well happens to be found to be a dry hole before the appeal period is up, or for other reasons, then the court, with the benefit of hindsight in its appeal by way of a new hearing, can decide on a radical revision of the Board hearing.[26] When this occurs it raises difficult questions about the function of the appeal procedure and the proper assessment of compensation.

## 3. BROADER ISSUES

There are a lot of surprisingly broad questions about surface rights compensation that are not immediately answerable from the Surface Rights Act.

(a) The first group of questions falls under the general head of: What is the purpose of surface rights compensation?

(i) Is compensation paid to indemnify the surface owner, i.e. to put him in the position, so far as money can do it, that he would have occupied if the right of entry had not occurred? This issue seems to be more precisely covered in the British Columbia legislation, which states that an operator is liable "to pay compensation to the land owner for loss or damage caused ...".[27]

(ii) Is compensation paid in lieu of a privately-negotiated purchase price or rental? Interestingly, the same British Columbia legislation goes on to say that the operator is also liable, if the Board so orders, "to pay rent for the duration of the occupation or use".

(iii) Is compensation payable for incursions that actually take place in physical form, or is it payable for the rights acquired, whether or not the operator actually uses them?

(iv) For what point in time and for what duration is compensation fixed? Is it fixed once and for all, or is it fixed with a view to making incremental adjustments on a progressive basis?

(v) Is a right of entry expropriation, and should the compensation be set in the same way as in expropriation proceedings?

(vi) Is the surface rights system no more than an adjustment to the common law rules that existed before it, in respect of oil and gas wellsites and coal mines? Are those categories of right of entry to be regarded differently from other entries such as for powerlines and pipelines?

(vii) What is represented by the entry fee of $500 per acre that must be paid under section 19? Is it to acknowledge the compulsory nature of the right of entry, is it to represent the intangible aspects of ownership, or is it purely a cash payment from the resource and utility industries to the farming community? (The answer is important because if the payment is for something specific, then no compensation is payable for that thing.)

(viii) On what basis is compensation to be fixed in a review of an annual compensation payment under section 27 (as newly revised)? Assuming that the factors listed in section 25 are to be taken into account, is the party seeking a review obliged to demonstrate what changes in circumstances justify a change from the rates fixed five years ago,[28] or is compensation to be fixed without reference to the previous levels?

(b) A second set of questions asks what is the character of surface rights legislation?

(i) Is the Surface Rights Act a framework of settled rules to be applied in a process of objective analysis? Is it neutral in its effect on individuals and on different sectors of Alberta society and the Alberta economy? Is it value-free?

(ii) Alternatively, is the Surface Rights Act best understood as a political adjustment made to rectify an imbalance of power between two sectors, in the same way, for example, as do the laws concerning mortgagee foreclosures or labour relations? Is it, therefore, value-laden?

## 4. CONCLUSION

I conclude with a few thoughts on what we should ask for in the principles, or rules, that govern the fixing of compensation. The first is to point to the twin criteria of fairness and efficiency. That rules should be fair, or just, could go unsaid except that the idea sometimes gets lost in the urge to achieve efficiency. We should expect the compensation rules to achieve fair results between owner and operator; and also between owner and owner, and operator and operator, which implies some degree of consistency. As for efficiency, we look

for a system of rules that will be straightforward and economical to put into effect. They should lend themselves to a smooth interaction between the operator company and the land owners. They should be capable of application in an informal context as well as in a formal one such as a courtroom.

Another useful question is what is the proper balance between flexibility and certainty in the rules? At one extreme we could find a bare statement that compensation is payable and that a particular tribunal is to fix it. At the other, we could find a very simple, very certain, rule that compensation is to be so many dollars for every right of entry, on whatever land and for whatever purpose. (An example of a less extreme, but still very fixed, set of rules is the "ready reckoner" formula for compensation that was used in Saskatchewan before 1968.[29]) It is obvious that flexibility is necessary to cope with wide ranges of factual circumstances, but there is an equal need for some degree of certainty and predictability as well. Predictability is an issue that comes to mind when we often see opposing parties putting forward compensation figures that are widely different; and even more so when the decisions of the tribunals fixing compensation are so often very different from each other. For all that, the very different interests that operators and surface owners have in the use of the land make it inevitable that there will always be differences in their views on the fixing of compensation.

## FOOTNOTES

1. S.A. 1983, c.S-27.1.

2. Petroleum and Natural Gas Act, R.S.B.C. 1979, c.323, s.9(2); Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c.S-65, s.3; Surface Rights Act, S.M. 1987, c.62 (C.C.S.M., c.S235), ss.2 & 16(3).

3. Generally, see Carter et al., "Compensation for Surface Rights in Alberta" (1985) 23 Alta. L. Rev. 435; Barton, "Controversy in Surface Rights Compensation: Pattern of Dealings Evidence and Global Awards" (1985) 24 Alta. L. Rev. 34.

4. [1978] 3 W.W.R. 484, (1978) 8 A.R. 439 (Alta. App. Div.).

5. E.g., Nova,An Alberta Corp. v. Bain, [1985] 4 W.W.R. 460; Walde v. Great Basins Petroleum Ltd. Alta. C.A. Calgary Appeal No.17152, 8 October 1985; Lomond Grazing Association v. Signalta Resources Ltd. Alta. C.A. Calgary Appeal No.18445, 25 November 1987.

6. (1986) 42 Alta. L.R. (2d) 97.

7. (1987) 37 L.C.R. 289 (Alta. Q.B.).

8. (1987) 37 L.C.R. 298 (Alta. Q.B.).

9. Supra, note 5.

10. (1986) 49 Alta. L.R. (2d) 48 (Alta. Q.B.).

11. Administrative Procedures Act, R.S.A. 1980, c.A-2, s.7. See the paper by Lucas and Scarth.

12. S.R.B. Decision 88/0062 and 88/0063.

13. Surface Rights Act, S.M. 1987, c.62 (C.C.S.M., S235), s.26(1).

14. The Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c.S-65, s.47(1).

15. Supra, note 13, s.26(1)(h).

16. Petroleum and Natural Gas Act, R.S.B.C. 1979, c.323, s.10.

17. Supra, note 14, s.30.

18. Supra, note 13, s.17.

19. Twin Oils Ltd. v. Schmidt (1968) 74 W.W.R. 647 (Alta. Dist. Ct.) is often referred to.

20. Supra, note 1, s.25(2).

21. E.g., Dome Petroleum Ltd. v. Grekul [1984] 1 W.W.R. 447 (Alta. Q.B.); Cabre Exploration Ltd. v. Arndt [1986] 4 W.W.R. 529 (Alta. Q.B.) and Sandboe v. Coseka Resources Ltd. (1987) 37 L.C.R. 289 (Alta. Q.B.), where there actually appears to have been no basis in the evidence for the deduction.

22. Supra, note 21.

23. Alta. Q.B., Hope J., Red Deer No.8603-22183, 17 December 1987.

24. [1977] 1 S.C.R. 517.

25. E.g., Coseka Resources Ltd. v. Toews, S.R.B. Decision 88/0021.

26. E.g., Dome v. Grekul and Sandboe v. Coseka, supra, note 21.

27. Supra, note 16, s.9(2). Also see Manitoba's Act, supra, note 13, s.16(3).

28. As in Merland Explorations Ltd. v. Wainwright Farms Ltd. (10 February 1986) Vegreville 8511-0084, Smith J. (Alta. Q.B.) at 4.

29. Petroleum and Natural Gas Regs. 1963, O.C. 976/63. For example, "capital damage for each well site: for the first acre twice the (municipally) assessed value plus $35; ... for each acre of dirt roadway twice the (municipally) assessed value plus $35."

# DECISION-MAKING BY THE SURFACE RIGHTS BOARD OF ALBERTA

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## 1. INTRODUCTION

This paper deals with various aspects of the process by which the Surface Rights Board makes decisions. We begin by outlining some of the important constraints placed upon the Board by the requirements of administrative law. After reviewing these principles, we shall deal with specific issues related to the Board's decision-making process, including the Board's expertise, its treatment of legal principles, and the Board's use of both its own previous decisions and judicial decisions.

## 2. ADMINISTRATIVE LAW PRINCIPLES GOVERNING BOARD DECISION-MAKING

As a statutory tribunal empowered to make decisions affecting people's rights, the Board is subject to a number of statutory and common law rules designed to ensure that it stays within its jurisdiction.[1] This concept of jurisdiction unites the administrative law rules which govern many different aspects of the decision-making process including the constitution of the Board, the subject matter of its deliberations, and the manner in which it hears evidence and develops its decision. For the purposes of this paper, we need only discuss the relatively few rules that have proved to be of particular importance to the Surface Rights Board of Alberta.

### a) THE REQUIREMENT FOR REASONS

One of the important rules governing the Board's decision-making process is its statutory obligation to set out its findings of fact and give reasons for its decisions.[2] From a policy standpoint, there are several justifications for this requirement.[3] Firstly, these reasons make the decision more acceptable to the parties by providing an explanation and an opportunity to assess their chances of a successful appeal. Secondly, this requirement promotes better administrative

decision-making and increased public confidence by discouraging arbitrariness and bias, and encouraging care and consistency. Finally, the provision of reasons facilitates the courts' supervisory role by outlining the evidence relied on and explaining how the decision was arrived at.

This requirement to give reasons has created some difficulty in the surface rights area and appears as a common ground of appeal from Board compensation orders. In part this can be traced to the subjective nature of compensation awards and the necessity for the Board to rely on its expertise in making decisions. Another factor is that the obligation to provide adequate reasons has proven to be difficult to reconcile with the use of pattern of dealings evidence and, in particular, global compensation awards.[4]

The reasons requirement is of primary importance in appeals from Board compensation orders.[5] In this context, there has been some divergence in opinion as to what constitutes adequate reasons and how the quality of the Board's reasons affects the court's inclination to vary the Board's order. The appellate court normally accords substantial respect to Board decisions - the usual test dictates that they will not be disturbed unless they are demonstrably wrong.[6] When the reasons given by the Board for its decision are perceived to be inadequate, however, the Court has been somewhat less hesitant to vary the Board's order.[7] The expressed rationale for this attitude is that the Board's expertise can only be respected and given weight when the use of that expertise can be identified from the reasons provided.[8] In some cases the Court of Queen's Bench has set a relatively high standard for the Board's reasons, leaving little to the Board's expertise.[9] It appears that the courts occasionally lose sight of the principle that no matter how cryptic the reasons of the Board, there must still be evidence demonstrating that the result was demonstrably wrong before the court can interfere.[10]

b) EVIDENCE

The Surface Rights Act specifically provides that the Board is not bound by the legal rules of evidence.[11] This is a normal provision for all types of administrative tribunals, and is confirmed by the Administrative Procedures Act's provision[12] that the Act does not require any tribunal to "adhere to the rules of evidence applicable to the courts of civil or criminal jurisdiction". The common law position, apart from statute, is essentially the same. The rationale for this

rule is to foster the basic objectives in entrusting decision-making powers to administrative tribunals as opposed to courts, including expeditious and inexpensive decision-making, reliance on board members' expertise, and informal non-technical procedures.

This immunity from the legal rules of evidence means that Board decisions are not liable to be set aside in judicial review proceedings solely because the Board erred in admitting evidence contrary to the relevant common law principles. In particular, it is not bound to exclude evidence that may technically fall within the hearsay rule. This rule excludes assertions of persons other than the witness as evidence of the truth of those assertions. The Board is thus free to consider "second hand" evidence that recounts the observations and experience of other persons, and presumably to give it the weight that the Board considers it deserves.

The immunity from the legal rules of evidence does not mean, however, that the Board can rely in its decisions on any evidence. A major practical reason is the de novo appeal to the Court of Queen's Bench. The weight and reliability of the evidence supporting a Board decision may be assessed by the Court; though of course the Court will begin with the principle from the Lamb[13] and Caswell[14] cases that the Board's decision should be given considerable weight. If evidence before the Board is vague or uncertain or is hearsay, it will have less weight and reliability in the Court's eyes, and will undermine the "great weight" of the Board's decision.

Similarly, the Board cannot reject evidence relevant to the matter in issue. Nor can it rely on evidence that relates to entirely irrelevant matters. Its decision will also be set aside if there is no evidence at all to support the decision, and it has been held that the Board's presumed expertise alone will not suffice.[15] Concern was also expressed by Dixon J. in Golden Eagle Oil & Gas Ltd. v. Carlstad[16] about the Board's stated reliance on its "knowledge gained through numerous involvements in similar situations".[17] If the Board purports to rely on evidence that is not disclosed to one of the parties or to which a party has no reasonable opportunity to respond, its decision may be set aside as contrary to the principles of natural justice or procedural fairness.[18]

The point to be drawn from this discussion is that the immunity from the legal rules of evidence should not be taken by either the Board or the parties as license to ignore any and all legal principles concerning evidence. It is not carte blanche to rely on any evidence, whether clearly relevant to the matters in issue

or not, and to ignore fundamental procedural fairness. Greater attention to these requirements may save both parties the time and expense of needless appeal or judicial review proceedings.

## 3. PROCESS ISSUES IN BOARD DECISION-MAKING

Having raised some of the issues relating to the broad administrative law constraints on the Board, we will now turn to a review of some of the more specific process issues relating to Board decision-making.

### a) BOARD APPOINTMENTS

As with other administrative tribunals, the Board's approach is to a large extent influenced by the background and experience of its members. This being so, the procedure by which Board appointments are made is a legal policy issue of some importance.

The Surface Rights Act provides that members of the Board are appointed by the Lieutenant-Governor in Council.[19] This cabinet appointment provision is the same as that which applies in the case of surface rights tribunals in the other three western provinces,[20] the Alberta Energy Resources Conservation Board,[21] and the Public Utilities Board of Alberta.[22] Interestingly, a similar provision governs the appointment of Alberta Provincial Court judges[23] and the federally-appointed judiciary.[24]

Formal controls on the exercise of this cabinet appointment power are not common in Canada. More familiar in this country are informal processes developed in order to ensure the quality of appointments. In the case of federally-appointed judges, for example, candidates are assessed through a system of prior consultation that includes the legal profession. Another example of such informal controls is the ERCB's tradition of members being appointed from within its own ranks to ensure some previous experience.

There are examples of more formal controls in appointments to administrative tribunals of other countries. In the United Kingdom, for instance, the Home Secretary must consider recommendations made by a special Council on Tribunals before making appointments to administrative tribunals.[25] Similar controls exist in the United States. It is also noteworthy that the Law Reform Commission of Canada has reviewed this issue, and recommended 1) the

development of written guidelines setting out the qualifications that an appointee to a given tribunal should possess 2) the creation of an Administrative Council to advise the government on such appointments, or, alternatively, the circulation of candidates' names to relevant private sector associations; and 3) the placing of public job advertisements to fill vacancies.[26] These steps, it was felt, would ensure the quality and appropriateness of tribunal appointments, and counteract the loss of public confidence that often attends "closed" appointment processes. The Commission also recommended that a greater effort be made to appoint persons with varying backgrounds and training representative of the various interests that a given tribunal must take into account.[27] In the surface rights context, potential appointees could include persons with a background in appraisal, agrology, lease negotiation, farming, ranching, and surface rights law.

In addition to the appointment process itself, provisions relating to the tenure of appointees are also worthy of mention. On this point, the Law Reform Commission recommended that the term of appointment and relative security of tenure associated with federal appointments be adjusted so as to make such appointments attractive to a wide variety of persons.[28] The same considerations could be applied to Surface Rights Board appointments. Maintenance of the quality of Board decision-making could also be enhanced by provision for ongoing review of appointees and the development of training programs to supplement the "on-the-job" learning process.[29]

b) BOARD INDEPENDENCE

One of the several methods of ensuring that appointed tribunals like the Surface Rights Board are ultimately accountable to the electorate is to designate in the empowering statute a Minister "responsible" for the tribunal. In the case of the Surface Rights Board it is the Minister of Agriculture.[30] This does not and cannot, without express statutory authority, mean that the Minister can direct the Board on particular applications. It does mean, however, that the Board must provide formal reports to government through that Minister, showing the year's applications and how they were dealt with and reporting on any other matters that the Minister requests.[31] The Board must also deal with the Minister's department during the budgetary process. The question that may be raised is whether these legitimate accountability arrangements raise significant concerns about the

Board's independence, given that agriculture departments are charged generally with promoting and supporting the agriculture industry.

In light of the increasingly sensitive relations between the agricultural and natural resource industries, it seems unlikely that these concerns will go away. Would it be prudent to further neutralize the Board's position by changing its responsible minister to one who oversees a generalized and service-oriented ministry, such as the Attorney General? If the Agriculture connection is to continue, would it be appropriate to formally require the Board to report annually to the Legislature through the Minister of Agriculture, rather than directly to the Minister? This latter change may be essentially symbolic, but it underlines the fundamental impartiality of the Board as a quasi-judicial tribunal. A third alternative is to designate no minister, and require the Board, like the Public Utilities Board, to report directly to the provincial cabinet.

### c) PREVIOUS BOARD DECISIONS

Like other administrative tribunals, the Surface Rights Board is not bound by its own previous decisions. It is, however, open to the Board to apply the principles and approaches of its previous decisions in deciding new applications. In fact, maintenance of relative certainty and stability of expectations on the part of both mineral owners and surface landowners requires that decisions reflect some degree of consistency. Several issues arise in this context.

#### i) PRINCIPLE AND EVIDENCE

There is an important distinction between the principles of previous Board decisions and the evidence that forms the basis of those decisions. Principles, including interpretation of relevant provisions of the Act, may be followed without elaboration in subsequent applications. An example is the "four heads" approach to determination of compensation. However, evidence upon which previous decisions were based, particularly evidence related to nearby comparable land, is in a different category. Although the Board's practice is not always consistent in this regard, procedural fairness normally requires that such evidence be filed, and that the parties be given an opportunity to test the evidence through questioning.[32]

ii) REFERENCE TO PREVIOUS DECISIONS

More generally, if previous decisions are to be relied upon, they should be identified in the Board's reasons, and the elements of the decisions considered to be relevant should be specified. It is insufficient as Dixon J. pointed out in Golden Eagle Oil and Gas Ltd. v. Carlstad[33] for the Board to merely recite its "knowledge gained through numerous involvements in similar situations". This duty does not, however, detract from the right of Board members to apply their general knowledge and experience in deciding particular cases.

iii) "FETTERING" DISCRETION

Another principle developed by courts in judicial review applications requires that the Board not apply its previous decisions mechanically and routinely without adequate consideration of the particular facts and circumstances of new applications. This "fettering of discretion" must be avoided by giving real and independent consideration to the current application. Courts have been particularly apt to find fettering of discretion where a board develops and applies a predetermined policy or formula without adequate consideration of the merits of each case. If, for example, the Board were mechanically to apply its computer averages of previous awards, such decisions may be jurisdictionally flawed as failing to decide the merits of the applications, or as procedurally unfair if there were no notice or opportunity to question use of the computer averages. In principle, there is nothing wrong (in fact there may be considerable value) with development and use of such a data base. It must, however, be carefully used as merely one factor to be taken into account, along with the facts and circumstances of each case.

d) BOARD'S USE OF LEGAL DECISIONS

It goes without saying that as a matter of principle the Board is obliged to pay heed to the guidance provided by the courts in decisions on appeal or on applications for judicial review. While as an expert tribunal the Board is entitled to substantial deference with respect to matters given to its jurisdiction, the courts have an unquestioned supervisory role to ensure that it remains within its jurisdiction and to correct errors in law, such as a misinterpretation of the Surface Rights Act. On a more practical level, a failure by the Board to follow a

judicial pronouncement results in a decision that stands a good chance of being overturned on appeal.

While this recognition of the judicial hierarchy would hardly seem to warrant comment, some questions have been raised as to the degree to which judicial guidance is provided to, and accepted by, the Surface Rights Board in Alberta. On a cursory level, references to judicial decisions do not figure as frequently in Board decisions as one might expect given the unique provision for de novo appeals and the concomitant wealth of judicial commentary in this area. For the most part the case law appears to be discussed in response to decisions cited by counsel, rather than being applied independently by the Board.

More specifically, a few examples of an apparent lack of communication can be gleaned from a review of Board and judicial decisions. The first of these relates to the issue of the degree to which residual and reversionary interests should be considered in making awards of compensation. Briefly stated, the issue is whether the residual and reversionary interests in land should be evaluated as part of the calculation of compensation in light of the fact that a taking under the Surface Rights Act is not in the nature of a fee simple taking. This issue was considered in a series of judicial decisions which consistently overturned Board decisions due to the Board's failure to recognize and deal with these values. In the face of the Board's continuing refusal to adopt this approach, Miller J. found it necessary to admonish the Board in Dome v. Grekul for persisting with an approach that had been discredited by higher authority.[34]

A more recent example appeared in cases relating to the right of entry fee. In two successive decisions Cavanagh J. stated his view that the right of entry fee constitutes a recognition by the Legislature of the intangible part of the bundle of rights, and that it was not the Board's responsibility to deal with these intangibles as a matter of compensation under s.25 of the Act.[35] Notwithstanding those decisions, the Board continues to consider that its award of compensation is to include these intangible damages.[36] Entirely apart from the question whether this characterization of the entry fee is correct in law,[37] one could reasonably expect the Board to recognize and deal with this direct judicial criticism of a standard statement in its reasons for decisions.

To be sure, this apparent lack of communication within the surface rights hierarchy is not limited to the application of Queen's Bench decisions by the Board. Examples of Court of Queen's Bench disregard of direction from the Court of Appeal are also evident.[38]

To some extent, therefore, one can sympathize with the Board's frustration in attempting to deal with the great body of judicial decisions that the Act has generated. A recent Board decision[39] is prefaced with a reference to this frustration:

> As earlier stated the issue before the Board whether compensation should be awarded in so called "global amounts" or according to a strict interpretation of certain factors under Section 25 of the Act has been dealt with in countless previous decision[s] with admittedly varying results depending upon the individual evidence brought by the parties. An untold number of those decisions have been referred to the Courts by way of appeal, and the decisions emanating from there have been equally if not more varied.

It would seem that as long as this "counsel of despair" governs the Board's approach to judicial decisions, consistency in decision-making will remain an elusive target.

e) THE BOARD'S RELATIONSHIP TO OTHER REGULATORY BODIES

A brief explanation of the Board's relationship to other regulatory bodies is relevant in a discussion of Board decision-making. Of primary importance is the Alberta Energy Resources Conservation Board, which administers the licencing process for energy resource developments. Landowners directly affected and other interested parties must appear before the ERCB should they wish to object to the drilling of a well, the location of a well or the manner in which it is operated.[40] A hearing is usually held prior to the issuance of the ERCB order,[41] but failing this the parties affected by an order made without a hearing may apply for one within thirty days after the order is made.[42] The Surface Rights Board is bound by the ERCB proceedings to the extent that it may not refuse a right of entry for ERCB-approved operations and it may not consider objections based on the necessity for or the location of the proposed operation.[43]

The activities of the Land Surface Conservation and Reclamation Council[44] in regulating surface disturbances are also relevant. Particularly significant is the Council's issuance of reclamation certificates when in its opinion the land surface is in satisfactory condition.[45] There are opportunities for the affected parties to comment on and appeal the issuance of these certificates.[46] Once a certificate is issued, the Council can no longer issue orders to the operator in respect of reclamation work.[47] In addition, right of entry orders and leases cannot be terminated until a reclamation certificate has been obtained.[48] While

the Board is aware that an operator must pass the scrutiny of the Council to terminate a right of entry, this does not prevent it from awarding compensation for damage to the land that cannot be rectified by reclamation work.[49] Where the issue is the quality of the reclamation work and whether a reclamation certificate should have been issued, the Board prefers that the Council deal with the dispute.[50]

f) ALTERNATE DISPUTE RESOLUTION MECHANISMS

The Surface Rights Board exercises statutory powers of decision in relation to applications for rights of entry and to applications for compensation. This represents a relatively formal decision function that we have seen is essentially quasi-judicial in character. There are alternative dispute resolution models.

One is a mediation model, in which an independent mediator, agreed upon by the parties, endeavours to assist the parties in reaching an agreement. This process is designed to promote ordinary informal negotiation and bargaining. It is facilitative, not determinative. Key elements include independence, credibility and skill in the mediator, as well as good faith and diligence on the part of the parties.

Mediation can be entirely a private matter. The parties may simply agree upon a mediator. Alternatively, there may be a statutory mechanism, involving application by one or both of the parties, and appointment of an appropriate mediator by a public agency. These mediation provisions may represent a preliminary step in a statutory process that leads, failing agreement, to a binding decision by the agency. This is essentially the scheme administered by the Mediation and Arbitration Board under the B.C. Petroleum and Natural Gas Act.[51] The Saskatchewan Surface Rights Acquisition and Compensation Act[52] also makes provision for referral by the Board of matters in dispute to a mediation officer, upon the request of a party. In practice however, the Saskatchewan mediation powers appear not to have been used.

The B.C. mediation system is a worthwhile model for consideration. There has, however, been occasional failure to distinguish clearly between the actual mediation and the subsequent arbitration steps. For example, in Chambers v. Mediation and Arbitration Board and Esso Resources Canada Ltd.[53] there appeared to be confusion on the part of both the Board and the parties about whether a matter was still before a mediator, or was in fact presented for

arbitration by the Board. The Board's right of entry order was set aside by the court, which held that the Board was mistaken in its view that a meeting with the parties after the mediator had "dismissed" the right of entry application was a rehearing of the mediator's order under the Act. The case underlines the fact that mediation-arbitration systems of this kind require that each step be well defined and consistent with the statutory powers conferred on the mediator and the Board. It is also imperative that the parties understand the procedural steps and be certain about where they are in the process at any given time. Another more general implication is that there are potential difficulties with a system that vests mediation powers in the same Board members who may later act as arbitrators on a particular matter.

Arbitration, like mediation, can be entirely private, based on agreement by the parties concerning an arbitrator and the issues to be arbitrated. An essential feature of most arbitration processes is that the parties agree in advance to be bound by the arbitrator's ruling. There is no appeal, and judicial review concerning the arbitrator's authority and the procedural fairness of the process is relatively limited. Procedures are characterized by greater informality than that required of administrative tribunals.

The arbitration concept can also be embodied in a statute. This has been done in British Columbia and Saskatchewan. On the whole these systems are very similar to that of Alberta, which gives administrative decision-making powers rather than arbitral powers to the Surface Rights Board. The key distinction, however, is the relative finality of decisions. Consistent with the arbitration model, the British Columbia and Saskatchewan statutes make board decisions on the merits of applications final with only supervisory appeal provisions, limited to review of questions of law (B.C.) or law and jurisdiction (Saskatchewan).

## 4. CONCLUSION

We have in this paper attempted to highlight some of the legal and policy issues that have arisen in respect of the process by which the Alberta Surface Rights Board makes decisions. To a significant extent, many of these issues relate to the more basic question of the appropriate degree of formality for the Board's decision-making process. Increased use of judicial authorities, for example, could lead to more emphasis on legal argument before the Board. Changes in the

Board's approach to and use of evidence, or its giving of reasons could also affect the formality with which proceedings are conducted.

The question of formality is therefore central to the surface rights process. The Board's origins can be traced in part to a desire for an informal, accessible and expeditious system for resolving surface rights disputes. Whether these objectives remain central in the present context is a key issue in the debate concerning the proper functioning of the Board.

## FOOTNOTES

1. This concept of jurisdiction is dealt with more fully in the Workshop paper dealing with Judicial Supervision of the Board.

2. Administrative Procedures Act, R.S.A. 1980, c.A-2, s.7; Alberta Regulation 135/80.

3. See Kushner, H.L., "The Right to Reasons in Administrative Law", (1986), 24 Alta. L. Rev. 305.

4. See B. Barton and B. Roulston, A Guide to Appearing Before the Surface Rights Board of Alberta, 1986, Working Paper 11, Canadian Institute of Resources Law, at 73-4; N. Bankes, "Case Comment: Dome Petroleum Ltd. v. Richards et al." (1986), 42 Alta. L.R. (2d) 167 at 170.

5. Compliance with the reasons requirement may also be an issue in judicial review applications, as was the case in Central Western Railway v. Surface Rights Board (1987), 56 Alta. L.R. (2d) 115 (Alta. Q.B.).

6. This test is derived from Caswell v. Alexandra Petroleums Ltd. [1972] 3 W.W.R. 706 (Alta. S.C., A.D.); approved in Lamb v. Canadian Reserve Oil and Gas Ltd. [1977] 1 S.C.R. 517.

7. Whitehouse v. Sun Oil Co. Ltd. [1982] 6 W.W.R. 289 at 295 (Alta. C.A.).

8. Id.

9. See Transalta Utilities Corporation v. Olson (1984), 31 L.C.R. 134 (Alta. Q.B.), where Rowbotham J. overturned the Board's compensation award on the basis of insufficient reasons but appeared to substitute similarly cryptic reasons.

10. Paloma Petroleum Ltd. v. Hutterian Brethren Church of Smoky Lake (14 January 1987) Edmonton 19276 (Alta. C.A.); Westmin Resources Ltd. v. Brodbin (18 December 1984) Vegreville 8411-0018, Smith J. (Alta. Q.B.).

11. Surface Rights Act S.A. 1983, c.S-27.1, s.8(3)(b).

12. Supra, note 2, s.9(b).

13. Supra, note 6.

14. Supra, note 6.

15. Lomond Grazing Association v. PanCanadian Petroleum Limited (18 June 1985) Lethbridge 8406-01492, MacLean J. (Alta. Q.B.).

16. (30 January 1985) Peace River 8409-0141, Dixon J. (Alta. Q.B.).

17. Id., at 14.

18. Wade, Administrative Law (5th ed., 1982) at 441 ff; Administrative Procedures Act, supra, note 2, s.4 & 5.

19. Supra, note 11, s.3(2).

20. Petroleum and Natural Gas Act, R.S.B.C. 1979, c.323, s.13(1); The Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c.S-65, s.8(2); The Surface Rights Act, S.M. 1987, c.62 (C.C.S.M. c.S235), s.6(1).

21. Energy Resources Conservation Act, R.S.A. 1980, c.E-11, s.4(1).

22. Public Utilities Board Act, R.S.A. 1980, c.P-37, s.3(2).

23. Provincial Court Judges Act, S.A. 1981, c.P-20.1, s.2(1).

24. Law Reform Commission of Canada, Independent Administrative Agencies, Working Paper 25 (Ottawa: 1980), at 160.

25. Id., at 162.

26. Id., at 160-163.

27. Id., at 163.

28. Id., at 163-164.

29. Id., at 170-172.

30. Surface Rights Act, supra, note 11, s.1(f).

31. Id., s.6.

32. See discussion at supra, note 18.

33. Supra, note 16.

34. Dome Petroleum Ltd. v. Grekul (1984), 28 Alta. L.R. (2d) 260 at 270 (Q.B.).

35. Sandboe v. Coseka Resources Ltd. (1987), 37 L.C.R. 289 at 293 (Alta. Q.B.); Shell Canada Resources Ltd. v. Lozeron (1987), 37 L.C.R. 298 at 305-6 (Alta. Q.B.).

36. See Bow Valley Industries Ltd. v. Sharp, SRB Decisions 88/0062 and 88/0063 at 6-7, where the paragraph specifically criticized by Cavanagh J. was repeated and the Board stated its view that a "large part of the adjudication of the compensation deals with damages of an intangible nature ...".

37. This issue is discussed in the Workshop paper dealing with Principles of Compensation.

38. See Walde v. Great Basins Petroleum Ltd. (8 October, 1985) Calgary 17152 (Alta. C.A.) where the Court of Appeal rebuked MacLean J. for (inter alia), failing to consider the Court's direction in Livingston v. Siebens [1978] 3 W.W.R. 484 (Alta. C.A.).

39. Supra, note 36, at 5.

40. Barton and Roulston, supra, note 4, at 5-6.

41. Energy Resources Conservation Act, supra, note 21, s.29.

42. Id., s.43.

43. Barton and Roulston, supra, note 4, at 6-7.

44. Constituted by the Land Surface Conservation and Reclamation Act, R.S.A. 1980, c.L-3, s.15(1).

45. Id., s.54(1).

46. Id., ss.41, 53, 58-60.

47. Id., s.43(1)(a).

48. Surface Rights Act, supra, note 11, s.31(4).

49. Barton and Roulston, supra, note 4 at 32.

50. Id.

51. Supra, note 20.

52. Supra, note 20.

53. [1980] 3 W.W.R. 102 (B.C.S.C.).

# JUDICIAL SUPERVISION OF THE SURFACE RIGHTS BOARD OF ALBERTA

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## 1. INTRODUCTION

This paper is designed to place the Surface Rights Board of Alberta within the broad perspective of administrative law and to ask the question: "What is the appropriate relationship between such an administrative tribunal and the courts?" After reviewing the general principles governing the relationship between administrative decision-makers and the courts, we will describe the particular relationship between the Surface Rights Board and the courts. The paper then concludes with a discussion of the alternative ways in which this relationship can be modified by the legislature.

Tribunals like the Surface Rights Board are typically established by governments to resolve particular classes of disputes expeditiously and impartially. The decisions are removed from the regular courts because it is felt that a less formal board, generally composed of experts in that area of decision-making, will be able to do a better and faster job than the courts. They are removed from government departments to foster the appearance of independence of the decision-makers. Nevertheless, such tribunals must still be held accountable for their decisions so as to avoid arbitrary or despotic rule by administrative decision-makers. That accountability could be achieved in our political system in several ways. First, the accountability might be purely political. Board members might be responsible to a Minister of the Crown and hold office at pleasure. The Minister would in turn be accountable to the legislature for the tribunal's decisions. Second, accountability might be achieved internally through internal rehearing, review and appeal powers. Finally, accountability may be achieved through the judicial supervision of tribunals either through the court's inherent rights of review or through an explicit statutory right of appeal. The focus of this paper is the attainment of accountability through that latter technique, although we would suggest that the second technique ought not to be totally ignored.

The Canadian Charter of Rights and Freedoms adopted in 1982 commences with the words: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." It is the second of those two fundamental phrases which engages our attention here, for another way to describe our topic is to ask the question: What do we mean by the "rule of law" in the context of the Surface Rights Board of Alberta? Put simply, the rule of law involves the proposition that every exercise of governmental power, whether by a minister, an official, or a tribunal or board must be in accordance with law, which for our purposes means authorized by provincial statute. Nobody may interfere with my rights, privileges or freedoms unless it can be proven that the action is justified, directly or indirectly, by statute. If I wish to question the legal pedigree of somebody's actions I do so through the courts which exercise a supervisory role over the state and its functionaries, including the Surface Rights Board. Historically, this has always been a major role of the courts,[1] even before the Charter, curbing the excesses of governmental power and ensuring that discretion is exercised in accordance with the law rather than on a whim; ensuring for example that somebody's liquor licence is not removed because he or she happens to have red hair or is a Jehovah's Witness.

But those examples are the egregious examples. Other cases will be much more difficult. When ought the courts to intervene? As a general rule a superior court, such as the Court of Queen's Bench in Alberta, will be able to intervene in two distinct situations. First, the statute which establishes a board, or authorizes the exercise of a discretionary power, may make specific provision for an appeal to a court. The right of appeal may be broad or narrow and we shall refer to different forms of appeal rights later in the paper. It is important to emphasize that there is no <u>right</u> to appeal to a court from a decision of a tribunal unless one is specifically accorded by statute. Second, a court is said to have an inherent supervisory jurisdiction over all tribunals and governmental decision-makers. This supervisory role of the courts (often referred to as the power of judicial review) is a limited one of ensuring that the board or official has not gone beyond its jurisdiction in rendering a decision.

The concept of the "jurisdiction of a tribunal" is critical to an understanding of the proper relationship between courts and statutory decision-makers. All statutory decision-makers have a limited authority conferred upon them by statute. They abuse that authority and hence lose jurisdiction to make decisions if, for example, they fail to give an affected person

a hearing, allow the decision to be made by somebody else (such as a member of staff),[2] take into account irrelevant considerations, or make an award for an easement for a road when they could only award easements for pipeline purposes. Or suppose that a board member exercises his or her discretion in a particular way as a result of a conversation with a cabinet minister or because he or she doesn't like one of the lawyers; then, in all these situations the court will intervene because the statute did not authorize the board to act in that way.

But if a board exercises its powers within its delegated authority, it is not subject to review by the courts even if a court might disagree with the decision or have made it in a different way. The rationale for this is that the legislature specifically decided to give this power (e.g., to make decisions on right of entry orders and compensation) to a board with the intention that the board make the decision as it saw fit. Presumably the legislature decided that it would rather trust a board composed of lay experts with such decisions rather than the courts with all their formal trappings. Provided that the board stays within the "four corners" of its statutory authority in reaching its decision, a court will not intervene. An example will make the point. A board set up to discipline police officers may hear unsworn testimony from a number of individuals but then rely on Y's evidence because Y appeared to be the most credible. The weighing of evidence is something which is entrusted to the board itself by the legislation; just because a court might have weighed that evidence differently is no justification for intervening, because the board has not exceeded its jurisdiction. On the other hand, if the board failed to disclose the substance of the testimony to the police officers before making its decision, the board could have lost jurisdiction because the legislature envisaged that the board could make a disciplinary decision only after giving the affected officers the opportunity of an adequate hearing and the opportunity to respond to allegations made against them.

This supervisory jurisdiction of the courts is said to be "inherent"; that is, it is not something which need be provided for by statute. It is therefore quite distinguishable from a right of appeal. In addition to supervising the jurisdiction of a board, a supervisory court may also review some decisions of the board on points of law,[3] such as where a board misinterpreted its constituent statute.

## 2. JUDICIAL SUPERVISION OF THE ALBERTA SURFACE RIGHTS BOARD

To this point we have described the general principles which govern the relationship between administrative decision-makers and the courts. That relationship, or the details of that relationship, may be varied to some extent by the legislature in the case of any particular board. Of special significance is the legislature's ability to expand or contract the supervisory role of the courts by adjusting the appeal clauses of a board's constituent statute. We can see this development illustrated in the Surface Rights Act of Alberta.[4]

As discussed, the judicial supervision of the Board can be broken down into two categories: first, supervision pursuant to the express appeal provisions of the statute and second, supervision pursuant to the court's "inherent jurisdiction" in areas not governed by the appeal provisions. Let us start with the appeal provisions which are of by far the greater significance.

Section 26 of the statute provides one of the widest appeal provisions which we have ever seen in the constituent statute of a tribunal.

> The operator or any respondent named in a compensation order may appeal a compensation order made under this Act to the Court of Queen's Bench as to the amount of compensation payable or the person to whom the compensation is payable or both.

Section 26 goes on to say in subsection (6) that "An appeal to the Court shall be in the form of a new hearing", and subsection (7) provides that the Court has the powers and jurisdiction of the Board. Appeals are to be set down for hearing at the next sittings of the Court and are generally heard expeditiously (subsection 5). Subsection (8) provides that a further appeal lies to the Court of Appeal. We say that these are wide grounds of appeal for two reasons. First, the appeal is not limited to an allegation that the Board made an error of law or exceeded its jurisdiction; it extends to an appeal on the merits of the Board's decision. Second, if the court finds that the Board has made an error it need not remit the matter back to the Board but it may itself make the decision which it feels that the Board ought to have made. In the final section of this paper we shall contrast this situation with that of other provincial surface rights boards and other tribunals in Alberta, but first let us examine how the courts have actually interpreted the broad language of section 26. The classic statement as to the correct role of the courts on appeals of this nature is found in Caswell v. Alexandra Petroleums Ltd.[5] where Mr. Justice Allen was commenting on an

essentially identical provision found in earlier legislation. Mr. Justice Allen stated:[6]

> In closing I would like to make a few general remarks as to what I conceive to be the functions of a court hearing an appeal from an award of the Right of Entry Arbitration Board. In the first place, although I have pointed out that the hearing is in the nature of a trial de novo, it is nevertheless an appeal from the findings of the tribunal making the award. Tribunals such as the Right of Entry Arbitration Board may be presumed generally to be selected because of knowledge or experience in the field in which they are to operate. They are dealing with these types of cases very frequently and they must be deemed to gain knowledge of their particular field through that experience. When they make detailed findings of fact, as they did in this case, after viewing the area and hearing representations from both sides, and render written reasons as extensive as they did in this case, I think that their findings should not be lightly disturbed. In other words I think it would require cogent evidence to establish where they were wrong and why their awards should be varied or revised upward or downward. The very informality of their proceedings may suit the type of case with which they are dealing better than formal court procedure.
>
> These boards were set up to meet a demand that compensation be fixed on a fair and adequate basis where lands or rights are expropriated for private operations, and considerable weight should be attached to their findings, except where they are clearly demonstrated to be wrong.

That statement has since been approved by the Supreme Court of Canada[7] and has been cited with apparent approval in almost every surface rights case since then. Nevertheless our courts have found it relatively easy to overturn decisions of the Board. It is not difficult for a court to characterize the Board's decision as demonstrably wrong. Furthermore, the courts have also indicated that deference to the Board's decision will not be appropriate where the Board has not provided adequate reasons to justify its decision.[8] To some extent this latter point is tied to the Board's obligation to give reasons for its decisions pursuant to the Administrative Procedures Act.[9]

If the principle laid down in the Caswell case were vigorously adhered to, the broad right of appeal would not be a cause of major concern. However, the varying application of the test (potentially by any one of more than 50 members of the Court of Queen's Bench) creates tremendous uncertainty, uncertainty which encourages the feeling that the Board hearing in many cases is merely "round one" of a fight which will inevitably be carried, at the very least, to the Court of Queen's Bench. In 1985 Associate Chief Justice Miller commented in the Richards

case that in the Grande Prairie judicial district alone there were "some 80 appeals filed from recent decisions of the Surface Rights Board".[10] The free availability of appeals also produced a situation in 1981 in which the Court of Appeal felt it necessary to condemn the practice of using the hearing before the Board as a "mere stalking horse or provisional inquiry" with the real inquiry to be conducted before the Court.[11]

This uncertainty causes us to question whether the broad right of appeal under section 26 of the Act is appropriate. Is it the best use of society's resources? Is it the best use of judicial resources? Is it appropriate to have the decision of an expert tribunal reviewed on the merits by any one of 50 generalist judges? Is the result qualitatively better?

Before we consider the alternatives, however, let us complete our review of the judicial supervision of the Board by referring to the second category of cases. In any other situation than those referred to in sections 22 and 26, any excesses in the Board's actions may be questioned by relying upon the traditional inherent supervisory jurisdiction of the courts, or by asking the Board to cure its own errors by a rehearing under section 32.[12] By comparison with the plethora of cases under section 26 there are very few examples of traditional judicial review of Board decisions. One example, however, is the recent case of Central Western Railway Corporation v. Surface Rights Board.[13] In that case Mr. Justice Cawsey quashed a decision of the Board on the grounds inter alia that it breached the rules of natural justice by not giving the plaintiff a hearing before making a right of entry order, by not providing reasons for its decision, and by failing to turn its mind to whether or not it had constitutional jurisdiction to proceed with the case.

Much as de novo appeals from decisions of the Board on compensation matters are heard expeditiously by the Court so too are applications for judicial review. For example, in the Central Western Railway case, the Board's decision was made on July 8, 1987, the application was heard on 11 September 1987 and the decision was handed down in October 1987. In terms of expeditiousness there is little to choose between the trial de novo and the application for judicial review. If anything, one would expect the latter to be more expeditious since such applications are heard in chambers on the basis of affidavit evidence alone.

This second category of inherent judicial supervision over the Board is also very wide when compared with the position of other tribunals. It is not uncommon, for example, for the legislature to include in a tribunal's constituent statute something known as a privative clause. Typically, in Alberta such a clause

is used to channel applications for judicial review and confine them within strict time limits. This point raises the question of the available alternatives to the status quo in surface rights.

### 3. THE ALTERNATIVES

There is a wide range of alternatives. The decision is not one of review or no review, appeal or no appeal. Instead, it is clear that the legislature is fully capable of crafting review and appeal clauses to meet the needs of particular tribunals. Some of the variables are such things as: review or appeal; a requirement of leave, or review or appeal as of right; the court to which the appeal or review application is made (Queen's Bench or Court of Appeal); the scope of review or appeal; and the timing of any such review or appeal. Now let us turn to look at some of these alternative approaches.

We shall first examine how other provinces have structured the judicial supervision of their surface rights tribunals. In Saskatchewan, a person affected by any decision or order of the Board (other than a right of entry order) may appeal to the Court of Appeal, with the leave of a single judge of that Court, on a question of law or jurisdiction[14] within 30 days of the decision. The scope and style of review is very similar in Manitoba, where the new Act[15] provides that an appeal may be brought to the Court of Appeal, with leave, within one month of an order of the Board. Leave may be sought where the Board fails to observe a principle of natural justice, makes an error of law, or acts beyond or refuses to exercise its jurisdiction.[16] In British Columbia a different scheme has been adopted. Section 24 of the Petroleum and Natural Gas Act provides that an appeal lies to the B.C. Supreme Court from an order of the Mediation and Arbitration Board on a point of law.[17] In addition the inherent supervisory jurisdiction of the Court would be available to correct any jurisdictional errors.

We can see from this brief survey that the availability and scope of the judicial review of Board decisions is far wider in Alberta than in any other western province. It remains for us to consider how the Alberta legislature has dealt with the judicial review of other administrative tribunals, and to consider the prevailing judicial approach to the review of administrative tribunals.

Let us compare the Surface Rights Board with four other Alberta provincial tribunals: the Public Utilities Board, the Energy Resources Conservation Board, the Labour Relations Board and the Land Compensation Board. These tribunals

exhibit three distinct approaches. The first two boards have been dealt with similarly by the legislature. In each case the legislature has purported to deny access to the inherent supervisory jurisdiction of the court[18] but at the same time has provided that a decision or order of either Board may be appealed, with leave, to the Alberta Court of Appeal, within one month,[19] on any point of law or jurisdiction. There is no review on the merits. The scheme adopted for these boards therefore is very similar to the scheme which has been adopted in Saskatchewan and Manitoba for their surface rights boards.

The scheme adopted for the Labour Relations Board is, on its face, somewhat different but the net result is very similar. The Labour Relations Act protects the Board by a strongly worded privative clause[20] designed to preclude the Board's inherent review jurisdiction, but it then goes on to provide that the traditional judicial remedies will be available if an application for judicial review is commenced within 30 days.[21] Such an application would be brought before the Court of Queen's Bench as opposed to the Court of Appeal but the overall scope of review would be very similar to the appeal on a point of law or jurisdiction that is provided for the E.R.C.B. or the P.U.B.

A third approach governs appeals from the Land Compensation Board. In this case, appeals lie as of right to the Court of Appeal on questions of law or fact.[22] The Court of Appeal may either refer the matter back to the Land Compensation Board or make the decision itself.[23] This power to refer matters back to the Board allows the Court to provide guidance on matters of legal principle without pre-empting the actual decision making.

That completes our discussion of the scope of the review or appeal, the timeliness of applications, the court to which such an application will be made, and the question of whether or not the review or appeal is as of right or only with leave. We will now examine the degree of deference to the tribunals which the courts show when considering such statutory provisions.

In our discussion of the Surface Rights Board we noted that, at least in principle if not always in practice, the courts interpreted the appeal provisions of the Surface Rights Act somewhat narrowly, purporting to intervene only where the Board was "clearly demonstrated to be wrong". We can conclude this section of the paper by considering what tests the courts have adopted with respect to other tribunals operating under different legislative schemes, such as the ones discussed above.

By and large, the courts have adopted an approach which, in both principle and practice, is even more deferential to the tribunal than the approach adopted in Caswell. First, the courts have indicated that, where they have been confined to review on jurisdictional grounds by an appropriately drafted privative clause, they should not intervene to quash the decision of an expert tribunal unless its interpretation of its constituent legislation is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".[24] Second, the courts have indicated that they will be equally deferential to tribunals such as the Labour Relations Board and labour arbitrators where the right of review is merely qualified and channeled by the legislature.[25] Alberta courts have been somewhat less deferential where the legislature has provided for an appeal on a question of law or jurisdiction. Thus in Trans Alta Utilities Corp. v. Alberta Public Utilities Board,[26] Mr. Justice Kerans for the court was clearly of the view that the "patently unreasonable" test ought not to be applied to the Public Utilities Board. Nevertheless, the test adopted would probably be more deferential than the Caswell case which the courts use when the appeal is an appeal on the merits. Interestingly, the Caswell test has been applied to the Land Compensation Board.[27]

## 4. CONCLUSION

At present the Alberta legislature provides a very broad right of appeal to the Court of Queen's Bench on compensation matters. Wide use is made of this appeal right leading to suggestions in the past that the Board itself was effectively being by-passed. Even if this is no longer the case we must question whether this constitutes an appropriate use of the judiciary and of court time. More fundamentally, we must ask whom we wish to make decisions on compensation - the Board or the courts? If our answer is the former we must further question why it is necessary to provide for an appeal on the merits to the Court of Queen's Bench.

The evidence from other jurisdictions, and from this jurisdiction with respect to other Boards, indicates that the Alberta Surface Rights Board has been dealt with uniquely on the point of judicial supervision. We believe that the time has now been reached where some more limited schemes for judicial supervision should be considered. The P.U.B./E.R.C.B. scheme, the modified judicial review

application of the Labour Relations Board, and the Land Compensation Board approach have been put forward as alternatives.

We believe that under a more restrictive appeals regime, the Board would still be accountable to the Courts and that the rule of law would still prevail. Further accountability and consistency might be achieved through a broader use of the Board's rehearing and review powers under s.32 of the Surface Rights Act. Decision-making under such a scheme would be more expeditious. There would be far fewer appeals and there would be nothing to prevent these appeals or applications for review being brought on quickly.

## FOOTNOTES

1. In fact, judicial review on jurisdictional grounds is recognized to be entrenched by s.96 of the Constitution Act, 1867: Crevier v. A.G. Quebec [1981] 2 S.C.R. 220.

2. Such as the Board Solicitor; Central Western Railway v. Surface Rights Board (1987), 56 Alta. L.R. (2d) 115 (Alta. Q.B.).

3. To be accurate, the inherent supervisory jurisdiction of a court only extends to those errors of law which "appear on the face of the record". The term "record" is a technical term which in Alberta extends to the board's decision, its reasons and the transcript of evidence. Alberta Rules of Court, Rule 753.12 (Jan., 1988); Woodward Stores v. Alberta Assessment Board, [1976] 5 W.W.R. 496 (Alta. S.C.T.D.).

4. S.A. 1983, c.S-27.1.

5. Caswell v. Alexandra Petroleums Ltd. [1972] 3 W.W.R. 706 (Alta. S.C. App. Div.).

6. Id., at 728. It is worthy of note that this statement also demonstrates the distinction between a true trial de novo, wherein the decision being appealed from is not considered by the appellate Court, and surface rights appeals, where the Board's decision is reviewed and (at least in theory) accorded considerable weight.

7. Lamb v. Canadian Reserve Oil and Gas Ltd. [1977] 1 S.C.R. 517.

8. Whitehouse v. Sun Oil Co. (1982), 22 Alta. L.R. (2d) 97 (Alta. C.A.).

9. Administrative Procedures Act, R.S.A. 1980, c.A-2, and Alta. Reg. 135/80; this obligation was discussed in Dome Petroleum Ltd. v. Grekul (1983), 28 Alta. L.R. (2d) 260 (Alta. Q.B.).

10. Dome Petroleum Ltd. v. Richards (1985), 42 Alta. L.R. (2d) 97 at 100 (Q.B.).

11. Esso Resources Canada Ltd. v. Smulski (1981), 18 Alta. L.R. (2d) 200 at 203 per McClung J.A.

12. Sometimes a court may actually require an applicant to pursue an internal remedy before the Board before proceeding with an application for judicial review: Harelkin v. University of Regina [1979] 2 S.C.R. 561; Re B.C.G.E.U. and Labour Relations Board of B.C. (1986), 26 D.L.R. (4th) 560 (B.C.C.A.).

13. Supra, note 2.

14. The Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c.S-65, s.71.

15. The Surface Rights Act, S.M. 1987, c.62 (C.C.S.M., c.S235), s.48.

16. Although "natural justice" is specifically referred to in the Manitoba Act we do not believe that the Manitoba legislation provides a broader ground of review since most commentators would view a breach of the principles of natural justice as a jurisdictional breach.

17. Petroleum and Natural Gas Act, R.S.B.C. 1979, c.323, s.24(2).

18. By means of a privative clause; Public Utilities Board Act, R.S.A. 1980, c.P-37, s.67, Energy Resources Conservation Act, R.S.A. 1980, c.E-11, s.45.

19. R.S.A. 1980, c.P-37, s.62, R.S.A. 1980, c.E-11, s.44.

20. Labour Relations Act, R.S.A. 1980, c.L-1.1, s.18(1) & (2).

21. Id., s.18(3).

22. Expropriation Act, R.S.A. 1980, c.E-16, s.37(1) & (2).

23. Id., s.37(2).

24. Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227 at 237. The better view is that the "patent unreasonableness" test does not apply to those preliminary or collateral questions which the tribunal must answer correctly in order to obtain "jurisdiction in the narrow sense".

25. Re Alberta Union of Provincial Employees and the Board of Governors of Olds College, [1982] 1 S.C.R. 923; Suncor v. McMurray Independent Oil Workers Loc. 1 (1983), 23 Alta. L.R. (2d) 105.

26. (1986), 43 Alta. L.R. (2d) 171 at 179-180 (C.A.).

27. Abasand Holdings Ltd. v. Province of Alberta (1980), 24 A.R. 349 at 357-8 (C.A.).

# COSTS ASPECTS OF THE SURFACE RIGHTS PROCESS

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## 1. INTRODUCTION

This paper deals with two conceptions of the costs associated with the surface rights process. In a broad sense, costs can be thought of as the expenses incurred by the participants in the process. In the first part of this paper we will review some alternative theories in an attempt to rationalize the Surface Rights Act's allocation of these expenses.

The term "costs" is also used in a more narrow and legalistic sense to refer to the costs awarded by the Board to participants in the hearings process. The second part of this paper identifies some of the issues relating to these costs awards: the general approach taken by the Board, the treatment of particular items of costs and appeals of costs awards. We also review the manner in which costs awards are dealt with by other tribunals to provide comparisions with the Alberta approach.

## 2. THE ALLOCATION OF COSTS BY THE SURFACE RIGHTS ACT

A great variety of costs are imposed on participants in the surface rights process. These costs can include the time associated with negotiating leases and attending hearings as well as expenses such as professional fees and compensation payments. The delays and lost time attributable to the process represent additional indirect costs to both operators and landowners.

One of the basic policy issues in surface rights is the allocation of all of these costs associated with the surface effects of resource extraction. That is, from a regulatory perspective, which party should logically bear these costs? Leaving aside the purely political factors which have contributed to the Act's evolution, two rationales can be suggested.

One interpretation is that the decision manifest in the Act is that the producers of the resource being extracted should bear these costs. The rationale from an economist's perspective is that the surface costs that would otherwise

accrue to the landowner should be treated as simply one more cost of resource production and recognized as such in both production decisions and in the cost of the resource being sold. In this sense, the Surface Rights Act can be seen as a method of "internalizing" these costs so that the operators' costs of production more closely approximate the overall social costs (i.e., including costs to the landowner) arising from production.[1]

The same broad objective of correcting perceived market failures underlies other forms of regulation relating to such diverse policy objectives as environmental protection and maximizing energy resource conservation. The common theme in all of these forms of regulation is that if left unregulated, the individual firm's need to reduce costs and maximize profits will in some cases lead to undesirable results: costs associated with surface disturbance may be imposed upon the landowner without any concomitant benefit; environmental damage may result from resource extraction; and overall recovery from oil and gas reservoirs may be lessened by imprudent production practices. The regulatory response to correct these tendencies has been, respectively, to require the payment of compensation to landowners, to clean up environmental damage, and to require good production practices in oil and gas production.

Another view of the Surface Rights Act begins with the proposition that the process by which the Board grants right of entry is tantamount to an expropriation.[2] Flowing from this characterization, the Act's provision of compensation to landowners accords with the general principle that property should not be taken without affording full compensation. The precise nature of this "compensation for expropriation" principle is difficult to state succinctly, but a brief review is warranted.

The origins of this principle can be traced to 13th-Century England in Magna Carta, which declared that[3]

> No freeman shall be ... disseised of his free tenement ... unless by the lawful judgment of his peers, or by the law of the land.

Although Magna Carta can be overridden by subsequent statutes, it has enjoyed a particular status because of its origin as "a solemn compact between the Sovereign and people". As such, it has been characterized as a "quasi-statute" forming part of the English constitution[4] which eventually found its way into Canadian law.

A reference to protections for property also appears in the Canadian Bill of Rights:[5]

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

A similar provision appears in the Alberta Bill of Rights.[6] It is important to note that both of these "bills of rights" are statutes rather than constitutional documents. They operate in their respective federal and provincial spheres by requiring that every law not specifically exempted from their operation be construed so as to not abrogate the rights they enumerate. Because they have the potential to "override" other statutes in this sense, they have been described as "quasi-constitutional instruments".[7]

The first direct constitutional protection of civil rights in Canada came with the adoption of the Charter of Rights in 1982.[8] Although the Charter provides for the survival of undeclared existing rights,[9] it is notable in our context for failing to provide any protection for property rights.[10]

The current status of the "compensation for expropriation" principle in Canadian law is as a rule of legal interpretation. There is a presumption in our law that compensation will accompany expropriations:[11]

> ... the general rule of law in expropriation cases is and has long been that compensation is given, and any statute providing for expropriation without compensation must be expressed in the clearest and most unequivocal terms.

Less clear is the existence of an implied right to compensation in the event of an expropriation.[12] These interpretive rules exist alongside an expectation that the Legislature will abide by the rule that compensation should be provided for forced takings. In our current context, the Surface Rights Act can be seen as a manifestation of this principle.

### 3. LEGAL COSTS

The term "costs" is used in this section in a narrow sense to refer to those costs which may be recovered from the opposite party in proceedings before the Surface Rights Board or the courts. These are dealt with separately both because of their relative importance[13] and due to the number of contentious issues that have arisen in relation to costs awards in surface rights proceedings.

This section of the paper describes the general principles governing amounts of costs by the Board and the courts before dealing with the more specific issues that have arisen in this context.

## (a) CURRENT SYSTEM

### (i) BOARD HEARING

The Surface Rights Act gives the Board complete discretion in awarding costs for Board proceedings:[14]

> 42(1) The costs of and incidental to the proceedings under this Act are in the discretion of the Board and may be fixed in any case at a sum certain or may be taxed.
> (2) Without restricting the generality of subsection (1), the Board may make regulations
> (a) establishing a schedule of fees and other expenses incurred by a party in connection with proceedings before the Board that may be allowed as part of that party's costs under this section, and
> b) respecting the circumstances under which the Board may allow costs with respect to matters dealt with in the schedule on a basis other than that prescribed in the schedule.
> (3) The Board may order by whom the costs are to be taxed and allowed.
> (4) The costs may include all preliminary costs of the respondent necessarily incurred in reaching a decision whether or not to accept the compensation offered by the operator.

To date, no regulations relating to costs have been promulgated pursuant to s.42(2).

In exercising this discretion, the Board's practice has been to award reasonable costs in favour of the landowner.[15] This is consistent with the principle of full compensation on an expropriation,[16] and also ensures that the affected landowner is able to retain professional assistance.[17] To guard against abuse of this indemnification, the Board has developed a "reasonableness" requirement:[18]

> a party entitled to an award of costs is entitled to be reimbursed for any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings.

This test is applied from the perspective of the party against whom the costs are awarded, as opposed to the actual client.[19]

(ii) APPEAL HEARING

Costs incurred in appealing Board decisions to the courts are governed by the following provision:[20]

> The costs of an appeal under this section,
>
> (a) when the appeal is by the operator, are payable by him on a solicitor and client basis regardless of the result of the appeal, unless the Court finds special circumstances to justify it to award costs on any other basis, or
>
> (b) when the appeal is by the owner or occupant,
>
> (i) if the appeal is successful, are payable by the operator on a solicitor and client basis, and
>
> (ii) if the appeal is unsuccessful, are payable on a party and party basis to the party, if any, that the Court in its discretion may direct.

The effect of this provision is that the operator must pay the cost of all appeals on a solicitor and client basis, unless the landowner initiates an unsuccessful appeal or unless there are special circumstances.[21]

In the case of an unsuccessful appeal by a landowner, the courts often decline to award costs to either side.[22] In Transalta Utilities Corp. v. Kube,[23] Stratton J. heard simultaneous appeals from both the operator and the landowner; both appeals were determined to be unsuccessful. Recognizing that s.26(9) did not deal with the situation before him, the judge awarded the landowners ninety percent of their solicitor-client costs to give effect to "... the spirit of that section ...".[24]

With respect to the "special circumstances" referred to in s.26(9)(a), Stevenson J.A. commented in Whitehouse v. Sun Oil Co. Ltd.[25] as follows:

> Without proposing any test I would have been prepared to find special circumstances if I could say the owners maintained an untenable position.

The relatively small amount of time spent on the landowner's unsuccessful cross-appeal was held to constitute "special circumstances" in Evaskevich v. Bankeno Resources Ltd.[26] In Shell Canada Resources Ltd. v. Lozeron,[27] Cavanagh J. appeared to find that the particular conduct of the Board, operators and landowners in negotiating and accepting area agreements amounted to special circumstances.[28] In Northwestern Utilities Limited v. Kellar,[29] Cavanagh J. stated that the "special circumstances" must be at least partially the fault of the landowner and would not be found where the Board was at fault.[30]

(b) SELECTED ISSUES

(i) TAXATION OF COSTS

Although the ordinary meaning of "taxation" refers to the levying of taxes on income or property, its usage in this context is quite different. In respect of costs, taxation is the process by which a client may bring his bill for legal services before an independent party (the so-called taxing authority) in order to have that bill assessed as to reasonableness. In surface rights cases, one of the issues that arises is whether a party ordered to pay costs can have the opposing party's legal bill taxed in this manner. This arose in Wainoco Oil and Gas Ltd. v Solick,[31] where the operator was ordered to pay the landowner's costs on the appeal of a Board decision. It was argued on behalf of the landowner that if the operator succeeded in reducing the bill through taxation, that could result in the landowner receiving less than full indemnity which is the intention of the Act. Cavanagh J. disagreed, holding that whoever is responsible for a solicitor's bill (in this case the operator) has the right to have it taxed.[32]

The second issue arising is who should conduct the taxation. The Board has the power to order a sum certain by virtue of s.42(1). If the Board chooses not to do so, s.42(3) gives it discretion to designate a taxing authority. Although there is some authority indicating that the Board could direct this issue to the taxing officer in the Court of Queen's Bench (who handles the taxation of civil litigation costs),[33] there is also some judicial opinion indicating that the Board must designate a party within its jurisdiction.[34] (It is clear that costs incurred on appeals can be referred to the taxing officer in the Court of Queen's Bench.[35])

With respect to the criteria to be applied in taxing costs before the Board, there is some authority suggesting that the applicable test is the same as that used to determine reasonable costs arising in civil litigation.[36]

(ii) APPEAL OF COST AWARDS

It is not clear whether a Board order as to costs can be appealed to the Court of Queen's Bench.[37] In Bergman v. Francana Oil and Gas Ltd.[38] the Alberta Court of Appeal clarified the Queen's Bench authorities in holding that there was no right of appeal; however the privative clause upon which this decision was founded no longer appears in the new Act. The earlier authorities

allowing such appeals are not helpful as they did so without any discussion on this point.

(iii) CONSTITUTIONALITY

The constitutionality of the costs provisions of the Act (s.26(9)) was challenged in one of the Cabre v. Arndt cases.[39] The operator argued that the costs provisions discriminated against operators, contrary to the Charter of Rights, by giving preferential treatment to landowners. The essence of the argument was that the contest between the operator and the landowner is like any other litigation and there is no reason to treat operators and landowners differently.

This argument was rejected by Dea J. on the basis that the parties are not in fact similarly situated in a surface rights case:[40]

> While it is clear that the parties are treated differently on the issue of costs, there is no discrimination, as the difference in treatment does not draw any irrational distinction between the parties. Instead, it confirms the distinction between the parties that is created by the legislation. That is, that the owner ought to be compensated for the operator's right of entry and user and that the owner ought not be out of pocket on the transaction.

This decision therefore affirms the basic principle of indemnity (discussed earlier) guiding the determination of cost awards.

(iv) EFFECTS OF DE NOVO APEAALS AND THE DEGREE OF FORMALITY

Costs are an important factor in considering any amendments to the process by which surface rights disputes are dealt with. Changes to the appeal and judicial review provisions,[41] for instance, could have a significant effect on the costs of the process. Removal of the de novo appeal to the Court of Queen's Bench would presumably reduce the costs currently associated with re-adducing evidence originally presented to the Board. However, replacement of this appeal provision with a more restrictive system of appeal or review could increase the significance of the hearing before the Board and lead to an increase in both the degree of formality and the costs associated with hearings before the Board. The possibility of increased "judicialization" of the Board is perceived to be a real one and deserves careful consideration.

(v) SPECIFIC ITEMS OF COST

1. Reimbursement for Landowner's Time

Although the Board has dealt with personal (as opposed to professional) time and expenses as a matter of compensation under general disturbance or inconvenience,[42] it is also willing to award personal costs to landowners, even when they are represented by counsel.[43] This latter approach seems appropriate and consistent with the principle that the landowner should not be out of pocket as a result of the forced taking.[44]

2. Costs Incurred During Negotiations

Despite the Act's specific reference to costs incurred in the course of negotiations,[45] this discretion is often not exercised. In a recent rental review case, the Board explained the rationale for denial of these costs in the following terms:[46]

> In considering the matter of costs, it is the Board's opinion that only such costs as are reasonably incurred in or incidental to proceedings before the Board are costs as may be contemplated by section 42 in connection with proceedings under the Act. In effect, the parties are mutually responsible for the terms of their Surface Lease and are required by the Act (Section 29(5)) to negotiate "in good faith" as a prerequisite to involving the Board in the matter. It is anticipated, therefore, that both parties will have spent time in negotiations and related matters, and only those added costs incurred in bringing the matter to an independent third party for settlement are costs which may be considered.

In some cases, the Board has awarded costs to landowners for time spent in negotiations leading up to the hearing.[47] This approach is consistent with the principle of full indemnity, and has been endorsed by at least one judicial decision.[48]

3. Travel Time

The Board regularly awards costs for time spent in travelling to hearings. It often reduces these claims, however, where fees and disbursements relate to travel from outside the immediate area in which the hearing is held.[49] The rationale for doing so appears to be that competent professional assistance should be available in the vicinity of the hearing location. The courts have been similarly

unsympathetic with respect to these costs.[50] Among the issues that arise in this context are the factors that the Board should consider in determining travel costs awards - for example, the relative scarcity of counsel experienced with the surface rights process, and the fact that the hearing location itself is often at some distance from the subject land.

## (c) ANALOGOUS APPROACHES

### (i) OTHER PROVINCIAL SURFACE RIGHTS BOARDS

British Columbia's Mediation and Arbitration Board has the widest discretion of any western surface rights board with respect to costs,[51] and may award reasonable costs of or incidental to the proceedings to either party. The Saskatchewan Surface Rights Board is given a similar discretion with respect to the amount of costs awarded, but if costs are awarded at all they must be awarded to the owner or occupant.[52]

The Manitoba Surface Rights Board administers the most complex costs provisions of the four western Boards. This Board may award costs to a wide range of participants in Board proceedings.[53] The amount of costs is left to the discretion of the Board, subject to a relatively complex test comparing the operator's offer to the Board's eventual compensation award.[54] If the operator's final offer is less than ninety percent of the Board's final award, the landowner or occupant is entitled to reasonable costs incurred in presenting his claim.[55] On the other hand, if the Board's compensation award falls below the operator's final offer, the Board cannot award costs of any kind to the landowner or occupant.[56] Where the operator's final offer falls between ninety and one hundred percent of the Board award, costs are left entirely to the Board's discretion.

### (ii) LAND COMPENSATION BOARD

The Expropriation Act[57] states that the landowner is entitled to reasonable legal appraisal and other costs "actually incurred" for the purpose of determining compensation, unless the Board determines that special circumstances exist to justify a reduction or denial of these costs.[58] Interestingly, the Land Compensation Board is, like the Alberta Surface Rights Board, given the power to

designate a taxing officer.[59] This Board also has the power to determine costs in cases where a settlement has been made without a hearing.[60]

The costs on appeal are dealt with on a similar basis to that employed by the Surface Rights Act. If the appeal is launched by the expropriating authority, the landowner is entitled to costs regardless of the outcome, barring "special circumstances".[61] In the case of landowner appeals, the costs are given to the discretion of the Court of Appeal.[62]

Two subsidiary provisions relating to costs are also of interest. Firstly, a landowner may be penalized with costs if he or she witholds relevant information from an expropriating authority attempting to conduct an appraisal.[63] Secondly, the Act makes it clear that landowners are entitled to obtain both an independent appraisal of the subject property and advice from a solicitor of his choice as to settlement at the cost of the expropriating authority.[64]

### (iii) ENERGY RESOURCES CONSERVATION BOARD

The ERCB has specific authority to award costs to persons owning or occupying land which stands to be affected by a decision of the ERCB.[65] The criteria governing the exercise of this discretion are set out in a regulation which allows the ERCB to deny a claim for costs in the following circumstances:[66]

(a) if the Board did not hold a hearing in the proceeding,
(b) if the claim does not comply with the requirements of section 3, [referring to technical requirements of the application],
(c) if the Board is not satisfied that the costs were reasonable and directly and necessarily related to the proceeding,
(d) if the Board is not satisfied that the local intervener was in need of legal or technical assistance in the preparation and presentation of his intervention,
(e) if the Board is not satisfied that the intervention was conducted economically,
(f) if, in the opinion of the board,
    (i) the intervention and its presentation was unnecessary, irrelevant, improper, or intended to delay the proceeding before the Board, or
    (ii) the claim is excessive, having regard to the nature of the proceeding and the intervention,

    or
(g) for any other reason the Board considers appropriate.

A party ordered by the ERCB to pay costs may request a review of those costs, whereupon the ERCB may vary, confirm or deny the award.[67]

(iv) CIVIL LITIGATION

Awards of costs in the course of civil litigation are at the discretion of the court with respect to whether costs are awarded, which party is entitled, and quantum. The general rule is that costs are awarded to the successful party unless there is evidence of misconduct, miscarriage in the procedure, oppressive or vexatious proceedings, or other factors, such as the determination of a new or difficult issue of law or where an award of costs will cause hardship.[68]

Where costs are awarded to a party in the litigation, they may be levied either on a "party-party" basis or on a "solicitor-client" basis. Party-party costs are awarded in a majority of the cases and are taxed according to a schedule prescribed in the Rules of Court; they effectively allow the party awarded costs to recover only a small part of his legal costs.

Costs are less frequently awarded on a solicitor-client basis - this implies a more generous scale whereby the party recovers all those costs determined to be necessary for the proper presentation of the case.[69] Awards of costs on this more generous scale are usually made where the Court wishes to punish one of the parties for acting unreasonably in the course of the litigation.

In addition to these general principles governing the exercise of judicial discretion, the Alberta Rules of Court provide a system whereby cost awards act as an incentive for pre-trial settlements.[70] The Rules allow a plaintiff to make an offer of settlement and a defendant to make an offer of judgment or payment of monies into court, prior to the commencement of trial. These offers or payments may be accepted by the opposite party according to the Rules and within the time limits prescribed. If a plaintiff refuses to accept a payment or offer that exceeds the amount eventually awarded at trial, the defendant is entitled to recover all costs relating to steps conducted subsequent to the making of the payment or offer. Similarly, if a plaintiff recovers an amount greater than his or her offer, that plaintiff is entitled to recover double the costs that would otherwise have been awarded in relation to all steps following the making of the offer. It is important to note that these offers and payments are kept strictly between the parties and no knowledge of these payments may be brought before the trial court judge.

## 4. CONCLUSION

We will conclude with a summary of the issues raised in this paper.

1. Are the expenses incurred as a result of the process too high or are they acceptable in light of the task assigned to the Board? Are there specific expenses that are of particular concern?

2. Is there consensus with respect to the general principles governing either the allocation of the overall expenses between the parties or the manner in which legal costs are awarded and determined?

3. Should the Broad promulgate costs regulations pursuant to s.42(2) to clarify the principles and rules relating to costs awards?

4. Should success at a hearing be considered in the Board's awards of costs? Should the amount in issue be considered in awarding costs?

5. How should costs incurred during private settlements be dealt with? Should the Board award costs for time spent in unsuccessful negotiations leading to a hearing?

6. Is the item of landowner's time being dealt with adequately? Are travel expense claims by counsel and expert witnesses being dealt with adequately?

7. Who should be able to initiate a taxation of Board or appeal costs? Should the Board tax costs itself or appoint a taxing officer?

8. Should appeals be allowed to the courts on issues of costs?

9. Would a more restrictive appeals procedure increase the cost of Board hearings? Would it increase the overall expenses of the process?

10. What can we learn from the approach taken to costs by other administrative tribunals and the courts?
    (a) Should the Board have total discretion with respect to costs as does its counterpart in B.C.?

(b) Should the "Manitoba" approach to costs (in making success a mandatory consideration) be considered? Does this system run the risk of influencing the Board's compensation awards? Is it preferable to keep the offers as a matter between the parties until after compensation has been awarded (as in Part 12 of the Alberta Rules of Court)?

(c) Should the costs of specifed expenditures be awarded as a matter of course (as provided in the Expropriation Act)?

## FOOTNOTES

1. For a general discussion of this principle see A. Scott, Natural Resources: The Economics of Conservation (Ottawa: Carleton University Press, 1983) at 54-7.

2. Dau v. Murphy Oil Co. [1970] S.C.R. 861, aff'g (1969), 70 W.W.R. 339 (Alta. S.C. App. Div.).

3. The Magna Carta, originally signed in 1215, was revised several times before being enrolled on the statute rolls in 1297. This quotation is taken from the summary provided in T.F.T. Plucknett, A Concise History of the Cannon Law (5ed.) (London: Butterworth, 1956) at 23-25.

4. Halsbury's Laws of England (1909) Volume VI, Para. 455.

5. S.C. 1960, c.44, s.1(a).

6. R.S.A. 1980, c.A-16, s.1(a).

7. P.W. Hogg, Constitutional Law of Canada (2ed) (Toronto: Carswell, 1985) at 643, quoting Laskin CJC's characterization of the Canadian Bill of Rights in Hogan v. The Queen, [1975] 2 S.C.R. 574 at 579.

8. The Charter is contained within the Constitution Act, 1982.

9. Id., s.26

10. Supra, note 7 at 577-8.

11. G.S. Challies, The Law of Expropriation (2ed.) (Montreal: Wilson and Lafleur, 1963) at 75; and see P.W. Hogg, supra, note 7 at 577-8, 628-9 and 703-4.

12. Manitoba Fisheries Ltd. v. The Queen, [1979] 1 S.C.R. 101.

13. In some cases these costs have exceeded the amount of compensation in dispute, leading the Board to comment in one decision that "... it approaches the situation of 'the tail now wagging the dog'", Mobil G.C. Canada v. Plandowski, SRB Decision E71/82, at 3.

14. Surface Rights Act, S.A. 1983, c.S-27.1, s.42. See generally B. Barton and B. Roulston, A Guide to Appearing Before the Surface Rights Board of Alberta, Working Paper 11 (Calgary: Canadian Institute of Resources Law, 1986) at 95 ff.

15. Although landowners responsible for frivolous or unnecessary hearings have been denied costs: (Schuetzle v. Coseka Resources Limited, SRB Decision 88/0017 and Umbach v. Shell Canada Limited, SRB Decision 87/0271); or ordered to pay operator's costs (Barton and Roulston, id., at 97, citing Schindel v. Hudson's Bay Oil and Gas Co. SRB decision C58/79).

16. This principle is discussed above at note 3. In Cabre Exploration Ltd. v. Arndt (1986), 69 A.R. 293, 35 L.C.R. 210 (Alta. Q.B.), Dea J. held that since the parties were not similarly situated, awarding costs to the landowner most of the time was not an improper exercise of its discretion.

17. Ontario Law Reform Commission, The Basis for Compensation on Expropriation, (Toronto: 1967) at 39, 54, referred to in Todd, The Law of Expropriation and Compensation (Toronto: Carswell, 1976) at 382 and in Law Reform Commission of British Columbia, Report on Expropriation (Vancouver: 1971) at 179.

18. Alberta Power Limited v. Kowalchuk and Voyager Energy Inc. SRB Decisions 87/0327 and 87/0328, at 8.

19. Barton and Roulston, supra, note 14, at 96.

20. Surface Rights Act, supra, note 14, s.26(9).

21. Barton and Roulston, supra, note 14, at 99.

22. See for example Alberta Power Limited v. Godlien (22 December, 1987, Edmonton 8603-18059 (Q.B.); Holtz v. Union Oil Company of Canada Limited (12 June 1985) Peace River 8309-1100 (Q.B.). The operator was awarded costs in these circumstances in Jones v. Bankeno Resources Ltd. (1987), 51 Alta. L.R. (2d) 237 (Q.B.).

23. (1987), 37 L.C.R. 228 (Alta. Q.B.).

24. Id., at 237.

25. [1982] 6 W.W.R. 289 at 298 (Alta. C.A.); Barton and Roulston, supra, note 14, at 99-100.

26. (1987), 50 Alta. L.R. (2d) 421 (Q.B.).

27. (1987), 37 L.C.R. 298 (Q.B.).

28. Id., at 307.

29. (1986), 47 Alta. L.R. (2d) 129 (Q.B.).

30. Id., at 133.

31. (12 January 1987) Grande Prairie 8604-11268 (Q.B.).

32. Id., at 3.

33. Harding v. Alberta Surface Rights Board (1985), 32 L.C.R. 381 (Alta. Q.B.).

34. Dicta in Nissen v. City of Calgary (1983), 51 A.R. 252 (C.A.), where Kerans J.A. considered an identical provision in the Expropriation Act (R.S.A. 1980, c.E-16, s.39(2)) governing the jurisdiction of the Land Compensation Board.

35. Dome Petroleum Ltd. v. Richards (supplementary reasons) (1986), 43 Alta. L.R. (2d) 310 at 321 (Q.B.).

36. As codified in the Alberta Rules of Court; see Nissen v. City of Calgary, supra, note 34, at 254.

37. See Barton and Roulston, supra, note 14, at 98-9.

38. (1985), 32 L.C.R. 161 (Alta. C.A.).

39. [1986] 4 W.W.R. 261 (Alta. Q.B.).

40. Id., at 269.

41. See the discussion on this point in the Workshop paper on Judicial Review of the Surface Rights Board of Alberta.

42. Barton and Roulston, supra, note 14 at 95; Husky Oil Operations Ltd. v. Luchyk, SRB Decision 88/0071, at 5.

43. Supra, note 18; Alberta Power Limited v. Pullishy, S.R.B. Decision 88/0005 at 5.

44. Grand Oaks Holdings Ltd. v. Calgary Power Co. (1982), 39 A.R. 475 at 485-5 (Q.B.).

45. Surface Rights Act, supra, note 14, s.42(4).

46. Marathon Realty Company Ltd. v. Icor Oil & Gas Company Ltd. SRB Decision 87/0216 at 5.

47. Alberta Power Limited v. Pullishy, supra, note 43.

48. Supra, note 44, at 484.

49. Bow Valley Industries Ltd. v. Sharp, S.R.B. Decisions 88/0062, 88/0063.

50. Wainoco v. Solick, supra, note 31, at 5.

51. Petroleum and Natural Gas Act, R.S.B.C. 1979, c.323, s.27.

52. The Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c.S-65, s.29(2), 47(3).

53. Surface Rights Act, S.M. 1987, c.62 (C.C.S.M. c.S235), s.26(2).

54. Id., s.26(3).

55. Id., s.26(4); this provision's original reference to the landowner or occupant's entitlement to party and party costs was deleted at second reading.

56. Id., s.26(5).

57. R.S.A. 1980, c.E-16.

58. Id., s.39(1).

59. Id., s.39(2).

60. Id., s.39(3).

61. Id., s.39(4).

62. Id.

63. Id., s.33(2)(a).

64. Id., s.35. Only reasonable costs will be paid.

65. Energy Resources Conservation Act, R.S.A. 1980, c.E-11, s.31. These affected landowners are known as "local interveners". Arguably, the ERCB could award costs to other participants using its general power in s.21 of this Act. Interestingly, a proposed amendment to this Act would render ERCB costs awards subject to execution according to the ordinary rules relating to the enforcement of court judgments: Bill 4, Energy Resources Conservation Amendment Act, 1988, currently at first reading stage in the third session of the 21st Alberta Legislature.

66. Local Intervener's Costs Regulations, Alta. Reg. 517/82, s.5.

67. Supra, note 65, s.31(4) & (5). Significantly, even though initial costs determinations are usually made by ERCB staff members, these reviews are often conducted by a panel of Board members.

68. M.M. Orkin, The Law of Costs (Toronto: Canada Law Book Limited, 1968) at 16-26.

69. The types of factors to consider are set out in Rules 613 and 635, of the Alberta Rules of Court.

70. Alberta Rules of Court, Part 12.

## SMALL GROUP REPORTS

On the second day of the Workshop, participants divided into four small groups to continue their discussions. The purpose of doing so was to give individuals with different viewpoints an opportunity to work together in seeking areas of agreement and clarification of differences. It was sought to include within each group individuals representative of all the main constituencies involved in surface rights. The two small group sessions addressed different topics, as are shown below; the main ideas generated during these sessions were recorded by a rapporteur appointed by each small group. At the end of each session, all Workshop participants reassembled in a plenary session to hear a report from each group's rapporteur and to carry on the discussion.

The written version of the rapporteur's summary of each small group discussion is reproduced here (after minor editing) to give the reader some sense of the issues that were raised, and of the options that were identified, in the small group sessions. The reports are in point form only, but they may be clearer if the reader has first read the papers that were written for the Workshop.

## SESSION 1: STRENGTHS AND WEAKNESSES OF THE EXISTING SURFACE RIGHTS SYSTEM

Group 1: Strengths and Weaknesses

Credibility of Surface Rights Board in question
- experience of members in a related field
- selection process
- need past experience in related field
- no staff base to assist the Board - researchers
- Members' remuneration, tenure, pension

Principles of Compensation
- question whether system is working
- effect on food/land base not well recognized
- are the controls in place to achieve stewardship of land
- need clear set of rules for compensation
- Board should consider trespass

The Process
- need for transcripts
- need better information on board decisions and information on compensation to be available to parties
- more integration with SRB/ERCB/Alberta Environment and Land Conservation and Reclamation Council

Costs
- need for checks and balances in appeal process
- need better process for determining costs - not fair to any of parties (at Board level)

Relationship Issues
- stereotyping
- need for more dialogue between stakeholders
- need for more direct consultation between companies and farmers

Group 2: Strengths and Weakness

Compensation
- Entry
  - Surface Rights Act allows speedy right of entry as opposed to the Expropriation Act, which requires up to a 2 year lead time
  - some farmers still use well site/access road location as a delay tactic at the ERCB
  - energy and farm industries appear to have different understandings of purpose of entry fee (sec. 19)

Section 25
- "shall or may" - won't practically make much difference
- "double compensation" - recognizes the company takes the land initially and thereafter uses it

Decision Making
- Mediation
  - at the ERCB, Board members adjudicate and staff mediate
- Compulsory filing of agreements
  - not useful enough to justify invasion of privacy and administrative cost
- Quality of reasons on SRB decisions
  - striving to improve
  - oral decisions? - NO
  - SRB needs the Board/staff resources to achieve writing better decisions and how they got there
- Independence issue
- energy industry concerned that justice needs to be done/perceived conflict of interest
  - advisory system re selection of SRB members

Costs
- why should industry pay?
  - must have equal bargaining position
- reasonable costs reasonably incurred should be covered for landowner
- must have opportunity to tax costs, at Board discretion, including even disallowing certain costs (e.g., conducting an appraisal and then deciding not to enter it as evidence at hearing)
- SRB does have the expertise to make the above discretionary determinations

Appeals
- Current system:
  - costly
  - divergent court decisions
  - at Court of Queen's Bench, only one person decides the case
  - provides opportunity to give new viewpoints

as alternatives to current system
- Grounds
  - error in law only
  - trial de novo
  - no appeals

SRB could use its re-hearing powers more when new facts arise rather than go to courts with new information

Group 3: Strengths and Weaknesses

Objectives
- right of entry - conditions on the right of entry order
- compensation - definition of
- determination of costs

Compensation
- Strengths
  - costs
  - 4 heads
  - patterns
  - 80% prepayment

    - Board process (instead of court)
- Weakness
    - patterns
    - uncertainty
        - as to what compensation is
    - use of phoney figures and bonuses distort record of Board

Court Supervision (Appeal Process)
- Strength
    - check and balance on Board
- Weakness
    - inconsistency of process
    - "Mutant" de novo process
    - costs

Costs
- Strength
    - discretionary
    - reasonable costs payable by operator to landowner
- Weakness
    - handling test cases
    - no fee guidelines

Clarity of the Act
- see Objectives
- see definition of compensation

Reporting to government
- which department should Board report to

Credibility of decisions

Group 4: Strengths and Weaknesses

General Principles of Compensation
- Weaknesses
    - no purpose statement
    - no purpose stated for entry fee
    - lack of adequate definition for entry fee
    - deals with different types of entry (wellsite/pipeline and power line) without treating them differently

Decision-making
- Weaknesses
    - accountable to thte Department of Agriculture rather than an impartial department like Attorney-General's Department
    - perception of appointment process
    - Board not setting out adequate reasons in a consistent fashion
    - greater formality required (e.g., transcript, oaths)
- Strengths
    - not bound by formal or judicial rules of evidence

## SESSION 2: OPTIONS FOR REFORM AND THEIR IMPLICATIONS FOR THE SYSTEM

Group 1: Options for Reform

Relationship Issues
- Characteristics of a landman
  - honesty
  - respect for others
  - be open with information
  - no high pressure tactics
  - don't tell owners what to do with their land
  - recognize farmer's knowledge
  - should be knowledgeable and well trained
- Consideration for the other party
  - need more time to conduct discussions
    better integration within companies between lands/exploration/production departments
  - improve companies' planning process
    - include lead times
  - orgainzational (internal issues)
  - be sensitive to cultural values
- Improve Negotiation
  - need to ensure accountability of landmen (PITS - Land Agents Licensing Act)
  - help owners learn to negotiate (Surface Rights Assocations)

Principles of Compensation
- need for definition of purpose for S.R. Act - what are we compensating for?
- need process to discuss above (dissenting opinion - don't tinker)
- need a clearer process

Credibility of Surface Rights Board
- Options:
  - need review process for selection of members
  - rotating position for farmer to sit on SRB
  - members chosen should have past related experience (farmer, landman, appraiser)
  - de-politicize appointments
  - independent opinion from local industry/farmer
  - solicit views from SRB users

Decision-Making Process
- should provide transcripts
  - improve credibility of process
  - will help SRB members decision-making
  - there is a public right to know
  - useful for appeal process
- better reasoned decisions
  - detailed analysis of issues and evidence, e.g., Land Compensation Board
  - need to understand rationale
- discuss issues of integration of ERCB/SRB/Alberta Environment

"Housekeeping" Issues to Consider:
- mediation/dispute resolution
- review provisions
- trespass
- extension of what Board hears

Costs
- give significant consideration to success and reasonableness of appeal
- determine costs by giving sufficient opportunity for input (e.g., ERCB process)

Group 2: Options for Reform

A. Issues: Purpose of Act
- Options for change:
  1. Purposive Section
     - to provide right of entry
     - to provide payment of compensation
     - to explain existence of entry free
  2. Improve Definition Sections
- Implications for system: certainty/loopholes

B. Issue: Prehearing
  1. A mechanism to consider

C. Issue: Formality of Hearing
- Options for Change:
  1. Rules of evidence don't apply
  2. Exchange facts prior to hearing
  3. Transcripts available to the parties
  4. Evidence under oath
- Implications for System:
  1. Quality of reasons
  2. Increase costs

D. Issue: Costs

Options for Change:
  1. On appeal, if concern, to taxation officer with understanding of surface issues
  2. Standard of reasonableness applied.

Group 3: Options for Reform

1. Objectives
   a. Define compensation in Act
      - (e.g., Saskatchewan Act)
   b. Define rules
      - what are "other factors"?
      - need to identify in leases
      - replace entry fee with lump sum taking fee - plus "true compensation" as determined by the SRB (surface leases, not pipeline)

- committee to review section 25 to be set up by Government
- poor for electrical and coal mining uses

2. Board
   a. Review process by Board for decisions (see section 32)
   b. Clarify reasons for decisions
   c. Tapes and transcripts
   d. Easy access to exhibits

3. Courts
   a. True trial de novo, or
   b. Appeal on points of law?

4. Costs
   a. Government pays for landowner's appeal
   b. Appellant at risk to avoid frivolous appeals

Group 4: Options for Reform

General Principles of Compensation

1. Statement of Purpose
   - Badly needed
   - Alternatives
     (i) draw from other statutes (e.g., purpose statement in Manitoba, Saskatchewan surface rights Acts)
     (ii) Characterization of purpose (i.e., expropriation statute, or process for exercising common law right (in the context of wellsites)
     (iii) set out new rights and procedures the statute is trying to create
     (iv) set out what sorts of rights and procedures the statute is not trying to provide for

Decision-Making

1. Legislate More Formality
   - transcripts
   - swearing witnesses
2. Rehearing has merit in its present form but not in its present application
3. Mediation not a viable alternative or adjunct, risk of adding another delay factor

Appeal

1. Very important to have a supervisory element to the Board's decision-making process
2. Options
   a. Status quo is promoting many of the problems we are having
   b. Remove the right to a trial de novo but retain a full right of appeal similar to Land Compensation Board process wherein Court can either send decisions back to Board with direction or correct minor errors itself, instead of hearing all the evidence over again. This would
      - upgrade Board's performance by providing judicial guidance instead of supplanting Board's role
      - increase Board's credibility
      - any modification or adjustment of current de novo system only prolongs the agony of rough justice

Costs

1. Principles - Options
   a. Landowner entitled as of right to his reasonable costs
   b. Landowner not entitled as of right - must be at some risk at all levels - may only require a change in the exercise of the Board's decretion
   c. Costs of operator should be at issue
2. Should be a statutory right of appeal on costs

**WORKSHOP ON SURFACE RIGHTS IN ALBERTA**

21 and 22 April 1988
Drumheller Inn

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