Resources

No. 35 Summer 1991

The Newsletter of the Canadian Institute of Resources Law

The Environmental Assessment of Electricity Exports: The Whale That Ate The NEB

*by Janet Keeping**

Introduction

As is widely known, Hydro-Québec plans to construct a massive new hydro-electric project called Grande Baleine ("Great Whale"). Hydro-Québec's plans are initially to export the power from Great Whale. To that end, and prior to construction of the project, the utility sought electricity export licences from the National Energy Board. In August of 1990 the Board released its decision on the application:[1] the licences were granted but subject to a number of conditions. The most controversial of these provided that the facilities required for production of the export power (all of which were to be located within Québec) be "subjected, prior to ... construction, to the appropriate environmental assessment and review procedures ... ".[2] On July 9, 1991, the Federal Court of Appeal ruled that these conditions, because they related to the production, and not export, of the energy involved, were beyond the powers of the National Energy Board.[3] This brief article discusses the reasons of the Court of Appeal for its conclusion and also examines the NEB's reasoning on the issue. It goes on to look at other problems with the NEB decision, and finishes with some thoughts on the practical consequences of carving up the environmental assessment pie in the way that Canadian law seems to demand.

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Résumé

Cet article traite de la délivrance par l'Office national de l'énergie de licences autorisant l'exportation d'électricité de "Grande-Baleine", un projet hydro-électrique proposé par Hydro-Québec, et de l'examen par la Cour d'appel fédérale de cette décision de l'Office. L'auteur soutient que la Cour a eu raison d'annuler les modalités assortissant les licences et exigeant que les équipements de production (par opposition aux exportations) soient soumis à une évaluation environnementale, modalités qui n'étaient pas de la compétence de l'Office. Elle soutient également que la décision de l'Office est défectueuse à d'autres égards, notamment du fait qu'elle n'examine pas de façon satisfaisante les incidences environnementales des exportations proposées, qui relèvent de sa compétence.

Federal Court of Appeal Decision

Although other issues are tackled in the case, on the approach adopted by the Federal Court of Appeal, the first question was "whether the Board's jurisdiction ... extends to facilities for the production of goods for export, or in other words, whether the Board can make the granting of a licence to export certain goods subject to conditions pertaining to their production".[4] The Court found the question embarrassingly easy to answer: it referred to the obvious point that the Board's jurisdiction in the matter flowed from *National Energy Board Act*[5] provisions regarding export of electricity and quickly moved to state the obvious – "The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity".[6] The Court allowed that facilities devoted to production of power either totally or primarily for export **might** fall within the NEB's jurisdiction, but completely rejected that characterization of Great Whale ("... it is clear that there is nothing of the kind here"). On the issue the Court was emphatic: the NEB had exceeded its jurisdiction and the conditions could not stand.

The Federal Court of Appeal went on to hold that the impugned conditions could be severed from the licences: "These conditions can clearly be dissociated from the licences themselves, and there is nothing in the reasons for the decision to suggest that, within the limits of its jurisdiction, the Board had reasons for refusing to grant the applications made to it".[7] As a result, Hydro-Québec now holds valid export licences unencumbered by the environmental assessment conditions the NEB attempted to impose. It is tempting to say that the Federal Court of Appeal erred here, that the NEB might not have issued the export licences had it known the environmental assessment conditions would be struck down, and thus those conditions were not severable. But the better view is probably the Court's. Although, as argued below, there may well have been considerations falling within the Board's jurisdiction that could have justified a refusal of the export licences on environmental grounds, the Board's decision suggests that it was incapable of discovering them.

NEB's reasoning

One comes away from reading the Federal Court of Appeal decision on this point somewhat mystified: if the applicable law is so transparent, then why did the NEB get it wrong? The answer seems to be that the NEB misunderstood the significance of the Rafferty/Alameda[8] and Oldman River dam[9] cases, but it is best to start with the position taken by Hydro-Québec on the Board's environmental jurisdiction.

Hydro-Québec argued consistently that the energy to be produced from Great Whale was needed to meet future Québec demand and that the only difference in the project caused by the plans to export power from it until domestic demand reached that level was that the facilities would have to be constructed a few years earlier than would otherwise be the case. Therefore, Hydro-Québec went on, applying the same principles of law as were later articulated by the Federal Court of Appeal, the only environmental impacts over which the NEB had jurisdiction were those associated with the advancement of construction. (Since Hydro-Québec was of the view that any such impacts were insignificant, it did not even submit evidence on the issue.)

But the NEB explicitly rejected this line of analysis in the following passage from its decision:

> ... the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of the facilities or only the impact of their advancement.[10]

Instead, the Board thought that it was under a duty to apply the EARP Guidelines[11] not only to the exports of energy from Great Whale but to the production facilities themselves:

> Following the recent decisions by the Federal Court of Canada in respect of the Rafferty-Alameda dam in Saskatchewan and other works on the Oldman River in Alberta, the Board has complied with the *EARP Guidelines Order* by carrying out an environmental screening of all export proposals. In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada, of the **production**,

transmission and end use of the electricity proposed to be exported.[12]

And later,

> ... for the Board to reach its decision on Hydro-Québec's applications [for export licences], and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.[13]

But the NEB's construal of the two cases is erroneous, for the NEB's role as an "initiating department"[14] in the case of electricity exports is very different from that of the federal Minister of Fisheries or Transport in the dam cases. Some explanation is in order.

The Rafferty/Alameda and Oldman River dam cases appear to have established a very broad scope for the applicability of EARP. The upshot of decisions of the Federal Court and the Federal Court of Appeal in those cases has been said to be that "every proposed action in Canada which requires federal permits, funds or land comes under EARP, and if significant adverse environmental effects are predictable any such proposal must go to public review".[15] Whether the scope of EARP can be so sweeping given the division of powers between the federal and provincial governments in the Canadian constitution is an issue that will probably be addressed by the Supreme Court of Canada in its decision in the Oldman case which is expected shortly. But even if the Supreme Court affirms the Federal Court on this point, it is still true that the jurisdiction of a statutory body such as the NEB must not only be made to fit within federal powers but as well within the legislation that gives it life. So the NEB can be an "initiating department" for the purposes of EARP only with respect to a NEB action: in connection with Great Whale, this means with respect to the issuance of an electricity export licence.

The NEB's enabling legislation does not, and *clearly* does not, give the NEB any jurisdiction over generating facilities' construction or operation approvals, and in this respect the position of the NEB is different from that, say, of the Minister of Transport or Fisheries in the Oldman case. The construction of the Oldman River dam was brought at least in part under the jurisdiction of the federal Minister of Transport by s. 5 of the *Navigable Waters Protection Act* which requires that a licence be issued by the Minister before any "work shall be built or placed in, on, over, under, through or across any navigable water".[16] There remains the question whether once required to environmentally assess a proposal before issuing a licence under the Act, the Minister of Transport is confined to aspects of the proposal relating to navigable waters or whether the assessment can be more comprehensive. But as far as electricity generating facilities go, the NEB does not even get that far: its legislative mandate does not reach the facilities at all.

The distinction with the Fisheries Minister's jurisdiction is analogous. The *Fisheries Act*[17] requires that any proposal that may affect fish habitat be authorized by the Minister of Fisheries. In other words, the construction of a dam where there is a fishery is brought under the Minister's jurisdiction by the terms of the legislation. Hence the basis for the applicability of EARP to the Minister of Fisheries in connection with the Oldman River dam. Again, the parallel giving the NEB decision-making power over Great Whale generating facilities, and hence status as an "initiating department" for an EARP of those facilities as opposed to the exports themselves, is missing. Unless overturned by the Supreme Court, the Rafferty/Alameda and Oldman cases impose the duty to apply EARP to Great Whale on the Ministers of Transport and Fisheries, and possibly several others[18]. But the cases do nothing to support an extension of the NEB's jurisdiction to the environmental assessment of electricity generating facilities.

Other problems with the NEB decision

There are other problems with the NEB decision. First, there is the nasty, but nevertheless enormously important, question as to whether Great Whale would be, in substance, a "dedicated" (as in, dedicated to export) hydro-electric facility. Hydro-Québec vigorously defended its assertion that it was not, that eventually all the power from Great Whale would

be needed to meet domestic demand. But a major intervenor, the Grand Council of the Crees (of Québec), thought otherwise:

> The Grand Council maintained that the requirement for new facilities was directly influenced by the proposed exports.
>
> It was the view of the Grand Council that the requirement for additional facilities in the future could be reduced by various factors ... Among the factors cited as having potential to reduce Québec's energy demands were demand-side management[19] and the development of energy-efficient technologies.[20]

The NEB had no response to this submission: it appears merely to have acquiesced to the utility's position on the matter.

It would seem, however, that no response to such a serious attack on the applicant's position is an inadequate response. Even if Hydro-Québec has no intention of pursuing demand-side management to the point that new generating plant would be unnecessary to domestic demand, the Crees' intervention on the matter begs the question – why is Hydro-Québec not being compelled to do so?

According to the received view, there are enormous constitutional problems with the imposition of efficiency and demand-side management criteria on Canada's utilities by the federal government. Some have argued that the federal peace, order and good government power would constitutionally found such legislation, but there are many doubters.[21] But coercive legislation aside, at a minimum, the federal government could be coordinating an effort to get such legislation passed by all the provinces. An example of sorts already exists with the special direction issued by the B. C. Cabinet in 1989 which requires the utilities commission in that province to take the need for conservation and energy efficiency into account in the regulation of B. C. Hydro. It is not unreasonable to suggest that the NEB might have recognized the need for such a process in its decision report. In any event, the NEB's total silence on the issue will not do.

Another issue on which the NEB merely acquiesced in the applicant's position concerned the environmental impact of the proposed exports on the consumption of electricity in the importing American states. According to Hydro-Québec, the effect of the imports would be to displace electricity from more noxious sources:

> It was indicated [in the applicant's evidence] that the hydro-electricity exported from Québec would be displacing fossil fuel-fired sources in both the States of New York and Vermont. Hydro-Québec showed that the displacement of thermal generation with hydro generation would result in a significant reduction of SO_2, CO_2 and NO_x emissions.[22]

In its decision the Board basically reiterates the applicant's position on the issue concluding that "The Board therefore believes and is satisfied that the downstream environmental effects and corresponding social impacts related to the end use of the electricity to be exported, would be positive."[23] The problem here is that both Canadian and American intervenors had argued against Hydro-Québec's evidence on the issue. The Board dutifully noted their positions, including summaries such as the following, in its chapter entitled "Interventions":

> ... the Grand Council [of Crees] identified the displacement of demand-side management and conservation in the United States as another possible adverse effect of the exports. ... the Grand Council believed that, particularly in Vermont, the exports would in fact be displacing the implementation of demand-side management by supplying a large portion of the state's energy needs.
>
> The [James Bay Defense] Coalition was of the view that insufficient consideration had been given to lower cost alternatives to Hydro-Québec's energy and that the importation of the energy into the United States would in fact undercut the development of energy-efficient technologies.[24]

But when the Board decided the issue, later in the report, it ignored the interventions and merely adopted Hydro-Québec's view of the matter.

This too will not do. Even if Hydro-Québec's evidence on the question provided an accurate account of what the American utilities **said** they would do in the absence of the imports, what those utilities will have to do if Canadian imports are not forthcoming may be quite a different matter. In both New York and Vermont there is a highly sophisticated (and, if recent reports are at all accurate, growing[25]) opposition to environmentally degrading methods of generating electricity. The point is that if those states cannot import Canadian generated hydro-

electricity, it may be doubted that the alternative will be reliance on the same old, dirty, generation sources.

Besides, it has been argued in other places that the NEB should be using its environmental-assessment-of-energy-exports jurisdiction to **pressure** importing jurisdictions to move more quickly to sustainable energy practices.[26] Supplying the American Northeast with electricity without first insisting that utilities there demonstrate greater efficiency and greater reliance on demand-side management just does not make sense. Whether Great Whale could under any circumstances make sense is another matter, but one does not even have to approach that question, until some prior issues are disposed of: the NEB has not even recognized their validity, let alone dealt with them properly.

Practical consequences of the division of environmental assessment powers

The Federal Court of Appeal's decision that the NEB exceeded its energy export licensing powers by requiring that Great Whale production facilities be environmentally assessed has been endorsed above as sound administrative law. But good law does not always make good sense: indeed, quite the contrary is the case when, as with Great Whale, the export licence applications that substantially justify an energy megaproject economically are hived off from the approval-of-production-facilities process. For one thing the two (or more) approval processes are inevitably at least somewhat duplicative. This is wasteful for all, but especially damaging for public interest intervenors who are often inadequately funded. Second, an approval in one process may lend credibility to the proposal in other review processes: even where the processes are supposed to be distinct, decision-makers may be influenced psychologically by an approval rendered in another forum. Third, the artificiality of splitting a proposal up into administrative, or any other body of, law dictated parts must greatly undermine public confidence in the regulatory process. It has been said that if one can think of a thing without also thinking about another thing to which the first is inextricably connected, then one has a legal mind.[27] But even if legal minds can keep the inextricably connected separate, most people cannot. Thus, regulatory frameworks that require that it be done are found baffling, a reaction which in turn feeds the public's currently high level of alienation from, and cynicism about, government.

Conclusion

The Federal Court of Appeal decision discussed here has been reported in the press as ruling "that the National Energy Board does not have the right to put environmental-screening conditions on its electricity export licences".[28] This is either true, but not legally newsworthy, or false. If such a description is taken to mean that the Board cannot link the issuance of an export licence to the environmental assessment of production facilities then it is true (unless those facilities are dedicated to export, a matter that went unexamined by both the Board and the Federal Court of Appeal in connection with Great Whale), but trivial, since although the NEB did attempt such a thing, it clearly exceeded its jurisdiction in doing so. But if the suggestion is actually that the NEB lacks the power to review energy exports from the environmental point of view, it is false. It has the power to review the environmental impact of exports, although as the above has attempted to show, in the case of Great Whale at least, it has not exercised these powers at all satisfactorily.

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Notes

1. National Energy Board, Reasons for Decision, Hydro-Québec, EH-3-89, August 1990.

2. Condition 10(a) of the licences which is quoted at 2-3 of the Federal Court of Appeal decision, *infra*, note 3.

3. *Attorney-General of Québec* v. *National Energy Board*, Federal Court of Appeal, A-1057-90, July 9, 1991.

4. *Id.*, at 5-6.

5. *National Energy Board Act*, R.S.C. 1985, c.N-7.

6. *Supra*, note 3, at 6.

7. *Supra*, note 3, at 8.

8. *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)*, [1989] 4 W.W.R. 526 (Fed Ct.), affirmed by Fed. C.A. in (1989) 99 N.R. 72.

9. *Friends of the Oldman River Society* v. *Canada (Minister of Transport) et al.* (1990), 68 D.L.R. (4th) 375 (Fed. C.A.).

10. *Supra*, note 1, at 37.

11. S.O.R./84-467, June 22, 1984.

12. *Supra*, note 1, at 34-35, emphasis on "production" added.

13. *Supra*, note 1, at 38.

14. An "initiating department" is defined in the EARP Guidelines as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal": *supra*, note 11, s.2.

15. P.S. Elder and Janet Keeping, "The Greening of Canada: The Oldman River Case under Appeal" (1990), 30 Resources 4.

16. *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.

17. *Fisheries Act*, R.S.C. 1985, c. F-14, s. 37.

18. Other matters falling under federal jurisdiction could include Indians and Indian lands, marine mammals and migratory birds.

19. The term "demand-side management" refers to measures aimed at influencing demand for energy, such as encouraging conservation, as opposed to increasing supply.

20. *Supra*, note 1, at 24.

21. See Judith B. Hanebury, "The Federal Role in Environmental Impact Assessment", an unpublished LL.M. thesis submitted to the Faculty of Graduate Studies, University of Calgary, August, 1991.

22. *Supra*, note 1, at 21.

23. *Supra*, note 1, at 43.

24. *Supra*, note 1, at 26.

25. See, for example, Pegi Dover "U.S. Groups Fight James Bay II", Probe Post (Summer, 1991), at 6.

26. Janet Keeping "Canadian Gas Export Policy: Part of the Problem", in *The Legal Challenge of Sustainable Development*, Ed. by J. Owen Saunders (Calgary: Canadian Institute of Resources Law, 1990), at 356.

27. See Sheilah L. Martin "Persisting Equality Implications of the 'Bliss' Case" in *Equality and Judicial Neutrality*, ed. by K.E. Mahoney and S.L. Martin (Carswell: Toronto, 1987), at 200.

28. Globe and Mail, National Edition, July 17, 1991, at A5.

New Board Member

The Institute has a new Board member effective May, 1991.

Edward John is Hereditary Chief of the Tl'azt'en Nation. Chief John has been a councillor with the Tl'azt'en Nation Council since 1974 and has served as Chief since 1990. He is past Tribal Chief of the Carrier Sekani Tribal Council and serves on numerous First Nations and non-aboriginal organizations and businesses.

Institute News

- Owen Saunders will be presenting two papers on "Accomodation of traditional uses within codified water laws" and "Accommodating international principles within national water management systems" at a Preparatory Organizational and Legal Studies Workshop sponsored by the Mekong Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin in Hanoi, Vietnam in October, 1991.

- Susan Blackman attended the summary workshop of the Clean Air Strategy for Alberta in Calgary in September, 1991.

- Susan Blackman attended the Annual meeting of the Provincial and Territorial Mining Rights Committee held in Regina in September, 1991.

1991 Essay Prize Awarded

The Institute recently awarded its annual $1,000 essay prize to Mr. Steven Ferner for his paper entitled "Instream Flow Protection and Alberta's Water Resources Act: Legal Constraints, Policy Objectives and Recent U.S. Trends".

Mr. Ferner graduated from the University of Calgary in 1978 with a B.Sc. (Honors) in Geography and from the University of Saskatchewan in 1985 with an M.Sc. in Civil (Water Resources) Engineering. He received his LL.B. in 1991 from the University of Alberta and is currently articling in Edmonton with the firm of McLennan Ross.

From 1980 to 1990 Mr. Ferner worked with Alberta Environment in River Forecasting and River Engineering and published several national and international articles related to streamflow forecasting and water management.

Mr. Ferner's paper was one of twelve essays submitted to a Selection Committee composed of Kemm Yates, a lawyer with the Calgary firm Milner Fenerty, Al Hudec of the Calgary law firm of Blake, Cassels & Graydon and Professor Nigel Bankes of the University of Calgary Law Faculty.

Recent Case Developments in Oil and Gas and Mining Law

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Mining

Claim Staking Disputes – Eskay Creek

The Eskay Creek area in British Columbia has generated a cloud of disputes which are likely to continue for a long time. One of the main disputes concerns groupsing of claims. Some claims named TOK were grouped so that assessment work could be shared among them, thus keeping them all in good standing. When the claims were surveyed, it was found that a gap existed in the group so that two of the claims in fact were separated from the others. A complaint was made to the Chief Gold Commissioner that the claims were not "adjoining" as was required for grouping, so the two claims has lapsed for lack of work. In *Mckenzie* v. *Calpine Resources Ltd.* (18 Jan 1991), the Commissioner refjected the complaint and held that: (i) airborne geophysical work could be applied to each claim without grouping and, because the claim holder did not know the gap existing, he would allow the filing of an amended Statement of Work; and (ii) complaints after one year after the recording of wrok are barred due to a limitation period in the *Mineral Tenure Act*, SBC 1988 c.8.

In *Tagish Resources Ltd* v. *Calpine Resources Inc.*, [1991] B.C.J. No. 3067 (QL Systems), Esson, CJ SC upheld this decision of the Chief Gold Commissioner. Esson, CJ first pointed out that, since 1988, an appeal from the Gold Commissioner's decision has not been an appeal on the merits. Therefore the court should be reluctant to disturb the Commissioner's findings of fact. The judge then reviewed the legislation and decided that the only important requirement in the case was that the Commissioner should be satisfied with the work done, which the Commissioner obviously was in this case. The judge commented further that the principal purpose of the *Mineral Tenure Act* is to encourage mineral exploration and development and provide a reasonably safe tenure for those who take the risks. Therefore, the courts avoid construing the Act so that honest errors are excessively penalized.

Reservation of Land from Staking – Yukon

Under the *Territorial Lands Act*, RSC 1985, c T-7, land was withdrawn from disposal for the purpose of facilitating native land claims negotiations in the Yukon. Section 3(3) of this Act declares that nothing in it shall be construed as limiting the operation of the *Yukon Quartz Mining Act*, RSC 1985 c. Y-4 (YQMA) or the *Yukon Placer Mining Act*, RSC 1985 c. Y-3 (YPMA). Halferdahl tried to stake claims on withdrawn lands. In the resulting court case, the Federal Court Trial Division ordered the Recorder to record the applicant's claims: *Halferdahl* v. *Whitehorse Mining District* (1990), 31 FTR 303. The case is under appeal to the Federal Court of Appeal.

As a result of the Trial decision, the YPMA and the YQMA have been amended by S.C. 1991, c. 2. In addition, while the appeal is pending, the Yukon Quartz Mining Act Work Relief Regulations (1991), SOR/91-175, have been made pursuant to the YQMA to relieve Mr. Halferdahl from doing any work on his claims for two years.

Oil and Gas

Receiver's Duties on Abandonment of Oil Wells of Bankrupt Company

The Alberta Court of Appeal has ruled in *Panamericana De Bienes Y Servicios, S.A.* v. *Northern Badger Oil and Gas Ltd.* In the case, the provincial Energy Resources Conservation Board ordered a receiver of a bankrupt company to abandon wells owned by the bankrupt. Secured creditors had not yet been paid. At trial, the judge held that the Board ranked in line with the creditors of the bankrupt company and its claim must come after those of the secured creditors.

In Appeal Nos. 11698 and 11713, June 12, 1991, Laycraft, C.J., agreed with the trial judge that the ERCB's order was lawful and within its jurisdiction. However, he ruled that the ERCB is not a creditor but is merely enforcing the general law. He also held that the receiver was the proper entity to whom to direct the Board order even though the receiver was not the licensee of the wells. The receiver was in control of the wells and was operating them, therefore, there was no other entity to whom the Board could address its order. The receiver was ordered to carry out the Board's order, with the result that costs of abandonment will be deducted from the amounts owing to secured creditors.

Natural Resources Transfer Agreements – Alberta

The Supreme Court of Canada has issued its judgment in *Canada (Director of Soldier Settlement)* v. *Snider Estate*, [1991] S.C.J. No. 56 (QL Systems). In the case, the Federal Soldier Settlement Board sold land without expressly reserving mines and minerals. The *Soldier Settlement Act*, S.C. 1919, c. 71, reserved the mines and minerals from all land sales by the Board. The mines and minerals were registered by the purchasers under Alberta's Land Titles system and the purchasers paid mineral taxes as they became due. The issues in the case were: 1. whether the Alberta Land Titles system operates so as to deprive the Federal Crown of the mines and minerals, and 2. whether the Natural Resources Transfer Agreement of 1930 transferred the mines and minerals to the province. The majority in the Supreme Court of Canada decided the case on the second issue and did not address the first issue (the point of decision of the Alberta Court of Appeal). Stevenson, J, for the majority, noted that the Natural Resources Transfer Agreement transferred the natural resources located in the province of Alberta from the Federal Crown to the Provincial Crown, in order that Alberta would be in the same position, with respect to administration and control of its natural resources, as the original provinces that entered Confederation. The Agreement specifically addressed lands held by the Soldier Settlement Board and protected certain of those lands from the transfer. Stevenson, J. held that this provision did not operate on the facts and the mines and minerals were in fact transferred to the province in 1930. Thus, the Federal Crown could no longer claim an interest in the lands. Two judges dissented primarily on the issue of construction of the relevant provisions of the Natural Resources Transfer Agreement.

Production Spacing Units – Alberta

In 1991, Alberta amended its *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, to remove the legislative authority for production spacing units (see S.A. 1991, c. 26).

Resources
No. 35 Summer 1991

Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current resources law issues and to give information about Institute publications and programs. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. Resources is mailed free of charge to more than 6,000 subscribers throughout the world. (International Standard Serial Number 0714-5918) *Editor:* Nancy Money

Canadian Institute of Resources Law
Executive Director: J. Owen Saunders
The Canadian Institute of Resources Law was established in 1979 to undertake research, education, and publication on the law relating to Canada's renewable and non-renewable resources. Funding for the Institute is provided by the Government of Canada, the Alberta Law Foundation, other foundations, and the private sector. Donations to projects and the Resources Law Endowment Fund are tax deductible.

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