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Law and Process in Environmental Management: Themes of the 6th Biennial Conference on Natural Resources Law

*by Steven A. Kennett**

The pivotal position of law in environmental management is the result of its dual role in formalizing both policy and process. The policy role is perhaps the more visible. Environmental policies are frequently embodied in statutes and their effectiveness may depend on their legal status. An evaluation of environmental law, in this sense, concerns the appropriateness of policy instruments measured against goals such as ecosystem integrity or sustainable resource use.

The other role of law focuses on process rather than substantive outcomes. Law is one means of establishing and controlling the processes which are used at all stages of environmental management, from the formulation and implementation of broad policies to decision-making on specific projects or resource allocations. This process function constitutes a significant challenge in the context of a rapidly changing environmental agenda. Traditional processes are being questioned, adapted and in many cases replaced in the search for more effective, efficient and legitimate mechanisms for developing and enforcing environmental policies.

Résumé

Le sujet de la sixième conférence biennale sur le droit des ressources naturelles, organisée par l'Institut canadien du droit des ressources, était «Législation et processus en matière de la gestion de l'environnement». Le présent article passe en revue les huit principaux thèmes dont il y a été question durant la conférence, soit la portée des processus de gestion de l'environnement; l'utilité et l'efficacité; la centralisation, la décentralisation et la hiérarchie des processus; l'accès à la gestion de l'environnement; la relation entre les processus interactifs et la prise de décisions; la sensibilité au contexte; la relation entre la législation et le processus, et l'effet du processus sur les résultats concrets. Ces thèmes démontrent que la gestion de l'environnement exige à la fois souplesse et imagination, et que les questions de procédure seront toujours le point de mire des efforts interdisciplinaires visant le développement intégré.

Ce numéro de *Resources* contient des extraits de trois des communications présentées dans le cadre de la conférence.

The significance of process is underlined by recent Canadian experience. The application of environmental assessment has been the focus of several major controversies, notably concerning the Oldman and Rafferty-Alameda Dams. Environmentalists are resorting to the courts more frequently and have demanded (and, in some cases, received) increased access to decision-making in both law reform and project approval. The internationalization of environmental law, ongoing jurisdictional conflicts in Canada and the special considerations relevant to First Nations and northern regions continue to generate significant process issues. Occasionally, as with Hydro-Québec's James Bay developments, all of these process issues come together at once.

"Law and Process in Environmental Management" was the focus of the 6th Biennial Conference on Natural Resources Law organized by the Canadian Institute of Resources Law. The Conference was held May 13-14, 1993 in Ottawa. It brought together an interdisciplinary group of experts for a wide-ranging and intensive series of sessions organized around the following topics: the environmental assessment process; the litigation process; emerging international processes; interjurisdictional environmental management in Canada; access to decision-making; and aboriginal and northern processes. From the wealth of information and considerable diversity of perspectives presented at the conference, eight broad themes emerged which define the principal process issues for environmental management.

The Scope of Environmental Management Processes

The first of these themes concerns a fundamental issue of process design. It is increasingly obvious that many environmental issues defy traditional boundaries, be they disciplinary, jurisdictional or conceptual. Interrelationships within ecosystems, globalization of environmental problems and the need to address economic and cultural factors raise significant questions regarding the scope of environmental management processes.

These questions were a central focus of the sessions on the environmental assessment (EA) process. It was argued that EA must be guided by an ecosystem approach which considers social, cultural and biophysical factors. In particular, cumulative effects assessment and the evaluation of needs and alternatives should be incorporated into EA. Furthermore, the process itself should extend to the entire life cycle of projects, as opposed to merely serving a gate-keeping function at the planning or approval stages. The suggestion was also made that the EA process should be applied beyond the traditional focus on individual projects to provide a means of assessing the sustainability of policies.

Expanding the scope of EA in these ways has important implications. Taking seriously the logic of sustainable development and adopting an expansive view of "environment" leads inevitably, it seems, towards the conclusion that EA should be at the centre of a comprehensive decision-making process for all aspects of human activity. This conclusion highlights a second theme which arose throughout the conference. In addition to adapting to an extraordinarily complex policy context, environmental management processes must also confront real constraints of time, money and human resources in a period of fiscal restraint and increasing economic competition.

Effectiveness and Efficiency

Environmental management processes must be broader in scope and more effective, but they must also operate in a way which reduces cost and confusion. It is no longer enough simply to trade off efficiency and effectiveness -- achieving sustainability in the current political and economic context requires simultaneous progress on both fronts.

This issue was raised in several references to the litigation process. One alternative suggested was to substitute economic instruments for the command-control model of environmental regulation and enforcement. It was also argued that consensus-based approaches, such as mediation round tables, can be less costly and quicker than reliance on the courts to settle environmental disputes. Efficiency arguments were also discussed in the interjurisdictional context, where it was noted that overlapping federal and provincial EA regimes can lead to significant duplication, delay and uncertainty in the project approval process.

Centralization, Decentralization and Hierarchy of Processes

A third theme, raised in several papers, is the need to establish a hierarchy among certain environmental assessment and planning processes. The first objective is to increase the effectiveness of environmental management by ensuring that

broad plans, programs and policy decisions are subject to assessment on sustainability grounds. The second objective, efficiency, is to be secured by refining the EA or planning process for individual undertakings and reducing the need to return to fundamental policy issues in the context of individual project approvals.

This approach is illustrated by the application of the EA process to policies or to classes of activities. The two-tier model would evaluate purposes, alternatives and effects for a policy or set of future undertakings and establish a case-specific approval process for similar activities.

In the context of land use planning, it was recommended that formal policy directions on critical issues be established at the provincial level. Regional, local or municipal planning processes would then operate within these parameters. In this way, centralized and decentralized decision-making could be more appropriately coordinated.

Access to Environmental Management Processes

A fourth general theme concerns access to environmental management processes. Whether the process concerns policy-making, dispute resolution, project approval or land use planning, a principal concern is its accessibility to those whose interests are directly affected.

This issue was discussed in sessions dealing with the litigation process. The general conclusion was that, while access has increased in recent years, there remain significant barriers formal and practical to effective environmental litigation. It was also noted that litigation can be an important means of public education and stimulating legislative reform. Consequently, the importance of access for public interest groups frequently goes beyond the issues at stake in a specific case.

Access to decision-making was also the focus of a session at the conference. Several speakers advocated the use of consensus decision-making to resolve contentious resource use issues, noting significant advantages over top-down government regulation and adversarial litigation. The importance of mechanisms to improve access were also raised in the context of law reform consultations and the EA process.

The Relationship between Participatory Processes and Decision-making

A fifth and related theme is the relationship between participatory processes and ultimate decision-making. For example, it was argued that a clear understanding of this relationship is essential if participants are to avoid disappointed expectations and effectively plan their strategies.

One theory was that decision-makers are more likely to respect the outcomes of public consultation if the issues addressed relate to administrative or executive functions rather than law-making. Other factors may include the political and economic sensitivity of the matters addressed, the impact of traditional lobbying, and the attitude of political or bureaucratic decision-makers to power sharing. The latter is a point of central importance. Increasing access to environmental management processes requires a fundamental change in attitude on the part of traditional decision-makers. Without this change in attitude, experiments with participatory processes are likely to produce cynicism which will undermine future attempts at consensus-building in environmental management.

Sensitivity to Context

The need to tailor environmental management processes to specific contexts is a sixth theme which was emphasised in several conference sessions. For example, the assessment of costs and benefits inherent in the EA process must take account of differing cultural and societal attitudes. The integration of the traditional ecological knowledge of aboriginal people into EA provides one way of adapting the process.

The importance of context was also underlined in sessions touching on the internationalization of environmental issues. Speakers questioned both the suitability of litigation for dealing with these issues and the appropriateness of relying on international trade mechanisms to fill the legal and institutional gaps in international environmental law.

Sensitivity to context, however, raises an important tension in process design. The value of flexibility must be weighed against the costs of procedural uncertainty.

The Relationship between Law and Process

The relationship between law and environmental management

processes is a seventh general theme addressed at the conference. At one level, as in the case of threshold provisions for EA regimes, the challenge is to translate policy objectives into the language and structure required for a legalized process.

Law can also operate as a control mechanism for environmental management processes. Litigation, for example, may ensure government accountability for the management of public resources. Legal mechanisms can also be used in the intergovernmental area to control discretion and ensure transparency in decision-making, delegation, standard-setting and enforcement. Using the courts to check administrative and even political decision-making, however, could result in the judicialization of regulatory processes and place judges in the role of law- and policy-makers. In fact, a paper presented on judicial review of EA decisions indicates that the courts are generally staying within traditional administrative law principles.

Law can also facilitate the development of environmental management processes. In the international sphere, for example, the flexibility provided by customary law, international agreements and the development of soft law are contributing to the growth of a legal order despite the obstacles of jurisdictional fragmentation and the preoccupation with national sovereignty.

The Impact of Process on Substantive Outcomes

The eighth and final theme which emerged from the conference is the connection between process and substance in environmental management. The most obvious connection is that better processes will produce better policies, laws and decisions. Process is not, of course, an end in itself. Explicit or implicit in every presentation was the belief that attention to matters of process will make environmental management more effective, efficient and legitimate.

The impact of process on substance can, however, go beyond the outcome in specific cases. Several papers considered the possibility that environmental management processes may fundamentally alter the way we think about issues, interact with each other, and conduct ourselves in relation to the environment. This theme was particularly evident in sessions examining the EA process and the use of participatory processes for conflict resolution and resource allocation. In some cases, benefits from procedural innovations may continue long after the specific matters at issue are resolved.

Conclusion

The broad themes reviewed here and the specific issues and proposals raised throughout the conference suggest that process issues in environmental management are unlikely to recede in importance. Obstacles to achieving sustainability on a global scale and addressing the immediate threats to ecosystem integrity which exist in Canada and throughout the world are enormous. The causes of environmental problems are frequently complex and deeply rooted and solutions must contend with a wide variety of often competing objectives and interests.

The search for effective and efficient processes for environmental management will require flexibility and imagination. As illustrated by the diversity of views presented at the conference, it will also provide fertile ground for collaboration between lawyers, policy-makers, scientists, members of public interest groups and the public at large. In this context, it is important to keep in mind the broad focus implied by the title "law and process". The role of law, though a critical one, is but one part of a broader enterprise of social ordering directed at achieving sustainability.

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The Institute will be publishing the papers from the Conference within the next few months. The following articles, "Participation and Sustainability: The Imperatives of Resource and Environmental Management", "The Role of Civil Litigation in Environment-Economy Law and Policy", and "Environmental Assessment: Current Challenges and Future Prospects" are excerpts from three of the papers.

Participation and Sustainability: The Imperatives of Resource and Environmental Management

*by Stephen Owen**

The need for a comprehensive provincial land-use strategy is related to the more general dysfunction that confronts society in the processes and substance of public policy decision-making. The dysfunction expresses itself in a widespread public cynicism about government effectiveness and fairness and a resulting dissatisfaction with the actions and decisions of government.

Procedurally, the public feels alienated from the decision-making process. Due to the extraordinary demands on government and the increasing complexity of society over the last several decades, we have delegated more and more authority to our elected and appointed representatives. On the spectrum between representative and participatory democracy, our form of government has swung far to the representative side. While there are many practical reasons for this development, the public is demanding a correction towards greater participation. A recent American poll identified the professions held in the lowest regard by the public as politicians, brokers and lawyers. There is a dangerous irony in this list in that such professions represent the intermediaries between the public and the fundamental political, financial and legal institutions that support our democratic, market-oriented societies.

The sense of public alienation from public decision-making is enhanced by the apparent inability of our decision-making structures to address individual needs. Our political system appears increasingly unrepresentative to many as parliamentary authority is subordinated to executive control supported by a government party which often represents significantly less than a majority of the population. Our judicial system has become irrelevant to many citizens through the excessive cost and delay of participation and through its inability to deal with dynamic, multi-party, public policy disputes which simply cannot be adjudicated on a right versus wrong basis. Finally, our administrative agencies are often seen as hierarchical structures that are insensitive to the individual needs of citizens and focus the attention of public servants upwards towards the source of authority and accountability, rather than towards the individuals directly affected by the discretionary and sometimes arbitrary decisions of the bureaucracy in carrying out statutory mandates.

The dysfunction arising from this increasing alienation must be addressed through processes which provide the opportunity for meaningful participation in government decisions by those most directly affected by them. For some categories of decisions that affect a broad spectrum of interests, a fair hearing is no longer sufficient to achieve a lasting and equitable result. Direct participation in the decision-making process is necessary.

In a land-use context the current procedural dysfunction is demonstrated by the rejection of the results of the existing planning processes. Parties from across the spectrum of interests in land-use regularly attempt to do "end runs" around decisions reached by processes in which they have taken no meaningful part. The chief forester reduces the annual allowable cut for a corporate timber licensee and the company seeks judicial review; a permit is issued for a logging road into a pristine watershed and an environmental group resorts to civil disobedience and sets up a blockade; Cabinet ministers are lobbied by various interest groups against administrative land-use decisions; and media campaigns, often spiced with exaggerated claims, are launched at home and abroad. A common tendency is for government to react to these pressures with ad hoc decisions outside of formal planning processes. This response creates inconsistency and enhances public distrust and alienation.

The procedural dysfunction that arises from inadequate public participation contributes to unbalanced and unstable substantive decisions which fuel confrontation in our society. Confrontation has played an important part in the development of western civilization through the dialectical challenge of ideas and philosophies, the search for truth through an adversarial justice system, the redistribution of wealth through labour-management tension, and the development of political ideologies through the parliamentary opposition dynamic. However, we have perhaps reached a point in our history where the demand on resources, increasing social pluralism, and the challenge of global competition make us unable to afford the debilitating cost in goodwill and resources of confrontation. This situation suggests that successful societies in the future will be those which can temper the confrontational dynamics in the fundamental

political, social and economic institutions of society with substantive results that are based on a broad consensus. These decisions will be better informed, more balanced and more stable.

In a land-use context, substantive dysfunction exists in British Columbia, notwithstanding an apparent abundance in natural resources and environmental splendour. The province suffers significant debt, unemployment and conflict even though it enjoys a state-owned land base and resource-lode approximately the size of France and Germany combined, with a population of only three million. The substantive dysfunction expresses itself in the ongoing loss of environmental options, resource jobs, community stability, and business certainty. It is becoming widely understood that such continuing losses can only be halted through the application of land-use principles of broad sustainability. It is clear that social stability will only be achieved through economic strength, which can only be maintained through environmental integrity. Achieving balanced land-use decisions which respect this interdependence can only realistically be achieved through the development of a broad consensus.

In summary, the general dysfunction in society reflected in the lack of widespread public support for government decisions, especially in matters of resource and environmental management, needs to be addressed through decision-making processes that provide for the meaningful participation of all significantly affected interests, and substantive results that can, so far as possible, be based on principles of broad sustainability.

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Environmental Assessment: Current Challenges and Future Prospects

*by Peter Jacobs, Peter R. Mulvihill, and Barry Sadler**

On the whole, much of environmental assessment is mistakenly perceived as a scientific endeavour – that is, objective and value-free. It may be more accurately described, however, as a creative, culturally-based mix of science and art. While the process is inherently value-based, informed by values derived from the biophysical and cultural setting, data that are considered scientific and objective are frequently used. Evaluators must be able to recognize and consider both facts and values. The very concept of information – particularly information related to the environment as a biological and cultural milieu – is necessarily selective and frequently manipulated to suit the objectives of the actors involved.

If the miscasting of environmental assessment as a purely scientific exercise has perpetuated a myth of objectivity, other myths have prevailed as well. Foremost among these is the idea that environmental assessment can be a one-time, "closed" process in which the impacts of a particular undertaking may be determined, mitigated, compensated and otherwise dealt with prior to the project approval stage. Experience has shown that there can be no predictable beginning or ending to the identification and management of impacts. In some cases, even the major impacts of projects have not been identified prior to the approval stage. For example, in the well-known case of the La Grande hydroelectric project in Northern Québec, the proponent's environmental impact studies failed to predict the methylmercury contamination that subsequently resulted from the flooding of lands. Even if this particular project had undergone formal environmental assessment, it is by no means certain that this major impact would have been predicted. The earlier case of the Churchill River Dam in Manitoba showed that even the formal environmental assessment of a project could fail to predict mercury contamination.[1] Moreover, the inherent uncertainty associated with development is not limited to biophysical impacts. It is also frequently difficult to predict how people will behave in an environment changed by development. If anything, 20 years of environmental assessment should have taught us that the manner in which we deal with imponderables is at least as important as how we deal with known factors and quantities.

For these reasons alone, it seems clear that adaptive environmental management must extend beyond impact statements to embrace policy issues at one end of the environmental planning spectrum and continuous monitoring and the revision of goals and development projects at the other end. Clearly, environmental assessment processes must assume an ongoing impact management capacity in addition to their predictive, consultative, mitigative and compensatory roles. The premise that the costs and benefits associated with project proposals can be distributed equitably either through project design or through mitigative measures has seldom been validated in practice. In reality, the management of impacts and benefits merely begins, rather than ends, at the approval stage. This

ongoing management role is particularly important in the case of larger, more complex projects that extend over long periods of time and involve numerous user groups.

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What is termed strategic environmental assessment (SEA) is a promising approach to ensuring that development policy-making takes account of sustainability principles.[2] A more proactive, integrated approach is required – in effect, a second generation environmental assessment process that moves beyond the "impact fixation" to address the causes of unsustainable development. These causes are located at the "upstream" phase of the decision-making cycle, in the macro-economic policies and development programs pursued by governments of all political stripes. Such a shift in emphasis demands two key innovations:

1. translating the principles of environmental sustainability into operational terms, guidelines and policy performance indicators; and
2. redesigning environmental assessment and related processes to give effect to these new "rules of the game".

A formal approximation for environmental sustainability is non-liquidation of natural capital – i.e., resource stocks plus the ecological processes that are essential for their continued productivity and regeneration. This criterion links long established conservation principles with new modes of economic valuation of the "source" and "sink" functions performed by natural systems. Maintenance of natural capital and related concepts, such as carrying capacity, are an extension of existing approaches to resource and environmental management. Other examples include: air and water quality standards and pollution emission "bubbles", no net loss of habitat policies, and sustained yield fish and timber allocation systems. Such approaches, of course, are tremendously difficult to extend to aquatic and terrestrial ecosystems, where output and input rules for sustainability encounter complex interdependencies among resource uses, energy "throughputs" and mass balances.[3] The point here is not to grasp a theory of the impossible but to promote the art of the practical, which involves creatively employing "best guess" science to implement prudent "rules of thumb" that help guarantee sustainability.

A "second generation" environmental assessment process is needed to support this new modus operandi.[4] SEA forms part of such an integrated approach and should realise the following interrelated benefits:

1. encourage a review of the potential environmental effects associated with all development proposals, from policy to project levels;
2. permit a more systematic consideration of need and alternatives; i.e., whether a particular program of development is needed (e.g., energy conservation vs. supply extension) and which is the "best practicable" environmental option (e.g., hydro vs. fossil fuel generation);
3. facilitate the identification and management of cumulative impacts; and
4. catalyse the reorientation of environmental assessment as an instrument of sustainability.

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Environmental assessment deals simultaneously with biotic and abiotic resources, and culturally variable ideas of environment and development. To do so, the evaluation process must be flexible and creative, reshaping development in directions that are more sustainable. Development can no longer be conceived or function in isolation, viewing economic growth independently of local culture, social justice, or the biophysical environment. Given our growing appreciation of scientific uncertainty and an increased concern with the health and well-being of the environment, development activities must now be conceived within an interdependent matrix of economic, social, and environmental management strategies. The fact that neither our institutions nor our policies, including environmental assessment, fully reflect this perception constitutes an urgent challenge that must be addressed creatively if we are to achieve sustainable development.

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Notes

1. See R.A. Bockely & D.M. Rosenburg, "Retrospective analysis of predictions and actual impacts for the Churchill-Nelson Hydroelectric development, Northern Manitoba" in C.E. Delisle & M.A. Bouchard, eds., Managing the Effects of Hydroelectric Development (Montreal: Collection Environnement et Geologie, 1990) v.9 at 221-242.

2. Barry Sadler, "Impact Assessment in Transition: A Framework for Redeployment" in R. Lang, ed., Integrated Approaches to Resource Planning and Management (Calgary: University of Calgary Press, 1986) at 99-129.

3. Herman E. Daly & John B. Cobb, Jr., For the Common Good – Redirecting the Economy toward Community, the Environment, and a Sustainable Future (Boston: Beacon Press, 1989).

4. Peter Jacobs & Barry Sadler, "Conclusions and Recommendations on Further Directions for Research and Development" in P. Jacobs & B. Sadler, eds., Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future (Hull: Canadian Environmental Assessment Research Council, 1990) at 171.

The Role of Civil Litigation in Environment-Economy Law and Policy

*by Andrew J. Roman**

Whether the importance of environmental litigation will increase or decrease should depend upon the efficacy with which it achieves the goals of environmental law and policy. It is important to recognize that these goals are now in the process of refinement and change. As we shall see, the nature of the new goals requires new and different techniques for their achievement.

The decline in environmental quality in Canada and around the globe in the last two decades is manifest in a number of ways.[1] Projecting the present trends into the future, contamination and degradation are undoubtedly going to increase if nothing new is done to reverse these trends in Canada and elsewhere. At a bare minimum, the goal of environmental law and policy must be planetary survival. The appropriate measure of the success of environment law, therefore, is not the number of convictions obtained in a year, or the dollar value of the fines – the usual statistics gleefully produced by environment ministries. It is trite but true that environmental law should aim at least to preserve, and perhaps to improve, the existing environmental quality. The relationship between environmental quality and the number of convictions or the dollar value of fines is, at best, rather indirect and tenuous.

Environmental law in Canada is really still very new – perhaps no more than twenty-five years old. Both because of our Constitution (property and civil rights being provincial) and the relative indifference of the federal government to environmental matters[2] (in comparison with the strong interests of municipal authorities and provincial governments), Canadian environmental law is largely provincial. Despite the much-ballyhooed federal Green Plan,[3] the Canadian Environmental Protection Act[4] and federal environmental assessments, most of the significant law and enforcement is at the provincial level.[5] The patchwork of municipal and provincial laws has led to a proliferation of different rules within large metropolitan areas, provinces, and across the country. This regulatory framework is costly and, all too often, ineffective. More uniform and better developed environmental laws and policies could undoubtedly be provided at the federal level, given its broader focus and greater resources.

The new environmental goals must stand the old order on its head. The focus of the effort must first be global, then national, provincial and local. As there is no world government at present or in the foreseeable future, international efforts such as the Brundtland Report[6] and the Environmental Summit held in Rio de Janeiro last year[7] provide the new model for the development of global environmental goals. Unfortunately, no mechanism has yet been found to translate these statements of good intention into effective law and policy within a short time, in the absence of a widely recognized crisis. An example of the latter is the deterioration of the ozone layer, which led to the Montreal Protocol of 1988 on chlorofluorocarbons. The crisis in the Atlantic fisheries, in contrast, is not yet acknowledged to be an international problem (as distinguished from a Canadian problem) and consequently a similarly effective international agreement has not been obtained. Bilateral treaties[8] will probably become more important, although they provide a slow route to achieving multinational agreements.

It seems clear that the command-control model, with its handmaiden litigation, is unlikely to be a major contributor to resolving the international environmental problems which, increasingly, constitute the most urgent issues. In the same way that currency movements, trade and business are becoming global, environmental problems – such as the population explosion, and the excessive "mining" of arable soil, potable groundwater, fish, and forests – are also increasingly global. Through the North American Free Trade Agreement (NAFTA), the Maastricht Treaty and other international trading arrangements, some environmental standards will become harmonized. In this context, however, the nation state as an atomistic environmental actor and the corollary of national environmental sovereignty are increasingly obsolescent notions. The inability of small and fragmented political units to address global problems is all the more relevant to the current

primacy of provinces and municipalities as the creators and enforcers of environmental law.

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As someone who has spent the largest part of his legal career researching, writing about and litigating access to justice issues, I would be the last person to deny the significance of improved standing rules, new causes of action, costs assistance for environment groups in litigation, improved access to information, more liberalized judicial review, and the elimination of the special formal and informal legal rules which give governments an unfair advantage before courts and tribunals. While all of these changes will make a significant contribution to social justice, they are not likely to be nearly as successful in solving our severe environmental problems. That is because the causes of our environmental problems are not legal as such, but rather reflect the failure of economic policy to internalize environmental costs and, indeed, the outright government subsidy of environmentally degrading activities.

Unlike aboriginal people all over the world who have lived in harmony with nature, most countries today have turned the environment into a commodity – a commodity priced at zero or well below its real value and therefore subject to over-consumption and destruction. Although litigation can make a difference in marginal cases at the local level, the practical limits of the remedies which may be awarded in the very costly process of bi-polar adjudication make it unlikely that use of the courts in any particular country will have a significant impact on the increasingly global nature of environmental degradation. Administrative tribunals may make a somewhat greater contribution, particularly in the environmental assessment area, but their role is also very specialized, limited and local.

United States social critic Ralph Nader once said that the law is the only discipline which sharpens the mind by narrowing it. Legal education and practice, which encourage lawyers to see the solutions to all human problems as being contained in law reports and statutes, do not prepare us well to make significant contributions to solving the global problems of environment-economy. As a profession, we understand far too little about science or economics. Moreover, most of us are quite unaccustomed to working in interdisciplinary teams, except perhaps when directing the efforts of expert witness in environmental hearings. While we can, with some effort, improve the litigation process, let us not allow it to distract us from the task that is far more important in the long run. Working together with social and physical scientists, who are by and large as ignorant of how law works as we are of their disciplines, we must develop and test new models of ordering human behaviour so as to encourage the preservation of our planet's fragile ecosystems, rather than their contamination and degradation. If we can make a serious contribution towards that goal, surely our children, and their children, will be more thankful for that than for the preparation of yet another statement of claim.

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Notes

1. For example, topsoil erosion is at a rate of 0.7% per year. There is rapid deforestation of both tropical and temperate zone forests. There has been a 50% ozone loss between 1977 and 1987. The ozone hole over Antarctica is about half the size of Canada. See Royal Society of Canada, Planet Under Stress: The Challenge of Global Change (Toronto: Oxford University Press, 1990).

2. Note the repeated litigation to force the federal government to take its own rather weak environmental assessment process seriously.

3. Government of Canada, Canada's Green Plan (Ottawa: Supply & Services Canada, 1990).

4. Canadian Environmental Protection Act, R.S.C. 1985 (4th Supp.), c.16.

5. The same situation is true in the United States, notwithstanding substantial federal funding for decontamination activities and unique federal concern for protection of oceans, migratory birds, the Great Lakes, and so on.

6. World Commission on Environment and Development, Our Common Future (New York: Oxford University Press, 1987) [hereinafter Brundtland Report].

7. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.

8. Such as the Agreement Between the Government of the United States of American and the Government of Canada on Air Quality, 13 March 1991, Can. T.S. 1991 No.3, 30 I.L.M. 676.

Recent Developments in Canadian Oil and Gas and Mining Law

*by Susan Blackman**

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Oil and Gas

Government Approval of Transfers of Oil and Gas Interests – Whether Absence of Approval Leaves Transfer of no Force and Effect – *Canada Oil and Gas Act*

In *Consolidated Oil & Gas Inc.* v. *Suncor Inc.*, [1993] A.J. No. 485 (Alta. Q.B.) (QL), an issue was raised as to the effect of a transfer of an interest in a federal oil and gas permit of which notice was not given to the appropriate government authority as required. Section 53(1) of the *Canada Oil and Gas Act*, R.S.C. 1985, c.O-6, provides: "Where an interest holder ... proposes to enter into an agreement or arrangement that may result in a transfer, assignment or other disposition of an interest ..., the interest holder shall give notice of such agreement or arrangement to the Minister, ... and no such agreement or arrangement shall have any force or effect with respect to such transfer, assignment or other disposition until it is approved ...." In the case, a mortgage agreement had been made but no notice was given. The issue arose of whether the agreement might have effect as between the parties even though it would have no effect between the parties and the government. Hunt, J. held that the mortgage agreement had no force or effect at all, although she thought that there were other circumstances where an agreement made with no notice given might have some effect.

Fiduciary Relationships -- Contract for Settlement of Dispute Including Payments that Might Arise at Future Date

In *Consolidated Oil & Gas Inc.* v. *Suncor Inc.*, [1993] A.J. No. 485 (Alta. Q.B.) (QL), three parties had made an agreement with respect to a federal oil and gas permit, the ownership of which was in dispute. Essentially, the agreement preserved a *status quo* and provided for the operation of the property. The interest was to be held in trust by one of the parties (Sun), and should that party ever transfer the interest to a second party (KRC), a payment obligation would arise between Sun and the third party (Consolidated). The agreement was made in contemplation of litigation in the United States and all parties sought legal advice. Consolidated claimed that, under the settlement agreement, Sun owed it a fiduciary obligation with respect to the payments that might arise if Sun transferred the property. Hunt, J. reviewed the elements of fiduciary relationships, namely: 1) The fiduciary has scope for the exercise of some discretion or power, 2) the fiduciary can unilaterally exercise that power or discretion os as to affect the beneficiary's legal or practical interests, and 3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. In this case, the judge found that the first two elements were satisfied, however, the third element was not because Consolidated had extensive legal advice before it entered into this contract. Hunt, J. said "Many parties undoubtedly regret, after the fact, the form of agreement they have signed. But that is no reason for a court to alter the bargain they have struck by rewriting their deal later through the finding of a fiduciary relationship."

Mining

Agreements for Lease and Sale of Mining Claims – Confidential Information – Ontario

In *Ontex Resources Ltd.* v. *Metalore Resources Ltd.*, [1993] O.J. No. 1236 (QL), the Ontario Court of Appeal considered two agreements for lease and sale respectively of mining claims. The 1981 agreement granted to the defendant the exclusive right to acquire a leasehold interest in 18 claims held by the plaintiff in exchange for operations conducted on the claims by the defendant. That agreement contained a clause permitting the plaintiff to inspect the mining operations and request information as well as obligating the defendant to supply the plaintiff with an annual report. In 1982, the defendant received a favourable report on the prospects of the claims (the "Winter Report") but withheld it from the plaintiff. Subsequently, the defendant wrote to the plaintiff reporting discouraging results. In 1983, a new agreement was made in which the plaintiff assigned to the defendant all its interest in the 18 claims in return for a 10% net profit interest. By the beginning of 1984, the defendant had the first results of what was a discovery. The defendant withheld this information from the plaintiff until 1986, during which time it acquired 478 additional claims along the same geological fault. At trial, the judge found in favour of the plaintiff,

and rescinded both the agreements. In addition, the judge held that there was a fiduciary relationship between the parties and that the defendant had breached that relationship by not supplying the confidential information. On the basis of *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the trial judge imposed a constructive trust on the 478 claims in favour of the plaintiff. Finally, the trial judge awarded punitive damages to the plaintiff against C, the principal of the defendant company.

The Ontario Court of Appeal held that there was no fiduciary relationship between the parties evident in either agreement. However, the withholding of the Winter Report was a breach of a provision of the 1981 agreement. The Court characterized the obligations in the agreement and held that, in light of the extensive work that the defendant had done, even exceeding the requirements of the agreement, the breach of the information clause could not justify the termination of the agreement since it was of considerably lesser importance than other clauses in the agreement. Therefore, the 1981 agreement was upheld. With respect to the 1983 agreement, the Court agreed with the trial judge that the 1983 agreement rested for its validity on proper disclosure having been made under the 1981 agreement. Therefore, the 1983 agreement was rescinded and the plaintiff was restored to the position of owner of the 18 claims.

With regard to the misuse of confidential information, the Court held that failure to share such information when required is as much a misuse of the information as any prohibited use (such as happened in *Lac* v. *Corona*). Therefore, a cause of action for breach of confidence had been made out for which the constructive trust might be the appropriate remedy. However, the court held that the plaintiff had not established that it would have partaken in the staking of the additional claims had it known of the information. In particular, the plaintiff could not have staked more claims without additional financing which it stated it could have got with the information that was withheld. However, that information would have had to be made public in order to get that financing, therefore, a great deal of staking competition would have appeared. The Court decided that the plaintiff had not shown it would have staked those additional claims or shared in the staking but for the actions of the defendant. The constructive trust remedy was not appropriate.

Finally, the Court held that punitive damages were not called for since such damages must be based on some legal claim. The plaintiff had no action against the principal of the defendant.

Improperly Staked Claim -- Jurisdiction of Gold Commissioner to Order Abandonment and Restaking -- British Columbia

In *Baymag Mines Co.* v. *163485 Canada Ltd.*, [1993] B.C.J. No. 844 (B.C.S.C.) (QL), the defendant had staked a claim with deficiencies including failure to mark the eastern boundary of the claim. The plaintiff overstaked the claim and brought complaint proceedings before the Chief Gold Commissioner. After obtaining an inspector's report and written submissions from the parties, the Chief Gold Commissioner found that the defendant had made a *bona fide* effort to locate the claim and ordered the defendant to abandon the claim and relocate it in stricter compliance with the regulations. The order was made pursuant to the power of the Chief Gold Commissioner to "dismiss the complaint", "order the cancellation of the record of the claim ...", or "make any order he considers appropriate ..." (see s.35(9) of the *Mineral Tenure Act*, S.B.C. 1988, c.5).

On the appeal of the Chief Gold Commissioner's decision to the British Columbia Supreme Court, Hood, J. held that the Commissioner had actually found that the staking did not comply with the Act, that is, it was not cured by the substantial compliance curative provision of s.34. The issue then was whether the Chief Gold Commissioner had the jurisdiction to order abandonment and restaking. Hood, J. held that the Commissioner's jurisdiction extended only to the determination of the validity of the original staking. Once that determination was made, the Commissioner was bound to "order the cancellation of the record of the claim" (s. 35(9)(b)), and once that was done, had exhausted his powers under s.35(9). He could not move on to make "any order he considers appropriate". Hood, J. also pointed out that, under the B.C. Act, an overstaker obtains rights that become fixed when the original claim is found to be invalid (s. 20(2.1)). Therefore, the complainant overstaker in this case obtained rights immediately upon the determination of invalidity of the original staking and the Commissioner could not then assist the original staker to redo the staking properly.

Environmental Assessment -- Requirement to Post Security for Reclamation -- Yukon Territory

In *Curragh Resources Inc.* v. *Canada (Min. of Justice)*, [1993] F.No. 669 (F.C.A.) (QL), the

appellant mine owner had been ordered to post $943,700 security to cover pollution of a stream as a condition of the water licence it obtained from the Yukon Territory Water Board ("Water Board"). On approving the licence, the Minister of Indian Affairs and Northern Development ("Minister") required the appellant to post additional security amounting to $4,406,000 intended to cover general reclamation and to ensure that post-closure water treatment was provided in perpetuity if necessary. The issue was whether the Water Board's authority to issue the water licence and require security ousted the authority of the Minister to require additional security.

The court reviewed a number of legislative provisions and pointed out that the water licence issued by the Water Board requires the approval of the Minister in order to be valid, therefore, the Minister is the final decision-maker, not the Water Board. The Minister was also the federal authority bound to apply the federal Environmental Assessment Review Process (EARP) which permits the requirement of security. Thus the Water Board's authority does not oust the Minister's authority. In addition, the project could have effects on native peoples and wildlife, two areas of concern which the Water Board could not consider. In respect of those matters, the Minister also had a duty to apply EARP. Thus, both the Water Board and the Minister had the statutory jurisdiction to require the appellant to post security, the former to cover water pollution, and the latter to cover reclamation and environmental damage as conditions on the water licence.

Coal Processing – Meaning of "processing of ore" in *Excise Tax Act*

In *Canadian National Railways Co.* v. *Canada*, [1993] F.C.J. No. 258 (F.T.D.) (QL), Canadian National Railways (CNR) attempted to claim a fuel tax rebate under the *Excise Tax Act*, R.S.C. 1985, c.E-15, for the use of fuel in mining. CNR transported metallurgical coal from mine sites to smelters and thermal coal from mine sites to power generation plants. In both cases, further processing was done at the smelters and power plants. In s.49.01(1), the Act defined "mining" to mean "the extracting of minerals from a mineral resource, the processing of ore, other than iron ore, from a mineral resource to the prime metal stage or its equivalent ...." The Canadian International Trade Tribunal found that coal is at a stage equivalent to the prime metal stage when it is crushed to size and washed and dried at the washery at the coal mine, therefore, CNR was not entitled to a rebate.

Denault, J. reviewed expert evidence and decided to attribute the ordinary meaning in the industry to the words "prime metal stage or equivalent". He felt this meaning would require the equivalent of the prime metal stage for coal to be when the highest concentration of carbon can be obtained. This state was obtained after the additional processing done by CNR's customers. Also, the judge found that the definition of mining did not require any of the processing to be done on the mine site. Therefore, CNR was entitled to the fuel tax rebate.

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