Resources
The Newsletter of the Canadian Institute of Resources Law

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Banff Conference on Natural Resources Law: Public Disposition of Natural Resources

Introduction

The first Banff Conference on Natural Resources Law was convened by the Institute April 12 to 15 at the Banff Centre. Attracting an audience of approximately 130 participants from across Canada and abroad, the Conference focussed on the general theme of the Public Disposition of Natural Resources.

Recent years have seen dramatic changes in government policy towards development of natural resources. Provisions for greater Canadian benefits and participation, direct government involvement in exploration and development, new measures to mitigate social and environmental impacts, new systems for resource disposition – these and other measures have radically changed the regimes under which governments dispose of natural resources.

While specific measures in specific resource sectors have been the focus of analysis and criticism by various constituencies, there has been to date no serious attempt to deal with the larger problem of how these individual changes have together affected the legal climate in which natural resources are exploited. This Conference provided, for the first time, a national forum for examining the legal and public policy implications of how governments allocate natural resource rights.

The Institute would like to acknowledge the contributions of the Alberta Law Foundation, the Government of Alberta, and in particular the Alberta Department of the Attorney General, and Travel Alberta for their support of the Conference.

This issue of *Resources* is devoted to an analysis of two aspects of the disposition of natural resources examined at the Conference: new directions in resource management – the single window, and private sector legal problems arising from Canadianization of petroleum activities.

New Directions in Resource Management: The Single Window

Government regulation of resource development, or of a particular stage of resource development, may be structured in a number of ways. Examples here are confined to the mineral industry, but the comments below have obvious analogies to the development of other natural resources. At one end of the spectrum government may restrict its involvement to providing a registry system and collecting royalties. Some licensing requirements will be included in its role, but these may be confined to collecting prospector's fees, ensuring that any work requirements are satisfied, issuing leases, etc. This concept of regulation characterized governmental philosophy for much of the early development of the Canadian mining industry. It is probably fair to say that it still characterizes government's approach to the *exploration* stage of mining – as reflected in the "free miner" principle which has survived in hard-rock mining and, to a lesser degree, in other sectors of the Canadian minerals industry. The role of government under this approach is a largely passive and facilitative one.

At the other end of the spectrum is a governmental role that adopts a more active and directive approach to mineral regulation. It is a role that finds its most complete expression in nationalization of the mineral sector, or a substantial portion of the sector. While outright nationalization of an entire sector has been rejected as an appropriate vehicle for mineral development in Canada, varying degrees of direct government intervention in the industry have found acceptance, both federally (uranium, and petroleum and gas) and provincially (potash in Saskatchewan, asbestos in Quebec, among others).

The approach taken in Canada towards regulation of mining has been generally similar throughout the different jurisdictions (both federal and provincial). Although the emphasis has varied over time and among provinces and territories, typically the development of a mine has proceeded in the context of a general legislative framework. This framework will normally include a mining act (or acts), environmental legislation, various taxing statutes, and other legislation covering such matters as land use, water rights, and municipal planning. The specific nature of government involvement will vary to some extent with each development. Thus, interpretation and application of (for example) environmental regulations may have important effects on how and whether a particular ore body is developed. Similarly, government grants or provision of infrastructure may be subject to certain conditions – the training and hiring of local workers for example.

This direct involvement by government, in both assisting and regulating mining development, has increased

The opinions presented are those of the authors and do not necessarily reflect the views of the Institute.

substantially over the past decade. Given public concern over environmental and resource matters, and the increase in size and remoteness of mineral development – which often necessitates government participation in the provision of infrastructure – this trend to increasing government involvement is likely to continue. In the result, Canadian regulation of mining involves a mix of general legislation provisions and specific *ad hoc* arrangements tailored to individual mines.

An alternative approach to regulation, especially relevant to major mineral developments, is to stress both the unique problems of such projects and the need to negotiate appropriately tailored conditions to deal with them. The detail of such negotiations, the range of matters covered, and the variety of voices (both governmental and non -governmental) that must be heard, suggest the need for a central coordinating body or process within government to channel negotiations with industry. This technique is often referred to as the single window approach. As used here, the term connotes both a coordinated *process* for negotiation between government and industry, and an *agreement* which is supplementary to normal legislative requirements.

The use of the single window in resource development has been quite common in other jurisdictions, most notably in the Australian states of Queensland and Western Australia, where it is not unusual to find detailed company -state agreements enacted as special public statutes. The concept has had relatively little use in Canada until recently. The use of what is essentially a single window in negotiating the British Columbia Northeast Coal Development is one exception. Another is the iteration towards something like a single window within the federal Department of Indian Affairs and Northern Development (DIAND) in the course of negotiating the Nanisivik, Polaris, and MacTung mineral developments in northern Canada. The DIAND experience is of particular interest in that it suggests both the advantages and disadvantages of employing a single window approach while working under a "traditional" legislative regime.

The potential advantages of a single window approach are readily apparent. Ideally, it permits a high degree of coordination in both the negotiation and implementation of resource developments, leading to faster and, one would hope, more informed decisions on the part of government. For major resource developments, involving large numbers of regulatory approvals and perhaps significant infrastructure items, there are obvious advantages to having a central coordinating point. That point may be a person, an agency, or even a set process (for example the coal approval process in Alberta). Of at least equal importance to greater coordination is the potential for flexibility which the single window offers both government and industry. Within a range, it is possible to tailor an agreement to meet the particular requirements of both industry and government for each specific project. This flexibility will be particularly significant for large hinterland projects where socio -economic and environmental impacts may require very individualized treatment. One can point, for example, to the detailed and innovative provisions with respect to native employment included in the Nanisivik agreement negotiated by DIAND.

But if advocates of the single window approach can point to the potential for greater coordination and flexibility, one must also recognize the difficulties in adopting the approach, especially where it is appended to a traditional, established regulatory regime. With respect to the greater degree of coordination possible, it has sometimes been suggested that this holds the potential for exclusion from the process of interested parties outside of government and industry. There seems to be some validity to this point in the Australian context, although *a priori* one could just as easily design a system to ensure and coordinate input from all affected parties. It is interesting to note for example that DIAND has included provisions in its agreements designed to encourage industry consultation with local groups.

Similarly, the flexibility introduced by such agreements can have negative connotations if it is used to override existing legislation or procedures in such a way as to create favoured status for a particular development. Again, this is a charge that has been levelled at Australian resource agreements. Since Canadian agreements – and certainly those negotiated by DIAND to date in the north – will not typically be legislatively enacted, the potential for such override will be far less here than in Australia. However, these non-statute agreements give rise to somewhat more complex legal problems than do the Australian enactments.

To raise just a few problems of concern to lawyers, what is the status of such agreements? For example, where a Minister undertakes in an agreement to issue a licence or approval at some future point in a project (and possibly subject to specific conditions), does this raise objections that he is invalidly fettering the discretion given to him by statute? This not only raises the basic problem of the legal validity of such a provision; it also leads to some interesting questions as to who may enforce (or attack) the agreement. Does the normal rule of privity of contract apply (assuming, what may not always be the case, that such agreements are contracts)? Or does the exercise of discretionary powers by a Minister raise the possibility of a challenge by other interested or affected parties, using public law remedies such as declaration? These are questions which are yet to be resolved but which should be asked *before* such agreements are concluded, especially in light of the recent trend in Canadian courts towards more liberalized rules of standing.

J. Owen Saunders

Private Sector Legal Problems Arising From Canadianization of Petroleum Activities

As is well known, one of the major purposes behind the Canadian government's 1980 National Energy Program (NEP) was the Canadianization of petroleum exploration and production on federal lands. This process had been started earlier through 1978 amendments to the Canada Oil & Gas Land Regulations. Under s.121, a permittee could apply for a Special Renewal Permit (SRP), thus delaying the need to go to lease, with attendant acreage surrenders. The SRP requirement, however, gave Petro -Canada the option of acquiring up to 25% of the acreage under the SRP (depending upon the Canadian ownership rate of the permittee).

The NEP took this approach even further. Section 27 of the new Canada Oil & Gas Act (a primary mechanism for

implementing the NEP) reserves a 25% Crown share out of all federal oil and gas lands, whether or not such lands have been the subject of earlier dispositions. This 25% Crown share may either be sold by public tender to a company of at least 75% Canadian ownership, or disposed of to a "Designated Crown Corporation" (DCC), which includes Petro-Canada.

These "Canadianization" efforts have proven extremely controversial, in no small measure due to the retroactivity feature which has altered exploration rules in mid-stream. It has been suggested that these steps, in combination with no or inadequate compensation for the appropriated rights, may be contrary to domestic and/or international law.

Moreover, it is now becoming apparent to the industry that the above provisions, and others, carry within them the seeds of several major legal questions. Fundamental to these questions, some of which are briefly canvassed below, is the following: what are the rights and responsibilities of the "new" interest owners in relation to predecessor interest owners?

At the time that Petro-Canada's option was exercised under the 1978 Regulations, or the 25% Crown share was reserved under the Act, it is likely that existing interest owners had already entered into a joint operating agreement (JOA). Although these are by no means standard in frontier areas, JOAs typically set out the rights and obligations of the operators and non-operators, and include indemnity clauses, mechanisms for decision-making, and means of sharing expenses. It must be asked: To what extent is Petro-Canada or another new interest owner bound by the obligations and entitled to the benefits of these joint operating agreements?

The 1978 Regulations are silent on this point, save for s.122(c) which protects Petro-Canada from liability for previous expenses. Because the Regulations required Petro-Canada to exercise its option by notifying the Minister, it is unlikely that there were direct contractual arrangements between Petro-Canada and the previous owners. If Petro-Canada was subsequently novated into an existing agreement, it would clearly be bound. If Petro-Canada was given notice of such an agreement, and was appropriately communicated with over time by the owners, it might be possible to establish acceptance of the agreement by implication. Failing either, all parties will have to resort to common law principles to determine their respective rights and duties. Since private ordering has been the historic rule in the industry, considerable research will be necessary to uncover the appropriate common law answers. This leaves unclear such matters as the extent to which Petro-Canada is entitled to joint account information, is bound by confidentiality requirements, is entitled to the benefit of rights of first refusal, is entitled to participate in Management Committees, and, most important, is subject to the same liability and indemnification provisions as the other parties.

These issues have been more explicitly dealt with in the Act. Where the Crown share is sold by public tender to a 75% Canadian company, s.32(2) states that "any applicable operating agreement or other similar arrangement stands varied or amended to the extent necessary to give effect to ... the addition of such purchaser as a party to any such operating agreement or other similar arrangements." This appears tantamount to a statutory novation of the new owner into any existing agreement, and thus the new owner will be subject to the same rights and obligations as the original owners.

The result is quite different where the Crown share devolves to a DCC. The DCC's interest need not become a "working interest" until the DCC is named operator or until 30 days after notification of the Minister's intention to authorize a production system on the lands (ss.35(4) and 36(1)). Until such a conversion, s.36(3) protects the DCC from any "expense incurred in respect of the relevant interest". In the interim, however, the DCC is entitled to demand "exploration, development or production information or documentation" (s.33), and any operating agreement is amended to permit the participation of a DCC on a Management Committee (s.34). However, if the DCC participates in a particular exploration or development decision, and a blow-out results, is the "expense" language in s.36 sufficient to protect it from a share of the resulting liability?

Upon conversion, the DCC's share has "all the attributes and ... all the obligations of a share", according to s.36(1). Notably, the section does not amend the JOA to such effect, nor does it add the DCC as a party to the JOA, as is the case where a Crown share is disposed of by public tender. If the legislative silence here denotes an intention, what is the intention? Is the DCC bound or not by penalty provisions for independent operations agreed to by other parties in the JOA? Must it indemnify the operator for all but the operator's gross negligence, as JOAs typically provide?

Many of these questions can be resolved on a common sense, day to day basis, and undoubtedly have been handled in this way. Nevertheless, there are many unanswered legal questions. In an antagonistic situation, they may be capable of resolution only through litigation. This could result in lengthy periods of uncertainty, and serious acrimony between companies that, on paper, are partners in the business of searching for and exploiting Canada's petroleum resources. Ironically, such a result would be contrary to one of the NEP's major purposes, namely, to increase knowledge of our resource base and to promote Canadian energy self-sufficiency. Protracted disputes of this kind could also further alienate an already disenchanted industry from its federal landlord.

It is hoped that such issues will be amicably approached by the parties involved. If new policy initiatives are taken by future governments, care should be taken to ensure that the impacts of such programs upon private rights are clarified in advance.

Constance D. Hunt

New Executive Director

Alastair R. Lucas, current Executive Director, will be leaving the Institute as of June 30, 1983 to take sabbatical leave. He will be in France to conduct research on the legal duties of Canadian and European state petroleum corporations, but will retain some research activities with the Institute, particularly in the water law area.

Professor Constance D. Hunt has been appointed Executive Director of the Institute as of August 1, 1983. Ms. Hunt brings a unique combination of professional and academic experience to the Institute. Professor Hunt holds a B.A. and LL.B. from The University of Saskatchewan, and an LL.M. from Harvard. She is a member of the bars of Alberta, Saskatchewan, and the Northwest Territories. Prior to joining the Faculty of Law at The University of Calgary, she spent two years as legal adviser to the Inuit Tapirisat of Canada. She served as Associate Dean of Calgary's law faculty from 1979 to 1981. For the past two years she has been a corporate counsel with Mobil Oil Canada, Ltd., several months of which were spent on special assignment to Mobil North Sea, Ltd. in London, England. Former editor of the Petroleum Law Supplement, she is currently a member of the Board of Directors of the Canadian Petroleum Law Foundation. She has written widely on resources law subjects, and is co-author of the *Canada Energy Law Service.*

Fairness Seminar

The seminar on Fairness in Environmental and Social Impact Assessment Processes was held in Banff, February 1-3, 1983 with support provided by the Federal Environmental Assessment Review Office. Over 50 participants attended, representing public interest groups, environmental consultants, and industry and government personnel. The proceedings of the seminar will be published and will include a series of recommendations which developed during the seminar.

Publications

Acid Precipitation in North America: The Case for Transboundary Cooperation, by Douglas M. Johnston and Peter Finkle. 1983. ISBN 0-919269-02-8. 75 p. $8.00

Acid precipitation in North America and Europe presents a difficult problem of transfrontier pollution which has serious consequences both for human health and the integrity of the natural environment.

Experience suggests that common law tort actions are unsuitable for the effective control of pollution because of difficulties with causation, proof of damage, and statutory authorization. Neither U.S. nor Canadian legislation effectively addresses the problem of long range transport of acid causing contaminants.

International legal solutions are based on the principles of abuse of rights, due diligence and good neighbourliness. Between Canada and the United States the Boundary Waters Treaty of 1909 is still fundamental to future cooperation. At the multilateral level, important initiatives have been taken by the United Nations Economic Commission for Europe, the Council of Europe, and the Organization for Economic Cooperation and Development.

Transfrontier acid precipitation is a serious problem in Canada-U.S. relations. A joint research and consultation group was established and in 1980 the two parties signed a Memorandum of Intent with a formal treaty to follow; however, negotiations have reached a stalemate. To be effective, the treaty should concern itself with: short- and long-range problems, practical elimination of sulphur emissions, and the rejection of dispersion techniques as a method of pollution control.

The International Legal Context of Petroleum Operations in Arctic Waters, by Ian Townsend Gault. Canadian Continental Shelf Law 2; Working Paper 4. 1983. ISBN 0-919269-10-9. 76 p. $7.00

This paper identifies Canada's claim to jurisdiction in Arctic waters for the purpose of the exploration, production, and transportation of hydrocarbons from the continental shelf. Those claims are then placed in the context of the rights enjoyed by Canada at international law.

In Part I the development of the law of the sea and the doctrine of the continental shelf is traced. Petroleum operations in Canadian Arctic waters, and the domestic legal regime applicable thereto, are also outlined. In Part II a number of aspects of the domestic legal regime are examined – territorial sea and fishing zones, hydrocarbon resource exploration and production, environmental protection, transportation of oil and gas, and the construction of offshore facilities.

Part III analyzes contemporary international legal norms with respect to offshore jurisdictional zones, including the doctrine of the continental shelf, environmental protection, transportation of oil and gas, the construction of offshore facilities, and the legal status of Arctic waters, especially the Northwest Passage and the waters of the Canadian Arctic archipelago. The status of the sector theory and offshore boundary delimitation issues in the Canadian Arctic are also examined. Some conclusions and comments on the state of the legal regime, international and domestic, are offered in Part IV.

Resources Law Bibliography. 1980. ISBN 0-919269-01-X. 537 p. $19.95

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by C.D. Hunt and A.R. Lucas. 1980. ISBN 0-919269-001. 168 p. $10.95

A Guide to Appearing before the Surface Rights Board of Alberta, by Laureen Ridsdel and Richard J. Bennett. Working Paper 1. 1982. ISBN 0-919269-04-4. 70 p. $5.00

Environmental Law in the 1980s: A New Beginning, Proceedings of a Colloquium, The Banff Centre, November 27-29, 1981, Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 1. ISBN 0-919269-05-2. 233 p. $13.50

Petroleum Operations on the Canadian Continental Margin - The Legal Issues in a Modern Perspective, by Ian Townsend Gault. Canadian Continental Shelf Law 1; Working Paper 2. 1983. ISBN 0-919269-05-2. 113 p. $8.00

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