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Australia's Offshore Petroleum Regime: Some Lessons for Canada

An expected higher level of petroleum activity in Canada's offshore area will soon test the effectiveness of our new federal-provincial management regimes... it is therefore a convenient time to reflect upon what can be learned from Australia's experience...

/ *Constance D. Hunt*

As federal states, Canada and Australia have been forced to address the fact that two levels of government (federal and provincial/state) wish to play a role in the management of offshore petroleum resources. Both countries have experienced conflict between the two levels of government leading to litigation, negotiation, intergovernmental agreement and legislation. Each country's offshore petroleum is now managed pursuant to complex arrangements that involve ongoing intergovernmental interaction with implications for the petroleum industry.

The Australian experience is of particular interest to Canada at this time for several reasons. First, since 1967, Australia's political accommodation has taken two different forms. Second, the effectiveness of both these Australian regimes has been tested because of the occurrence of considerable offshore exploration and production. Third, the current system has been in operation for close to a decade and has undergone a number of alterations deemed necessary by one or more of the governments.

Canada's experience is more limited and recent. Here, intergovernmental agreements were reached with the offshore provinces of Nova Scotia and Newfoundland only in 1982 and 1985 respectively; legislation implementing the 1985 Atlantic Accord and the 1986 Nova Scotia Accord (which replaced the 1982 agreement) is very new. Negotiations are continuing between Canada and British Columbia. Because the agreement on current Newfoundland and Nova Scotia arrangements coincided with a downturn in petroleum prices, there has been little offshore activity carried out pursuant to the new regimes. The July, 1988 announcement that the Hibernia oil development will proceed offshore Newfoundland reflects renewed interest in the offshore, and the expected higher level of activity will put to the test the effectiveness of our legislative and administrative arrangements. It is therefore a convenient time to reflect upon the Australian experience.

This article briefly discusses the legal and political background to Australia's offshore petroleum regime and describes the current system, emphasizing federal-state aspects. An analysis of selected features of the regime is followed by observations about its relevance to Canada.

The Background

Australia consists of six states and several federal territories, one of which (the Northern Territory) enjoys a considerable degree of self-government.[1] Important geographical, historical and constitutional factors have influenced the development of its offshore petroleum regime. For example, the six states formed a federation simultaneously, with the result that their legal positions concerning the offshore were nearly indistinguishable. Moreover, the six states and the Northern Territory all have lengthy coastlines.

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Federal-state negotiations concerning offshore petroleum commenced in the early 1960s and culminated in an agreement in 1967. Pursuant to the 1967 Agreement, boundaries were drawn offshore between the states to create an "adjacent area" for each. Virtually identical legislation (the so-called Common Mining Code) was passed by each level of government so that each adjacent area was subject to the relevant state's mining code as well as to a Commonwealth mining code. These "mirror" statutes were to be amended, and regulations pursuant to them passed, only with the agreement of all governments. The area adjacent to each state was administered by a state official (typically the mines or energy minister), with the Commonwealth minister playing only a small role in decision-making. A maximum 10% royalty was split on a 40/60 basis between the Commonwealth and the adjacent state, and states were entitled to an "over-ride" royalty above 10% and to other monies payable under the Common Mining Code. These arrangements were designed to leave thorny legal issues concerning offshore jurisdiction unresolved.

While in oppositition, the Labour party had criticized the 1967 Agreement and, shortly after its election to office, introduced the Seas and Submerged Lands Act 1973. The validity of this legislation, which declared federal authority over the continental shelf and territorial sea, was attacked collectively by the states before the High Court. In a 1975 decision,[2] all seven judges upheld the legislation vis-à-vis the continental shelf, while a majority also found it valid vis-à-vis the territorial sea. Not suprisingly, in the period after 1973 the co-operative federal-state arrangements that had characterized the 1967 Agreement gradually fell apart. A lengthy round of negotiations followed the High Court decision, culminating in the 1979 Offshore Constitutional Settlement (OCS) that forms the basis of the current regime.

The Current Regime

In contrast to the 1967 Agreement and Canada's Atlantic and Nova Scotia Accords, the OCS was not evidenced by a formal agreement. Instead, its terms were set out in an information package released by the Commonwealth Attorney-General's Department.[3]

Pursuant to the OCS, the Commonwealth has passed legislation vesting in each state proprietary rights and title in respect of the seabed of an adjacent three-mile territorial sea (the "coastal waters") and giving each state the same powers with respect to this area as it would have if the waters were within the state.[4] Petroleum activities in the Commonwealth "adjacent areas" beyond the coastal waters are governed by the Commonwealth's Petroleum Submerged Lands Act (PSLA). Although vesting day-to-day administration in a Designated Authority (DA) who is typically the relevant state minister, the PSLA lists a number of important matters (such as the opening of areas for permits and the grant and renewal of exploration permits and production licences) to be determined by a Joint Authority (JA). The JA for each adjacent area consists of the Commonwealth minister and the relevant state minister; in the event of disagreement, the Commonwealth minister's views prevail. State petroleum legislation governs activities in the coastal waters, and to the extent practicable, such laws are to have provisions common to each other and to the PSLA. The OCS retained the 1967 royalty-sharing arrangements.

To summarize, under the current Australian regime two types of offshore boundaries exist: boundaries between the states, and boundaries between each state's three-mile coastal waters and the Commonwealth adjacent area. State petroleum laws govern each state's coastal waters and the Commonwealth PSLA governs each adjacent area beyond. A state minister participates in the administratiuon of the relevant adjacent area, as the DA responsible for day-to-day matters and as a member of the appropriate JA.

Selected Aspects of the Regime

(a) Consistency in Laws, Policies and Administration

In theory, petroleum activities throughout the offshore are to be governed by similar laws, policies and administrative practices. One statute (the Commonwealth PSLA) applies to all adjacent areas and, as among the adjacent areas and the state coastal waters, common laws are to be achieved through the retention of a common mining code. The dominant role of the Commonwealth minister in each JA should ensure common policies and administration throughout the adjacent areas, while state participation in the JA structure should promote a uniform approach to state coastal waters and adjacent areas. Since uniformity is seen as a desirable goal, other steps have been taken to this end.

In 1983, the Commonwealth issued Guidelines pertaining to the handling of JA matters.[5] Intended to ensure a consistent approach to the administration of the PSLA, the Guidelines include model clauses for work requirement conditions, criteria for assessing exploration permit applications, and guidelines for handling work program variations, permit cancellations and permit surrenders. Applying to the decisions of all JAs, these Guidelines promote a common approach throughout the adjacent areas.

Uniformity within the adjacent areas has also been achieved through the use of "Directions".[6] Some observers suggest that this less formal device of second-level regulation has been utilized because of difficulties in reaching a consensus among all governments on Regulations, as required by the 1967 Agreement. The Directions, which cover matters that in Canada one would expect to find in Regulations, were finalized through the Australian Minerals and Energy Council's (AMEC) Standing Committee on Offshore Petroleum Legislation (Standing Commitee).

AMEC pre-dated the 1967 Agreement and consists of the relevant state and Commonwealth ministers; offshore matters consitute only a small part of its agenda. The Standing Committee is made up of the heads of the petroleum departments, and meets approximately every six months. In addition to its role in developing the Directions, the Standing Committee is often where Commonwealth proposals to amend the PSLA are mooted. It has proven to be an important mechanism for promoting consistency: while the states are not legally obliged to mirror PSLA amendments in their own petroleum statutes, the Standing Committee structure encourages intergovernmental communication, and thus helps to achieve a similar approach even in the state coastal waters.

The role played by the JA and DA, Guidelines, the Directions, and the existence of AMEC and the Standing Committee have all helped to achieve consistency in the treatment of the entire

offshore. Nevertheless, differences have begun to emerge. In 1985, the Commonwealth amended the PSLA to permit cash bidding in the adjacent areas in certain circumstances. Because they had a different exploration philosophy, the states refused to introduce counterpart amendments to the laws governing their coastal waters. A similar result followed the Commonwealth's decision to replace the excise tax and royalty regime in parts of the adjacent areas with a profit-based Resource Rent Tax (RRT).

These chinks in the concept of a Common Mining Code have been largely of academic interest, as much of the activity so far has occurred in areas subject only to the PSLA. As interest grows in coastal waters and areas that span the coastal waters and Commonwealth adjacent areas, divergences in law and practice may give rise to serious legal and practical problems.

(b) The Decision-Making Mechanisms

As explained above, the OCS contemplated day-to-day administration of adjacent areas being handled by the DA (state minister), and selected matters being handled by the JA, with the Commonwealth minister retaining the final say. This arrangement, which gave the Commonwealth a much larger role than under the 1967 Agreement, reflected its powerful bargaining position following the High Court decision. Two aspects are of particular interest: the efficiency of these decision-making mechanisms and the gradual enlargement of the JA's jurisdiction.

Industry representatives express a generally high level of satisfaction with the way administrators make decisions under the Australian system. This is especially true as regards matters within the DA's control. State mining departments are typically within easy reach of industry head offices and interactions are frequent and smooth. There seems to be less satisfaction in relation to JA decisions. Some industry members complain about time lags and the fact that, where state and Commonwealth officials disagree about the appropriate course of action, each level of government tends to blame the other for resulting delay. Problems can be exacerbated by the fact that Commonwealth officials are isolated in distant Canberra. State officials observe that because so many steps must be followed in the JA process (as set out in the Guidelines), opportunities for mis-communication abound. Some view the JA structure as cumbersome, time-consuming and inefficient.

Part of the state-level criticisms may be attributed to the gradual diminution of the DA's role and the corresponding enlargement of JA jurisdiction. The several amendments to the PSLA implemented by the Commonwealth in this direction since 1983 are seen by some as mere fine-tuning of the system, and by others as evidence of a growing Commonwealth domination of offshore decision-making. Matters formerly decided by the DA which now are within the JA's authority include the power to vary the rate of petroleum production; most of the powers to vary, suspend or exempt from compliance with the conditions of title documents; the power to make directions concerning unitization; and the power to determine the amount of petroleum to be assigned from a pool which is contained in more than one licence area.

(c) Fiscal Matters

While the revenue-sharing provisions of the OCS appear simple (i.e. the retention of the royalty-sharing arrangements agreed upon in 1967), probably no other matters have caused so much friction between the state and Commonwealth governments. One long-standing issue between the Commonwealth and the state of Victoria has been the treatment, for royalty calculation purposes, of the crude oil excise levy imposed by the Commonwealth in 1975 in order to capture industry's "windfall profits". Treated as a deduction prior to calculation of royalty, the excise levy would dramatically reduce the state's revenue while increasing that of the Commonwealth. After years of negotiation, the Victorian DA concurred in this result in 1980, but in 1986, revoked its earlier approval. When the Commonwealth minister exercised his power under the PSLA by directing the DA to revert to the former calculation method, the state sought judicial review in the Federal Court,[7] arguing *inter alia* that the Commonwealth power to give directions about this issue was limited to matters of procedure. In part, Victoria asserted that any other interpretation would abrogate the concept of "sharing" between the states and the Commonwealth referred to in a recital of the PSLA. This argument was given short shrift by the Court and the Commonwealth direction was upheld.

Another important problem has been the role to be played by the Commonwealth in the assessment and verification of offshore royalties. Since 1977, the Commonwealth has been criticized in reports of the Commonwealth Auditor-General and Parliament's Joint Committee of Public Accounts for its low level of involvement. One Commonwealth response has been to expand the powers of the JA. Some industry representatives have voiced concerns about costs and inefficiencies that could result from a proliferation of audits of their operations, while state officials believe the Auditor-General's criticisms are partially responsible for the Commonwealth's increasing intrusion into day-to-day administration.

Earlier reference has been made to the Commonwealth's recent decision to replace the tax and royalty regime in parts of the adjacent area with a resource rent tax (RRT). The current state-Commonwealth negotiations over the sharing of the RRT may be an important test of the OCS, and further skirmishes may lie ahead concerning entitlement to the proceeds from cash bidding in the adjacent areas.

(d) The Constitutional Status of the 1979 OCS

There has been considerable academic discussion in Australia about whether the Commonwealth could unilaterally undo the 1979 OCS by amending or repealing the State Powers or State Titles legislation. The legal arguments surrounding this issue are complex, turning upon such matters as the method by which the OCS was legislated and certain unique features of Australian constitutional law.

Most commentators concur on at least one point: if the Commonwealth were to diminish the states' titles to the territorial sea, s.51(3) of the Constitution[8] would require the payment of compensation. If this view is correct, serious practical problems would face any Commonwealth government attempting to follow such a course. The material released by the Attorney-General's Department announcing the OCS hints that this result was intended, stating that the grant of propriety rights and title would provide assurance to the states that the territorial sea arrangements would have "permanency and stability".

It will be recalled that a Labour government passed the legislation that spawned the High Court litigation. Labour was in opposition by the time the OCS was negotiated, and regained office shortly after its implementing legislation was proclaimed in 1983. The current Labour government maintains officially that there is no legal obstacle to unilateral Commonwealth alteration of the OCS. Having reviewed the arrangements, however, it has concluded that the OCS is working satisfactorily and no present action is required to regain Commonwealth title to the territorial sea.

Nevertheless, the Prime Minister has made it plain that, should the states not continue acting in ways compatible with the national interest while exercising powers obtained under the OCS, the Commonwealth will reconsider its position. This may help to explain the relatively meek state response to the Commonwealth's PSLA amendments, such as the ones that expand the jurisdiction of the JA at the expense of the DA.

Lessons for Canada

The Canadian and Australian offshore petroleum regimes have similarities and differences. Canada's system is bilateral while Australia's is mulitlateral. Canada's does not require the drawing of a boundary between the territorial sea and the continental shelf. Although both systems have been implemented by legislation by both levels of government, the legislation plays a different role in each. In Australia there is the advantage of one Commonwealth statute governing the entire continental shelf (the adjacent areas) and the possible disadvantage of different state statutes governing the territorial sea (the state coastal waters). Both have decision-making mechanisms that require the involvement of two levels of government in certain important decisions.

Despite the differences, a number of observations can be made about the relevance of Australia's experience for Canada. The first concerns interprovincial offshore boundaries. While this was a larger issue in Australia because all states and the Northern Territory have coastlines, the length of time it took to negotiate acceptable boundaries and the political problems that arose in the process, suggest that with respect to Canada's east coast, this should be addressed sooner rather than later. Canada's legislation makes provision for boundary resolution by negotiation and arbitration.[9]

A second point relates to the amendability of legislation governing offshore petroleum. Some observers suggest that the 1967 Agreement's "mirror legislation" concept created rigidity that made it difficult to amend the applicable legislation: the need to obtain the concurrence of all governments in proposed amendments led to a process that was clumsy, slow and logistically difficult. As mentioned earlier, common regulations were never achieved. Such problems have all but disappeared now as the High Court decision and the OCS give the Commonwealth unilateral power to amend the PSLA. A multitude of important technical and policy alterations have been made already. While some changes have not been greeted enthusiatically by the states, they grudgingly accept the Commonwealth's legal authority to proceed.

Under the Canadian Accords, the federal Conservative government has committed itself to alter the legislation and pass certain regulations only with the agreement of the affected provincial government. This arrangement will work so long as both governments are in agreement on major issues – the recent federal-Nova Scotia decision to place a moratorium on Georges Bank drilling being a case in point.

Australia's experience, however, demonstrates that the two levels of government will not always have common views; for this reason, the states take comfort from the belief that, even though the OCS may not constitutionally entrench the territorial sea arrangements in law, it virtually does so in practice. Canada's Accords promise Newfoundland and Nova Scotia the federal government's support should they wish to seek constitutional entrenchment; and perhaps it is time to consider moving this matter off the back burner.

A related matter is consistency in the treatment of different offshore areas. This is a goal in both countries, although the importance of regional variations and the need for local discretion is also recognized. Canada's bilateral approach requires a multiplicity of statutes and decision-making bodies that make the achievement of consistency a long-term challenge. Australia has made some admirable progress toward this goal through institutions such as AMEC and its Standing Committee, and through devices such as common Directions and Guidelines. These are achievements to be emulated in Canada.

Finally, by delegating authority over royalties to the provinces, Canada has finessed some of the messy fiscal problems that have plagued the Australian regime. In a federal state, however, such intergovernmental issues cannot be avoided completely. This is especially true in the context of high-risk, high-cost projects, as demonstrated by the lengthy negotiations surrounding the Hibernia project and the complex fiscal arrangements that have resulted.

Constance D. Hunt is Professor of Law and Executive Director of the Institute. *This article is drawn from a larger study undertaken during her recent sabbatical leave which forms part of the Institute's project "Oil and Gas Law on Canada Lands". Her research has been supported by the Social Sciences and Humanities Research Council of Canada and the Universities of Melbourne and Calgary.*

Notes

1. As the Northern Territory is treated almost exactly like a state for the purpose of offshore petroleum, most references hereafter to the states include the Northern Territory.
2. *New South Wales* v. *The Commonwealth* (1975), 135 C.L.R. 337 (H.Ct.).
3. The "Agreed arrangements" set out in the information package are reproduced as Appendix A in Michael Crommelin, "Offshore Mining and Petroleum Constitutional Issues", (1981) 3 A.M.P.L.J. 191 at 214. Although the OCS includes arrangements relating to such matters as fisheries, marine parks and shipping and navigation, only petroleum matters are discussed here.
4. Coastal Waters (State Title) Act 1980 and Coastal Waters (State Powers) Act 1980.
5. Guidelines for Handling Matters Requiring Commonwealth and State/Northern Territory Decisions 83/1.
6. "Specific Requirements as to Offshore Petroleum Exploration and Production – 1985".
7. *Fordham and the State of Victoria* v. *Evans et al.*, Federal Court of Australia, No. VG 428 of 1986, Nov. 13, 1987.
8. This gives the Commonwealth power to legislate with respect to "the acquisition of property on just terms from any State".
9. *See e.g.* the Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c.3, s.6.

Gradual Change in Canadian Mining Legislation

by Barry Barton

Mining legislation in Canada is not often subject to radical reshaping, but changes in the country's foremost mining jurisdictions over the last few years have been sufficiently significant to deserve comment. It is especially interesting to detect parallels in the changes that have been occurring in the different provinces and territories.

Four provinces have entirely overhauled their mineral statutes.[1] In 1985 Saskatchewan split its Mineral Resources Act into a new Mineral Resources Act confined to resource regulation and conservation for both private and public minerals, and a Crown Minerals Act for the disposition of interests in Crown-owned resources. New regulations for hardrock minerals were made under the latter Act. In the same year New Brunswick introduced a new Mining Act that put strong emphasis on the impact of mining on surface owners and the environment. In 1987 Quebec announced new legislation that is now enacted and awaiting proclamation. This Mining Act will bring in a number of features that re new to the most active mining provinces. It will also permit the registration of certain mineral titles in the ordinary land registry offices as well as in the registers kept by Energy and Resources. Earlier this year British Columbia replaced the Mineral Act and the Mining (Placer) Act with the Mineral Tenure Act. This Act has brought placer claims and leases closer into line with their hardrock equivalents, and has made more land available for placer mining. It also features the ill-named "recreation area" which originated in the Park Act and is proving to be expedient but contentious as a means of allowing exploration and mining work in provincial parks or in areas under consideration as parks.

Minor changes have occurred in the Northwest Territories and Ontario[2]. In the former, they have eliminated Canadian ownership requirements and have increased the procedural protections available to miners in their relations with the department. In the ter, the changes have only been ial, the most notable being a new power for the Mining Recorder to relieve against forfeitures caused by administrative errors in the Ministry. Bills to carry out a proper reform of the Ontario Act that were introduced in 1983 and 1985 went nowhere,[3] but recent staking disputes have added to the pressure for modernization.[4] Ontario must share honours with the Yukon for the most antiquated mining legislation in Canada – not that modernizing efforts in mining law have always been for the better.

The new legislation exhibits different styles. The Saskatchewan Act and Regulations, for example, are superbly clear, going through permits, claims and leases in turn, and spelling out for each how it is acquired, how it is held, and what it confers. Key legal points such as the right to go to lease, the right of renewal and the effect of non-registration of a transfer have been greatly clarified. The Quebec Act shares this virtue of lucidity. The British Columbia legislation, however, loses clarity in being split between the Act and the Regulations in an awkward way. Section 23 of the Act, for example, informs the reader that "a free miner who locates a claim shall apply to record the claim within the prescribed period after location". Why could the number of days not have been left in the Act? Surely the government does not intend to change the time limit every few months.

We can usefully consider these recent reforms by generalizing in terms of the issues that recur from province to province.

Simplification of the title system

Several provinces display an intent to simplify the range of titles to minerals that are available. New Brunswick and Quebec have both eliminated the development licence ("mining licence" in New Brunswick) that was the next step after a claim if the ground was to be held for any length of time. Saskatchewan has abolished the claim block that was used to acquire larger areas of ground. In all three cases the ordinary claim is extended to serve these purposes. British Columbia's system of titles for hardrock minerals is already uncomplicated, but there has been an attempt to simplify the treatment of the different types of minerals. Placer claims and leases have been retained, but are subject to the same rules as mineral claims and leases have been retained, but are subject to the same rules as mineral claims and leases to a greater degree. "Industrial" minerals such as limestone, dolomite, marble, shale, clay, volcanic ash, bentonite, perlite and kaolin, previously under the Land Act, are now under the Mineral Tenure Act.

Another complexity that is disappearing is the limitation on the number of claims that a person could stake in a year; Quebec has dropped its limit of 5 per person, and British Columbia has dropped the limits on 2-post claims and placer claims. (It is interesting that British Columbia has not eliminated 2-post claims. Essentially mineral claims staked by an older and simpler method, they had been retained for use by individual miners, but they are prone to staking errors and fractions between claims. They are now made equally available to individual and corporate miners.)

Simplification of acquisition and term

There is a general movement to reduce the period for the recording of a claim after staking from 30 days or thereabouts to 20 days; it occurs in New Brunswick (actually 21 days), Saskatchewan, Quebec (30 days north of the 52nd parallel) and British Columbia. Quebec had previously allowed 15 to 30 days depending on the distance to be travelled. This is similar to the Yukon Quartz Mining Act's charming anachronism of one extra day for every 10 miles to be travelled.

As for the term of a claim, Saskatchewan and Quebec have both introduced a first term of two years before work has to be recorded, allowing an extra year for exploration work to get under way. Those provinces, along with New Brunswick, have also made the claim indefinitely renewable, rather than requiring the claimholder to acquire a development licence or go to lease.

Legal nature of a claim

One of the persistent issues in mining law in some jurisdictions is the legal character of the interests created by the legislature. Is a mineral claim, for example, a property interest, an interest in land? Ontario and Quebec have always had useful statutory definitions,

and Saskatchewan does now, defining a claim as a chattel real. The issue has resulted in some uncertainty in British Columbia, especially after the *Cream Silver Mines* case[5]. However the new Act leaves the definition of the claim holder's interest as "a chattel interest" as ambiguous as it was before.

Map designation of claims

Quebec is the first of the larger mining jurisdiction to permit claims to be acquired by filing at the mining registrar's office a notice of map designation that describes the claim by map references. It is not necessary to stake out the ground physically, making it possible to acquire mineral rights by paperwork alone, but also making it more difficult out in the field to see who owns what ground. Quebec is introducing map designation on a trial basis only, and only for that part of the province south of the St Lawrence River and southwest of the boundary between the regional country municipalities of l'Islet and Kamouraska. No person can use map designation to acquire more than 200 claims in any thirty-day period.

Exploration licences

Quebec has also brought in mining exploration licences for the acquisition of mineral rights for large areas (50 - 400 km^2) for limited periods (5 years with one right of renewal) but only for that part of the province north of the 52nd parallel. Just as with the equivalent titles in Saskatchewan, Manitoba and the Northwest Territories, the holder of a mining exploration licence may acquire claims and leases in the licence area before surrendering the licence. Saskatchewan has reduced the amount of land that can be tied up in this kind of licence by reducing the maximum size and shortening the maximum term to two years.

Surface rights

Relations between the owners of mineral rights and the owners of surface rights have deservedly received new attention, especially in legislation ensuring that mineral operators at the very least inform surface owners before beginning operations on their land. The New Brunswick Mining Act requires the holder of a prospecting licence to show the licence to a surface owner on demand, and a miner must make every reasonable effort to notify the owner as soon as possible after staking a claim on private land. The miner must inform the owner again before carrying out operations other than staking, and must attempt to reach agreement with him on surface use issues. The Act also endeavours to clarify the liability of miners for damage to land and interference with the enjoyment of property.

In a similar vein, British Columbia now requires a miner to give notice to a landowner before carrying out operations that involve surface disturbance by mechanical means. British Columbia also transfers surface rights jurisdiction under the Mineral Tenure Act to the Mediation and Arbitration Board which previously dealt only with oil and gas surface rights.

When it comes to surface rights, there is a slip in the clarity of drafting of the Saskatchewan regulations. The previous provisions for surface-mineral disputes to be adjudicated by an Arbitration Board have been omitted, and, therefore, at the moment there is no law to govern these matters in the hardrock area except for the general common law principles.

Disputes

Quebec abolished the position of the Mining Judge in 1986 and transferred the jurisdiction to the Provincial Court. Quebec has also removed the important "substantial compliance" provision, section 37: "When staking, it shall be sufficient to observe the provisions of this act in substance, and as nearly as circumstances permit". In effect, a new but similar test for the amount of leeway that the Act allows in the staking process is embodied in a condition that the staking rules must be complied with "as nearly as practicable". An attack on the validity of a claim for non-compliance with the staking rules must be made within one year of the date of registration. The dispute procedures in British Columbia have been widened to include placer claims and further grounds for complaint.

Conclusion

Many of these changes appear to support the contention that mining law is moving in parallel in the different jurisdictions of Canada. The innovations introduced in one province often turn out to have been in use in another province for some years. There is evidence of a trend in different provinces towards a title system focussed on the claim as the main interest, to be acquired and held indefinitely, on a year by year basis, until mining begins.

One must also note that even through a period of greater change than usual, the basic structure of the mining legislation in the various provinces and territories has been left intact. The free entry system, as the central element of the structure in all jurisdictions except Alberta, Nova Scotia and Prince Edward Island, has been subject to very little modification. With its characteristics of free access to public land, self-initiation by the miner in the acquisition of mineral rights, and an unimpeded right to go to lease, the free entry system is effective in encouraging mineral activity, but does not lend itself readily to the solution of multiple-resource use problems.

In most jurisdictions, incremental development of the statutes results in minor amendments every year or two. These frequent amendments ensure that the legislation – in marked contrast with the 1872 Mining Law of the United States[6] – keeps pace with changing conditions and stays reasonably efficient as a system for the acquisition of mineral title, even if its basic structure has avoided re-examination. The experience has been one of evolution rather than revolution.

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Notes

1. This legislation is:
   Saskatchewan; The Mineral Resources Act, SS 1984-85-86, c.M-16.1, The Crown Minerals Act, SS 1984-85-86, c.C-50.2, The Mineral Disposition Regulations, 1986, Sask Reg 30/86, replacing The Mineral Disposition Regulations, 1961, Sask Reg 431/67.
   New Brunswick; Mining Act, SNB 1985, c.M-14.1, replacing the Mining Act, RSNB 1973, c.M-14.
   Quebec; Mining Act, SQ 1987, c.64, as amended by SQ 1988 c.9, replacing the Mining Act, RSQ 1977, c.M-13.
   British Columbia; Mineral Tenure Act, SBC 1988, c.5, as amended by SBC 1988 c.44, replacing the Mineral Act, RSBC 1979 c.259 and the Mining (Placer) Act, RSBC 1979, c.264.
2. SOR/88-9, amending the Canada Mining Regulations, CRC 1978, c. 1516; Mining Amendment Act, SO 1988, c.48.
3. The two bills were Bill 129, 3d Sess., 32d Leg. Ont., 1985 and Bill 29, 1st Sess., 33d Leg. Ont., 1985.
4. See Northern Miner, June 27, 1988.
5. *Cream Silver Mines Ltd.* v *The Queen* [19[illegible] 27 DLR (4th) 305 (BCSC), [1986] 4 WWR 328.
6. 30 USC ss. 21-54. See J.D. Leshy, *The Mining Law: a Study in Perpetual Motion,* Washington, Resources for the Future, 1987.

Institute News

More Sponsors for Mining Law Project

BP Canada, Cominco Ltd., Davis and Company, Lawson Lundell Lawson & MacIntosh, and James Wade Engineering Ltd. have recently joined the growing list of sponsors for the Institute's Canadian Mining Law Project, which began in July. The Canadian Mining Law Project is a two-year $143,000 research project which will result in a one-volume manuscript of mining law, focusing on mineral title. The project will cover mining legislation in all provinces and territories, as well as federally.

The following is a complete list of project sponsors to date: American Barrick Resources Corporation, BP Canada, Cominco Ltd., Davis and Company, Falconbridge Limited, Fasken Martineau Walker, Hudson Bay Mining and Smelting, International Corona Resources Ltd., LAC Minerals Ltd., Lawson Lundell Lawson & MacIntosh, Noranda Minerals Inc., James Wade Engineering Ltd., the Foundation for Legal Research, the Rocky Mountain Mineral Law Foundation, and the law foundations of Alberta, British Columbia, New Brunswick, the Northwest Territories, Ontario, and Saskatchewan. Additional sponsors will be announced in future issues of *Resources.*

Executive Director Returns

Constance D. Hunt, the Institute's Executive Director, returned from a one year sabbatical leave of absence on August 1, 1988. During Professor Hunt's absence the Institute's acting Executive Director was Professor Alastair R. Lucas.

While on sabbatical Professor Hunt undertook a major research study on *Management of Offshore Petroleum in Canada and Australia.* This is the final study in the Institute's Oil and Gas Law on Canada Lands Project. The study compares the management regimes for offshore petroleum in the provinces of Newfoundland and Nova Scotia with those in the Australian states of Western Australian and Victoria. It identifies legal and administrative problems with these regimes that exist in one or both countries with a view to assessing the effectiveness of the management systems and identifying whether solutions in one country are applicable to the other. The study will be published by the Institute.

In addition to this research, Professor Hunt also made a variety of presentations (see below) and served on the Committee on Arctic Social Sciences, which was established by the United States National Research Council. The Committee is preparing a report to provide advice concerning social sciences research in the Arctic.

Contract Law Course for Oil and Gas Personnel

On November 24 and 25 the Institute will present a Contract Law Course at Calgary's Westin Hotel. Aimed at non-lawyers in the petroleum industry who deal extensively with contracts, the course will be open to the public. Previously, the course has been offered to employees of Gulf Canada, Home Oil, Canadian Superior, Mobil Oil, and Suncor Resources.

The course examines such issues as how a contract is formed and terminated, the concepts of consideration and privity, judicial approaches to the interpretation of contracts, and the calculation of damages. In addition, the course scrutinizes a number of clauses commonly found in petroleum industry contracts (including *force majeure,* independent contractor, choice of laws, liability and indemnity, and confidential information). The course does not focus upon specific *types* of contracts used in the industry but is geared for industry personnel at all levels whose jobs require them to understand the basics of contract law. Materials prepared for the course draw upon Canadian cases involving the petroleum industry.

Course instructors are Nicholas Rafferty, a contract law professor in The University of Calgary's Law Faculty, Constance Hunt, Executive Director of the Institute, and Institute Research Associate Barry Barton. The course involves lectures by the instructors, but also utilizes individual and group problem-solving methods.

The registration fee is $395, including all materials. If you are interested in registering for this course please contact Nancy Money at 220-3200 as soon as possible since space is limited.

Recent Presentations *By Institute Staff*

- During her recent sabbatical, Executive Director Constance Hunt spent four months as a visiting scholar at the University of Melbourne. She made a variety of presentations there and to groups throughout the country. She spoke to the Victorian and Western Australian branches of the Australian Mining and Petroleum Law Association, and also made presentations to the Monash University law faculty, the University of Adelaide's LL.M. seminar and continuing education program, and the University of Western Australia law faculty. Several of the papers presented will appear in Australian publications.

- Research Associate Owen Saunders presented a paper on "Legal Aspects of Water Exports" at the annual meeting of the Canadian Bar Association. The meeting took place in August in Montreal.

- Constance Hunt was one of two non-Scandinavians invited to participate in a seminar sponsored by the Nordic Council of Ministers. The seminar was held in the Faroe Islands in June. It concerned the effect of oil activities on the fishery and on small communities. Professor Hunt presented a paper concerning the experiences in Canada. The paper is being published as part of the seminar proceedings.

Nancy Money Joins Staff

The Institute's new Conference Coordinator is Nancy Money, who came to work for the Institute on August 1, 1988. As Conference Coordinator she will be responsible for organizing the Institute's Conference on Natural Resources Law and seminars, workshops, courses, and meetings. In addition, she serves as secretary to the Institute's Executive Director.

Mrs. Money has a Bachelor of Science degree from the University of Alberta. Prior to joining the Institute, she worked for The University of Calgary Faculty of Law, and was employed with Ducks Unlimited in Edmonton and Camrose, Alberta. She fills the position held for more than eight years by Shirley Babcock. Ms. Babcock left the Institute in July to move to British Columbia.

Institute's 4th Conference on Natural Resources Law

The Institute's biennial Conference on Natural Resources Law will take place May 11 to 13, 1989 in Ottawa. Co-sponsored by the Institute and the University of Ottawa Faculty of Law, it will focus on the topic of "Sustainable Development".

Sustainable Development is the concept of environmentally compatible economic development recommended by the United Nations World Commission on Environment and Development, chaired by Norwegian Prime Minister Gro Harlem Brundtland (The Brundtland Report). In the Brundtland Report, "sustainable development" is defined as "development that meets the needs of the present without comprising the ability of future generations to meet their own needs". In Canada the topic has also attracted attention as a result of the National Task Force on Environment and the Economy which was established by the Canadian Council of Resources and Environment Ministers.

The 4th Institute Conference on Natural Resources Law will examine the legal issues involved in sustainable development, including the impact on trading relations, sustainable development in energy, and legal techniques for moving toward sustainable development. More information about the conference will be included with the Fall 1988 and Winter 1989 issues of *Resources.*

Publications

Maritime Boundaries and Resource Development:
Options for the Beaufort Sea, by Donald R. Rothwell. 1988. ISBN 0-919269-24-9. 61 pages. $15.00.

In 1984 the International Court of Justice decided for Canada and the United States the direction of the maritime boundary through the Gulf of Maine. While neither party to the adjudication was particularly happy with the result, it is possible the Canada-United States maritime boundary in the Beaufort Sea may eventually be delimited by a similar method. This book examines the *Gulf of Maine Case* to show how court decisions affecting maritime boundary disputes have failed to equitably resolve the competing claims of adjacent coastal states, and proposes some alternatives for deciding the maritime boundary in the Beaufort Sea.

To date there has been little progress in resolving the Beaufort Sea boundary dispute. Yet until it is resolved the commercial development and environmental protection of an area of the Beaufort Sea is uncertain. The outcome of the dispute is being closely followed by interests in the petroleum industry who are eager to exploit the nonrenewable natural resources of the area. Until a maritime boundary is delimited, they are forced to curtail their operations, not knowing which government they are to negotiate with or which part of the Beaufort Sea they can operate in.

Some of the questions raised by the judgement in the *Gulf of Maine Case* and the impact it had upon the law of maritime boundary delimination are assessed in *Maritime Boundaries and Resource Development.* Two other recent boundary adjudications are also referred to. In analysing the Beaufort Sea dispute, the arguments put forward by Canada in support a line drawn along the 141st meridian and by the United States in favour of an equidistance are reviewed. It is concluded that flaws exist in both proposed boundary lines.

The book shows how a court decision would be unlikely to resolve this dispute, since previous cases have failed to equitably resolve the two countries' competing claims. This has especially been the case where irregular coastal geography is combined with exploitable natural resources which straddle the disputed area. As the Beaufort Sea boundary is such a case, five alternatives to traditional methods are put forward for consideration. These are: modified equidistance, joint development, joint regional management, a regime of common petroleum deposits, and the regime of transborder petroleum deposits. It is argued that a joint development zone be adopted in the Beaufort Sea. This would allow for equitable resource exploitation by both states, which, if combined with a "Beaufort Marine Cooperative Agreement", could also respect the region's unique environment. As a consequence, the difficulties in negotiating and eventually delimiting a fixed maritime boundary may be avoided.

Classifying Non-Operating Interests in Oil and Gas,
by Eugene Kuntz, presented at a seminar sponsored by the Faculty of Law and the Canadian Institute of Resources Law, The University of Calgary, (discussion paper). 1988. 28 pages. $10.00

This publication is a paper which was presented at a seminar on "Classifying Non-operating Interests in Oil and Gas" by Professor Eugene Kuntz, Visiting Chair of Natural Resources Law at The University of Calgary, on April 7, 1988.

The first part of the paper provides background information on the topic, dealing specifically with the need for non-operating interests, the development of non-operating interests, and the present use of these interests. It then briefly describes the five different types of non-operating interests: royalty interest, overriding royalty interest, production payment, net profits interest, and carried interest.

The third part of the paper explains the need for classification of these interests and the methods of classification (traditional and incidents of ownership). The remainder of the paper examines judicial classification of non-operating interests in the United States and Canada. Judicial decisions concerning each of the different types of non-operating interests (royalty interest, overriding royalty, production payment, net profits interest, and carried interest) are examined for the United States and then for Canada. Finally, conclusions are offered.

Other Recent Publications

Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights, by Richard H. Bartlett. 1988. ISBN 0-919269-23-0. 231 pages. $30.00

A Reference Guide to Mining Legislation in Canada. (Second Edition), by Barry Barton, Barbara Roulston, and Nancy Strantz. 1988. ISBN 0-919269-25-7. 120 p. $30.00

Books on a variety of resources law topics (mining, forestry, oil and gas, electricity, acid rain, etc.) are available from the Institute.

How to Order

To order any of these publications please send a cheque payable to "The University of Calgary." Orders from outside Canada should be submitted in U.S. funds. ($15.00 U.S. for *Maritime Boundaries and Resource Development* or $10.00 U.S. for *Classifying Non-Operating Interests in Oil and Gas.)* Please send orders to:
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